

# DUTY TO DISCLOSE: AMAZON'S E-COMMERCE PLATFORM, PRIVATE-LABEL, AND THE NEED FOR DISCLOSURE

By: Reiley Pankratz\*

## I. INTRODUCTION

Every modern consumer knows that Amazon has millions of products and brands on its online e-commerce platform. What every modern consumer does not know is that many of these brands and boosted products appearing at the top of the search page are Amazon's own private-label products. "Private-label" means products produced by Amazon that are only available through Amazon sales channels. In 2019, *The Washington Post* reported that "according to analyst estimates, about half of all American households are now [Amazon] Prime members, turning to mobile apps, desktops or even the Alexa voice-enabled application for much of their shopping."<sup>1</sup> When an Amazon shopper logs on to their Amazon account and searches for a specific product, they will find not only that searched product but also a comparable product, often with an alluring, lower price.<sup>2</sup> For example, when a consumer searches for Glad trash bags, they will find a link for a 100-bag package of Glad trash bags for \$16.77.<sup>3</sup> Upon clicking that link, Amazon suggests an 80-bag package of Solimo trash bags for \$11.11.<sup>4</sup> Solimo is, of course, Amazon's brand.<sup>5</sup> This option is at first appealing to consumers, but are shoppers really getting the best product for the best price from this in-your-face marketing style? Additionally, do shoppers understand that these products are Amazon-owned private-label brands? This lack of transparency leaves a wide-open space for abusive and unfair consumer practices. Amazon should be able to sell its own products, but consumers have

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<sup>1</sup> Jay Greene, *Aggressive Amazon Tactic Pushes You to Consider its Own Brand Before You Click Buy*, WASH. POST (Aug. 28, 2019), <http://www.washingtonpost.com/technology/2019/08/27/aggressive-amazon-tactic-pushes-you-consider-its-own-brand-before-you-click-buy/> [<https://perma.cc/F66Z-AK33>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

the right to know that Amazon owns the brand.

## II. BACKGROUND

Over the last few decades, online retail and e-commerce have become ubiquitous. It is difficult to remember a time when consumers could not type “Amazon” into their smartphone’s browser and have anything they needed delivered to their doorstep almost instantaneously, without ever stepping foot into an actual store. In 2018, retail e-commerce sales in the United States topped \$525 billion.<sup>6</sup> The top ten e-commerce sales companies in America “represented 70.1% of total retail e-commerce in 2018.”<sup>7</sup> Amazon held the largest share of sales among the companies with 49.1%.<sup>8</sup> Amazon’s market share continues to grow as it expands into a broad and diverse range of product categories and develops new disruptive services: same-day delivery, Amazon Music, Amazon Video, Amazon Prime, and personal assistant technology products like the “Echo” and “Alexa.”<sup>9</sup> The COVID-19 pandemic also helped to solidify Amazon as an e-commerce giant. As a result of the ongoing pandemic forcing people to stay home and shop online, Amazon nearly doubled its net profit year over year.<sup>10</sup> In the first three months of the pandemic, Amazon had nearly \$89 billion in sales and its net profits reached \$5.2 billion.<sup>11</sup>

The rapid pace of change in the online retail market has been difficult for the law and regulatory agencies to understand and keep up with. Many regulations enacted to govern commerce and unfair anticompetitive practices did not consider online retail and e-commerce because this market did not yet exist.<sup>12</sup> While some of these traditional regulations apply to e-commerce markets, current regulations fall short in many respects. The Federal Trade Commission (FTC) should continue to enact regulations specifically with e-commerce in mind.

As Amazon grows, regulatory bodies are looking at e-commerce with increased scrutiny. Amazon is facing multiple antitrust investigations.<sup>13</sup> The

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<sup>6</sup> *Top 10 US Companies, Ranked by Retail Ecommerce Sales Share, 2018*, EMARKETER (July 1, 2018), <https://www.emarketer.com/chart/220521/top-10-us-companies-ranked-by-retail-e-commerce-sales-share-2018-of-us-retail-e-commerce-sales> [https://perma.cc/2NAS-EXGC].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Dave Gershgorn, Alison Griswold, Mike Murphy, Michael J. Coren & Sarah Kessler, *What is Amazon, Really?*, QUARTZ (Aug. 20, 2017), <https://qz.com/1051814/what-is-amazon-really/> [https://perma.cc/83DC-FQ7S].

<sup>10</sup> Cameron Faulkner, *Amazon Doubled its Profits During a Pandemic*, THE VERGE (July 30, 2020), <https://www.theverge.com/2020/7/30/21348368/amazon-q2-2020-earnings-covid-19-coronavirus-jeff-bezos> [https://perma.cc/GQY3-AX7C].

<sup>11</sup> *Id.*; see Alana Semuels, *Many Companies Won’t Survive the Pandemic. Amazon Will Emerge Stronger Than Ever*, TIME (July 28, 2020), <https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/> [https://perma.cc/5T85-7ZPE].

<sup>12</sup> See Kerry Jones, *The Hidden Cost of Lower Prices: Reevaluating Antitrust Analysis*, 19 HOUS. BUS. & TAX L.J. 347 (2019).

<sup>13</sup> Laura E. Bladow, Note, *Worth the Click: Why Greater FTC Enforcement is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM. & MARY L. REV. 1123, 1149 (2018).

United States Department of Justice (DOJ) and the FTC are conducting inquiries into Amazon's practices.<sup>14</sup> In 2019, the House Judiciary Committee asked more than eighty businesses for complaints explaining how "Big Tech" companies have negatively impacted their businesses.<sup>15</sup> This committee is seeking information about how these smaller companies have been harmed by the "Big 4" technology companies: Amazon, Apple, Facebook, and Google.<sup>16</sup> The investigation is seeking information about any potential anticompetitive practices.<sup>17</sup> The House Judiciary Antitrust Subcommittee held another hearing in July of 2020, again seeking testimony from the CEOs of Amazon, Apple, Facebook, and Google.<sup>18</sup> At this time, the decisions of the Subcommittee are still pending.

Amazon currently labels most of its brands with "Amazon Label" but there is no current federal or state statute or regulation requiring this disclosure, leaving Amazon and similar e-commerce platforms able to unduly influence customers' buying habits and choices. Leaving this disclosure decision up to the goodwill of Amazon and other similarly situated e-commerce companies leaves a large and unregulated arena. This gray area is easy for e-commerce giants to abuse, allowing companies to take advantage of unknowing customers and to hoard additional profits for themselves.

To avoid anticompetitive practices and foster a fairer marketplace, the FTC should require Amazon to provide more transparency to consumers through affirmative and comprehensive disclosures of its private-label products on its own platform. This required disclosure would also apply to similarly situated e-commerce companies that produce private-label products and sell on proprietary platforms. This article will focus on Amazon since it has the most influence in the e-commerce market today.

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<sup>14</sup> Press Release, U.S. Dep't of Just., Just. Dep't Reviewing the Pracs. of Mkt.-Leading Online Platforms (July 23, 2019), <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms> [<https://perma.cc/9RLQ-7QXW>]; see Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants> [<https://perma.cc/2VNE-7J2V>].

