



September 25, 2026

The Honorable April J. Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Re: Proposed Enforcement Policy Statement Regarding Personalized Pricing, Docket No. FTC-2026-1057

Introduction

On August 19, 2026, the Federal Trade Commission published on its website a Proposed Enforcement Policy Statement Regarding Personalized Pricing.¹ The Commission acknowledges in the Proposed Statement that “[t]he extent to which businesses currently use personalized pricing is not well understood,” and that its effects on consumers are unclear.² The Commission also acknowledges that very few firms could actually use personalized pricing to raise prices to affected consumers above competitive levels, because “in the vast majority of circumstances, [firms must] contend with competitive pressures that limit pricing power.”³ In addition, the Commission acknowledges that it lacks the authority to prohibit personalized pricing in all circumstances, but states that where consumers reasonably expect prices not to vary based on their personal data, a business should clearly and conspicuously disclose that the price is personalized, the basis for the personalization, and the types of data on which it is based.⁴ The Commission suggests that the “failure to make these disclosures is likely to constitute an unfair or deceptive act or practice in violation of Section 5” of the Federal Trade Commission Act,⁵ but also expressly declines to rule out characterizing “some personalized pricing practices [as] unfair even when fully disclosed to consumers.”⁶ The Commission also describes seven “examples of scenarios in which personalized pricing without adequate disclosure would raise Section 5 concerns”;⁷ it is important to note, however, that all seven postulated scenarios are described as leading to *higher* prices for the affected consumers.

International Franchise Association

The International Franchise Association (“IFA”) appreciates the opportunity to comment on the Proposed Statement. IFA is the largest organization representing franchising. Its members include franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, human resources, business development, and operations. Franchising serves as an engine for economic growth, contributing an estimated \$907.3 billion in economic output and providing an estimated 8.8 million direct jobs in 2025 across the more than 830,000

¹ [Federal Trade Commission’s Proposed Enforcement Policy Statement Regarding Personalized Pricing](#) (August 19, 2026) (hereinafter [Proposed Statement](#)).

² [Proposed Statement](#), slip op. at 3.

³ [Proposed Statement](#), slip op. at 4.

⁴ [Proposed Statement](#), slip op. at 1.

⁵ [Proposed Statement](#), slip op. at 1.

⁶ [Proposed Statement](#), slip op. at 6 n.20.

⁷ [Proposed Statement](#), slip op. at 7-8.

franchised establishments operating in the United States.⁸ When considering the significant impact of franchised businesses on the U.S. economy, it is imperative to recognize that franchising is small. Approximately half of the U.S. franchised businesses are operated by franchisees owning a single unit.⁹ These small business owners hire local workers, serve local consumers, support local families and invest in local communities. Often, these small businesses are the first casualties of broad, sweeping regulations that fail to appropriately consider the disparate impact of compliance costs on small businesses, and those casualties have real consequences to local communities across America, including lost job opportunities, less competition resulting in higher prices and fewer consumer choices, and fewer local businesses investing back into the community. As is often the case, small businesses are disproportionately affected by regulations, compared to larger firms that have the legal and executive firepower to navigate difficult administrative and operational changes.

Background

It is important to recognize that personalized pricing is a long-established norm in many markets. Indeed, from time immemorial, retailers have offered discounts from listed prices in literally thousands of different ways – and frequently based on consumer expectations and consumer behavior – in order to persuade consumers to purchase their products and services. In the Commission case that led to *Sperry & Hutchinson v. FTC*, for example, the Commission considered the operation of a particularly complex personalized pricing system, the S&H Green Stamp system, and challenged efforts by S&H “to prevent or suppress the operation of trading stamp exchanges and other free and open redemption of trading stamps,” including by retailers not permitted to carry S&H stamps.¹⁰ As the Supreme Court summarized on appeal from the Commission decision:

S&H has been issuing trading stamps-small pieces of gummed paper about the size of postage stamps-since 1896. In 1964, the year from which data in this litigation are derived, the company had about 40% of the business in an industry that annually issued 400 billion stamps to more than 200,000 retail establishments for distribution in connection with retail sales of some 40 billion dollars. . . .

In the normal course, . . . S&H sells its stamps to retailers, primarily to supermarkets and gas stations, . . . retailers give the stamps to consumers . . . as a bonus for their patronage; [and] consumers paste the stamps in books of 1,200 and exchange the books for “gifts” at any of 850 S&H Redemption Centers maintained around the country. . . . Since its development of this cycle 75 years ago, S&H has sold over one trillion stamps and redeemed approximately 86% of them.¹¹

On remand from the Supreme Court, the Commission approved a consent order settling some of the allegations in the administrative complaint. Commissioner Mary Jones dissented from that decision because in her view it was inconsistent with the Commission’s original opinion finding liability:

In its original opinion in this case, the Commission took the position that the free exchange and redemption of trading stamps are important both to consumers and to competing retailers and that [S&H’s] efforts to suppress the free redemption and exchange of stamps lessens consumers’ freedom of choice. The Commission’s original order, therefore, directed S&H to cease and desist

⁸ Alka Sinha, Khadija Cochinwala & Jin Wang, 2026 FRANCHISING ECONOMIC OUTLOOK 4 (INT’L FRANCHISE ASS’N 2026), <https://www.franchise.org/franchising-economic-outlook/>.

⁹ See 2023 Mega 99 Rankings, MULTI-UNIT FRANCHISEE MAGAZINE ISSUE 1 (2023), https://www.franchising.com/articles/2023_mega_99_rankings.html.

¹⁰ *In the Matter of Sperry & Hutchinson Company*, 73 F.T.C. 1099, 1165 (1968).

¹¹ *Federal Trade Commission v. Sperry & Hutchinson Company*, 405 U.S. 233, 236 (1972) (hereinafter *S&H*).

from impeding the free transferability of trading stamps and from attempting in any way to suppress the free and open redemption or exchange of stamps by retailers or stamp exchanges.¹²

Of course, the theoretical degree to which pricing can be personalized has expanded dramatically with the advent of the Internet, cell phones, computer applications, and other technological mediums and devices too numerous to mention. Nevertheless, the Commission should still be guided in this proceeding by the sentiment it enunciated in the *S&H* case; that is, it should refrain from imposing any requirements, with respect to personalized pricing (or with respect to any other type of pricing, for that matter) that in any way lessen consumers' freedom of choice, and lessen the ability of retailers to compete for business by offering discounts, whether personalized or generally available.

Summary of Argument

For the reasons detailed in this Comment, IFA respectfully urges the Commission to withdraw the Proposed Statement and terminate this proceeding. If the Commission instead determines to continue this proceeding, it should, as discussed below, do so through a notice and comment procedure that includes a rigorous review of all relevant evidence. In particular, the Commission should first develop as much information as possible regarding the legal, economic, and policy considerations presented by personalized pricing in its many forms, either through a study under Section 6(b) of the FTC Act or by issuing a Request for Information, with a particular focus on the franchising sector. The Commission should then conduct a notice and comment proceeding, analogous to the procedures prescribed for rulemaking by the Administrative Procedure Act, including preparing a Regulatory Flexibility Act small business analysis, in order to create a comprehensive record as to whether, and if so in what respects, an Enforcement Policy Statement addressing personalized pricing should be issued.

