AAI AMERICAN ANTITRUST INSTITUTE

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

I. INTRODUCTION

The American Antitrust Institute (AAI)[1] respectfully submits these comments on the Federal Trade Commission's ("FTC" or the "Commission") Proposed Enforcement Policy Statement Regarding Personalized Pricing (the "Proposed Statement"), issued for public comment on August 19, 2026.

AAI commends the Commission for confronting personalized pricing and agrees with its central conclusion: consumers can suffer injury when a price built on the consumer's personal data is presented as though it were the price everyone sees. The Proposed Statement explains that, to avoid injury from a higher personalized price, the consumer must possess the information or tools to "modify their behavior to avoid triggering higher prices," to dispute or correct inaccurate data collected about them, or to avoid the collection of those data in the first place.[2] The Proposed Statement relies on disclosure to ensure consumers have these capabilities, but it elides the necessity of market competition. Without adequate competition, disclosure alone is not sufficient to prevent consumer injury.

The Proposed Statement offers several examples of personalized pricing that would raise concerns under Section 5 absent adequate disclosure, including:

- A rideshare company that charges a user more for transport to a medical facility during a life-threatening emergency, or a hotel that charges more to a consumer traveling for a funeral;
- A food delivery company that quotes a higher price to a consumer believed to be unable to leave home to buy food; and
- A rideshare company that charges a user more because the user has not installed any of the company's competitors' apps.[3]

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[1] AAI is an independent non-profit education, research, and advocacy organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see http://www.antitrustinstitute.org.

[2] Proposed Statement at 6.

[3] *Id.* at 7–8.

But in these examples, injury is not reasonably avoidable if consumers cannot switch to adequate substitutes:

- If a rideshare customer experiencing a medical emergency cannot avoid revealing that her destination is an emergency room, then she cannot avoid a higher personalized price unless an available rival offers a better alternative.
- If a food delivery customer who cannot easily leave home is unable to conceal her incapacity (where, for example, she must reveal it by providing specific delivery instructions), the same is true.
- If a rideshare customer installs a competitor's app but the rideshare service knows that the competitor does not serve the customer's geographic area, the customer gains nothing because the seller will rationally price in response to the absence of competitive pressure rather than the fact of the app's installation.

In each of these examples, the higher price is not the product of an information asymmetry that disclosure can cure. It is the product of an altogether different market failure: the consumer's inability to switch. Where switching to a better-priced alternative is not an option, disclosure only enables the consumer to bear witness to her injury, not to avoid it.

The evidence and analysis before the Commission, including the analysis in the Proposed Statement, support an approach that goes beyond a narrow focus on disclosure. AAI urges three changes in the final Statement accordingly:

- ***First*, the final Statement should make competitive conditions an explicit part of the Section 5 unfairness analysis, without presupposing that competitive pressure exists and disciplines personalized prices.**
- ***Second*, the final Statement should expressly preserve the Commission's competition authorities, which disclosure does not displace, and clarify that disclosure is not a safe harbor.**
- ***Third*, the Commission should design its approach to disclosure with competitive effects in mind, so that it strengthens the price comparisons that discipline personalized pricing rather than supplying information to rivals.**

These recommendations are explained in Sections II, III, and IV, respectively.

II. THE COMMISSION SHOULD MAKE COMPETITIVE CONDITIONS EXPLICIT IN ITS SECTION 5 ANALYSIS

The Proposed Statement concludes that certain personalized pricing may constitute an unfair and deceptive act or practice ("UDAP") under Section 5(n) of the FTC Act: (1) the higher price a consumer pays because of personalized pricing "may be a substantial injury"; (2) the consumer may be unable reasonably to avoid that price; and (3) the injury may not be outweighed by countervailing benefits to consumers or competition.[4] The Proposed Statement's treatment of undisclosed personalized pricing is sensible as far as it goes. Concealment of personalized pricing may leave a consumer unable reasonably to avoid a substantial injury, and concealment itself benefits neither consumers nor competition.

