Before the
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing	Docket No. FTC-2026-1057

COMMENTS OF

National Consumers League
National Consumer Law Center (on behalf of its low-income clients)
Truth in Advertising, Inc.
California Advocates for Nursing Home Reform
Center for Responsible Lending
Community Legal Services in East Palo Alto
Consumer Action
Consumer Federation of America
Consumer Federation of California
Contra Costa Senior Legal Services
Demand Progress Education Fund
Elder Law & Advocacy
Electronic Privacy Information Center (EPIC)
Housing and Economic Rights Advocates
Legal Assistance for Seniors
Mental Health Advocacy Services
National Association of Consumer Advocates
Public Counsel
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Travelers United
The following Consumer Law Advocates, Scholars & Students (CLASS) Network chapters:

- Antitrust, Consumer Protection, and Privacy Law Society, UC Law San Francisco
- Consumer Justice Advocates, Maryland Carey Law
- Consumer Law Advocacy Society, University of California, Irvine School of Law
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Electronically filed via www.Regulations.gov on September 25, 2026

INTERESTS OF THE FILERS

The 27 signatories to this comment share a strong interest in promoting clarity, truthfulness, and transparency in the consumer marketplace. Some signatories are national organizations that represent the public interest and are committed to honest markets, consumers' data privacy, and fair business practices. Others are groups affiliated with the nationwide Consumer Law Advocates, Scholars & Students ("CLASS") Network, a community of law student organizations dedicated to educating the next generation of consumer advocates.[1] All undersigned organizations, on behalf of the communities they represent, have a strong and abiding interest in protecting Americans from manipulative tactics – including unfair or deceptive uses of personalized pricing – as well as in the Federal Trade Commission ("FTC" or "Commission") using its full authority under Sections 5 and 18 of the FTC Act to regulate the use of individualized pricing technologies. Accordingly, we strongly support the FTC taking action to require pre-purchase disclosure of personalized pricing to consumers and we urge the FTC to: (1) make clear that certain uses of personalized pricing may violate Section 5 even when disclosed; (2) address the anti-discrimination and Fair Credit Reporting Act obligations these practices implicate; and (3) withdraw its statements casting doubt on its authority to prohibit personalized pricing.

I. Disclosure is Necessary to Prevent Deception

Consumer advocates strongly support the Commission's proposed view that failing to disclose personalized pricing or misrepresenting associated practices and terms may violate the FTC Act. The proliferation of algorithmic personalized pricing presents several consumer harms. As the Commission has highlighted, many Americans do not even know that their information is being collected, let alone that it can be used to raise the prices they pay.[2] Worse, this practice is increasing across industries that have not historically personalized their prices.

A 2025 study from Groundwork Collaborative, Consumer Reports, and More Perfect Union found that 74% of evaluated grocery items appeared to shoppers at multiple prices on Instacart,

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[1] The CLASS Network is a partnership of the Center for Consumer Law and Economic Justice at U.C. Berkeley Law and the National Association of Consumer Advocates.

[2] "Many Americans do not understand just how much data they generate every second of their lives. Nor do they necessarily understand how those data are collected and stored, to whom they may be sold, or how they may be used—including, potentially, to price products and services uniquely for them on the basis of their intimate details," *from* "Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing," page 3, Federal Trade Commission (Aug. 19, 2026) (hereinafter, "FTC Proposed Personalized Pricing Enforcement Policy"). https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf; "Many consumers today are not actively aware that their devices constantly gather data about them, and that that data can be used to charge them more money for products and services," *from* "Behind the FTC's Inquiry into Surveillance Pricing Practices," Federal Trade Commission (July 23, 2024). https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/07/behind-ftcs-inquiry-surveillance-pricing-practices.

with some items carrying five different price tags in the same store at the same time.[3] That same study found an average difference of 13% between the lowest and highest prices for the same food items, while some shoppers faced up to 23% higher prices compared to the price other consumers paid for the same product.[4] Other major retailers like Kroger and Walmart have also used pricing software fed with consumer data, often collected through loyalty programs, to evaluate consumers' preferences, set rates, and personalize offers.[5]

