

State AGs Deliver Input on FTC's Food Delivery Fee ANPRM

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Last month, a bipartisan group of attorneys general from 16 states submitted a [comment letter](#) in response to the FTC's ANPRM on food delivery fees that advocated for the FTC to adopt a new rule addressing pricing for food delivery services. In their letter, the AGs noted the growth and "essential" nature of food delivery platforms to consumers and suggested that some platforms use "drip pricing" by not presenting fees clearly until at the point of checkout and may fail to conspicuously disclose the purpose or methodology of those fees, such as "service fees" and "small order fees." The AGs posited that consumers may not be able to understand how much to tip due to lack of clarity regarding these and other fees. They further claimed that consumers are confused by "markups" of items, where the price on the platform is higher than the price in a restaurant.

The AGs also addressed personalized pricing (also referred to as "[surveillance pricing](#)") and suggested that the use of consumer information to offer individualized pricing and offers (including promotions and discounts) may further complicate transparency and could create harms by, for example, generating higher prices at restaurants consumers visit more often. The AGs claimed that providing customers different [discounts](#) based on their personal data is no different than charging different base prices, since the end goal (i.e., increasing revenue) is the same. This could also lead to outcomes, the AGs said, where customers more dependent on delivery may be charged more based on their circumstances. The AGs further stated that customers "cannot meaningfully avoid personalized pricing that they don't know about."

The AGs suggested that online food delivery services should be added to the existing Rule on Unfair and Deceptive Fees, with some additional inclusions:

- Clearly and conspicuously displaying the total price including fees at each stage of item selection;
- Accurately describing the purpose of each fee and how it is calculated, including who the fees go to; and
- Disclosing any markup or variation from in-store pricing for menu items and to separately itemize the total markups.

The AGs further suggested that this Rule "may not be appropriate" for addressing personalized pricing, and instead recommended issuing a new rule on that issue for food delivery platforms. Such a rule, they suggested, should include clear and conspicuous disclosure of:

- The use of pricing technology to set personalized pricing based on individual data;
- Any specific price set using personalized pricing;
- Any variation in price between a fixed reference price (such as in-store or public), and
- The factors that result in price differentials.

Discounts and promotions, the AGs said, should specifically be included in such a rule and not exempted, and further disclosures are merited when personalized pricing is used as part of a loyalty program. Further, the platforms should be required to disclose the specific customer data used.

While these comments pertain specifically to online food platforms, AGs have voiced similar concerns with other industries (and in some cases, states have already enacted relevant laws). For example, earlier this year 27 state AGs submitted a comment letter pertaining to [Rental Housing Fees](#). The AGs encouraged the FTC to continue its “efforts to address unfair and deceptive pricing practices across the economy.” The AGs continue to stress that any such rules that the FTC adopts should be a floor not a ceiling, allowing states to enact further protections.

Businesses should continue to consider how they are disclosing their fees and the purpose for those fees. Further, they should consider reviewing how any “personalized pricing” is being disclosed to customers, including in the context of any loyalty programs. We anticipate further AG scrutiny in this space, and many of these topics will be discussed at the upcoming NAAG Presidential Summit. We will be in attendance and report on further developments.