ECOMMERCE INNOVATION ALLIANCE

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Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)
Washington, DC 20580

RE: Comments of the Ecommerce Innovation Alliance on the Proposed Enforcement Policy Statement Regarding Personalized Pricing, Docket No. FTC-2026-1057 (Aug. 19, 2026)

Dear Secretary:

The Ecommerce Innovation Alliance ("EIA") respectfully submits these comments in response to the Federal Trade Commission's Proposed Enforcement Policy Statement Regarding Personalized Pricing, released for public comment on August 19, 2026 (the "Proposed Statement").[1] EIA shares the Commission's commitment to a marketplace in which the price a consumer sees is the price that consumer pays, free from hidden charges, bait-and-switch tactics, and deceptive representations. As drafted, however, the Proposed Statement sweeps far beyond that commitment. Its framework reaches the ordinary discounts, loyalty rewards, and promotional offers that small and mid-sized ecommerce businesses depend on every day to find, win, and keep their customers. These practices benefit consumers, consumers welcome them, and no reasonable consumer regards them as deceptive. EIA urges the Commission to clarify the scope of its policy before adopting it, and to develop a full and balanced record that accounts for the millions of small and mid-sized businesses the current record ignores before making enforcement policy of this breadth.

Two concerns loom largest. **First, compliance would be extraordinarily difficult, if not impossible, for a small business to implement.** The everyday promotional tools the Proposed Statement reaches are run through third-party platforms the merchant does not control, change constantly, and reflect a shifting blend of business factors that cannot feasibly be cataloged and disclosed offer-by-offer, least of all by the small businesses that have no compliance department, no in-house counsel, and no data-science team. **Second, the Proposed Statement would expose businesses of every size to sweeping litigation risk.** Because thirty States and the District of Columbia direct their courts to follow the FTC's interpretations of Section 5, a vague federal

[1] Fed. Trade Comm'n, Proposed Enforcement Policy Statement Regarding Personalized Pricing (Aug. 19, 2026) [hereinafter "Proposed Statement"].

enforcement standard would hand the plaintiffs' bar a ready-made template for demand letters and class actions under state unfair-and-deceptive-practices statutes, which carry the private rights of action, statutory damages, and one-way fee-shifting the FTC Act itself does not.

These comments proceed in eight parts. Part I describes EIA and the small and mid-sized businesses it represents. Part II explains why personalized offers are, in practice, a pro-consumer development that delivers savings and cuts through noise. Part III shows how, at a time of persistent inflation, the Proposal would raise the prices consumers actually pay, and would do so regressively. Part IV explains why a decision of this breadth should not be made through an enforcement policy statement, on a record that is silent as to small businesses and that the Commission's own Chairman has said is not yet complete. Part V shows that there is no consumer entitlement to a uniform price. Part VI explains how compelled disclosure of discount logic would invite gamesmanship and draw unprincipled lines between business models. Part VII presents the voices of EIA's merchant members in their own words. Part VIII sets out EIA's specific recommendations.

I. Interest of the Ecommerce Innovation Alliance

EIA is a nonprofit trade association that brings the ecommerce industry together to advocate for common-sense policies that strengthen the ecommerce ecosystem while protecting consumers' privacy. EIA's membership includes ecommerce merchants and the technology providers that serve them, spanning nearly 20,000 members across all fifty states.

EIA's perspective is essential to this docket because of who its members are not. They are not the big-box retailers, national grocery chains, hotel conglomerates, and rideshare platforms whose practices populate the Proposed Statement's illustrative examples and the studies on which it relies. EIA's merchant members are, overwhelmingly, small and mid-sized businesses: direct-to-consumer clothing and apparel labels, jewelry and accessories brands, cosmetics and personal-care lines, home-goods and housewares stores, family-owned brands, seasonal businesses, farms selling value-added products direct to consumers, and independent online stores of every description. Many are run by their founders. Most have no in-house counsel, no compliance department, and no data-science team. They reach their customers through off-the-shelf ecommerce and marketing platforms (online storefronts, email and SMS tools, and loyalty apps) using the standard promotional features those platforms provide.

These businesses form a large share of the American ecommerce economy, and they compete every day against the largest retailers on earth. The promotional tools the Proposed Statement would place under a cloud of enforcement risk, including welcome offers, loyalty rewards, win-back campaigns, abandoned-cart discounts, and subscribe-and-save pricing, are the same tools that

allow a five-person company to build the kind of direct customer relationships that would otherwise belong only to businesses with big-box scale. EIA submits these comments to ensure that the perspective of these businesses, which is entirely absent from the record underlying the Proposed Statement, is heard before the Commission acts.

The stakes for these businesses are not marginal, and neither is the segment of the economy they occupy. Small businesses are the backbone of American economic life: the 34.8 million small businesses in the United States make up 99.9 percent of all American firms, employ roughly 59 million people (about 45.9 percent of the private-sector workforce), and generate 43.5 percent of U.S. gross domestic product, and in the most recent year of data they accounted for 2.6 million net new jobs.[2] Ecommerce has become one of the primary channels through which these firms reach customers and grow. American consumers spent $1.19 trillion online in 2024, or 16.1 percent of all retail sales, a share that has risen every year.[3] The small and mid-sized merchants EIA represents sit where those two engines of the economy meet, small-business job creation and the growth of online commerce. When they succeed, they hire, and they do so disproportionately in the local communities and rural areas where a single online storefront can be a meaningful employer, as the fifth-generation Iowa farm and the other merchants in Section VII attest. A compliance burden these firms cannot absorb is therefore not a narrow concern. It falls on the part of the economy that creates most of its new jobs, and it does so to address data practices the record attributes to the largest enterprises, not to them.

In preparing these comments, EIA surveyed its merchant network about the practices the Proposed Statement could reach. Their responses appear throughout these comments and are collected in Section VII. EIA expects to receive additional examples and respectfully reserves the opportunity to supplement this record.

II. Personalized Offers Are a Pro-Consumer Development: They Deliver the Right Deals to the Right Consumers and Cut Through the Noise

A. Personalization in ecommerce is overwhelmingly about discounting, relevance, and relationship-building, not extracting a hidden premium

The Proposed Statement frames personalization as a threat: a means by which merchants armed with intimate data charge each consumer the most that consumer will tolerate. Whatever may be

[2] U.S. Small Bus. Admin., Office of Advocacy, Frequently Asked Questions About Small Business (July 2024) (99.9 percent of firms; 45.9 percent of employment, or about 59 million workers; 43.5 percent of GDP); U.S. Small Bus. Admin., Office of Advocacy, 2024 Small Business Profiles (Nov. 19, 2024) (2.6 million net new jobs in the latest year of data).

