

December 20, 2023

Senator Amy Klobuchar
Chair
Senate Committee on the Judiciary
317 Hart Senate Office Building
Washington, DC 20510

Senator Mike Lee
Ranking Member
Senate Committee on the Judiciary
316A Russell Senate Office Building
Washington, DC 20510

RE: “The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights,” Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights Hearing

Dear Chair Klobuchar and Ranking Member Lee:

The Responsible Online Commerce Coalition (ROCC) appreciates the Subcommittee holding this hearing to examine the influence that algorithms have on competition. We believe that any discussion about the state of competition in digital markets must consider how dominant platforms’ use of algorithms can adversely affect businesses that depend on the platform. As a coalition of businesses, including third-party sellers, who rely on Amazon and other digital marketplaces to reach their customers, our membership has first-hand experience with how platforms can use algorithms to distort competition. This type of anticompetitive conduct is all-too-often overlooked because of the lack of transparency and accountability for how dominant digital platforms use algorithms in the course of their business.

ROCC is a non-profit association that represents businesses that rely on Amazon and other online commerce platforms to reach their customers. The Coalition seeks to ensure fair play for all businesses that operate in online commerce, so that businesses who offer the best products for the best consumer value can prosper. Our members range in size and location, from small third-party sellers to recognizable brand names, and are located in the U.S., as well as Europe and the U.K.

ROCC has previously weighed in on related issues that affect our membership. Our Director of U.S. Competition Policy, Amanda Lewis, testified before this Subcommittee earlier this year in a hearing focused on legislative proposals to rein in digital platforms.¹ ROCC has also been active in joining letters to the Biden Administration and Congress in favor of policies that would help restore competition to digital markets.² Recently, the Coalition also submitted

¹ *Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Amanda Lewis, Partner, Cuneo Gilbert & LaDuca, LLP; Co-Founder and Director of U.S. Competition Policy, ROCC).

² Letter from ROCC et al., to Chair and Ranking Members of the Subcomm. on Innovation, Data, and Com. and H. Comm on Energy and Com. (Apr. 19, 2023), <https://theroccoalition.com/wp-content/uploads/April-2023-EC->

comments to the FTC in response to a proposed rulemaking on fake reviews which overlaps, in part, with the Subcommittee's interest in how algorithms can impact competition.³ Consistent with our prior advocacy, ROCC urges you and the other Members of this Subcommittee to support and advance legislation to prohibit dominant digital platforms from continuing to abuse their monopoly power. Although it is often more difficult to identify and detect, such abuse of monopoly power includes instances where gatekeeper platforms weaponize algorithmic tools to harm competition. ROCC strongly supports the American Innovation and Choice Online Act (AICOA) as critical to address these harms and thanks Chairwoman Klobuchar and Senator Grassley for their bipartisan leadership on this bill.

Impact of Dominant Platforms' Anticompetitive Algorithmic Misconduct

Often, dominant digital platforms act as gatekeepers in our modern world. In fact, earlier this year the European Commission designated six such companies, including Amazon, as "gatekeeper platforms" under the Digital Markets Act.⁴ Their role as central intermediaries with significant market power in areas such as news, entertainment media, communication, and shopping, enable them to direct virtual traffic in ways that frequently advantage themselves at the expense of other businesses and consumers. This is not a new concern. The July 2022 House Judiciary Committee's Digital Markets Report discussed "[t]he effect that small algorithm changes by dominant platforms can have on small businesses that rely on the platform."⁵ ROCC members are at the whim of Amazon's ability to change algorithms to steer shoppers to certain products and sellers, often without advance notice or explanation, in ways that directly affect their revenue. The dominant platforms' power derives, in large part, from their ability to use and manipulate algorithms in ways that can have a critical impact on sellers and users that rely on the platform, as well as the fear this immense power engenders. The dominant platforms' use of algorithms is at the root of some of their worst abuses, as a single, arbitrary tweak to an algorithm could cause significant financial harm to dependent businesses with no avenues for recourse or accountability.