In short-term lodging, a San Francisco investigative journalist discovered that certain hotel booking sites charged San Franciscans more than travelers from Phoenix or Kansas City for the same hotel stay. In one instance, the San Franciscan was quoted $500 more per night for the same hotel room than a traveler booking from another state.[6] Similarly for air travel, in 2025 Delta Air Lines announced plans to set 20% of its domestic fare pricing via algorithm that would consider data including "customer lifetime value, past purchase behaviors, and 'the real-time context of each booking inquiry.'"[7]

The FTC is not alone in its view that certain personalized pricing practices may be unlawful. After news broke of Delta's plans, Transportation Secretary Sean Duffy, who enforces the U.S. Department of Transportation's ("DOT") authority to prohibit unfair and deceptive practices and unfair methods of competition in air travel, warned airlines that "to try to individualize pricing on seats based on how much you make or don't make or who you are, I can guarantee you that we will investigate if anyone does that….We would engage very strongly if any company tries to use AI to individually price their seating."[8]

Additionally, a growing number of states are taking action to protect their constituents. For example, New York requires the disclosure of personalized pricing[9] and is working toward a prohibition on the practice;[10] Connecticut requires disclosure when personal data is used to set prices and broadly prohibits personalized pricing;[11] and Maryland has passed a law to rein in the

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[3] "Same Cart, Different Price: Instacart's Price Experiments Cost Families at Checkout," Groundwork Collaborative (Dec. 9, 2025). https://groundworkcollaborative.org/work/instacart/.
[4] *Id.*
[5] "Personalizing Price With AI: How Walmart, Kroger Do It," Forbes (Sep. 7, 2021). https://www.forbes.com/sites/bryanpearson/2021/09/07/personalizing-price-with-ai-how-walmart-kroger-do-it/.
[6] "Hotel booking sites show higher prices to travelers from Bay Area," SFGate (Feb. 3, 2025). https://www.sfgate.com/travel/article/hotel-booking-sites-overcharge-bay-area-travelers-20025145.php.
[7] "Airfare by algorithm: Delta leans into AI pricing — but is it a good thing?" The Hill (Jul. 18, 2025). https://thehill.com/regulation/transportation/5407485-delta-air-lines-artificial-intellience-pricing/.
[8] "Secretary Duffy Hosts Press Conference on Unleashing American Drone Dominance," U.S. Department of Transportation, at 21:25 (YouTube, Aug. 5, 2025), https://www.youtube.com/live/iGwZFhUO41U?t=1281s.
[9] "Attorney General James Demands Answers from Instacart about Algorithmic Pricing," Office of the New York Attorney General (Jan. 8, 2026). https://ag.ny.gov/press-release/2026/attorney-general-james-demands-answers-instacart-about-algorithmic-pricing
[10] "Midyear Personalized Pricing Roundup," Frankfurt Kurnit Klein + Selz (Jun. 9, 2026). https://technologylaw.fkks.com/post/102n1er/midyear-personalized-pricing-roundup.
[11] *Id.*

practice for grocery stores.[12] Courts are taking notice, too: a federal district court recently allowed deception claims brought by 38 consumers challenging an insurance company's personalized pricing practices to proceed, largely denying the defendants' motion to dismiss.[13] Public interest advocates agree with the FTC that, "[W]hen consumers walk into a retail store…they reasonably expect the price on the shelf to be the same price offered to any other consumer shopping at the same store at the same time."[14]

II. The FTC Should Clarify That Disclosure is Not Always Sufficient to Prevent Consumer Injury

The proposed policy statement correctly identifies several examples of undisclosed personalized pricing that may violate Section 5. There are, however, many scenarios – including several the proposed statement itself identifies – where disclosure alone would not be sufficient to prevent the consumer injury that Section 5 prohibits.

For example, the Commission's description of a "rideshare company charging a user more for transport to a medical facility on the basis of data suggesting that the user has a life-threatening medical emergency or condition"[15] raises significant concerns regarding substantial injury and unavoidability. In such a scenario, the consumer faces bodily harm or death if they do not pay the inflated fare. In the midst of a medical emergency, they cannot reasonably avoid the injury by taking time to carefully read disclosures or compare prices – and their condition may prevent them from meaningfully processing a disclosure at all.

