

Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

August 20, 2018

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201 — Topic 3

Dear Chairman Simons and Commissioners:

The Institute for Local Self-Reliance (“ILSR”), a public interest research and advocacy organization founded in 1974, is pleased to submit these comments in connection with the Federal Trade Commission’s upcoming Hearings on Competition and Consumer Protection in the 21st Century. In addition to offering comments on Topic 3, ILSR has separately submitted comments on Topic 1.

The Importance of These Hearings

When the FTC was formed in 1914, it was given broad policymaking and enforcement authority. As the Conference Committee report on the FTC Act stated, “[i]t is impossible to frame definitions which embrace all unfair practices.”¹ The report emphasizes the FTC’s role in responding to evolving circumstances and heading off new anticompetitive practices “in their incipiency.”² Furthermore, Representative Covington, the original sponsor of the Act, believed the FTC’s jurisdiction should be broad as he stated that the Act “embraces within the scope of section 5 every kind of person, natural or artificial, who may be engaged in interstate commerce.”³

Given this mandate, the FTC has a special responsibility and authority to respond to the rapid rise of technology platforms. We therefore commend the FTC for undertaking these hearings and gathering input from experts and citizens on this important topic. We believe these hearings present a critical opportunity for the Commission to examine the implications of the increasingly dominant role of technology platforms in commerce and the need for changes in competition policy and enforcement to address the implications of platform power.

The Dominance of Amazon’s Platform

ILSR’s comments for this topic focus exclusively on Amazon. For several years, ILSR has been conducting in-depth research and original reporting on Amazon, drawing on a variety

¹ F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972) (citing H.R. Conf. Rep. No.1142, 63d Cong., 2d Sess., 19 (1914)).

² See 51 CONG. REC. 13118 (1914) (statements of Sen. Reed).

³ See 51 CONG. REC. 14,927–28 (1914) (statements of Rep. Covington).

of sources, including interviews and surveys with manufacturers, retailers, and other firms that compete with Amazon and, in most cases, also rely on its platform to reach the market.⁴

Last year, online retail spending in the U.S. surpassed \$450 billion.⁵ Amazon's platform captured nearly half of this spending.⁶ Amazon's market share has grown significantly since 2014, when online shopping amounted to about \$300 billion and Amazon accounted for about one-third of this spending.⁷ Amazon now sells more books and toys than any other retailer (online or offline) and is projected soon to become the top seller of clothing and electronics.⁸

Perhaps the most significant measure of Amazon's platform power is its share of online shopping search. More than half of all online shopping searches in the U.S. now start on Amazon.⁹ One of the main drivers of this dominance in shopping search is Amazon Prime, the company's membership program, which provides free two-day shipping and other perks for \$119/year. Already, 100 million Americans, accounting for more than half of the country's households, are Prime members.¹⁰ There's evidence that being a Prime member alters consumer behavior. When people pay for Prime, they naturally want to maximize the value in free shipping they derive from it by doing more of their shopping on Amazon.¹¹ Studies show Prime members are significantly less likely to comparison-shop, compared to non-Prime customers.¹²

Amazon Uses Its Platform Power to Undermine Competition

As a result of commanding such a large share of shopping traffic and search, Amazon has become an essential intermediary for most producers and retailers of consumer goods. Firms that once drew sufficient consumer traffic from search engines to their own sites are now compelled to become third-party sellers on Amazon's Marketplace — or forego access to a majority of online shopping traffic.¹³

Becoming a seller on Amazon's platform is a treacherous road for these companies. It means handing over to Amazon their customer relationships and a trove of data about their products and transactions. Amazon commonly exploits this data to undermine sellers as competitors. Studies have found that when third-party sellers post new products, Amazon starts selling many of their

⁴ Olivia LaVecchia & Stacy Mitchell, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, INST. FOR LOC. SELF-RELIANCE (Nov. 2016) http://ilsr.org/wp-content/uploads/2016/11/ILSR_Amazon_Report_final.pdf; Stacy Mitchell & Olivia LaVecchia, *Amazon's Next Frontier: Your City's Purchasing*, INST. FOR LOC. SELF-RELIANCE (July 2016), https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf

⁵ "Quarterly Retail E-Commerce Sales, 4th Quarter 2017," U.S. Census Bureau News, U.S. Department of Commerce, Feb. 16, 2018.

