

September 25, 2026

The Honorable Andrew Ferguson
Chairman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

RE: Proposed Enforcement Policy Statement Regarding Personalized Pricing

Dear Chairman Ferguson,

The Network Advertising Initiative ("NAI") respectfully submits these comments in response to the Federal Trade Commission's ("Commission" or "FTC") Proposed Enforcement Policy Statement Regarding Personalized Pricing ("Policy Statement").

Founded in 2000, the NAI is the leading non-profit, self-regulatory trade association for advertising technology companies. For 25 years, the NAI has promoted strong consumer privacy protections, a free and open Internet, and enabled small businesses to thrive by promoting the highest voluntary industry standards for the responsible collection and use of consumer data.¹ The NAI has nearly 80 member companies that span the ad-tech industry.

The NAI agrees with the Commission's core conclusion: using a consumer's data to set prices for them that are materially higher than those that consumer would otherwise encounter, without that consumer's knowledge or any meaningful opportunity to control the practice, can constitute a deceptive or unfair practice under Section 5. The Commission's longstanding analytical frameworks—the FTC Policy Statement on Deception (1983) and the FTC Policy Statement on Unfairness (1980), codified in Section 5(n) of the FTC Act—provide the appropriate lens through which to evaluate this practice, and the NAI commends the Commission for grounding this Policy Statement in that legal authority.

These comments seek to address two overarching concerns and recommend a series of clarifications. First, the Policy Statement does not adequately distinguish between data-driven pricing practices that harm consumers (i.e. such as covert price increases based on vulnerability) and those that benefit consumers, including loyalty programs, targeted promotional offers, digital coupons, and other discount mechanisms that allow consumers to access goods and services at reduced prices.

¹See History of the NAI, The Network Advertising Initiative, <https://thenai.org/about-the-nai-2/history-of-the-nai/>.

Second, the Policy Statement's disclosure framework, while appropriately grounded in Section 5 of the FTC Act,² leaves significant ambiguity for businesses seeking to comply, which risks chilling the practices that provide unrivaled and incontrovertible benefits to American consumers.

Therefore, the NAI recommends that the Commission provide affirmative clarity across the following key areas:

- I. Acknowledge and preserve the general category of data-driven pricing that results in lower prices for consumers, including through illustrative examples;
- II. Provide clearer Section 5 guidance to remove legal uncertainty, including:
 - A. Resolve the uncertainty regarding the permissibility of fully-disclosed personalized pricing;
 - B. Issue model disclosure language to give businesses a clear path to compliance.

I. THE POLICY STATEMENT SHOULD ACKNOWLEDGE AND PRESERVE BENEFICIAL DATA-DRIVEN PRICING PRACTICES

A. The Commission's Section 5 Framework Is the Appropriate Legal Foundation

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."³ The Commission has elaborated these standards through two foundational policy statements: the FTC Policy Statement on Deception (1983) ("Deception Statement")⁴ and the FTC Policy Statement on Unfairness (1980), codified in Section 5(n) of the FTC Act ("Unfairness Statement").⁵ Applied here, the Commission correctly notes that covert price increases based on consumer data can cause substantial injury consumers cannot reasonably avoid when they lack knowledge of the practice.

B. Data-Driven Discounts Provide Substantial Consumer Value

Loyalty programs, targeted digital coupons, promotional offers based on purchase history, location-related deals, and retention pricing for at-risk subscribers all represent instances in which businesses use data about consumers to offer them lower prices than they would otherwise encounter.

These practices are not only economically beneficial in the abstract; they have concrete, measurable positive effects on consumer welfare. Research demonstrates that:

² 15 U.S.C. § 45

³ 15 U.S.C. § 45(a)(1)

⁴ According to the Deception Statement a practice is deceptive if: (1) there is a representation, omission, or practice that is likely to mislead the consumer; (2) the consumer is acting reasonably under the circumstances; and (3) the representation, omission, or practice is material. The Commission's focus on material omissions—i.e., the failure to disclose that pricing is personalized when consumers reasonably expect uniform pricing—appropriately applies this framework. See FTC Policy Statement on Deception, 103 F.T.C. 174, 183 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)).

⁵ According to Section 5(n) and the Unfairness Statement a practice is unfair if: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or competition. See FTC Policy Statement on Unfairness (Dec. 17, 1980), appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

1. Loyalty programs enable consumers to access discounts, upgrades, and exclusive pricing that reduce the effective cost of goods and services across retail, travel, hospitality, and entertainment sectors.⁶
2. Targeted digital coupons, such as those provided to individuals based on consumer preferences and purchase history, allow retailers to reach consumers with offers they are more likely to use, increasing both consumer savings and market competition for those consumers' business.⁷
3. Location-based promotional pricing reaches consumers at or near the point of purchase, enabling spontaneous decisions that benefit both the consumer (lower cost) and the business (conversion of an otherwise lost sale).⁸
4. Retention pricing for customers or subscribers of a service that are at risk of cancellation preserves access to services at existing price points, benefiting consumers who may have faced a higher-priced alternative or foregone the service entirely.⁹

These practices have operated in the marketplace for decades. The Commission has previously recognized, in its 2016 report on big data, that data analytics can produce consumer benefits, including "more relevant advertisements, lower prices, and improved access to goods and services."¹⁰ That recognition should inform this Policy Statement. A framework that treats data-driven price discounting on equal footing with data-driven price increases risks significant collateral harm to a practice that the Commission has correctly recognized as a "long-established norm."

