

July 7, 2021

The Honorable Merrick Garland
Attorney General
The Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Attorney General Garland and Chair Khan:

I write regarding an investigation by my staff revealing that Amazon search and sponsorship algorithms may be misleading consumers who are seeking masks authorized by the U.S. Food and Drug Administration (FDA) and other personal protective equipment during the COVID-19 pandemic. This problem is exacerbated by the fact that the information consumers need to verify whether a product has received an FDA emergency use authorization (EUA) is often either incorrect or not easily discernable on Amazon.com, and that Amazon's quality control methods do not appear to be sufficient to prevent customers from receiving counterfeit items. I am concerned that Amazon's policies and procedures appear to be increasing risks for many individuals that are purchasing COVID-19 masks and other protective gear to protect themselves and their communities.

Many communities and private sector establishments are rolling back mask requirements as cases drop dramatically due to increased vaccination rates. But many people have still not been vaccinated; COVID-19 vaccines have not yet been approved for use in children under the age of 12; and many schools, camps, and other private-sector establishments have mask requirements or recommendations that remain in place. It is critical that individuals be able to obtain masks and other PPE that meets appropriate requirements.

Last year, Congress passed the COVID-19 Consumer Protection Act, which made it "unlawful under Section 5 of the Federal Trade Commission Act for any person, partnership, or corporation to engage in a deceptive act or practice in or affecting commerce associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 or a government benefit

related to COVID-19.”¹ Under the law, any such violation “shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Sec. 18(a)(1)(B) of the FTC Act.”² As such, I urge you to use your authorities to investigate how Amazon’s search and sponsorship algorithms may be misleading customers who are seeking products related to COVID-19.

On March 30, 2021, I wrote to Amazon Chief Executive Officer, Andy Jassy, summarizing the results of my staff’s investigation, which found that:

- 1. Amazon is promoting products not authorized by the FDA, even when customers are specifically searching for FDA-authorized masks.** On March 4, 2021, my staff conducted a sample search of the term “KN95 Face Mask FDA Approved.” This search produced 436 results, with 22 on the first page of results. But two of the masks that appeared in the first page have not, in fact, received an approval or emergency use authorization from the FDA.³ Even more concerning, one of these products appeared near the top of the search results as a “sponsored product,” even though it did not advertise itself as “FDA-approved,”—presumably because sellers were paying Amazon to promote their product. Because sponsored products appear alongside search results specifically responsive to the query, with only a small notation that they are sponsored, customers may be unwittingly directed to non-FDA authorized masks.⁴
- 2. Amazon does not provide enough information for consumers to determine whether a product has received an EUA from the FDA.** Amazon’s unclear presentation of information or lack of information for consumers makes it difficult for customers to verify whether a mask is in fact authorized by the FDA. Only seven of the top 22 KN95 search results specifically and clearly denote that they have received an EUA either in the title or the description of the product; an additional 12 of the 22 top results indicate that the mask had received an EUA only in the Customer Question & Answer section—meaning Amazon customers, not necessarily Amazon or the sellers, were sometimes having to provide this information after they had purchased the product. Three of the results—including the two that appeared as sponsored results—provided no indication that the mask was authorized by the FDA. And even when a mask is authorized by the FDA, the information needed to verify this authorization may be incomplete or wrong, or missing important facts.⁵

¹ The Federal Trade Commission, “COVID-19 Consumer Protection Act of the 2021 Consolidated Appropriations Act,” <https://www.ftc.gov/enforcement/statutes/covid-19-consumer-protection-act-2021-consolidated-appropriations-act>.

² *Id.*

³ Amazon.com, “RightCare KN95 Protective Face Mask (Non-Medical), 99% Efficiency 5-PLY mask with Ear Loops and Shapeable Nose Bridge, 10 Pack,” March 4, 2021, https://www.amazon.com/RightCare-Protective-Non-Medical-Efficiency-Shapeable/dp/B08FXZD8BC/ref=sr_1_7_sspa; Amazon.com, “Kingfa KN95 Face Mask 50 Pcs Disposable Respirator 5-Ply Layer | GB2626-2006 Compliant,” March 4, 2021, https://www.amazon.com/Kingfa-Non-NIOSH-Respirator-GB2626-2006-Compliant/dp/B0882TV6JM/ref=sr_1_19.