<sup>15</sup> Jack Nicas & David McCabe, *Congress Asks More than 80 Companies for Big Tech Complaints*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/technology/house-antitrust-investigation-big-tech.html> [<https://perma.cc/DG5K-M9Z5>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google Before the Subcomm. on Antitrust, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113> [<https://perma.cc/K3XR-P9UK>]; see Bill Baer, *The Tech Antitrust Hearings Are Over: What's Next For Enforcement?*, BROOKINGS BLOG (Aug. 11, 2020), <https://www.brookings.edu/blog/techtank/2020/08/11/the-tech-antitrust-hearings-are-over-whats-next-for-enforcement/> [<https://perma.cc/N9VS-GK37>].

### A. Amazon's Customer Loyalty & Product Placement

Amazon is materially different from traditional brick and mortar retail businesses. Amazon is always creating new ways to cultivate and bolster customer loyalty, solidifying a strong presence in its target markets.<sup>19</sup> Amazon's business model is very effective in creating customer loyalty, especially due to pervasive marketing and features of Amazon Prime. Amazon Prime pulls customers in by promising consumers faster shipping and better buying options.<sup>20</sup> Amazon Prime shoppers are more likely than non-Prime shoppers to buy products on Amazon's online marketplace, compared to other similar retailers, including online and retail storefronts.<sup>21</sup> Sixty-three percent of Amazon Prime users complete an online purchase on the same website visit, while only thirteen percent of non-Prime Amazon users do.<sup>22</sup> "For Walmart and Target, these figures are 5% and 2%, respectively."<sup>23</sup> These numbers illustrate Amazon's dominance in the online market, showing how anticompetitive practices are a potential risk.<sup>24</sup> This market dominance and power show how increasingly important it is to regulate the online marketplace as Amazon continues to take more and more of the e-commerce pie.

Products that pop up on a customer's Amazon feed are not randomly selected.<sup>25</sup> One of the most important predictors of an individual product's success on Amazon is how Amazon promotes that product through search engine optimization and strategic product placement.<sup>26</sup> According to data collected by Amazon:

- 70% of Amazon shoppers never click past the first page of search results.
- 35% of Amazon shoppers click on the first product featured on a search page.
- The first three products displayed in search results account for 64% of clicks.
- 85% of clicks are on brands on the first page of search results.<sup>27</sup>

Product placement is so profitable to Amazon that it even changed its

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<sup>19</sup> Jones, *supra* note 12, at 360.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 360–61.

<sup>22</sup> *Id.* at 361.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 362.

<sup>26</sup> Dana Mattioli, *Amazon Changed Search Algorithm in Ways That Boost Its Own Products*, WALL ST. J. (Sept. 16, 2019), <https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345> [<https://perma.cc/P9WS-S8E6>].

<sup>27</sup> Loren Baker, *Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know*, SEARCH ENGINE J. (Aug. 14, 2018), <https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173/> [<https://perma.cc/A9ZE-NQA4>].

algorithms powering its product-search system.<sup>28</sup> The updated algorithm favors products with higher profit margins for Amazon, instead of products that are most relevant to the customer's search term or consumer-preferred bestsellers within the product category.<sup>29</sup> Many consumers do not understand that Amazon manipulates these results based on its profit margins.<sup>30</sup>

### **B. The Algorithm**

Amazon's proprietary search engine optimization algorithm, "A9" uses a search engine algorithm method specifically designed to convert a website visit into an online sale.<sup>31</sup> This is unique compared to other search engine optimization algorithms.<sup>32</sup> For example, Google's algorithm is set more broadly to answer a searcher's question, not immediately convert the query into a sale.<sup>33</sup> Amazon keeps its "A9" algorithm a closely guarded secret, even walling off employees internally.<sup>34</sup> Amazon holds its algorithm close to the vest to protect its competitive edge and prevent individual online sellers from "gaming the system."<sup>35</sup> When a consumer places a product search query on Amazon, the proprietary system "scrapes" currently available listings for similar products, considering more than 100 unique variables.<sup>36</sup> Amazon engineers call these variables "features."<sup>37</sup> These variables include weighted factors such as, "shipping speed, previous buyers' ratings, and recent sales volumes."<sup>38</sup> The A9 algorithm assesses these variables and then populates relevant listings to the online shopper.<sup>39</sup> Then, the A9 algorithm calculates the product display order that appears on the consumers' screen based on the variables.<sup>40</sup> Many consumers believe that search algorithms are "neutral and objective," meaning the search results from their queries are truly the most relevant listings based on search terms used.<sup>41</sup> Regulations should be updated to reflect changes in consumer habits and to account for the growing capabilities of e-commerce technology to influence consumer habits.<sup>42</sup>

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<sup>28</sup> Mattioli, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Baker, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Mattioli, *supra* note 26.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Amazon's proprietary algorithm even brings up free speech issues; however, free speech issues relating to the algorithm will not be discussed in this article. See Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results – White Paper Commissioned by Google*, UCLA SCH. L., Research Paper No. 12-22 (2012). See generally *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. May 27, 2003); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

### C. Private-Label Products

Amazon operates as a third-party marketplace as well as selling its private-label branded products.<sup>43</sup> Amazon's private-label products give it a large incentive to influence consumer habits. Amazon currently has over seventy-six private-label brands, products that are manufactured just for Amazon sales.<sup>44</sup> Amazon sells over 10,000 private-label products, according to research firm Marketplace Pulse.<sup>45</sup> These items populate all different product categories, including household goods like AmazonBasics' batteries, Presto paper towels, and even clothing—like Lark & Ro dresses.<sup>46</sup>

Private-label brands are not a new concept in the retail marketplace.<sup>47</sup> Sears, Roebuck and Co.—the American department store commonly known as Sears—began its direct-to-consumer catalog business in 1888. In 1927, after the catalog business proved successful, Sears began selling and advertising appliance brands Craftsman and Kenmore as its own “in-house brands.”<sup>48</sup> “Sears was acquiring inventory from third parties and obviously knew exactly which [products] were selling well.”<sup>49</sup> Sears made calculated business decisions about which markets to enter and which markets to avoid based on private-label sales data.<sup>50</sup> Sears is not the only retailer that knew private-label products would help its business gain market share. More recently, Walmart—America's largest big-box retailer—began providing its own private-label brands. Outside manufacturers and suppliers negotiating with Walmart deal knowing “full well that Walmart can enter their markets.”<sup>51</sup> This may be acceptable in a brick and mortar retail world; however, traditional brick and mortar companies did not have the data resources that Amazon currently does.<sup>52</sup>

Amazon's private-label business is a relatively small but rapidly growing part of Amazon's business and business model.<sup>53</sup> As of 2018, Amazon's private-label business was only around one percent of its online retail sales, representing nearly two billion dollars in sales.<sup>54</sup> The Investment firm, SunTrust Robinson Humphrey, estimated that Amazon's private-label business alone will generate at least thirty-one billion dollars in product sales by the year 2022.<sup>55</sup> Amazon's

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<sup>43</sup> Connie Chen, *Amazon Now Sells 76 of Its Own Private-Label Brands – From Clothes to Baby Wipes*, BUS. INSIDER (July 2, 2018), <https://www.businessinsider.com/amazon-private-label-brands-list-2018-4> [https://perma.cc/UUV2-PCG5].

