entertainment software association

September 25, 2026

By Electronic Filing

April Tabor
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, DC 20580

RE: Proposed Enforcement Policy Statement Regarding Personalized Pricing

Dear Secretary Tabor:

The Entertainment Software Association ("ESA") submits these comments in connection with the Federal Trade Commission's ("FTC" or "Commission") Proposed Enforcement Policy Statement Regarding Personalized Pricing (the "Proposed Policy Statement"). ESA is the U.S. association for the video game industry. Our members are the innovators, creators, publishers, and business leaders reimagining entertainment and transforming how America plays video games on consoles, handheld devices, and personal computers.[1]

ESA appreciates the FTC's efforts to clarify when personalized pricing practices might be deceptive or unfair under Section 5 of the FTC Act. As drafted, however, the Proposed Policy Statement suffers from the fatal flaw of focusing too much on "hypothetical use cases rather than robust factual findings"[2] and suggests mandatory disclosures for practices that would not otherwise satisfy the FTC's unfair or deceptive practices standard. As a result, it is unclear whether the Policy Statement prohibits a wide range of pricing practices that benefit consumers. Instead, the FTC should provide clear guidance on what practices are unfair or deceptive, applying appropriate legal standards to clear factual findings, and following the proper statutory procedures.

Specifically, the FTC should clarify that the Proposed Policy Statement does not apply to discounts, coupons, offers, market research, and other practices that benefit consumers or otherwise do not satisfy the standards for deception and unfairness. In order to make the appropriate factual findings to support any further action, the FTC should withdraw the Proposed Policy Statement and instead follow the proper Section 18 Magnuson-Moss rulemaking procedures.

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[1] Entertainment Software Association, *Our Members*, https://www.theesa.com/our-members.

[2] Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Surveillance Pricing 6(b) Staff Research Summaries, Matter Number P246202 at 2 (Jan. 17, 2025).

I. PERSONALIZED DISCOUNTS, COUPONS, OFFERS, AND MARKET RESEARCH BENEFIT CONSUMERS

Video game companies have rewarded player loyalty and offered personalized discounts, coupons, and similar offers to promote their products and services for decades.[3] For example, a company may offer a loyal player who has purchased multiple versions of a game released over several years a discount when it releases a new sequel to the game. Video game companies also may offer players discounts on digital items specific to characters or features they frequently use in-game. If a player has completed or stopped playing a game they have already purchased, a company might provide personalized offers to promote purchases of new levels or experiences available for that game. Similarly, subscription-based game services may offer discounts to long-time subscribers who upgrade to a higher-tier service or to encourage a lapsed subscriber to return. These practices are analogous to those that occur across many different industries from retail, to consumer products, to restaurants. Consumers understand and appreciate these well-established business practices that benefit both consumers and businesses.

As the Proposed Policy Statement recognizes, personalized pricing can be consistent with consumers' reasonable expectations. Personalized pricing "is a long-established norm in some markets," and consumers "obviously do not expect that prices will never vary based on their personal data."[4] These practices allow consumers to enjoy a product or service they already find valuable at a price that is advantageous to them. For example, if a consumer is running out of storage space on a cloud-based video game platform, that consumer reasonably expects and likely appreciates a well-timed discount for an upgraded tier with more storage. This results in a win-win for the business and for the consumer. The consumer receives a lower price, and the company strengthens the customer relationship. Undermining companies' ability to tailor discounts and other offers to a customer based on the consumer's needs and preferences would threaten these pro-consumer tools. The effects might be particularly severe for independent game developers, as well as those publishing free-to-play games with no upfront purchase cost, who rely on personalized discounts and offers to develop strong relationships with fans, sustain enthusiasm for their games, and generate revenue to operate their businesses.

The Proposed Policy Statement also risks capturing basic market research practices relied on by many companies, including those in the video game industry. The fact that different consumers may see different prices does not necessarily indicate that personalized pricing is occurring—let alone that the practice is unfair or deceptive. For example, a company may conduct an A/B test to evaluate the viability of product prices without using any consumer's personal data to determine the varying pricing shown in that A/B test. Market research of this kind provides benefits to consumers by helping businesses to appropriately price products for all consumers and improve market efficiency. Broad restrictions on personalized pricing would threaten to undermine basic market research methods that benefit consumers.

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[3] Notably, many of the enacted state personalized pricing laws recognize exceptions for loyalty, membership, and rewards programs, as well as for efforts to retain customers. *See, e.g.*, New York One Fair Price Act (New York S.8623B/A.9349B); Connecticut Pub. Act No. 26-64.

[4] Proposed Policy Statement at 1.

II. THE PROPOSED POLICY STATEMENT DISCOURAGES THESE PRO-CONSUMER PRACTICES BECAUSE IT IS UNWORKABLY VAGUE AND OVERBROAD

Any FTC action addressing personalized pricing must preserve the substantial consumer benefits described above, which can only be done by ensuring any requirements are clear and narrowly tailored to particular facts that are proven to satisfy all elements of deception or unfairness. As drafted, the Proposed Policy Statement suffers from the same deficiencies that Chair Ferguson flagged in the Surveillance Pricing 6(b) Staff Research Summaries. It identifies only a handful of "hypothetical use cases rather than robust factual findings."[5] Consequently, the Proposed Policy Statement fails to draw a line between practices that should be permitted and those exploitative practices that materially mislead reasonable consumers or result in unavoidable substantial injury with no countervailing benefits.