⁴ Letter from Senator Elizabeth Warren to Amazon Chief Executive Officer, Andy Jassy, March 30, 2021.

⁵ *Id.*

- 3. Amazon’s quality control standards result in consumers obtaining masks that are not authorized by the FDA.** In addition to the misleading search results and inaccurate or incomplete information, a staff assessment of customer reviews for KN95 products found cases where customers indicated that the quality of the product received may not have matched the product that was advertised and that the customer had ordered.⁶

On April 14, 2021, Amazon responded to my letter, providing answers to my questions that indicated the company is failing to take accountability for the concerns raised by the results of my staff’s survey. In particular, the information the company provided in response to my queries indicates that its methods may actively mislead consumers who are seeking FDA authorized products.

For example, Amazon’s response indicated that the company provided “sponsored” links to non-FDA authorized masks even in cases where consumers are seeking FDA-authorized products. According to Amazon:

We consider many factors when choosing the search results to feature for customers, including purchase frequency, item information, availability, and delivery speed. “Similar products” are a collection of product recommendations that are based on the context of the customer’s current shopping preferences, aspects of the customer’s shopping history, or elements of both....⁷

At no point does Amazon indicate that it bases sponsored or similar results on customers’ specific desire to seek FDA-authorized products, although it implied this may be one factor that affects the results. Indeed, the company admitted that it prioritizes its own financial considerations—over providing customers with products that accurately meet their search needs—when placing sponsored products:

When choosing offers to appear as Sponsored Products, Amazon considers many factors, including customers’ expected interest in the eligible offers based on the query, keywords a selling partner has bid on, and the amount of the bid. When shoppers search Amazon for products, we run a real-time auction to decide which Sponsored Products offers, if any, will be most helpful for our customers when as they shop in our store.⁸

When asked “Specifically, if a customer searches for a product that has an FDA approval or EUA, is there any mechanism that prevents products that do not have an FDA approval or EUA from appearing as “sponsored” or “similar” products?,” Amazon gave a clear answer: “No.”

⁶ *Id.*; See Amazon.com, “KN95 Advanced Filtration Respirator Face Masks (50 Pack) | On FDA EUA list | > 95% Filtration | Type FFP2 - CE Certified to EN149,” March 4, 2021, <https://www.amazon.com/KN95-Advanced-Filtration-Respirator-Masks/dp/B087996M76>; Amazon.com, “KN95 Face Mask included on FDA EUA white list, Pack of 20,” March 4, 2021, <https://www.amazon.com/KN95-Face-Mask-Pack-20/dp/B087RJ9JCF>.

⁷ Letter from Amazon Vice President, Public Policy, Brian Huseman, to Senator Warren, April 14, 2021.

⁸ *Id.*

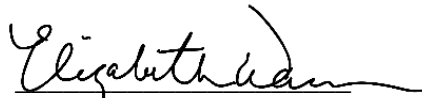
The information provided by Amazon also described the methods the company uses to prevent fraud and ensure quality control of products it sells are not doing enough to prevent consumers from obtaining fraudulent items. According to Amazon:

Amazon requires that all products in our store comply with applicable laws, regulations, and Amazon policies, and we continuously scan numerous data points related to sellers, products, brands, and offers to detect activity that may indicate a potential concern. When we find such concerns, we act quickly to protect our customers and our store from these bad actors. For KN95 masks, we review filtration lab testing results from accredited labs, verify manufacturer information (including a review of invoices to trace the inventory from the supplier to the manufacturer), review product packaging and the product detail page for unverified or unapproved claims, check the product against the CDC's counterfeit list, and confirm that any KN95 masks claiming to be on the FDA's EUA list are in fact on the list.⁹

But despite these efforts, my staff investigation identified numerous cases where consumers reported obtaining fraudulent or counterfeit KN-95 masks.

I am providing my initial letter, summarizing my staff's investigation, as well as Amazon's response. Given the significant public health concerns facing consumers who may be receiving misleading information from Amazon about the masks that they seek for protection from COVID-19, I urge you to review the enclosed materials and use your authorities to protect consumers and public health. Thank you for your attention to this matter.

Sincerely,


Elizabeth Warren
United States Senator

⁹ *Id.*