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December 19, 2018

Mr. Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons:

I am deeply concerned that the price parity provisions in Amazon's contracts with third-party sellers could stifle market competition and artificially inflate prices on consumer goods that millions of Americans are planning to buy this holiday season. I urge you to act quickly to protect American shoppers by opening an investigation into these price parity clauses. European officials took action against these clauses five years ago. American consumers deserve the same protections. U.S. antitrust officials should open their own investigation immediately.

Recent economics research has demonstrated that price parity provisions – also known as most-favored nation clauses – can harm consumers, especially when enforced by large tech platforms with significant market power.¹ Given Amazon's leading position in the U.S. e-commerce market,² it may now possess the degree of market power at which its price parity provisions could raise serious competition concerns. Amazon's price parity provisions limit the discounts that third-party merchants can offer to customers who find their products through any site other than Amazon's online marketplace. With few exceptions, Amazon's contract requires that the purchase price that third-party merchants offer on Amazon is "at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sold via" other sales channels.³ In the past, Amazon is reported to have enforced these price parity provisions by

¹ See Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs* 127 YALE L.J. 2176 (2018) <https://www.yalelawjournal.org/feature/antitrust-enforcement-against-platform-mfns>; Andre Boik and Kenneth S. Corts, *The Effects of Platform MFNs on Competition and Entry* 59 J.L. & ECON. 105, 113-29 (2016) <https://www.journals.uchicago.edu/doi/abs/10.1086/686971> (finding that platform most favored nations clauses "typically raise platform fees and retail prices and curtail entry or skew positioning decisions by potential entrants pursuing low-end business models.").

² See Emily Stewart, *Happy Prime Day! Experts Worry Amazon is Building a Dangerous Monopoly* Vox (Jul 17 2018) <https://www.vox.com/2018/7/17/17583070/amazon-prime-day-monopoly-antitrust> (regarding Amazon's market share).

³ See Amazon Services Business Solutions Agreement, S-4 (noting that offers to wholesale purchasers and customers that have opted into membership-based customer loyalty or customer incentive programs are excluded from the price-parity provision).

threatening to remove merchants who violated these contract clauses from their marketplace,⁴ a practice that is rumored to have continued in recent years.⁵

Amazon's price parity provisions may raise prices for consumers both in the short term and in the long run. In the short term, these clauses prohibit third-party merchants who sell on online marketplaces with lower transaction fees from passing on any savings to consumers. For example, if a competitor to Amazon charges lower commission fees to third-party merchants operating on its site, Amazon's price parity provision will prohibit sellers from reducing their prices to reflect the lower cost of selling through Amazon's competitor.⁶ In the long run, these provisions may permit Amazon to steadily raise the transaction fees it charges third-party merchants, secure in the knowledge that sellers will either have to accept the higher fees or charge all its online customers higher prices across all sales channels.⁷

Relatedly, Amazon's price parity provisions may work to block the emergence of more efficient online marketplaces that might offer consumers lower prices on their favorite goods. In order to compete with Amazon and attract third-party sellers to its site, another online marketplace might wish to offer reduced transaction fees to third-party merchants selling through online sales channels. One advantage of this market strategy would be to enable third-party merchants to drop their prices for consumers who visit the site, which should attract additional consumers to the site over time. However, because third-party merchants are barred by Amazon's price parity provision from passing on savings from reduced transactions costs to consumers, Amazon's potential competitors may be hamstrung in their efforts to induce sellers to offer consumers a better price. This lack of competition puts additional upward pressure on prices.

Amazon's price parity provisions have already raised serious antitrust concerns among European regulators. Roughly five years ago, British⁸ and German⁹ antitrust officials opened investigations into Amazon's price parity provisions because they were concerned that these contract clauses violated their national competition laws. For example, German antitrust officials found that, because Amazon offers its own retail products alongside those of third-party merchants, these price parity provisions likely constituted an unlawful horizontal restraint on trade that may have led to higher prices and acted as a barrier to entry for competitors.¹⁰

⁴ *Case Report: Amazon Removes Price Parity Obligation for Retailers on Its Marketplace Platform*, Ref.: B6-46/12, Bundeskartellamt 1 (Dec. 9, 2013) <https://perma.cc/5VGV-Q9QF> ("Compliance with the price parity instructions was regularly monitored and enforced by Amazon from 2012 onwards. Amazon threatened the retailers concerned with measures culminating in the withdrawal of the right to sell on amazon.de.").

⁵ *See Price Parity? Threatened with suspension over Price Parity?* (Feb. 26 2018) <https://sellercentral.amazon.com/forums/t/price-parity-threatened-with-suspension-over-price-parity/389017>

⁶ *Cf.* Baker & Scott Morton, *supra* note 1, at 2181-82.

⁷ *Cf.* Boik and Corts, *supra* note 1, at 107.