In practice, "self-preferencing" misconduct is one of the most common anticompetitive ways in which algorithms are designed to operate. The Digital Markets Report found, for

[Letter.pdf](#); Letter from ROCC et al., to President Joseph R. Biden (Oct. 19, 2023), https://rethinktrade.org/wp-content/uploads/2023/10/DMA-Letter-to-WH_10.19.2023.pdf; Letter from ROCC et al., to President Joseph R. Biden (Nov. 15, 2023), <https://theroccoalition.com/wp-content/uploads/ROCC-Letter-re.-Digital-Trade-Negotiations.pdf>.

³ ROCC, Comment Response to Proposed Trade Regulation Rule on Use of Consumer Reviews and Testimonials Rule (Sept. 29, 2023), 88 Fed. Reg. 49364 (proposed July 31, 2023) (to be codified at 16 C.F.R. pt. 465), <https://theroccoalition.com/rocc-response-to-ftcs-proposed-rule-on-fake-reviews/>.

⁴ Regulation 2022/1925, of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265)1.

⁵ Staff of Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. On the Judiciary, 117th Cong., 2d Session, Investigation of Competition in Digital Markets at 23, 49 (published July 2022), <https://www.congress.gov/117/cprt/HPRT47832/CPRT-117HPRT47832.pdf>.

example, that Google adjusted its search algorithm to automatically and artificially elevate the ranking of some of Google’s own services above those offered by competitors.⁶ The vast scale and power of artificial intelligence capabilities at work in many such algorithms create a cyclical trend where a reduction in traffic to certain pages results in more obscurity and less revenue, which then leads to even further reduction in traffic. The Digital Markets Report refers to this as a “network effect in reverse.”⁷

ROCC members, who mostly rely on Amazon to sell their products, have experienced the adverse effects of this phenomenon. Amazon’s algorithms “pick winners” and do what is best for Amazon’s bottom line. Amazon has repeatedly insisted that its Buy Box algorithm considers a range of criteria to help predict the best available offer for consumers. In reality, however, the platform’s Buy Box algorithm has been weaponized to expand and maintain Amazon’s monopoly power.

Two currently pending lawsuits against Amazon, filed by the Federal Trade Commission (FTC) and California Department of Justice (CA DOJ), allege that Amazon’s algorithmic conduct violates U.S. and state antitrust law. In the CA DOJ’s complaint against Amazon, sellers report that Amazon uses the Buy Box to prevent them from selling their products for a lower price on other platforms.⁸ Amazon’s “price parity policy” penalizes third-party sellers whose products are offered for sale at a lower price on other retail channels.⁹ Frequently, this drives up prices due to Amazon’s exorbitant seller fees and cost structure. Amazon’s monopoly power in e-commerce, however, makes it just as difficult for these businesses to survive without selling on Amazon’s platform, resulting in reduced competition in the marketplace and economic harm to both sellers and consumers.

It is an algorithm that makes this misconduct possible, as the Buy Box algorithm allows Amazon to automatically remove the Buy Box for products which violate its anticompetitive pricing policy, at incredible scale and speed. Since these algorithms lack transparency, Amazon is able to punish sellers and suppress products at will with little to no accountability. In fact, Amazon founder and former CEO, Jeff Bezos, admitted to the House Judiciary Committee that “the Buy Box does favor products that can be shipped with Prime,” effectively forcing sellers to pay for “Fulfillment by Amazon” (FBA) services if they want to make sales and be profitable.¹⁰ The FTC complaint revealed information about Amazon’s “first-party anti-discounting algorithm,” alleging that it suppresses competition and hurts third-party sellers in the process by

⁶ *Id.* at 156.

⁷ *Id.* at 158.

⁸ Complaint at 57, *California v. Amazon.com, Inc.*, No. CGC-22-601826 (filed Sept. 15, 2022).

⁹ *Id.*

¹⁰ *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2023).