C. The Commission Should Expand the Policy Statement to Include Examples that Affirmatively Identify Permissible Practices

While the Policy Statement does not provide a definition for "personalized pricing," the framing appropriately focuses on practices that *elevate* prices, providing seven illustrative examples of potential Section 5 violations that relate to a willingness-to-pay framing. Each example involves an egregious fact pattern, including: pricing based on mobility limitations, bereavement travel, attendance at a crime victim's funeral, or use of a competitor's app. The NAI agrees that practices exploiting personal vulnerability or sensitive life circumstances may warrant enforcement scrutiny under Section 5.

⁶ The United Kingdom's Competition and Markets Authority found members of grocery store loyalty programs saved between 17-25% on average. See, e.g. *Competition & Mkts. Auth. (U.K.), Review of Loyalty Pricing in the Groceries Sector* (Nov. 27, 2024),

<https://www.gov.uk/government/publications/review-of-loyalty-pricing-in-the-groceries-sector/executive-summary>

⁷ The FTC itself recognized that personalized pricing done properly is likely a net benefit to consumers when unaccompanied by anticompetitive, unfair, or deceptive conduct. See, Org. for Econ. Coop. & Dev. [OECD], *Personalised Pricing in the Digital Era – Note by the United States*, DAF/COMP/WD(2018)140 (Nov. 21, 2018), <https://www.justice.gov/atr/page/file/1313091/dl>.

⁸ See, e.g., Jean-Pierre Dubé, Zheng Fang, Nathan Fong & Xueming Luo, *Competitive Price Targeting with Smartphone Coupons*, 36 Mktg. Sci. 944 (2017) (finding competing movie theaters cut prices when using location targeting practices in their competitor's market in an experiment); Danaher, P. J., Smith, M. S., Ranasinghe, K. A., & Danaher, T. S. (2015). Where, when, and how long: Factors that influence the redemption of mobile phone coupons. *Journal of Marketing Research*, 52(5), 710-725. <https://doi.org/10.1509/jmr.13.0341>

⁹ In 2024, the FTC recognized that retention offers are not unfair or deceptive on their face. See Negative Option Rule, 89 Fed. Reg. 90476, 90512 (Nov. 15, 2024) (to be codified at 16 C.F.R. pt. 425), *vacated sub nom.* Custom Commc'ns, Inc. v. FTC, 142 F.4th 1060 (8th Cir. 2025). (finding that requiring immediate effectuation of cancelling may prevent the consumer from receiving "valuable concessions" and other informational benefits).

¹⁰ Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

However, the Policy Statement does not present illustrations that do not violate the deception or unfairness standard that could serve to clarify the offering of discounts as a permissible practice, such as data-driven discount-oriented practices, which are the inverse of the examples currently in the Policy Statement.

Businesses could reasonably read an enforcement policy that lists only severe violations as providing no assurance that common, highly-regarded, consumer-beneficial practices are permissible. This would create a chilling effect inconsistent with the Commission's mission of protecting consumers. A business that stops offering loyalty discounts or targeted coupons out of uncertainty about the Policy Statement's scope would not serve the interests of its customers.

The Commission has a well-established practice of providing guidance for businesses in related policy contexts to help inform compliance. In its Endorsement Guides, for example, the FTC provides affirmative examples of compliant disclosures alongside examples of non-compliant practices.¹¹ The NAI recommends that the Commission adopt a similar approach with this Policy Statement and include additional examples that affirmatively confirm beneficial practices, including:

- Loyalty program pricing in which a consumer voluntarily enrolls in a program that uses purchase history to deliver reduced prices—does not constitute a deceptive or unfair practice under Section 5, and does not require additional disclosure beyond the program's own terms.
- Targeted digital coupons and promotional offers delivered through advertising platforms or directly by businesses, based on a consumer's first-party interactions, the inferred consumer interest, or purchase history, should remain permissible data-driven pricing practices that provide consumer benefits without requiring specific personalized pricing disclosures.
- Location-based promotional offers that provide lower prices to consumers based on relevant data, such as proximity to a retail store or nearby service provider, where this data has been collected with informed consent related to advertising and marketing uses.
- Retention pricing, including offers of reduced pricing made to subscribers or customers identified as at risk of discontinuing a service—these are consumer-beneficial practices that reflect the consumer's revealed preference and do not implicate Section 5.