⁸ BBC News, *Amazon to Alter Pricing Policy for Traders* (Aug. 29 2013) <https://www.bbc.com/news/business-23881202>.

⁹ *Case Report: Amazon Removes Price Parity Obligation for Retailers on Its Marketplace Platform*, Ref.: B6-46/12, Bundeskartellamt 1 (Dec. 9 2013) <https://perma.cc/5VGV-Q9QF>

¹⁰ *Id.*

In response to British and German regulators' investigations, Amazon promised that it would cease enforcing its price parity provisions against European sellers.¹¹ However, it has continued to enforce them in the United States.¹² Amazon consumers in the United States deserve the same protections as their European counterparts.

Just as Amazon's price parity provisions raised concerns abroad, they should raise legal concerns among antitrust regulators at home. Our courts have already found that price parity provisions can be unlawful restraints of trade. For example, the Second Circuit held in 2015 that, in the context of e-book pricing, Apple's price parity agreement – or what the court called a most-favored nation clause – constituted a violation of Section 1 of the Sherman Act.¹³ Amazon's price parity provisions are particularly concerning because at least one other online marketplace – Walmart, which also owns Jet.com¹⁴ – appears to be using a price parity provision.¹⁵ The use of multiple price parity provisions throughout the e-commerce industry raises concerns that these clauses may collectively work to block competition and raise prices in violation of Section 1 of the Sherman Act.¹⁶

Legal scholars have noted that online tech platforms using price parity provisions may run afoul of the Sherman Act's prohibition on attempts to monopolize.¹⁷ The case for challenging Amazon's price parity provisions under Section 2 of the Sherman Act is particularly strong. That is because Amazon controls nearly half of all U.S. e-commerce,¹⁸ which should allow regulators to easily establish that Amazon has the high market share typically necessary to bring successful litigation under Section 2.¹⁹ The FTC could act under both of the above legal theories through its powers under Section 5 of the FTC Act.

In light of the strong economic and legal arguments that Amazon's price parity provisions raise antitrust concerns, I urge you to open an investigation into their effect on the marketplace. This would be in line with past practice. For example, the Department of Justice

¹¹ See BBC News, *supra* note 7.

¹² See Amazon Services Business Solutions Agreement, S-4.

¹³ See e.g., *United States v. Apple Inc.*, 791 F.3d 290 (2d. Cir 2015); Baker & Scott Morton, *supra* note 1, at 2191-92 (discussing the Apple MFN).

¹⁴ Andria Cheng, *Walmart's Jet.com Is Getting A Makeover To Try To Win Over New York's Millennials* Forbes (Sept. 13 2018) <https://www.forbes.com/sites/andriacheng/2018/09/13/walmart-jet-redesign-new-york/>.

¹⁵ See e.g. Zentail, *Price Wars: Multichannel Repricing for Amazon, Walmart Marketplace* (May 2017) <https://insider.zentail.com/price-wars-multichannel-re-pricing-for-amazon-walmart-marketplace/> (stating that Walmart's online marketplace has a price parity rule); Walmart Marketplace Program Retailer Agreement, 8. *Parity Pricing, Special Offers and Promotions* <https://marketplace-apply.walmart.com/resource/1454541787000/SellerAgreementDoc> (containing a price parity provision almost identical to Amazon's); see also Spirit of Jet Marketplace, *Pricing* <https://prodreports.blob.core.windows.net/policies/policy-revision-4.pdf> (stating that the "Retailer Price of an item (i.e., Item Price + Shipping Price) should be equal to or less than what [third party merchants] sell the item for elsewhere, including, but not limited to, any on-site sales or promotions").

¹⁶ See Baker & Scott Morton, *supra* note 1, at 2180 (noting that a price parity provision can "facilitate coordination" by "discourage[ing] discounting and stabiliz[ing] prices," and citing examples).

¹⁷ See 15 U.S.C. §§ 1, 2; Baker & Scott Morton, *supra* note 1, at 2188-89.

¹⁸ See Emily Stewart, *supra* note 2.

¹⁹ *Cf.* Baker & Scott Morton, *supra* note 1, at 2196 (noting that 30% market share may be sufficient to establish monopoly power for purposes of a case under Section 2 of the Sherman Act).

has pursued cases against price parity provisions in the health and dental insurance industries.²⁰ Our antitrust officials must be similarly aggressive in protecting competition in the online marketplaces that millions of Americans will be visiting this holiday season.

Thank you for your consideration. Please contact Sam Simon or Adam Bradlow in my office at adam_bradlow@blumenthal.senate.gov with any questions and to provide your response.

Sincerely,



Richard Blumenthal
United States Senate

Cc:
Commissioner Rohit Chopra
Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson

²⁰ See e.g., *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665, 671-76, 679 (E.D. Mich. 2011); *United States v. Delta Dental of R.I.*, 943 F. Supp. 172 (D.R.I. 1996).