[3] U.S. Census Bureau, Quarterly Retail E-Commerce Sales, 4th Quarter 2024 (Feb. 19, 2025) ($1.19 trillion in 2024 retail e-commerce sales, 16.1 percent of total retail sales).

true of the hypothetical monopolist in the economic literature, that framing bears little resemblance to how personalization actually works in the ecommerce economy that EIA's members inhabit. For small and mid-sized merchants, personalization runs almost entirely in one direction: downward from the advertised price. The everyday personalized "prices" in ecommerce are a 15% welcome offer for a first-time visitor; a discount code emailed to customers who have not purchased since last season; free shipping for loyalty-program members; a small incentive to complete a purchase left in a cart; a lower per-unit price for customers who subscribe to recurring delivery. **In each case the list price remains the list price, publicly displayed and identical for everyone, and the personalization determines who is invited to pay less.**

These practices benefit consumers in two distinct ways. First, and most obviously, they lower prices. Targeted discounting delivers savings to the consumers most likely to value them (the hesitant first-time buyer, the lapsed customer, the price-sensitive shopper who abandoned a cart) rather than spreading a shallower discount indiscriminately across all buyers, including those who would happily have paid full price. Economic research bears this out. In the leading empirical study of personalized pricing in a real-world digital market, a majority of consumers, over sixty percent, paid lower prices under personalized pricing than under the uniform price.[4] The consumers most likely to benefit are the most price-sensitive, who are disproportionately lower-income consumers who would otherwise be priced out of the market entirely. As Wharton marketing professor Z. John Zhang recently testified before the Senate Judiciary Committee, a uniform price is not self-evidently the fair price: it favors price-insensitive (often higher-income) consumers while reducing access for price-sensitive (often lower-income) consumers, and flexible pricing "can benefit firms, consumers, or at minimum lower-income consumers, and society when done properly."[5]

Second, personalization reduces noise. The alternative to a targeted offer is not "no marketing"; it is untargeted marketing: the blast email sent to every address on a list, the coupon mailed to every household, the promotion shown to every visitor regardless of relevance. Consumers are not better off receiving more irrelevant offers. They are better off when a seasonal business reaches them at the start of the season they actually shop in, when a replenishment reminder arrives roughly when the product runs out, and when the discount offered is for a product they have shown interest in rather than one they have not. EIA member 3 Moms Organics, a small family business in East Hampton, New York that sells tick and mosquito repellent, describes this reality well: because

[4] Jean-Pierre Dubé & Sanjog Misra, Personalized Pricing and Consumer Welfare, 131 J. Pol. Econ. 131 (2023). The Commission itself relies on this study. Proposed Statement at 3 n.8.

[5] Written Testimony of Dr. Z. John Zhang, Professor of Marketing, The Wharton School, Before the U.S. Senate Judiciary Subcommittee on Crime and Counterterrorism, Hearing on "Your Data, Their Profit: The Consumer Cost of AI Surveillance Pricing" (Aug. 4, 2026) [hereinafter "Zhang Testimony"].

customers may purchase during one tick season and have no reason to think about repellent for many months, "[e]mail, customer segmentation, win-back campaigns, subscriptions, and targeted offers allow a small seasonal business like ours to reestablish that relationship when customers actually need us again." See Section VII.A.

The distributional story matters too. Three decades of pricing research show that flexible, personalized pricing tends to intensify competition rather than suppress it, and that the firms best positioned to benefit are those with high-quality products, strong brands, and loyal customers, which are "precisely the kinds of firms that policy and regulation may want to encourage."[6] Where competition is present, and among EIA's members it always is, differential pricing of this kind tends to redound to consumers' benefit rather than harm them, because the savings a merchant extends to win a price-sensitive customer are disciplined by every rival a click away. Far from being a loophole in the free market, it is one of the free market's basic mechanisms.

B. The practical reality: promotional pricing decisions reflect a shifting blend of many factors that cannot feasibly be cataloged and disclosed offer-by-offer

The Proposed Statement would require businesses engaged in "personalized pricing" to 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."[7] Applied to the promotional practices described above, that obligation misunderstands how these decisions are actually made.

A single promotional offer from an ordinary ecommerce merchant typically reflects a blend of factors that have nothing to do with profiling any individual's willingness to pay: current inventory levels and the need to move seasonal stock; product margins and wholesale commitments; the calendar (holidays, seasonal cycles, anniversaries of the brand); which marketing channel the customer arrived through, because discount codes double as advertising-attribution tools; whether the customer is new, returning, lapsed, or subscribed; whether the customer joined an email or SMS list, followed the brand, or enrolled in a rewards program; and ordinary experimentation, such as testing whether a ten-percent or fifteen-percent offer performs better. These inputs shift week to week and campaign to campaign. A Cincinnati chocolate maker in EIA's network reports that promotional codes are "a significant tool for tracking our advertising." The discount is as much a measurement device as a price. See Section VII.B.

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[6] Zhang Testimony at 2; see also Andrew Rhodes & Jidong Zhou, Personalized Pricing and Competition, 114 Am. Econ. Rev. 2141 (2024).

[7] Proposed Statement at 1, 6–7.

Requiring a merchant to catalog, keep current, and "clearly and conspicuously" disclose the basis and data types behind every such offer, at the moment each offer is displayed, would impose a compliance architecture that even sophisticated enterprises would find burdensome and that small merchants cannot realistically build. It would also produce disclosures that are either so general as to be useless ("this offer is based on your relationship with our store") or so granular as to be incomprehensible and, worse, alarming, dressing up a routine win-back email in the language of surveillance. As 3 Moms Organics puts it, mandatory data disclosures on every offer "could also make very normal customer interactions sound much more invasive than they actually are." See Section VII.A. A disclosure regime under which a birthday discount from a family farm reads like a data-broker transaction does not inform consumers. It misleads them, and it penalizes exactly the customer relationships the Commission should want to encourage.

III. At a Time of Persistent Inflation, the Proposal Would Raise the Prices Consumers Actually Pay, and Would Do So Regressively

The Commission has presented the Proposed Statement as part of a broader agenda focused on the cost of living for American families, and it grounds the Statement in the President's executive orders directed at lowering the prices Americans pay.[8] EIA shares that objective without reservation. Applied to ordinary discounts and promotions, however, the Proposed Statement would work against it, raising the prices consumers actually pay at the worst possible moment to do so.

Consumers remain under real and continuing price pressure. Even as headline inflation has moderated from its recent peaks, prices remain sharply elevated after several years of the steepest inflation in four decades, and they have not receded. The Consumer Price Index rose 3.4 percent over the twelve months ending July 2026, still above the Federal Reserve's two-percent target and layered on top of cumulative increases that consumers continue to feel in their weekly budgets.[9] For most households, the cost of living is not an abstraction; it is the central financial fact of the moment.

Consumers have responded by leaning harder on precisely the tools the Proposed Statement would burden. In McKinsey's most recent State of the Consumer survey, fielded in the spring of 2025, more than half of consumers reported looking for deals on every purchase, and 47 percent of U.S. consumers said they wait for a sale or promotion before buying apparel and footwear, categories

[8] Proposed Statement at 2 & n.2 (describing the Administration's focus on "issues that affect the cost of living for American families" and cataloging executive orders directed at lowering prices).

[9] U.S. Bureau of Labor Statistics, Consumer Price Index Summary (data for July 2026, released Aug. 12, 2026) (3.4 percent twelve-month change).

at the center of EIA's membership.[10] Coupons and discount codes are a primary vehicle for that behavior: industry research from leading promotions firms finds that a majority of online shoppers search for a coupon or discount code before completing a purchase, and that the share of consumers using more coupons than in the prior year has risen alongside prices.[11] For millions of households, loyalty pricing, subscribe-and-save, abandoned-cart offers, and targeted discount codes are not marketing frills. They are part of how a paycheck is stretched to the end of the month.

The Proposed Statement, by casting a cloud of enforcement risk over those tools and by pressing merchants toward abandoning them, as Sections II and VI explain, would take savings away from the households with the least room to give them up. This is the heart of the problem: the consumers who rely most heavily on discounts are the most price-sensitive, and price-sensitive consumers are disproportionately lower-income. They are also, as the economic literature the Commission itself cites confirms, the consumers who benefit most from personalized offers and who would be harmed most by their disappearance. A majority of consumers pay lower prices under personalized pricing than under a single uniform price, and the gains flow disproportionately to the price-sensitive buyers who would otherwise be priced out of a purchase entirely.[12] A uniform price, or the loss of the discount that made a product affordable, helps the shopper who was going to pay full price anyway and hurts the shopper who was not.

