FTC Focus: A Shift In The Pricing Disclosure Terrain

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This article is part of a monthly column that considers the significance of recent Federal Trade Commission announcements about antitrust issues. This installment examines the potential future direction of pricing disclosures.

At the Federal Trade Commission, surveillance and algorithmic pricing are back on the agenda.

And as developments unfold, several states are pursuing their own categorical bans — most recently, with New Jersey's July 23 move prohibiting companies from charging consumers differently based on individualized data.

Previously, on April 14, the FTC opened a rulemaking inquiry into online food and grocery delivery practices and expressly asked whether platforms adequately disclose their use of variable or personalized pricing, whether consumers are shown different prices for identical items, and whether online prices differ from prices offered in stores — after the U.S. Department of Justice and FTC launched a February inquiry into collaboration among competitors and named algorithmic pricing technology as an area of concern.

That effort places such pricing practices squarely within FTC inquiry and provides the clearest indication yet of how the commission under FTC Chairman Andrew Ferguson may approach an issue first studied extensively during the Biden administration: through antitrust guidance, price transparency and traditional deception principles rather than a categorical ban.

The emerging question is no longer whether regulators will address personalized pricing, but whether the federal government and the states will address it in materially different ways.

The Difference Between Algorithmic and Surveillance Pricing

Although frequently discussed together, algorithmic pricing and surveillance pricing involve different conduct and implicate different legal concerns.

Algorithmic pricing generally refers to competing firms using a common pricing intermediary or software platform. Competitors submit competitively sensitive pricing information to the platform, which aggregates or analyzes the data and provides pricing recommendations back to participating firms.

As the FTC explained in its 2023 statement of interest in In re: Realpage Rental Software Antitrust Litigation in the U.S. District Court for the Middle District of Tennessee: "In-person handshakes gave way to phone and fax, and later to email. Algorithms are the new frontier. And, given the amount of information an algorithm can access and digest, this new frontier poses an even greater anticompetitive threat than the last."[1]

Under the Biden administration's FTC's theory, algorithmic pricing may implicate a Sherman Act Section 1 claim where competitors understand that they are participating in the same pricing system and the software effectively serves as a common pricing agent.

Surveillance pricing, by contrast, concerns a firm's use of extensive consumer information, as opposed to competitor information, to personalize prices, discounts, product rankings or offers.

Rather than coordinating with competitors, surveillance pricing focuses on collecting and analyzing information about individual consumers, including purchase history, browsing behavior, location, demographics, loyalty-program activity, device information and other behavioral signals to determine what price or offer a particular consumer is likely to accept.

The FTC's main concern as it relates to surveillance pricing has been consumer privacy and pricing transparency.

The FTC's View on Algorithmic Pricing Under Section 1

Under the Biden administration, the FTC submitted a few statements of interest in cases regarding algorithmic price-fixing.[2] Across these filings, the FTC consistently rejected the argument that algorithmic pricing somehow falls outside traditional antitrust principles simply because competitors communicate through software rather than directly with one another.

What was particularly notable about the FTC's position is that, in its view, plaintiffs need not allege direct communications among competitors to "plausibly allege an agreement subject to Section 1 scrutiny."[3]

Competitors' joint use of algorithmic pricing mechanisms could remove unilateral decision-making. Instead of person-to-person interaction, price-fixing can be automated now, and any attempt to obfuscate personal responsibility for the algorithm's decision doesn't cut it — even if competitors maintain some pricing discretion.[4]

In other words, according to the FTC, competitors cannot accomplish through an algorithm what they could not lawfully accomplish through direct communications.

The Ferguson FTC has expressly identified algorithmic pricing as an area for antitrust scrutiny. In February, the FTC in conjunction with the Department of Justice launched a public inquiry ahead of considering guidance on collaboration among competitors.

One of the specific topics of interest for the agencies was: "What new technologies and business models would benefit from additional guidance — for example, algorithmic pricing, information and data sharing, or labor collaborations?"

While the agencies have not yet articulated a formal enforcement framework, the request for public comment suggests that the agencies are evaluating whether the use of looking beyond traditional price-fixing to examine whether pricing software, shared algorithms or common data inputs may facilitate coordination or otherwise raise antitrust concerns, even in the absence of direct communications between competitors.

New York State's Legislature passed the New York State Algorithmic Pricing Disclosure Act in June, which would require businesses using personalized pricing algorithms to provide clear notice whenever prices, discounts or offers are determined using consumers' personal information or automated decision-making, and Maryland has gone considerably further.