Prescribing a disclosure regime also assumes there is a competitor available who does not engage in similar predatory practices. What if all major rideshare services adopt the practice of taking advantage of injured or dying consumers after the Commission sanctions the behavior with a disclosure-only policy regime? If one rideshare company is successful in increasing its profits through personalized pricing – even with disclosures – its competitors will face pressure to follow.

Other potential uses of personalized pricing in the FTC's proposal raise similar concerns, including practices that prey on individuals who are unable to leave their homes, parents with

[12] "Maryland Passes First Law in U.S. Banning Personalized Pricing in Grocery Stores," Consumer Reports (Apr. 28, 2026). https://www.consumerreports.org/money/grocery-stores-supermarkets/maryland-passes-first-law-in-us-banning-personalized-pricing-a3386234932/.
[13] In re Allstate & Arity Consumer Privacy Litigation, Master Docket No. 25 CV 407, 2026 WL 594708 (N.D. Ill. Mar. 3, 2026).
[14] FTC Proposed Personalized Pricing Enforcement Policy, p. 2. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf.
[15] *Id.* p. 8.

several children, and consumers traveling for "can't-miss personal business."[16] In each scenario, disclosure is necessary but likely insufficient to prevent harm.

The FTC correctly states that a "higher price paid by a consumer due to personalized pricing may be a substantial injury."[17] The Commission continues: "[C]onsumers may not be able to avoid paying the higher personalized price if they lack the information or tools necessary to, among other things, modify their behavior to avoid triggering higher prices, dispute or correct inaccurate information collected about them that is leading to higher prices, or avoid the collection of that data in the first place."[18] Disclosure supplies none of these tools. Absent a comprehensive federal data privacy law, consumers in most of the American economy may have no guaranteed right to access, correct, or delete the data used to price them – so even a fully informed consumer often cannot avoid the higher price.

Other regulators have recognized that disclosure is an inadequate remedy for these kinds of practices. Secretary Duffy's warning to airlines against personalized pricing, discussed above, offered no exemption for carriers that disclose the practice. And since 2014, DOT has made clear that consumers' ability to shop anonymously must be preserved, and that personalized fare offers are subject to its prohibition on unfair or deceptive practices and unfair methods of competition.[19] Airlines cannot simply disclose that they require personal information to determine prices; carriers must offer non-personalized pricing.[20]

The Commission should make clear that while disclosure of personalized pricing is necessary to prevent consumer deception, there are situations in which disclosure alone may be insufficient to avoid consumer injury. As a result, the FTC may still pursue enforcement action to remedy significant harms.

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[16] *Id.*
[17] *Id.* at 6.
[18] *Id.*
[19] "We want to make clear our determination that consumers' ability to shop anonymously must not be undermined as new data standards and distribution practices are implemented, whether as a function of an industry agreement on data standards and protocols or through implementation of such standards by individual airlines and ticket agents. Our tentative approval of IATA's agreement, as conditioned, should not be construed as approval for individual airlines to require disclosure of personal data. An airline may request data necessary to identify on whose behalf a request is being made, but providing such information cannot be mandatory in order to receive an airfare or ancillary product offer." *from* Order to Show Cause, U.S. Dep't of Transp., Order 2014-5-7, Docket DOT-OST-2013-0048 (May 21, 2014). https://www.transportation.gov/sites/dot.gov/files/docs/IATA_Res_787_showcause.pdf#page=13. The tentative findings and conditions were finalized shortly after. *See* "2014-8-1 Final Order," U.S. Dep't of Transp, Docket DOT-OST-2013-0048 (Aug. 6, 2014). https://www.regulations.gov/document/DOT-OST-2013-0048-0459.
[20] Furthermore, DOT finalized a rule in 2024 that, among other things, explicitly prohibited as unfair or deceptive the failure to provide anonymous shopping. The rule has since been vacated on procedural grounds, yet DOT maintains its requirement for anonymous shopping as a matter of enforcement policy. *See* "Enhancing Transparency of Airline Ancillary Service Fees," U.S. Department of Transportation (Apr. 30, 2024). https://www.federalregister.gov/documents/2024/04/30/2024-08609/enhancing-transparency-of-airline-ancillary-service-fees#p-554.