ESA appreciates the FTC's intent to target conduct that results in concrete consumer harm. However, despite this well-founded objective, the Proposed Policy Statement fails to provide clear guidance on which practices are covered. Instead, the Proposed Policy Statement relies on a handful of extreme hypothetical use cases, such as pricing that takes advantage of vulnerable consumers with life-threatening medical emergencies, who experienced a death in the family, or who were recent victims of a crime.[6] Because the Proposed Policy Statement focuses on extreme examples that do not map to ordinary commercial practices, the Proposed Policy Statement creates substantial uncertainty for businesses about whether ordinary commercial practices would be covered. Indeed, the Proposed Policy Statement appears to define personalized pricing as a practice that permits businesses to "set personalized prices based on analysis of consumers' personal data and resulting conclusions," a definition that is broad enough to capture the beneficial practices described above.[7]

The Proposed Policy Statement is also unclear as to the form of required disclosures. At the same time, overly prescriptive pricing disclosures could be redundant with, or conflict with, privacy notices, which consumers consult for details on how their personal data is used. Overbroad notification requirements that apply to routine, benign practices also could make it more difficult for consumers to know when unexpected forms of personalized pricing are occurring. Accordingly, any guidance on personalized pricing must:

- *Identify unlawful conduct with specificity, based on a developed factual record.* The FTC should clearly limit the scope of unlawful activity to specific forms of clearly exploitative conduct that are proven to result in concrete, substantial consumer injury that is unavoidable and not outweighed by other benefits.[8] Each type of violative conduct included in the policy must be based on robust factual findings, rather than unsupported assertions or hypothetical use cases.

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[5] *See* Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Surveillance Pricing 6(b) Staff Research Summaries, Matter Number P246202 at 2 (Jan. 17, 2025).

[6] Proposed Policy Statement at 7-8.

[7] *Id*. at 1.

[8] While substantial consumer injury is a necessary condition for unfairness, it is not sufficient. Consistent with 15 U.S.C. § 45(n), a practice that causes substantial injury to consumers is not unfair if those concerns are "outweighed by countervailing benefits to consumers or to competition." Any personalized pricing guidance also must recognize this in order to align with the FTC Act.

- *Exclude discounts and other price reductions*. Any policy should specify that personalized pricing that results in a discount or other price reduction is not deceptive or unfair. As the Proposed Policy Statement recognizes, there is no deception or unfairness if the omitted information is not material or does not cause unavoidable substantial injury to the consumer. No disclosures should be required where personal data is used to, for example, provide a consumer a lower price, discount, or offer, because a lower price is unlikely to be material to the consumer. Likewise, a reduction in price does not result in any injury (much less a substantial one) to the consumer. Consumers who do not receive the price reduction pay the non-personalized disclosed price, and therefore also receive all material information and suffer no substantial injury.
- *Clarify exclusions*. Any policy should clearly exclude, for example, A/B testing, seasonality, shipping conditions, volume discounts, inventory fluctuations, and similar market-based pricing, discount, and offer considerations, as well as the display of discounts, timing, frequency, and offers based on objective account-level data (like tenure, usage, or plan history).
- *Avoid referencing inapplicable authorities*. The Proposed Policy Statement includes references to the FCRA and state insurance laws.[9] These laws provide no authority for the Commission to require similarly detailed disclosures under Section 5. These references should be removed from any published guidance in order to avoid confusion that their disclosure standards apply more broadly than specified by statute.
- *Make disclosures flexible*. Any personalized pricing guidance that requires companies to make disclosures should recognize that companies interact with consumers in a wide range of ways. Some types of disclosures may be better suited than others to a particular interaction context. Consistent with prior FTC guidance on disclosures, and rather than adopting a one-size-fits-all disclosure requirement, the FTC should give businesses express flexibility to decide what information is most relevant to their customers and how best to display that information. For example, any policy should explain that a business need not make a personalized pricing disclosure or explain the data used to make such a decision when that is obvious from context.[10] Moreover, limited space available on some platforms like mobile phones may require variations in the length and placement of these disclosures.[11]

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[9] Proposed Policy Statement at 6.

[10] This approach would align with the FTC's existing guidance concerning native ads, which notes that some ads "may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure." *See* Federal Trade Commission, *Native Advertising: A Guide for Business* (Dec. 2015), https://www.ftc.gov/business-guidance/resources/native-advertising-guide-businesses.

[11] The FTC has confirmed the need for such variation in guidance. *See* Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* at ii (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf (recognizing that disclosures may need to be adjusted based on factors such as screen size).