But disclosure only prevents injury if the injury is caused by an information asymmetry. Because other market failures can also cause substantial injury, the Commission should treat concealment and disclosure as the beginning of the analysis, not the end. If personalized pricing causes substantial injury because consumers lack adequate substitutes, concealment and disclosure do not resolve the remaining UDAP elements under Section 5(n). Both reasonable avoidability and countervailing benefits depend on the competitive conditions in which the pricing practices occur, regardless of the consumer's awareness that the practices exist.

The Proposed Statement expressly declines to take a position on "whether some personalized pricing practices are unfair even when fully disclosed to consumers."[5] AAI urges the Commission to revise, or, at minimum, clarify this reservation, without undertaking to resolve any particular case. We ask the Commission to acknowledge that personalized pricing may be unfair even if it is fully disclosed, and to clarify that the Statement cannot be construed to create a safe harbor. Further, we ask the Commission to commit to further study of personalized pricing in concentrated markets and under other competitive conditions in which alternatives are not reasonably available.

As the research the Proposed Statement cites makes clear, reasonable avoidability and countervailing benefits turn on competitive conditions and the choices actually available to consumers, not solely concealment and disclosure. The Commission should therefore assess a firm's personalized pricing practices in the competitive context in which they occur. General conclusions cannot be carried across firms and markets without regard to how those conclusions change according to competitive dynamics.

A. Firms' capacity to extract surplus through personalized pricing depends on whether they possess market power

The Proposed Statement proceeds on the premise that competition constrains personalized pricing. It states that real-world personalized pricing "would have to contend with competitive pressures that limit pricing power" in the "vast majority of circumstances."[6] But that premise needs to be tested in a given enforcement matter; it cannot be assumed. Extensive

[4] *Id.* at 5–6.
[5] *Id.* at 6 n.20.
[6] *Id.* at 4.

economic evidence suggests market power has been increasing in the American economy,[7] and personalized pricing may injure consumers if the seller has market power or otherwise knows a consumer's choices are constrained. Moreover, personalized pricing may itself make a market less competitive over time.[8]

In a competitive market, consumers may pay less under personalized pricing than under uniform pricing.[9] In such ideal circumstances, a seller may well use personalized pricing to cut prices to win an individual consumer.[10] A monopolist, however, is in a different position. As the Proposed Statement itself recognizes, perfect personalized pricing in the absence of competition would allow a monopolist to capture the entire consumer surplus by charging each consumer the most she is willing to pay.[11] The same practice—setting a price based on a consumer's personal data—thus produces opposite effects depending on the level of competition the seller faces. Assessing market structure and competitive conditions is necessary to determine which effects are produced.

The Proposed Statement's own examples illustrate this reality. In each, the firm extracts higher prices from the consumers they know lack alternatives: the consumer on the way to the emergency room, the consumer who cannot leave home, the consumer with no competing app on her phone.[12] Whether personalized pricing produces the injury of a higher price, and how large that injury is, depends directly on the competition available for the particular transaction.

It follows that the highest personalized prices will be charged in the least competitive markets, which are also those in which disclosure accomplishes the least. Where a consumer has no alternative, disclosure cannot prompt switching and cannot induce sellers to compete on their pricing policies.[13] A framework that presumes competitive markets is therefore weakest exactly where the problem is worst.

Personalized pricing may also shape the competitive conditions on which it depends. When other unfair practices occur in a market featuring a robust field of significant rivals, competitive conditions often matter only at the margin: assuming the consumer indeed has

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[7] JONATHAN BAKER, THE ANTITRUST PARADIGM 12–25 (2019) (citing and discussing over 100 studies chronicling eight indicators of rising market power).
[8] *See infra* Section III.
[9] *See, e.g.,* Andrew Rhodes & Jidong Zhou, *Personalized Pricing and Competition*, 114 Am. Econ. Rev. 2141, 2143 (2024).
[10] *See, e.g., id.* at 2142–43. Further, under competitive personalized pricing, an individual consumer pays a relatively lower price when the consumer does not have a strong preference between alternatives, implying the price depends on the closeness of competition. *Id.* at 2151.
[11] Proposed Statement at 3–4 (citing Jean-Pierre Dubé & Sanjog Misra, *Personalized Pricing and Consumer Welfare*, 131 J. Pol. Econ. 131, 141 (2023)).
[12] *Id.* at 7–8.
[13] Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175, 181–184 (2007).

somewhere else to take her business, there is no reason to suspect competitive conditions may determine the injury. Personalized pricing is different. Because competition is an *input* into the personalized price—the seller measures how little competition the consumer enjoys and charges accordingly—personalized pricing can in turn erode the competition that would otherwise discipline it. As an example, discussed in Section III.C below, the practice can be used to target and exclude rivals.

