

June 29, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

I am writing regarding my concern that Amazon's proposed acquisition of Metro-Goldwyn-Mayer Studios (MGM) could harm consumers and workers and reduce innovation by inhibiting competition in numerous markets.¹ This \$8.45 billion deal would ostensibly help Amazon attract consumers to its subscription streaming services. But because this service is tied to a wide range of additional Amazon products and services that affect broad sectors of our economy, this transaction requires meticulous antitrust scrutiny. I support the Federal Trade Commission's (FTC) review of this deal, which is consistent with your ongoing investigation into Amazon's anticompetitive business practices.²

The FTC has, in recent years, taken a narrow view during its analyses of vertical transactions³ like this one, primarily focusing on price effects in the relevant product or service markets.⁴ But the FTC should, in this and other cases, take a broader view, consistent with Section 7 of the Clayton Antitrust Act of 1914 (Clayton Act), which prohibits any acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly" in "*any* line of commerce or in *any* activity affecting commerce."⁵ I urge you to use the FTC's broad authority under this law to assess the possible anticompetitive effects this deal will have on streaming services and entertainment products in addition to the broader impacts that this

¹ New York Times, "James Bond, Meet Jeff Bezos: Amazon Makes \$8.45 Billion Deal for MGM," Brooks Barnes, Nicole Sperling, and Karen Weise, May 26, 2021, <https://www.nytimes.com/2021/05/26/business/amazon-mgm.html>.

² The Wall Street Journal, "Amazon's Planned Purchase of MGM to be Reviewed by FTC," Brent Kendall, June 22, 2021, <https://www.wsj.com/articles/amazons-planned-purchase-of-mgm-to-be-reviewed-by-ftc-11624379614>.

³ Vertical transactions refer to mergers and acquisitions that combine firms or assets at different stages of the same supply chain. Department of Justice and Federal Trade Commission, "Vertical Merger Guidelines," June 30, 2020, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

⁴ Id.

⁵ 15 U.S.C. 18 (emphasis added).

transaction may have on workers, small businesses, and competition overall as Amazon—which is already the dominant e-commerce firm⁶—accelerates its aggressive monopolistic behavior.

Concerns about Competition in the Video Streaming Market

On May 26, 2021, Amazon—which is worth \$1.64 trillion—announced its intent to purchase the MGM movie studio for \$8.45 billion.⁷ MGM holds the rights to around 4,000 films and 17,000 hours of television⁸ that would provide content for Amazon’s streaming video service, Amazon Prime Video. The problem is that this streaming service is only available to paid subscribers of Amazon Prime—a bundled service that includes streaming content in addition to exclusive deals and fast delivery on various products sold through Amazon’s online market platform and Whole Foods Market.⁹ Amazon’s streaming competitors are already at a disadvantage because of Amazon’s broad range of services that are tied to its streaming service through an annual \$119 Prime membership “whose value proposition is to help you buy more products.”¹⁰

As of April 2021, there were nearly 150 million Prime subscribers in the U.S. and 200 million Prime members worldwide,¹¹ up from around 10 million members in 2012.¹² A decade ago, analysts estimated that Amazon was operating at a loss in part because of Prime,¹³ but over the course of the COVID-19 pandemic, the company’s profits increased 220 percent¹⁴—partially due to the addition of around 50 million Prime subscribers (nearly 30 million in the U.S.) who could easily make purchases on Amazon’s platform.¹⁵ The Prime membership is so sticky that

⁶ Forbes, “3 Reasons Why Amazon Will Likely Continue To Gain E-Commerce Market Share,” Ethan McAfee, March 31, 2021, <https://www.forbes.com/sites/forbesbusinesscouncil/2021/03/31/3-reasons-why-amazon-will-likely-continue-to-gain-e-commerce-market-share/?sh=3f0fff4c3ab8>.

⁷ New York Times, “James Bond, Meet Jeff Bezos: Amazon Makes \$8.45 Billion Deal for MGM,” Brooks Barnes, Nicole Sperling, and Karen Weise, May 26, 2021, <https://www.nytimes.com/2021/05/26/business/amazon-MGM.html>.

⁸ IndieWire, “Amazon Wants to Buy MGM for Its 4,000-Film Library,” Chris Lindahl, May 17, 2021, <https://www.indiewire.com/2021/05/amazon-wants-to-buy-mgm-1234638339/>.