The result is a policy that is regressive in operation, whatever its intent. The affluent consumer who never bothers with a coupon is unaffected by a rule that chills couponing. The family clipping digital codes to afford the same goods loses the savings. A measure offered in the name of consumer protection, as part of an agenda to ease the cost of living, would in practice raise the effective prices paid by the very households that agenda is meant to help, and it would spare the households that need help least.

The mechanism compounds the irony. The disclosure the Proposed Statement would compel does not lower any price by a single cent. It adds a layer of compliance cost, which presses prices upward, while simultaneously making merchants more likely to withdraw the discounts and loyalty offers that press prices down. Consumers would be left with fewer of the offers they actively seek out and higher prices on the goods they buy, and told, by way of consolation, more about the data

[10] McKinsey & Co., State of the Consumer 2025 (survey fielded Apr. 23–May 6, 2025; 2,838 consumers, U.S. subsample of 1,327) (more than half of consumers look for deals on every purchase; 47 percent of U.S. consumers wait for a sale or promotion before purchasing apparel and footwear).

[11] See, e.g., Inmar Intelligence, Consumer Behavior data (2024) (share of consumers using more coupons than in the prior year); Vericast, Consumer Behavior research (reporting that 88 percent of consumers say a coupon would motivate them to try a new brand or store).

[12] Dubé & Misra, supra (over sixty percent of consumers paid lower prices under personalized pricing); Zhang Testimony, supra (personalized pricing expands access and affordability for price-sensitive, disproportionately lower-income, consumers).

behind an offer they are no longer receiving. That is not a consumer-protection outcome. If the Commission's goal is to protect household budgets against the cost of living, the way to advance that goal is to preserve, not endanger, the everyday discounting that puts money back in consumers' pockets, and to aim enforcement squarely at the genuine harm the Commission's examples describe, an undisclosed premium charged above the advertised price, as EIA recommends in Section VIII.

IV. The Commission Should Not Create Sweeping Enforcement and Litigation Risk by Making Policy of This Breadth Through an Enforcement Policy Statement on a Record That Says Nothing About Small and Mid-Sized Businesses

A. An enforcement policy statement is the wrong vehicle for a decision of this magnitude

The Proposed Statement announces how the Commission "intends to deploy enforcement resources" across an enormous swath of the economy, potentially reaching every business that varies any price, discount, or promotion using any customer data. Yet it does so through a policy statement that, by its own terms, "does not confer any rights on any person and does not operate to bind the FTC or the public,"[13] and whose illustrative examples "are presented for discussion purposes only" and are "not . . . definitive statements of the Commission relating to the legality of the identified practices."[14] The Commission thus proposes to reshape pricing and promotional practice economy-wide while disclaiming any obligation to stand behind the specifics. **Businesses are left with the worst of both worlds: guidance vague enough that no merchant can determine in advance which side of the line a given offer falls on, yet weighty enough that regulators, state Attorneys General, and private plaintiffs will treat it as authoritative.**

The vagueness is not incidental to the Proposed Statement; it is built into its structure. The disclosure obligation triggers wherever consumers "reasonably expect that prices for a product or service will not vary based on their personal data," a facts-and-circumstances test that will be applied case by case, in hindsight, in enforcement. The Proposed Statement acknowledges that personalized pricing "is a long-established norm in some markets" without identifying which markets qualify.[15] It contrasts a discount "based on [a consumer's] purchase history with that retailer" with "a higher price based on information about their disposable income or their shopping habits with other firms," without saying whether a merchant pricing off its own first-party customer relationship is inside or outside the zone of concern.[16] It nowhere uses the words "discount," "coupon," "loyalty," "promotion," or "cart," even though its framework, on its face,

[13] Proposed Statement at 8.

[14] Proposed Statement at 5 n.18.

[15] Proposed Statement at 1.

[16] Proposed Statement at 5.

reaches all of them. And it expressly reserves the possibility that personalized pricing may be unfair "even when fully disclosed," meaning that even perfect compliance with the Statement's disclosure prescription offers no safe harbor.[17] If the Commission believes conduct of this breadth warrants a new regulatory regime, the appropriate course is a rulemaking or, at minimum, a further study and request for information that builds an actual record, not an enforcement policy adopted on a brief comment period of a few weeks.

B. The record is silent on the businesses that will bear the policy's heaviest burdens

Every example in the Proposed Statement involves a large enterprise: a food delivery company, a grocery chain, a hotel, rideshare platforms, a big-box retailer monitoring its own parking lots.[18] The Commission's principal factual foundation, the surveillance pricing study conducted under Section 6(b), examined eight intermediaries (consultancies, pricing-software vendors, and payment networks) that serve large enterprise clients. It did not examine, and does not purport to describe, the practices of small and mid-sized merchants, and even as to its subjects the Commission's own staff acknowledged that it could not measure how widespread the studied practices are.[19] Nothing in the record examines how the proposed disclosure framework would apply to the millions of small businesses that run standard promotional tools through commodity ecommerce platforms; what compliance would cost them; or whether consumers are confused by their practices at all. What limited real-world evidence there is, from the merchants themselves, points the opposite way from the Proposed Statement's premise: small brands report that marketplace mechanics already press them toward a single price across channels, so that the individualized pricing the Commission fears is not where the small-business market is heading at all. One EIA member, a multichannel organic food brand, recounts that a marketplace suppressed its primary listing until it eliminated a price discrepancy created when a wholesale partner discounted below the marketplace price, and concludes that "small brands face strong pressure toward uniform pricing, which is the opposite of the harm this policy targets." See Section VII.F. In EIA's experience, small merchants are not running the individualized, willingness-to-pay pricing the Proposed Statement describes, so the policy would sweep them in without cause. Nevertheless, a disclosure mandate would reach the ordinary discounts, loyalty offers, and cart-recovery messages these merchants have run every day for years, creating new compliance and litigation exposure for each of them.

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[17] Proposed Statement at 6 n.20.

[18] Proposed Statement at 7–8.

[19] See Fed. Trade Comm'n, Surveillance Pricing 6(b) Study: Research Summaries, A Staff Perspective (Jan. 2025). The study's subjects included Mastercard, Accenture, McKinsey & Co., and enterprise pricing-software vendors, firms whose clients are, overwhelmingly, large enterprises.

The record also omits the asymmetry of the burden. A national retailer can absorb a new disclosure architecture: it has counsel to interpret the guidance, engineers to implement it, and margin to pay for both. The Iowa farm cannot: "This implementation would shut my rural agricultural business down. . . . I don't have the financial bandwidth to hire another person nor pay another company to manage this type of process." See Section VII.C. A policy nominally aimed at the data practices of the largest firms will, in practice, fall hardest on the smallest, and it will push small merchants to abandon the targeted discounting that lets them compete with those very firms. Before adopting any policy in this area, the Commission should study its small-business impact, as it would be required to do in a rulemaking.