A framework that assumes competitive markets thus does not simply overlook particular instances of the harm. It assumes away the mechanism that produces the harm itself. If personalized pricing contributes to the market power that makes disclosure ineffective, disclosure cannot be counted on as a remedial response. The final Statement should say so plainly. Competitive conditions should be assessed in the market where the pricing occurs, not supplied as a background assumption.

B. Whether injury is "reasonably avoidable" turns on the availability of competitive alternatives

To be sure, disclosure can help a consumer avoid injury in several ways. First, it may change how a consumer deals with the seller in front of her, without regard to other sellers. If a higher price can be avoided by withholding data, by forgoing some action that triggers the price, or by refusing the transaction, disclosure may benefit consumers even in an uncompetitive market.[14]

Second, disclosure may prompt a consumer to look for a seller that does not personalize, or that would quote her a lower personalized price, steering her toward her optimal transaction. Finally, disclosure may cause sellers to compete on their pricing practices. Sellers may seek to win customers by promising uniform prices, or by declining to price on the data consumers find most objectionable.[15] This outcome is the most valuable, because it leads sellers to compete away the injury rather than merely route individual consumers around it.

However, many of disclosure's consumer benefits depend on the availability of adequate substitutes. As the Proposed Statement's examples show, a rideshare customer traveling to an emergency room cannot withhold data concerning her destination. The consumer who forgoes the transaction may avoid the high personalized price, but in the absence of alternatives she must forgo a welfare-enhancing transaction she would otherwise make. Other consumers must resort to the transaction if it involves an emergency or necessity. The consumer who, when prompted by disclosure, goes looking for a seller that does not personalize or who offers lower personalized prices, but finds none, only learns from disclosure that her fate is sealed.

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[14] Proposed Statement at 5–6.

[15] While sellers might engage in similar practices even absent disclosure, disclosure removes information asymmetries that blunt the effectiveness of this competition.

The Proposed Statement already recognizes this dynamic implicitly. The problem when consumers are unaware of personalization, it explains, is that they cannot take steps to avoid the higher price, including "choosing a different retailer whose prices are static or widely offered."[16] The Commission's embrace of disclosure thus presupposes that a different retailer is available. The final Statement should make explicit that much of its theory of avoidance via disclosure rests on the existence of competitive alternatives.

Making it explicit matters because personalized pricing can target a high price toward the consumers least able to avoid it. A consumer who can readily avoid a higher price once informed is frequently not the consumer who is charged a higher price. Either she is already comparison shopping, or her evident ability to comparison shop leads sellers to quote a competitive personalized price. The Commission therefore should not infer, from the fact that some consumers can avoid high personalized prices after disclosure, that the consumers who actually pay them can.

Explicitly stating that a higher personalized price is not reasonably avoidable in the absence of practical alternatives for the transaction at issue, which disclosure does not affect, would not imply that every injury arising in a concentrated market is unavoidable under Section 5 law. A particular consumer's alternatives are relevant and important only where the seller identifies the absence of alternatives available to the *particular* consumer and prices on that absence. In that circumstance, the firm has itself determined that the consumer cannot avoid the price. The Commission should not presume a capacity to avoid injury that the seller's own conduct itself rules out. Personalized pricing is, so far, a practice in which firms make that determination at scale, one consumer at a time.

C. Countervailing benefits to consumers or competition should be assessed against actual market structure and competitive dynamics

The Proposed Statement addresses countervailing benefits only briefly. For the narrow practice it addresses there is little to say: concealing personalization benefits neither consumers nor competition.[17] But when answering the reserved question of whether disclosed personalization is unfair, countervailing benefits will do substantial work. The same point about market structure and competitive dynamics governs.