⁹ Amazon, Prime page, accessed on June 22, 2021, https://www.amazon.com/amazonprime?encoding=UTF8&ref=nav_cs_primelink_nonmember_4f162594c63141e596796a3b01e2f9e4; New York Times, “Amazon to Buy Whole Foods for \$13.4 Billion,” Nick Wingfield and Michael J. de la Merced, June 16, 2017, <https://www.nytimes.com/2017/06/16/business/dealbook/amazon-whole-foods.html>.

¹⁰ The Atlantic, “Cancel Prime,” Ellen Cushing, June 22, 2021, <https://www.theatlantic.com/ideas/archive/2021/06/amazon-prime-day-dystopian/619265/>.

¹¹ Digital Commerce 360, “Amazon Prime reaches 200 million members worldwide,” Fareeha Ali, April 16, 2021, <https://www.digitalcommerce360.com/article/amazon-prime-membership/>.

¹² GeekWire, “Inside Amazon Prime’s ‘explosive’ growth: 10 million members and profitable,” Todd Bishop, March 12, 2013, <https://www.geekwire.com/2013/amazon-prime-10m-members-counting/>.

¹³ The Wall Street Journal, “Amazon ‘Primes’ Pump for Loyalty,” Stu Woo, November 14, 2011, <https://www.wsj.com/articles/SB10001424052970203503204577036102353359784>.

¹⁴ New York Times, “Amazon’s profit soars 220 percent as pandemic drives shopping online,” Karen Weise, April 21, 2021, <https://www.nytimes.com/2021/04/29/technology/amazons-profits-triple.html>.

¹⁵ Digital Commerce 360, “Amazon Prime reaches 200 million members worldwide,” Fareeha Ali, April 16, 2021, <https://www.digitalcommerce360.com/article/amazon-prime-membership/>.

“less than 1% of Prime members are likely to consider other mass-market retail sites,”¹⁶ and reports have estimated that households with a Prime membership spend about \$3,000 a year on Amazon—more than double the amount spent by those that do not,¹⁷ which suggests a sizable competitive advantage for the bundled services that has only increased over time.¹⁸

Amazon’s tactic to operate at a financial loss and use low prices to lure in customers and capture the market has worked before,¹⁹ and the FTC must determine whether this vertical acquisition is truly an entertainment strategy or merely another step towards unfettered monopolization. MGM is reportedly valued at \$6.5 billion in equity, yet its acquisition by Amazon is valued at \$8.45 billion—the second largest acquisition in Amazon’s history.²⁰ This acquisition presents an important opportunity to ensure that the FTC approaches vertical transactions involving tech platforms with the proper dosage of antitrust scrutiny.

A typical antitrust analysis of a vertical deal would assess whether the acquisition could grant Amazon the incentive and ability to disadvantage Prime Video’s streaming service competitors or MGM’s production-company competitors. While the FTC should investigate the possible anticompetitive effects under this framework, I urge the FTC to also consider how Amazon and its expansive operations may *already* have the ability to harm competition in these markets, even without acquiring MGM, and how the MGM acquisition may exacerbate this concern. For example, Netflix is a customer of Amazon that uses Amazon Web Services (AWS),²¹ which is a dominant vendor of cloud infrastructure. As a result, Amazon already possesses a trove of sensitive information from Netflix and thousands of other companies that use AWS. Whenever Amazon enters a new market, Amazon could exploit these data to its advantage, thwarting competition in the process.

Concerns about Amazon’s Acquisition of MGM and Its Broader Effect on Competition

Amazon’s massive presence in a host of retailing businesses creates conflicts of interest throughout its online marketplace ecosystem that may provide it with the incentive and ability to harm competitors in unexpected ways that a narrowly-focused antitrust analysis may not anticipate or reveal. Therefore, the FTC should look beyond streaming and entertainment

¹⁶ Forbes, “Walmart And Target Being Crowded Out Online By Amazon Prime,” Clare O’Connor, April 6, 2015, <https://www.forbes.com/sites/clareoconnor/2015/04/06/walmart-and-target-being-crowded-out-online-by-amazon-prime/?sh=60ebd7cb2d33>.

¹⁷ New York Times, “Amazon’s profit soars 220 percent as pandemic drives shopping online,” Karen Weise, April 21, 2021, <https://www.nytimes.com/2021/04/29/technology/amazons-profits-triple.html>.

¹⁸ Forbes, “Walmart And Target Being Crowded Out Online By Amazon Prime,” Clare O’Connor, April 6, 2015, <https://www.forbes.com/sites/clareoconnor/2015/04/06/walmart-and-target-being-crowded-out-online-by-amazon-prime/?sh=60ebd7cb2d33>.

