

Congress of the United States
Washington, DC 20510

May 2, 2019

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Cc: Commissioners Chopra, Phillips, Slaughter, and Wilson

Dear Chairman Simons:

We write to ask that you conduct an investigation under Section 5 of the Federal Trade Commission (FTC) Act into whether tax preparation companies' efforts to hide Free File from internet search engine results constitute unfair and deceptive practices or unfair methods of competition, and to determine if these companies may have entered into an illegal agreement to do so. Our request follows a report last week indicating that tax preparation companies that are members of the Free File Alliance have taken actions to hide from the public their free tax preparation services offered in conjunction with the IRS, and a new review by Congressional staff finding that this practice is more widespread than previously reported, encompassing five tax preparation companies.

The Free File program, which, since 2003, the IRS has delegated to a group of private tax preparation companies called the Free File Alliance, was created to provide free, online tax filing services to low-income and underserved taxpayers.¹

Last week, ProPublica reported that two of the largest Free File providers—TurboTax and H&R Block—had inserted code into the websites for their respective editions of Free File that would prevent those websites from appearing in online search results.² In other words, if a taxpayer looking to use TurboTax's Free File program tried to use a search engine to find it, they would likely encounter TurboTax's other, paid products, but not the Free File service that they sought. An additional review conducted by Congressional staff this past week revealed that, in addition to TurboTax and H&R Block, three other Free File members—TaxSlayer,³ FreeTaxUSA,⁴ and

¹ FreeFile, "About," accessed May 1, 2019, <https://freefilealliance.org/about/>.

² ProPublica, "TurboTax Deliberately Hid Its Free File Page From Search Engines," Justin Elliott, April 26, 2019, <https://www.propublica.org/article/turbotax-deliberately-hides-its-free-file-page-from-search-engines>.

³ TaxSlayer, "American Pledge Free File Federal Tax Return," source code, line 11, accessed April 29, 2019, <https://www.taxslayer.com/americanpledge/?source=TSUSATY2018>.

⁴ FreeTaxUSA, "Free Federal and State Tax Filing," source code, line 36, accessed April 29, 2019, <https://www.freetaxusa.com/freefile/>.

1040.com⁵—appear to be using similar code to hide their Free File websites. Hiding Free File from the public clearly aligns with the financial interests of these companies, because taxpayers are more likely to encounter and use their fee-based services, which are easily found through search engines. For the same reason, it has likely increased prices for low-income consumers who should have had access to Free File but were understandably unaware of the specific IRS website that may have led them there. The fact that nearly half of Free File members are employing this deceptive practice is presumably a partial explanation for why so few eligible taxpayers use Free File at all.

The FTC has authority under Section 5 of the Federal Trade Commission Act to investigate and prevent “unfair or deceptive acts or practices in or affecting commerce.”⁶ The FTC has defined a deceptive practice as one that includes “a representation, omission or practice that is likely to mislead the consumer.”⁷ In determining whether a practice is unfair under Section 5 of the FTC Act, courts have looked at whether the practice injures consumers, whether it violates an established public policy, and whether it is immoral, unethical, oppressive, or unscrupulous.⁸

These companies’ actions in hiding Free File from search engine results—and therefore from consumers—in order to artificially inflate profits and deprive low-income consumers of a cheaper product merit investigation as unfair and deceptive practices.

Limiting the options consumers see when they search for tax-time products “is likely to mislead the consumer” about the available products and their costs.⁹ Consumers have a reasonable expectation that available options will appear on internet searches, as long as they enter relevant key search terms. This behavior causes consumers material harm by steering them toward more expensive products. And it directly conflicts with the IRS’s public purposes for establishing Free File and its agreement with the Free File Alliance, in which IRS agreed not to provide a service that would compete with private preparers. Specifically, Alliance members agreed to pursue several objectives: to “make tax return preparation and filing easier and reduce the burden on individual taxpayers,” to increase electronic filing, to “provide greater service and access” to the Free File program for taxpayers, and to “encourage further growth in electronic filing” by allowing taxpayers to file online, free of cost.¹⁰ Removing a Free File program from search results directly undermines each one of these goals.

⁵ 1040.com, “E-file your taxes for free,” source code, line 12, accessed April 29, 2019, <https://www.1040.com/irsfreefile/home>.

⁶ FTC, “A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority,” Jul. 2008, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>; see 15 U.S.C. § 45(a)(1) and (2).

⁷ FTC, “FTC Policy Statement on Deception,” Chairman James Miller, Oct. 14, 1983, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf;

⁸ FTC, “FTC Policy Statement on Unfairness,” Chairman Michael Pertschuk, Dec. 17, 1980, <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁹ FTC, “FTC Policy Statement on Deception,” Chairman James Miller, Oct. 14, 1983, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf;

¹⁰ Internal Revenue Service, “Eighth Memorandum of Understanding of Service Standards and Disputes, Between the Internal Revenue Service and Free File, Incorporated,” October 2018, <https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf>.

Section 5 of the FTC Act also bans “unfair methods of competition.”¹¹ The Supreme Court has established that this includes all violations of the Sherman Antitrust Act, including “every...conspiracy in restraint of trade.”¹² A review by Congressional staff discovered that at least five companies, all members of the Free File Alliance, engaged in substantially similar actions, inserting code into their websites to prevent consumers from finding Free File through internet searches. These actions have likely increased prices for consumers who were reasonably unaware of the Free File option. Given the Free File Alliance’s Memorandum of Understanding (MOU) with the Internal Revenue Service, this parallel conduct merits investigation by the FTC into whether the companies entered into an explicit agreement to suppress competition by excluding certain products from search results.

In light of the importance of Free File to millions of Americans, we urge you to open an investigation under Section 5 of the FTC Act into whether these companies’ efforts to hide Free File from search results constitute unfair and deceptive practices or unfair methods of competition, and determine if they entered into an illegal agreement to do so.

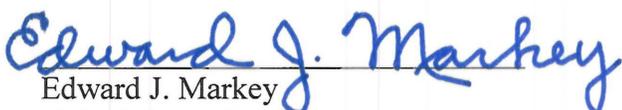
Sincerely,



Elizabeth Warren
United States Senator



Brad Sherman
Member of Congress



Edward J. Markey
United States Senator



Richard Blumenthal
United States Senator

¹¹ FTC, “The Antitrust Laws,” <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.

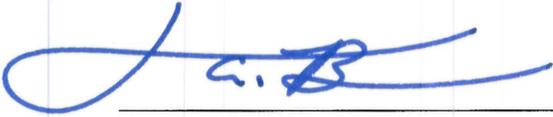
¹² *Id.*



Tammy Duckworth
United States Senator



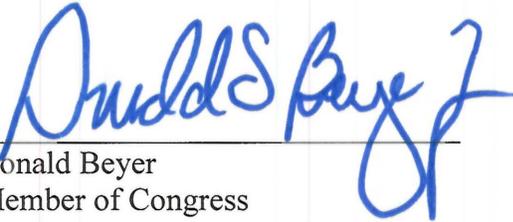
Bernard Sanders
United States Senator



Cory A. Booker
United States Senator



Eleanor Holmes Norton
Member of Congress



Donald Beyer
Member of Congress



Jackie Speier
Member of Congress



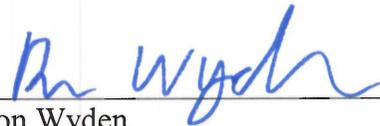
Katie Hill
Member of Congress



Earl Blumenauer
Member of Congress



Tim Ryan
Member of Congress



Ron Wyden
United States Senator