

TurboTax's Dance with Anti-Consumer Conduct

Michael Polkoff

Student Fellow

Institute for Consumer Antitrust Studies

Loyola University Chicago School of Law

Introduction

Intuit's consumer segment revenue, driven primarily by its TurboTax product has led to tremendous success for the company. In 2023, the consumer segment generated \$4.135 billion dollars in revenue.¹ Advertised as the best-selling tax preparation software, the product lives up to the hype with a dominant market share of tax preparation products which has only increased in recent years. In April 2019 TurboTax's share of the tax preparation market was 63% and in May 2021 TurboTax's share of sales was 73%.² The Company assisted 40.5 million taxpayers with their tax return during the 2023 fiscal year.³ TurboTax's market success is a clear indication of the benefits available to consumers through easy to use software for electronic filing.

The dark side of the success of TurboTax is marred by reports of anti-competitive and anti-consumer behavior.⁴ Part of TurboTax's growth and market share has come at the expense of consumers and competition. TurboTax has marketed products as "free" when they were not free for the majority of customers, redirected customers away from products they were contractually required to provide, undercut their competition by lobbying the Internal Revenue Service ("IRS") to establish price minimums, and ultimately failed to provide free tax services to those who needed it most as agreed with the IRS. The costs of TurboTax's anti-consumer actions may have ultimately spurred governmental response through a lawsuit from the Federal Trade Commission ("FTC") and competition from the IRS.

The Free File Alliance limits competition

Intuit's journey into their free to file marketing began in 2002 when they signed a deal with the IRS and other tax preparation competitors to provide free tax services to millions of Americans.⁵ As Intuit was facing existential concerns that the IRS would develop their own return free file system, Intuit and its competitors formed the Free File Alliance to collectively enter into an agreement with the IRS.⁶ Under the Agreement, the IRS promised to not create a return free tax system. In return the Free File Alliance had to collectively offer free federal services to at least 60%

¹ *Intuit Inc.*, 2023 Form 10-K, 41, (Sep. 1, 2023) <http://www.sec.gov/edgar>.

² *Janine Perri*, TurboTax supercharges its market share during 2021 tax season, Bloomberg Second Measure (Jun. 17 2021), <https://secondmeasure.com/datapoints/tax-prep-2021-turbotax-hrblock-blucora/>.

³ *Intuit Investor Relations*, Intuit Reports Strong Fourth Quarter and Full Year Results; Sets Fiscal 2024 Guidance, (Aug. 24, 2023), <https://investors.intuit.com/news/news-details/2023/Intuit-Reports-Strong-Fourth-Quarter-and-Full-Year-Results-Sets-Fiscal-2024-Guidance/>.

⁴ *Justin Elliott and Paul Kiel*, Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes for Free — ProPublica (Oct. 17, 2019), <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

⁵ *Id.*

⁶ *Id.*

of taxpayers.⁷ The agreement contained a loophole. Each company was allowed to segment the population and individually was only required to provide free services to around 10% of taxpayers.⁸

Intuit and other tax preparers ensured that their marketing made it difficult for consumers to find and access the program, while aggressively promoting “free” products that often charge fees at the backend.⁹ The rate of adoption of free filing adoption actually decreased over time as the companies became more efficient at redirecting taxpayers. The IRS reported that both the number and percentage of Free File users declined. From 5,142,125 taxpayers in 2005 filing through Free File (which reflected 3.79 percent of all individual taxpayers) to a low point in 2017 only 2,231,261 taxpayers using Free File (reflecting 1.48 percent of all individual taxpayers).¹⁰

An IRS Public Report pointed to the Free File Alliance members directly marketing their non-Free File products to taxpayers who used their Free File product in prior years as a primary driver of the decrease.¹¹ In other words, instead of offering their products for free to 60% of taxpayers, the limitations and restrictions imposed by Intuit and other members of the Free File Alliance left only 2% of taxpayers with free services.

More shocking is that Intuit and the Free File Alliance were able to use the IRS to facilitate an agreement that that was determined by the Justice Department to be likely a form of price fixing without IRS involvement.¹² In 2005, TaxAct, a competitor to TurboTax, upended the status quo by offering “no restrictions” free tax services to everyone with simple returns.¹³ This was a large success and TurboTax and other members of the Free File Alliance were forced to offer free services in response.¹⁴

Concerned about declining profits, the head of TurboTax raised concerns to a House committee that tax providers would not be able to compete and that the Free File Alliance should only be for the “disadvantaged, underprivileged and underserved taxpayer populations” and that the IRS should restrict providers offering free tax preparation to avoid vendors going out of business.¹⁵ The IRS wrote to the antitrust section of the Department of Justice for legal advice in which the Department of Justice responded that “any agreement among [Free File Alliance] members to restrict such free service is likely a form of price fixing” and thus illegal unless the IRS itself were to impose such a restriction.¹⁶

In a revised agreement in 2005 with the Free File Alliance the IRS did just that and expressly barred the companies from offering free tax prep to everyone through the program, only taxpayers

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Internal Revenue Service Advisory Council*, November 2018 Public Report, (Nov. 2018). Publication 5316Catalog Number 71824A.