In April 2026, Governor Wes Moore signed the Protection from Predatory Pricing Act, making Maryland the first state to prohibit certain forms of surveillance pricing in grocery stores. The legislation prohibits grocers and third-party delivery services from using dynamic pricing or an individual's personal data to set higher prices.[5]

Approximately a dozen other states have also jumped on the proverbial bandwagon and are considering legislating various forms of surveillance pricing, including California, Colorado, Georgia, Illinois, Massachusetts, Minnesota, Rhode Island, Texas, Vermont and Washington.

The FTC's Consideration of Surveillance Pricing Rulemaking

In the days of the Biden administration, the FTC conducted a surveillance pricing market study through 6(b) orders to several intermediary firms and published its findings in January 2025.[6] What the staff found was that companies will surveil consumers' purchasing habits down to the type of products that consumers leave unpurchased, mouse movements, and consumers' location and demographics.

The tools used can run the spectrum of more generalized store level pricing to individually targeted pricing and promotions, and include price targeting, consumer segmentation and profiling, and search and product ranking tools. Some of the findings also found that consumers can be shown higher priced products on the first page of results based on their previous search and purchase activity.

The FTC additionally reported that a pricing targeting tool could tell where a consumer is at a given time and tailor online prices based on the consumer's current location. Such tools can be used to give pricing recommendations on a monthly basis or even down to the minute.

The Biden era's FTC was mostly concerned with transparency and consumer privacy. According to the agency, consumers often have no meaningful way to determine whether they are receiving the same prices as other consumers, whether advertised discounts are genuine, how products are ranked, or whether the products displayed are being personalized based upon behavioral information.

The FTC has also expressed concern over the extensive collection of consumer data beyond reasonable expectations, including cross-device tracking, third-party data brokers and limited consumer choice regarding how their information is used.

The January 2025 materials were approved by a 3-2 vote. Ferguson, then a commissioner joined by then-Commissioner Melissa Holyoak, dissented, arguing that the commission had released incomplete staff findings before the investigation concluded.[7]

Once chairman, Ferguson largely moved away from the Biden FTC's broader rhetoric surrounding surveillance pricing. The commission has since closed public comment on portions of the 2025 investigation and has not publicly expanded the market study. At the same time, however, Ferguson has indicated that the agency continues to evaluate disclosure requirements relating to personalized pricing, suggesting that the current FTC may favor transparency obligations over broader substantive regulation.

That approach is perhaps most visible in the commission's interest in online food-delivery pricing. Earlier this year, the FTC sought public comment regarding whether online grocery and food-delivery platforms adequately disclose fees that are "unclear, inconsistently disclosed, or revealed only at the last moment before consumers make a purchase."[8]

The commission also specifically requested comment on whether platforms should disclose when consumers are being shown different prices than other users for identical products.[9] The inquiry suggests that, under Ferguson, disclosure may become the principal federal response to individualized pricing.

What's Next

Looking ahead, the most immediate regulatory developments on surveillance are likely to come from the states rather than the FTC. The result may be an increasingly fragmented regulatory landscape in which businesses face differing disclosure obligations and substantive restrictions depending upon the jurisdiction.

Indeed, the 2026 inquiries by the FTC indicate that algorithmic and surveillance pricing are not simply unfinished business from the prior administration but still part of its active strategy.

[1] In re RealPage, Inc., Rental Software Antitrust Litig., No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023), ECF 627.

[2] See Cornish-Adebiyi v. Caesars Entertainment Inc. , Case No. 1:23-cv-02536-KMW-EAP, ECF 96; In re: RealPage Inc. Rental Software Antitrust Litig. , No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023), ECF 627, 628; Duffy v. Yardi, No. 2:23-cv-01391 (W.D. Wa. March 1, 2024), ECF 149.

[3] Cornish-Adebiyi v. Caesars Entertainment Inc. , Case No. 1:23-cv-02536-KMW-EAP, ECF 96.

[4] FTC and DOJ File Statement of Interest in Hotel Room Algorithmic Price-Fixing Case, https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-doj-file-statement-interest-hotel-room-algorithmic-price-fixing-case.

[5] https://governor.maryland.gov/news/press-releases/governor-moore-signs-legislation-protect-marylanders-pocketbooks-grocery-stores-safeguard-voting.

[6] FTC Surveillance Pricing 6(b) Study: Research Summaries A Staff Perspective (January 2025).

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

[8] FTC Seeks Public Comment on Unfair and Deceptive Fee Practices in Online Food and Grocery Delivery Services, https://www.ftc.gov/news-events/news/press-releases/2026/04/ftc-seeks-public-comment-unfair-deceptive-fee-practices-online-food-grocery-delivery-services.

[9] Id.

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