At the conclusion of this process, if the Commission determines to issue a revised version of the Proposed Statement, it should adhere to the following fundamental principle: personalized pricing which does not increase the price that an affected consumer pays above the price paid by other consumers in the same venue at the same time cannot be characterized as an unfair or deceptive act or practice that violates Section 5 of the FTC Act. The Proposed Statement implicitly endorses this standard, inasmuch as all the examples of purportedly undesirable personalized pricing it identifies *increase* the prices that affected consumers pay. Moreover, any revised version of the Proposed Statement should expressly state that it does not apply to loyalty discounts, promotional discounting, customized incentives, behavioral offers, or any other practices that lower prices to consumers. It should likewise confirm that it does not reach loyalty programs in which consumers have affirmatively enrolled and whose offers, rewards, and discounts reflect the consumer's own repeated interactions with the brand, and it should make clear that the Commission's concerns are directed at the augmentation of a business's records with data purchased from data brokers and other third parties, rather than at first-party data generated through a consumer's direct relationship with the business or franchise system. In addition, it should key the disclosure trigger for personalized pricing that increases prices for affected consumers to inferred sensitive characteristics, vulnerability, or the absence of practical alternatives, rather than to any use of consumer data.

Any revised version should also differ in at least the following more specific respects from the Proposed Statement. First, it should expressly define "personalized pricing" to refer to price differences among individual consumers, but not to price differences among firms such as franchisees, or among different geographic locations. Second, it should adopt the exclusions from disclosure obligations common to enacted state laws that currently address personalized pricing, including voluntary enrollment programs, bona fide status-based discounts, and cost-justified differentials. Third, it should recognize the significance of third-party marketplace pricing and multi-party licensing structures, and place the responsibility for

¹² [*In the Matter of Sperry & Hutchinson Company*](#), 83 F.T.C. 478, 479 (1973) (Jones, Commissioner, dissenting).

making any required disclosures on the party which sets and personalizes the prices that affected consumers pay. Fourth, it should include model disclosure language and a safe harbor available to any party which makes disclosures in good faith, based on the information reasonably available to it; specify the components of disclosure content rather than mandate particular wording; and permit any required disclosures to be layered to include both a short-form notice in conjunction with the offer at issue and a detailed explanation in the program terms. And finally, it should expressly state – contrary to the statement in footnote 20 of the Proposed Statement – that if a firm fully discloses to affected consumers the personalized pricing practices it has used to set their prices, those practices cannot nevertheless be characterized as unfair.

The remainder of this Comment discusses these and other legal, economic and policy problems arising from the Proposed Statement in more detail.

Definitional Concerns

The Proposed Statement uses one term for three distinct practices; however, only the first could ever conceivably serve as the basis for liability under the FTC Act or any other statute the Commission enforces. The first practice, upward personalization, raises the price an affected consumer pays above the price paid by all other consumers purchasing the product or service at issue in the same venue at the same time. This is the conduct which the Commission’s examples describe, and IFA does not defend this practice, although, as detailed below, efforts to prevent it may on balance actually injure both competition and consumers. The second practice, discounts from a posted price, includes loyalty rewards, coupons, and promotional offers for consumers who therefore pay less than the publicly offered price. The third practice, demand-based and revenue-management pricing, includes hotel rates, daypart pricing, and similar models that vary with market conditions rather than with the identity of the buyer.

If the Commission ultimately determines to issue a revised version of the Proposed Statement, that Statement should expressly state that it only applies to the first category of practices (i.e., to personalized pricing practices that actually increase the price that affected consumers pay above the price offered to any other consumer shopping in the same venue at the same time) and expressly does not apply to the second and third categories, or to any other type of personalized pricing that does not increase the prices that affected consumers pay.

In particular, a revised Statement should make clear that it does not apply to discounts, coupons, rewards, or other offers that result in a price lower than the base price at which the business offers the product or service to the public generally, however the Commission ultimately defines that price as discussed below. The Proposed Statement is concerned with the use of personal data to charge consumers more, and IFA shares the Commission’s interest in ensuring that consumers are not exploited in that way. Discounts and offers, however, benefit the consumers who receive them, and they are among the most common ways in which franchised small businesses compete for customers in their local markets. A Statement written broadly enough to be read to include them would discourage businesses from offering them, and the consumers the Commission seeks to protect would bear the cost in the form of fewer and less generous offers.

The Proposed Statement also does not define either the term “personalized pricing” or the “price” against which any increase in the price an affected consumer must pay should be measured, and while the Commission has previously defined “price” in a number of different contexts, it is not clear which definition of price, if any, should apply. The Guides Against Deceptive Pricing, for example – which suggest at length when a firm, in a variety of different circumstances, can describe a particular price as a “lower price” – illustrate the difficulty of determining which “price” might be relevant to establishing whether a

personalized price actually leads to a consumer paying a higher price than might otherwise be the case.¹³ Similarly, the Guide Concerning Use of the Word “Free” and Similar Representations defines “regular price” as the price

in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in the geographic market or trade area in which he is making a “Free” or similar offer in the most recent and regular course of business, for a reasonably substantial period of time, i.e., a 30-day period. For consumer commodities which fluctuate in price, the ordinary and customary price shall be the lowest price at which any substantial sales were made during the aforesaid 30-day period.¹⁴

Additionally, the Regulations Under Section 5(C) of the Fair Packaging and Labeling Act define “ordinary and customary” prices and “regular” prices as

the price at which a consumer commodity has been openly and actively sold in the most recent and regular course of business in a particular market or trade area for a reasonably substantial period of time, i.e., a 30-day period. For consumer commodities which fluctuate in price, the ordinary and customary price shall be the lowest price at which any substantial sales were made during the aforesaid 30-day period.¹⁵

Finally, the Rule on Unfair or Deceptive Fees defines “total price” as

the maximum total of all fees or charges a consumer must pay for any good(s) or service(s) and any mandatory ancillary good or service, except that government charges, shipping charges, and fees or charges for any optional ancillary good or service may be excluded.¹⁶

Given the significant definitional uncertainty surrounding the term “personalized pricing” and the term “price,” if the Commission determines to issue a revised version of the Proposed Statement, it should expressly define both terms.

Loyalty Programs and Promotional Discounting Should Not Be Covered

Programs that reward consumers with discounts for their continued loyalty in purchasing a particular product or service – or for installing applications on their electronic devices and using them to order products or services – are standard across franchised quick-service restaurants, coffee, hospitality, fitness, and retail services (among others), and the underlying practice long predates the technology. Coupons, punch cards, and points redemption have offered different prices to different consumers for decades, as the Commission’s *S&H Green Stamps* case from the 1960s illustrates, and consumers who take advantage of these programs do not expect that every buyer pays the same amount. In particular, enrollment in such programs requires consumers to take affirmative steps; program terms are published; and a

¹³ [Guides Against Deceptive Pricing](#), 16 C.F.R. Part 233 (2026).

¹⁴ [Guide Concerning Use of the Word “Free” and Similar Representations](#), 16 C.F.R. § 251.1(b)(2) (2026). These two industry guides are not binding; they are rather “administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.” [Application of Guides In Preventing Unlawful Practices](#), 16 C.F.R. Part 17 (2026).

¹⁵ [Regulations Under Section 5\(C\) of the Fair Packaging and Labeling Act](#), 16 C.F.R. § 502.2(c) (2026).

¹⁶ [Rule on Unfair or Deceptive Fees](#), 16 C.F.R. § 464.1 (Definitions) (2026).

consumer who joins a rewards program in order to receive better prices reasonably does not expect their price to match a non-member's price. Moreover, injury from such programs is completely avoidable, where enrollment is voluntary, the terms required to secure the discounts at issue are disclosed, and any member may at any time decline any offer and instead pay the posted price. Furthermore, personalized pricing programs that lower prices for affected consumers (that is, provide discounts from posted prices) of course can never cause any injury whatsoever, much less the substantial injury required in order to establish that a particular act or practice is unfair under Section 5 of the FTC Act. Indeed, the Proposed Statement's discussion of unfairness expressly assumes that the personalized price is the higher price and does not address personalized pricing which lowers the prices consumers pay.

