

September 25, 2026

The Honorable Andrew Ferguson
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, District of Columbia 20580

Re: Comments of ACT on the Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing, Docket No. FTC-2026-1057, Matter No. P034101

The Association for Competitive Technology (ACT) appreciates the opportunity to comment on the Federal Trade Commission's (FTC) proposed enforcement policy statement regarding personalized pricing.¹

I. Introduction and Statement of Interest

ACT is a not-for-profit trade association representing the global small business technology developer community. Our members are entrepreneurs, independent developers, and small firms that build software, connected devices, and data-driven services across nearly every sector of the economy.

Representing small businesses seeking to do right by their customers and clients, ACT shares the FTC's goal of protecting consumers from unfair and deceptive trade practices. ACT members, many of them small technology firms without dedicated compliance staff, are often on all sides of different market transactions, as buyers, sellers, and contractors. It is therefore in our interest to have consumer protection policies that are effective for consumers and, because small firms often lack robust compliance departments, are clear and understandable for businesses.

II. Comments on the Proposed Enforcement Policy Statement Regarding Personalized Pricing

¹Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing, Matter No. P034101 (proposed for public comment Aug. 19, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/p034101-ftc-enforcement-policy-statement-re-personalized-pricing-proposed-for-public-comment.pdf. Comments are filed in Docket No. FTC-2026-1057.

The Commission’s policy statement seeks to apply its Section 5 authority to enforce against unfair or deceptive acts or practices in or affecting commerce to new forms of dynamic data-driven pricing, which the statement refers to as “personalized pricing.” Several features of the statement are welcome, including its use of accurate and well-established terminology, its grounding of the injury it describes in the prices consumers actually pay rather than in generalized claims about privacy, and its acknowledgment that “Congress has not given the Commission the authority to prohibit personalized pricing outright.”² Section 5 already reaches personalized pricing practices in the marketplace that harm consumers, and ACT supports enforcement against them. However, given the broad swath of commercial activity that could be swept into the concept of personalized pricing, the vast majority of which is utterly routine and well known to market participants, the precision of any policy statement’s definition and the specificity of its examples will be exceptionally important. ACT urges FTC to focus on what American consumers reasonably expect and to base any enforcement policy statement on concrete evidence of consumer expectations. Such an approach would be consistent with Chairman Ferguson’s dissent from the publication of surveillance pricing 6(b) staff research summaries where he cautioned that publishing ideas and initial observations accompanied by “hypothetical use cases rather than robust factual findings” may undermine the trust placed in the Commission’s Section 6(b) work.³

This is even more true given that the FTC’s interpretation of Section 5 flows down into the consumer protection laws of the states and territories, many of which even directly cite the FTC Act and the Commission’s and courts’ interpretation of its terms. As this policy statement will create a new understanding of the meaning of Section 5 with regard to personalized pricing practices, its impact will be felt at the federal level and in many jurisdictions below it. Small firms already build their compliance programs around the definitions in state privacy statutes, and a federal enforcement standard that turns on a differently scoped and/or less clear understanding of personal data would leave them facing obligations that do not line up. It is therefore essential that the FTC craft its concepts and definitions carefully to avoid applying new liability beyond specifically identified harmful practices.

The policy statement primarily discusses personalized pricing in the context of large physical or digital storefronts and individual consumers, but many of its concepts could be applied to other sizes of businesses and types of commercial transactions. Section 5 extends to unfair and deceptive acts and practices in or affecting commerce generally, and the Commission has long brought cases on behalf of business purchasers deceived about

² Proposed Enforcement Policy Statement, *supra* note 1.

³ Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, Regarding the Publication of Staff Research Summaries on Surveillance Pricing (Jan. 17, 2025), https://search.ftc.gov/system/files/ftc_gov/pdf/surveillance-pricing-6b-research-summaries-ferguson-dissent-final.pdf.

the terms on which they were buying,⁴ with state analogues covering business purchasers by their terms. Every scenario the statement offers to illustrate the practice involves a consumer facing a retail, grocery, delivery, lodging, or rideshare price set higher because of what the seller infers about willingness to pay or about limited ability to shop elsewhere, and none involves a price negotiated between businesses. ACT members also buy software and cloud services, so clarity about when a quoted price is treated as personalized matters to them as purchasers and not only as sellers. The clarity ACT asks for applies the same way whether a member is quoting a price or being quoted one. Many ACT members create software solutions for the technological needs of business clients. They may have default, off-the-shelf versions of their products or services, but they may also create custom solutions after learning more about their clients' specific needs and situations. In fact, this flexibility and customizability is an important competitive advantage for small software development firms, as they can more nimbly react to nuanced challenges than large companies.

These customizable solutions, however, commonly lead to small firms like ACT's members charging different prices to different clients for substantially similar products and services. If read broadly, the FTC's policy statement could mean that these pricing differentials could expose small software developers to Section 5 liability for a pricing methodology that has long been commonplace in the market for software products and services, as well as many other sectors of the economy. A developer serving two hospital systems with different integration and security requirements will quote each of them differently for work that looks similar from the outside.

While small companies like ACT's members may not expressly represent to potential clients that their prices are static or widely offered, the enforcement policy statement says that liability for deception may also attach "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."⁵ Without clear guidance from the FTC, the attachment of liability based on the subjective understanding of the customer creates an environment of uncertainty for small businesses. In the context of software development, it should be reasonably clear to a client that the final price is not widely offered and is instead "personalized" at the end of a lengthy negotiation over contract terms or software capabilities. But if a client merely accepts the developer's first offer then the standard supplies no conclusive answer about what that client reasonably believed, and the developer has no way to know in advance how an enforcer will read the transaction.

In another common scenario, small companies often offer a product at different prices early in its life cycle to determine the optimal price going forward. For example, a small developer might offer its new software subscription for \$39, \$59, or \$99 and offer prospective users different prices at random in order to measure over time which price

⁴ See Federal Trade Commission, Protecting Small Businesses, Cases, <https://www.ftc.gov/business-guidance/small-businesses/protecting-small-businesses-cases>.

⁵ Proposed Enforcement Policy Statement, *supra* note 1.

point generates the most revenue. If this type of price differential becomes considered a Section 5 violation, companies may be required to do this sort of testing by offering each of these different prices for one period of time after another. This, however, would take longer, make it more difficult to tease out seasonal and other effects, and generally make it more difficult for the small business to make a good pricing decision. While this sort of testing may not seem to be reliant on the personal data of the user, random sorting would still require processing the user's device ID, so clarity on whether this type of activity falls under the proposed enforcement policy is very much needed. The statement already confirms that prices may vary with supply and demand and with regional differences in taxes, regulations, and market conditions, and ACT asks the Commission to confirm on the same footing that a price offered as part of a randomized test is not personalized pricing where the price shown does not turn on what the seller infers about the individual.

ACT also notes that under 15 U.S.C. § 45(n) a practice is unfair only where the injury is substantial and consumers cannot reasonably avoid it. In other words, a buyer can reasonably avoid a personalized price unless the fact or nature of the personalization has been concealed, meaning that a client who supplies specifications and negotiates terms knows that the quote is individualized to its own requirements and remains free to negotiate further or to buy elsewhere, which the Commission should confirm. The proposed statement also points to the Restore Online Shoppers' Confidence Act and to the Commission's fees rule, and ACT asks that neither be read to reach negotiated commercial software contracts, which lie outside the subscription, ticketing, and short-term lodging settings those authorities address.

In addition, the requirement that businesses should disclose "all relevant information, such as... the basis of that personalization, and the type of data used," when applied to the custom software context, could require small developers to disclose market research, leads development information, data on competitors, or other competitively sensitive information that the developer relied on in its price negotiations with the prospective client. The disclosure of this information is not in keeping with the FTC's overall goal of protecting consumers' personal privacy and informing them of the use of their personal data, and it could put small developers at a competitive disadvantage by revealing the types of research they undertake.