⁶ "Amazon captures nearly half of all e-commerce sales, report says," Chicago Business Journal, Jul. 13, 2018.

⁷ *Supra* note 4 at 11.

⁸ "Cowen: It Looks Even More Like Amazon Will Become America's Top Clothing Retailer in 2017," Julie Verhage, BLOOMBERG, May 11, 2016.

⁹ Spencer Soper, *More Than 50% of Shoppers Turn First to Amazon in Product Search*, Bloomberg (September 27, 2016, 12:01 AM EDT), <https://www.bloomberg.com/news/articles/2016-09-27/more-than-50-of-shoppers-turn-first-to-amazon-in-product-search>.

¹⁰ "Amazon reveals it has more than 100 million Prime members," CNN MONEY, April 19, 2018.

¹¹ *Supra* note 4 at 17.

¹² "These new stats about Amazon should make Google very nervous," Jillian D'Onfrio, BUSINESS INSIDER, April 20, 2015.

¹³ See e.g., Stacy Mitchell, "Amazon Doesn't Just Want to Dominate the Market—It Wants to Become the Market," THE NATION, Feb. 15, 2018 (detailing the story of Gazelle Sports).

most popular items itself.¹⁴ Other research has found that Amazon frequently awards the “buy box” to its own products and those of companies that pay for its warehousing and shipping services even when other sellers offered substantially lower prices.¹⁵

Amazon also leverages market insights gained from this data to expand into new areas with a built-in advantage. Data derived from competing manufacturers and retailers on its platform, for example, has enabled Amazon to produce a growing line of thousands of private-label products. At times, the company has manufactured knock-offs of popular products on its site and then given its own versions top-billing in its search results.¹⁶ Other research has found that Amazon gives its own clothing items better access to promotional placement (in the carousels at the bottom of product pages) than those produced by rivals — restricting access and suppressing sales of competing brands at no cost.¹⁷ As Amazon exploits its platform position to direct consumers’ attention to its own products, and as the presence of competing retailers both online and offline has shrunk, manufacturers report that it’s become more difficult to successfully launch new products and brands.¹⁸ Amazon’s position effectively allows it, rather than the market, to decide winners and losers.

The need for a presence on Amazon’s platform and the lack of viable competing platforms allows Amazon to abruptly and unilaterally change terms for sellers, including suspending their seller accounts without explanation,¹⁹ and to set fees, for use of both the platform and Amazon’s warehousing and shipping services, that are not tempered by meaningful competition.²⁰

By leveraging the interplay between the different parts of its business — retailer, platform, manufacturer — Amazon can amplify its market power over suppliers. It has, for example, used its ability to selectively police sellers of counterfeit products on its platform as a bargaining chip to compel suppliers to agree to its terms. In 2016, for instance, after the shoemaker Birkenstock repeatedly asked Amazon to take action against counterfeit shoes sold on its platform, Amazon offered to do so, but only if Birkenstock agreed to sell directly to Amazon the niche products it had previously reserved for specialty retailers.²¹

As Amazon moves into public-sector procurement, it’s using its contracts with governments to further expand its platform power. In July, ILSR published an investigation of a national contract that Amazon secured last year to supply cities, counties, and school districts.²² As Amazon markets the contract to local governments — already 1,500 have signed on — the

¹⁴ See e.g., Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, Harvard Business School Working Paper 15-044, at 15.

¹⁵ Julia Angwin & Surya Mattu, *Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn’t*, PROPUBLICA (Sept. 20, 2016) <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesn-t>

¹⁶ See e.g., “Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too,” Spencer Soper, BLOOMBERG (April 20, 2016).

¹⁷ *Amazon: Prioritizing its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform*, THE CAPITOL FORUM (Dec. 13, 2016).

¹⁸ *Supra* note 4 at 25-27.

¹⁹ Spencer Soper, “Amazon Angers Mom-and-Pop Sellers With ‘Arbitrary’ Suspensions,” BLOOMBERG, Aug. 26, 2016.

²⁰ Amazon has repeatedly raised its fees, with fulfillment fees rising in 2018 by as much as 14 percent for standard-size items (and more for oversize goods), on top of similar increases in 2017. *Supra* note 13.

