

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 — Comments on Topic 3

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.

1. Given its broad mandate, the Commission has a special responsibility to examine and respond to the dominance of technology platforms in commerce.

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

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.

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).

2. Amazon's platform has become essential infrastructure for most producers and retailers of consumer goods.

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 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.³

Last year, online retail spending in the U.S. surpassed \$450 billion.⁴ Amazon's platform captured nearly half of this spending.⁵ 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.⁶ 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.⁷

The more significant measure of Amazon's platform power, however, is its share of online shopping search. More than half of all online shopping searches in the U.S. now start on Amazon.⁸ 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.⁹ 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.¹⁰ Studies show Prime members are significantly less likely to comparison-shop, compared to non-Prime customers.¹¹

³ 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 2018), https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf

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

⁵ "Amazon captures nearly half of all e-commerce sales, report says," Chicago Business Journal, Jul. 13, 2018.

⁶ LaVecchia and Mitchell, *supra* note 3 at 11.

⁷ "Cowen: It Looks Even More Like Amazon Will Become America's Top Clothing Retailer in 2017," Julie Verhage, BLOOMBERG, May 11, 2016.

⁸ 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>.

⁹ "Amazon reveals it has more than 100 million Prime members," CNN MONEY, April 19, 2018.

¹⁰ LaVecchia and Mitchell, *supra* note 3 at 17.

¹¹ "These new stats about Amazon should make Google very nervous," Jillian D'Onfrio, BUSINESS INSIDER, April 20, 2015.

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.¹²

3. Amazon uses its dominant gatekeeper position to undermine competition from rival retailers and manufacturers that depend on its platform to reach the online market.

Becoming a seller on Amazon’s platform is a treacherous road for competing retailers and producers. 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 most popular items itself.¹³ 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.¹⁴

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 private-label products. At times, the company has manufactured knock-offs of products that are bestsellers on its site and then given its own versions top-billing in its search results.¹⁵ 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.¹⁶

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

¹² 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).

¹³ 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.

¹⁴ 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>

¹⁵ See e.g., “Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too,” Spencer Soper, BLOOMBERG (April 20, 2016).

¹⁶ *Amazon: Prioritizing its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform*, THE CAPITOL FORUM (Dec. 13, 2016).

that it's become more difficult to successfully launch new products and brands.¹⁷ 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 also allows Amazon to abruptly and unilaterally change terms for sellers, including suspending their seller accounts without explanation,¹⁸ and to set fees, for use of both the platform and Amazon's warehousing and shipping services, that are not tempered by meaningful competition. Amazon has repeatedly raised these fees, with fulfillment fees rising this year by as much as 14 percent for standard-size items (and more for oversize goods), on top of similar increases in 2017.¹⁹

By leveraging the interplay between the different parts of its business — retailer, platform, manufacturer — Amazon can amplify its market power over suppliers and its ability to dictate terms. 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 supply Amazon on Amazon's terms. These terms included making available to Amazon the niche products Birkenstock had previously reserved for specialty retailers in exchange for them providing additional services to Birkenstock customers.²⁰ In effect, Amazon sought to use its platform power to both win concessions from a supplier and neutralize a competitive strategy of its smaller retail rivals.

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.²¹ As Amazon markets the contract to local governments — already 1,500 have signed on — the 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.²² As a result, independent office supply dealers and other businesses that sell to local governments are now being pushed to

¹⁷ LaVecchia and Mitchell, *supra* note 3 at 25-27.

¹⁸ Spencer Soper, "Amazon Angers Mom-and-Pop Sellers With 'Arbitrary' Suspensions," BLOOMBERG, Aug. 26, 2016.

¹⁹ 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.

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

²¹ Stacy Mitchell & Olivia LaVecchia, *Amazon's Next Frontier: Your City's Purchasing*, INST. FOR LOC. SELF-RELIANCE (July 2018), https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf

²² *Id.*

join the Amazon Marketplace by both Amazon and, in some cases, public officials if they want to continue to sell to these jurisdictions.²³ Many of these independent office supply businesses have their own robust e-commerce sites and have been providing next-day delivery for decades. One price analysis found they have lower prices than Amazon.²⁴ Having to operate on Amazon's platform means relinquishing to Amazon data about their transactions and 15 percent of their revenue, a cost that can make their pricing uncompetitive.²⁵

As part of these hearings, we urge the FTC to examine Amazon's platform power and the conflicts of interest inherent to a situation in which a company controls market access for its competitors and the terms they're subject to for that access. As part of this process, we also look forward to sharing additional comments on what we see as the elements of an appropriate structural remedy.

4. Merger policy has failed to recognize how Amazon's acquisitions would entrench its platform power.

Amazon has made a number of acquisitions that have helped to entrench and expand its dominant position.²⁶ These mergers all won quick approval from federal antitrust enforcers²⁷ 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, for example, 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, a tactic available to Amazon because of its investors' commitment to market share over profits, its ability to cross-subsidize from other parts of its business, and current antitrust jurisprudence that treats predatory pricing as essentially nonexistent.²⁸

²³ *Id.*

²⁴ *Id.* at 14-15 (citing a study by OPSSoftware, a price tracking firm).

²⁵ *Id.*

²⁶ 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).

²⁷ 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>.

²⁸ Lina M. Khan, *Amazon's Antitrust Paradox*, 127 YALE L. J. 710 (2017).

In another example, 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 ability to attract producers and retailers to its a platform by reducing the relative speed and efficiency of other warehousing and package delivery services.²⁹

Finally, in 2017, Amazon acquired Whole Foods. The deal gave Amazon a foothold in the large and pivotal grocery industry, but its more significant competitive impact had to do with how the acquisition fortified Amazon's already dominant position as a platform for online commerce. For one, Amazon gained a stream of new data about the offline behavior and transactions of consumers, as well as the ability to begin to translate its sticky online relationship with Prime members to their offline shopping. Second, Amazon 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 to stage last-mile deliveries.³⁰ Having the infrastructure to rapidly deliver packages to doorsteps is an important component of sustaining its dominant position in e-commerce. Amazon loses money on its Prime shipping services, using other parts of its operations to cross-subsidize package delivery.³¹ This creates a significant barrier for potential e-commerce platform competitors to challenge Amazon, and it has the effect of inducing more sellers of goods to rely on Amazon's platform, rather than operate independently, as their cost of using competing carriers like UPS becomes relatively more expensive.

For most producers and retailers, selling goods online now entails going through Amazon. Here we've outlined a few of the risks and consequences inherent in this kind of centralized market power, and look forward to elaborating and offering additional comments about policy and enforcement recommendations as this process proceeds. We believe these hearings present a critical opportunity for the Commission to examine the implications of the increasingly dominant role of technology platforms such as Amazon and the need for changes in competition policy and enforcement to address the implications of platform power.

²⁹ 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").

³⁰ "Amazon Is Looking for Larger Whole Foods Stores to Support Delivery Plans," TRANSPORT TOPICS, Mar. 22, 2018.

³¹ Todd Bishop, The cost of convenience: Amazon's shipping losses top \$7B for first time, Geekwire, Feb. 9, 2017.

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

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