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September 25, 2026

Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C. 20580

Re: FTC-2026-1057—Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing

Thank you for the opportunity to respond to the proposed enforcement policy on personalized pricing. My name is Josh Withrow and I am a fellow with the R Street Institute's Technology and Innovation Policy team. R Street is a nonprofit, nonpartisan public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government in many areas, including technology and innovation.

Overview

The Federal Trade Commission (FTC) has released a "Proposed Enforcement Policy Statement Regarding Personalized Pricing," which lays out possible reasons the Commission may deem certain pricing strategies to be unfair or deceptive under Section 5 of the FTC Act. Although the use of particular knowledge about individual consumers to offer variable pricing based on different circumstances is hardly new, the digital economy has certainly given companies far greater access to granular data about their customers than ever before. Thus, public anxiety about the potential for companies to use data to maximize the amount that they can charge to each individual is understandable. However, we are concerned that these enforcement guidelines may exceed both the FTC's statutory authority under Section 5 and the actual economic evidence that personalized pricing is likely to cause consumer harm.

As the proposed policy statement itself acknowledges, "The extent to which businesses currently use personalized pricing is not well understood, and the effects of personalized pricing on consumers are unclear."[1] Moreover, economic studies of personalized pricing,

[1] "Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing" *FTC.gov,* Pg. 3. https://www.regulations.gov/document/FTC-2026-1057-0001

including the several studies cited in the proposal, offer many examples of how personalized pricing can be beneficial to many consumers.[2] Because of this ambiguity, the FTC should be cautious not to adopt an enforcement strategy that could be construed as presumptively condemning personalized pricing as unfair or deceptive.

An Overly Broad Theory of Harm

The most obvious scenario where individualized pricing would cause harm to consumers would be a company with monopoly power in a market having sufficient data on individual consumers to be able to accurately raise prices to the highest amount each is able or willing to pay. However, as Professor Mark Jamison points out succinctly, "A firm's ability to engage in individualized pricing is constrained by competitive alternatives."[3] In reality, consumers would most likely react poorly to being gouged in this way, paving the way for competitors to provide an alternative.[4] The proposed enforcement policy acknowledges that competition likely alleviates some abuses of individualized pricing, but seems reluctant to acknowledge circumstances where it might actually provide pro-consumer benefits.

After all, personalized pricing encompasses a spectrum of pricing strategies that range from only slightly personalized, like basic dynamic pricing that takes into account impersonal factors like location or time of day, to highly individualized price-setting based on a given consumer's habits.[5] The extent to which individual users' data informs a pricing algorithm is also unlikely to correlate directly to whether a consumer welfare is helped or harmed by differential pricing.

For example, a membership program that targets certain customers with discounts according to their purchase and browsing history is highly personalized and technically constitutes price discrimination, but in a way which offers value to both businesses and the customers who choose to participate. Such personalized pricing variations also provide ways for companies to differentiate themselves from competitors. Yet the proposed enforcement policy focuses on mandatory consumer warnings and data privacy restrictions for any use of personalized pricing, seemingly absent any need to prove that consumers are being harmed.

Uncertain Legal Authority

In fact, the entire premise of personalized pricing being punishable as "unfair" under Section 5 is questionable on its face.[6] The standard of proof for establishing a business practice as unfair

[2] Mark Jamison, "Thoughts on the Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing," comment submitted to the Federal Trade Commission, Sept. 18, 2026. https://www.regulations.gov/comment/FTC-2026-1057-1113

[3] Jamison, pg. 3.

[4] John M. Yun, "Should We Fear Personalized Pricing?" *George Mason University Law & Economics Research Paper*, No. 25-10, July 23, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5364130.

[5] "Data-Driven Pricing: Key Technologies, Business Practices, and Policy Implications." *Future of Privacy Forum,* July 14, 2025. https://fpf.org/resource/data-driven-pricing-key-technologies-business-practices-and-policy-implications/

[6] George S. Ford, "Personalized Pricing and the limits of Section 5" *Phoenix Center for Advanced Legal and Policy Studies*, Sept. 16, 2026, https://phoenix-center.org/perspectives/Perspective26-05Final.pdf.

or deceptive under Section 5 requires that the practice be "likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves."[7] So long as there are alternative retailers to shop from and compare prices to, any price is reasonably avoidable.