¹¹ *Id.*

¹² *Justin Elliott and Paul Kiel*. Inside TurboTax’s 20-Year Fight to Stop Americans From Filing Their Taxes for Free — ProPublica (Oct. 17, 2019), <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

who made less than \$50,000 a year would be eligible.¹⁷ The 2005 agreement marked the high water point in free file adoption and the IRS’s anti-competitive agreement may have led to further decline in the availability of free options for basic filers.

Intuit operated for years under the cover of the Agreement until investigative reporting started generating criticism. Reporting from ProPublica has described a pattern of actions that have resulted in customers paying for products that should be free to them under the Free File Alliance.¹⁸ Former midlevel Intuit employees reported to ProPublica that hiding the truly free products is a “purposeful strategy”.¹⁹ Investigation into the code of the website revealed that people who find TurboTax through a search engine or ad labeled or marketed as free would direct you to a paid product which charged fees at the end.²⁰ TurboTax’s website itself ensured that eligible taxpayers would not be made aware of Free File.

Even service members making under \$66,000 who were contractual eligible for free TurboTax, were directed to paid products from the TurboTax military landing page.²¹ Instead of the free services which Intuit had agreed to provide, they were offered a “military discount of \$5 and charged for full priced services.”²²

in 2021 amid allegations that Intuit was tricking customers into paying for services that they were eligible for free, Intuit left the Free File Alliance.²³ Intuit still advertises that they are “committed” to free online tax filing and free services.²⁴

Free to file is not free

After more than 20 years promoting itself as “free free free”, Intuit is faced with legal challenges from the states and the Federal Trade Commission.²⁵ In June 2021, the Federal Trade Commission and state attorneys generals filed a demand and draft complaint relating to the “free” tax preparation.²⁶ On May 4, 2022, TurboTax agreed to a settlement with the 50 states and the District of Columbia for \$141 million.²⁷ Under the terms of the settlement, TurboTax agreed to pay the \$141 million to covered customers and agreed to various restrictions on advertising and marketing practices including to (1) to refrain from misrepresenting the price, cost, limitations, or

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Justin Elliott and Kengo Tsutsumi, TurboTax Uses A “Military Discount” to Trick Troops Into Paying to File Their Taxes — ProPublica (May 23, 2019).* <https://www.propublica.org/article/turbotax-military-discount-trick-troops-paying-to-file-taxes>.

²² *Id.*

²³ *Intuit Blog Team, Why TurboTax is no longer part of the Free File Program.* (Jul. 15, 2021) <https://www.intuit.com/blog/news-social/accelerating-technology-innovation-to-better-help-consumers-solve-their-most-pressing-financial-problems/>.

²⁴ *Id.*

²⁵ *Intuit Inc., 2023 Form 10-K, 93, (Sep. 1, 2023)* <http://www.sec.gov/edgar>.

²⁶ *Id.*

²⁷ *Id.*

other characteristics of TurboTax products or services, (2) to cease running the “free free free” or similar advertisements, and (3) to make certain disclosures.²⁸

The FTC continued their case asserting that the restrictions in the settlement were inadequate, contained “loopholes”, and further injunctive relief was required to protect consumers.²⁹ On August 29, 2023, the FTC administrative law judge found that Intuit had engaged in deceptive advertising in violation of the FTC act and issued an initial decision entering a cease and desist order.³⁰

This decision was upheld by the Federal Trade Commission on January 22, 2024.³¹ The opinion found that Intuit repeatedly engaged in deceptive advertising in violation of Section 5 of the FTC Act and affirmed the order requiring Intuit to clearly disclose all obligations required to obtain free services and the percentage of taxpayers or consumers that qualify for the free services.³² Intuit has responded that they intend to appeal the decision.³³ Subject to federal appellate review, Intuit’s 20 years of “free free free” may have come to an end.