- *Include a cure period*. The FTC should expressly recognize a cure period for companies to come into compliance after being notified of a violation.[12] A cure period helps avoid arbitrary and capricious applications of the guidance. It also helps address uncertainty resulting from the need to engage in a highly fact-dependent analysis to determine whether a particular personalized pricing practice was deceptive or unfair. Moreover, in determining how long a business should have to cure, the FTC should consider whether substantial redesigns may be required, such as changes to when and how offers are provided or significant modifications to notice methods.

Absent these important clarifications, video game companies and others will be disincentivized from utilizing personalized pricing, discounts, and other offers that benefit consumers as described above. Publishing clear guidelines would provide a basis for consistent application and business certainty, as guidance that does not clearly define lawful and unlawful conduct is susceptible to arbitrary and capricious enforcement. Moreover, clear guidelines help address constitutional concerns associated with policies that are overbroad or fail to provide adequate notice of what is expected of regulated parties.[13]

III. ANY FURTHER ACTION ON PERSONALIZED PRICING MUST FOLLOW LEGALLY REQUIRED ADMINISTRATIVE LAW PROCEDURES

As drafted, the Proposed Policy Statement appears to be an effort at regulation without going through the proper rulemaking procedures. It directs businesses to provide personalized pricing disclosures;[14] it requires that these disclosures include the "fact that the price is personalized, the basis of that personalization, and the type of data used;"[15] and it threatens that companies who fail to follow these entirely new substantive requirements risk aggressive enforcement.[16] When a Commission action functions as a binding legislative rule under Section 5, it must be promulgated under the Magnuson-Moss rulemaking procedures.[17] Those procedures were not observed here.

Under the Magnuson-Moss procedures, the FTC must, among other things, publish an advance notice of proposed rulemaking, a description that defines the unfair or deceptive practices "with specificity," a discussion of alternatives to the rule, cost-benefit analyses of the rule and its alternatives, a structured opportunity for interested persons to submit written data,

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[12] This is a common practice in state legislation addressing the use and processing of personal information. *See, e.g.*, Va. Code Ann. § 59.1-584(B); Utah Code § 13-61-402(3)(a); Fla. Stat. § 501.72(2); Tex. Bus. & Com. Code § 541.154.

[13] A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

[14] Proposed Policy Statement at 4-7.

[15] *Id*. at 6.

[16] *Id*. at 4.

[17] *See* 15 U.S.C. § 57a; *see also, e.g., Gen. Electric Co. v. EPA*, 290 F.3d 377, 379-80 (D.C. Cir. 2002) (concluding that a guidance document was a legislative rule where it gives substance to the vague language of a law, does so in an obligatory fashion, and is treated by the agency as controlling in the field); *see also Appalachian Power v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("[T]he entire Guidance, from beginning to end… reads like ukase. It commands, it requires, it orders, it dictates.").

views, and arguments, and an informal hearing mechanism.[18] The Commission cannot circumvent these safeguards merely by labeling what is functionally a rule as an "enforcement policy statement." Doing so would result in the FTC addressing significant policy questions with broad economic consequences without the public participation, evidentiary record, and procedural safeguards Congress expressly requires.

The consequences of circumventing the Magnuson-Moss procedures are evident on the face of the Proposed Policy Statement itself. For example, the Proposed Policy Statement fails to substantively engage with the distinctive benefits associated with some forms of personalized pricing, such as the examples provided in Section I. It does not provide factual findings demonstrating that each of the elements of deception or unfairness are satisfied for all types of personalized pricing practices. As Congress intended, use of the Magnuson-Moss procedures would remedy those deficiencies through public input and consideration of empirical evidence.

It is particularly important that the Commission not rush this process given that the U.S. Congress and multiple state legislatures are considering legislation that would comprehensively address personalized pricing practices in connection with other affordability concerns.[19] Hasty FTC action risks establishing standards that create regulatory uncertainty and inconsistency.

To comply with its statutory obligations and ensure rational enforcement of its Section 5 authority, the FTC should withdraw the Proposed Policy Statement and, if it wishes to establish specific standards for personalized pricing disclosures, promulgate those standards as a proposed rule through the proper Section 18 Magnuson-Moss rulemaking process.

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ESA members are committed to providing value to American consumers while giving them the tools to make informed purchasing decisions. We urge the FTC to take an approach to personalized pricing that acknowledges the benefits of longstanding personalization practices, provides sufficient guidance to businesses, and complies with the agency's statutory obligations.

Sincerely,
Michael G. Lewis
Vice President & Associate General Counsel

[18] *See generally,* Federal Trade Commission, *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* (revised May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

[19] The One Fair Price Act (S. 3387), 119th Cong. (2025); *see also* Stop AI Price Gouging and Wage Fixing Act of 2025 (H.R. 4640), 119th Cong. (2025); Stop Price Gouging in Grocery Stores Act of 2025 (H.R. 4966), 119th Cong. (2025); Lower Grocery Prices Act (H.R. 887), 119th Cong. (2025); No Rigged Grocery Prices Act (H.R. 8895), 119th Cong. (2025); SLASH Prices Act (H.R. 9371), 119th Cong. (2026).