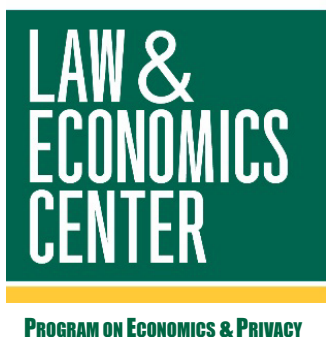




On August 19, 2026, the Federal Trade Commission (FTC) issued for public comment a Proposed Enforcement Policy Statement Regarding Personalized Pricing (“Statement”), which it describes as the use of consumers’ personal data to set prices based on characteristics such as estimated willingness to pay or likelihood of comparison shopping.¹ Although acknowledging that it lacks authority to prohibit personalized pricing categorically, the Statement sets forth the circumstances under which undisclosed personalized pricing is likely to constitute an unfair or deceptive act or practice in violation of Section 5 of the FTC Act (FTCA).²

More specifically, the Statement explains that Section 5 may apply where a seller represents or implies that a price is static or widely offered when it is personalized, or where consumers reasonably believe that a price is static or widely offered and the seller fails to disclose that the price is personalized.³ Further, the Statement also explains that failing to disclose the “basis for the personalization of a price or the effect of that personalization” may be deceptive. The proposed Statement also identifies a potential unfairness theory: undisclosed personalization causes substantial injury to those consumers who pay higher prices, that they cannot avoid because they are unaware of the fact or the nature of price personalization.⁴ Thus to avoid Section 5 liability, when consumers reasonably expect non-personalized pricing, firms using personalized pricing should clearly and conspicuously disclose that the price is personalized, the basis for the personalization, and the types of personal data used.

The Program on Economics & Privacy⁵ is pleased to offer the following comment, which makes two main points:

¹ Federal Trade Commission, Proposed Enforcement Policy Statement Regarding Personalized Pricing 1–5 (Aug. 19, 2026), at https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf.

² Statement at 1.

³ Id. at 5.

⁴ Id. at 6.

⁵ The Program on Economics & Privacy (PEP) is a division of the Law & Economics Center at George Mason University’s Antonin Scalia Law School. PEP’s mission is to foster the use of sound

- First, the FTC lacks the legal authority to declare nothing more than undisclosed personalized pricing a deceptive practice. The Federal Trade Commission Act (FTCA) is likely to reach materially misleading express or implied claims regarding a firm's personalized pricing practices. Consumer expectations alone, however, cannot convert nothing more than a firm's silence about personalized pricing into deceptive conduct. A "pure omission" theory of deception under the FTCA can succeed only when such unfulfilled expectations concern a product's "irreducible minimum performance standards," meaning "reasonably fit for its intended use" and "free of gross safety hazards." Neither the presence of personalized pricing nor the manner in which a firm engages in personalized pricing renders a product unfit for its intended use or grossly unsafe. Accordingly, the FTC cannot reach undisclosed personalized pricing under a pure omission theory of deception.
- Second, absent an express or implied claim of uniform pricing, any challenge to undisclosed personalized pricing would likely have to rely on its unfairness authority. Under this theory of liability, the FTC would have to show that undisclosed personalized pricing was likely to cause substantial consumer injury, that is not outweighed by countervailing benefits to consumers or competition, and is not reasonably avoidable.⁶ Price discrimination that increases output necessarily increases total welfare, and generates benefits for at least some consumers. Indeed, the limited empirical literature suggests that in the studied settings, a majority of consumers benefit from personalized pricing, while the consumers who lose tend to be high-value, relatively inelastic consumers. What is more, the ability of competing firms to use consumer information to target discounts at rivals' consumers can enhance market competition, leading to lower prices for both marginal and inframarginal consumers under certain circumstances. Given the potentially significant countervailing benefits from personalized pricing, it is unlikely that the Commission could satisfy the unfairness standard. In any event, to meet its burden, the FTC would be required to provide a detailed empirical accounting of costs and benefits that to date has been absent from the FTC's unfairness cases.

economics in policy discussion involving privacy, data security, and other consumer protection and competition issues facing the digital economy.

⁶ 15 U.S.C. §45(n).

1. Deception

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices.” To be deceptive, an act or practice must give rise to a representation understood by a significant minority of consumers acting reasonably under the circumstances.⁷ This representation must be false and material. Materiality is a proxy for harm, since a claim is material when it alters consumers’ “choice of or conduct regarding a product.”

