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**Washington, D.C. 20036**

September 23, 2026

*Via regulations.gov*
Andrew N. Ferguson, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Mr. Chairman:

Washington Legal Foundation (WLF) appreciates the opportunity to comment on the Commission's proposed policy "to deploy enforcement resources" against firms that engage in personalized pricing on the theory that this practice can "violate Section 5 of the FTC Act or any other law enforced by the Commission."[1] WLF is a public-interest law firm and policy center promoting free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF regularly files comments with this agency[2] and amicus briefs in the federal courts[3] to counsel against needless FTC enforcement.

In many settings, often outside the United States, the norm isn't static pricing, but the live price discovery of haggling. This sort of negotiated bargaining, much like an auction, can very precisely match supply with demand. A merchant who thinks her ware is worth $20 to a prospect discovers that specific buyer's limit is $15—and then assesses whether she can afford to make the sale at that price. But as anyone who has participated in the practice knows, haggling can be awkward. That leads to deadweight loss. The shy bail out entirely. The hurried accept a higher price to move to the next thing.

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[1] FTC, *Proposed Enforcement Policy Statement Regarding Personalized Pricing* 1 (Aug. 19, 2026) (Proposed Statement).

[2] WLF Comment, *Proposed Policy Statement Concerning the Suppression of Accuracy in Artificial Intelligence Systems*, Docket No. FTC-2026-0859 (July 31, 2026).

[3] *AMG Cap. Mgmt. v. FTC*, 593 U.S. 67 (2021); *FTC v. Meta*, Case No. 26-5028 (D.C. Cir. Aug. 27, 2026).

And even for those who love it, haggling is time-consuming. Both sellers and buyers can waste significant time reaching a mutually acceptable price (or, worse, realizing that no such price exists). And so, until recently, for many enterprises, it was simply a better use of scarce resources to estimate a general price, make a set offer, and adjust to market feedback. If products fly off the shelf, raise prices. If they linger or spoil, reduce them.

But now, modern technology means a firm may more precisely tailor an offer to a willing buyer without the downsides of haggling. In the online marketplace, user data allows a business to more accurately estimate individual demand for its goods or services and engage in first-degree price discrimination: directly offering a tailored price that is more likely to precisely match a single buyer's willingness to pay.

The first Trump administration rightly contended that while some "consumers may be uncomfortable with the general idea of personalized pricing . . . to the extent that personalized pricing allows firms to engage in something resembling perfect first-degree price discrimination . . . it will tend to improve total welfare."[4] More effective matching means more efficient selling. In short, by making markets clear more efficiently, personalized pricing generates wealth.

This doesn't just benefit sellers. Individualized pricing increases consumer bargaining power as well. Consumers can log out of an app, open a virtual private network, or view an item on a different device to see how a business's offer varies—then buy (or move on) accordingly.[5] And thanks to smartphones and other digital devices, price comparison between rival firms offering substitutable goods has never been easier. No longer must one trek over to the grocery store across town to see if tuna is slightly cheaper there. A shopper can switch apps from Amazon to Instacart to Walmart as fast as fingers can swipe.

Nor is that all. Personalized pricing reduces antitrust concerns. A price-fixing cartel always suffers from the risk of defection, because the first enterprise to offer a lower-than-agreed-upon price will quickly magnet over a disproportionate quantum of demand. So colluding firms must vigilantly police their confederates. But if prices are silently and individually tailored to would-be buyers via their digital devices, determining whether conspirators are complying with even a general price agreement ("Nobody offers less than $50 for the sweatpants") is almost impossible. How is a conspirator ever to be sure that the other guy isn't quietly selling Debra from Brownsville (and thousands of others that fit her profile) the sweatpants for $40?

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[4] Dir. for Fin. & Enter. Affairs Competition Comm., *Personalized Pricing in the Digital Era – Note by the United States* 3–5, OECD (Nov. 21, 2018), https://perma.cc/4VJL-88GR.

[5] Proposed Statement at 5.