The Proposed Statement also suggests that "telling a consumer only that he is being shown a 'specially selected' price, for example, would likely be misleading because it omits important information."¹⁷ However, describing offered prices in this way is the ordinary language of local marketing and promotional discounting, and it can never constitute an unfair act or practice if the price an affected consumer pays is not higher than the price paid by other consumers in the same venue at the same time. Nevertheless, the Proposed Statement, in footnote 20, declines to expressly confirm that fully disclosed personalized pricing practices are not unfair. That means full compliance with whatever disclosure obligations a revised version of the Proposed Statement might impose would still leave firms and their brands exposed to possible liability, and that in turn will chill the loyalty programs that small franchisees fund through brand fund contributions. To address these concerns, any revised version of the Proposed Statement should confirm that the Commission's concern is limited to concealed upward personalization (i.e., personalized pricing that increases the prices that affected consumers pay above the prices paid by other consumers in the same venue at the same time) and should withdraw the footnote 20 reservation.

For the same reasons, a revised Statement should expressly confirm that it does not apply to loyalty programs in which the offers, rewards, or discounts a consumer receives are based on that consumer's repeated interactions with the business, and in which the consumer has affirmatively opted in. Tailored experiences built on a consumer's direct relationship with a brand benefit both the consumer and the business. The consumer receives offers that reflect what he or she actually buys, and the franchisee, which typically funds and honors those offers at the unit level, earns repeat business in a market where the consumer remains free to shop elsewhere. Subjecting these programs to a burdensome regulatory framework would discourage the very relationships that allow small franchised businesses to compete with larger rivals. An express exclusion would also align federal policy with the approach the States have already taken. The comprehensive privacy statutes enacted in a number of States expressly permit a business to offer a different price or level of goods or services in connection with a consumer's voluntary participation in a bona fide loyalty, rewards, or discount program,¹⁸ and, as discussed below, the enacted and pending State laws that specifically address personalized pricing exempt loyalty programs as well.

Customized Incentives and Behavioral Offers Should Not Be Covered

A literal reading of the Proposed Statement also places at risk a wide variety of customized incentives and behavioral offers, including but not limited to birthday and anniversary rewards, win-back offers to lapsed customers, prices available only through the use of apps, geographically limited offers, abandoned-cart and abandoned-order incentives, tiered status benefits, local promotions targeted to a franchisee's trade area, and surprise-and-delight rewards. The Proposed Statement's parking-lot example, which describes a situation in which a retailer charges

¹⁷ [Proposed Statement](#), slip op. at 6-7.

¹⁸ See, e.g., Va. Code Ann. § 59.1-578(A)(4) (2026); Colo. Rev. Stat. § 6-1-1308(1)(d) (2026).

more for a product sold on its website on the basis of data revealing that the consumer is inside one of the retailer's physical locations or parking lots at the time of browsing the retailer's website . . .¹⁹

illustrates this problem. While the Commission is apparently concerned about a retailer charging more because it knows a browsing consumer is already on site, franchised brands use the same data to lower prices offered to affected consumers, by pushing discounts to consumers near their respective locations. Unfortunately, the Proposed Statement does not distinguish between personalized pricing that increases prices for affected consumers and personalized pricing that instead lowers prices for them. Of course, in any event, a personalized offer is not a personalized price where the base price remains publicly posted and available to everyone.

The Contours of Required Disclosures

When personalized pricing does not lead to higher prices for affected consumers than for other consumers in the same venue at the same time – and so, as discussed below, is neither deceptive nor unfair – it is not clear why anything more than simply clearly and conspicuously disclosing that the prices at issue are personalized should ever be required. As currently written, however, the Proposed Statement suggests that the disclosure of additional information should always be required, even if the price personalization at issue does not lead to higher prices for affected consumers:

To be effective, personalized pricing disclosures should be clear and conspicuous and include all relevant information, such as the fact that the price is personalized, the basis of that personalization, and the type of data used.²⁰

However, the Fair Credit Reporting Act and State insurance law disclosure requirements to which the Proposed Statement refers only require firms to disclose the basis for particular actions when those actions are *adverse* actions, such as an increase in the prices affected consumers must pay.²¹ Moreover, the Commission orders issued in the two cases the Proposed Statement cites for this proposition did not require the respondents to make affirmative disclosures to remedy the omission of material information. They instead addressed and prohibited the respondents from making expressly false and misleading representations. In the Commission case that led to the Court of Appeals decision in *P. Lorillard v. Federal Trade Commission*, Lorillard had advertised in

the leading newspapers of the country and over the radio . . . that the Reader's Digest had had experiments conducted and had found that Old Gold cigarettes were lowest in nicotine and lowest in irritating tars and resins, just as though a substantial difference in such content had been found. . . .²²

As the Proposed Statement points out, the Court emphasized that “to tell less than the whole truth is a well-known method of deception.”²³ However, the Court also concluded that the advertising in question was deceptive not because it omitted relevant information, but rather because it affirmatively conveyed a false and misleading representation by printing only a small part of the Reader's Digest article; that is, it created

¹⁹ [Proposed Statement](#), slip op. at 8.

²⁰ [Proposed Statement](#), slip op. at 6.

²¹ [Proposed Statement](#), slip op. at 6.

²² *P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 58 (4th Cir. 1950).

²³ *P. Lorillard v. Federal Trade Commission*, 186 F.2d at 58.

... an entirely false and misleading impression, not only as to what was said in the article, but also as to the quality of the company's cigarettes. Almost anyone reading the advertisements or listening to the radio broadcasts would have gained the very definite impression that Old Gold cigarettes were less irritating to the throat and less harmful than other leading brands of cigarettes because they contained substantially less nicotine, tars and resins, and that the Reader's Digest had established this fact in impartial laboratory tests; and few would have troubled to look up the Reader's Digest to see what it really had said. The truth was exactly the opposite. There was no substantial difference in Old Gold cigarettes and the other leading brands with respect to their content of nicotine, tars and resins and this was what the Reader's Digest article plainly said.²⁴

IFA agrees completely that false and misleading representations such as these violate Section 5 of the FTC Act because they are not only deceptive but also likely to injure consumers who mistakenly believed, because of the misrepresentations, that Old Gold cigarettes were safer than other cigarettes. By contrast, however, the Proposed Statement characterizes personalized pricing as possibly deceptive or unfair by omission; that is, failing to disclose that the prices offered to affected consumers reflect some degree of personalization may be deceptive or unfair. However, as discussed below, even that failure to disclose can only be described as possibly deceptive or unfair if it injures affected consumers by imposing higher prices on them than on other consumers in the same venue at the same time, and that possible injury is of course far less serious than the injury effected by false and misleading cigarette advertising.

Similarly, the Supreme Court opinion in *Federal Trade Commission v. Standard Education Society*²⁵ focuses on affirmatively false and misleading representations, rather than on practices that may be deceptive by omission. In that case, the Court found that under the respondents' sales plan,

salesmen obtained an audience with the prospective purchasers by representations made to them that by reason of their prestige and influence they had been selected by the Company to receive a set of books free of costs for advertising purposes. After respondents' agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose leaf supplement alone was \$69.50, and that the usual price of both books and loose leaf supplements was much in excess of \$69.50.²⁶

The Commission found that these practices were not only "unfair," but also "false, deceptive and misleading,"²⁷ and the Court sustained both that determination and the Commission order that among other provisions

... ordered respondents not to represent falsely to purchasers that sets of books had "been reserved to be given away free of cost to selected persons" and that the usual price at which respondents' publications are sold is higher than the price "at which they are offered to such purchasers."²⁸

²⁴ *P. Lorillard v. Federal Trade Commission*, 186 F.2d at 58.

²⁵ *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937).

²⁶ *Federal Trade Commission v. Standard Education Society*, 302 U.S. at 115.

²⁷ *Federal Trade Commission v. Standard Education Society*, 302 U.S. at 113. At the time of this Supreme Court decision, in 1937, the Federal Trade Commission Act empowered the Commission to prevent only "unfair methods of competition." The 1938 Wheeler-Lea Amendments to the FTC Act empowered the Commission to prevent "unfair or deceptive acts or practices" as well.

