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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association (“RILA”) respectfully submits these Comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Proposed Enforcement Policy Statement Regarding Personalized Pricing (“Proposed Enforcement Policy”).¹ RILA is a trade association of the world’s largest, most innovative, and recognizable retail companies and brands. RILA convenes decision-makers, advocates for the retail industry, and promotes operational excellence and innovation. RILA’s aim is to elevate a dynamic retail industry by transforming the environment in which retailers operate. RILA’s more than 200 members include retailers with both brick-and-mortar stores and online channels, product manufacturers, and service providers that collectively generate more than \$2.7 trillion in annual sales. As of August 2026, more than 15.4 million Americans work in the retail industry, making retail one of the nation’s largest employers, supporting jobs in every state and congressional district through hundreds of thousands of stores, fulfillment facilities, and distribution centers nationwide.²

RILA and its members have a significant interest in the Commission’s approach to “personalized pricing,” as many of RILA’s members use data to understand customers’ preferences, offer access to tailored products and discounts, and respond to market conditions. Using data helps retailers discount prices, get the right goods to the right place at the right time, and generally make goods more affordable for consumers. RILA’s members do not use an individual consumer’s data to increase prices for that consumer. Retail is an intensely competitive industry that operates on thin net profit margins,

¹ *Federal Trade Commission’s Proposed Enforcement Policy Statement Regarding Personalized Pricing*, FTC Docket No. 2026-1057 (Aug. 19, 2026).

² *See* Retail Trade: NAICS 44-45: U.S. Bureau of Labor Statistics, <https://www.bls.gov/iag/tgs/iag44-45.htm>.

averaging roughly 2% to 5% across the industry depending on the sector. Retailers cannot afford to lose a customer and are highly aware that, now more than ever, price-sensitive consumers are only a click or mere steps away from competitors and can price check and shift their purchases easily. Data power RILA members' ability to ensure customer satisfaction and retain customers, who have many retail options both in-person and online, by offering them personalized shopping experiences. RILA knows from experience that both consumers who shop around and consumers who are brand-loyal appreciate and affirmatively seek out personalization and curated content when choosing among the many retail options available. These features build on and strengthen the relationship between a customer and a particular retailer.

While RILA shares the Commission's interests to ensure that prices meet consumer expectations, maximize transparency, and protect consumer data, the Proposed Enforcement Policy would cause harm to the very consumers it purports to protect. ***First***, the Proposed Enforcement Policy risks chilling procompetitive conduct, including loyalty programs and personalized promotions that lower prices and are affirmatively sought out by customers, because it is overbroad and not expressly limited to targeting harmful price increases. ***Second***, the Proposed Enforcement Policy is a significant departure from the Commission's well-established Section 5 standards and is outside the Commission's mandate. ***Third***, the Proposed Enforcement Policy's vague definitions and legal standards invite confusing disclosures that will result in meritless litigation to the detriment of consumers.

For these reasons, RILA encourages the Commission to:

- Narrow the definitions in its final enforcement policy statement;

- Focus its enforcement priorities on personalization that raises the price a consumer pays above the retailer’s published or generally available price, and on any actual deceptive statements regarding truly “personalized pricing” for an individual consumer based on their individual data, rather than the overbroad and confusing approach it is currently proposing; and
- Confirm that a discount from a published price is not the conduct the Commission is targeting and that ordinary market-responsive pricing and bona fide consumer benefits are outside the Commission’s targeted conduct.

I. THE PROPOSED ENFORCEMENT POLICY RISKS CHILLING PROCOMPETITIVE CONDUCT

The Commission’s Proposed Enforcement Policy must clarify that not all data-driven pricing practices are the same. If the Commission does not expressly limit the scope of its definition of “personalized pricing” to individual price increases, the Commission risks chilling procompetitive benefits for both retailers and consumers.³ In the Proposed Enforcement Policy, the Commission improperly treats the use of data for personalized shopping or personalized discounts as inherently suspect, ignoring that an act or practice is only deceptive if it results in injury or is relied upon to the customer’s detriment, and an act or practice is unfair only if it causes substantial harm to consumers. Retail discounts do not injure, harm, or operate to the detriment of consumers. The Proposed Enforcement Policy conflates retail with more concentrated industries with higher profit margins. By

³ See Pedro Gonzaga et al., *Personalised Pricing in the Digital Era, Background Note by the Secretariat, Directorate for Financial & Enterprise Affairs Competition Committee*, Organisation for Econ. Co-Operation & Dev. (Nov. 28, 2018), [https://one.oecd.org/document/DAF/COMP\(2018\)13/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf) (“Personalised pricing, like any price discrimination, is typically pro-competitive and often enhances consumer welfare. As compared to more traditional forms of price discrimination, personalized pricing generally has more accentuated effects, having the potential to optimize static efficiency and incentives for innovation.”).

contrast, there are over 1,000,000 retail establishments in the United States, and more than 600,000 retailers—a broad field that creates intense competition.⁴ An unhappy customer can easily and quickly find a new retailer, which naturally disciplines pricing practices.

Retailers recognize that today’s consumers are most loyal to prices. Many RILA members rely on consumer data to provide personalized shopping experiences and personalized loyalty-based discounts that distinguish themselves within this competitive landscape and respond to market shifts efficiently. They use data-driven pricing tools to sell more products at lower prices, rather than selling fewer products at higher prices. Setting aside that federal and state consumer protection laws already prohibit inflating “regular” prices to only offer the product on sale or at a discount, consumers are also very price aware. Retailers know that customers know the “regular” price for their weekly shopping, and that customers can easily compare prices, such that loyal customers will switch shopping to another store if the “regular” price is raised abruptly.

Notably, the Commission’s press release announcing the Proposed Enforcement Policy defines “personalized pricing” as “the use of personal data to set prices according to the amount that a company believes an individual consumer is willing to spend.” All the example scenarios the Commission identifies as raising “Section 5” concerns demonstrate injury to consumers by higher prices based on individualized data points. RILA is confident that its members do not engage in “personalized pricing” by setting retail prices for individual consumers based on their ability to pay.