<sup>44</sup> *Id.*

<sup>45</sup> Mattioli, *supra* note 26.

<sup>46</sup> *Id.*

<sup>47</sup> Randal C. Picker, *Breaking up Amazon? Platforms, Private-labels and Entry*, TRUTH ON THE MKT. (July 17, 2019), <https://truthonthemarket.com/2019/07/17/breaking-up-amazon-platforms-private-labels-and-entry/> [https://perma.cc/AW8J-CUZD].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Mattioli, *supra* note 26.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

“private-label executives argued Amazon should promote its own items in search results,” pointing to “grocery-store chains and drugstores that showcase their private-label products alongside national brands and promote them in-store.”<sup>56</sup>

Some legal scholars argue the best solution to this emerging e-commerce issue is a complete overhaul of antitrust laws and antitrust theory; however, there is likely a simpler way to implement a solution: disclosures.<sup>57</sup> The FTC should enact a regulation requiring Amazon (and other similarly situated e-commerce companies with a platform and private-label brands) to clearly disclose which products are its own private-label products and which products are supplied from outside vendors to avoid anticompetitive practices and consumer deception. This solution would provide more transparency to consumers while being minimally burdensome for Amazon to implement, as evidenced by Amazon increasingly labeling products as its own. This proposed regulation would require an affirmative, obvious, and comprehensive disclosure to online customers. This regulation would be similar to legislation recently enacted in Europe and could be enforced similarly to how the FTC currently polices social media advertising through regulation mandated influencer disclosures.<sup>58</sup>

### III. LITERATURE REVIEW

Some scholars advocate using antitrust law to force Amazon to choose between being only a marketplace or a private-label brand.<sup>59</sup> This would prohibit Amazon from selling its private-label products in its marketplace.<sup>60</sup> However, this proposal would unduly burden Amazon, which should have the right to sell its private-labels on its marketplace, as long as it is not creating an anticompetitive marketplace. If the market wants and supports Amazon’s private-label products, it should be available to consumers. Additionally, Amazon’s practice of offering consumers a choice between private-label and other products does not violate current antitrust law.<sup>61</sup> Without massive upheavals to current antitrust doctrine, antitrust is not able to adequately address the challenges of Amazon.<sup>62</sup>

#### A. *Modern Antitrust Law*

Modern antitrust law views competition largely with an “eye to the short-term interests of consumers, not producers or the health of the market as a whole;

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<sup>56</sup> *Id.*

<sup>57</sup> See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).

<sup>58</sup> See *id.*; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Carl T. Bogus, *Why Antitrust Must Deal with Consolidated Corporate Power*, 52 U. MICH. J.L. REFORM 265 (2019).

<sup>59</sup> See Khan, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; see Jones, *supra* note 12.

<sup>62</sup> See Khan, *supra* note 58.

antitrust doctrine views low consumer prices, alone, to be evidence of sound competition.”<sup>63</sup> By this standard, Amazon succeeded; it has taken over the marketplace by zealously devoting its business model to aggressive marketing and bulk purchasing techniques, ultimately driving down prices for consumers.<sup>64</sup> At first, Amazon’s low prices helped it evade antitrust scrutiny.<sup>65</sup> The famous antitrust scholar, Robert Bork, argued in his work, *The Antitrust Paradox*, that the “sole normative objective of antitrust should be to maximize consumer welfare, best pursued through promoting economic efficiency. Although Bork used ‘consumer welfare’ to mean ‘allocative efficiency,’ courts and regulators largely measure it through effects on consumer prices.”<sup>66</sup> Consumer protection remains the primary focus of modern antitrust law.<sup>67</sup> The United States Supreme Court agreed with Bork’s perspective, which solidified the notion that an antitrust analysis is concerned with benefitting consumers and protecting against consumer harm.<sup>68</sup>

### **B. The European Approach to Antitrust Regulation**

Europe and the European Union (EU) are also wrestling with how to effectively regulate Amazon without a complete upheaval of current European antitrust law.<sup>69</sup> Under new EU rules, approved in 2019, “Google and Amazon will have to tell third-party companies how they rank products on their search and sales platforms, while Facebook and other tech firms will have to be more transparent about user terms and conditions.”<sup>70</sup> Online marketplaces must also clearly specify when they are selling their own products and services.<sup>71</sup> The EU reports that these products must be “exhaustively disclosed” going forward.<sup>72</sup> In February 2019, the European Parliament, the Council of the EU, and the European Commission “reached a political deal on the first-ever rules aimed at

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<sup>63</sup> Khan, *supra* note 57, at 716; see Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187 (2019); Joshua D. Wright, *The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019).

<sup>64</sup> Khan, *supra* note 57, at 716.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 720; see Kenneth Heyer, *Federal Trade Commission, Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19 (2014); Robert H. Bork, *THE ANTITRUST PARADOX* (N.Y. Free Press, 2d ed. 1978).

<sup>67</sup> Jones, *supra* note 12, at 354; see Neil W. Averitt, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).

<sup>68</sup> Jones, *supra* note 12, at 354.

<sup>69</sup> European Commission Press Release IP/19/4291, *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct of Amazon* (July 17, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_429](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_429) [<https://perma.cc/8G5J-45Y7>].

<sup>70</sup> Foo Yun Chee, *EU Unfair Practices Digital Rules Put Spotlight on Google, Amazon, Facebook*, REUTERS (Apr. 17, 2019), <https://www.reuters.com/article/us-eu-tech-regulation/eu-unfair-practices-digital-rules-put-spotlight-on-google-amazon-facebook-idUSKCN1RT1HO> [<https://perma.cc/3QD6-X7FU>].

<sup>71</sup> Chris O’Brien, *EU Proposal Targets Digital Platforms, Including Google, Amazon, Facebook, and Apple*, VENTUREBEAT (Feb. 14, 2019), <https://venturebeat.com/2019/02/14/eu-proposal-targets-digital-platforms-including-google-amazon-facebook-and-apple/> [<https://perma.cc/KQJ7-CWQM>].