Firms under investigation will argue that the losses some consumers suffer are outweighed by the gains other consumers in the market enjoy. Whether that is so depends on the market. Perfect personalized pricing by a monopolist, as the Proposed Statement recognizes, would transfer the entire consumer surplus to the seller, leaving no countervailing consumer

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[16] *Id.* at 5.
[17] *Id.*at 6.

benefits at all.[18] Where firms compete, personalization can intensify rivalry and leave consumers better off in the aggregate[19]—but recent work the Proposed Statement cites finds that result is fragile.[20] The important point is that countervailing benefits claimed for personalized pricing are contingent on the structure and competitive conditions of the market in which they are claimed.

The Commission should accordingly decline to credit general claims about the benefits of personalized pricing that do not hold in the market where the conduct occurs. Countervailing benefits should be measured against the competitive conditions a firm actually faces, not against an imaginary competitive market the firm does not inhabit.

D. Sustained personalized pricing may be probative of market power

The disclosures the Proposed Statement contemplates will do more than inform individual consumers. They have the potential to generate an observable record showing which firms personalize prices, on what basis, and in which markets. That record has value beyond consumer protection.[21]

A firm's sustained ability to charge different consumers different prices for the same product, based on estimates of what each consumer will pay, is itself evidence about competitive conditions in that market. The inference is a familiar one. Price discrimination alone does not prove market power; it can occur in competitive markets. But price discrimination that persists and remains profitable requires that arbitrage be limited and that rivals not be positioned to undercut the higher prices, and the Supreme Court has recognized that price discrimination may evidence market power when buttressed by evidence of above-market pricing.[22] Where a firm

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[18] *Id.* at 3–4. Perfect personalized pricing by a monopolist may nonetheless increase total welfare as additional consumers enter the market. Categorical conclusions cannot be drawn about the marketwide consumer welfare effects of imperfect personalized pricing, which depends on factors including the monopolist's ability to collect and utilize information. *See, e.g.,* Dubé & Misra, *supra* note 11.

[19] *See e.g.* Org. for Econ. Coop. & and Dev. [OECD], *Personalised Pricing in the Digital Era Background Note by the Secretariat*, at 21, JT03439922 (Nov. 28, 2018) (The loss in consumer surplus from personalized pricing is likely to be smaller "when companies engage in aggressive price competition to acquire each individual consumer," whereas "if firms have substantial market power, there is a greater risk that personalised pricing approaches perfect or first-degree price discrimination" and consumer surplus is extracted.)

[20] For example, consumers may be worse off under personalized pricing when the assumption that all consumers remain in the market is relaxed. *See, e.g.,* Rhodes & Zhou, *supra* note 9, at 2144.

[21] Because this additional value could create an incentive for firms to be vague in their disclosures, it is particularly important that the Commission stand by and enforce its position that effective disclosure "should be clear and conspicuous and include all relevant information." Proposed Statement at 6.

[22] *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 44–45 (2006) (Price discrimination "may provide evidence of market power, particularly if buttressed by evidence"

prices on indicators that a particular consumer lacks alternatives, and sustains those prices over time, the natural reading is that the firm is right about the lack of alternatives.

The Commission should recognize the evidentiary value of personalized pricing in the final Statement, for two reasons. It gives the unfairness analysis described above a workable evidentiary anchor, because the pricing conduct itself supplies information about the market structure against which that conduct must be assessed. And it connects the Commission's consumer protection work to its competition mission: the disclosures the Proposed Statement calls for will produce facts bearing on the Commission's authorities under the Sherman Act and under Section 5's unfair-methods prong, discussed in Section III below. Disclosure is not only a remedy for the individual consumer. It is also infrastructure for enforcement.

III. THE FINAL STATEMENT SHOULD PRESERVE THE COMMISSION'S COMPETITION AUTHORITIES

A. Disclosure is not a defense under the Sherman Act, the Clayton Act or the unfair-methods prong of the FTC Act

The Proposed Statement says that, with respect to personalized pricing practices, the Commission will take appropriate actions under Section 5 "or any other law enforced by the Commission" and "will use all tools at its disposal."[23] Indeed, as discussed below, there are already indications that certain uses of personalized pricing may need to be scrutinized under the competition laws enforced by the Commission. As a matter of competition law, the disclosure record described in Section II.D is evidence, not a defense. A firm that fully discloses that it personalizes prices can at most satisfy its consumer protection obligations, nothing more. Disclosure does not speak to whether pricing rules were reached in concert with rivals, whether personalization maintains monopoly power, or whether the practice is a stand-alone unfair method of competition. On those questions, a firm's own account of what drives its prices is a source of proof, and the final Statement should say so.