III. The FTC Should Consider Potential Violations of Anti-Discrimination Law in Personalized Pricing Enforcement Actions

The proposed policy statement posits several alarming scenarios[21] that may violate Section 5, including:

- "A food delivery company quoting a higher price to consumers on the basis of data personal to those consumers that lead the company to believe they are less likely or unable to leave their homes to purchase food,"
- "A grocery chain charging a delivery customer a higher price for milk based on data showing that several children live in the customer's household,"
- "A retailer charging more for a home-security camera system based on court filings indicating a particular customer has recently been the victim of a crime," and
- "A rideshare company charging a user more for transport to a medical facility on the basis of data suggesting that the user has a life-threatening medical emergency or condition."

The Americans with Disabilities Act ("ADA") prohibits discrimination against consumers with disabilities in public accommodations.[22] Charging higher prices on the basis of data that a consumer is "less likely or unable to leave their home[]" or "has a life-threatening medical emergency or condition" raises serious concerns under federal disability law. Should the Commission seek enforcement action under the FTC Act against conduct resembling these examples, the Commission should coordinate with the U.S. Department of Justice to address potential ADA violations as well.

Many states also protect broader classes from discrimination compared to federal law. For example, some jurisdictions prohibit discrimination in public accommodations based on familial status.[23] Others ban prejudicial treatment in housing due to a consumer's status as a victim of certain crimes.[24] Should the FTC investigate conduct similar to the examples highlighted above relating to a consumer living with "several children," or charging more for "a home-security camera system" because a consumer "has recently been the victim of a crime," the Commission should consider joint action with state enforcement authorities.

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[21] FTC Proposed Personalized Pricing Enforcement Policy, pp. 7-8. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf.

[22] 28 CFR § 36.201(a). https://www.ecfr.gov/current/title-28/chapter-I/part-36/subpart-B.

[23] *E.g.* Pennsylvania Human Relations Act, § 3. https://www.palegis.us/statutes/unconsolidated/law-information/view-statute?txtType=HTM&yr=1955&sessInd=0&smthLwInd=0&act=222&chpt=0&sctn=3&subsctn=0; D.C. Code § 2–1401.01 et seq. https://code.dccouncil.gov/us/dc/council/code/titles/2/chapters/14.

[24] *E.g.* D.C. Code § 2–1401.01 et seq. https://code.dccouncil.gov/us/dc/council/code/titles/2/chapters/14.

That many uses of personalized pricing may violate anti-discrimination statutes and state consumer protection laws[25] underscores that disclosure alone is often insufficient to prevent injury. A business disclosing its higher prices for individuals with disabilities is still discriminating; the only lawful course of action is to not discriminate. Likewise, a bus company advertising higher fares for residents fleeing a wildfire would likely face scrutiny from local regulators because disclosure does not cure such an egregious practice.

IV. The FTC Should Include a Discussion of FCRA Implications in the Policy Statement

The FTC correctly notes that any personalized pricing based on a consumer report would trigger the consumer protections of the Fair Credit Reporting Act ("FCRA"). In particular, the seller would be required to provide an adverse action notice to the consumer under 15 U.S.C. § 1681m(a). An adverse action is defined in part as "an action taken or determination that is— (I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, …; and (II) adverse to the interests of the consumer."[26] Charging a consumer a higher price, based on a consumer report, for a purchase the consumer initiated falls squarely within that definition.

The FCRA's coverage is broad and not limited to credit reports. The law reaches reports used for employment background checks, bank account screening (e.g., ChexSystems/Early Warning Services), tenant screening, and a host of other purposes. The Consumer Financial Protection Bureau ("CFPB") has issued a non-exclusive list of consumer reporting agencies ("CRAs"), which shows the vast range of companies and information covered under the FCRA.[27]

Any seller that uses consumer report information from a CRA – whether or not the CRA is on the CFPB list – must provide an adverse action notice. For example, one of the companies on the CFPB list is "The Retail Equation," which "[m]onitors and reports to merchants retail product return and suspected exchange fraud and abuse."[28] A seller that charged a higher price to a consumer based on a Retail Equation report would be required to provide an adverse action notice.

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[25] Forty-four (44) states and territories prohibit price gouging. Most of these policies apply to business practices taking advantage of consumers in connection to a natural disaster or similar state of emergency, but some states like Ohio and Michigan prohibit significant price disparities generally (without a predicating disaster necessary). *See* "Price Gouging State Statutes," National Conference of State Legislatures (Jan. 21, 2025). https://www.ncsl.org/financial-services/price-gouging-state-statutes.

