

Responses to Questions for the Record
of
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Subcommittee on Crime and Counterterrorism
Hearing on “Your Data, Their Profit: The Consumer Cost of AI Surveillance Pricing”

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Questions Submitted by Senator Amy Klobuchar (D-MN)

- 1. In an economy in which consumers are facing rising costs, one of the few ways people can push back is by comparing prices among sellers to find the best deal.**

How do frequently changing prices that are hard for consumers to track affect sellers’ incentives to compete by reducing prices to win business away from competitors?

Prices may change for any number of reasons, or for little discernable reason at all. This hearing has focused largely on how and why different consumers may be offered different prices for the same good or service based on a calculation of their relative willingness to pay.

Corporations may also offer different prices to different consumers as a means of testing what price point optimizes revenue and conversion rates.¹ Even under the most conventional thinking about how prices are set, consumers might expect the price to go up in response to an increase in

¹ When grocery delivery platform Instacart was accused of differential pricing in December 2025, a spokesperson for the company characterized their conduct as “short term, randomized and designed so that... retail partners understand consumer preferences.” Ben Casselman, “Same Product, Same Store, but on Instacart, Prices Might Differ,” New York Times (Dec. 9, 2025).

the cost to provide a good or service. A broadly accepted form of willingness to pay pricing is changing the price of a good or service based on the level of demand for a corresponding supply of products. A spike in demand for a product in limited supply will lead to an increase in price, while a glut of products at the end of the year may result in an end-of-season sale.

The practice of changing a price based on changing market conditions or changes in input costs is commonly referred to as “dynamic pricing.” In its broadest definition, dynamic pricing can refer to the basic fact that a price changes over time, irrespective of the reason for that change in price. It encompasses both widely accepted and pro-competitive conduct, on the one hand, and, on the other hand, conduct that has the effect of reducing a consumer’s ability to perceive whether a price is fair at all. In an era where prices were communicated by a physical price tag, the frequency of price changes was mitigated by the practical ability to post a new price tag. As prices are increasingly communicated online or other digital means, that practical inefficiency no longer mitigates the frequency of price changes.

Rapid dynamic pricing has taken hold in key sectors across the economy. Aside from its digital ride-hailing interface, the real innovation of Uber and Lyft was an algorithm that raised prices in moments of high demand, ostensibly to attract more drivers to the roads to meet that demand. In 2015, one study observed that Uber’s algorithm changed prices every three-to-five minutes – up to 20 times per hour.² A near-decade later, electronic shelf labels at Walmart, the largest grocery retailer in the United States with over 4,700 stores and annual sales exceeding \$735 billion as of August 2026, allow for the changing of prices as often as every ten seconds.³

² Nicholas Diakopoulos, “How Uber surge pricing really works,” The Washington Post (Apr. 17, 2015).

³ Lola Murti, “A supermarket trip may soon look different, thanks to electronic shelf labels,” NPR (June 19, 2024).

Online pricing and digital price tags have solved an obvious operational inefficiency: Changing a price no longer requires changing a physical price tag. Connecting digital prices to large stores of data – not just personal information, as with surveillance pricing, but with data regarding competitor prices and changes in input costs – solves yet another operational inefficiency by allowing companies to more quickly react to real-time changes in market conditions. But these operational efficiencies have a deleterious tradeoff: the gradual softening of consumer price sensitivity.

Consumer price sensitivity is the driving force of affordability. Uniform pricing, where a single price is offered to the entire marketplace, is governed by a generalized calculation of consumer price sensitivity, wherein output and pricing decisions are dictated by consumers who exhibit higher price sensitivity. In that conventional scenario, less sensitive consumers, who we might refer to as *infra*-marginal consumers, benefit from the greater price sensitivity of marginal consumers. The primary effect of personalized pricing is to segment consumers by their relative sensitivity to price. When marginal consumer demand no longer dictates price, prices – and corporate profits – increase. Where one might expect corporate profits to be re-invested to expand output at a lower price to reach more sensitive consumers, the economic literature suggests that instead, markets are subject to greater segmentation and less overall affordability.⁴ Lower-income consumers may be left out of the marketplace altogether.

Affordability may also derive from inefficiencies in the price setting process. At a threshold level, the practical consequence of higher consumer price sensitivity – that is, the ability to compare prices across different retailers – only inures to prices that are not subject to constant fluctuation. But rapid dynamic pricing also dulls benefits of price competition where

⁴ Andrew Rhodes and Jidong Zhou, “Personalized Pricing and Competition,” *American Economic Review*, Vol. 114, No. 7 (July 2024).

they might otherwise exist, by “de-risking” the price setting process. Beneficial price competition derives from the risk associated with setting a price that is either too high or too low.