The Commission should make clear that adequate disclosure is not a safe harbor under any of the Commission's authorities, including its competition laws. The structure of the Proposed Statement invites the contrary inference. It describes when personalized pricing without adequate disclosure violates Section 5, and it declines to address whether disclosed

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of above-market pricing (citing 10 Areeda ¶ 1769c)); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477 (1992); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 3 (2010) (Price discrimination against targeted customers requires that arbitrage be limited); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.3.D (2023) (Price discrimination requires that arbitrage is limited, which may result in a relevant market "as narrow as an individual customer" if prices are set individually).

[23] Proposed Statement at 4, 8.

personalized pricing may be unfair.[24] It notes that complete disclosure "would likely be enough to dispel any reasonable expectation" that would be a predicate to a UDAP claim.[25] Read alongside the Commission's statement that it intends to deploy enforcement resources consistent with its conclusions, a firm could reasonably take the final Statement as an assurance that disclosure ends its exposure. Given the limitations of disclosure to address the range of potential harms associated with personalized pricing, the final Statement should make the point affirmatively rather than leave it to inference: compliance with the disclosure principles described in the Proposed Statement does not establish that a personalized pricing practice is lawful under Section 5 or under any other law the Commission enforces.

B. Personalized pricing intermediaries and algorithmic coordination

Although the Proposed Statement never mentions the term "algorithmic pricing," personalized pricing also implicates the same competition concerns raised by algorithmic pricing. The data-driven personalized pricing the Statement addresses is, after all, a form of algorithmic pricing; it involves algorithmic tools that use increasingly detailed consumer data to set prices.[26]

The Commission, together with DOJ, has explained that competitors who delegate pricing to a common algorithm may engage in illegal price fixing, even if they never communicate directly and even if they retain some discretion to depart from the algorithm's recommendations.[27] Personalized pricing tools often present the same structure and same concerns as other algorithmic pricing intermediaries: a single vendor supplying pricing capability to many sellers.[28] A vendor that trains its models on data from competing clients, or supplies them the same estimates of individual consumers' willingness to pay, can align how those clients price to the same consumers without any direct exchange among them.[29] This is not a minor concern. The 6(b) staff research summaries show that the intermediaries studied serve at least

[24] *Id.* at 6 n.20.
[25] *Id.* at 7.
[26] Ginger Zhe Jin, Liad Wagman & Mengyi Zhong, *Surveillance Pricing: A Cautionary Summary of Potential Harms and Solutions*, CPI Antitrust Chronicle at 3 (July 14, 2025) (cited in Proposed Statement at 4 n.13)
[27] Statement of Interest of the United States of America, *Duffy v. Yardi Sys., Inc.*, 758 F. Supp. 3d 1284 (W.D. Wash. Mar. 1, 2024); Statement of Interest of the United States, *Cornish-Adebiyi v. Caesars Ent., Inc.*, No. 1:23-cv-02536-KMW-EAP, 2024 U.S. Dist. LEXIS 178504 (D.N.J. filed March. 28, 2024).
[28] *See* David O. Fisher, *Tacit Agreements to Collude: Enforcing Section 1 of the Sherman Act in the Age of Algorithms*, Antitrust (Fall 2025), at 31 (explaining the role of an algorithmic cartel manager).
[29] Nathanael Jo et al., *Homogenous Algorithms Can Reduce Competition in Personalized Pricing*, ARXIV (Mar. 19, 2025), at 1, https://arxiv.org/pdf/2503.15634.