The thinness of that record is not a point EIA raises against the Commission's own considered judgment. It is a concern the Commission's current leadership has already expressed, on this very subject. When the surveillance pricing study's staff research summaries were released in January 2025, then-Commissioner, now-Chairman Andrew Ferguson dissented on precisely this ground. He objected that "[t]he Commission should not be releasing staff's early impressions that 'can be outdated with new information' because the fact gathering process on the very issues being presented to the public is still underway," and urged that "[t]he Commission should allow staff to do its work and issue a final, fact-based report, rather than rush to meet a nakedly political deadline to present something, anything, to the public."[20]

The Chairman's objection was not a quibble about timing. It rested on his view of what Section 6(b) studies are and why they matter. He described them as "among our most important duties," the mechanism by which Congress made the Commission "a fact-finding body" charged with "secur[ing], evaluat[ing] and report[ing] facts which reveal[] the structure of our economy," and he noted that the Commission has "completed scores of rigorous 6(b) studies over the last century, many of which have contributed to the public's discussion of issues of national importance and have informed federal legislation."[21] It is precisely because that work carries such institutional weight, he cautioned, that releasing tentative staff impressions as though they were the Commission's considered findings risks "undermin[ing] the trust placed in the Commission's Section 6(b) work" and the willingness of the businesses that receive its orders to cooperate in future studies.[22] Those observations describe the ordinary and proper sequence of the

[20] Dissenting Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, Regarding the Surveillance Pricing 6(b) Staff Research Summaries, at 1–2 (Jan. 17, 2025) [hereinafter "Ferguson Dissent"], https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-regarding-0.

[21] Ferguson Dissent, supra, at 1–2.

[22] Ferguson Dissent, supra, at 2. The Chairman contrasted staff's "initial observations" and "ideas" with the "robust factual findings" that a completed study is meant to produce.

Commission's fact-finding work: gather the facts, complete the study, and then, on that foundation, speak.

EIA respectfully submits that this counsel is even more compelling now. The Proposed Statement does not merely release preliminary staff impressions; it announces an economy-wide enforcement posture, and it rests on the same incomplete record the Chairman warned against relying upon while the facts were still being gathered. The remedy the Chairman prescribed then, a final, fact-based record developed before the Commission draws conclusions, is the remedy the Commission should follow now, before making enforcement policy that will reach millions of small businesses the existing record never studied.

The intervening record confirms the concern rather than dispelling it. After the January 2025 staff research summaries, the Commission invited public comment on surveillance pricing, and that comment period closed in April 2025. But the Commission never issued the "final, fact-based report" the Chairman called for, and in the year and a half since it has published no further study, report, or data of its own on personalized pricing.[23] The Proposed Statement itself reflects that gap. Its factual account of personalized pricing rests on the same January 2025 staff summaries and the same secondary economic literature that accompanied them; it cites no Commission study or data on personalized pricing generated in the intervening period, and the more recent enforcement matters and executive actions it invokes concern hidden fees and deceptive charges, not the prevalence or effects of personalized pricing on which the record remains silent. The Commission has thus done the reverse of what its Chairman prescribed. Rather than complete the record and then decide, it has decided, announcing an economy-wide enforcement posture, while the record sits exactly as incomplete as it was when he warned against relying on it.

That inversion departs not only from the Chairman's stated view but from the Commission's own longstanding practice. For a century, the completed 6(b) study, and not a set of preliminary staff impressions, has been the characteristic factual predicate on which the Commission builds policy in a market it sets out to understand. It gathers non-public facts under compulsory process, issues a final report, and only then advances the recommendations, guidance, or enforcement priorities that the report's findings support, a pattern visible across subjects as varied as data brokers, patent-assertion entities, and pharmacy benefit managers.[24] The Commission departed from that sequence

[23] See Fed. Trade Comm'n, Surveillance Pricing Update and the Work Ahead (Jan. 17, 2025) (announcing a public comment period that closed April 17, 2025); Fed. Trade Comm'n, Surveillance Pricing (agency feature page) (reflecting no final report issued following the January 2025 staff research summaries). The comment period closed roughly sixteen months before the Proposed Statement issued in August 2026.

[24] Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), authorizes the Commission to compel businesses to furnish information about their "organization, business, conduct, practices, management, and relation to other" entities, and the Commission has long treated the resulting studies as the empirical foundation for its policy work. See, e.g., FTC, Data Brokers: A Call for Transparency and Accountability (May 2014) (6(b) study followed by recommendations to

in the one area where it could least afford to. It opened the surveillance pricing study precisely because, as its own staff acknowledged, "[t]he extent to which businesses currently use personalized pricing is not well understood, and the effects of personalized pricing on consumers are unclear."[25] To announce an economy-wide enforcement policy on personalized pricing before finishing the very study designed to supply those missing facts is to build the policy on the gap the study was meant to fill.

That leaves the question at the heart of the Commission's deception theory: whether consumers are in fact confused or misled by ordinary promotional personalization. On that question, the answer from the merchants closest to those consumers is no. A fifth-generation Iowa family farm sells value-added agricultural products direct to consumers in all fifty states. Loyalty pricing, targeted discount codes, abandoned-cart and win-back offers, first-time-buyer and birthday discounts, and subscribe-and-save together drive a conservative 85% of its sales. The farm reports: "I have never once got a call from a customer asking what data we pulled to market to them. . . . Never has one customer complained about the way we communicate with them in regards to sales, pricing, and deals. They in fact love being included in our farming world and brand, and they love the discounts for simply supporting us." See Section VII.C. On the record before the Commission, there is no evidence that consumers are deceived by ordinary promotional personalization, and there is affirmative evidence, from the businesses closest to those consumers, that they are not.

C. The Proposed Statement will become the engine for follow-on litigation under state UDAP statutes

The Commission cannot evaluate this policy's real-world consequences by looking only at its own enforcement intentions, because the Commission will not be the policy's principal enforcer. Thirty states and the District of Columbia have enacted unfair-and-deceptive-acts-and-practices ("UDAP") statutes that expressly direct their courts to be guided by, or to give "due consideration and great weight" to, the FTC's interpretations of Section 5.[26] Unlike the FTC Act, most of these

Congress); FTC, Patent Assertion Entity Activity: An FTC Study (Oct. 2016) (6(b) study followed by legislative and procedural recommendations). In each, the Commission developed the factual record under Section 6(b), issued a report, and only then advanced policy grounded in that record. EIA is aware of no instance in which the Commission has announced an enforcement policy of comparable breadth directed at the very subject of a pending 6(b) study before completing that study. The Commission's consistent historical practice, and the design of the fact-finding authority its own Chairman calls "among our most important duties," counsel strongly against doing so here.

[25] Proposed Statement at 3.

[26] See, e.g., Fla. Stat. § 501.204(2) ("due consideration and great weight shall be given to the interpretations of the Federal Trade Commission"); Mass. Gen. Laws ch. 93A, § 2(b); Tex. Bus. & Com. Code § 17.46(c)(1); 815 Ill. Comp. Stat. 505/2; Wash. Rev. Code § 19.86.920.

statutes carry private rights of action, and many provide statutory minimum damages, double or treble damages, and one-way attorney's-fee shifting.[27]

The consequences are not hard to foresee. Once the Commission declares that failing to disclose the "basis" and "data types" behind a "personalized price" is "likely to constitute an unfair or deceptive act or practice," the plaintiffs' bar acquires a ready-made template for demand letters and putative class actions against every merchant whose website displayed a targeted discount without an accompanying data disclosure. Those claims will be pursued not under the FTC Act, with its institutional filters and prosecutorial discretion, but under state statutes where no regulator screens the claims and where fee-shifting makes even weak cases profitable to file and expensive to fight. Every ambiguity in the Proposed Statement (the undefined "reasonable expectation" trigger, the unresolved status of first-party data, the unspecified disclosure mechanics) becomes a litigation theory. Small merchants cannot afford to litigate the meaning of a "facts-and-circumstances" federal policy statement in fifty-one jurisdictions, so they will settle. **The Commission's prosecutorial discretion stays in Washington; the Proposed Statement's vagueness will not.**

This is not a speculative concern. The plaintiffs' bar is already watching this docket. A law firm that describes itself as having brought the first "surveillance pricing" case against a major airline and the first "surveillance wage-fixing" case against a major rideshare platform has filed a comment in this very proceeding, urging the Commission to enforce Section 5 aggressively against personalized pricing.[28] Whatever the merits of such suits against the large enterprises they have targeted so far, the Proposed Statement would hand that same litigation model a federal standard to invoke against merchants of every size, in every state that channels FTC interpretations into its own consumer-protection statute.