⁸ Material omissions can also be deceptive under Section 5. Most commonly, omissions are cast as so-called “half-truths,” where the firm has made an express or implied representation that, while truthful on its face, omits enough information to render it deceptive on net.⁹ For example, when an advertisement features outcomes for a health supplement that are not representative of actual outcomes, it must provide a disclosure of this fact that is sufficiently clear and conspicuous to render the net impression of the advertisement non-deceptive.¹⁰

When a firm does nothing to create a misimpression, however, the ability to employ a deception theory becomes more circumscribed. That a firm merely fails to provide information that some consumers might find material to their decision making is insufficient to convert pure silence into legally actionable deception under Section 5. As the Commission explained in *International Harvester*, treating pure omissions as deceptive would expand deception “virtually beyond limits” because “[t]he number of facts that may be material to consumers—and on which they may have prior misconceptions—is literally infinite.”¹¹ Accordingly, the Commission has limited potential liability under a pure omission theory to failing to disclose that the product at issue is not reasonably fit for its intended use or not free from gross safety

⁷ See *ECM BioFilms, Inc. v. FTC*, 851 F.3d 599, 609 (6th Cir. 2017) (“The Commission determines whether an advertisement is deceptive by engaging ‘in a three-step inquiry, considering: (i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers.’”) (quoting *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015)).

⁸ Deception Policy Statement at 5-6.

⁹ See Statement of Acting Chairman Maureen K. Ohlhausen, In Re Lenovo, Inc. (Sept. 5, 2017), at 1 (“Most of the FTC’s failure to disclose cases are half-truth cases, and many could be restyled as cases of implied false or misleading claims.”).

¹⁰ See FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING at 6 (“The key is the overall net impression of the ad — that is, whether the claims consumers take from the ad are truthful and substantiated.”), at <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>. In some cases, the initial impression may be so deceptive that there is no disclosure that could render the net impression non-deceptive. See Deception Policy Statement at 4 (“when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.”).

¹¹ *Int’l Harvester* at 1059.

hazards.¹² Thus, that unfulfilled expectations are reasonable is only a necessary condition for a pure omission to be deceptive—such unfulfilled expectations must also concern the core fitness of the product at issue.

The Policy Statement appears to ignore this important limitation, and attempts to ground its deception theory on the incorrect premise that a contradiction of *any* reasonable consumer expectation must be disclosed.¹³ This proposition is incorrect as a matter of law; not all unfulfilled consumer expectations—even reasonable ones—are capable of converting silence into deception actionable under Section 5. As explained above, only those reasonable beliefs that go to the core functionality or safety of a product must be disclosed to avoid potential deception liability. Although some consumers may reasonably expect that a price is uniform, tailored pricing simply does not implicate one of these core attributes.¹⁴ Similarly, erroneous beliefs about how a business arrives at a consumer’s personalized price are not the type of attribute that implicates a product’s “irreducible minimum performance standards.” Simply put, merely posting a price for a product is insufficient as a matter of law to give rise to an implied claim of price uniformity.¹⁵ Thus, nothing more than failing to disclose the fact of, and methods underlying, personalized pricing cannot be deceptive under the FTC Act.

What is more, the Statement’s proposed approach to pure omissions raises some important policy questions. First, how would the FTC determine the markets in which consumers might reasonably expect personalized pricing, and does personalized pricing include targeted coupons or discounts, or only posted prices?

¹² See *Int’l Harvester* at 1058-59; Ohlhausen, *Lenovo Statement* at 1-2. Stated differently, the FTC has determined that such “irreducible minimum” quality standards are the only implied claims that arise from merely offering a product for sale.

¹³ See, e.g., Policy Statement at 1 (personalized pricing in markets without “long-established norms” of the practice “would therefore run contrary to . . . consumers’ reasonable expectations that the price they see for a product or service is the same price that any other consumer at the same place and time would see”); *Id.* (“Where consumers reasonably expect that prices for a product or service will not vary based on their personal data” failure to disclose such a fact “is likely to constitute an unfair or deceptive act or practice”); *Id.* at 5 (retailers may deceive consumers “when a consumer reasonably believes that a price for a good or service is static or widely offered, and the merchant fails to disclose that the price is in fact personalized”).

¹⁴ Indeed, the Commission in *Int’l Harvester* rejected a pure omission theory because the undisclosed possibility of fuel geysering was so rare. See also *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60 (1st Cir. 2020) (using the FTC Act to interpret Massachusetts law, and explaining that merely offering a chocolate product implies that it is fit for human consumption, and carries no implied claim about labor practices); *Hodsdon v. Mars Inc.*, 891 F.3d 857 (9th Cir. 2018) (the alleged use of child labor did not go to the central functionality of candy, and thus was not actionable as a deceptive omission under California consumer protection law).