[26] 15 U.S.C. § 1681a(k)(1)(B)(iv). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap41-subchapIII-sec1681a.pdf.

[27] "List of Consumer Reporting Agencies," Consumer Financial Protection Bureau (2025). https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies_list_2025.pdf.

[28] *Id.* at 42.

We urge the FTC to address the adverse action notice requirement in the final policy statement. Doing so is well within the FTC's jurisdiction, given that the Commission has primary FCRA enforcement authority over users that are not "covered persons" under the Dodd-Frank Act, including certain retail sellers.[29]

Finally, the FTC should state that retail sellers do not have a legitimate business need to use certain types of consumer reports for personalized pricing. The FCRA permits users to obtain a consumer report "in connection with a business transaction that is initiated by the consumer," but only if the user has a "legitimate business need for the information."[30] Retail sellers should not be permitted to use such information to set personalized prices for non-financial products, *e.g.*, credit report data from the Big Three credit bureaus or bank account data from ChexSystems or Early Warning Services. Consumers should not be charged a higher price for groceries or gas because they have a subprime credit score or a low bank balance.

V. The FTC's Statements About the Limits of Its Authority Undermine Its Goal of Limiting Unfair or Deceptive Personalized Pricing Schemes

The undersigned organizations commend the FTC's commitment to vigorously enforcing Section 5 against deceptive or unfair personalized pricing practices. However, the Commission should remove its statements that "Congress has not given the Commission the authority to prohibit personalized pricing in all circumstances" or "the authority to prohibit personalized pricing outright."[31]

These statements about the outer limits of the FTC's authority are unnecessary to explain the Commission's enforcement priorities. In fact, the Commission's claim that it may not have authority to prohibit personalized pricing under Section 5 may weaken consumers' ability to challenge personalized pricing more than if the Commission was silent on the extent of its authority. Furthermore, the agency's position conflicts with how Congress and the courts have understood the Commission's authority.

The FTC Act authorizes the Commission to prescribe rules that "define with specificity acts or practices which are unfair," including rules "prescribed for the purpose of preventing such acts or practices."[32] Under this authority, the Commission may categorically prohibit certain unfair practices that are (1) likely to cause substantial injury to consumers, (2) not reasonably avoidable

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[29] 15 U.S.C. § 1681s(a). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap41-subchapIII-sec1681s.pdf

[30] 15 U.S.C. § 1681b(a)(3)(F). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap41-subchapIII-sec1681b.pdf

[31] FTC Proposed Personalized Pricing Enforcement Policy, pp. 1, 4. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf

[32] 15 U.S.C. § 57a(a)(1)(B). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap2-subchapI-sec57a.pdf.

by consumers themselves, and (3) not outweighed by countervailing benefits to consumers or to competition.[33]

The Supreme Court and lower courts have long interpreted the Commission's unfairness authority as a broad and intentionally flexible mandate.[34] Likewise, the Commission has described the unfairness provision as a "dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy."[35] The Commission's Policy Statement on Unfairness explains that the unfairness provision 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."[36]

By circumscribing the outer limits of the Commission's authority, the proposed policy statement undermines the flexibility Congress intended to preserve. Businesses may read these delimiting statements as ratifying practices that, even if permissible today, may soon become prohibited as data-driven pricing evolves. Such an outcome serves neither consumers, nor businesses, whose reliance on the statement would be misplaced if the Commission later adopts categorical prohibitions.

The statement as drafted would also needlessly put a thumb on the scale against consumers who challenge personalized pricing under state unfair and deceptive practices statutes. And as more information becomes available about personalized pricing, the Commission may conclude that the practice does violate Section 5 regardless of disclosure, and would then have to retract its earlier statement.

