

BEFORE THE FEDERAL TRADE COMMISSION WASHINGTON, D.C. 20580

**In the Matter of: Proposed Enforcement Policy Statement Regarding Personalized Pricing
Matter No. P034101**

COMMENTS BY DIGITAL LIBERTY

I. INTRODUCTION AND EXECUTIVE SUMMARY

This submission of public comments is offered in response to the Federal Trade Commission's ("FTC" or "Commission") *Proposed Enforcement Policy Statement Regarding Personalized Pricing* (Matter No. P034101). The Commission proposes that the failure of a business to disclose the use of personalized pricing, alongside the specific data forming the basis of that pricing, likely constitutes an unfair or deceptive act or practice under Section 5 of the Federal Trade Commission Act.

While the Commission's stated goal is to protect consumers from the opaque application of artificial intelligence (AI) in retail markets, the Proposed Policy Statement rests on a historically inaccurate premise and a legally flawed application of consumer protection law. The assumption that uniform pricing is the absolute norm—and that personalized pricing is a deceptive deviation from that norm—ignores the realities and history of commerce. Personalized pricing is a long-established, ubiquitous, and economically efficient practice. The integration of AI into pricing mechanisms simply modernizes this practice, making price signals far more accurate, enhancing resource allocation, and ultimately making goods and services more affordable for price-sensitive consumers.

We respectfully urge the Commission to withdraw the Proposed Policy Statement. Regulating AI-driven dynamic pricing through the threat of Section 5 enforcement will not protect consumers; rather, it will destroy targeted discounting, force businesses to adopt higher uniform prices, and disproportionately harm low- and middle-income Americans.

II. THE MYTH OF THE UNIFORM PRICE BASELINE: PERSONALIZED PRICING AS A HISTORICAL AND MODERN NORM

The Commission's Proposed Policy Statement relies heavily on the assumption that American consumers hold a "reasonable expectation" that prices are completely static and uniformly offered to all buyers at all times. This assumption is disconnected from both historical precedent and modern commercial reality.

A. The Historical Context of Commerce

For millennia, virtually all economic exchange was characterized by personalized pricing. In traditional markets, merchants and buyers engaged in direct negotiation, assessing the buyer's willingness to pay, the seller's need to liquidate inventory, and the relational history between the

parties. The "posted price"—a single, non-negotiable price applied equally to all consumers—is a relatively recent invention, popularized in the late nineteenth century by large department stores like Macy's and Wanamaker's. These retailers adopted uniform pricing not out of a moral obligation to consumer fairness, but to solve an administrative problem: they needed to prevent newly hired clerks from skimming profits or granting unauthorized discounts in massive, multi-department floor spaces.

Smaller merchants, meanwhile, continued to offer personalized pricing. It was especially common in small communities with high degrees of social trust for merchants to offer discounts to customers with whom they maintained long-established relationships based on ability to pay. This was not universal nor universally altruistic as stock needed liquidation and discounts reinforce customer loyalty, but no less moral for these ulterior considerations. Uniform pricing in a different context – larger scale, modern, and urban – is an administrative convenience for the seller, not a fundamental right of the buyer.

B. Ubiquity in the Modern Economy

Even with the rise of the department store, personalized pricing never disappeared. It simply evolved, and today it permeates almost every major sector of the global economy. Consumers navigate personalized pricing daily without assuming they are being deceived. Common examples include:

- **Higher Education:** Universities use complex financial data to offer personalized tuition rates. The published "sticker price" is effectively a cap, while the vast majority of students receive individualized financial aid packages based on their specific economic profiles.
- **Financial Services:** Interest rates on mortgages, auto loans, and credit cards are strictly personalized based on a consumer's credit score, income, and debt history.
- **Automotive Sales:** The final price of a vehicle is negotiated and personalized based on trade-in values, financing options, and targeted manufacturer rebates (e.g., military or recent graduate discounts).
- **Travel and Hospitality:** Airlines and hotels employ sophisticated yield management algorithms. Two passengers sitting next to each other on a flight almost never paid the same price, as fares fluctuate based on booking time, browsing history, loyalty status, and point of origin.
- **Retail and E-Commerce:** Loyalty programs, digital coupons, and targeted email promotions ensure that frequent shoppers or price-sensitive shoppers pay less for groceries and consumer goods than occasional buyers.

The application of AI to digital storefronts is a modern adaptation rather than a radical departure from these established norms.

III. THE MICROECONOMICS OF AI PRICING: ACCURATE SIGNALS AND EXPANDED AFFORDABILITY

The Commission views algorithmic pricing with suspicion, fearing it acts as a mechanism for unchecked monopolistic extraction. However, in competitive markets, AI-driven personalized pricing operates as a highly efficient mechanism that benefits consumers by expanding affordability.

A. Enhancing the Accuracy of the Price Signal

Prices are crucial signals conveying information about supply and demand. When prices are forced to remain uniform and static, they fail to reflect real-time gluts in inventory, sudden shifts in consumer demand, or localized supply chain disruptions. The price mechanism allows billions of decentralized actors to involuntarily process trillions of data points in real time, matching supply with demand at a granular level.