Notably, states that have legislated directly in this area have recognized the need to protect ordinary promotional activity in ways the Proposed Statement does not. New York, the first state to enact an algorithmic pricing disclosure law, exempts subscription-based pricing, and its legislature has since advanced amendments creating express carve-outs for "bona fide custom discounts," including loyalty, membership, and rewards programs; class-based discounts for seniors, veterans, teachers, and similar groups; clearly posted promotional periods, end-of-season, flash, and early-

[27] See, e.g., Mass. Gen. Laws ch. 93A, § 9 (minimum statutory damages; double or treble damages for willful or knowing violations; attorney's fees); Wash. Rev. Code § 19.86.090 (treble damages and fees).

[28] Comment of YAGMAN PLLC, Docket No. FTC-2026-1057 (Aug. 20, 2026), https://www.regulations.gov/comment/FTC-2026-1057-0012 (describing the firm's litigation targeting personalized pricing and data-collection practices and urging aggressive Section 5 enforcement).

bird sales; and discounts based on a customer's own transaction history with the merchant.[29] The Proposed Statement contains no equivalent. If adopted as drafted, it would establish a federal enforcement posture broader than the state statutes merchants are already building compliance programs around, inverting the usual relationship between federal guidance and state experimentation and guaranteeing conflict rather than clarity. The compliance friction this creates is itself a reason for restraint that commenters have flagged from across the spectrum. Independent Women, for example, warns that a broad disclosure mandate would fall hardest on small businesses, particularly given the conflicting definitions already found across state privacy laws, and it urges the Commission to align its terms with existing state statutes and to provide a transition period rather than layer a broader and vaguer federal standard on top of them.[30]

V. There Is No Consumer Entitlement to a Uniform Price: Selective Discounting Is the Historic Norm of American Commerce, Not a Deviation From It

The Proposed Statement rests on the premise that consumers "reasonably expect" that the price they see "is the same price that any other consumer at the same place and time would see," and that departures from uniform pricing therefore contradict "longstanding practice."[31] As a description of American commercial history, that premise is backwards. **Price uniformity is the recent innovation; price flexibility is the real tradition.**

For most of commercial history, virtually every price was personal. Haggling and negotiation were the default in American shops through the nineteenth century: the shopkeeper sized up the customer, the customer bargained back, and no two buyers had any expectation of paying the same amount.[32] The fixed price tag was a business innovation, not a legal mandate. John Wanamaker popularized the "one-price" system in his Philadelphia department store in the 1870s because fixed pricing suited his business model of high-volume retailing with clerks who could not be trusted to negotiate, and competitors adopted it because it worked, not because anyone thought the law required it.[33] From the beginning, the one-price system coexisted with pervasive, deliberate price variation among customers.

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[29] N.Y. Gen. Bus. Law § 349-a (eff. Nov. 10, 2025); S.8623-B/A.9349-B, 2025–2026 Leg. Sess. (N.Y. 2026) (passed Senate June 4, 2026) (defining exempt "bona fide custom discounts").

[30] Comment of Independent Women, Docket No. FTC-2026-1057 (2026) (signed by Patrice Onwuka, Vice President of Economic Policy), https://www.regulations.gov/comment/FTC-2026-1057-1092.

[31] Proposed Statement at 1.

[32] See Fed. Reserve Bank of St. Louis, Sold Fast: Price Tags and the Impact on Consumer and Producer Surplus, Page One Economics (Feb. 2025).

[33] Id. Wanamaker's one-price policy spread widely after the 1876 Centennial Exhibition brought millions of visitors to Philadelphia.

That variation has never stopped, and consumers have never been confused by it. The retail coupon is nearly a century and a half old: Coca-Cola began distributing tickets for a free glass of the drink in 1887, an offer available only to those who held the ticket.[34] Trading-stamp loyalty programs date to the 1890s. Senior discounts, student discounts, military discounts, matinee pricing, happy-hour pricing, ladies' night, early-bird specials, cash discounts, volume discounts, trade and wholesale pricing, clearance racks discovered by some shoppers and not others, rain checks, price-matching for the customer who asks, and "new customer" introductory rates for everything from newspapers to gym memberships are all forms of selective discounting in which two consumers, at the same place and time, pay different prices for the same good based on who they are, what the seller knows about them, or simply whether they asked. Entire industries, including automobiles, furniture, mattresses, jewelry, real estate, and professional services, operate to this day on individually negotiated prices in which the seller's assessment of each buyer determines the figure, and nothing is disclosed about how.

Consumers do not merely tolerate this system; they participate in it enthusiastically. Nobody believes the shopper who redeems a twenty-percent coupon has defrauded the shopper behind her who pays full price, and nobody believes the reverse either. The social meaning of a discount has always been that sellers may reward loyalty, court new customers, clear inventory, and sharpen their pencils for a buyer worth winning, and that a consumer who does not receive a particular discount retains exactly what he always had: the advertised price. A legal framework premised on a consumer entitlement to whatever price any other consumer received would not restore some traditional baseline. It would invent an entitlement that has never existed in American commerce, and it would do so by administrative pronouncement.

The Proposed Statement's own escape hatch confirms the point. The Commission concedes that personalized pricing is "a long-established norm in some markets" and excludes those markets from its concern. But the Commission never explains what principle separates the car dealership, which prices every transaction individually based on its private read of each customer's urgency, sophistication, financing needs, and willingness to walk away, and discloses none of it, from an online merchant that offers a lapsed customer fifteen percent off based on the transparent fact that she has not ordered in a year. If the answer is only that dealerships have "traditionally operated" that way, that is not a limiting principle. It is a grandfather clause. It rewards incumbency, entrenches the opacity of the most notoriously opaque pricing ritual in American retail, and denies newer, smaller, more transparent businesses the same flexibility. That is the kind of unprincipled market intervention, favoring some business models over others, that the Commission ordinarily exists to prevent. EIA addresses this asymmetry further in Section VI.B.

[34] See The History of Coupons, Time (Apr. 6, 2010); How Americans Started Clipping Coupons, History.com.

VI. Compelled Disclosure of Discount Logic Would Invite Gamesmanship and Draws Unprincipled Lines Between Business Models

A. Disclosing the combination of factors that triggers a discount is an instruction manual for exploiting it

The Proposed Statement's prescription (disclose the basis for personalization and the types of data used) assumes disclosure is costless to the disclosing business. For discounts, it is not. A merchant's promotional logic is, functionally, a set of trade secrets: which behaviors it rewards, at what thresholds, and how much it will spend to recover a hesitant or lapsed customer. Publishing that logic converts a customer-recovery tool into a system to be gamed.