¹⁹ Bloomberg, “Amazon Emails show Effort to Weaken Diapers.com Before Buying It,” Matt Day, July 29, 2020 (discussing Amazon’s likely predatory strategy to acquire a competitor), <https://www.bloomberg.com/news/articles/2020-07-29/amazon-emails-show-effort-to-weaken-diapers-com-before-buying-it>.

²⁰ Wall Street Journal, “Amazon to Buy MGM, Bagging a Lion to Help Wage Streaming Battle,” Joe Flint, May 26, 2021, https://www.wsj.com/articles/amazon-to-buy-hollywood-studio-mgm-for-8-45-billion-with-debt-11622033315?mod=article_inline.

²¹ CRN, “AWS Creates Conflict For Amazon, Needs Regulation: House Subcommittee,” Joseph Tsidulko, October 6, 2020, <https://www.crn.com/news/cloud/aws-creates-conflict-for-amazon-needs-regulation-house-subcommittee>.

services and assess the possible competitive effects on customers, sellers, and workers across all of Amazon’s retailing segments when reviewing this transaction.

i. Small Businesses

Although Amazon claims that it is helping small businesses thrive,²² a 2018 survey of 2,000 small business owners suggested otherwise: two out of three felt that their growth opportunities were being stifled by large corporations like Amazon²³ that were “disrupting just about every industry.”²⁴ Within Amazon’s marketplace, sellers of all kinds can list their products and give Amazon a cut of their sales. Amazon claims that these sellers “have full control of their own prices both on and off Amazon,” but this does not appear to always be the case.²⁵ Anecdotally, for example, one small-time entrepreneur was selling vitamin-infused coffee on the Amazon marketplace, but after listing his products for a cheaper price on another e-commerce site, Amazon removed their “Buy Now” and “Add to Cart” buttons from his site, causing his sales to tumble.²⁶ Amazon effectively bullied him into either removing his products from the other site entirely or raising his prices there so as not to trigger Amazon’s detection system that would hurt his sales in their marketplace. The company’s own employees have even disclosed the ways in which Amazon has used proprietary data from sellers on its platform to launch competing private-label products.²⁷ Amazon’s exclusionary conduct has become so unwieldy that the D.C. Attorney General recently filed an antitrust lawsuit alleging that the company is unlawfully and unfairly crushing competition.²⁸ Given Amazon’s history of hurting small businesses, I urge you to consider how this transaction will affect small theatres who may routinely license MGM material²⁹ and how strengthening Amazon Prime through this purchase may negatively impact small businesses in other sectors of our economy.

ii. Treatment of Workers

I am concerned that Amazon’s growing monopoly power, which harms its consumers and the competitive process with its rivals, can also give the company excessive control in labor

²² Amazon, “Amazon Announces 150 New Tools and Services Have Launched in 2019 to Help Small and Medium-Sized Businesses Grow Their Online Sales,” press release, August 22, 2019, <https://press.aboutamazon.com/news-releases/news-release-details/amazon-announces-150-new-tools-and-services-have-launched-2019>.

²³ Lendio, “Small Business Owners: American Dream Is out of Reach,” Melanie King, September 27, 2018, <https://www.lendio.com/blog/small-business-tools/small-business-cut-off-american-dream/>.

²⁴ USA Today, “Don’t let Amazon swallow your small business,” Rhonda Abrams, May 9, 2018, <https://www.usatoday.com/story/money/columnist/abrams/2018/05/09/small-business-surviving-amazon/592950002/>.

²⁵ New York Times, “Prime Power: How Amazon Squeezes the Businesses Behind Its Store,” Karen Weise, December 19, 2019, <https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html>.

²⁶ *Id.*

²⁷ Wall Street Journal, “Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products,” Dana Mattioli, April 23, 2020, <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

²⁸ New York Times, “The Big Deal in Amazon’s Antitrust Case,” Shira Ovide, May 25, 2021, <https://www.nytimes.com/2021/05/25/technology/amazon-antitrust-lawsuit.html>.