Artificial intelligence allows merchants to simulate this feedback at a smaller scale. AI might not be able to solve the knowledge problem identified by Friedrich von Hayek, but it can process billions of data points in real-time, significantly improving merchant visibility of supply and demand. If a retailer possesses excess perishable inventory, an AI algorithm can instantly target discounts to local consumers who have shown a historical propensity to purchase those goods at a reduced price. The AI makes the price signal radically more accurate, ensuring that goods flow to those who value them without resulting in deadweight loss or physical waste.

B. Eliminating Deadweight Loss and Lowering Prices

The most severe consequence of a uniform pricing mandate is the systemic exclusion of low-income consumers from the market.

When a merchant is forced to set a single uniform price, they must maximize their margin across the entire consumer base. Consequently, they set the price at a level that average or above-average income consumers can afford. Consumers whose "reservation price" (the maximum amount they are willing and able to pay) falls below that uniform threshold are priced out of the market entirely. In economic terms, this results in "deadweight loss"—transactions that would have benefited both the buyer and the seller fail to occur.

AI-driven personalized pricing solves this problem. By identifying consumers who are highly price-sensitive, merchants can offer targeted, personalized discounts to secure their business. A retailer can charge a premium to an affluent, time-constrained shopper who needs immediate delivery, while simultaneously offering a heavily discounted price to a budget-constrained shopper who is willing to wait a few extra days or who has been utilizing price-comparison tools.

If the Commission restricts personalized pricing by burdening it with impossible disclosure mandates, merchants will abandon targeted discounting entirely. The inevitable result will be a reversion to higher uniform prices. The affluent will see little change, but marginal, low-income, and highly price-sensitive consumers will find essential goods and services increasingly unaffordable.

V. THE DESTRUCTIVE CONSEQUENCES OF THE PROPOSED DISCLOSURE REGIME

If the Commission moves forward with this Proposed Policy Statement, the practical implications will be harmful for American commerce and consumer welfare.

The FTC proposes that businesses utilizing personalized pricing must "clearly and conspicuously disclose not just that the price is personalized, but also the basis for that personalization and the types of data on which the personalization is based."

A. Technical Impossibility and Disclosure Fatigue

Modern AI pricing algorithms do not operate on a simple "If X, then Y" logic tree. They utilize deep learning models that synthesize hundreds of real-time variables—inventory levels, regional weather patterns, regional fuel costs, supply chain delays, user device type, time of day, and aggregate demand velocity. Mandating that a retailer explain the "basis for that personalization" at checkout in a clear and conspicuous manner is a technical impossibility. It requires translating high-dimensional mathematical inferences into consumer-facing legalese.

The result will be screen-blocking pop-up disclosures that provide zero actionable information to the consumer. This will exacerbate "disclosure fatigue," training consumers to blindly click "Accept" on regulatory warnings, thereby degrading the effectiveness of genuine safety or privacy alerts.

B. The Chilling Effect on Artificial Intelligence Adoption

Faced with the threat of subjective FTC enforcement and the impossible burden of explaining neural networks in a shopping cart UI, retailers will take the path of least resistance: they will turn their AI pricing engines off.

This would be a step backward for American productivity. Predictive pricing systems allow retailers to optimize logistics, manage lean inventories, and reduce the overhead costs associated with unsold goods. By chilling the adoption of these technologies, the FTC will artificially inflate retail operating costs, which will inevitably be passed on to consumers in the form of macro-inflationary pressure.

C. The End of Pro-Consumer Discounting

As previously established, the ultimate victim of this policy will be the price-sensitive consumer. Stripped of the ability to use data to deploy targeted discounts, retailers will be forced to implement rigid, uniform pricing across their platforms. They will naturally calibrate these prices upward to protect their margins against their most affluent buyers, effectively eliminating the digital clearance racks and targeted promotions upon which low-income shoppers rely. The FTC, operating under the banner of consumer protection, will have successfully mandated higher retail prices for America's most vulnerable demographic.

VI. CONCLUSION

The Federal Trade Commission's *Proposed Enforcement Policy Statement Regarding Personalized Pricing* is a solution in search of a problem. It targets an ancient, ubiquitous, and economically beneficial pricing strategy merely because it is now executed by software rather than human clerks.

Using artificial intelligence to price goods makes economic signaling more precise, clears markets more efficiently, and enables retailers to offer life-changing affordability to price-sensitive consumers. Consumers remain entirely free to reject any offer and take their business elsewhere—the ultimate and most effective form of consumer protection.

We respectfully request that the Commission abandon this unworkable interpretation of Section 5, withdraw the Proposed Policy Statement, and allow competitive market dynamics to continue delivering efficiency and affordability to American consumers.

Respectfully submitted,

James Erwin
Executive Director
Digital Liberty
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