¹⁵ Note that this scenario is also different from one involving discounts off of fictitious “regular” prices. In such cases, there is a clear claim that the offered price is a sale, which might create an implied claim regarding the “value” of the product.

Further, if a firm does not engage in personalized pricing now is it forbidden from ever doing so absent disclosure because consumers have come to expect uniform pricing? If so, this would likely put incumbents who are allowed to engage in non-disclosed personalized pricing at a competitive advantage, potentially having a negative impact on competition. This list is not exhaustive, but serves to illustrate the inherent subjectivity and concomitant uncertainty that accompanies the type of analysis the Statement envisions.

Finally, by countenancing dynamic pricing based on market-wide demand or supply shocks or differential pricing based on cost differences in serving consumers,¹⁶ it casts a shadow of potential illegality on the undisclosed use of any information related solely to a consumer's willingness to pay in setting prices. By requiring a firm to disclose any such information, the Statement implicitly acts to increase consumer bargaining power in an otherwise legal market transaction. This represents an unprecedented intrusion into firms' pricing decisions.

2. Unfairness

As noted above, the legal impediment to challenging undisclosed personalized pricing on a deception theory is grounded in sound policy: it would be impossible for businesses to provide adequate disclosures addressing the myriad preconceptions that consumers may bring into a transaction.¹⁷ Accordingly, since *International Harvester*, the Commission has almost solely evaluated pure omissions under an unfairness standard, which requires an inquiry into the relative costs and benefits of disclosure.¹⁸ In the context of personalized pricing, an unfairness inquiry would require the Commission to show that undisclosed personalized pricing causes or is likely to cause substantial consumer injury that is not reasonably avoidable, and is not outweighed by countervailing benefits to consumers or competition.¹⁹ As discussed below, these conditions are not likely to be satisfied in most settings.

¹⁶ See Statement at 2-3.

¹⁷ See *Int'l Harvester* at 1062 (explaining that the "resulting costs and burden on advertising" of disclosures if a seller had to correct all possible erroneous consumer expectations "would very possibly represent a net harm for consumers"); Ohlhausen Lenovo Statement at 1 ("Copious disclosures would be both impractical and unhelpful, and the law sensibly does not require sellers to disclose all information that a consumer might find important.").

¹⁸ See *Int'l Harvester* at 1060 ("Although pure omissions are not appropriately characterized as deceptive or reached through deception analysis . . . they might still be reached as unfair.").

¹⁹ 15 U.S.C. § 45(n).

To determine the consumer impact of a practice, one must conjure a counterfactual setting in which the practice at issue is absent and compare the difference in consumer outcomes between the actual world (with the practice) and the constructed world (without the practice). Thus, to evaluate whether the use of undisclosed personalized pricing is likely to be “unfair,” one must compare consumer outcomes with and without personalized pricing.

As noted in the Statement, theoretically, the consumer welfare impact of single-firm price discrimination is ambiguous; it depends on weighing the additional surplus captured from high-valued consumers against the surplus gains to marginal consumers who can now purchase at prices below the uniform price. Nonetheless, if price discrimination increases output, it unambiguously increases total welfare.²⁰ The limited empirical literature suggests that a majority of consumers gain from lower prices, and losses to consumer welfare are due to transfers of consumer surplus from high-value inelastic consumers to the firm.²¹

What is more, it is important to understand that firms do not engage in personalized pricing in a silo—targeted discounts are a means of competition. In some circumstances, the ability to tailor prices to attract rivals’ consumers can counteract the ability of firms to use price discrimination to extract surplus from high-value consumers.²² That is, raising prices to inframarginal customers is no longer an equilibrium strategy when a competitor can offer these consumers a

²⁰ This assumes that the resources spent by the firm to engage in price discrimination are less than the surplus generated from increased output.

²¹ See Jean-Pierre Dube & Sanjog Misra, *Personalized Pricing and Consumer Welfare*, 131 J. Pol. Econ. 131 (2023) (63% of customers receive a price below the optimal uniform benchmark); Nicholas Buchholz et al., *Personalized Pricing and the Value of Time: Evidence from Auctioned Cab Rides*, 93 Econometrica 929 (2025) (62.5% of consumers gain and total surplus rises by 5.2%).