⁴ The 2022 U.S. Economic Census reports 644,146 retail-trade firms and 1,040,277 retail-trade establishments. See U.S. Census Bureau, *Retail Trade: Summary Statistics for the U.S., States and Selected Geographies* (2022), <https://data.census.gov/table/ECNBASIC2022.EC2244BASIC>.

The Proposed Enforcement Policy as written creates significant uncertainty about retailers' ability to offer important savings and benefits to customers. The Commission never expressly limits the acts or practices within the scope of "personalized pricing" to practices that cause injury by raising prices. Instead, it broadly defines the scope of "personalized pricing" as setting "prices based on analysis of consumers' personal data and resulting conclusions, such as estimates of how much an individual consumer is willing to pay for a product or whether that consumer is likely to engage in comparison shopping."⁵ The Commission's language risks chilling procompetitive and pro-consumer conduct that RILA members employ to improve customer experiences, decrease prices, and compete more effectively.

A. Loyalty Programs and Personalized Discounts

Loyalty programs have become a foundational part of retail in America. Today's retail loyalty programs help consumers manage affordability by delivering savings and creating value through personalized experiences that foster broad consumer engagement. Most of RILA's members operate long-standing opt-in loyalty programs that are voluntarily subscribed to by more than half of their customers; in many instances, 75-85% of customers belong to the loyalty programs of some of the most popular retailers. Consumers understand loyalty programs are powered by data and voluntarily share those data with retailers as part of the customer-retailer relationship. In their program terms, retailers make clear that the customer's data will be used to provide targeted deals that reflect their preferences, personalized offers, and benefits like free shipping, rewards, credits, cashback, fuel savings, and faster delivery. A critical tool for stretching their limited resources, millions of households have voluntarily opted in to these established programs, to get more

⁵ Proposed Enforcement Policy at 1.

value from purchases, stay within their budget, and manage household expenses. While customers voluntarily share data so retailers can help them save time and manage their budgets, retailers do not use an individual's personal information to increase an individual customer's "published" price.

Retailers have used data to personalize shopping and customize discounts for hundreds of years.⁶ Just like the small town, dry goods shopkeeper of the 1800s would keep track of their customers' special occasions and birthdays to save favorite treats or special bolts of cloth behind the counter, today's loyalty programs are the modern version of the shopkeeper's personalized experience. Knowing their customers allows retailers to track customer preferences, prioritize the deals and offerings that will make it easier for customers to buy what they want, engage customers for another shopping trip or to add additional items to their cart, or to complete their purchase when they might otherwise abandon their online "shopping cart." This is consistent with "longstanding practice and customers' reasonable expectations."⁷ The modern retailer now services millions of customers across thousands of locations and uses modern tools to sort through their customers' preferences, deliver a continuous experience regardless of whether the consumer shops at their "regular" store or another location, and ensure the right products are in the right stores when their customers will want them. All these elements improve the customer experience, create customer loyalty, and allow retailers to compete more efficiently with their peers.

⁶ See *The History of Customer Loyalty Programs: 250 Years of Getting You to Come Back*, Qualtrics (Apr. 22, 2026), <https://www.qualtrics.com/articles/customer-experience/history-of-customer-loyalty-programs/>.

⁷ Proposed Enforcement Policy at 1.

Personalization also creates relevance. Today’s customers are busy managing families, work, and other obligations. They want relevant savings, not one-size-fits-all promotions. They expect their retailers to help make life easier by providing recommendations and targeted offers so that they do not have to sift through endless and meaningless (to them) offerings and coupons. When retailers provide offers to all customers, loyalty customers appreciate having the most relevant offers appear first—for example, if their purchases show they likely own fish, customers of a pet products retailer appreciate when they can avoid scrolling through 50 coupons for cat litter, dog food, and flea medicine before getting to the fish product deals. Such shopping efficiency is available because that customer voluntarily shared their data.

Elective loyalty and rewards programs that allow customers to affirmatively opt in to receive valuable rewards, discounts, savings, and early access to products and experiences are popular among shoppers who are cost-conscious and seek value to maximize savings and stretch their dollars; this is particularly resonant given today’s customers’ focus on affordability.⁸ Consumers enroll in these programs through voluntary, transparent processes that explain program features including personalized offers and discounts and uses of data, including personal information. Retailers may utilize personal

⁸ See Ramya Murali, et al., *Reshaping Loyalty Programs in an Era of Value Seeking*, Deloitte (Jan. 12, 2026), <https://www.deloitte.com/us/en/insights/industry/retail-distribution/reshaping-customer-loyalty-programs.html> (“[T]he 2025 Deloitte Consumer Loyalty Program Survey . . . finds that while price, value, and quality remain the top drivers of brand loyalty across all age and income groups, loyalty programs follow close behind.”); *Chamber of Progress Poll: New Yorkers Reject Algorithmic Pricing Bans That Would Wipe Out Everyday Discounts*, Chamber of Progress (Apr. 24, 2026), <https://progresschamber.org/research/chamber-of-progress-poll-new-poll-new-yorkers-reject-algorithmic-pricing-bans-that-would-wipe-out-everyday-discounts/> (Morning Consult survey of 1,025 New York adults found that most New Yorkers oppose banning loyalty programs, coupons, senior discounts, and student pricing even if they rely on algorithms to function); *The Bond Loyalty Report 2024 Press Release*, Bond Brand Loyalty, Inc. (July 25, 2024) <https://info.bondbrandloyalty.com/the-loyalty-report-2024-press-release> (finding that the average consumer participates in 19 different loyalty programs, with 79% more likely to recommend brands with solid loyalty programs, and 85% more likely to continue buying from brands offering loyalty programs).

information to provide relevant discounts and offers to loyalty program members. Popular examples of loyalty program benefits include “store cash” redeemable on future purchases, an annual birthday gift or discount, free shipping for loyalty members, extra coupons for a future purchase or new items, fuel discounts, earned drinks or food for convenience store loyalty members, tiered rewards that get richer based on annual spend with the retailer, free installation or a white glove delivery option, flexible perks that can be used toward groceries or gas based on the customer’s preference, special events and seasonal treats, extended return windows, early access to sales or seasonal clearance merchandise, and hundreds more. These program benefits are beloved by consumers and a critical component of how they save money. Shoppers also expect that certain categories of customers—like military families, veterans, teachers, first responders, students, and seniors—might receive discounts that recognize their contributions or income restrictions. These programs are an important tool for retailers to compete for customers while also building reciprocal loyalty and giving consumers additional opportunities to save. All of these are aligned with today’s consumers’ reasonable expectations.