²⁸ *Federal Trade Commission v. Standard Education Society*, 302 U.S. at 115.

The Commission order did not, however, direct the respondents who chose to represent to prospective purchasers that they had been “specially selected” to receive discounts to explain to those purchasers the basis for their selection; they simply had to make truthful representations. By contrast, as noted above, the Proposed Statement suggests that firms that charge personalized prices should disclose not only that fact but also the information used to effect that practice, even if the prices charged to affected consumers are not higher than the prices paid by other consumers in the same venue at the same time.

It is also important to recognize that the disclosure standard which the Proposed Statement proposes to impose is simply not achievable as written, because it would require firms not only to disclose, clearly and conspicuously, that they are using personalization to set prices for affected consumers, but also to disclose the basis for and the data types used to effect that personalization.²⁹ That level of detail cannot be delivered at the point of sale on a mobile screen for a rewards engine weighing dozens of behavioral inputs in real time. By contrast, a layered approach – consisting of a short-form notice at the time the offer in question is made, and the provision of a detailed explanation in the program terms at a later time – might be feasible.

The Seven Commission Scenario Examples Are Not Representative Examples

The Proposed Statement provides seven examples of scenarios “in which personalized pricing without adequate disclosure would raise Section 5 concerns,”³⁰ but these scenarios all describe egregious conduct that is unlikely to be either widespread or effective as a means of raising consumer prices. In short, the Proposed Statement is regulating for the outlier. It proposes to prevent possibly unfair or deceptive conduct by a small number of bad actors by imposing broad disclosure obligations on every business that uses consumer data in pricing, and the cost of those obligations (including the cost of determining how to comply in the first place) will far exceed any benefit. To begin with, the cost of securing initial and ongoing legal advice to determine what is and is not permissible is likely to be substantial, particularly given the evolving landscape of state laws applicable to personalized pricing, as discussed below. That cost will fall particularly hard on franchised small businesses. Indeed, in the recently concluded Rule on Unfair or Deceptive Fees rulemaking proceeding, IFA pointed out that if that Rule were to have applied to its restaurant members, they would have had to purchase hundreds of hours of legal advice, at an average billable rate of \$500 per hour, so that they would be able

to understand the impact of the Proposed Rule for systemwide advertising across all media channels and digital platforms and on-site at franchised restaurant locations, as well as ongoing costs of compliance as new national, regional and local advertising campaigns are implemented.³¹

Adoption of any type of Enforcement Policy Statement with respect to personalized pricing will force virtually every franchisor and franchisee and every other retail firm in every retail industry to spend comparable amounts for legal advice, both initially and on an ongoing basis.

The scenario examples also share a feature the Proposed Statement never identifies: each depends on a conclusion that the consumer is vulnerable, constrained, or without practical alternatives; that is, for example, housebound, bereaved, in a medical emergency, recently victimized, feeding children, or already standing in the store. As a threshold matter, as the Commission acknowledges, a firm is unlikely to be able to carry out a personalized pricing program that increases prices to affected consumers unless it possesses either a complete monopoly or a very high degree of market power in the relevant product and geographic

²⁹ [Proposed Statement](#), slip op. at 6.

³⁰ [Proposed Statement](#), slip op. at 7-8.

³¹ [Comment from International Franchise Association](#), Trade Regulation Rule on Unfair or Deceptive Fees, Docket No. FTC-2023-0064 (Comment ID FTC-2023-0064-3294), at 12.

market in which it operates.³² Moreover, the harms described in the seven scenarios arise from the exploitation of the vulnerability at issue to increase the price an affected consumer pays, not from the use of data. The disclosure obligations that the Proposed Statement would impose, by contrast, would attach to any price that varies with consumer data.

Four of the scenario examples reach franchising directly.³³ First, with respect to the scenario in which a grocery chain charges “a delivery customer a higher price for milk based on data showing that several children live in the customer’s household,” it is important to recognize that franchised restaurant, retail, and family-entertainment brands often use household data for family bundles, kids-eat-free nights, birthday clubs, catering sizing, and many other family-friendly promotions that lower the prices of or expand the value of the offered products and services at issue. Moreover, requiring brands to disclose the inferences on which they may rely in this circumstance, and their data sources, would also implicate federal and state statutes that require rigorous protection of and confidentiality for information regarding minors.

Second, the scenario in which a firm has access to and relies on “data revealing that the user has not installed any of the company’s competitors’ apps” on his or her phone is far more likely to lead to a discount rather than a surcharge for the user. Loyalty tiers and exclusivity rewards rest on similar inferences about how much of a consumer’s category spending a brand captures, and consequently, the firm involved is far more likely to offer a discount than to impose a surcharge in exchange for a user’s loyalty to its brand.

Third, the scenario in which a firm attempts to charge a user more for medical transport to a medical facility “on the basis of data suggesting that the user has a life-threatening medical emergency or condition” is equally unlikely (in addition to probably violating a variety of federal and State laws prohibiting precisely that conduct). Franchising has a substantial presence in home health, senior care, non-emergency medical transportation, in-home care, urgent care, and physical therapy, where price reflects the client’s condition because the condition determines the service delivered. Requiring disclosure of the basis for the price would push care brands toward restating a client’s health information on a pricing screen, which would raise concerns under both the Health Insurance Portability and Accountability Act of 1996 and State health privacy laws.

Fourth, the scenario in which a firm uses geofencing (i.e., monitoring the presence of cellphone users within a particular area surrounding one of the firm’s business locations) as a means of personalizing the price offered to affected consumers within that area raises many of the same concerns. In particular, franchised brands geofence routinely, and almost always do so in order to deliver lower prices to consumers within the geofence area. The Proposed Statement nevertheless fails to distinguish prices that vary from store to store from prices that vary from person to person. In a given franchise system, franchisees set prices independently, and an app that shows a different price after the consumer selects a different location is simply displaying localized pricing.

Two further problems appear in the seven scenario examples. First, public records are ordinary inputs for many different types of franchise systems (including in particular franchised restoration and remediation brands, property services, locksmiths, and tax preparation services) where pricing reflects the scope of the work required rather than the magnitude of a particular customer’s misfortune. And franchised restaurants appear on third-party marketplaces that set their own consumer-facing prices and fees and

³² See Proposed Statement, slip op. at 3-4. The Commission has described the degree to which a particular firm possesses market power – that is, the power to raise price above marginal cost – as a continuum that begins “with the complete absence of market power at one end” and ends with monopoly power at the other end. *In the Matter of International Telephone & Telegraph Corp.*, 104 F.T.C. 280, 411 n.60 (1984).

³³ Proposed Statement, slip op. at 7-8.

personalize independently of both the brand and the operator. Neither the brand nor the operator can see that personalization or compel the third party to effect a disclosure about it.

Second, accuracy is a problem across all seven scenarios. Personalization logic is typically licensed from third-party vendors on confidential terms. For that reason, a business required to disclose the basis of personalization may not be able to describe it with the precision the standard implies, and the logic that would make the disclosure complete may be a trade secret. Moreover, as discussed below, if the Proposed Statement were to be issued in its current form, it could be expected to lead to both State and private litigation. Most state Unfair or Deceptive Acts or Practices statutes provide a private right of action, and many allow a prevailing plaintiff to recover attorney's fees, which makes low-value claims economically viable to bring as class actions. Plaintiffs will cite the Commission's articulated standard as evidence of what constitutes an unfair or deceptive practice under state law, and complaints will name franchisors and franchisees together.