250 clients, including multiple grocery chains, apparel retailers, and other sellers in the same retail categories; the likelihood that the same vendors already serve competing sellers is high.[30]

Coordination through a common vendor can take two forms. In the first, the vendor combines or shares data across competing clients. That is the conduct at issue in the Commission's prior algorithmic pricing work. In the second, no client's data ever reaches a rival, but competing sellers price from the same models—or models built on the same data or the same underlying components—so that their estimates of what each consumer will pay move together.[31] Recent research finds that this correlation reduces consumer welfare and that firms may even accept less accurate predictions in exchange for greater correlation with a competitor's predictions.[32] The 6(b) record does not yet show which, if either, is occurring. The Commission should use its Section 6(b) and compulsory process authority to find out and should treat evidence that a firm chose a model because rivals use it as probative of coordination under Section 1 and of an unfair method of competition under Section 5.

C. Control of data inputs and exclusionary effects

The Proposed Statement's own rideshare example has a striking mirror image in real life that illustrates another competition concern: the data on rival apps can be a tool of anticompetitive exclusion. The Proposed Statement describes a company that charges a rider more because she has not installed a competitor's app. Uber's "Hell" program reportedly worked the other way: Uber combined its own data with data drawn from a rival's app to identify drivers who also drove for the rival, then steered extra rides and bonuses to the rival's rideshare drivers.[33] The signal—whether a customer/driver uses a rival app—was the same and so was the logic: reward those a competitor can reach and extract from the ones it cannot.

The research the Proposed Statement cites identifies asymmetric data access as a central source of harm. As the Proposed Statement notes, the more sophisticated personalized pricing becomes, the less likely consumers are to benefit.[34] One cited study finds that consumers can be worse off when only some firms in a market can personalize than when all or none can.[35]

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[30] FTC Office of Technology, *Surveillance Pricing 6(b) Study: Research Summaries—A Staff Perspective* (Jan. 2025), at 6–7.
[31] Jo et. al., *supra* note 29, at 1 (explaining that when firms use the same third-party algorithm, their predictions may be identical across firms).
[32] *Id.* at 4–5, 7–8 (explaining that consumers "are always worse off when pricing algorithms are correlated" because they have fewer lower-price options to choose from; meanwhile, firms prefer correlated algorithms—which cause competitors to adopt a similar price rather than undercutting when a high price is imposed—over accurate algorithms under certain conditions, such as when consumers are price sensitive).
[33] Thomas K. Cheng & Julian Nowag, *Algorithmic Predation and Exclusion*, 25 U. Pa. J. Bus. L. 41, 46–48 (2023).
[34] Proposed Statement at 4.
[35] *Id.* at 4 n.13 (citing Rhodes & Zhou, *supra* note 9).

Another explains why: asymmetric data access can reduce competition, allowing a data-rich firm to selectively target its rivals' customers while raising their switching costs.[36] A consumer who accepts a targeted discount may pay less today. But as the rival loses the customers it most needs to compete, the consumers identified as locked-in by the personalizing firm can end up paying more.[37]

Where a data-rich firm also has market power, the risks extend to predation and other exclusionary conduct.[38] The doctrines governing predatory pricing and tying implicitly assume that a dominant firm must pursue those strategies across the board, and so must accept a tradeoff: cutting price to fight a rival sacrifices margin on loyal customers, and imposing a tie risks losing customers who object.[39] Precise customer segmentation can shrink or eliminate that tradeoff. A dominant firm can confine below-cost prices to the customers a rival is contesting, which reduces its losses and makes recoupment more likely, and it can impose a tie only on customers unlikely to walk away.[40] A rival without comparable data cannot answer in kind; its response must be applied more broadly, at far greater cost.[41] Targeting can also shrink the pool of customers available to an entrant, depriving it of the scale that viable entry may require.[42] Existing screens may miss this conduct. A price-cost test that averages in sales to loyal customers who received no price cut overstates the relevant price and can conceal below-cost pricing to the customers that matter.[43] The Commission thus should apply its exclusionary-conduct standards with targeting in view.