“artificially [raising] the costs that sellers face when seeking to multihome,” which “suppresses Amazon’s rivals’ ability to compete for sellers.”¹¹

The FTC complaint identifies another egregious example of algorithmic misconduct: Project Nessie. More than a decade ago, Amazon found out that third-party sellers would frequently follow the prices set by Amazon’s first-party Retail department and used this information to build an algorithm that artificially inflated prices across the board without the knowledge of sellers or shoppers. In fact, Amazon has allegedly gone to great lengths to avoid detection of Project Nessie’s manipulation of the platform’s prices, rotating which products are subject to the algorithm and strategically pausing the algorithm’s performance during periods of “increased media focus and customer traffic.”¹² By taking advantage of scaled black-box algorithms designed to inflate prices and suppress competition, Amazon has allegedly extracted more than \$1 billion in excess profit from consumers and third-party sellers.¹³

In addition to recent lawsuits, there have been many reports and news articles, spanning the last decade, detailing how Amazon uses algorithms in ways that distort competition in e-commerce.¹⁴

Importance of Congressional Action and Support for the American Innovation and Choice Online Act (AICOA)

ROCC applauds the Subcommittee’s efforts to investigate the rampant, unchecked manipulation of the market by way of algorithms and believes that Congress must take action to restore competition to digital markets. Although there have been increased state and federal efforts to pursue litigation as a means of tackling Big Tech’s anticompetitive practices, we have observed the immense amount of time and resources that litigation requires. For example, the FTC case against Amazon will not go to trial until at least 2026.¹⁵ ROCC strongly supports the FTC’s, the California DOJ’s, and the D.C. Attorney General’s efforts to hold Amazon accountable for its anticompetitive conduct, as litigation can be an important and effective tool in

¹¹ Complaint [Public Redacted Version] at 123, *FTC et al. v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (filed Nov. 2, 2023).

¹² *Id.* at 121.

¹³ *Id.* at 125.

¹⁴ See, e.g., Renee Dudley, *The Amazon Lockdown: How an Unforgiving Algorithm Drives Suppliers to Favor the E-Commerce Giant Over Other Retailers*, ProPublica (Apr. 26, 2020), <https://www.propublica.org/article/the-amazon-lockdown-how-an-unforgiving-algorithm-drives-suppliers-to-favor-the-e-commerce-giant-over-other-retailers>; Jeffrey A. Trachtenberg, ‘They Own the System’: Amazon Rewrites Book Industry by Marching into Publishing, *The Wall Street Journal* (Jan. 16, 2019), <https://www.wsj.com/articles/they-own-the-system-amazon-rewrites-book-industry-by-turning-into-a-publisher-11547655267>; Julia Angwin & Surya Mattu, *Amazon Says it Puts Customers First. But Its Pricing Algorithm Doesn’t*, *Business Ethics* (Sept. 20, 2016), <https://business-ethics.com/2016/09/20/12675-amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt/>.

¹⁵ Daphne Howland, *FTC Antitrust Trial Against Amazon Won’t Start Until Mid-2026, At the Earliest*, *Retail Dive* (Dec. 19, 2023), <https://www.retaildive.com/news/ftc-amazon-antitrust-lawsuit-trial-2026/702951/>.

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shaping a competitive marketplace free of abuse by dominant platforms. However, it takes a long time to obtain relief and even longer to successfully enforce a given remedy.

For these reasons, it is vital for Congress to act on legislation that would, immediately, create a more competitive online marketplace. AICOA would explicitly and unquestionably make clear that it is illegal for dominant platforms like Amazon to use anticompetitive, anti-discounting algorithms to prevent sellers from multihoming or to penalize them for operating in a pro-competitive manner.¹⁶ Such legislation would be an effective tool in halting the digital gatekeepers' continued abuse of powerful and opaque technology for anticompetitive purposes.

We commend the Subcommittee for holding this important hearing and urge you to continue to work on these critical policy issues related to the impact of algorithms on fair competition in online marketplaces.

Sincerely,

The Responsible Online Commerce Coalition
(ROCC)

¹⁶ American Innovation and Choice Online Act (AICOA), S. 2033, 118th Cong. (2023).