<sup>72</sup> *Id.*



creating a fair, transparent, and predictable business environment for businesses when using online platforms,” coined the “Digital Single Market.”<sup>73</sup>

As part of the “Digital Single Market” strategy, the entire online platform marketplace is regulated.<sup>74</sup> These new rules apply to almost 7,000 online platforms and marketplaces within the EU.<sup>75</sup> The rules do not discriminate between large established companies and small start-ups, they apply to all equally.<sup>76</sup> Specific rule provisions will also apply to online search engines, with special attention to practices involving or manipulating product ranking transparency.<sup>77</sup> Greater transparency in online platforms is one of the primary purposes of the new EU regulations. In addition to new avenues for dispute resolution and bans on specific unfair trade practices, the rules call for transparent ranking and mandatory disclosure for a broad range of business practices.<sup>78</sup> Under the new rules, marketplaces and search engines are required “to disclose the main parameters they use to rank goods and services on their site.”<sup>79</sup> This practice will help online sellers understand how to curate their product’s online market presence while increasing competition.<sup>80</sup> The goal is to help sellers with online presence while protecting against “gaming of the ranking system.”<sup>81</sup> Under the rules, platforms must “exhaustively disclose any advantage they may give to their own products over others.”<sup>82</sup> Companies must also disclose “what data they collect, and how they use it—and in particular how such data is shared with other business partners.”<sup>83</sup> The EU regulation also places an emphasis on personal data protection. If personal data is collected, EU General Data Protection Regulation (GDPR) rules apply.<sup>84</sup>

The EU policy also lays out enforcement guidelines.<sup>85</sup> Business entities will be able to bring suit for non-compliance.<sup>86</sup> These guidelines are in place to help overcome the fear of retaliation and lower cost burdens for small companies.<sup>87</sup> For additional enforcement, Member States can appoint “public authorities with enforcement powers,” and businesses can file individual complaints with these

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<sup>73</sup> European Commission Press Release IP/19/1168, Digital Single Market: EU Negotiators Agree to Set Up New European Rules to Improve Fairness of Online Platforms’ Trading Practices (Feb. 14, 2019), [https://europa.eu/rapid/press-release\\_IP-19-1168\\_en.htm?fbclid=IwAR0zRsYTL87eK\\_vLu9ukbwA1KesnRsUGMy-fCpO-4MtKU\\_swMdanGy\\_r1Q](https://europa.eu/rapid/press-release_IP-19-1168_en.htm?fbclid=IwAR0zRsYTL87eK_vLu9ukbwA1KesnRsUGMy-fCpO-4MtKU_swMdanGy_r1Q) [hereinafter EU Press Release] [<https://perma.cc/6AQ5-WV83>].

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; see Manu J. Sebastian, *The European Union’s General Data Protection Regulation: How Will It Affect Non-EU Enterprises?*, 31 SYRACUSE J. SCI. & TECH. L. 216 (2015).

<sup>85</sup> EU Press Release, *supra* note 73.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

authorities.<sup>88</sup> To oversee enforcement, the EU formed a dedicated “Online Platform Observatory” to monitor the “evolution of the market and the effective implementation of the [new] rules.”<sup>89</sup> Europe has taken notice of the major control Amazon has in the online marketplace and is taking regulatory steps to mitigate the risks that accompany online retail.<sup>90</sup> To protect American consumers, the United States should follow Europe’s lead.

#### IV. AMAZON & CONSUMER HARM

##### A. *Is Amazon Harming Consumers?*

At first glance, Amazon’s private-label products do not seem to harm consumers, especially from a pricing standpoint. Since modern United States antitrust doctrine focuses on consumer harm, providing consumers with the lowest prices is a strong defense against the antitrust argument.<sup>91</sup> But, when looking at the long-term effects of Amazon’s actions, consumer harm becomes inevitable.

There are not many comprehensive reports of AmazonBasics or other Amazon private-label products being bad quality for the price of the items; however, quality and price analysis is a short-term view of consumer harm.<sup>92</sup> Amazon’s private-label products often have lower prices than similar products, edging out third-party sellers on Amazon.<sup>93</sup> Third-party sellers are being pushed out by Amazon private-label brands, and to add insult to injury, as much as one-third of every dollar merchants make selling through Amazon goes back to Amazon to account for “merchant fees and commissions.”<sup>94</sup> Amazon is controlling the marketplace through its own goods, and if it cannot win that sale, it is still reaping the benefits from the profits of the third-party sellers.<sup>95</sup> In 2018, Amazon generated \$42.7 billion in revenue derived from third-party seller fees and commissions.<sup>96</sup> A Seattle-based third-party Amazon seller told *The Washington Post*, “We peeled out because we weren’t going to compete against Amazon. . . . [t]he house always wins.”<sup>97</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See EU Press Release, *supra* note 73.

<sup>91</sup> See Khan, *supra* note 57, at 792.

<sup>92</sup> *Id.* at 791.

<sup>93</sup> Jason Aten, *Here’s How Amazon Gets You to Buy its Own Products. And Why That’s Bad News for Third-Party Sellers*, INC. (Aug. 30, 2019), <https://www.inc.com/jason-aten/heres-how-amazon-gets-you-to-buy-its-own-products-why-thats-bad-news-for-third-party-sellers.html> [<https://perma.cc/FZAQ-KZH2>].

<sup>94</sup> Jay Greene, *Amazon Sellers Say Online Retail Giant is Trying to Help Itself, Not Consumers*, WASH. POST (Oct. 1, 2019), <https://www.washingtonpost.com/technology/2019/10/01/amazon-sellers-say-online-retail-giant-is-trying-help-itself-not-consumers/?arc404=true> [<https://perma.cc/8CKY-6HDM>].

<sup>95</sup> See Aten, *supra* note 93.

<sup>96</sup> Greene, *supra* note 94.

<sup>97</sup> *Id.*

### B. Monopoly

According to Herb Hovenkamp, a renowned antitrust scholar, antitrust law defines a company as dominating a market if its customers would “absorb a non-cost justified price increase rather than moving to a rival.”<sup>98</sup> Amazon edging out third-parties from its marketplace is making it increasingly difficult for consumers to move to a rival, even if they want to.<sup>99</sup> American history shows the damage that unchecked monopolies can do to markets.<sup>100</sup> According to Hovenkamp, the “historical problem of monopoly at common law developed in areas in which high technology was not particularly significant.”<sup>101</sup> This is no longer the case.

Monopolies have four primary adverse effects: price-fixing, declining quality, innovation loss, and price inflation.<sup>102</sup> Two notorious American monopolies are Andrew Carnegie’s U.S. Steel and John D. Rockefeller’s Standard Oil Company.<sup>103</sup> From the late nineteenth to the early twentieth century, these two companies held virtually singular control over the supply of their respective commodities in the American economy.<sup>104</sup> Without meaningful competition, these behemoths controlled the market and set the national price for steel and oil.<sup>105</sup> Once a company has a monopoly in its market, it can begin to raise prices and increase profits.<sup>106</sup> In 1890, regulators passed the Sherman Antitrust Act to remedy monopoly harm, forcing the problematic entities to break up into smaller companies.<sup>107</sup>

In today’s market, Amazon is a primary retailer of basic household items and is quickly gaining market share.<sup>108</sup> If United States regulators do not intervene and update policy to the age of e-commerce, consumers and Amazon third-party retailers will inevitably be harmed in the long run when prices begin to rise, and product quality drops. Amazon may be providing a short-term benefit to the consumer by providing lower prices now; however, history shows that when looking at the long-term effects of monopolies, the consumer will be harmed. Regulatory agencies should bring regulations in line with the reality of e-commerce before Amazon causes irreparable damage to the online market.