The proposed policy statement thus depends on the theory that failing to proactively warn customers that a seller is using personalized pricing likely constitutes deception, and that it causes injury by violating consumers' "reasonable expectations" that prices are being offered uniformly. Therefore, the policy statement effectively mandates "clear and conspicuous" disclosure of any use of personalized pricing, the absence of which may violate Section 5.[8]

This is very different than if a company were to make overtly false claims about its pricing, such as claiming to offer uniform prices to all consumers but secretly personalizing prices. Such fraudulent claims would qualify as unfair or deceptive practices regardless of whether personalized pricing is involved.

To claim that the mere absence of a conspicuous disclosure of what data goes into setting prices is inherently unfair and deceptive goes much further, and assumes that consumers are powerless to comparison shop against other products sold elsewhere. To quote economist George Ford, "A price is an offer, and the consumer may accept or reject it. If the transaction occurs at the offered price (nothing is hidden) and the consumer receives the product represented (no misrepresentation), then—under the Commission's own long-standing guidance—there is no explicit or implicit deception and no cognizable unfairness."[9]

Meanwhile, the policy statement's effective disclosure mandate on the use of personalized pricing would be ridiculous, if not impossible, to comply with as written. The statement defines an "effective" pricing disclosure as including "all relevant information, such as the fact that the price is personalized, the basis of that personalization, and the type of data used."[10] If enforced as written, this could force companies to post impossibly long, detailed disclosures that would be of doubtful use to consumers.[11] Compliance costs, as is often the case with transparency regulation, would likely fall harder on smaller competitors. Mandatory warnings about personalized data use may also encourage businesses to limit or eliminate personalized pricing tactics altogether, even in cases that obviously benefit consumers, such as loyalty rewards programs and custom coupons, lest consumers be turned away by these needlessly detailed disclosures. Transparency is not always useful and, if done poorly, can be counterproductive.

Finally, the Commission should not arbitrarily enter into *de facto* regulation of how companies use consumer data except as instructed to do so by legislation. The long-standing inability of Congress to agree upon a federal data privacy and security framework is frustrating, and the R

[7] 15 U.S. Code § 45, https://www.law.cornell.edu/uscode/text/15/45.
[8] FTC Proposed Enforcement Policy Statement, pg. 6.
[9] Ford, pg. 7.
[10] FTC Proposed Enforcement Policy Statement, pg. 6
[11] Dan Gilman, "Fine Print for Every Price: The FTC's One-Size-Fits-All Guidance," *Truth on the Market*, Aug. 28, 2026. https://truthonthemarket.com/2026/08/28/fine-print-for-every-price-the-ftcs-one-size-fits-all-guidance/

Street Institute has long pushed for such a framework to be enacted.[12] However, in the meantime, the FTC should not aim to expand the horizons of Section 5 enforcement. As the Cato Institute has pointed out, courts are less likely than ever to defer to an agency's discretion on regulatory authority, and it is unwise to empower future administrations which may have far less restraint in abusing pricing regulations that apply to much of the digital economy.[13]

Suggestions for Improvement

1. Limit the scope of enforcement regarding deceptive practices to actual willful misrepresentation of pricing practices or false claims of uniform pricing rather than relying on a vaguely defined notion of consumer "expectations."
2. Simplify any mandated disclosures to a concise, neutral notice that users' data has been taken into account in calculating prices.
3. Provide an explicit safe harbor for personalized pricing programs that merely provide consumer discounts, such as membership programs, loyalty rewards, age discounts, and coupons.
4. Let Congress lead the way on data privacy regulation.

Thank you for your time and consideration in soliciting input on this matter.

Respectfully submitted,

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[12] Adam Thierer, "Congress has a fresh chance to pass a comprehensive federal privacy law," R Street Institute, Apr. 22, 2026, https://www.rstreet.org/commentary/congress-has-fresh-chance-to-pass-a-comprehensive-data-privacy-law/.

[13] Juan M. Londoño and Christopher Gardener, "Comments of Juan Londoño and Christopher Gardner in Response to Federal Trade Commission Request for Public Comment on Its Proposed Enforcement Policy Statement Regarding Personalized Pricing," comment submitted to the Federal Trade Commission, Sept. 18, 2026. https://www.regulations.gov/comment/FTC-2026-1057-1112