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PUBLIC INTEREST COMMENT

The Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing

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Request for Public Comment on Proposed Enforcement Policy Statement Regarding Personalized Pricing
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I thank the Federal Trade Commission (FTC or Commission) for the opportunity to comment on its proposed *Enforcement Policy Statement Regarding Personalized Pricing*.[1] The proposed statement sets out when the Commission may consider personalized pricing deceptive or unfair under Section 5 of the FTC Act and what disclosures it may expect from sellers that use it. In finalizing the statement, the Commission should target genuine deception and unfairness while preserving established Section 5 limits and protecting bona fide individualized discounts.

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My recommendations for the Commission are threefold:

1. The final statement should preserve the traditional FTC Act Section 5 deception standard. A consumer's supposed expectation of uniform pricing should not, standing alone, create a duty to disclose personalization. The Commission should require a material express or implied representation, or circumstances in which silence itself reasonably communicates a false representation.
2. The Commission should also rigorously apply FTC Act Section 5(n), which deals with unfair acts or practices. Injury and countervailing benefits should be assessed against a realistic uniform-

[1] Federal Trade Commission, *Proposed Enforcement Policy Statement Regarding Personalized Pricing*, August 19, 2026.

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pricing counterfactual, the uniform price a consumer likely would have faced absent personalization, not against the lowest personalized price offered to another consumer.

3. The final statement should expressly protect bona fide personalized discounts, coupons, loyalty benefits, and similar offers that reduce consumers' effective prices, and it should tailor any disclosure obligation to curing an actual misleading impression, rather than explaining a firm's pricing model or data architecture.

Discussion

I. Personalized Pricing Is Price Discrimination, and Its Welfare Effects Are Ambiguous

The proposal appropriately acknowledges that the extent of personalized pricing is "not well understood" and that its effects on consumers are "unclear."[2] Those concessions should substantially inform the final statement. Personalized pricing is a technologically refined form of price discrimination in which sellers use information about individual consumers to tailor the prices of discounts they offer. Price discrimination can either raise or lower consumer welfare depending on demand, market power, competition, and the available counterfactual.

The basic efficiency point is familiar. A uniform price can exclude consumers whose willingness to pay exceeds marginal cost but falls below the single market price. A seller able to identify more price-sensitive consumers can profitably offer them lower prices, expand output, and reduce deadweight loss by enabling transactions that a uniform price would prevent. Personalized pricing can also intensify rivalry by enabling firms to target discounts at consumers most likely to switch. The United States made essentially these points in its 2018 submission to the Organisation for Economic Co-operation and Development (OECD), concluding that personalized pricing is a form of price discrimination that can enhance competition and that, absent deception or unlawful discrimination, personalization by itself generally does not create a consumer-protection problem.[3] Market-oriented scholarship likewise stresses that competitive structure and the relevant counterfactual matter more than the label "personalized."[4]

Empirical evidence reinforces the need for case-specific analysis. Dubé and Misra found that aggregate consumer surplus declined in their particular experiment, but more than 60 percent of consumers benefited from personalization.[5] Research on Amazon has found individualization of net prices through targeted coupons rather than a simple pattern of individualized surcharges.[6] That is economically important: A policy that makes targeted discounts riskier may induce some sellers to substitute a higher uniform price, harming the very consumers the policy is meant to protect. Mercatus research has therefore cautioned against treating algorithmic price variation as inherently suspect.[7]

[2] FTC, *Proposed Enforcement Policy Statement*, 3–4.
[3] United States, Personalized Pricing in the Digital Era – Note by the United States, OECD Competition Committee, DAF/COMP/WD(2018)140, paras. 2, 14–17 (Nov. 28, 2018).
[4] John M. Yun, "Should We Fear Personalized Pricing?," International Center for Law & Economics, July 14, 2025.
[5] Jean-Pierre Dubé & Sanjog Misra, "Personalized Pricing and Consumer Welfare," 131 *J. Pol. Econ.*, (2023): 131–89.
[6] Rasha Ahmed, Sahar Al Seesi, and Gerardo Ruiz Sánchez, "Do Online Firms Individualize Search Results? An Empirical Analysis of Individualization on Amazon," 17 *J. Theoretical & Applied Electronic Commerce Research* (2022): 1204
[7] Cody Taylor, "The Case for Algorithmic Pricing: Consumer Welfare, Market Efficiency, and Policy Missteps" (Mercatus Policy Brief, Mercatus Center at George Mason University, May 14, 2025).

II. A Consumer's Expectation Does Not by Itself Create a Section 5 Disclosure Duty

The proposal is strongest when it addresses an actual false claim—for example, a merchant that says or clearly implies that everyone is receiving the same price when that is untrue. The legal difficulty arises when the proposal states that a merchant may be acting deceptively whenever a consumer "reasonably believes" a price is static or widely offered and the merchant does not disclose that it is personalized.[8] That formulation risks making the consumer's preexisting belief, rather than the seller's representation or practice, the source of the duty to speak.