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<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See* William H. Page, *Standard Oil and U.S. Steel: Predation and Collusion in the Law of Monopolization and Mergers*, 85 S. CAL. L. REV. 657 (2012).

<sup>101</sup> Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1264 (1984).

<sup>102</sup> Kimberly Amadeo, *Monopolies: Pros, Cons, and Effect on Economies*, THE BALANCE (Dec. 27, 2019), <https://www.thebalance.com/monopoly-4-reasons-it-s-bad-and-its-history-3305945> [<https://perma.cc/7T5B-ZW9B>].

<sup>103</sup> *See* Page, *supra* note 100; FED. TRADE COMM’N, FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY 1, [https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition\\_Antitrust-Laws.pdf](https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf) [<https://perma.cc/ESG6-XC4C>].

<sup>104</sup> *See* Amadeo, *supra* note 102; FED. TRADE COMM’N, *supra* note 103, at 1.

<sup>105</sup> FED. TRADE COMM’N, *supra* note 103, at 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See* Greene, *supra* note 1.

Recognizing Amazon as providing short-term cost benefits to consumers is a myopic view and will have vast consequences if it is not remedied through regulation now.

### ***C. How is Product Boosting Analogous to Online Advertising?***

Amazon labels its practice of curating products to consumers as “merchandising,” not advertising.<sup>109</sup> The FTC should classify this practice as advertising—because it boosts the product’s online sales—and mandate disclosure of this practice. In summer 2019, Amazon introduced the A9 feature that shows its private-label branded products right before customers add competitor products to their online shopping carts.<sup>110</sup> As discussed, the website shows a “similar item to consider,” featuring Amazon private-label products, usually showing a lower price for a similar item.<sup>111</sup> Amazon’s promotional tactic offers “AmazonBasics batteries to shoppers searching for Energizer models, its Trek Support gel insoles to customers searching for Dr. Scholl’s products, and its Basic Care nicotine gum to those searching for Nicorette’s offering.”<sup>112</sup> *The Washington Post* also reported “examples of Amazon offering its private-label products as alternatives to diapers, coffee pods, beauty care products, and vitamin supplements.”<sup>113</sup> Amazon argues that this practice is no different than brick and mortar stores showcasing their own private-label goods.<sup>114</sup> But, brick and mortar retailers can simply choose where to physically place their products, not manipulate if shoppers can even see them as an option. Amazon spokeswoman Nella Rona said, “Like any retailer, we promote our own brands in our stores, which provide high-quality products and great value to customers. We also extensively promote products from our selling partners.”<sup>115</sup> Although Amazon says that it uses this “merchandising” feature to promote third-party sellers too, there is no evidence of this being true.<sup>116</sup>

### ***D. Native Advertising***

In the internet era, the FTC recognized that marketers are using innovative mediums to “create, format, and deliver digital and online advertising.”<sup>117</sup> In response, the FTC developed “native advertising” guidelines.<sup>118</sup> Native advertising means advertising content that “bears a similarity to the news, feature articles, product reviews, entertainment, and other material that

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<sup>109</sup> See Greene, *supra* note 94.

<sup>110</sup> Greene, *supra* note 1.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

<sup>115</sup> Greene, *supra* note 1.

<sup>116</sup> Greene, *supra* note 94.

<sup>117</sup> FED. TRADE COMM’N, NATIVE ADVERTISING: A GUIDE FOR BUSINESSES (Dec. 2015), <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> [hereinafter NATIVE ADVERTISING] [<https://perma.cc/2PN5-GG9W>].

<sup>118</sup> *Id.*

surrounds it online.”<sup>119</sup> For businesses to avoid deceptive native advertising, the FTC’s website advises:

1. An advertisement or promotional message shouldn’t suggest or imply to consumers that it’s anything other than an ad.
2. Some native ads may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure. In other instances, a disclosure may be necessary to ensure that consumers understand that the content is advertising.
3. If a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.<sup>120</sup>

Based on the FTC’s native advertising definition and guidelines, Amazon’s showcasing and boosting private-label products when consumers are looking at similar products *is* advertising. Amazon’s “merchandising” is advertising because the Amazon private-label products are boosted with “content that bears similarity to the material that surrounds it online,”<sup>121</sup> and in many instances, are difficult to distinguish from similar products.<sup>122</sup> Amazon’s aggressive marketing techniques need to be disclosed to the consumer so that the consumer understands the featured products are brands owned by Amazon. Amazon should not be able to skirt advertising regulations just because its products are being sold on its own platform. In the context of an online sale, Amazon’s boosted products are similar to an advertisement and should be treated as such, requiring appropriate disclosures to alert consumers.

## V. PROPOSED REGULATION

Modern antitrust law, as noted above, measures consumer welfare primarily by effects on consumer prices.<sup>123</sup> When looking at Amazon through the modern antitrust lens, it is difficult to argue that Amazon is currently hurting consumer welfare because Amazon usually has very low prices. But, with a more long-term view, consumer harm is likely. The simpler and quicker solution, instead of an overhaul of a major area of antitrust law, is to enact specific regulation under the powers of the FTC. The United States should follow Europe’s lead in creating a fairer and more equitable online marketplace. Through the FTC’s social media advertising regulations, native advertising policies, and Europe’s policies, the FTC has a clear framework to enact these regulations. The FTC should enforce mandatory disclosures of Amazon’s—and similarly situated e-commerce companies—private-label brands on its own platform.

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See* NATIVE ADVERTISING, *supra* note 117.

<sup>123</sup> *See* Khan, *supra* note 57; Khan, *supra* note 58; Bogus, *supra* note 58.

### A. *History of the FTC and Its Role*

In 1914, Congress enacted the Federal Trade Commission Act (FTC Act)—establishing the FTC.<sup>124</sup> The goal of the FTC Act was to address and remedy anticompetitive practices, especially within large corporations.<sup>125</sup> Under the Act, the FTC has “authority to investigate and prevent any practice that is unfairly deceptive to consumers or that hinders competition.”<sup>126</sup> Section 5 of the FTC Act gives the FTC authority to govern “unfair and deceptive acts and practices.”<sup>127</sup> The FTC’s power to govern Amazon and similarly situated e-commerce companies falls under 15 U.S.C. § 45(a)(1).<sup>128</sup> Section 45(a)(1) states: “Unfair methods of competition in or affecting commerce, and unfair or deceptive methods of competition in or affecting commerce, are hereby declared unlawful.”<sup>129</sup> Additionally, the FTC issued a policy establishing three elements of deception:

- 1) [T]here must be a representation, practice, or omission likely to mislead consumers;
- 2) [T]he consumers must be interpreting the message reasonably under the circumstances; and
- 3) [T]he misleading effects must be material; that is, likely to affect consumers’ decisions of conduct.<sup>130</sup>

The FTC later identified three factors that it considered when applying the prohibition against consumer unfairness, which include whether the practice injures consumers, whether it violates established public policy, and whether it is unethical or unscrupulous.<sup>131</sup> Section 5 of the FTC Act was “deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion.”<sup>132</sup> In 2015, the Third Circuit held that the FTC’s authority to regulate “unfair methods of competition in or affecting commerce” under Section 5 of the FTC Act extends to the regulation of

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<sup>124</sup> Jones, *supra* note 12, at 352.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 15 U.S.C.A. § 45(a)(4)(B) (West, Westlaw through Pub. L. No. 116-158).