The Commission's Concerns Arise From Third-Party Data Augmentation, Not First-Party Data

The harms the Proposed Statement describes arise primarily when a business supplements what it knows from its own dealings with a consumer with data obtained from outside sources, such as data brokers, in order to conclude that the consumer is willing to pay more. The Proposed Statement itself recognizes that consumers generate data that "countless firms collect and purchase."³⁴ And in most of the Commission's scenarios, the data that lead to the higher price have nothing to do with the product or service being sold or with the consumer's history with the seller: which competing applications are installed on the consumer's phone, court filings showing that the consumer was recently the victim of a crime, or information suggesting that the consumer is traveling for a funeral or facing a medical emergency.³⁵ A consumer has no reason to expect that a hotel or a retailer will obtain that kind of information, much less use it to set a price, and no practical way to learn of it or correct it.

The Proposed Statement draws the same distinction in its own analysis. It describes as potentially deceptive a price that a consumer believes "is a discount based on their purchase history with that retailer" but that is in fact a higher price based on "their disposable income or their shopping habits with other firms."³⁶ And the example it offers of a disclosure that would likely be adequate is one explaining that the price reflects data about the consumer's "previous purchases from the same retailer through the same login account."³⁷ In both passages, the Commission treats pricing based on the consumer's own relationship with the business as the benign baseline, and pricing based on outside data as the source of concern.

IFA therefore urges the Commission to clarify that the Statement is directed at this type of third-party data augmentation, and that the Commission does not hold the same concerns with respect to first-party data; that is, data generated through a consumer's direct relationship with a business. When a business uses what it learns from a consumer's own purchases, visits, and program activity to improve the products, services, and offers for which the consumer engages with that business, that use is aligned with the consumer's reasonable expectations of how the data will be used, and the consumer is the one who benefits. The Commission reached the same conclusion more than a decade ago in its 2012 Privacy Report, *Protecting Consumer Privacy in an Era of Rapid Change*, when it determined that businesses need not offer

³⁴ [Proposed Statement](#), slip op. at 3.

³⁵ [Proposed Statement](#), slip op. at 7-8.

³⁶ [Proposed Statement](#), slip op. at 5.

³⁷ [Proposed Statement](#), slip op. at 7.

consumers a choice before using their data for practices consistent with the context of the transaction or the business's relationship with the consumer, and that most first-party marketing meets that standard.³⁸

For franchise systems, how the Commission defines first-party data will matter a great deal. A consumer who joins a brand's rewards program, orders through the brand's app, and makes purchases at a franchised location understands that he or she is dealing with a single brand, even though the franchisor, the franchisee that owns the location, and the service providers that operate the program on their behalf are legally distinct entities. Data that flow among those parties in order to run the brand's loyalty program, honor its offers, and serve the consumer at the unit level are first-party data in every sense that matters to the consumer. Any revised Statement that distinguishes between first-party and third-party data should therefore treat data collected and shared within a single franchise system, under a common brand, as first-party data. The 2012 Privacy Report recognized that common branding is relevant to whether data sharing among related entities is consistent with consumers' expectations,³⁹ and the same principle applies here. Otherwise, a franchisor's use of transaction data from its franchisees' locations to deliver a brand-wide offer could be mischaracterized as the very third-party data augmentation the Commission is concerned about.

The Structure of Franchise Systems Precludes Requiring the Disclosures at Issue

While the Proposed Statement addresses the manner in which a unitary retailer or merchant may deploy personalized pricing, franchise systems are not structured that way, and no single party controls the pricing tool that franchisees use to set prices. A franchisor commonly enters into a master license for software; franchisees participate as sublicensees; and each franchisee establishes the software's parameters for setting prices at the unit level. The franchisor may have some visibility into the data but frequently is not aware that a franchisee has altered the software parameters it uses to set prices, perhaps in a way that would violate applicable law. And while retail prices are set by the franchisee, consumer data is collected across brand-operated digital channels and franchisee point-of-sale systems under separate privacy notices.

Franchisors generally do not set franchisee resale prices, and doing so carries real antitrust risk, particularly under State laws that still treat minimum resale price maintenance as *per se* unlawful. Further, franchisees operating under the same brand are independent businesses that may compete with one another in overlapping geographic markets. Therefore, pricing independence, as governed by the rule of reason, is a legal requirement rather than a business preference, and a framework that presumes that a single entity controls both the personalization logic and the price cannot be reconciled with what the antitrust laws require. Indeed, franchise systems are the quintessential example of collaborations, which are designed to create and have the effect of creating an efficiency-enhancing integration of economic activity that provides important benefits to competition and consumers. As a result, the analysis of any given franchise system and its pricing practices, from an antitrust perspective, is governed by the rule of reason. In *Continental T.V. v. GTE Sylvania*, the Supreme Court expressly considered the franchise system created by Sylvania to distribute and sell at retail the television sets it manufactured. The Court determined that the permissibility of the location restrictions embedded within the Sylvania franchise system, under Section 1 of the Sherman Act, should be governed by the rule of reason rather than the *per se* rule, and emphasized that this approach should be the norm rather than the exception:

Since the early years of [the twentieth] century a judicial gloss on [the prohibition enunciated by Section 1 of the Sherman Act] has established the "rule of reason" as the prevailing standard of analysis. . . . Under this rule, the factfinder weighs all of the

³⁸ Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 38-40, 48 (Mar. 2012) (hereinafter 2012 Privacy Report).

³⁹ 2012 Privacy Report at 41-42.

circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. . . . *Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.⁴⁰

The Court reaffirmed this principle in *State Oil v. Khan* – in which it determined that “vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason”⁴¹ – and in *Leegin v. PSKS, Inc.*, where it stated:

Resort to *per se* rules is confined to restraints . . . “that would always or almost always tend to restrict competition and decrease output.” To justify a *per se* prohibition a restraint must have “manifestly anticompetitive” effects . . . and “lack. . . any redeeming virtue.”⁴²

And the Court once again reaffirmed this principle in *National Collegiate Athletic Association v. Alston*:

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as “a fact-specific assessment of market power and market structure” aimed at assessing the challenged restraint’s “actual effect on competition”—especially its capacity to reduce output and increase price.⁴³

As these cases suggest, the organizational structure of franchise systems and the need to evaluate the legality of their intra-brand interactions under the rule of reason while simultaneously preserving all the benefits for competition and consumers that their organizational structure provides make it particularly important not to misallocate the responsibility for making any disclosures a revised version of the Proposed Statement might require. Accordingly, the Proposed Statement should recognize that in a multi-party licensing structure, responsibility attaches to the party whose conduct produced the price at issue (i.e., the party that configured the tool and set the price) rather than to brand affiliation. Moreover, any model disclosure language or safe harbor should be available to any party that discloses in good faith based on the information reasonably available to it.

Legal and Economic Issues

A. Personalized Pricing That Injures Consumers and Competition Is Unlikely To Occur

Section 2 of the Sherman Act prohibits individuals and firms from monopolizing, or attempting to monopolize, or combining or conspiring to monopolize a relevant product and geographic market,⁴⁴ and a violation of any of these provisions also constitutes an unfair method of competition that therefore violates Section 5 of the FTC Act.⁴⁵ As noted above, only personalized pricing that increases prices to affected consumers above the prices paid by other consumers in the same venue at the same time raises any policy concerns with respect to injury to competition or consumers. And the Commission acknowledges in the Proposed Statement that only a firm with monopoly power in a relevant market, and therefore not constrained by competition from any other firms, could impose perfect personalized pricing that increases

⁴⁰ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977) (citations omitted).

⁴¹ *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997).

⁴² *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citations omitted).

⁴³ *National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 88 (2021) (citations omitted).

⁴⁴ 15 U.S.C. § 2.