Merchants are already seeing this happen without any mandated disclosure. An Iowa small business in EIA's network reports that customers have reverse-engineered its recovery offers on their own: the owner "knows customers intentionally leave items in their carts to trigger the abandoned-cart offer." See Section VII.D. Under the Proposed Statement, that merchant would be obliged to confirm the mechanism in writing, disclosing clearly and conspicuously that abandoning a cart produces a ten-to-fifteen-percent discount, that lapsing for a season produces a win-back offer, and that new-customer status is worth twenty percent. Every customer becomes a perpetual "new" customer with a perpetually abandoned cart. The predictable result is that merchants stop offering recovery discounts altogether, because the offers become economically irrational once they are claimable on demand, and the consumers who lose are the genuinely hesitant, price-sensitive shoppers those discounts were built to help. **A disclosure mandate meant to protect consumers from higher prices would, applied to discounts, eliminate the lower ones.**

The Cincinnati chocolate maker in EIA's network makes the related point from the customer-relationship side: forced itemization of every code and eligibility pathway means "[e]xplaining to a customer why they did not receive the 'most preferred' rate," a conversation that helps no one, because "[i]t will drive customers away once they realize they did not obtain the absolute lowest price," even when the price they paid was the fair, advertised price they expected all along. See Section VII.B. Compelled disclosure of discount logic does not cure consumer resentment. It manufactures resentment, by recasting every ordinary promotion as evidence that someone else got a better deal.

B. The "traditional operation" exemption is unprincipled favoritism among business models

As discussed in Section V, the Proposed Statement would leave undisturbed the sectors where individualized, undisclosed pricing is most aggressive, such as automobile dealers and other negotiated-price industries, on the sole ground that personalized pricing is "long-established" there. Meanwhile, the small online merchant whose only "personalization" is a discount code for returning customers would face a federal disclosure regime, enforced through Section 5 and

amplified through state UDAP statutes, because ecommerce is new enough that no tradition immunizes it.

The Commission should recognize this for what it is: a rule that allocates pricing freedom by seniority. A consumer buying a $40,000 car may be charged thousands more than the buyer at the next desk based on the dealer's undisclosed judgment about her urgency and sophistication, with no disclosure of "basis" or "data types" required, because that is how dealers have "traditionally operated." A consumer buying a $40 bag of chocolates online is protected from receiving an insufficiently documented discount. If reasonable consumer expectations are the touchstone, they cut the other way. Modern consumers know perfectly well that online offers vary from person to person; they trade discount codes with friends and hunt for them in browser extensions. Many car buyers, by contrast, genuinely do not understand the extent to which the dealership's price is tailored to its read of them. A framework whose burdens track the age of the business model rather than the risk of consumer harm is not consumer protection. It is an intrusion into free markets that grants incumbents a flexibility it denies their newer, smaller, and more transparent competitors.

VII. The Voices of Small and Mid-Sized Merchants

EIA surveyed its merchant network on the practices the Proposed Statement could affect. The responses below are representative. They are reproduced with each merchant's permission; where a merchant asked not to be named, EIA has honored that request and identifies the business only by description. The two Iowa businesses described below are distinct enterprises. EIA is continuing to collect member experiences and anticipates supplementing these examples.

A. 3 Moms Organics (East Hampton, New York)

3 Moms Organics is a small family business selling tick and mosquito repellent. Its founder writes:

> "We use several everyday ecommerce tools that could potentially fall under this broad definition of personalized pricing, including targeted discounting and email offers, abandoned-cart and customer recovery efforts, first-time customer promotions, and subscribe-and-save. A significant portion of our Shopify orders are touched by some form of promotional or personalized pricing, and repeat customers are an important part of our business."

Because the business is seasonal, these tools are how it reconnects with customers each year:

> "We sell tick and mosquito repellent, so every year we essentially have to reconnect with customers as the season begins and remind them that we are still here and ready to help keep them and their families safe outdoors. . . . Email, customer segmentation, win-back campaigns, subscriptions, and targeted offers allow a small seasonal business like ours to reestablish that relationship when customers actually need us again."

On the nature of these tools and the burden of the proposed disclosures:

> "My concern is that these are not sophisticated pricing algorithms designed to determine how much a particular individual is willing to pay. They are standard ecommerce tools that small businesses use every day to welcome a new customer, recover an abandoned cart, reconnect with a previous customer, reward loyalty, or make repeat purchasing easier. Requiring a disclosure explaining what customer data was used every time one of these offers appears would create another layer of compliance, technical implementation, and potentially legal review for a small business. It could also make very normal customer interactions sound much more invasive than they actually are."

> "For small businesses, these tools allow us to build relationships with customers and compete with much larger companies that have significantly greater marketing resources. I would hate to see regulations intended to address true personalized pricing practices unintentionally place additional burdens on ordinary discounts, retention programs, subscriptions, and customer communications that small businesses depend on."

B. A chocolate maker (Cincinnati, Ohio)

A Cincinnati chocolate maker describes the range of ordinary promotional discounts its business runs and the consequences of compelled itemization:

> "We use many promotional discounts including first customer, referral, abandoned cart, subscription rates. Our biggest discount is for our wholesale customers which represents 30% of our business and amounts to over $10,000 in discounts annually. Explaining to a customer why they did not receive the 'most preferred' rate is a very difficult conversation. It would be harmful to explain to each customer where each code could have been used. It will drive customers away once they realize they did not obtain the absolute lowest price. Promotional codes are a significant tool for tracking our advertising."

C. A fifth-generation family farm (Iowa)

A family farm in its fifth generation of farming in Iowa sells value-added agricultural products direct to consumers in all fifty states, running its promotional tools through standard email and ecommerce platforms. The farm uses loyalty pricing, targeted discount codes, abandoned-cart and win-back offers, first-time-buyer and birthday discounts, and subscribe-and-save. Together these tools drive "85% conservatively" of its sales, "if not more in some instances, since we sell products through different sales and marketing channels." On what the proposed disclosure framework would mean:

> "This implementation would shut my rural agricultural business down. Our sales touch all 50 states in the USA. We need those sales in all 50 to survive in a rural economy. I don't have the financial bandwidth to hire another person nor pay another company to manage this type of process. To disclose to thousands of subscribing customers why they got an email about a new sale, or why they got a loyalty discount for their previous purchase or

> subscription, is not workable for a farm our size. I have never once got a call from a customer asking what data we pulled to market to them. We have permissions in place to send our customers appropriate information because they actively subscribe to it. If they don't want us to communicate with them in these ways, they simply unsubscribe or unfollow our brand. Never has one customer complained about the way we communicate with them in regards to sales, pricing, and deals. They in fact love being included in our farming world and brand, and they love the discounts for simply supporting us."

D. An Iowa small business

A separate Iowa small business relies on everyday promotional tools to compete and keep customers coming back. The business runs a points-based rewards program that generates gift cards and awards perks for birthdays and social follows, along with abandoned-cart discounts of ten to fifteen percent, win-back email offers of ten to fifteen percent, and new-customer discounts of fifteen to twenty percent. These offers move the needle: some customers "live and breathe" by the rewards program and love treating themselves with what they earn, and the owner knows customers intentionally leave items in their carts to trigger the abandoned-cart offer. The offers are not deceptive. They are so well understood that customers actively seek them out.

E. Armada, Inc. (Massachusetts)

Carly Redford of Armada, Inc., a Massachusetts business, explains that customized discounts are how a small online brand recreates the ordinary experience of being a valued regular:

> "Customized discounts and incentives are a crucial way in which we can recognize and celebrate frequent customers. If you are someone that goes to an establishment frequently, it's not uncommon to be known by those businesses and get perks/freebies for being a regular. These discounts work the same and allow us to replicate that same kind of feeling with customers."