Because small firms are much less able to absorb liability or the costs of enforcement actions than large firms, they are likely to avoid circumstances and practices where such liability might attach rather than take the risk. Where the compliance step is a disclosure, difficulty for small firms will be particularly high if the statement's expectations do not account for differences in business model, platform, screen size, or user interface. The statement's expectation that a seller obtain consent covering the use of data for pricing raises the same problem, because much of the analytics and advertising data a small developer holds arrives through third-party software development kits it does not control, and responsibility should sit with the value-chain participant best able to mitigate the risk, with no firm held to a consent it had no practical way to obtain or verify. Adding further

notices to interfaces that already carry privacy and cookie disclosures also risks the disclosure fatigue that leads consumers to click through without reading, which serves neither the Commission's purpose nor the consumer's. Therefore, it is important for policymakers to narrowly tailor the application of new prohibitions to as specific of practices as possible to avoid dissuading small businesses from participating in otherwise unobjectionable market activity. ACT suggests that the Commission tie disclosure expectations to the use of personal data to raise a price above the price a seller otherwise offers, rather than to the use of data to surface a discount, a promotion, a loyalty or membership benefit, or a negotiated rate. ACT notes that the sector-specific disclosure regimes the statement points to are consistent with this request, since they require disclosure of the basis for an individualized adverse action such as an increased insurance premium, and they do not support a disclosure regime that reaches reductions from a seller's standard price.

ACT therefore requests that the FTC consider additional clarity to the enforcement policy statement on personalized pricing to confirm that its reasonable-expectations test does not treat custom or contracted product development, or a price negotiated between businesses, as the personalized pricing the statement describes, and that a reduction from a seller's disclosed standard price is not the injury the statement addresses. A buyer who supplies specifications and negotiates terms cannot reasonably expect a static, widely offered price, which is the expectation the statement protects, and the Commission recognizes as much when it observes that the prices of insurance and credit necessarily turn on a consumer's individualized characteristics. Such clarity would go a long way to ensuring that personalized pricing enforcement is focused on consumer harm rather than unintentionally affecting a broad swath of business practices that are common throughout the economy.

In addition, ACT cautions the Commission against assuming that personalized pricing is, in and of itself, a consumer harm. Algorithmic or data-driven pricing can in many circumstances be procompetitive, allowing companies of all sizes to respond rapidly to changes in supply, demand, and consumer behavior. These tools foster efficiency, improve inventory management, reduce overhead, and help tailor offerings to consumer needs. Dynamic and personalized pricing tools can also be important for new entrants seeking to compete with larger incumbents. Treating the use of such tools as inherently harmful to consumers would be overbroad and reduce benefits to competition without countervailing benefits to consumer protection. Pricing that is discriminatory, deceptive, or anticompetitive is already unlawful under federal antitrust law, state consumer protection statutes, and the civil rights laws that prohibit pricing on the basis of protected characteristics, so the Commission can reach the conduct that actually harms consumers without a disclosure regime that also reaches routine discounting. A regime that leads sellers to withdraw from data-driven discounting, or that leads consumers to withhold the data that would earn them a discount, would leave consumers paying more than they do today. We urge the Commission to focus on specific outcomes that have resulted in consumer harm, not on the use of specific technologies or tools.

Finally, ACT notes that small firms that do build to the statement will need time to do so, and requests a transition period of at least twelve months after the statement is finalized, together with staff guidance illustrating how the Commission expects firms to comply, during which the Commission will work with firms to bring their practices into line to make good-faith compliance realistic for businesses without compliance staff.

III. Conclusion

Small businesses like ACT's members benefit greatly from clear, understandable policy language that makes it as achievable as possible to follow the law without the need of large in-house compliance departments. ACT supports the FTC's goal of protecting consumers from unfair or deceptive pricing practices enabled by new technological methods and urges the Commission to focus on those practices that have demonstrated consumer harm in the marketplace.

We welcome the opportunity to discuss these comments with the FTC.

Sincerely,

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