Control of the data inputs that personalization requires is therefore itself a competition issue. The literature the Proposed Statement cites observes that data brokers may have an incentive to sell data exclusively to a single downstream firm, because doing so softens the competition that broad data availability would produce.[44] Exclusive data arrangements, and conduct that forecloses rivals from those inputs, warrant scrutiny as potential exclusionary conduct. The 6(b) record also updates the premise of this literature. Writing in 2023, Cheng and Nowag treated precise customer segmentation as a foreseeable capability rather than a present

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[36] Jin et al. *supra* note 26, at 5.
[37] *Id.* (explaining that endogenous switching costs can raise the average price when locked-in buyers outnumber contestable ones).
[38] *See e.g.* OECD *supra* note 19, at 28 (explaining that firms "target lower prices to rivals' customers, in an attempt to foreclose the market").
[39] Cheng & Nowag *supra* note 33, at 44.
[40] *Id.* at 51, 53, 62–64.
[41] *Id.* at 54–55 & n.47.
[42] *Id.* at 63.
[43] *Id.* at 79–80.
[44] Jin et al. *supra* note 26, at 6 (citing Jin-Hyuk Kim, Liad Wagman & Abraham L. Wickelgren, *The Impact of Access to Consumer Data on the Competitive Effects of Horizontal Mergers and Exclusive Dealing*, 28 J. Econ. & Mgmt. Strategy 373 (2019)).

one.[45] The staff research summaries show that hundreds of clients are now served by pricing intermediaries, and these intermediaries' tools can potentially estimate individual consumers' price sensitivity.[46] The precondition for targeted exclusion could well already be met, even if its prevalence is not yet documented.

D. Implications for merger review

The Commission should also bring what it learns about personalized pricing to merger review under Section 7. Two points follow from the analysis above.

First, because the effects of personalized pricing turn on market structure and competitive conditions, a transaction that eliminates the closest alternative available to particular consumers can harm them even if other consumers see no change. Personalization makes that harm easier to inflict: a merged firm that can identify which customers lost their best alternative can raise prices to those customers alone. Merger analysis already recognizes markets defined around targeted customers when price discrimination is feasible,[47] and sustained personalized pricing is evidence that it is. *See supra* Section II.D.

Second, given the exclusionary value of data inputs, firms will have incentives to consolidate those inputs or acquire exclusive rights to them.[48] The Commission should make clear that it will assess a transaction's likely effect on personalized pricing capability, including acquisitions of data assets and of the intermediaries that supply personalization tools, and will pursue appropriate remedies under Section 7 and its other authorities.

IV. THE DISCLOSURE APPROACH SHOULD BE DESIGNED WITH COMPETITIVE EFFECTS IN MIND

The competitive dynamics of personalized pricing should not bear only on how the Commission frames the UDAP inquiry. They should also shape how the Commission designs the disclosures themselves and evaluates whether those disclosures are working.

A. Disclosure of personalization serves competition as well as consumer protection goals

Proper disclosure of personalized pricing protects the competitive process, not only the consumers deceived by its concealment. A firm that conceals personalization both misleads consumers and shields the practice from the competitive pressure that would otherwise discipline it.

Consumers regard individualized pricing as less fair than pricing set for broader consumer segments, and perceived unfairness prompts responses that are costly to the firm, such

[45] Cheng & Nowag *supra* note 33, at 50–51.
[46] *Research Summaries* at 6–7.
[47] *See FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037–40 (D.C. Cir. 2008).
[48] *See* Kim et al., *supra* note 44.

as complaints, refund demands, and negative word of mouth.[49] Firms therefore have little commercial reason to disclose that they personalize. The Proposed Statement's own deception analysis assumes as much: its discussion of omissions is addressed to the firm that simply says nothing.[50]

One consequence deserves emphasis, because the Proposed Statement describes the extent of personalized pricing as not well understood and the economic research as limited.[51] Where firms have reason to conceal a practice, the absence of documented instances is not evidence that it is not happening. The Commission's own experience bears this out: it did not learn what it knows about personalized pricing only from the published literature, but rather by compelling eight pricing intermediaries to produce material using its Section 6(b) authority.

Concealment also defeats the comparison that would otherwise discipline personalized pricing. The margin a firm can extract from a given consumer is bounded by the gap between what she is willing to pay and the best alternative available to her.[52] That discipline operates consumer-by-consumer, and it requires that the consumer know she has reason to look for an alternative. A consumer who believes the price she sees is the price everyone sees has no occasion to search. The resulting loss of competitive discipline is a competition concern, not only a fairness one.