That is difficult to reconcile with the Commission's settled FTC Act Section 5 deception framework. The FTC deception policy statement requires a representation, omission, or practice that is likely to mislead a reasonable consumer and is material.[9] The Commission's own decisions distinguish misleading omissions from "pure omissions"—matters about which a seller has said nothing under circumstances that give the silence no particular meaning. In *International Harvester*, the Commission explained that pure omissions are not treated as deceptive merely because consumers may hold erroneous preconceptions; otherwise the concept of deception would expand "virtually beyond limits." The FTC Food Advertising Policy Statement states the same principle: Not all omissions are deceptive, and silence is not deceptive when the circumstances do not give it a misleading meaning.[10]

A displayed price ordinarily communicates a concrete proposition: The consumer may buy the product at that price. It does not necessarily communicate a second proposition that every other consumer at the same time is being offered the identical price. In markets where coupons, loyalty programs, negotiated prices, retention offers, and targeted promotions are common, that broader implication is especially uncertain. If the Commission believes the context of a particular transaction conveys a uniform-price claim, established doctrine allows it to prove that implied claim. Where the implication is not evident from the communication itself, the deception policy statement contemplates extrinsic evidence of how reasonable consumers understand the representation.[11]

The proposal's reliance on *FTC v. Colgate-Palmolive* does not eliminate this distinction. *Colgate-Palmolive* involved a false representation about the relationship between an advertised "special" price and the product's ordinary selling price; it did not hold that a seller must volunteer every material fact a consumer might wish to know about price formation.[12] Nor should the Fair Credit Reporting Act be read to supply a generalized Section 5 disclosure rule. Congress specifically required adverse-action notices when consumer reports are used in covered decisions.[13] That targeted statutory mandate shows why the Commission should be cautious about inferring a comparably detailed duty—disclosure of the fact of personalization, its basis, and the types of data used—from Section 5 alone.

III. Section 5(n) Requires a Real Counterfactual and a Real Accounting of Benefits

The same caution is warranted under unfairness. FTC Act Section 5(n) makes three elements mandatory: substantial injury, lack of reasonable avoidability, and injury not outweighed by

[8] FTC, *Proposed Enforcement Policy Statement*, 5.

[9] Federal Trade Commission, *Policy Statement on Deception*, 103 F.T.C. 174, 175–83 (1984) (appended to In re Cliffdale Associates, Inc.).

[10] In re International Harvester Co., 104 F.T.C. 949, 1058–59 (1984); Federal Trade Commission, *Enforcement Policy Statement on Food Advertising* (1994).

[11] FTC, *Policy Statement on Deception*, 103 F.T.C. at 176–78 (explaining the use of extrinsic evidence for implied claims in appropriate cases).

[12] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 387 (1965), opinion.

[13] Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), statutory text; FTC, *Proposed Enforcement Policy Statement*, 6.

countervailing benefits to consumers or competition. The Eleventh Circuit recently emphasized that all three requirements must be satisfied.[14]

The proposal suggests that a higher personalized price "may" impose substantial injury. Sometimes it may. But the relevant comparison is not necessarily the price offered to a different consumer. It is the price the challenged consumer likely would have faced absent personalization. If a seller would otherwise charge everyone $10, a personalized offer of $7 to one shopper and $11 to another produces a very different welfare picture from a rule that simply treats the $4 spread as injury. The same issue arises with reasonable avoidability: An upfront price that a consumer can compare with alternatives presents a different case from a fee disclosed only after the consumer is locked into a transaction.

The proposal also states that any consumer or competitive benefits from personalized pricing may be realized without concealing its nature. That is an empirical proposition, not a legal axiom.[15] Detailed disclosure mandates can change behavior on both sides of the market. Consumers may strategically mask information to qualify for discounts; firms may respond by reducing targeted offers; and the cost of explaining the "basis" and "types of data" used by complex pricing systems may discourage experimentation. Economic work on personalized discounts and consumer tracking illustrates why firms often deliver personalization through coupons and other lower-price mechanisms.[16] Section 5(n) requires those effects to be examined, not assumed away.

IV. The Final Statement Should Target Deception Without Chilling Discounts

The Commission can protect consumers without creating a de facto prohibition on personalized pricing. The final statement should make clear that the FTC will pursue actual false claims—such as a representation that a price is universally available when it is not, a fictitious "discount," a misleading explanation of why a price was offered, or deceptive collection or use of personal data. But any disclosure remedy should be limited to the information needed to cure the particular misleading impression.

The Commission also should create an enforcement safe harbor, or at least a strong presumption of nonenforcement, for bona fide individualized discounts. That protection could cover a personalized price that is no higher than a bona fide contemporaneous price generally available from the same seller, as well as targeted coupons, opt-in loyalty benefits, and retention offers, absent a separate false or misleading claim. Such a principle would directly address the risk that enforcement uncertainty causes firms to withdraw low-price offers. It would also accord with a broader market-process concern: Rules that make lawful pricing technologies harder to use can reduce experimentation and weaken competition.[17]

Conclusion

The FTC is on solid ground when it insists that sellers tell the truth about prices. It should not, however, transform that principle into a general duty to disclose the mechanics of price formation whenever the Commission believes consumers expect uniform pricing. Established Section 5 deception

[14] 15 U.S.C. § 45(n), statutory text; FTC v. Corpay, Inc., 164 F.4th 807, 839–40 (11th Cir. 2026), opinion.
[15] FTC, *Proposed Enforcement Policy Statement*, 6.
[16] Benjamin Reed Shiller, "Approximating Purchase Propensities and Reservation Prices from Broad Consumer Tracking," 61 *Int'l Econ. Rev.*, no. 847 (2020).
[17] Alden Abbott, "Legal Challenges to Algorithmic Pricing May Undermine Market-Process Improvements," *Truth on the Market*, December 8, 2025.

doctrine requires a deceptive representation, omission, or practice—not simply a consumer preconception. Section 5(n) unfairness doctrine requires proof of net consumer injury after accounting for competitive benefits. A final statement built around those limits, coupled with express protection for individualized discounts, would deter genuine deception and unfairness while preserving price competition and experimentation that can lower prices and expand output.