Beyond personalized shopping, RILA members leverage data to identify the consumers likely to respond positively to discount offers. Data are used to offer a broad population of shoppers numerous benefits including flash sales, coupons for price-sensitive shoppers, cart abandonment discounts, subscription and retention offers, and new product introductions. These offers reduce the published price, and do not raise the price a consumer would otherwise pay. Often, these retailer coupons and offers are funded by manufacturers or consumer packaged goods brands so that the retailer can provide its customers with relevant offers and coupons for products, brands, and categories they already purchase or may want to try. For example, “vendor funded offers” are a common

feature in the grocery space, where the manufacturer making the product funds the discount or coupon to incentivize shoppers to try a new product. Vendors want the offers to go to the consumers most likely to purchase the product with the coupon and continue purchasing into the future, and each campaign has a limited budget. But if the grocer is required to provide the same coupon to all shoppers, the manufacturer's offer funding will be diluted and a \$1 coupon for 100,000 shoppers would become a virtually worthless 1 cent coupon for 10,000,000 shoppers.

While RILA does not believe that these programs should trigger the disclosure requirements under the Commission's Proposed Enforcement Policy, uncertainty about the policy's overbroad scope risks discouraging responsible use of customer data through loyalty programs, membership benefits, and personalized discount offers. Specifically, retailers might stop offering personalized discounts, tailored loyalty offers, or efficient pricing updates to avoid triggering the broad notice obligations under the Proposed Enforcement Policy. Spurring businesses to abandon personalization tools that drive customer engagement will result in fewer relevant offers to customers, weaker customer loyalty, diminished retail customer experience, and lost revenue for retail businesses. As noted in Section III below, mandating sweeping disclosures will confuse consumers and might cause them to miss out on these procompetitive programs.

Some state legislation regulating personalized and algorithmic pricing already recognizes the benefits that these programs offer consumers. For example, Maryland's Protection From Predatory Pricing Act expressly prohibits the use of personal data "to set a higher price" and ensures that promotional pricing offers, loyalty program benefits, and other temporary discounts or changes to pricing related to retention of existing customers

are not in scope.⁹ RILA encourages the Commission to take a similar approach that expressly targets acts and practices that cause harm and thus are within the scope of the FTC Act, rather than unnecessarily risk eliminating the very coupons, loyalty programs, and personalized promotions that consumers are using regularly to stretch budgets and save money. The distinction those laws draw is the right one: a “personalized price” that raises what a consumer pays is a different practice from a discount offered off a published price. Only the first can cause the injury the Commission identifies, which is a consumer paying more than the published price because of what a retailer inferred about them.

B. Electronic Shelf Labels

The Proposed Enforcement Policy also could be interpreted to apply to electronic shelf labels (“ESLs”), which risks needlessly stifling innovation in the retail sector. ESLs are modern replacements for paper price tags. They improve pricing accuracy, reduce errors by ensuring that the shelf price matches the register price, and help staff manage inventory. ESLs allow retailers to allocate employees toward customer-facing, value-added functions beyond managing price updates across hundreds or even thousands of items in a tedious process that can take days to complete. ESLs are not intended to facilitate personalized pricing because they do not track consumers, collect personal data, or enable real-time surge pricing.¹⁰ It is a myth that in-store retailers are using ESLs to change prices based on customers’ proximity to a store, movement throughout a store, or their use of mobile applications inside or outside a store. Further, researchers studying the impact of ESLs on pricing found that “price-change and price-growth rates are indistinguishable from

⁹ See MD. CODE ANN. COM. LAW § 13-321 (2026).

¹⁰ See Dee-Ann Durbin, *Shoppers Are Wary of Digital Shelf Labels, but a Study Found They Don’t Lead to Price Surges*, Associated Press (June 9, 2025), <https://apnews.com/article/electronic-shelf-labels-supermarket-prices-digital-132ef73fbbe2eb13a8c724b55fb458d1>.

those of other grocery retailers operating in the same states, before, during, and after the ESL rollout.”¹¹ Instead, ESLs allow consumers to benefit from more timely promotions and markdowns. For example, ESLs allow a retailer to ensure that the same price is shown to all customers when the price changes on an item, but the item is displayed in multiple places throughout a store, i.e., in aisle, endcap, and vignette display. ESLs also ensure that pricing is clear, that sales or promotions are denoted, and help avoid the scenario that sale signs mistakenly remain posted after a sale has ended. Many retailers have faced enforcement actions at one time or another due to outdated paper shelf labels or lingering sales signs due to employee error in switching out shelf labels and sale signs—ESLs resolve those issues. Moreover, retailers that use ESLs operate within a fiercely competitive marketplace in which undermining customer trust through confusing or manipulative pricing would jeopardize both reputation and customer loyalty. Rather than crafting industry-wide policies based on myths and anxieties, the Commission should focus on facts and the law.¹² RILA encourages the Commission to adopt an approach that accounts for the procompetitive benefits of innovative pricing technology, like ESLs, by focusing on regulating any actual nefarious conduct rather than eliminating tools that promote efficiency and clear communication.

