FTC Announces Proposed Enforcement Policy Statement Regarding “Personalized Pricing,” Signals Potential Scrutiny of the Use of Consumer Personal Information in Pricing

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Yesterday, the FTC announced that it was seeking public comment on a newly issued Proposed Enforcement Policy Statement Regarding Personalized Pricing, which seeks to describe current FTC Staff’s perspective on when personalized pricing may present deception and unfairness issues in light of the “rise of data-driven ‘personalized pricing’ [with] the potential to transform our history of relatively limited variation in pricing from one consumer to the next.” The Policy Statement acknowledges at the outset that the FTC lacks authority “to prohibit personalized pricing,” but previews an intent to “aggressively” enforce any related practices that violate Section 5 of the FTC Act, signaling heightened scrutiny of how businesses disclose and implement personalized pricing practices.

Rather than attempt to promulgate new trade regulation rules, which are subject to a host of substantive and procedural requirements, the FTC relies on existing Section 5 unfairness and deception principles to lay out potential UDAP issues with personalized pricing practices. Specifically, the Policy Statement suggests that consumers may be harmed when they are unaware that prices are personalized because they are unable to take steps to avoid potentially higher prices, such as shopping elsewhere or altering their browsing behavior. Although the statement signals heightened enforcement scrutiny in this area, it provides limited guidance on how the FTC intends to apply these principles in practice.

As we previously discussed here, lawmakers and regulators at the state level have also taken an interest in regulating personalized pricing, sometimes referred to as “surveillance pricing.” States such as Maryland, Connecticut, New Jersey, and New York have all recently enacted prohibitions on and/or prescriptive requirements related to personalized pricing. Other states have similarly expressed an intent to rely on existing state consumer protection authority to enforce conduct related to “surveillance pricing.”

The FTC’s Proposed Enforcement Policy Statement identifies several circumstances where FTC believes personalized pricing practices may raise concerns under Section 5:

- **Misrepresented static prices:** where companies "represent, expressly or by implication, that price is static or widely offered when… it is personalized."
- **Inadequate disclosures:** where companies fail to adequately disclose that a price is personalized.
- **Misleading basis for price:** where companies "mislead consumers as to the basis for the personalization of a price or the effect of that personalization," for example, by leading consumers to believe "that a personalized price is a discount based on their purchase history with that retailer when it is in fact a higher price based on information about their disposable income or their shopping habits with other firms."
- **Lack of informed consent:** where "businesses that base personalized prices on personal data of consumers without sufficiently verifying that consumers consented to the collection of those data for that purpose."

Interested parties will have 30 days following the Policy Statement's publication in the Federal Register (which should occur shortly) to submit comments on the proposed enforcement policy statement. Businesses that use personalized pricing should assess both their disclosure practices and the data inputs used to generate personalized prices to evaluate risk under the FTC's Proposed Enforcement Policy Statement and related emerging state laws.