She warns that the proposal would take that tool away: it "removes our ability to incentivize top customers and treat them equally to their investment in the brand." Among her enumerated concerns are discounts, coupons, and promotions being treated as personalized pricing, the line between segment-based offers and individual personalization, third-party data and consent, A/B testing, whether even compliant practices could be deemed unfair, and the compliance burden on a small business.

F. A small-batch organic food brand (California)

A California brand that has spent more than a decade selling small-batch organic food products, through its own online store, several major marketplaces, and roughly eighty wholesale accounts, describes both the line-drawing problem and the practical burden. Its central request is for clarity on "where the line sits between ordinary retail practices and 'personalized pricing,'" and

specifically whether a welcome discount for new email subscribers or a win-back coupon for lapsed customers is personalized pricing or ordinary segment-based promotion, and whether inherently different wholesale and retail pricing is out of scope. On what the policy would mean for a business its size:

> "The biggest risk for a company our size is compliance cost and chilling effect, not any change to how we actually price. We don't do individualized algorithmic pricing. . . . If those practices require legal review, new disclosures, or documentation of targeting logic, that burden lands on a team of a handful of people with no in-house counsel. The likely outcome is we simply stop offering discounts, which hurts consumers and hands another advantage to large brands that can absorb compliance overhead."

The brand also flags a dependency small merchants cannot control: because its promotions run through third-party tools, its "ability to comply depends entirely on whether those vendors build compliant disclosure features." And its real-world experience cuts directly against the premise that small merchants are drifting toward individualized pricing. Marketplace mechanics already push it toward a single price: when a wholesale partner discounted below its marketplace price, the marketplace suppressed the brand's primary offer until the discrepancy was resolved. As the brand puts it, "small brands face strong pressure toward uniform pricing, which is the opposite of the harm this policy targets." It urges the Commission to "build a clear safe harbor for publicly available, opt-in promotions (email signup discounts, subscribe-and-save, coupon codes)" and to "scale any disclosure or documentation requirements to business size," observing that "a rule written for large algorithmic pricers shouldn't sweep in a nut butter company's welcome coupon."

G. An anonymous EIA member

Another member, who asked to remain anonymous, framed the single question the member most wants answered, which is the same clarification EIA presses in Section VIII:

> "Ask if this rule explicitly excludes discount codes or promotions to standard pricing. The text of the [policy] makes it seem like it is, but it's worth getting a direct answer."

H. Tushy (Justin Allen, Chief Executive Officer)

Justin Allen, the Chief Executive Officer of Tushy, which sells bidets and smart toilets, explains that his welcome offer is not personalized pricing at all, but the tool that helps a hesitant first-time buyer try an unfamiliar and intimate product:

> "At times, a 'Welcome Offer' is part of how we get past this initial hesitation. It isn't a lever for finding out what someone will pay or personalized pricing; everyone is eligible. It's what turns 'I've been curious about that for years' into an order because it allows us to build a relationship with the customer and deliver more important information about a new product category."

He describes why a mandated disclosure would be especially destructive in his category:

> "We sell a product for the most private room in a person's home, to customers who are already a little self-conscious about the category. Slapping them with a 'Based on your browsing and purchase history, here's a discount on a toilet product' would unsettle anyone. . . . The Commission would be requiring the disclosure that makes an intimate purchase feel surveilled, in the one category where that feeling would do the most damage."

He adds that compelled disclosure would also blunt one of the brand's few tools for a delicate subject, since "you can't staple a compliance disclosure to a joke and have the humor survive," and that the operational load would be crushing for a small team: Tushy runs "dozens of automated programs across Email, SMS, Loyalty, and Subscriptions," each of which "would need its own disclosure, updated each time an offer changes, which is constantly for a small business with limited resources." He closes by imploring the Commission to rethink the policy.

I. Klaviyo (Massachusetts)

Klaviyo, the Massachusetts-based marketing platform whose email, SMS, and loyalty tools are used by thousands of ecommerce businesses, writes that the Proposed Statement "does not clearly distinguish everyday discounting and promotional practices from the price-manipulation conduct it is actually targeting," and that the resulting ambiguity lands with particular force at the platform layer: "If the FTC does not clearly distinguish personalized pricing from ordinary personalization, platforms will have to design for the broadest possible interpretation," because "[a]t scale, the safest technical response to regulatory ambiguity is often the most restrictive one." That response, Klaviyo warns, cascades directly to its merchant customers, who "will lose access to tools that support lawful discounts, loyalty programs, segmentation, cart-abandonment offers, and other targeted benefits," and ultimately to consumers, who "would receive fewer discounts, loyalty rewards, and incentives for new or returning customers." Klaviyo also identifies an internal inconsistency in the Proposed Statement's own illustrations:

> "The statement's own example of a retailer charging more because location data shows a shopper standing in its parking lot is functionally identical to a geofenced discount triggered by the same location signal; the only difference is the direction of the price adjustment, and the statement offers no principle to distinguish the two."

Klaviyo asks the Commission to separate personalization from personalized pricing; to allocate responsibility across the technology ecosystem, with the merchant controlling the price bearing primary responsibility; to provide operational disclosure standards with model language; to establish workable consent and verification requirements; and to provide a disclosure-based safe harbor for bona fide discounts, loyalty rewards, and cohort-based offers whose basis is truthfully described. Finally, because the Proposed Statement reserves judgment on whether even fully disclosed personalized pricing could still be deemed unfair, and because it is an enforcement policy

statement rather than a rule adopted through notice-and-comment rulemaking, "meaning there is no compliance runway," Klaviyo urges the Commission to confirm that adequate disclosure satisfies Section 5, warning that otherwise "no amount of disclosure gives businesses certainty of compliance."

J. Postscript (Alex Beller, Co-Chief Executive Officer)

Postscript is an SMS marketing platform used by ecommerce brands, most of them small and mid-sized businesses, to communicate with customers who have opted in to receive text messages. Postscript is a member of EIA, and its Co-Chief Executive Officer, Alex Beller, serves on EIA's Board of Directors. Mr. Beller explains that the offers the Proposed Statement would place under suspicion reach consumers only because those consumers asked for them:

> "Every text message a brand sends through Postscript goes to a shopper who affirmatively signed up to receive it. When that subscriber gets a birthday discount, a thank-you offer after her third order, or a reminder about the cart she left behind, that is not surveillance. It is the relationship she chose, and she can end it at any time by replying STOP."

He adds that the disclosure framework is especially ill-suited to the channel:

> "A text message is a few lines long. There is no room in it for an explanation of which customer data led to a discount, and attaching a disclosure to every offer would turn a friendly note from a favorite brand into something that reads like a legal notice. Our platform does not set anyone's prices; our merchants do. But if the rules are unclear, the brands we serve will not hire lawyers to parse them. They will simply stop sending discounts, and the shoppers who count on those savings will be the ones who lose."

VIII. Recommendations

EIA respectfully urges the Commission to take the following steps before finalizing any enforcement policy in this area.

First, the Commission should state expressly that the policy is limited to situations in which a consumer is charged more than the normal advertised rate, and that it does not extend to selective discounting and promotions. The consumer-protection concern animating the Proposed Statement is that a consumer will unknowingly pay a data-driven premium above the price everyone else sees. That concern is entirely absent when the personalization operates as a discount from a publicly advertised price. A consumer who does not receive a promotional offer pays the same advertised price she always expected; she has lost nothing and been told nothing false. Drawing this line would align the Commission's policy with the carve-outs every state legislature to address the issue has adopted, with the intuition of every consumer who has ever clipped a coupon, and with the distinctions drawn even by witnesses sharply critical of surveillance pricing.