¹¹ See Stamatopoulos, Ioannis and Sanders, Robert Evan and Bray, Robert, *Electronic shelf labels have not led to surge pricing in US grocery retail, despite regulator concerns* (March 27, 2026). Available at SSRN: <https://ssrn.com/abstract=5271491> or <http://dx.doi.org/10.2139/ssrn.5271491> (“Policymakers are concerned that ESLs have facilitated surge pricing strategies, whereby retailers increase prices in response to factors such as time of day, weather conditions, or demand spikes. We examine these concerns with comprehensive transaction data from a US grocery retailer with \$3 billion in annual revenue, which gradually implemented ESLs across over 100 stores beginning in September 2022. We find virtually no surge pricing either before or after ESL adoption . . . Further, using the NielsenIQ scanner data, we demonstrate that our focal retailer’s price-change and price-growth rates are indistinguishable from those of other grocery retailers operating in the same states, before, during, and after the ESL rollout.”).

¹² Existing federal, state, and local pricing laws already require that the price charged to the consumer be the one that was displayed. Retailers could not defend against claims of mis-pricing violations if prices were switching in-store for different customers at the same time.

C. Data Privacy

RILA supports the Commission's objective to protect consumers' data privacy. But the Proposed Enforcement Policy does not adequately distinguish between retailers' first-party data use, which consumers expect and benefit from, and third-party data uses, such as sharing customer data with other platforms or data brokers, which can raise more significant privacy concerns. RILA members are committed to protecting customer information and maintaining policies and procedures governing its collection, use, retention, storage, and deletion. Members employ administrative, technical, and physical safeguards designed to protect customer information from unauthorized access, disclosure, misuse, alteration, or loss. Retailers also continue to empower customers with meaningful control and flexibility over how their personal information is used. Consistent with state law, customers can access, correct, or delete their information; opt out of marketing communications and the sharing of their information; and discontinue participation in loyalty programs. RILA members already operate in compliance with applicable privacy, data security, and consumer protection laws, and remain vigilant with respect to protecting consumer information.

Retailers use first-party data—information gathered through direct customer relationships and transactions—to understand customer preferences and deliver relevant discounts. For example, retailers can use consumer data to ensure goods are where they need to be, and reduce waste when selling perishable goods like food or seasonal items through increased supply chain efficiency. RILA members do not vary their pricing by time of day or store foot traffic the way prices may vary in other sectors built around

dynamic demand pricing (e.g., during rush hour, holidays, or inclement weather).¹³ Unlike the examples the Commission references in its Proposed Enforcement Policy, in which businesses pre-installed surveillance software on consumers' devices and collected consumer television viewing data without their consent,¹⁴ retail shoppers consent to and expect retailers to engage with their data to provide customized experiences and benefits, such as an in-store coupon for a favorite ice cream that has not been purchased recently. There are several other pro-consumer benefits to the data that retailers hold, including identifying and quickly contacting customers who purchased a product subject to a safety recall or containing an undisclosed allergen, contacting customers whose products have warranties that are about to expire, assisting customers in identifying the correct filter for their HVAC unit or refrigerator water dispenser, eliminating concerns about fraudulent returns through product purchase record confirmation, or providing customers with a list of purchased products to facilitate insurance claims after floods or wildfires. RILA's member companies can provide these benefits because their customers voluntarily share their data and millions of RILA member consumers have utilized these loyalty program benefits. RILA encourages the Commission to consider retailers' robust commitment to

¹³ The example the Commission cites as "proof" of recent surveillance pricing in retail has been debunked. See *The Truth About Pricing Tests on Instacart*, Instacart (Dec. 18, 2025), <https://company.instacart.com/updates/the-truth-about-pricing-tests-on-instacart> ("Myth 2: 'Instacart is doing surveillance pricing, charging each customer based on their personal information.' Fact: 'Absolutely not. We don't use, and we don't allow our partners to use, personal, demographic, or user-level behavioral information about individuals to set online item prices on Instacart. Some of the most misleading stories over the last week have claimed that Instacart uses information about your income, ZIP code, or shopping history to charge you more for items like milk, eggs, and cereal. We don't do that. Period. In the A/B tests that Consumer Reports wrote about, customers were randomly assigned to groups based on product category and store location. Then some customers were randomly, and temporarily, shown a slightly higher price than the pre-test price. Others were randomly, and temporarily, shown a slightly lower price than the pre-test price. Retail partners never use personal information about individual customers to set prices on Instacart. In fact, Consumer Reports admits that they found no evidence that our retail partners did this, but they still suggested it may be happening on our platform. It's not.'").

¹⁴ See Proposed Enforcement Policy at 7 n.25.

consumer data privacy and the fact that consumers often consent to, and understand that retailers will engage in first-party use of their data to offer discounts and coupons. This is an exchange that consumers expect and understand.

RILA suggests that focusing the Commission’s enforcement on any actual nefarious conduct, including undisclosed data practices that consumers have no practical way to discover or control would better serve consumers’ interests. The Commission’s overbroad Proposed Enforcement Policy does not clearly distinguish uniform, ordinary price updates from “personalized pricing.” This lack of clarity could discourage pricing reductions based on excess or close-dated inventory and reduce promotional opportunities. RILA encourages the Commission to narrow the Proposed Enforcement Policy to prevent the unintended consequences of reducing or eliminating personalized shopping or personalized discounts, avoid stifling innovation in the retail industry, and clarify that tools that enable generalized market-responsive pricing are outside the Commission’s targeted conduct.

II. THE PROPOSED ENFORCEMENT POLICY IS A SIGNIFICANT DEPARTURE FROM THE COMMISSION’S SECTION 5 STANDARDS AND OUTSIDE THE COMMISSION’S MANDATE

A. Section 5’s Deception Framework

The Proposed Enforcement Policy is overbroad and risks expanding the Commission’s historic deception standards under Section 5 beyond any identifiable limit. At its core, the proposed policy would create a standard that is based on a consumer’s expectation rather than any deliberate act by a seller. This is a dramatic departure from the standards that the Commission has had in place, going back several decades.

The Commission’s deception framework, which has been in place since the 1980s, has three core elements: “(1) there must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under

the circumstances; and (3) the misleading effects must be ‘material,’ that is, likely to affect consumers’ conduct or decision with regard to a product.”¹⁵

RILA agrees that sellers that make express representations regarding data collection or pricing that are not true should face enforcement for deceptive conduct. RILA also agrees that if a seller omits a material fact about data collection or pricing that is rendered misleading through some deliberate act or representation by the seller, the Commission can and should bring an enforcement action for violations of Section 5. RILA would applaud the Commission for doing so, as misinformation regarding pricing strategies is proliferating in the media and the Commission’s rigorous enforcement of deceptive conduct would comfort consumers who are uneasy.