The Debra-from-Brownsville problem also guards against much of the Commission's list of horribles, where personalized pricing always ratchets predatorily upwards—the hypothetical food-delivery company that charges more to a user unable to leave the house or the rideshare company that offers an outsized fare for the chronic patient's trip to the hospital.[6] So long as other enterprises vigorously compete in the market and switching costs for the consumer are virtually frictionless, price competition will force a firm inclined to misbehavior to tread carefully.

That said, personalization even brings benefits to noncompetitive markets. In a field dominated by a solitary firm enjoying monopoly power, tailored pricing can reduce or eliminate attendant consumer-welfare harm, obviating the need to apply scarce federal antitrust enforcement resources against the monopolist. As Judge Bork observed long ago, a "monopolist must restrict output to maximize net revenues—but that proposition holds only if the monopolist is confined to charging a single price."[7] But when a monopolist can "charge the monopoly price to all who would pay it, and a series of lower prices to others, [it] would produce the same amount as a competitive industry," and no antitrust problem.[8]

The Proposed Statement elides those benefits and argues that consumers are generally unaware of personalized pricing, which leaves buyers passively at the mercy of predatory firms.[9] It's far from obvious that's the case. Indeed, the agency's assumption of widespread consumer ignorance is in real tension with its own report that "[t]he public, Congress, and state legislatures are increasingly concerned that the massive amount of data collected and generated when consumers use modern technology is making it possible for merchants to personalize prices for goods and services that traditionally did not vary from person to person."[10]

But let's say the agency's right about general consumer ignorance. That still doesn't counsel in favor of a stepped-up enforcement posture against the FTC's "non-

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[6] Proposed Statement at 7–8.

[7] Robert H. Bork, *The Antitrust Paradox* 391 (Bork Publ'g 2021).

[8] *Id*. The Commission dismisses this benefit as merely "theoretical," Proposed Statement at 3–4, but it is a basic and longstanding observation of modern antitrust. "A monopolist who is moderately thoughtful about his self-interest will realize that he could increase net revenues if he could segregate his customers according to the elasticities of their demands." Bork at 414.

[9] Proposed Statement at 6 ("For example, consumers 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.").

[10] *Id*. at 2.

exhaustive" list of bad behaviors.[11] Markets may be the right place to discover prices, but litigation is no place to discover the bounds of the law. "A fundamental principle in our legal system," instantiated in the Fifth Amendment's Due Process Clause, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[12]

The Proposed Statement's vague summary of potential acts that *may* "raise Section 5 concerns" doesn't meet that standard.[13] During his first term, President Trump warned against "attempts to regulate the public without following the rulemaking procedures of the" Administrative Procedure Act[14] and instructed agencies against "treat[ing] noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations."[15] He did so precisely because guidance documents are inherently incomplete and vague. The Proposed Statement, with its "non-exhaustive" list of potential "concerns,"[16] is no outlier.

By self-definition, the Statement doesn't capture the entirety of the agency's upcoming enforcement posture. That's unacceptable. To the extent that tailored pricing flushes out unique harms, the Nation's going concerns must be able to look for a binding regulation informed by notice-and-comment to govern their conduct, not guess as to whether their conduct conforms to suggestions in an incomplete guidance document. Regulation-by-regulation is consistent with the rule of law. Regulation-by-enforcement isn't.

The Proposed Statement seeks to avoid this problem by offering a safe harbor. Combine your tailored offer with a posted disclosure and all's well, so long as the "personalized pricing disclosures" are "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."[17]

There are several problems with this approach.

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[11] Proposed Statement at 7.

[12] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[13] Proposed Statement at 7.

[14] Executive Order 13891 (Oct. 9, 2019).

[15] Executive Order 13892 (Oct. 9, 2019).

[16] Proposed Statement at 7.

[17] *Id*. at 6.