There is no indication that a broad prohibition on personalized price increases would exceed the Commission's rulemaking authority. Courts have affirmed the FTC's broad authority to prohibit certain commercial practices as categorically unfair.[37] Personalized pricing could likewise

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[33] 15 U.S.C. § 45(n). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap2-subchapI-sec45.pdf; *see also* "FTC Policy Statement on Unfairness," Federal Trade Commission (Dec. 17, 1980). https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness

[34] *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310 (1934) ("Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories.") https://www.supremecourt.gov/pdfs/USReports/USREPORTS-291_PDFA.pdf#page=368; *see also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) ("[T]he Commission has broad powers to declare trade practices unfair."). https://www.supremecourt.gov/pdfs/USReports/USREPORTS-405_PDFA.pdf#page=385; *see also National Petroleum Refiners Ass'n v. FTC.*, 482 F.2d 672, 685 (D.C. Cir. 1973) (While the "Commission's power to proscribe conduct it deems harmful to the consumer or to competition are not clearly defined, they are indeed expansive.").

[35] *In Re Pfizer Inc.*, 81 F.T.C. 23, 61 (1972) ("[A]s consumers products and marketing practices change in number, complexity, variety, and function, standards of fairness to the consumer may also change.").

[36] "FTC Policy Statement on Unfairness." https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[37] *See*, *e.g.*, *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 962 (D.C. Cir. 1985).

qualify as categorically unfair, either now or in the future. Indeed, DOT appears to have taken a categorical approach to prohibiting personalized pricing under its authority to prohibit unfair and deceptive practices and unfair methods of competition. And the case for a broad prohibition will only grow as invasive pricing technology becomes more pervasive and sophisticated.

Moreover, there is good reason to believe that courts would uphold a broad prohibition on personalized price hikes under the three established elements of the Commission's unfairness authority.[38] The first and most important requirement of the unfairness authority is that the practice cause substantial injury to consumers.[39] The Commission's Policy Statement on Unfairness treats monetary harm as the paradigmatic example of a substantial injury.[40] Accordingly, consumers who are overcharged based on personal data suffer precisely that injury – even if they received meaningful notice of the personalized price.[41]

Second, the costs incurred from personalized pricing are not outweighed by countervailing benefits to consumers or to competition.[42] As the proposed policy statement notes, there has been minimal research into the net effect of personalized pricing.[43] Still, the Commission is right to conclude that the "more sophisticated personalized pricing practices become, the less likely consumers are to benefit" in the aggregate.[44] Indeed, scholars have argued that advancements in the accuracy of pricing algorithms will only increase the ability of incumbent businesses to extract surpluses at the expense of consumers and competition.[45] In light of these significant and actively evolving long-term costs, it seems prudent for the Commission to refrain from speculating about the outer limits of its authority.

Finally, consumers cannot reasonably avoid personalized pricing.[46] As the Commission rightly notes, many consumers do not understand how their personal data is used "to price products and

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[38] *See* 15 U.S.C. § 45(n). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap2-subchapI-sec45.pdf
[39] "FTC Policy Statement on Unfairness." https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness
[40] *Id.* (emphasizing economic harm and recognizing that an injury may be sufficiently substantial "if it does a small harm to a large number of people or if it raises a significant risk of concrete harm").
[41] *See*, *e.g.*, *Am. Fin. Servs. Ass'n*, 767 F.2d at 978 (upholding a rule prohibiting certain creditor practices as categorically unfair and rejecting the argument that substantial consumer injuries are limited to those caused by "deception, coercion, or withholding of material information").
[42] *See* 15 U.S.C. § 45(n). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap2-subchapI-sec45.pdf
[43] FTC Proposed Personalized Pricing Enforcement Policy, pp. 3, 4. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf.
[44] *Id.* at 4.
[45] *See*, *e.g.*, Lauren E. Knudson, *Stalking in the Grocery Aisles: Using Section 5 of the FTC Act to Curtail Big Data Driven Price Discrimination*, 107 Iowa L. Rev. 1283, 1305 (2022) (noting that price discrimination may advantage some consumers in the short term but will disadvantage all consumers in the long term because "price discrimination allows monopolies to get larger, most likely resulting in decreased innovation and options").
[46] *See* 15 U.S.C. § 45(n). https://www.govinfo.gov/content/pkg/USCODE-2024-title15/pdf/USCODE-2024-title15-chap2-subchapI-sec45.pdf

services uniquely for them."[47] Although disclosure may mitigate this problem, it cannot rectify other structural barriers to meaningful notice and choice. For example, personalized pricing could soon predominate in certain sectors, giving consumers no choice but to purchase products at a higher price.[48] Even a moderate expansion of personalized pricing would significantly increase the time and resources required to avoid such practices.[49] Because artificially inflated costs will limit the "free exercise of consumer decisionmaking," the Commission has authority to regulate such practices.[50]