<sup>128</sup> *See id.* § 45(a)(1).

<sup>129</sup> *Id.*

<sup>130</sup> KATHERINE PORTER, *MODERN CONSUMER LAW* 161 (Wolters Kluwer 2016); *see* Appendix to Cliffdale Associations, 103 F.T.C. 110 (1984); FED. TRADE COMM’N, *FTC POLICY STATEMENT ON DECEPTION* (Oct. 1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/M5AK-FMH5>].

<sup>131</sup> Letter from Michael Pertschuk, Chairman, Fed. Trade Comm’n et al., to Sen. Wendell H. Ford & Sen. John C. Danforth, Consumer Subcomm., Comm. on Commerce, Sci. & Transp., U.S. Senate, *Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction* (Dec. 17, 1980), *appended to Int’l Harvester Co.*, 104 F.T.C. 949 app. at 1070 (1984), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [<https://perma.cc/3E8Y-WE2A>]; *see* 15 U.S.C.A. § 45(n) (West, Westlaw through Pub. L. No. 116-158).

<sup>132</sup> *Id.*

cyberspace practices that are harmful to consumers.<sup>133</sup>

It is important to note that Amazon is currently marking most of its private-label brands with the marking “Amazon Brand.” This is likely a result of the EU legislation discussed above.<sup>134</sup> While Amazon is not being purely deceptive at this time (due to occasional product labeling), and thus would likely not fall under the deceptive arm of this statute, there is no regulation in place that affirmatively requires an online company to disclose its brands on its platform. Simply trusting that Amazon will continue to disclose is a risky gamble, as Amazon gains more market share and influence over consumers.

### **B. “Unfair” Practices and Online Advertising**

Since Amazon is not currently being outwardly deceptive on its platform, this article will focus on the meaning of “unfair” within the terms of Section 5 of the FTC Act. The point when a method of competition becomes “unfair” within the meaning of 15 U.S.C. § 45 often turns on “exigencies of [a] particular situation, trade practices, or practical requirements of [the] business in question.”<sup>135</sup> According to the United States Supreme Court, “the words ‘unfair practices’ and ‘unfair methods of competition’ are not limited to precise practices that can readily be cataloged. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.”<sup>136</sup> This means that the scope of each word’s definition “was left for case-by-case definition.”<sup>137</sup> One of Congress’s purposes for intentionally incorporating such broad language in the Act may have been to allow it to change with the times. The current private-label platform issue is the perfect opportunity to utilize the nimbleness of the statute.

As social media and internet marketing have grown rapidly over the last few decades, policy must move rapidly to regulate the complicated and vastly changing online marketplace. Unfortunately, regulations often lag behind technological advances. Government agencies, like the FTC, often try to address technological advances, but their limited actions are not always enough. In 2000, the FTC addressed internet and e-commerce marketing through FTC staff guidance, known as “Dot Com Disclosures.”<sup>138</sup> The “Business Center” on the FTC website “provides plain-language guidance to help businesses understand

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<sup>133</sup> See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015).

<sup>134</sup> See Chee, *supra* note 70.

<sup>135</sup> *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 396 (1953).

<sup>136</sup> *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 307 (1963); *accord LaPeyre v. FTC*, 366 F.2d 117, 121 (5th Cir. 1966).

<sup>137</sup> *Pan Am. World Airways, Inc. v. United States*, 371 U.S. at 306.

<sup>138</sup> Press Release, Fed. Trade Comm’n, Fed. Staff Revises Online Advert. Disclosure Guidelines (Mar. 12, 2013), <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines> [hereinafter Press Release] [<https://perma.cc/S2K7-NT3D>]; see FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [<https://perma.cc/64MX-ZTWC>].

their responsibilities and comply with the FTC law.”<sup>139</sup> The FTC’s Business Center guidance is essentially an easily digestible and practical form of the regulations. The Business Center’s guidance makes it easier for independent businesses to check that they comply with complicated regulations.<sup>140</sup> This “Dot Com Disclosure” guidance “takes into account the expanding use of smartphones with small screens and the rise of social media marketing.”<sup>141</sup>

In 2013, the FTC updated guidance said:

[C]onsumer protection laws apply equally to marketers across all mediums, whether delivered on a desktop computer, a mobile device, or more traditional media such as television, radio, or print. If a disclosure is needed to prevent an online ad claim from being deceptive or unfair, it must be clear and conspicuous. Under the new guidance, this means advertisers should ensure that the disclosure is clear and conspicuous on all devices and platforms that consumers may use to view the ad. The new [advertising] guidance also explains if an advertisement without a disclosure would be deceptive or unfair, or would otherwise violate a Commission rule, and the disclosure cannot be made clearly and conspicuously on a device or platform, then that device or platform should not be used.<sup>142</sup>

The FTC publishes formal Guidelines, establishing the types of practices the FTC will find unlawful under Section 5 of the FTC Act. The FTC Guidelines, titled “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” explain broad principles outlining endorsement disclosure requirements and provide the basis for voluntary compliance with the law by advertisers and endorsers.<sup>143</sup> The purpose of the Guidelines is to explain the FTC’s interpretation of how Section 5 of the FTC Act applies to the use of endorsements in advertising.<sup>144</sup>

An FTC press release explains the basic concepts of these Guidelines. According to the press release,

The FTC’s Endorsement Guides provide that if there is a “material connection” between an endorser and an advertiser – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless it is already clear from the context of the communication. A material connection could be a business or family relationship, monetary payment, or the gift of a free product. Importantly, the Endorsement Guides apply to both marketers and

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<sup>139</sup> See FED. TRADE COMM’N, BUS. CENTER, <https://www.ftc.gov/tips-advice/business-center/guidance> [https://perma.cc/9ZMD-ER29].

<sup>140</sup> *Id.*

<sup>141</sup> Press Release, *supra* note 138.

<sup>142</sup> *Id.*

<sup>143</sup> 16 C.F.R. § 255.0 (2020), WL 16 CFR § 255.0.