⁴⁵ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 689-693 (1948); *Fashion Originators’ Guild of America v. Federal Trade Commission*, 312 U.S. 457, 465-468 (1941).

prices to affected consumers, and thereby capture the entire consumer surplus available from sales in that market.⁴⁶ By contrast, “in the vast majority of circumstances” – as the Commission also acknowledges – efforts to use personalized pricing to increase prices to affected consumers “would have to contend with competitive pressures that limit pricing power.”⁴⁷

In short, very few firms in very few markets are likely to possess the requisite monopoly power or high degree of unconstrained market power needed to successfully deploy personalized pricing to *increase* prices to affected consumers. Thus, personalized pricing that actually successfully raises prices to affected consumers is likely to be rare and therefore can be addressed through case-by-case enforcement. In particular, the Commission can seek to prohibit the practices of the few firms that possess the high degree of market power needed to successfully raise prices through personalized pricing by alleging that they are using personalized pricing to illegally monopolize or attempt to monopolize their respective markets, in violation of Section 2 of the Sherman Act and Section 5 of the FTC Act.

B. Personalized Pricing That Does Not Increase Prices To Affected Consumers Does Not Constitute A Deceptive Act or Practice

The Commission has for more than forty years, since the issuance of its *Policy Statement on Deception* in 1983, defined a deceptive act or practice as a “representation, omission or practice” (1) that is likely to mislead consumers “acting reasonably under the circumstances,” and (2) that is “material” because it involves “information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”⁴⁸ With respect to what “material” means in the context of Commission rulemaking in particular, the Commission *Telemarketing Sales Rule* similarly defines “Material” as “likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution,”⁴⁹ and the Commission *Rule on Impersonation of Government and Businesses* defines “Materially” as “likely to affect a person's choice of, or conduct regarding, goods or services.”⁵⁰

Satisfying this standard in turn requires establishing three elements: (1) that the representation, omission or practice is likely to mislead the consumer;⁵¹ (2) that the consumer is acting reasonably in the circumstances;⁵² and (3) that the representation, omission or practice is material; that is, that it is “likely to affect the consumer’s conduct or decision with regard to a product . . .” and “injury is likely.”⁵³ The only type of personalized pricing that could be characterized as deceptive under this standard is the type which actually increases the price an affected consumer pays above the price offered to any other consumer shopping in the same venue at the same time. By contrast, personalized pricing that does not produce this effect does not satisfy either the second or the third element of the deception standard. Therefore, with respect to the “reasonable consumer element,” while the Proposed Statement provides a suggested characterization of reasonable consumer expectations, it would more accurately describe these expectations if it were modified to read as follows:

When consumers walk into a retail store, for example, they reasonably expect the price on the shelf to be *no higher than* the price offered to any other consumer shopping at the same

⁴⁶ [Proposed Statement](#), slip op. at 3-4.

⁴⁷ [Proposed Statement](#), slip op. at 4.

⁴⁸ [In the Matter of Cliffdale Associates, Inc.](#), 103 F.T.C. 110, 164-166 (1984), citing [Federal Trade Commission Policy Statement On Deception \(October 14, 1983\)](#) (appended to the *Commission Opinion in Cliffdale Associates*, 103 F.T.C. at 174-184) (hereinafter [Deception Statement](#)).

⁴⁹ [Telemarketing Sales Rule](#), 16 C.F.R. § 310.2(t) (2026).

⁵⁰ [Rule on Impersonation of Government and Businesses](#), 16 C.F.R. § 461.1 (2026).

⁵¹ [Deception Statement](#), 103 F.T.C. at 176-177.

⁵² [Deception Statement](#), 103 F.T.C. at 177-182.

⁵³ [Deception Statement](#), 103 F.T.C. at 182-183.

store at the same time. Likewise, when they browse to a product listing on a retailer's website, they reasonably expect the price to be *no higher than* the price that anyone else browsing to that listing would see.⁵⁴

Similarly, with respect to the materiality element, while a firm may falsely claim to an affected consumer that it *is not* charging a personalized price, or fail to disclose that it *is* charging a personalized price, that representation or omission will not be material to the consumer – that is, it will not affect his or her decision as to whether or not to purchase the product or service at issue – unless the price the firm charges is higher than the price offered to any other consumer shopping in the same venue at the same time. In short, consumers who secure lower prices through loyalty programs, promotional discounting, customized incentives, behavioral offers, or in any of the literally thousands of other ways in which firms reward their customers with lower prices, are not likely to care to what degree those lower prices may derive from one type of personalization or another.

C. Personalized Pricing That Does Not Increase Prices To Affected Consumers Does Not Constitute An Unfair Act or Practice

Section 5(n) of the FTC Act provides that

[t]he Commission shall have no authority under this section or section 57a of this title [Section 18 of the FTC Act] to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.⁵⁵

Personalized pricing that lowers prices to affected consumers arguably could never be characterized as unfair under this standard, because lower prices could never satisfy the “substantial injury” requirement, and further, the benefits to consumers and competition of this type of personalized pricing will always outweigh any conceivable injury. This conclusion of course applies most strongly to consumers who secure lower prices through loyalty programs, promotional discounting, customized incentives, behavioral offers, or any of the literally thousands of other ways in which firms reward their customers with lower prices, whether through personalized pricing or in some other way. Indeed, as with the deception theory, the only type of personalized pricing that could conceivably be characterized as unfair under this standard is the type which actually increases the prices that affected consumers pay above the prices offered to other consumers shopping in the same venue at the same time. That is not often likely to be the case, because in order to satisfy the “substantial injury” requirement, the injury to affected consumers derived from the difference between the higher prices they pay and the lower prices offered to other consumers would have to be sufficiently large to be characterized as “substantial.” Moreover, with respect to the “benefits to consumers or competition” element, the countervailing benefits to consumers and competition from vigorous price competition, whether from personalized pricing or otherwise, are likely to far outweigh, in the aggregate, any injury attributable to even the type of personalized pricing that increases prices to affected consumers. And while that injury may not be “reasonably avoidable” by affected consumers unless the firm using personalized pricing affirmatively advises them that the higher prices they pay are based on personalized data, the difficulty of satisfying the other two elements of the unfairness standard makes it unlikely that even personalization that increases prices to affected consumers could ever be characterized as unfair.

⁵⁴ See [Proposed Statement](#), slip op. at 2, revised to replace “the same” with the language in italics and to delete the final clause.

⁵⁵ [15 U.S.C. § 45\(n\)](#).

D. While the Robinson-Patman Act Does Not Apply To Retail Sales, Its Interpretation and Defenses Are Instructive

Congress enacted the Clayton Act in 1914, and section 2 of that Act became the first federal statute to expressly prohibit certain forms of price discrimination. In 1936, Congress enacted the Robinson-Patman Act amendments to the Clayton Act,⁵⁶ because it believed that large firms could dominate markets through predation and other forms of economic warfare directed against smaller firms, and felt that “power buyers” such as large retailers could use their market power to extract price concessions from manufacturers and other sellers that were unavailable to their smaller competitors. As the Commission has stated,

[t]he major legislative purpose behind the Robinson-Patman Act was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores.⁵⁷

Consistent with the context in which the Robinson-Patman Act was created, the Supreme Court and the Commission have concluded that the Act is based on one fundamental principle:

to assure, to the extent reasonably practicable, that businessmen at the same functional level would stand on equal competitive footing so far as price is concerned.⁵⁸

To that end, reduced to their essentials without their exceptions (and provided that a number of jurisdictional requirements are satisfied) section 2(a) of the Act requires sellers to sell to everyone at the same price, while section 2(f) of the Act requires buyers with the requisite knowledge to buy from a particular seller at the same price as everyone else. Sections 2(c), 2(d), and 2(e), as elaborated by the Commission through the FTC Act, prohibit sellers and buyers from using brokerage, allowances, and services to accomplish indirectly what sections 2(a) and 2(f) directly prohibit.