²⁹ Vulture, “Disney Is Quietly Placing Classic Fox Movies Into Its Vault, and That’s Worry,” Matt Seitz, October 24, 2019 (describing the concern in the context of Disney’s purchase of 21st Century Fox), <https://www.vulture.com/2019/10/disney-is-quietly-placing-classic-fox-movies-into-its-vault.html>.

markets, resulting in worse bargaining positions and employment conditions for its workers. In the case of the MGM acquisition, to the extent that it allows Amazon to expand its Marketplace services, it could result in anticompetitive effects on workers. Accordingly, the FTC should assess whether monopoly or monopsony power contributes to Amazon's well-documented history of alleged labor violations.

Multiple workers have filed charges against Amazon with the National Labor Relations Board (NLRB) alleging retaliation for concerted activity protected under the National Labor Relations Act (NLRA).³⁰ One of those cases has been settled, and it was reported that the NLRB found merit in another charge that workers were unlawfully dismissed.³¹ Based on the number of such charges, an NLRB spokesperson told press that the Board is considering whether the "meritorious allegations warrant a consolidated effort between the regions."³² Amazon has also been accused of other NLRA violations. The Retail, Wholesale, and Department Store Union recently filed 23 objections with the NLRB alleging that Amazon interfered with the NLRA rights of workers during a unionization drive at the company's facility in Bessemer, Alabama.³³ Multiple reports have also detailed company practices related to surveilling potential activity protected under the NLRA, including posting jobs for intelligence analysts tasked with monitoring "labor organizing threats,"³⁴ investing in technology to track potential unionization efforts,³⁵ and monitoring internal listservs³⁶ and private social-media groups.³⁷

Additionally, the FTC should consider growing evidence of unsafe working conditions in Amazon warehouses. Multiple analyses of Occupational Safety and Health Administration (OSHA) data have found that Amazon warehouses have high rates of serious injury rates. The Washington Post found that "Amazon's serious injury rates are nearly double those at warehouses run by other companies."³⁸ The Center for Investigative Reporting also found that serious injuries at Amazon fulfillment centers are "nearly double the most recent industry

³⁰ NBC News, "Fired, interrogated, disciplined: Amazon warehouse organizers allege year of retaliation," Victor Blue, March 30, 2021, <https://www.nbcnews.com/business/business-news/fired-interrogated-disciplined-amazon-warehouse-organizers-allege-year-retaliation-n1262367>.

³¹ New York Times, "Amazon Illegally Fired Activist Workers, Labor Board Finds," Karen Weise, June 15, 2021, <https://www.nytimes.com/2021/04/05/technology/amazon-nlrb-activist-workers.html>.

³² NBC News, "Fired, interrogated, disciplined: Amazon warehouse organizers allege year of retaliation," Victor Blue, March 30, 2021, <https://www.nbcnews.com/business/business-news/fired-interrogated-disciplined-amazon-warehouse-organizers-allege-year-retaliation-n1262367>.

³³ RWDSU, "Union Holds Amazon Accountable for Illegal Conduct, Demands Full Review," April 19, 2021, https://www.rwdsu.info/rwdsu_files_nlrb_election_objections.

³⁴ CNBC, "Amazon deletes job listings for analysts to track 'labor organizing threats' following public outcry," Annie Palmer, September 1, 2020, <https://www.cnn.com/2020/09/01/amazon-seeks-intelligence-analyst-to-track-labor-organizing-threats.html>.

³⁵ Vox, "Leaked: Confidential Amazon memo reveals new software to track unions," Jason Del Rey and Shirin Ghaffary, October 6, 2020, <https://www.vox.com/recode/2020/10/6/21502639/amazon-union-busting-tracking-memo-spoc>.

³⁶ Vice, "Amazon Employee Warns Internal Groups They're Being Monitored For Labor Organizing," Lauren Gurley and Janus Rose, September 24, 2020, <https://www.vice.com/en/article/m7jz7b/amazon-employee-warns-internal-groups-theyre-being-monitored-for-labor-organizing>.

³⁷ Vice, "Inside Amazon's Secret Program to Spy on Workers' Private Facebook Groups," Lauren Gurley and Joseph Cox, September 1, 2020, <https://www.vice.com/en/article/3azegw/amazon-is-spying-on-its-workers-in-closed-facebook-groups-internal-reports-show>.