<sup>144</sup> *Id.*



endorsers.<sup>145</sup>

To help with clarity, the FTC also published a brochure that answers the most common questions about the FTC Endorsement Guides.<sup>146</sup> One of these brochures on social media endorsement, titled “The FTC’s Endorsement Guides: What People Are Asking,” provides that the Endorsement Guides adhere to the “truth-in-advertising” standard, that endorsements and advertisements must be “honest and not misleading.” A valid “endorsement must reflect the honest opinion of the endorser and can’t be used to make a claim that the product’s marketer couldn’t legally make.”<sup>147</sup>

This guidance, covering the “Truth-in-Advertising” regulation, has major implications for national brands and their marketing strategies through online platforms.<sup>148</sup> The FTC has shown that its regulation has teeth and continues to zealously enforce the regulation, attempting to keep the online social media marketplace as fair as possible.<sup>149</sup> For example, in 2016, Lord & Taylor, a national retailer, agreed to settle the FTC’s unfair and deceptive practices charge.<sup>150</sup> The charges alleged that Lord & Taylor deceived consumers “by paying for native advertisements, including a seemingly objective article in the online publication *Nylon* and a *Nylon* Instagram post, without disclosing that the posts actually were paid promotions for the company’s 2015 *Design Lab* clothing collection.”<sup>151</sup> According to the FTC Press Release, the Director of the FTC’s Bureau of Consumer Protection said, “Lord & Taylor needs to be straight with consumers in its online marketing campaigns. Consumers have the right to know when they’re looking at paid advertising.”<sup>152</sup> The FTC’s complaint further alleged “charges that Lord & Taylor did not require the influencers to disclose that the company had compensated them,” resulting in no disclosures on the posts.<sup>153</sup> The influencers’ social media posts were viewed by 11.4 million Instagram users in just a few days, resulting in 328,000 “brand engagements” with Lord & Taylor’s Instagram account.<sup>154</sup> Because of the influencer posts, the

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<sup>145</sup> Press Release, Fed. Trade Comm’n, Fed. Trade Comm’n Staff Reminds Influencers & Brands to Clearly Disclose Relationship (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/6WRB-7ZSD>].

<sup>146</sup> See FED. TRADE COMM’N, THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [hereinafter ENDORSEMENT GUIDES] [<https://perma.cc/YM9M-EZH3>].

<sup>147</sup> *Id.*

<sup>148</sup> See Bladow, *supra* note 13.

<sup>149</sup> *Id.* at 1152.

<sup>150</sup> *Id.* at 1151 n.228; Press Release, Fed. Trade Comm’n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers” (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [hereinafter FTC Settles with Lord & Taylor] [<https://perma.cc/F5X3-MBLC>].

<sup>151</sup> FTC Settles with Lord & Taylor, *supra* note 150.

<sup>152</sup> *Id.* (quoting Jessica Rich, Director of the FTC’s Bureau of Consumer Protection).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

secretly promoted dress sold out very quickly.<sup>155</sup> The settlement agreement with the FTC, which is called a consent order, provided that “Lord & Taylor is prohibited from misrepresenting that paid ads are from an independent source, and is required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements.”<sup>156</sup> The proposed consent order also established a “monitoring and review program” for the company’s upcoming social media campaigns.<sup>157</sup>

This case study shows the FTC’s power over monitoring the fairness of the online marketplace. It also shows how the FTC chose to deploy its power to regulate social media promotions because of the influence online promotions have over the marketplace and the modern consumer. By enacting these regulations and enforcing them with real monetary consequences social media advertising is now more transparent to online viewers and consumers. Online sales platforms should follow suit.

It is worth noting that the FTC saw the importance of using mandatory disclosures to push and require honest advertising on social media platforms. However, the FTC chose *not* to enact similar regulation for similar issues in the e-commerce marketplace, where consumer choices are also manipulated by vendors, and usually to a higher degree. In fact, “more than half of all online shoppers begin their search on Amazon.”<sup>158</sup> The FTC has the power to enact regulations in this area through its rulemaking authority given in Section 5 of the FTC Act.<sup>159</sup> Through the EU policy, as well as the FTC’s own policy for social media advertising and endorsements, the FTC already has a framework to put a disclosure regulation into place, and it should do so now before it is too late to protect the integrity of the e-commerce marketplace, and ultimately the modern consumer.

The principle reason this disclosure should be required is to ensure a more transparent online marketplace for e-commerce consumers. The FTC already identified a similar problem on social media and saw the need to enact regulation. Now, the FTC should push that regulation further into the actual marketplace, not just outside independent advertising. As noted above, the FTC Endorsement Guides state: “When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”<sup>160</sup>

A similar standard should be applied in e-commerce markets. It is simple to apply the FTC’s endorsement standard to Amazon’s products that are being sold on Amazon’s platform. There is an obvious “material connection” between the endorser, Amazon, and the advertiser, also Amazon. Amazon is in a sense endorsing its product when it places Amazon products above other products, a

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> 15 U.S.C.A. § 45 (West, Westlaw through Pub. L. No. 116-158).

<sup>160</sup> 16 C.F.R. § 255.5 (2020), WL 16 CFR § 255.5.

key indicator of winning the consumer's purchase.<sup>161</sup> Since consumers are more likely to purchase an item that is boosted highly in their personalized feed and Amazon has the sole power to choose how products are arranged on its website, this connection may affect the weight or credibility that the consumers give the endorsement, meaning that this connection should be clearly and conspicuously disclosed.<sup>162</sup> The FTC has essentially already done the work drafting this regulation and applying the regulation to social media endorsements. It is a simple step for the FTC to amend and apply this regulation to e-commerce platforms, where the regulation will have an even more measurable effect.

### C. Arguments Against Disclosure

Arguments against disclosure include: free market principles; existing remedies available through common law claims and state consumer laws; shortfalls of mandated disclosures in other industries; and the current regulatory climate.

The first argument against disclosure, free market principles, relies on supply and demand, with little to no government control and regulation interfering in the market.<sup>163</sup> Under free market principles, the market is regulated by supply and demand, consumer choices, and the belief that the market will support the best products and the lowest prices.<sup>164</sup> However, this theory is difficult to maintain when technology can manipulate consumer behavior more than ever before. Additionally, no society has a completely free market. There is always a need for necessary, although sometimes limited, regulation. In order to protect free markets and ensure that the best products are available to consumers in the age of new technology, the law and regulatory bodies should intervene. The law and regulatory bodies need to ensure that consumers are properly educated on their choices and are making purchasing decisions based on better products and prices *not* because of undue influence by companies who stand to profit from consumers' buying decisions.

The second argument against additional disclosure requirements is the availability of common law and state statutory claims to remedy consumer harm.<sup>165</sup> Both tort and contract common law theories provide multiple legal avenues for challenging business practices that may be "unfair or deceptive" to consumers.<sup>166</sup> However, "[c]onsumers trying to use tort or contract theories often have difficulty proving intent or damages"—required elements of many common law claims.<sup>167</sup> Common law tort claims like fraud or deceit, fraud by omission, or misrepresentation may be available to consumers feeling misled or

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<sup>161</sup> Mattioli, *supra* note 26.

<sup>162</sup> *Id.*

<sup>163</sup> Prateek Agarwal, *Free Market*, INTELLIGENT ECONOMIST (Apr. 16, 2020), <https://www.intellicenteconomist.com/free-market/> [https://perma.cc/WFS2-8RKE].

