

Amidst uncertainty from FTC, states zero in on dynamic and algorithmic pricing

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Dynamic pricing sits at the focal point of regulatory crosshairs. Also called algorithmic or "surveillance pricing," this type of pricing uses customers' personal data to set individualized prices. For privacy regulators, dynamic pricing raises concerns about the collection and use of personal data like location, browsing history, and purchase patterns. And for consumer protection regulators, it implicates pricing and fee disclosures.

And although the grocery industry has been the most prominent target of dynamic pricing discourse, the Federal Trade Commission (FTC) has noted that it is used by a wide range of online retailers, the financial services and travel industries, and many other types of businesses.

California Attorney General Rob Bonta announced on January 27, 2026, a sweep investigating the use of personal data to set individualized prices. The California investigative sweep highlights a flurry of recent attention on dynamic pricing spurred by a December 9, 2025, investigative report by Groundwork Collaborative and Consumer Reports including that grocery prices on Instacart sometimes differ by more than 20% from one customer to another.

Following that reporting, Senate Minority Leader Chuck Schumer sent a letter to the FTC urging the agency to take action, and the New York Attorney General's Office (NY AG) launched a public investigation.

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Below, we summarize FTC, California Department of Justice (CA DOJ), and NY AG regulatory scrutiny and investigations. We also outline other relevant state legislation and suggest key considerations for companies using these pricing tools.

The FTC's approach to dynamic pricing remains unclear, despite launching an industry study in June 2024 and later publishing a preliminary staff research summary on that study in January 2025. The FTC gathered information for its "surveillance pricing" study through administrative subpoenas to eight dynamic pricing vendors using algorithms and AI "to categorize individuals and set a targeted price for a product or service."

The subpoenas requested information about how dynamic pricing vendors obtain data used to set personalized prices, technical details about how their algorithms work, information about the data used to train those algorithms, and analyses of the impact these tools have on prices consumers pay. The FTC press release announcing the study noted its goal was "to shed light on how the current data ecosystem may facilitate the ability to target consumers with individual prices."

Although the FTC press release referenced a long history "of documenting and investigating the hidden ecosystem of data brokers, digital platforms, and other intermediaries that specialize in monitoring and selling user data," the press release and the subpoenas to pricing vendors do not mention or reference specific laws that might be violated by the use of dynamic pricing.

The FTC's preliminary staff research summary, released in January 2025, found these companies' AI-driven pricing tools relied on consumer data such as location, browsing history, and purchase patterns to set individualized prices, adjust prices in real-time, and manipulate product rankings, but it did not reference any FTC statute or regulation that might be violated through their use.

Before ascending to Chairman, then-Commissioner Andrew Ferguson objected to that release based on timing and procedural issues but supported staff working towards a comprehensive final report and noted concerns that dynamic pricing could erode trust in digital markets. Concurrent with the preliminary staff research summary, the FTC also sought public comment on the same issues, but the notice was withdrawn by Chairman Ferguson later that month.

Dynamic pricing implicates two areas where the FTC has been active in enforcement, and additional investigations may be on the horizon. The FTC has brought many enforcement actions based on unfair or deceptive collection and use of personal data – especially where privacy policies mislead consumers about how data will be used and where companies use sensitive personal data without consumers' knowledge or consent. The FTC has also brought many enforcement actions regarding unfair or deceptive disclosures of prices.

The January 27 press release announcing the CA DOJ investigative sweep explained that pricing practices could both trigger obligations under the California Consumer Privacy Act (CCPA) and present violations. As part of the sweep, the California DOJ sent letters to online retailers, grocery stores, and hotels, seeking information about how they use consumers' shopping and internet browsing history, location data, demographics, and other data to set prices.

According to the press release, the investigative letters also asked recipients about their policies and public disclosures regarding personalized pricing, pricing experiments the companies may have conducted, and efforts to comply with "algorithmic pricing, competition, and civil rights laws."

The New York AG letter to Instacart explains it is investigating compliance with New York's Algorithmic Pricing Disclosure Act, G.B.L. § 349-A (the Act), which took effect on November 10, 2025.

The Act requires that any company using "personalized algorithmic pricing" must provide consumers a clear and conspicuous disclosure that says, "[t]his price was set by an algorithm using your personal data."

The law defines "personalized algorithmic pricing" as pricing set by an algorithm that "fluctuates dependent on conditions" using "personal data" that "identifies or could reasonably be linked, directly or indirectly, with a specific consumer or device." Certain rideshare data used to calculate prices is exempt from that definition of personal data, and the law altogether exempts most insurance companies and financial institutions.

The letter to Instacart emphasized that making the required disclosure through an inconspicuous hyperlink may not meet the requirement that it be clear and conspicuous. In addition, the letter emphasized that a disclosure is required for all displays of prices, including "individual product pages" and "category pages." The letter also stated that the law applies to any company offering goods or services to consumers in New York.

The New York law took effect in November 2025 and gives the Attorney General (AG) sole enforcement authority under the Act. Although it provides for civil penalties up to \$1,000 per violation, the law requires that the AG provide companies with notice of suspected violations and an opportunity to cure violations. Notably, the statute does not specify the amount of time the AG must provide for companies to cure violations.

In the wake of the intense scrutiny and press surrounding the use of dynamic and personalized pricing, it's likely that legislators in other states will introduce similar legislation.

Last year, several other states considered proposals to address risks associated with data-driven pricing practices, including unfair discrimination and using personal and sensitive data. For example, last year Colorado HB 25-1264 and Texas SB 2567 would have classified the use of surveillance data to set prices or wages as an unfair trade practice.

And several states considered legislation to prohibit personalized pricing in specific industries and contexts, such as Vermont H.371, which would have prohibited brick and mortar grocery stores from using digital price displays that change the price while the store is open, and Illinois HB 3838, which would have banned using dynamic pricing to sell tickets to live entertainment events.

The increasing regulatory scrutiny of dynamic and personalized pricing tools should put companies on alert. Companies using these tools should take note of New York's disclosure requirements, as the broad scope may complicate compliance implementation. And similar laws may be coming soon from other states. The California DOJ sweep also has a wide-ranging impact. Many state privacy regimes take cues from California,

and other states may be considering similar investigations.

Given these concerns, it is prudent for companies to assess whether they use consumer data to set prices and how they disclose such use in light of state privacy laws. It is also generally important to ensure representations to consumers reflect current business practices – the FTC has brought many enforcement actions where there is a disconnect between statements in privacy policies and actual use of data.