To provide a crude example, consider that both Company A and Company B have the same input costs, meaning that their pricing decisions are similarly constrained by the cost to produce the same good or service. If Company A sets a price that would result in greater profit, Company B might respond by offering a slightly lower price. All other variables the same, price sensitive consumers will naturally buy from the more affordable price offered by Company B, thereby saving money or preserving consumer surplus. If Company A sets a price that underestimates consumer demand and sets a lower price than the market will bear, consumers will save money by purchasing from Company A. At some point, Company A will realize their mistake and raise their prices to realize the higher margin. Alternatively, to stay competitive, Company B will have to lower its prices to meet consumer demand. Either way, consumers benefit both from the risk of setting the “right” price and from the time lag between setting the wrong price and adjusting for their mistake. To the extent rapid price adjustments are informed by instantaneous, real-time access to competitor pricing data, such an optimal price ecosystem may leave price-sensitive consumers with nowhere to turn.

Just as surveillance pricing has dragged personalized pricing from the realm of the theoretical to an actual possibility, the same underlying technology may optimize price-setting in a manner that shields competitors from the inherent risk of responding too slowly to any number of changes in market conditions. Consumers absorb that risk in both subjective and objective forms: Rapid changes in price erode the consumer’s subjective perception of what a fair market price looks like, and the tacitly coordinated, instantaneous response to competitor pricing objectively reduces the ability to engage in comparison shopping.

The appropriate policy response is dictated by the pursuit of market prices that are (1) predictable, (2) transparent, and (3) fair. Policymakers may enhance predictability by imposing regulatory guardrails that approximate the practical lag of changing a price tag – for example, by restricting the number of times per day that a price may change. They may increase transparency by requiring sellers to disclose, at the point of sale, the average market price offered by the retailer over the past 90 days. Policymakers may enhance overall fairness through a number of means, including by restricting the conditions under – and to what extent – a retailer may leverage its pricing power.⁵ As discussed in the next section, policymakers may also seek to restrict competitors from using any third party- or platform-based pricing service that has the purpose or effect of aligning competitor pricing strategies, even where the evidence may be insufficient to prove an illegal conspiracy.

2. Companies that engage in surveillance pricing frequently rely on third-party intermediaries to crunch user data to set personalized prices. Any time competing companies outsource price-setting decisions to third parties, there is a heightened risk of collusion.

How can outsourcing pricing decisions to third parties increase prices, potentially in violation of the antitrust laws?

Make no mistake, surveillance pricing is good for business. It leads to increased corporate profits and reduced consumer welfare.⁶ Assumptions that increased corporate profits will naturally lead to increased productivity and expanded markets that reach more consumers at lower price points meet a dire confrontation with reality, which broadly reveals record corporate

⁵ One such proposal, the “Price Gouging Prevention Act of 2025,” S.2321, 119th Congress (2025-2026), broadly defines an “exceptional market shock” to include, among other events, “any other cause of an atypical disruption in the market.”

⁶ *Supra*, fn. 4.

profits,⁷ record low labor shares of productivity,⁸ and a fractured consumer economy where the top ten percent of income owners are keeping the economy afloat, while the bottom 80% of income earners readjust to a smaller slice of the pie.⁹ It is my hypothesis that the same AI-based technologies responsible for personalized or surveillance pricing are laying the infrastructure for a new era of inequality in America.

As I suggest in my written comment to the Committee, the opportunity offered by AI-based pricing to realize greater profits creates an upstream financial incentive for small businesses to partner with third party services that transform the opportunity into reality.¹⁰ It is a simple expression of finance and capital allocation that in competitive capital markets, investment will flow to the highest expected return relative to their risk. For an increasing number of businesses, choosing between a pricing model that prioritizes long-term consumer trust and one which chases the maximum rate of return is begging to look less like choice and more like coercion. My written comment also discusses the potential antitrust risk posed by firms that possess asymmetrical access to data vis-à-vis competing firms, and who wield access to that data to foreclose market entry or impose extractive fees and anticompetitive conditions in exchange for access to that data.¹¹

The National Grocers Association offers a blunt assessment of the “choice” to engage with third party commerce platforms: “The practical effect is that independent grocers cannot opt out of these platforms without surrendering a meaningful share of their consumer base, even

⁷ Tobias Burns, “Second-quarter earnings bonanza driven by record corporate profits,” CNBC (Sept. 1, 2026).