However, the Commission should not expand the framework for what constitutes a deceptive statement under Section 5 that it has followed for the past several decades. Under the Commission’s framework, not all omissions are deceptive.¹⁶ The Commission separates out “pure omissions,” which occur when “the seller has simply said nothing, in circumstances that do not give any particular meaning to his silence”¹⁷ from omissions where a seller tells a “half-truth” or takes some other act that can cause an omission to be misleading.¹⁸ Although a pure omission can lead to “erroneous consumer beliefs if a

¹⁵ *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1059 (1984).

¹⁶ *See id.*; *see also Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 72 (1st Cir. 2020) (“According to the FTC, omissions give rise to liability based on deception in two limited circumstances: (1) to tell only half the truth, and to omit the rest (e.g., where a seller fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression); and (2) to simply remain silent, if [the seller] does so under circumstances that constitute an implied but false representation (e.g., where a misleading impression arise[s] from the physical appearance of the product, or from the circumstances of a specific transaction, or . . . based on ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good”)).

¹⁷ *Int’l Harvester*, 104 F.T.C. at 1059.

¹⁸ *See Tomasella*, 962 F.3d at 72-73.

consumer had a false pre-existing conception which the seller failed to correct,” the Commission “does not treat pure omissions as deceptive.”¹⁹ As the Commission has stated, to treat pure omissions as deceptive would “expand[] the concept [of deception] virtually beyond limits.”²⁰ In addition, the Commission acknowledged that it would not be appropriate to punish a seller for an omission that does not “reflect a deliberate act on the part of the seller.”²¹

The Proposed Enforcement Policy reverses the previous well-reasoned resistance to treat pure omissions as deceptive, imposing liability on retailers even though there has been no “deliberate act” and the retailer has “simply said nothing, in circumstances that do not give any particular meaning to his silence.”²² The Commission’s proposed shift to treating omissions as deceptive based solely on consumer expectation risks opening the floodgates as to what can constitute deception under Section 5. Such a shift will lead to “perverse outcomes” and unnecessary costs and burdens on sellers that would have to attempt to foresee and disclose around the “literally infinite” number of potentially material facts about which consumers “may have prior misconceptions.”²³

The Commission’s reliance on *FTC v. Colgate-Palmolive Co.*²⁴ as support for treating pure omissions as deceptive is unavailing. The statement the Commission cites from *Colgate* stands for the straightforward proposition that a retailer cannot suggest a

¹⁹ *Int’l Harvester*, 104 F.T.C. at 1059-60.

²⁰ *Id.*

²¹ *See id.*

²² *Id.* at 1059.

²³ *See id.* at 1059-60 (stating that declaring pure omissions as deceptive “would surely lead to perverse outcomes” as “[t]he number of facts that may be material to consumers – and on which they have prior misconceptions – is literally infinite”).

²⁴ 380 U.S. 374 (1965).

product is being sold at a special discount when the “normal price” is an inflated price that the seller never actually offers.²⁵ This practice is called “false reference” pricing and is already addressed in the Commission’s Guide Against Deceptive Pricing.²⁶ In addition, false reference pricing involves a deliberate act by the seller—suggesting a false former price. As discussed above, the Commission’s policy for the past several decades has been that omissions are not deceptive absent a deliberate act by the seller. *Colgate* therefore cannot establish that the proposed policy is in line with the Commission’s existing framework for deceptive conduct.

The Proposed Enforcement Policy is particularly troubling as it seeks to make this drastic shift without fully understanding its impact on the market or consumers. As the Commission concedes, “[t]he extent to which businesses currently use personalized pricing is not well understood, and the effects of personalized pricing on consumers are unclear.”²⁷ The Commission should not erroneously assume businesses are using pricing strategies in a way that is harmful to consumers. Indeed, as discussed above, there are numerous procompetitive benefits of loyalty programs and personalized shopping experiences that the Commission should be loath to deter. At the very least, the Commission should conduct a rigorous cost-benefit analysis before radically departing from its established precedent.²⁸

B. Section 5(n)’s Unfairness Standard

The Proposed Enforcement Policy is also inconsistent with the traditional standard for unfairness under Section 5(n). Section 5(n) requires three elements: substantial injury,

²⁵ *See id.* at 387.

²⁶ 16 C.F.R. § 233.1.

²⁷ Proposed Enforcement Policy at 3.

²⁸ RILA has previously offered to provide robust survey data to the Commission to shed insight on these issues and remains committed to helping the Commission better understand current retail practices.

lack of reasonable avoidability, and injury not outweighed by countervailing benefits to consumers or competition.²⁹ Here, the elements of Section 5(n) cannot be met as the Commission cannot show that any injury outweighs the potential benefits to consumers or competition.

In the Proposed Enforcement Policy, the Commission concedes that there is “limited economic research” into personalized pricing, but that what research does exist suggests that it can “increase business profits” as well as create “benefits to some consumers.”³⁰ And according to the statement’s own language, these procompetitive benefits are not necessarily outweighed by losses to other consumers.³¹

Further undercutting that the Proposed Enforcement Policy meets the requirements for Section 5(n) unfairness is the fact that it would sweep in practices through which customers are offered lower prices. For example, RILA’s members’ loyalty programs offer customers deals or lower prices based on purchase history or other factors such as having excess inventory or returns at particular locations. The proposed policy does not attempt to account for or distinguish these pro-consumer practices. These practices are clearly beneficial to consumers and in direct contravention of Section 5(n)’s injury requirement.

Without any clear sign that discounted pricing or personalized shopping causes injury “not outweighed by countervailing benefits to consumers or competition,” the

²⁹ 15 U.S.C. § 45(n) (“The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”).

³⁰ Proposed Enforcement Policy at 4.

