BCLP. Client Intelligent

Insights

SECOND SWEEP: FTC EYES SURVEILLANCE PRICING, AGAIN

Aug 26, 2026

Summary

On August 19, 2026, the FTC proposed an Enforcement Policy Statement Regarding Personalized Pricing (the "Proposed Statement"). This Proposed Statement builds on—but does not reference—the FTC's past investigative work in this space. Clients with personalized pricing practices, or those that are considering adopting these practices, should conduct a careful review of their pricing policies and procedures to ensure that they do not fall within the FTC's evolving concerns. The FTC's Proposed Statement discusses how these practices could be deceptive, unfair, violative of privacy, or anticompetitive in certain circumstances. However, the FTC emphasizes that disclosure to consumers could cure many of these potential issues.

The Proposed Statement represents the FTC's most recent contribution to the active debate, at state and federal levels, on the impacts of personalized pricing on consumers. The Proposed Statement, however, does not mention or rely on any of FTC staff's previous work on this issue, some of which we previously covered here, including eight subpoenas the FTC issued to financial services, consulting, and analytics companies in July 2024; and the two preliminary reports FTC staff issued in January 2025 based on the responses to those eight subpoenas. This is also the second proposed enforcement policy statement from the FTC in as many months, marking the second consecutive month the FTC has broken from past practice by submitting a proposed enforcement policy statement for public comment. This request for public comment is particularly striking given that one of Chairman Ferguson's first actions was withdrawing Chair Khan's request for public comment on the same topic, suggesting the current FTC leadership now sees value in public input it previously curtailed.

Substantively, the FTC focuses the majority of the Proposed Statement on the FTC's deception authority (though potential unfairness, privacy, or competition issues do each get brief mentions). On deception, the FTC raises concerns that consumers may be deceived by undisclosed usage of personalized pricing. Specifically, the Proposed Statement asserts, without citation, that "[w]hen consumers walk into a retail store . . . they reasonably expect the price on the shelf to be the same price offered to any other consumer shopping at the same store at the same time." How true this expectation is in practice—despite companies long offering discounts and other loyalty benefits that only show up at checkout—is hard to measure. What is clearer is that the FTC seems more concerned with upward, rather than downward, price adjustments: "Consumers who reasonably believe that a personalized price is a discount based on their purchase history with that retailer when it is in fact a higher price based on information about their disposable income or their shopping habits with other firms . . . may be deceived into not taking action to avoid the personalized price." This concept, where "misled consumers might suffer the injury of paying a higher price that they could have otherwise avoided," presents the clearest example of a personalized pricing practice that could lead to easily measurable consumer harm.

For privacy, the FTC acknowledges the potential for privacy concerns on both businesses that collect consumers' personal data for personalized pricing and those customers that consent to give that personal data. Unfortunately, the Proposed Statement does not go beyond acknowledging this concern, which raises more questions than it answers, as many personalized pricing claims often involve challenging privacy issues. Tellingly, the Proposed Statement does not cite the FTC's most recent privacy settlement, again suggesting that the privacy issues underlying personalized pricing remain highly unsettled.

For unfairness, the FTC suggests that "[c]onsumers may not reasonably be able to avoid [a] higher price if the fact or nature of personalization of the price has been concealed by the retailer." However, the Proposed Statement leaves many key questions unanswered, including, in a footnote, the FTC's declination "at this time to take any position on whether some personalized pricing practices are unfair even when fully disclosed to consumers."

The FTC also briefly mentions competition issues associated with personalized pricing, indicating that more research is needed. As the Proposed Statement explains, the welfare effects from personalized pricing practices are mixed: "The limited economic research on the question suggests that while personalized pricing is likely to increase business profits, benefits to some consumers are accompanied by losses to other consumers and that the more sophisticated personalized pricing practices become, the less likely consumers are to benefit." While the FTC's prior preliminary staff reports on this topic attempted to answer this question, they are not discussed in the Proposed Statement. However, by focusing on "business profits," the FTC gives businesses a ready-made story that they are rationally adopting the same practices and vendor for independent business reasons (parallel conduct) rather than collusion (concerted action).

Importantly, the Proposed Statement offers some guidance for clients on how to resolve potential FTC concerns, with the most important being the traditional mechanisms of sufficient disclosures. The FTC gives one example centered around misleading information/disclosures: "Telling a consumer only that he is being shown a 'specially selected' price . . . would likely be misleading because it omits important information." However, "a clear and conspicuous disclosure that a personalized price is based on a consumer's estimated willingness to pay derived from data about the consumer's previous purchases from the same retailer through the same login account—if accurate and complete—would likely be enough to dispel any reasonable expectation that the posted price is not personalized and give the consumer the information he needs." In practice, the Proposed Statement asks businesses to disclose three points: that the price is personalized, the basis for that personalization, and the types of data used to set it. Clients should consider ensuring their current pricing disclosures meet each of these elements.

Notably, the FTC's Proposed Statement is not the only enforcement signal in this space. On January 27, 2026, California Attorney General Rob Bonta announced an investigative sweep targeting businesses' use of consumers' personal information to set individualized prices, on the basis that such practices may trigger obligations under, or even violate, the California Consumer Privacy Act. This state investigation is only one of many developments on the state level, including efforts by states like Maryland to ban surveillance pricing in some sectors, and by New York to impose transparency requirements. Connecticut and New Jersey have likewise enacted restrictions on personalized or surveillance pricing, and dozens of other states have similar bills pending. At the federal level, on August 5, 2026, U.S. Senator Josh Hawley (R-Mo.), as Chairman of the Senate Judiciary Subcommittee on Crime and Counterterrorism, held a hearing on "Predatory AI Surveillance Pricing," signaling bipartisan federal interest in the practice, alongside the FTC's enforcement efforts.

Clients should track this state and federal legislative activity alongside the FTC's Proposed Statement when assessing overall exposure. Clients that use surveillance or personalized pricing either directly or via third-party pricing intermediaries, or are considering adopting such practices, should check in with qualified counsel to evaluate any risk exposure in line with the Proposed Statement and other regulatory efforts in this area. The team at BCLP stands ready to assist clients going through this process.

Related Capabilities

- Retail & Consumer Products
- Antitrust & Competition
- Data Privacy & Security

Meet The Team

David B. Schwartz

Partner, Washington, D.C.

david.schwartz@bclplaw.com
+1 202 508 6086

Merrit M. Jones

Office Managing Partner,
San Francisco

merrit.jones@bclplaw.com
+1 415 675 3435

Goli Mahdavi

Global AI Lead, San Francisco

goli.mahdavi@bclplaw.com
+1 415 675 3448

Darren E. Ray

Associate, Washington, D.C.

darren.ray@bclplaw.com
+1 202 508 6034