²² See Jacques-François Thisse & Xavier Vives, *On the Strategic Choice of Spatial Price Policy*, 78 Am. Econ. Rev. 122 (1988); Kenneth S. Corts, *Third-Degree Price Discrimination in Oligopoly Markets: All-Out Competition and Strategic Commitment*, 29 RAND J. Econ. 306 (1998); Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 RAND J. Econ. 1 (2001); Lars A. Stole, *Price Discrimination and Imperfect Competition*, in 3 Handbook of Industrial Org. (2007). Generally, competitive price discrimination leads to lower prices for marginal and inframarginal consumers under the condition of best-response asymmetry, where one firm’s weak market is a rival’s strong market. Under certain parameters, this condition can lead to “all-out competition” for most consumers in the market, defeating the ability of a firm to extract additional surplus from its “strong market” inframarginal consumers. More recent theoretical work from Rhodes & Zhou shows that the extent to which personalized pricing intensifies competition depends on market coverage and access to data, with more firms (greater market coverage) and more uniform access to data needed to personalize prices more likely to enhance competition. See Andrew Rhodes & Jidong Zhou, *Personalized Pricing and Competition*, 114 Am. Econ. Rev. 2141 (2024).

discount to lure them away. Again, the limited empirical information on price discrimination in a competitive setting is consistent with this result.²³

What is the marginal impact of disclosure of personalized pricing? If disclosure does not alter consumer behavior in a material way, then undisclosed personalized pricing is not likely to create substantial consumer injury, and it cannot be unfair. But if disclosure alters behavior, the analysis becomes more complicated. As the policy statement notes, consumers may engage in behavior that defeats firms' abilities to engage in personalized pricing.²⁴ The extent to which this leads to some consumers paying lower prices in the counterfactual world with full disclosure, undisclosed personalized pricing represents consumer harm. But this harm must be weighed against the benefits foregone by consumers in the counterfactual world with less personalized pricing. That is, the disclosure and concomitant reduction in personalized pricing is likely to generate a negative externality for the consumers who would have paid lower prices in a world with more frequent personalized pricing. As explained above, the limited empirical evidence has found that a majority of consumers gain from personalized pricing, and that the losses in consumer surplus are concentrated in high-valued inframarginal consumers. What is more, to the extent that personalized pricing enables firms to compete more effectively against their rivals by targeting discounts, even inframarginal consumers are likely to suffer losses from a reduction in personalized pricing.

In sum, the consumer welfare impacts of undisclosed personalized pricing are complicated, requiring one to weigh gains to marginal consumers and, where personalization expands output, gains in total welfare, against potential losses to high-value inframarginal consumers. Further, the Commission must consider the equilibrium impact when the ability to personalize prices is available to all or most firms in a market. Given the potentially significant countervailing benefits from personalized pricing, an unfairness theory seems unlikely to succeed, and in any event, would require the type of nuanced empirical balancing that to this point has been absent from the Commission's unfairness cases.²⁵

²³ For example, Jean-Pierre Dubé, Zheng Fang, Nathan Fong & Xueming Luo, *Competitive Price Targeting with Smartphone Coupons*, 36 Mktg. Sci. 944 (2017), conducts a field experiment and finds that the ability to geotarget customers located near a rival theatre increased price competition.

²⁴ See Policy Statement at 5-6.

²⁵ Most unfairness cases involve behavior that is clearly harmful and offers very little in terms of potential benefits, and none involve the type of detailed cost-benefit analysis that would be required in a case involving undisclosed personalized pricing. See, e.g., Complaint, *FTC v. Invitation Homes Inc.*, No. 1:24-cv-04280-SEG (N.D. Ga. Sept. 24, 2024); Complaint, *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-06435 (D.N.J. Nov. 3, 2022); Complaint, *FTC v. Benefytt Techs., Inc.*, No. 8:22-cv-01794-TPB-JSS (M.D. Fla. Aug. 8, 2022); *FTC v. FleetCor Techs., Inc.*, 620 F. Supp. 3d 1268, 1337–38 (N.D. Ga. 2022), *aff'd* in relevant part sub nom. *FTC v. Corpay, Inc.*, 164 F.4th 807 (11th Cir. 2026);

* * *

As a matter of law, because price uniformity does not concern the core fitness or safety of a product, the mere failure to disclose the use of, or inputs into, personalized pricing cannot be deceptive under the FTC Act. Further, given the potentially significant countervailing benefits from personalized pricing, the Commission must perform a nuanced empirical analysis to meet its burden under an unfairness theory. The Program on Economics & Privacy appreciates the opportunity to provide these comments.

Complaint, *FTC v. Avant, LLC*, No. 1:19-cv-02517 (N.D. Ill. Apr. 15, 2019); Complaint, *FTC v. NetSpend Corp.*, No. 3:16-cv-04203 (N.D. Cal. Nov. 10, 2016); *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009); *FTC v. Neovi*, 604 F.3d 1150 (9th Cir. 2010).