³¹ *Id.*

Proposed Enforcement Policy cannot meet the requirements for unfairness under Section 5(n).

C. The Proposed Enforcement Policy Is Outside of the Commission's Congressional Mandate

Respectfully, the Commission should proceed with particular caution here where it concedes that it does not have a statutory mandate to address personalized pricing. The Commission also risks overstepping its authority by attempting to use a “Policy Statement” to accomplish what would ordinarily require notice-and-comment rulemaking.

The Proposed Enforcement Policy itself acknowledges that “Congress has not given the Commission the authority to prohibit personalized pricing in all circumstances.”³² However, the policy’s operative provisions would essentially create new disclosure obligations and enforcement standards. Considering the increased risk due to the vague definitions and legal standards,³³ the policy makes over-disclosure the price of continuing a lawful practice. That is a substantive requirement, and it should not be imposed through an enforcement policy statement.

In addition to acting outside of congressional mandate, the Commission also skirts the requirements of notice-and-comment rulemaking by issuing its interpretation as a policy statement rather than a formal rule. It is concerning that the Commission is expanding its traditional standards under Section 5 to impose a new disclosure obligation on a customary practice outside the confines of notice-and-comment rulemaking and the procedural protections of the Administrative Procedure Act. The requirements of notice-and-comment rulemaking are not “arbitrary hoops through which federal agencies must

³² Proposed Enforcement Policy at 1.

³³ See *infra* pp. 22-27.

jump without reason,” but instead are required to “improve[] the quality of agency rulemaking by exposing regulations to diverse public comment” which “ensures fairness to affected parties and provides a well-developed record that enhances the quality of judicial review.”³⁴ Considering the potential impact of this change on the Commission’s long-standing framework for liability under Section 5, the Commission should not cut corners on process.³⁵

The Commission’s boilerplate language that the Proposed Enforcement Policy “does not confer any rights on any person and does not operate to bind the FTC or the public” fails to mitigate the potential harm or far-reaching effect of the policy. As discussed below, the Commission’s Section 5 guidance is persuasive on state consumer protection laws which often contain a private right of action. Retailers will not be able to ignore the increased risk of regulatory enforcement from both the Commission and states, coupled with increased litigation risk from an aggressive plaintiffs’ bar.

D. The Commission’s Policy Would Discourage Pro-Consumer Behaviors

As discussed in Section I, the Proposed Enforcement Policy could discourage or diminish practices that consumers count on to stretch their budgets. RILA members often offer customers deals, discounts, coupons, or gifts to express gratitude for their relationship and loyalty. The ability to provide those discounts and benefits depends on knowing their

³⁴ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (cleaned up).

³⁵ Highlighting the irregularity of the Commission’s process here is the lack of publication of the Proposed Enforcement Policy in the Federal Register. Indeed, when the Commission first announced the proposed policy, its press release stated that the comment period would be thirty days after publication in the Federal Register and that the “Commission vote authorizing the Federal Register notice was 2-0.” However, the Commission started the comment period without ever publishing in the Federal Register and changed the language in the press release on the FTC website to remove reference to publication in the Federal Register without acknowledgment beyond noting that a prior version of the press release “was updated . . . to correct an earlier error.” Press Release, FTC, *FTC Seeks Comment on Enforcement Policy Statement Regarding Personalized Pricing*, <https://www.ftc.gov/news-events/news/press-releases/2026/08/ftc-seeks-comment-enforcement-policy-statement-regarding-personalized-pricing> (last visited Sep. 15, 2026).

customers—for example, some retailers may offer a birthday box or other holiday gifts to certain customers and their pets. Retailers also develop and offer services for customers based on their repeated interactions, such as personalized style assistants or other curated content. Considering the overly broad reach of the proposed policy, and its potential to sweep discounts and benefits into its enforcement net, retailers may deem offering and operating loyalty programs too risky to continue. If retailers can no longer offer most loyalty program discounts, rewards, personalized offers, or membership benefits, the consumer will lose. In response to rising pressures on affordability, consumers have increasingly turned to loyalty and membership programs as part of everyday shopping. But if those programs are no longer a tool in their affordability toolbox, consumers will spend more time hunting for deals, will have reduced shopping flexibility, and will have less value from everyday purchases.

Although RILA supports the Commission’s desire to rein in deceptive practices regarding collection of consumer data to engage in what should be prohibited, namely, “personalized pricing,” the Commission should not make such sweeping and far-reaching policy changes without proper Congressional authorization and without going through the administrative procedures that were designed to enhance the quality of agency decision-making.

III. THE PROPOSED ENFORCEMENT POLICY INVITES CONFUSING DISCLOSURES AND MERITLESS LITIGATION TO THE DETRIMENT OF CONSUMERS

A. The Proposed Enforcement Policy’s Vague Definitions and Legal Standards Incentivize Confusing and Meaningless Disclosures

In addition to expanding the well-established standards for deception and unfairness under Section 5, the Proposed Enforcement Policy is likely to lead to superfluous and confusing disclosures for consumers because it never squarely defines the

regulated practice. As discussed below, this central ambiguity also provides fertile ground for frivolous litigation.

At the outset, the Proposed Enforcement Policy offers no single definition of “personalized pricing” to put businesses on notice of what practices require disclosure. The statement broadly takes aim at price setting using “analysis of consumers’ personal data and resulting conclusions, such as estimates of how much an individual consumer is willing to pay for a product or whether that consumer is likely to engage in comparison shopping.”³⁶ But leveraging basic localized consumer, market, and demographic data to calculate costs, set prices, and offer discounts is a longstanding practice across the retail industry. The Proposed Enforcement Policy does not clearly delineate between “personalized pricing” on an individual consumer-by-consumer basis and using an algorithm to help set prices or determine the correct discounts that benefit consumers.