²¹ “Birkenstock quits Amazon in US after counterfeit surge,” Ari Levy, CNBC, Jul. 20 2016. (Birkenstock pushed back, but other companies, including Nike, appear to have caved to a similar demand.)

²² Stacy Mitchell & Olivia LaVecchia, *Amazon’s Next Frontier: Your City’s Purchasing*, INST. FOR LOC. SELF-RELIANCE (July 2016), https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf

company has told public officials that they can still shop with their current vendors under the contract, because those vendors can become third-party sellers on Amazon’s platform.²³ As a result, independent office supply dealers and other businesses that have a track record of winning local government contracts have now been pitched to join the Amazon Marketplace by both Amazon and, in some cases, public officials.²⁴

Amazon has Entrenched Its Platform Power Through Acquisitions

Amazon has made a number of acquisitions that have helped to entrench and expand its dominant market position.²⁵ These mergers all won quick approval from federal antitrust enforcers²⁶ and offer striking examples of how antitrust enforcement has thus far failed to recognize the distinct nature and consequences of platform business models.

In 2009 and 2010, Amazon acquired two upstart rivals that had gained ground as online competitors: Zappos and Quidsi (formerly Diapers.com). In both cases, Amazon engaged in protracted below-cost selling to compel its targets to agree to a merger.²⁷

In 2012, Amazon bought Kiva Systems, a robotics company that at the time supplied warehouses everywhere. Amazon decided not to extend Kiva’s other contracts, but to reserve the technology exclusively for Amazon’s warehouses. This buttressed Amazon’s growing position as a logistics and package delivery company, which in turn enhanced its power to attract producers and retailers to its a platform by reducing the speed and efficiency of other warehousing and package delivery services.²⁸

In 2017, Amazon acquired Whole Foods. Although the deal gave Amazon a foothold in the large and pivotal grocery industry, its more significant competitive impact had to do with the ways it allowed Amazon to fortify its already dominant position as an online platform. With Whole Foods, Amazon gained a trove of new offline data about consumers. It also gained new infrastructure for its package-delivery operations, including 470 stores nestled among millions of middle- and upper-income consumers. Amazon is now using Whole Foods stores and parking lots to stage last-mile deliveries.²⁹ Having the infrastructure to rapidly deliver packages to doorsteps is an essential component of sustaining a dominant position in online commerce. Should Amazon weaken UPS and FedEx, it will leave competing retailers and producers to pay higher prices through these carriers, or to rely more on Amazon’s platform to sell their goods.

As we noted above, we believe these hearings present a critical opportunity for the Commission to examine the implications of the increasingly dominant role of technology

²³ *Id.*

²⁴ *Id.*

²⁵ For a complete list of Amazon’s acquisitions see, *List of mergers and acquisitions by Amazon*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Amazon (last visited Aug. 16, 2018).

²⁶ See e.g., *Statement of Federal Trade Commission’s Acting Director of the Bureau of Competition on the Agency’s Review of Amazon.com, Inc.’s Acquisition of Whole Foods Market Inc.*, FEDERAL TRADE COMMISSION (August 23, 2018), <https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau>.

²⁷ Lina M. Khan, *Amazon’s Antitrust Paradox*, 127 YALE L. J. 710 (2017).

²⁸ Kim Bhasin and Patrick Clark, “How Amazon Triggered a Robot Arms Race,” BLOOMBERG, June 29, 2016 (“The acquisition effectively gave Jeff Bezos command of an entire industry”).

²⁹ “Amazon Is Looking for Larger Whole Foods Stores to Support Delivery Plans,” TRANSPORT TOPICS, Mar. 22, 2018.

platforms such as Amazon and the need for changes in competition policy and enforcement to address the implications of platform power.

Thank you for the opportunity to submit these comments in advance of the Commission's upcoming hearings. We look forward to following and contributing to the Commission's process in the coming months, and we would welcome the opportunity to answer questions, provide additional information, or discuss these issues with the Commissioners and staff. I can be reached via email (smitchell@ilsr.org) or phone (207-989-8500).

Sincerely,

/s/ Stacy Mitchell

Stacy Mitchell
Co-Executive Director
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