Well-designed disclosures are likely to strengthen that discipline rather than burden firms disproportionately. The extent of the obligation tracks the extent of the conduct: a firm that does not personalize prices has nothing to disclose and bears no burden. A firm that does will face genuine design questions, but competition is served when a consumer can tell what she is being offered and has reason to compare it against something else. Uncertainty about how widespread personalization has become is therefore a reason to favor disclosure, not a reason to doubt it.

B. Disclosures should be consumer-facing and should not facilitate coordination

That conclusion holds only for disclosure directed at consumers. The disclosures the Proposed Statement describes are all consumer-facing: they tell a shopper that the price quoted to her is personalized and, where relevant, on what basis. That is the right design. Whether a disclosure dispels a misimpression turns on what the individual consumer understands when she is quoted a price, not on what information is available to the market generally.

A disclosure mandate that becomes an excuse to publish price levels or pricing rules, by contrast, would serve no consumer protection purpose and would place into circulation current,

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[49] Proposed Statement at 6 n.24 (citing Priester et al. and Xia et al.).
[50] *Id.* at 5.
[51] *Id.* at 3–4.
[52] *See supra* Section II.B.

firm-specific price information of the kind antitrust law scrutinizes most closely.[53] The concern is not hypothetical in this setting, because the intermediaries that supply personalized pricing capability may well already serve competing sellers.[54]

The Commission should confirm that the final Statement does not contemplate or endorse publishing prices or pricing logic to rivals or to the market at large, and that nothing in it immunizes an information-sharing arrangement adopted in the name of disclosure compliance.

V. CONCLUSION

To reiterate, AAI applauds the Commission for recognizing the impact of personalized pricing on consumers and for clarifying that these practices can be unfair and deceptive if they are not disclosed. But, as explained, because the effects of personalized pricing depend heavily on the real-life choices consumers have, including those determined by market structure and competitive conditions, disclosure will not address all consumer harm. AAI urges the Commission to ensure that neither the text of the Proposed Statement nor the fact of its issuance forecloses other study and action that will be necessary to protect consumer welfare as the prevalence of the practice grows. To that end, AAI urges the Commission to revise the Proposed Statement to:

1. Acknowledge that personalized pricing may be unfair even when fully disclosed, particularly where consumers lack practical alternatives, and expressly preserve that question (Section II; Statement at 6 n.20).
2. Make clear that, in any matter involving personalized pricing, countervailing benefits will be assessed against the market as it actually exists, not an idealized competitive one (Section II.C).
3. State that compliance with the disclosure framework does not foreclose competition enforcement, and that disclosure is not a safe harbor under any law the Commission enforces (Section III.A).
4. Confirm that disclosures are for consumers, not a channel for sharing competitively sensitive information among rivals, and that the Statement provides no immunity for information exchange among competitors (Section IV.B).

AAI further urges the Commission to commit to further work on the competitive effects of personalized pricing, drawing on information already gathered through its Section 6(b) study

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[53] *See United States v. Container Corp. of America*, 393 U.S. 333, 336–37 (1969) (exchange of current price information among competitors in a concentrated market for a fungible product had the effect of stabilizing prices); *Todd v. Exxon Corp.*, 275 F.3d 191, 211–13 (2d Cir. 2001) (assessing information-exchange claims under the rule of reason by reference to the character of the information exchanged).

[54] *See supra* Section III.B.

and, where appropriate, additional compulsory process, and to take enforcement action where warranted. That work should examine:

5. whether personalization vendors pool data across competing clients or supply rivals with correlated pricing models (Section III.B);
6. whether exclusive data arrangements, including with personalized pricing intermediaries, and other personalized pricing practices are facilitating exclusionary conduct (Section III.C); and
7. whether mergers create asymmetric access to consumer data that could allow personalized pricing to entrench incumbents and raise barriers to entry (Section III.D).

Finally, the Commission should complete the record on which this policy rests. The orders that produced the staff research summaries went to eight pricing intermediaries, and the resulting record is supply-side: what those vendors can do is documented, while which firms deploy those capabilities, at what level of granularity, and with what effect on the prices consumers actually pay is not. That gap bears directly on the competitive-conditions analysis described above. AAI urges the Commission to develop the demand-side record and to issue a comprehensive final report.

AAI appreciates the opportunity to comment and would welcome the chance to discuss these issues further with the Commission and its staff.

Sincerely,

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