For starters, when the government "regulat[es] the communication of prices" it "regulates speech."[18] So the way a retailer structures an offer is under the express protection of the First Amendment.[19] This holds even when the agency alters price communication via a safe harbor rather than a universal rule. Rational firms that continue to use personalized pricing will plunk immunizing disclaimers alongside their tailored offers with the same alacrity as if they were mandated. Quietly making a disclaimer essential is, constitutionally speaking, no different from making it mandatory.[20]

The Supreme Court's cornerstone decision in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* explained that such measures comply with the Constitution only if they can survive exacting scrutiny.[21] While that standard isn't necessarily as restrictive as strict scrutiny, exacting scrutiny "is not a loose form of judicial review."[22] Under that rigorous test, the regulation must (1) "directly advance"[23] the government's stated objective and (2) "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[24]

The Proposed Statement's disclaimers fail both steps. First, the Commission stands its need for curative disclaimers on public ignorance of personalized pricing. But it turns out that such disclaimers don't really affect consumer behavior at all.[25]

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[18] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017).

[19] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (striking down state law barring pharmacists from advertising prices).

[20] *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024) (government may not "do indirectly" what it "is barred from doing directly"); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (First Amendment shields "the right to refrain from speaking").

[21] 447 U.S. 557, 564–66 (1980); *cf. Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021) (Roberts, C.J., controlling) ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny").

[22] *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014).

[23] *Central Hudson*, 447 U.S. at 564.

[24] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (applying *Central Hudson*).

[25] *The Effects of Online Disclosure About Personalised Pricing on Consumers: Results from a Lab Experiment in Ireland and Chile* 27–28, OECD Digital Econ. Papers No. 303 (Jan. 2021) (summarizing the study's "main finding" as "fail[ure] to find evidence that displaying a disclosure about online personalised pricing has an impact on consumer decision-making"); https://bit.ly/4AeS9UO; Eur. Comm'n, *Consumer Market Study on Online Market Segmentation Through Personalised Pricing/Offers in the European Union* 247, Pub. Off. of the Eur. U. (2018) ("Personalisation practices and transparency regarding personalisation by the online platform did not

So personalized price disclosures can't "directly advance" any legitimate educative or conduct-altering mission.[26]

Second, there's a fairly obvious less-restrictive means by which the FTC could educate the American consumer without coercing private firms to fork over space for an FTC-directed disclaimer: good, old-fashioned government speech. The Commission can use the bully pulpit to educate the public about the existence of targeted pricing and suggest canny ways to comparison shop in a world of tailored offers.

That far less-restrictive alternative carries an additional bonus. The Proposed Statement demands that any disclaimer provide the "clear and conspicuous" reveal of "relevant information."[27] But relevance suffers from an obvious eye-of-the-beholder problem.[28] No firm can possibly be sure that any given disclosure would truly fit the FTC's vision of relevance. And even if a business managed to disclose the right information, it could never be certain it had done so with sufficient granularity to pass muster and escape enforcement risk.

In practice, that means the Proposed Statement will generally deter firms from using tailored pricing (the cynical might suggest that's the point), even when the agency would concede that personalization maximizes total welfare and creates wealth. That's yet another reason why the agency's misguided disclaimer safe harbor won't work—and why it shouldn't be implemented at all.

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The Commission's correct that efficient personalized pricing is available due to the sheer quantity of data Americans willingly provide through regular digital use. Congress could make tailored pricing unprofitable by barring the private collection or sale of that data—or by prohibiting algorithmically set bespoke pricing entirely. As of now, perhaps cognizant of the many benefits that individualized prices offer, it hasn't done so. In the absence of such legislation, it's not for the Executive Branch to unsettle that policy choice.

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have a statistically significant impact on participants' propensity to purchase a product in the experiment"); https://perma.cc/2XW7-S4WQ.

[26] *Central Hudson*, 447 U.S. at 564.

[27] Proposed Statement at 6.

[28] This isn't just a practical objection, it's a constitutional one. "Vague laws chill speech" and violate the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (capitalization altered).

The Proposed Statement should be withdrawn.


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