Maximizing consumer welfare and economic efficiency in a free market economy, however, necessarily means that different firms perform differently, and the Supreme Court has therefore on several occasions stated that “the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.”⁵⁹ In particular, the Court has warned against interpretations of the Robinson-Patman Act which “extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. . . .”⁶⁰ In *Brooke Group*, the Court confirmed that

⁵⁶ The relevant provisions are set forth in sections 2(a)-(f) of the Clayton Act, [15 U.S.C. § 13\(a\)-\(f\)](#); references to the Robinson-Patman Act in the text therefore refer to section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

⁵⁷ *In the Matter of Boise Cascade Corp.*, 107 F.T.C. 76, 210 (1986), citing *In the Matter of General Motors Corp.*, 103 F.T.C. 641, 693-96 (1984), *rev'd and remanded on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), *on remand*, 113 F.T.C. 956 (1990), *appeal dismissed pursuant to stipulation*.

⁵⁸ *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 520 (1963); accord, e.g., *Boise Cascade Corp.*, 107 F.T.C. at 205.

⁵⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), quoting *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 440 U.S. 69, 80 n.13 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 458-59 (1978); *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61, 74 (1953).

⁶⁰ *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. at 80, quoting *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. at 63. Thus, the Court has made it clear that firms cannot use the Act as a pretext for anticompetitive conduct. For example, verifying the prices offered by competing firms cannot include systematically

[b]y its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. . . . Congress did not intend to outlaw price differences that result from or further the forces of competition.⁶¹

Similarly, the Commission has concluded that

[t]he interpretation and application of the Act should be consistent with the interpretation and application of the other antitrust laws whenever possible.⁶²

The Robinson-Patman Act does not apply to retail sales; it applies only to discrimination between customers competing for resales at the same functional level.⁶³ The manner in which the Supreme Court and the Commission have interpreted the statute, however, is arguably relevant to evaluating sales practices at the retail level. In particular, as noted above, the Supreme Court has determined that the Act “condemns price discrimination only to the extent that it threatens to injure competition,” and was not intended to prevent “price differences that result from or further the forces of competition.” And the defenses available to firms accused of engaging in price discrimination in violation of the Act are also instructive. In particular, firms can argue that the price discrimination at issue was necessary in order to meet the competition of competing firms;⁶⁴ to account for cost differences;⁶⁵ or to account for “changing conditions affecting the market for or the marketability of the goods concerned.”⁶⁶ Personalized pricing that reduces prices to affected consumers clearly “further[s] the forces of competition,” and can be impelled by these same types of competitive factors, to the benefit of both consumers and competition.

State Statutes That Address Personalized Pricing

Thus far, four States have enacted laws that address personalized pricing; more than forty bills addressing personalized pricing are pending across more than twenty States; and a separate group of pending State bills addresses the use of electronic shelf labels. The Fair Price Protection Act, enacted in New Jersey on July 23, 2026, provides the best model for the Commission to consider from a coverage perspective. In particular, while it prohibits retail food stores and third-party grocery delivery platforms from varying prices on the basis of personal data, it exempts from that prohibition loyalty programs; bona fide group discounts for teachers, veterans and seniors; and price differences reflecting actual or reasonable operational cost differences. Moreover, it permits the use of location data at the store by store level for order fulfillment purposes, and for assessing local supply and demand conditions, but prohibits the use of that data at the person to person level to profile consumers, or to infer protected class status. The statute does, however, include significant penalties for violations, including fines of up to \$50,000 per violation and treble damages, and also includes a private right of action.

Connecticut has enacted a statute addressing personalized prices that, beginning July 1, 2027, will prohibit retail sellers and third-party delivery services from setting customized prices based on a consumer’s personal data, while exempting publicly disclosed promotions, group-based discounts, and loyalty and rewards programs; and it provides in particular that if a given price for a given product has been *increased*

checking prices directly with rivals, because this could lead to collusion and price stabilization. [United States v. United States Gypsum Co.](#), 438 U.S. at 456-59.

⁶¹ [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.](#), 509 U.S. at 220.

⁶² [Boise Cascade Corp.](#), 107 F.T.C. at 204-05.

⁶³ See, e.g., [Federal Trade Commission v. Fred Meyer, Inc.](#), 390 U.S. 341, 348-349 (1968).

⁶⁴ [15 U.S.C. § 13\(b\)](#).

⁶⁵ [15 U.S.C. § 13\(a\)](#).

⁶⁶ [15 U.S.C. § 13\(a\)](#).

by a price setting device using a consumer's personal data, the product label must expressly disclose that fact. New York's Algorithmic Pricing Disclosure Act, which became effective in November 2025, requires such disclosures in far more types of situations, and therefore currently appears to be the closest existing analogue to the Proposed Statement. By contrast, the One Fair Price Act, which the New York legislature passed in June 2026 and which awaits the Governor's action, would replace the disclosures required by the earlier statute with an outright prohibition of personalized pricing, but would also exempt from coverage loyalty programs, coupons, subscription pricing, and senior and veteran discounts. Similarly, a Maryland statute that will become effective on October 1, 2026, will ban the use of personalized pricing for food retailers and delivery platforms. And finally, in Illinois, House Bill 4248 would address personalized pricing by requiring the disclosure of the categories of personal data used to set the prices at issue and would give consumers the right to opt out of paying that price and instead, on request, to pay a non-personalized baseline price. This type of disclosure requirement would raise particular compliance problems for franchise systems, because the baseline prices are independently set by franchisees.

As the foregoing discussion indicates, three State legislatures have independently determined to adopt many of the same exclusions from coverage that IFA supports, including in particular voluntary enrollment programs, bona fide status-based discounts, and cost-justified differentials, with the New Jersey statute in addition providing that personalized pricing can be used for fulfillment purposes and to address local market conditions. The Proposed Statement does not include any of these exclusions, but it should, because a federal standard that includes the State exemptions would give multistate franchise systems a far more workable rule. Moreover, a federal standard that specifies the content a disclosure must convey, but leaves the precise wording to businesses, is more defensible than a prescribed script, and works across the range of channels in which a franchised brand displays a price. By contrast, a federal standard that does not include the foregoing exemptions, and that prescribes the precise disclosure language that firms must use, would raise the floor everywhere and give the States a template addressing personalized pricing that omits the protections the States themselves have created. Colorado's Governor drew the same distinction that IFA urges here. On June 2, 2026, Governor Jared Polis vetoed H.B. 26-1210, a surveillance pricing bill passed by the Colorado General Assembly, explaining that "[b]ecause of the broad sweep, the bill would punish differentially lower prices, not just higher prices," and objecting to the State defining in statute which consumer discounts are legally acceptable.⁶⁷

If the Commission determines to issue a revised version of the Proposed Statement, many if not most States can be expected to conform their respective law enforcement approaches to personalized pricing to the contours of that Enforcement Policy Statement, particularly in light of the many current connections and cooperative interactions between Commission and State law enforcement efforts. Thus, while the FTC Act does not authorize the States to file lawsuits in federal court alleging that particular individuals or firms have violated either its provisions or trade regulation rules such as the Franchise Rule, other statutes enforced by the Commission and codified as part of the FTC Act do permit concurrent State enforcement. In particular, statutes prohibiting contracts that impede consumer reviews;⁶⁸ prohibiting the circumvention of ticket access control measures;⁶⁹ and requiring online marketplaces to collect, verify, and disclose to consumers information regarding high-volume third-party sellers⁷⁰ authorize State Attorneys General, acting as *parens patriae*, to file civil actions alleging violations of those statutes in federal court. Moreover, as noted above, while the Commission cannot enforce the Sherman Act directly, a violation of the Sherman

⁶⁷ Veto Letter of Governor Jared Polis, H.B. 26-1210 (Colo. June 2, 2026), *as quoted in Colorado Bill to Ban Surveillance Prices, Wages Vetoed by Gov. Polis*, Colorado Newsline (June 2, 2026), <https://coloradonewsline.com/briefs/surveillance-pricing-bill-vetoed/>.

⁶⁸ 15 U.S.C. § 45b(e).

⁶⁹ 15 U.S.C. § 45c(e).