The Proposed Enforcement Policy recognizes that “[c]onsumers obviously do not expect that prices will never vary,” that “[p]rices will vary based on changes in supply and demand that affect everyone participating in the same market,” that “[s]ometimes those supply-demand variations will be intensely local[.]” and even that “the prices of some products necessarily vary from purchaser to purchaser because of the nature of the product[.]”³⁷ But the policy statement never provides a definition of “personalized pricing” that enables businesses to differentiate those acceptable pricing practices from ones requiring disclosure. That ambiguity is worsened by the proposed legal standard, which stretches the definition of deception beyond any identifiable limits.³⁸ The Proposed

³⁶ Proposed Enforcement Policy at 1.

³⁷ *Id.* at 2–3.

³⁸ *Supra* pp. 22.

Enforcement Policy states that retailers *may* violate Section 5 “when a consumer reasonably believes that a price for a good or service is static or widely offered, and the merchant fails to disclose that the price is in fact personalized.”³⁹ Businesses may run afoul of that standard even only “by implication,”⁴⁰ and what a reasonable consumer expects is an elusive and inherently subjective standard. The Proposed Enforcement Policy also provides no examples of express or implied claims where “personalized pricing” practices were actually used by a retailer.

The Proposed Enforcement Policy also makes it impossible for retailers to know whether they are offering adequate disclosures. The policy first suggests that “to be effective, personalized pricing disclosures should be clear and conspicuous and include all relevant information, such as the fact that the price is personalized, the basis of that personalization, and the type of data used.”⁴¹ However, the Commission undercuts that guidance in a footnote, reserving the possibility that certain personalized pricing practices violate Section 5 “even when fully disclosed to consumers.”⁴² The reservation leaves retailers with no reliable path to compliance. RILA urges the Commission to withdraw the reservation, or to confirm in a final statement that a clear and conspicuous disclosure meeting the criteria the Commission identifies resolves the deception concerns the statement raises.

³⁹ Proposed Enforcement Policy at 5.

⁴⁰ *Id.*

⁴¹ *Id.* at 6.

⁴² *Id.* at 6 n.20.

Two of the Commission’s proposed examples highlight the difficulty businesses will face in determining which practices require disclosure.⁴³ First, the Commission suggests that a “retailer charging more for a home-security camera system based on court filings indicating a particular customer has recently been the victim of a crime” would raise Section 5 concerns.⁴⁴ RILA agrees that raising the price of the security system only for that customer would be wrong. But retailers raise and lower prices of goods across entire stores or geographic areas based on supply and demand, and that practice is neither deceptive nor “personalized pricing.” This is no different than charging full price for snow shovels at the start of winter, then marking them down when spring arrives. Incorporating such localized data mirrors longstanding retail pricing practices; it also helps retailers price products fairly and ensures that consumers can acquire the products they want. But one-off court filings aside, the proposal provides little guidance on whether and when the use of such aggregated data can become so granular as to become “personalized.” Second, the Commission proposes that a “retailer charging more for a product sold on its website on the basis of data revealing that the consumer is inside one of the retailer’s physical locations or parking lots at the time of browsing the retailer’s website” would also allegedly raise Section 5 concerns.⁴⁵ Retailers do not raise prices online when they see a consumer browsing for a product. Instead, most retailers offer price-matching policies if their online price is lower than their in-store price, and vice versa. Many RILA members also offer to price match against competitors, including both online and in-store retail rivals, because

⁴³ Notably, none of the Commission’s hypothetical scenarios have citations to real-world examples of the practice, nor have any clear basis in fact. *See id.* at 7–8.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

they know that they are now competing with the entire internet.⁴⁶ Such a practice would not meaningfully differ from retailers’ historical pro-consumer practice of offering in-store discounts, and would be no more personal than a personal shopper helping the consumer in-store then offering tailored delivery pricing or discounted financing.

The result of all the uncertainty is that retail businesses would be incentivized to over-disclose or require consumer consent for every transaction that involves data analysis or algorithmic price setting—even when prices are not “personalized” for the individual customer, and even when those practices are beneficial to the consumer, are routine, and are expected. But retailers already provide robust consumer-facing Terms and Conditions, Privacy Policies, and price disclosures to ensure consumers are fully informed, and often those agreements and notices must be carefully drafted to comply with existing state laws, that often differ state-to-state. In comparison, mandating additional sweeping disclosures and consent requests is more likely to mislead and confuse consumers, who may believe they are being offered “personalized” pricing when they are in fact being offered a uniform price applied across an entire geographic region or hundreds of thousands of customers. Even worse, when truly harmful “personalized pricing” practices would garner the same warning as a student discount, the consumers may begin to perceive the disclosures as meaningless and ignore them entirely even when “personalized pricing” is occurring.

Existing state laws on “personalized pricing” demonstrate the difficulty. For example, New York broadly defines algorithmic pricing and requires businesses to use a uniform disclosure: “THIS PRICE WAS SET BY AN ALGORITHM USING YOUR

⁴⁶ Competition with online only retailers and ease of consumer price comparison also causes many retailers with physical stores to keep prices consistent across vast geographic markets, even when there are meaningful differences between geographic markets based on commercial rent, employee wages, and other business inputs that would otherwise justify a price increase in that market.

PERSONAL DATA.”⁴⁷ But the New York mandatory disclosure says nothing about how the algorithm sets prices or which data were used; that opaque disclosure only confuses consumers. And conforming to the Proposed Enforcement Policy may muddy the waters further by requiring businesses to deploy a second duplicative or conflicting disclaimer. Because consumer uncertainty and confusion are precisely the kinds of harm the Commission wants to avoid, providing a uniform, clear definition of pricing practices that require disclosure—and detailing how businesses can comply with concurrent state law obligations—would benefit both businesses and consumers.

B. The Proposed Enforcement Policy Invites Meritless Litigation, Raising the Cost of Goods for Consumers

The same vague definitions and legal standards would also expose retailers to abusive and manufactured litigation from an overzealous plaintiffs’ bar. The lack of a single definition for “personalized pricing” invites disagreement about what practices are covered, the concept of a “reasonable consumer” is necessarily elusive and contentious—as expectations will always differ across consumers and across businesses—and whether a disclosure is “clear and conspicuous” is a similarly subjective inquiry.⁴⁸

These open issues raised by the vague and subjective standards in the Proposed Enforcement Policy will provide launchpads for rent-seeking litigation by opportunistic plaintiffs’ firms. Although Section 5 does not itself permit a private right of action, state and local enforcers look to the Commission for critical guidance on a growing patchwork of state laws prohibiting unfair or deceptive trade practices (“UDAP”).⁴⁹ These “little FTC

⁴⁷ N.Y. Gen. Bus. Law § 349-a.