At the August 4, 2026 Senate Judiciary Subcommittee hearing on surveillance pricing, the American Economic Liberties Project testified that sound legislation "would not prohibit senior, student or veterans' discounts" and "would allow loyalty programs, but ensure that any benefits are consistently offered to all participants," explaining that "acceptable forms of price discrimination" are those that are "publicly advertised, pursuant to criteria that are accessible, and subject to consistent application across all consumers."[35] That is precisely the line between ordinary promotions and surveillance pricing that EIA asks the Commission to draw: publicly advertised discounts, applied on consistent terms, sit on one side, and undisclosed individualized pricing sits on the other. It would also reflect a point urged on the Commission from across the policy spectrum in this very docket: the Mercatus Center at George Mason University, commenting on the Proposed Statement, cautions that the Commission should ground any enforcement in demonstrated deception rather than in consumers' generalized expectations about uniform pricing, and should take care that its approach does not sweep in the individualized discounting that lowers prices and expands consumer choice.[36] The same carve-out is urged from elsewhere across the spectrum. Independent Women, a national women's public-policy organization, agrees that loyalty programs, membership discounts, regional pricing, and history-based coupons use personal data to lower prices rather than to extract a premium, and it asks the Commission to confine any disclosure obligation to price increases above a baseline while leaving promotions and discounts outside the framework.[37] And even the Center for AI and Digital Policy, which urges the Commission to go well beyond disclosure and to treat the use of consumer profiling for price-setting as unlawful outright, expressly excludes loyalty programs, traditional discounts, and cost-based price differences from the conduct it would prohibit.[38] From market-oriented economists to women's-policy advocates to commenters who would ban the practice outright, the docket reflects a striking consensus that ordinary, publicly advertised discounting is not the harm at which this policy should be aimed. It would also focus the Commission's enforcement resources on the genuinely troubling scenarios its examples describe (hidden

[35] Testimony of Lee A. Hepner, Senior Legal Counsel, American Economic Liberties Project, Before the U.S. Senate Judiciary Subcommittee on Crime and Counterterrorism, Hearing on "Your Data, Their Profit: The Consumer Cost of AI Surveillance Pricing," at 10–11 (Aug. 4, 2026). The American Economic Liberties Project is an advocate for aggressive action against surveillance pricing; its recognition that publicly advertised, consistently applied discounts are categorically different from individualized, data-driven pricing underscores how widely shared the distinction EIA urges is.

[36] Comment of the Mercatus Center at George Mason University, Docket No. FTC-2026-1057 (Sept. 2, 2026), https://www.regulations.gov/comment/FTC-2026-1057-0946.

[37] Comment of Independent Women, Docket No. FTC-2026-1057 (2026) (signed by Patrice Onwuka, Vice President of Economic Policy), https://www.regulations.gov/comment/FTC-2026-1057-1092.

[38] Comment of the Center for AI and Digital Policy, Docket No. FTC-2026-1057 (2026), https://www.regulations.gov/comment/FTC-2026-1057-1090 [hereinafter "CAIDP Comment"].

premiums extracted from consumers in vulnerable moments) rather than diffusing them across millions of routine promotions.

Second, the Commission should confirm that pricing and promotional decisions based on a merchant's own first-party customer relationship provide a clear path to compliance. The Proposed Statement already gestures toward this line, contrasting a discount based on "purchase history with that retailer" against pricing based on "disposable income or . . . shopping habits with other firms." The Commission should adopt the favorable half of its own example expressly: a merchant that personalizes offers based on data generated through its own direct relationship with the customer (purchase history, site activity, subscription and loyalty enrollment, and communications preferences the customer provided) should know that it stands outside the zone of enforcement concern. EIA does not ask the Commission to adopt the converse; the use of data beyond the first-party relationship should simply remain subject to ordinary case-by-case Section 5 analysis rather than any presumption of deception.

Third, if the Commission believes broader action is warranted, it should build a real record first. That record should include, at minimum: study of small and mid-sized merchants' actual promotional practices, not merely the enterprise intermediaries examined under Section 6(b); quantification of compliance costs across business sizes, including for merchants who rely entirely on third-party platform tooling they do not control; analysis of the follow-on litigation exposure the policy will create under state UDAP statutes that give the Commission's interpretations "great weight"; and evidence, currently absent, that consumers are actually deceived by ordinary promotional personalization. A matter of this economic breadth deserves the rigor of a rulemaking record, with a comment period commensurate to its scope, not a policy statement finalized weeks after its release. EIA is not alone in urging that more deliberate course. The Center for AI and Digital Policy, though it favors more aggressive substantive action than EIA does, likewise calls on the Commission to proceed through formal rulemaking under Section 18 rather than by enforcement policy statement alone.[39]

Fourth, any final policy should articulate its principles neutrally across business models. Whatever framework the Commission adopts should not condition pricing flexibility on how long a given industry has "traditionally" priced without disclosure. If undisclosed individualized pricing is tolerable at a car dealership, the Commission should explain why; if it is a problem, the Commission should say so evenhandedly. What the Commission should not do is adopt a rule whose practical effect is to burden new, small, and transparent businesses while exempting the oldest and most opaque.

[39] CAIDP Comment, supra.

Fifth, the Commission should allocate any disclosure obligation to the party that sets the price. The Proposed Statement does not currently distinguish businesses that set prices from those that supply the technology used to set them. Ecommerce platforms, email and SMS tools, and loyalty applications supply configurable features that merchants alone configure and control, and the vendor typically has no direct consumer relationship through which to deliver a point-of-sale disclosure. This mirrors the FCRA framework the Commission invokes, under which the obligation falls on the user taking the adverse action, not the consumer reporting agency.

Sixth, at a minimum, the Commission should exempt small and mid-sized businesses from any disclosure obligation, whether through a revenue threshold or by reference to the Small Business Administration's existing size standards. The record contains no evidence that small merchants engage in the individualized, surveillance-style pricing the Proposed Statement targets, and considerable evidence that they cannot bear its compliance and litigation costs. A size-based exemption would focus the Commission's resources where its own examples already point, on the largest enterprises, while sparing the millions of small businesses that would otherwise face a federal mandate they lack the staff, the counsel, and the technical control over their own promotional tools to satisfy. Congress and the Commission routinely calibrate regulatory obligations to business size, and nothing in Section 5 requires the Commission to train an economy-wide disclosure regime on the businesses least able to comply and least likely to be engaged in the conduct that concerns it.

IX. Conclusion

EIA supports vigorous enforcement against genuinely deceptive pricing: hidden fees, false reference prices, and data-driven premiums extracted from consumers who reasonably believed they were seeing the same price as everyone else. But the Proposed Statement, as drafted, does not confine itself to those harms. It casts a cloud over the ordinary discounts, loyalty rewards, and promotional offers on which small and mid-sized ecommerce businesses depend. These are practices with a pedigree older than the price tag, practices that consumers understand and embrace, and practices that the record before the Commission contains no evidence anyone finds deceptive. EIA urges the Commission to limit its policy to charges above normal advertised rates, to confirm a workable path to compliance for merchants using their own customer relationships, and to develop a complete record, including the small-business perspective presented here, before taking any broader action.

EIA appreciates the Commission's consideration of these comments and welcomes the opportunity to provide additional information, including further merchant experiences, as the Commission's review proceeds.

Respectfully submitted,



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