Other regulators in the Trump-Vance Administration appear to read a general prohibition on unfair or deceptive practices as broad enough to support a ban on personalized pricing. Transportation Secretary Duffy, who enforces those same prohibitions for air travel, unequivocally promised to "engage very strongly" against airlines that personalize prices, without any safe harbor for disclosed uses. And the FTC's authority is, in some respects, more expansive than the Transportation Department's. The FTC Act prohibits unfair or deceptive acts or practices, while DOT's statute only covers unfair and deceptive "practices" (not "acts").[51] Given the Commission's broader mandate, its authority to match the policy that applies to air travel should be clear.

For these reasons, the undersigned organizations urge the Commission to endorse a broader vision of its authority – consistent with Congressional intent and the text of Section 5 – that allows its enforcement policies to adapt to the rapidly changing risks of an invasive pricing economy. At a minimum, the Commission should remove the statements suggesting that it does not have the authority to prohibit personalized pricing "outright" and "in all circumstances."[52]

VI. Conclusion

[47] FTC Proposed Personalized Pricing Enforcement Policy, p. 3. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf

[48] *See* Alexander MacKay & Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response*, 100 Wash. U.L. Rev. 111, 112–13 (2022) (explaining that all consumers will be charged a supracompetitive price when a sector is controlled by personalized pricing and noting that pricing algorithms are "becoming an increasingly common feature of many markets."); *see also Am. Fin. Servs. Ass'n*, 767 F.2d at 977 (recognizing that consumer choice is frustrated where consumers have limited "ability or incentive" to look for alternative options).

[49] *See* Luke Herrine, "Unfairness, Reconstructed," 42 Yale J. on Reg. 95, 151 (2025) ("[C]onsumers always have a limited amount of information, a limited ability to make sense of it, and a limited amount of time and attention to process all the information that is available."); *see also* Rory Van Loo, "Helping Buyers Beware: The Need for Supervision of Big Retail," 163 U. Pa. L. Rev. 1311, 1371 (2015) ("[T]he consumer must decide between either paying more money or spending more time. A choice between two harms does not involve 'reasonably avoidable' harm.").

[50] "FTC Policy Statement on Unfairness." https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness; *see also Am. Fin. Servs. Ass'n*, 767 F.2d at 977 (recognizing that meaningful consumer choice is frustrated where consumers have limited "ability or incentive" to look for alternative options).

[51] 49 U.S.C. § 41712.https://www.govinfo.gov/content/pkg/USCODE-2024-title49/pdf/USCODE-2024-title49-subtitleVII-partA-subpartii-chap417-subchapI-sec41712.pdf.

[52] FTC Proposed Personalized Pricing Enforcement Policy, pp. 1-4. https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf

Commission action to limit the harms resulting from personalized pricing will provide immense benefit to the American public. The undersigned public interest organizations appreciate the FTC's attention to this critical consumer protection issue and support the use of its authority to rein in this growing problem.

Respectfully submitted,

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On behalf of:

National Consumers League
National Consumer Law Center (on behalf of its low-income clients)
Truth in Advertising, Inc.
California Advocates for Nursing Home Reform
Center for Responsible Lending
Community Legal Services in East Palo Alto
Consumer Action
Consumer Federation of America
Consumer Federation of California
Contra Costa Senior Legal Services
Demand Progress Education Fund
Elder Law & Advocacy
Electronic Privacy Information Center (EPIC)
Housing and Economic Rights Advocates
Legal Assistance for Seniors
Mental Health Advocacy Services
National Association of Consumer Advocates
Public Counsel
Public Law Center
Travelers United
The following Consumer Law Advocates, Scholars & Students (CLASS) Network chapters:

- Antitrust, Consumer Protection, and Privacy Law Society, UC Law San Francisco
- Consumer Law Association, The George Washington University Law School

[53] With gratitude to April Kuenhoff and Chi Chi Wu at the National Consumer Law Center for their drafting assistance.

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