⁴⁸ As discussed above, the Proposed Enforcement Policy muddies the waters even further by suggesting that some practices may be unfair under Section 5(n) even if fully disclosed. *Supra* pp. 24.

⁴⁹ See Charles A. Byrd, *A 50-State Survey of Consumer Protection Acts and Their Connections to the Federal Trade Commission Act*, Pro Te: Solutio (Mar. 13, 2019), <https://protesolutio.com/2019/03/13/a->
(*cont’d*)

Acts” often recast Section 5 into state law claims with private rights of action, explicitly permitting state courts to look to Commission guidance when interpreting state law.⁵⁰ And even when the texts of state UDAP laws do not explicitly link their interpretations to those of the Commission, the Commission’s interpretation may nevertheless give rise to state law liability—for example, any violation of federal law may serve as the basis for a violation of the California Unfair Competition Law statute.⁵¹ As a consequence, any ambiguous or overbroad Commission interpretation of Section 5 can unintentionally invite a deluge of private state law litigation, including class actions.

The Telephone Consumer Protection Act of 1991 (the “TCPA”) is a hallmark example of when well-intentioned consumer protection regulations can go awry. Originally enacted to protect consumers from basic unwanted telephone solicitations, plaintiffs’ firms quickly seized on the broad language of the TCPA and accompanying FCC regulations to threaten and cajole businesses into quick payouts.⁵² As the years went by, firms became more aggressive and coercive, and consumers lost out as businesses

50-state-survey-of-consumer-protection-acts-and-their-connections-to-the-federal-trade-commission-act/.

⁵⁰ See, e.g., D.C. Code § 28–3901(d) (“In construing the term ‘unfair or deceptive trade practice’ due consideration and weight shall be given to the interpretation by the [FTC] . . . as employed in section 5(a) of [the FTC Act]. . .”); Tex. Bus. & Com. Code Ann. § 17.46(c)(1) (“It is the intent of the legislature that in construing [the Texas UDAP statute] . . . the courts to the extent possible will be guided by . . . the interpretations given by the [FTC for] Section 5(a)(1) . . .”).

⁵¹ See *People v. McKale*, 602 P.2d 731, 733 (Cal. 1979); *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999); Cal. Bus. & Prof. Code § 17200.

⁵² See, e.g., *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8073 (2015) (“2015 FCC Order”) (Pai, Former Comm’r, dissenting) (noting that “the TCPA has become the poster child for lawsuit abuse”); *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation “has blossomed into a national cash cow for plaintiff’s attorneys” (internal quotation marks omitted)).

eliminated legitimate customer communications to avoid liability. Despite the Supreme Court’s attempt to rein in TCPA litigation in 2021,⁵³ the practice continues.⁵⁴

The same abusive behavior is already proliferating with the rise of state UDAP laws providing a private right of action,⁵⁵ again treating Commission guidance as a sword against businesses rather than as a shield for consumers. Retailers are already under siege by similarly improper and meritless mass arbitration and class action threats assembled from a patchwork of state law claims, often citing Commission guidance.⁵⁶ The Proposed Enforcement Policy’s vague definitions and legal standards for personalized pricing would only embolden plaintiffs’ firms and amplify that practice. Like businesses in the TCPA context were forced to suspend coveted marketing text messaging programs, retailers here may feel compelled to curtail legitimate and beneficial pricing practices—like offering group discounts and loyalty programs—not because they harm the consumer, but merely to avoid the costs associated with meritless threats and suits.

The ultimate loser of this frivolous litigation would be the consumer. As detailed above, the retail industry is more competitive than ever before. The cost to retailers of meritless and rent-seeking litigation is inevitably passed on to shoppers,⁵⁷ counteracting

⁵³ See *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021) (narrowing the TCPA’s definition of an autodialer).

⁵⁴ See Megan Brown et al., *Expanding Litigation Pathways: TCPA Lawsuit Abuse Continues in the Wake of Duguid*, U.S. Chamber of Commerce Inst. for Legal Reform (Apr. 25, 2024), <https://instituteforlegalreform.com/research/expanding-litigation-pathways-tcpa-lawsuit-abuse-continues-in-the-wake-of-duguid/>.

⁵⁵ See James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 Antitrust L.J. 947, 947–48 (2017) (arguing that rather than providing consumers relief for deceptive practices, “[t]he result [of state UDAP laws] has been an explosion in consumer protection litigation that serves no social function and for which consumers pay indirectly through higher prices and reduced innovation”).

⁵⁶ See *id.* at 960–69.

⁵⁷ See *id.* at 974.

the Commission's purpose and the Trump Administration's goal of lowering the cost of living for American families.

IV. CONCLUSION

RILA and its members strongly urge the Commission not to adopt the Proposed Policy Statement as drafted, especially when the Commission has recognized that the use and effects of personalized pricing remain unclear. RILA supports the Commission's efforts to protect consumers and lower prices. RILA suggests that the Commission should narrow the definitions in its final enforcement policy statement; focus its enforcement priorities on actual deceptive statements regarding actual instances of "personalized pricing," rather than taking the overbroad approach presented in the Proposed Enforcement Policy; confirm that ordinary market-responsive pricing and bona fide benefits are outside the Commission's targeted conduct; direct its enforcement priorities to personalization that raises the price an individual consumer pays above the published or generally available price; confirm that a discount from a published price is not the conduct the Commission is targeting; conduct a rigorous cost-benefit analysis before departing from established precedent; and adhere to formal administrative procedures in order to do so.

If you have any questions regarding these comments or need any additional information, please reach out to Monica Welt, RILA General Counsel at monica.welt@rila.org.

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