³⁸ Washington Post, "Amazon warehouse workers suffer serious injuries at higher rates than other firms," Jay Greene and Chris Alcantara, June 1, 2021, <https://www.washingtonpost.com/technology/2021/06/01/amazon-osha-injury-rate/>.

standard” and that “Amazon’s injury rates have gone up each of the past four years.”³⁹ A report from the National Employment Law Project (NELP) found that “counties hosting Amazon fulfillment centers have turnover rates that are much higher than the average rate of turnover for warehouse workers in California and workers in other industries overall in the state” and that “the average turnover rate for warehouse workers in counties with Amazon fulfillment centers was 100.9 percent” in the most recent year for which data is available.⁴⁰ NELP describes this data as evidence of a “business model ... in which the company views its workers as disposable and designs its operations to foster high turnover.”⁴¹

The FTC should determine whether Amazon is abusing either monopoly or monopsony power to the detriment of the labor market and, if so, whether purchasing MGM would subject a new set of employees to similar abuses or worsen conditions for current Amazon employees.

iii. Amazon’s History of Antitrust Issues

In addition to the D.C. Attorney General’s lawsuit for potential antitrust violations, the FTC itself has a history of holding Amazon accountable for unfair business practices that harm consumers. Earlier this year, Amazon settled for over \$61 million with the FTC after Amazon “failed to pay Amazon Flex drivers the full amount of tips they received from Amazon customers over a two and a half year period.”⁴² Though Amazon promised its drivers and its consumers that “100% of tips are passed on to your courier” and prohibited any other way to tip workers than through its platform, Amazon “made secret changes to the program without telling drivers or customers” and “pocketed about a third of each tip to offset the guaranteed minimum Amazon promised to drivers.”⁴³ A few years prior, the FTC sued Amazon for violating the FTC Act “by billing parents and other Amazon account holders for charges incurred by their children without the permission of the parent or other account holder.”⁴⁴ Amazon eventually settled for more than \$70 million in consumer refunds.⁴⁵

Section 7.2 of the *Horizontal Merger Guidelines* states that a history of collusion or coordinated interaction in a market will be given “substantial weight” when the Department of Justice and the FTC assess the likelihood that an acquisition or merger will lead to

³⁹ Reveal, “How Amazon hid its safety crisis,” Will Evans, September 29, 2020, <https://revealnews.org/article/how-amazon-hid-its-safety-crisis/>.

⁴⁰ <https://www.nelp.org/publication/amazons-disposable-workers-high-injury-turnover-rates-fulfillment-centers-california/>

⁴¹ *Id.*

⁴² Federal Trade Commission, “Amazon to Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers,” February 2, 2021, <https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some>.

⁴³ Federal Trade Commission, “Amazon to pay \$61 million for tapping into tips promised to drivers,” Lesley Fair, February 2, 2021, <https://www.ftc.gov/news-events/blogs/business-blog/2021/02/amazon-pay-61-million-tapping-tips-promised-drivers>.

⁴⁴ Federal Trade Commission, “FTC Alleges Amazon Unlawfully Billed Parents for Millions of Dollars in Children’s Unauthorized In-App Charges,” July 10, 2014, <https://www.ftc.gov/news-events/press-releases/2014/07/ftc-alleges-amazon-unlawfully-billed-parents-millions-dollars>.

⁴⁵ Federal Trade Commission, “FTC settlement with Amazon yields \$70 million for consumers, advice for business,” May 30, 2017, Lesley Fair, <https://www.ftc.gov/news-events/blogs/business-blog/2017/05/ftc-settlement-amazon-yields-70-million-consumers-advice>.

anticompetitive harms.⁴⁶ I urge you to implement this approach and to also give substantial weight to any history of anticompetitive behaviors or unfair practices when you assess prospective transactions, horizontal or vertical. The FTC should disfavor approving deals involving parties with a known pattern of inhibiting competition and harming consumers and workers. Allowing such firms to continue buying up competitors would only exacerbate these abuses of market power.

Conclusion

I support the FTC's review of Amazon's MGM acquisition, and I urge you to conduct a broad and meticulous review. Amazon is a large and powerful acquirer with expansive operations; an investigation into the ramifications of this deal should include both its direct impacts on streaming services and prices charged to consumers and its broader effects on small businesses, workers, and the economy as a whole. As the House Antitrust Subcommittee recently reminded us in its detailed report on competition in digital markets, our antitrust laws were crafted to "protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."⁴⁷ Our contemporary antitrust treatment of vertical transactions must encapsulate this all-encompassing competition approach, as required by the Clayton Act. Dutifully scrutinizing this transaction is necessary to protect workers, small businesses, competition, and innovation.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator

⁴⁶ Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," August 19, 2010, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

⁴⁷ U.S. House, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, "Investigation of Competition in Digital Markets," October 2020, p. 392, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.