<sup>164</sup> *Id.*

<sup>165</sup> PORTER, *supra* note 130, at 159.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 160.

tricked by a seller.<sup>168</sup> While these tort claims may be effective avenues to recovery for some consumer issues, they were developed in a world of face-to-face transactions, not the complicated online markets of today.<sup>169</sup> Although old laws can be applied to new situations, the result is not always satisfactory, especially when huge technological advances are involved.

Many states have their own “Unfair and Deceptive Acts and Practices Laws.”<sup>170</sup> State Unfair and Deceptive Acts and Practices (UDAP) laws are usually available causes of action to aggrieved consumers seeking relief.<sup>171</sup> These statutory claims expand on the common law and have a lower barrier to entry because all elements of the traditional tort claims are not necessary to plead a statutory claim under UDAP.<sup>172</sup> Although these common law and UDAP claims may be effective for many consumer issues, they are not a practical avenue to relief in this market. These causes of action are remedial for after-the-fact damage, not to prevent an uninformed sale from taking place.<sup>173</sup> Additionally, it would be difficult to use a UDAP statute to force Amazon into disclosure unless a majority of states or states with major economic influence, like California and New York, began to require disclosure under their respective UDAP statutes.<sup>174</sup> If a state with a smaller market enacted this legislation and Amazon did not want to comply, Amazon could simply refuse to do business in that state. This refusal could harm the consumer even more. A federal solution is likely more effective when dealing with a massive global entity like Amazon, streamlining regulation, and enforcement across all states. A simple disclosure requirement is a low-cost and low-burden requirement to protect against these claims ever entering the court system.

The third argument against disclosure focuses on the limitations of mandated disclosures. Mandated disclosures are required in many consumer-facing industries, like credit transactions, health care, and insurance.<sup>175</sup> Some scholars argue that “[a]lthough mandated disclosure addresses a real problem and rests on a plausible assumption, it chronically fails to accomplish its purpose. Even where it seems to succeed, its costs in money, effort, and time generally swamp its benefits.”<sup>176</sup> Opponents of extending disclosure regulations identify three key issues that may contribute to the ineffectiveness of disclosures in certain industries.<sup>177</sup> First, sellers and buyers do not always exchange complete information before a transaction.<sup>178</sup> Second, even if sellers do disclose,

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<sup>168</sup> *Id.* at 159–60.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 164.

<sup>171</sup> *Id.* at 159.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 165.

<sup>174</sup> See generally Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37 (2018).

<sup>175</sup> Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 650 (2011).

<sup>176</sup> *Id.* at 651.

<sup>177</sup> *Id.* at 665.

<sup>178</sup> *Id.*

consumers do not always read the information before a transaction, and even if consumers do choose to read it, they do not always understand the implications of the given information.<sup>179</sup> And most importantly, mandated disclosure does not always change or improve consumer choices.<sup>180</sup>

In consumer credit transactions, “there is much evidence that consumers do not read . . . disclosures, are overloaded by the number of disclosures, and do not understand the basic disclosed features” relating to the transaction.<sup>181</sup> While this may be true in transactions involving complicated financial products or insurance premiums, simple labeling of a brand name is different. A label clearly stating “Amazon Brand” is unlikely to confuse consumers. The required conspicuous placement will guard against consumers overlooking the label. This proposal is not a large packet of fine print text sent with a credit card application; it is a two-word phrase on a familiar website. The cost of implementation is a low burden. Amazon clearly decided it was worth the cost of implementation considering it began labeling its brands to comply with European regulation.<sup>182</sup> The FTC defended mandated disclosure saying, “[i]t is a basic tenet of our economic system that information in the hands of consumers facilitates rational purchase decisions; and, moreover, is an absolute necessity for efficient functioning of the economy.”<sup>183</sup> Online shopping is the way of the future, it is important to protect consumers in this new industry. The benefit of a label will outweigh the low burden to e-commerce companies.

Another argument against mandated disclosure is that required mandatory disclosure is simply a Band-Aid fix and will not remedy the root of the problem: current antitrust law not aligning with the modern online marketplace.<sup>184</sup> While this is likely true, the need for disclosure is an incremental change. A disclosure regulation can be enacted quickly before additional and lasting damage is done to online markets and before more damage is done to consumers through unfair trade practices. The change in antitrust law principles is likely on the horizon as e-commerce continues to grow, but it does not need to be the first step in regulating the online marketplace. Additionally, enacting this required disclosure will keep the United States on par with the EU in controlling online marketplace fairness.

The final argument against the need for a disclosure regulation is the current regulatory climate. As evidenced by the Executive Order titled “Reducing Regulation and Controlling Regulatory Costs,” the Trump Administration has pushed against further governmental regulations and regulatory oversight.<sup>185</sup> The Trump Administration is rolling back regulations in many different market

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 666.

<sup>182</sup> See Ben-Shahar & Schneider, *supra* note 175.

<sup>183</sup> Proprietary Vocational and Home Study Schools, 43 Fed. Reg. 60,796, 60,805 (Dec. 28, 1978).

<sup>184</sup> See Khan, *supra* note 57.

<sup>185</sup> Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/> [<https://perma.cc/S3KT-72QD>].

sectors, even enacting a “two-for-one policy” stating that for every one new regulation, two old regulations must be “rolled back.”<sup>186</sup> President Trump’s Executive Order decreed that it is the:

Policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.<sup>187</sup>

However, this Executive Order applies to agencies that submit their rules to the White House Office of Management and Budget and its Office of Information and Regulatory Affairs.<sup>188</sup> Independent regulatory agencies like the FTC are exempt from such review.<sup>189</sup> If new regulation is enacted by the FTC, as proposed here, these regulations would not be encumbered by the Trump Administration’s attempt to deregulate.<sup>190</sup> The incoming Biden Administration is likely to have different regulatory strategies.

## VI. CONCLUSION

In the eyes of the law, e-commerce and platforms like Amazon are a fairly new frontier. Using the FTC’s regulatory powers, the United States should follow the actions of the EU by applying existing FTC frameworks like native advertising regulations to protect the online marketplace. Simply adhering to existing FTC frameworks will create a level playing field for consumers. Enacting a required disclosure regulation will protect the online marketplace for the good of the consumer, ensuring the market is not vulnerable to constant and calculated manipulation from large technology companies like Amazon. Without incremental steps in e-commerce regulation, Amazon will continue to have free reign in the marketplace, without the best interests of the consumer in mind.

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* § 1.

<sup>188</sup> Connor Raso, *How Has Trump’s Deregulatory Order Worked in Practice?*, BROOKINGS (Sept. 6, 2018), <https://www.brookings.edu/research/how-has-trumps-deregulatory-order-worked-in-practice/> [https://perma.cc/3XJ8-WAKQ].

<sup>189</sup> *Id.* (explaining how the FCC is an independent regulatory agency); see William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015).

<sup>190</sup> *Id.* (explaining how FCC regulations would not be encumbered by presidential attempts to regulate). For the same reason that the FCC would not be forced to deregulate as an independent regulatory agency, the FTC would also not be required to regulate.