⁸ Dan Burns, “US workers’ share of GDP skids to fresh record low,” Reuters (Aug. 6, 2026).

⁹ Rachel Louise Ensign, “The U.S. Economy Depends More Than Ever on Rich People,” The Wall Street Journal (Feb. 23, 2025).

¹⁰ “Your Data, Your Profit: The Consumer Cost of AI Surveillance Pricing,” Hearing Before the S. Comm. On the Judiciary, Subcomm. On Crime and Counterterrorism, Statement of Lee Hepner, at 5 (Aug. 4, 2026).

¹¹ *Id.*

when the terms of participation are unfavorable.”¹² They continue: “This dynamic gives the online food delivery platforms substantial leverage over independent grocers... [P]latforms are able to impose pricing, fee, and tip structures that independent grocers might not want or adopt on their own first-party e-commerce platforms.”¹³ These concerns are not constrained, by any measure, to the online delivery of groceries. Whether knowing, coerced, or without any insight at all into the opaque functioning of third-party platforms and pricing services, the delegation of a business’ price-setting function to a third party threaten competition, impede direct relationships between otherwise independent businesses and their consumers, and often implicate a transfer of competitively sensitive information and trade secrets.

The delegation of independent market research and the price-setting function to third parties carries a heightened risk of collusion that courts have only recently begun to examine, and policymakers have only recently begun to apprehend. Here, as in the above analysis of surveillance pricing and rapid dynamic pricing, the law is catching up to a problem that had previously been thought impossible; namely, the ability to facilitate and enforce an anticompetitive conspiracy across a diffuse or decentralized marketplace.¹⁴ While recent litigation has focused disproportionately on the price-setting function itself, of which price discovery is one part, equal scrutiny among policymakers should be afforded to the market research function itself. Where courts have recognized that the exchange between competitors of non-public or other competitively sensitive information, either directly or indirectly, may violate the antitrust laws, they have been comparatively lax in their scrutiny of technologies that are

¹² Comment of the National Grocers Association, Advance Notice of Proposed Rulemaking on Unfair or Deceptive Fees in Online Food Delivery Services, 91 Fed. Reg. 20381, Docket ID No. FTC-2026-0463-0001 (May 18, 2026).

¹³ *Id.*

¹⁴ Bryan Koenig, “AI Could Expand Price-Fixing to Less Concentrated Markets,” Law360 (Nov. 9, 2023).

capable of crawling, indexing, and processing vast amounts of transaction-level data to communicate benchmark prices.

The appropriate policy response to the heightened risk of collusion, or the softening of market competition, when independent businesses delegate core pricing functions to third party platforms and pricing services can take several forms. In recent years, dozens of state and local jurisdictions have adopted new bright-line policies that prohibit the exchange of nonpublic competitively sensitive information. The best of these policies define “nonpublic data” based on a qualitative assessment of its value to the coordination of pricing or other commercial terms. In other words, some categories of data, even if publicly accessible, are deemed “nonpublic” where there is no incentive to share such data publicly but for the facilitation of a conspiracy. In 2025, California lawmakers took a slightly different approach – one informed by the Supreme Court’s scrutiny of the “formula” underlying a price fixing conspiracy – by prohibiting the use of a “common pricing algorithm” to “coerce” the acceptance of a recommended price or commercial term.¹⁵ Other policy approaches have sought to right-size the pleading standards for bringing a price fixing claim, to avoid premature litigation of the merits or avoidance of discovery by firms whose algorithms conceal their conspiracy in code.¹⁶

Finally, I would submit that the proliferation of third-party pricing algorithms and online price-setting platforms flows from a distinction between horizontal and vertical price restraints that ignores the harms to choice and affordability that inure to consumers when competing businesses delegate their independent decision-making authority. The creation of new markets for competition *between* platforms cannot provide such easy justification for the collapse of market competition *within* those platforms, particularly where network effects and dark patterns

¹⁵ CA Assembly Bill 325 (2025); Cal. Bus & Prof. Code §16729.

¹⁶ Competitive Prices Act, H.R.8633, 119th Congress (2025-2026).

impede the ability of consumers to simply pack up their participation on one platform to move to another. To concede this point is to assign greater economic control to market middlemen, who too frequently leverage access to markets to diminish the creative spark of innovators, business owners, and workers. If America has become a country that no longer makes things, opting instead to funnel our best minds toward the intricate design of financial architecture while offshoring labor's share of the proceeds, the unrestrained agglomeration of power by platforms is surely an accelerator of this phenomenon.