The FTC Act's unfairness test expressly requires that any harm must be substantial and the Commission must weigh "countervailing benefits to consumers or to competition" before finding a practice unfair.¹² The practices described above likely do not cause any "substantial" harm to any consumer and represent precisely the countervailing benefits that would mitigate any hypothetical harm. An enforcement policy that leaves their status ambiguous would be inconsistent with the statutory text. Therefore, the NAI recommends that the final policy statement adopt a clear definition of "personalized pricing" that relates to upward price variation, and separately acknowledge "data-driven discounting" or "data-driven promotional pricing" as distinct and beneficial.

¹¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 88 Fed. Reg. 48092 (July 26, 2023) (codified at 16 C.F.R. pt. 255).

¹² 15 U.S.C. § 45(n).

II. THE POLICY STATEMENT SHOULD PROVIDE CLEARER SECTION 5 GUIDANCE AND REDUCE LEGAL UNCERTAINTY

A. The Commission Should Resolve the Open Question of Whether Fully-Disclosed Personalized Pricing Can Constitute an Unfair Practice

The Policy Statement expressly "declines at this time to take any position on whether some personalized pricing practices are unfair even when fully disclosed to consumers."¹³ This is a significant omission. A business that reads and complies with the Policy Statement's disclosure requirements is left without assurance that its practices are lawful. This would create an unreasonable enforcement risk that is difficult to reconcile with the Commission's objective to provide fair notice.

The FTC's own Administrative Procedure Act obligations include providing regulated parties with fair notice of what conduct is prohibited.¹⁴ A policy that identifies disclosure as the primary compliance mechanism, but declines to confirm that disclosure is sufficient, fails to provide the certainty that businesses need, and it ultimately fails the best interests of consumers.

The NAI urges the Commission to resolve this question in the final Policy Statement. Specifically, the Commission should articulate the circumstances, if any, under which fully-disclosed personalized pricing practices could constitute unfair practices, and should identify the relevant factors it would weigh under Section 5(n). At a minimum, the Commission should confirm that businesses that provide clear, conspicuous, and accurate disclosures—and that offer consumers a meaningful opportunity to avoid personalized pricing—are protected from unfairness enforcement absent evidence of substantial harm that the disclosure did not address.

B. The Commission Should Provide Model Disclosure Language

The Policy Statement requires that disclosures about personalized pricing be "clear and conspicuous" and must identify: (1) that the consumer is seeing a personalized price; (2) the basis for the personalization; and (3) the categories of data used. This is a reasonable framework as a matter of principle, but its practical application raises significant implementation challenges.

The Commission has previously provided model disclosure language or practices in analogous contexts. Its Negative Option Rule¹⁵ and its Endorsement Guides¹⁶ both include specific language or practices that businesses can follow. The FTC's ".com Disclosures" guidance similarly provides examples of compliant and non-compliant disclosure presentations in online environments. Businesses seeking to comply with the Policy Statement's disclosure requirements would benefit from comparable specificity here. The NAI respectfully requests that the Commission issue supplementary guidance that provides:

¹³ Fed. Trade Comm'n, *Proposed Enforcement Policy Statement Regarding Personalized Pricing* at 7 (Aug. 19, 2026).

¹⁴ See *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 261 (3d Cir. 2015) (recognizing fair notice as a constraint on Section 5 enforcement).

¹⁵ In removing the opt-in requirement to "Saves," the FTC provided guidance indicating that such offers likely do not constitute unfair or deceptive practices on their own absent the presence of "unreasonable and unnecessary barriers to cancellation." See Negative Option Rule, 89 Fed. Reg. 90476, 90512 (Nov. 15, 2024), *vacated sub nom.* Custom Commc'ns, Inc. v. FTC, 142 F.4th 1060 (8th Cir. 2025).

¹⁶ § 255.2(e) provides specific examples of endorsements in context and how certain practices may affect compliance. See, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 88 Fed. Reg. 48092 (July 26, 2023) (codified at 16 C.F.R. pt. 255).

- Model disclosure language for common personalized pricing scenarios, including e-commerce checkout flows, mobile applications, and in-store digital displays.
- Guidance on the timing, placement, and presentation of required disclosures to meet the "clear and conspicuous" standard in digital environments.

Conclusion

The NAI supports the Commission's commitment to protecting consumers from data-driven pricing practices that covertly raise prices without their knowledge or meaningful ability to avoid the practice. Such practices, when they involve material omissions that mislead consumers acting reasonably or cause substantial harm that cannot be avoided, are appropriately addressed under the FTC Act's longstanding deception and unfairness frameworks.

The Policy Statement will be more effective—and more protective of consumers—if it provides clearer guidance that: (1) affirmatively recognizes the substantial consumer benefits of discount-oriented personalized pricing; (2) identifies categories of common, responsible data practices that do not require additional disclosures; (3) resolves the uncertainty regarding fully-disclosed personalized pricing; (4) clarifies the scope of application to precise location data and other sensitive data; and (5) provides model disclosure language that gives businesses a concrete and reliable path to compliance.

The NAI and its member companies remain committed to responsible data practices and stand ready to work with the Commission to develop practical, effective guidance that protects consumers while preserving the significant benefits that data-driven pricing can provide.

Sincerely,



David LeDuc

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