IRS overcomes lobby to launch a free file option

From the beginning, tax experts have advocated that the IRS develop a system for "non-itemizers" based on information available from employers.³⁴ The Free File Alliance responded with direct efforts to prevent this eventuality and Intuit also initiated more subtle “grassroots” effort via a public relations firm.³⁵ Based on public data and statements by Intuit, ProPublica estimates that roughly 15 million paying TurboTax customers, an estimated \$1.5 billion of Intuit’s revenue, could have filed free under the previous free filing plan.³⁶ Other advocates estimate that potential savings of an IRS system would save a collective \$2 billion and 225 million hours in prep costs and time for tens of millions of taxpayers.³⁷ Intuit has long recognized and disclosed in filings to the SEC the federal government could become direct competitor which “could potentially have material and adverse revenue implications on us”.³⁸

²⁸ Federal Trade Commission, In the Matter of Intuit Inc., Opinion of the Commission, 33, (January 22, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf.

²⁹ *Id.*

³⁰ *Id.* at 2.

³¹ *Federal Trade Commission*, FTC Issues Opinion Finding that TurboTax Maker Intuit Inc. Engaged in Deceptive Practices (January 22, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-issues-opinion-finding-turbotax-maker-intuit-inc-engaged-deceptive-practices>.

³² *Id.*

³³ *Intuit Blog Team*, Intuit Responds to U.S. Federal Trade Commission’s Flawed Decision, (Jan. 22, 2024), <https://www.intuit.com/blog/news-social/intuit-responds-to-u-s-federal-trade-commissions-flawed-decision/>.

³⁴ *Frank Pasquale*, A Rule of Persons, Not Machines: The Limits of Legal Automation , 87 GEO. WASH. L. REV. 1 (2019).

³⁵ *Id.*

³⁶ Justin Elliott and Paul Kiel. Inside TurboTax’s 20-Year Fight to Stop Americans From Filing Their Taxes for Free — ProPublica (Oct. 17, 2019), <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free>.

³⁷ *Id.*

³⁸ *Intuit Inc.*, 2023 Form 10-K, 16, (Sep. 1, 2023) <http://www.sec.gov/edgar>.

Members of the Senate Finance Committee have recently become more vocal in pushing for development.³⁹ In 2019, the IRS updated agreement with the free filing alliance eliminated language that prevented the IRS from creating a system and the IRS beginning studying to develop a plan.⁴⁰ For the 2023 tax year the IRS launched a pilot program in 12 states, allowing most taxpayers in those states without itemized deduction or non-standard income to participate in the pilot program.⁴¹

The next decade

The Free File Alliances agreed to provide free filing to 60% of filers, instead they deceived and redirected taxpayers to paid options which resulted in less than 2% of taxpayers filing for free under the program. Rather than minimizing the tax preparation burden, TurboTax has maximized profits and entrenched a 70% market share. The 60% of the taxpayers who the Free File Alliance agreed to provide free quality tax preparation have paid billions - in return for concession from the IRS not to compete and a minimum price fixing agreement. The combination of the IRS allowing anticompetitive price fixing and the deceptive marketing campaign from Intuit left many consumers worse off than they would have been.

The future of tax preparation looks brighter. The IRS has begun developing a much-needed direct file process and now has the benefit of 20 years of industry hindsight and practice to build into the new platform. The new program will be able to incorporate the greatest aspects of the current tax preparation products integrated with the latest technology and information available to the IRS. Had the IRS attempted to develop this tool in 2003, it undoubtedly would have been a more challenging and more expensive endeavor than the current program.

The new IRS direct file program will directly compete with, and could save billions for the 60% of taxpayers promised free filing under the Free File Alliance. While this will hurt the bottom line for Intuit, Intuit's customer data suggests that 33% of TurboTax's customers have incomes over \$100,000 as of May 2021.⁴² TurboTax will remain a strong product helping these individuals navigate itemized forms and likely would remain a loyal customer base to TurboTax even with a successful IRS launch. IRS's new direct file system would instead start to remedy the millions of taxpayers worse off as a result of the unfair and deceptive conduct of the Free File Alliance.

³⁹ *Dylan Moroses*, Wyden Urges IRS To Create Free Online Tax Filing Service. (January 2, 2020), <https://www.law360.com/tax-authority/articles/1230718/wyden-urges-irs-to-create-free-online-tax-filing-service>.

⁴⁰ *Id.*

⁴¹ *Internal Revenue Service*, Direct File - IRS Inflation Reduction Act Strategic Operating Plan (February 8, 2024) <https://www.irs.gov/about-irs/strategic-plan/direct-file>.

⁴² ⁴² *Janine Perri*, TurboTax supercharges its market share during 2021 tax season, Bloomberg Second Measure (Jun. 17 2021), <https://secondmeasure.com/datapoints/tax-prep-2021-turbotax-hrblock-blucora/>.