⁷⁰ 15 U.S.C. § 45f(d).

Act also constitutes an unfair method of competition, in violation of Section 5 of the FTC Act,⁷¹ and the Clayton Act authorizes any State Attorney General to file a civil action

in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act, 15 U.S.C. §§ 1-7].⁷²

Furthermore, many States also enforce their own Little FTC Acts, and these statutes typically prohibit many of the same types of unfair methods of competition and/or unfair or deceptive acts or practices that the FTC Act prohibits – as interpreted by the Commission and the federal courts through administrative litigation and rulemaking and federal court litigation – and many of these statutes also authorize private rights of action. Thus, for example, as the Supreme Court recognized in 2008 in *Altria Group, Inc. v. Good*, as it considered the interaction between the Maine Unfair Trade Practices Act (MUTPA) and both the Federal Cigarette Labeling and Advertising Act⁷³ and the FTC Act:

The MUTPA provides, as relevant, that “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.” § 207. In construing that section, courts are to “be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 45(a)(1) of the Federal Trade Commission Act (15 United States Code 45(a)(1)), as from time to time amended.” § 207(1).⁷⁴

As one example of this principle from the perspective of the Commission itself, in 2008, then-Commissioner (later Chairman) William E. Kovacic discussed the manner in which State efforts to prevent unfair methods of competition and unfair or deceptive acts or practices are frequently guided by Commission actions, in the course of dissenting from Commission acceptance of a consent agreement for public comment:

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition (“UMC”) or unfair acts or practices (“UAP”). The federal and state UMC and UAP systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. . . . By statute or judicial decision, courts in many states interpret the state UMC and UAP laws in light of FTC decisions, including orders. As a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own UMC or UAP jurisprudence. A number of states that employ this incorporation principle have authorized private parties to enforce their UMC and UAP statutes in suits that permit the court to impose treble damages for infringement.⁷⁵

⁷¹ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 689-693 (1948); *Fashion Originators’ Guild of America v. Federal Trade Commission*, 312 U.S. 457, 465-468 (1941).

⁷² 15 U.S.C. § 15c(a).

⁷³ 15 U.S.C. §§ 1331-1341.

⁷⁴ *Altria Group, Inc. v. Good*, 555 U.S. 70, 73 n.1 (2008).

⁷⁵ Federal Trade Commission: *In the Matter of Negotiated Data Solutions LLC, File No. 0510094: Analysis of Proposed Consent Order to Aid Public Comment*, 73 Fed. Reg. 5846, 5854 (January 31, 2008), Dissenting Statement of Commissioner William E. Kovacic, citing Dee Pridgen, *Consumer Protection and the Law* 214-22 (2007 Edition) (discussing use of FTC precedent to interpret state consumer protection statutes); Lawrence Fullerton et al., *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums* (American Bar Association, Section of

In light of these principles, if the Commission determines to finalize a revised version of the Proposed Statement, it should do so only after carefully considering the manner in which some States have already enacted laws addressing personalized pricing; the manner in which many States and private parties conduct litigation under their own Little FTC Acts; and the extent to which those efforts are likely to conform to and be influenced by the requirements set forth in the Commission's Enforcement Policy Statement.

Procedural Issues

For all the reasons discussed above, IFA recommends that the Commission withdraw the Proposed Statement and terminate this proceeding. If, however, the Commission determines to pursue issuing a revised Enforcement Policy Statement that addresses personalized pricing, IFA urges the Commission to proceed as though it were conducting a rulemaking proceeding, using notice and comment procedures modeled after the rulemaking procedures set forth in the Administrative Procedure Act (the "APA"), 5 U.S.C. § 551 *et seq.* That statute applies, *inter alia*, to "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy."⁷⁶ And while the notice and comment rulemaking procedures the APA prescribes technically are not required for "interpretative rules" – that is, for statements "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers"⁷⁷ – those procedures offer a useful guide for ensuring that statements of policy such as the Proposed Statement are as well-grounded in legal and economic policy as possible.

Consistent with that approach, IFA recommends that the Commission first conduct a comprehensive study of the contours and prevalence of personalized pricing, as contemplated by Section 6(b) of the FTC Act, and issue a report detailing the findings produced by that study, including in particular the extent to which personalized pricing actually increases the prices that affected consumers pay above the prices paid by other consumers in the same venue at the same time, and the extent to which personalized pricing may actually be in use throughout the retail economy; that is, the extent to which it is prevalent. As noted above, the Proposed Statement recognizes that the "extent to which businesses currently use personalized pricing is not well understood,"⁷⁸ and a Section 6(b) study would provide the information needed to determine the extent to which personalized pricing is actually prevalent in the American economy. With respect to determining the requisite level of prevalence needed to warrant proceeding, the Commission could rely on the standard prescribed for trade regulation rule rulemaking proceedings in Section 18 of the FTC Act. That section of the FTC Act provides that the Commission may issue a Notice of Proposed Rulemaking only if it determines that "unfair or deceptive acts or practices are prevalent," and it may only reach that conclusion if

- (A) it has issued cease and desist orders regarding such acts or practices, or (B) any other information available to the Commission indicates a *widespread pattern of unfair or deceptive acts or practices*.⁷⁹

If the Commission thereafter determines to pursue issuing a revised version of the Proposed Statement, it should also conduct the same type of regulatory flexibility analysis that it must conduct as part

Antitrust Law, Working Paper No. 1, July 1988) (describing how FTC consumer protection actions inform application of state law).

⁷⁶ [Perez v. Mortgage Bankers Association](#), 575 U.S. 92, 95-96 (2015), *citing* 5 U.S.C. § 551(4).

⁷⁷ [Perez v. Mortgage Bankers Association](#), 575 U.S. at 96-97, *citing* [Shalala v. Guernsey Memorial Hospital](#), 514 U.S. 87, 99 (1995).

⁷⁸ [Proposed Statement](#), slip op. at 3.

⁷⁹ [15 U.S.C. § 57a\(b\)\(3\)\(A\),\(B\)](#) (emphasis added).

of a rulemaking proceeding. Such an analysis is particularly important with respect to determining the likely effects that a revised version of the Proposed Statement will have on small businesses, including the hundreds of thousands of small businesses represented by IFA. To that end, Section 603 of the Regulatory Flexibility Act requires a Notice of Proposed Rulemaking issued in a rulemaking proceeding to include “an initial regulatory flexibility analysis” that describes the impact the proposed rule will have on small entities.⁸⁰ This analysis must include the following information:

- (1) a description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule. . . .⁸¹ [and]

. . . a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. . . .⁸²

This type of analysis will be essential to determining whether the Commission should issue a revised version of the Proposed Statement (with those revisions ideally including the modifications recommended in this Comment) and the likely effects that a revised version of the Proposed Statement will have on small businesses, including in particular the small businesses that, as part of franchising systems, play such an important role in ensuring the success of the American economy.

Conclusion

For the reasons detailed in this Comment, IFA respectfully recommends that the Commission withdraw the Proposed Statement and terminate this proceeding. In the alternative, if the Commission determines to pursue developing and issuing a revised version of the Proposed Statement, that version should not cover any type of personalized pricing other than the type that increases the prices that affected consumers pay above the prices paid by other consumers in the same venue at the same time, and should include all the other revisions and address all the other concerns described in the above pages.

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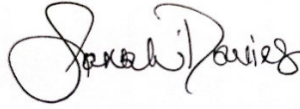
⁸⁰ [5 U.S.C. § 603\(a\).](#)

⁸¹ [5 U.S.C. § 603\(b\).](#)

⁸² [5 U.S.C. § 603\(c\).](#)

Thank you for the opportunity to submit our views and for considering our perspective and recommendations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sarah Davies". The signature is fluid and cursive, with the first name "Sarah" and last name "Davies" clearly distinguishable.

Sarah Davies
General Counsel
International Franchise Association