

Surveillance Pricing

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EPIC's expertise

- EPIC is an independent nonprofit established in 1994 to secure the fundamental right to privacy in the digital age
- We've prioritized state tech policy work for many years now, including data privacy and surveillance pricing bills
- Worked with Sen. Maroney on several tech bills in CT
- Testified on surveillance pricing bills in MD, NJ, NY, NYC, and CO last session

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Why is this a problem now?

- Short answer: increasing information and power asymmetry
- Big data, the normalization of surveillance, and sophisticated machine learning algorithms mean that retailers know way more about us than we ever could have expected and can act on that knowledge to set prices
- This data ecosystem has traditionally served targeted advertising, but now it's being applied to pricing

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How widespread is it?

- Difficult to measure due to the opacity of businesses' pricing practices, but likely extremely widespread
- FTC study surveyed 7 companies that offer surveillance pricing services, and they reported 250 clients in aggregate
- Grocery, clothing, hardware, health, convenience, and general merchandise stores all implicated, among others
- More than 85% of the U.S. population shops online, where surveillance pricing is easiest

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There's no longer one “base price”

- There is no one “base price” that consumers see for a good. Instead, the price depends on personal data, which sets either an individualized or group-level price
- Without a verifiable base price, there is no way for consumers to know for sure whether they are getting a good deal or whether their neighbor is paying less for the same product

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Individualized Discounts and Loyalty Programs

- Loyalty programs and individualized discount tactics are often surveillance pricing in disguise
- To illustrate: A business realizes that it will violate a surveillance pricing law if it sets price of a box of cereal at \$4.99 for Customer A and \$6.99 for Customer B. So it sets the price at \$6.99 for all consumers, offers Customer A a \$2 coupon, and offers no coupon to Customer B.
- This is still surveillance pricing, just called “personalized discounts”

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Individualized Discounts and Loyalty Rewards — Examples

- BCG, which provides loyalty program surveillance pricing services, estimated that there was \$70B in growth available in the loyalty market in moving from traditional loyalty programs to ones that set individual prices
 - Much of this profit undoubtedly comes from increased revenues (read: increased prices)
- FTC study showed most businesses increased margins by 2-4% when implementing surveillance pricing

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Connecticut's law

- CT was only the second state to pass a law banning surveillance pricing
- Iterative process, each law after got a bit better (NJ, NY, Seattle)
- We expect states to continue in 2027
- CT should incorporate some of the early lessons to avoid its law being out of date before it even takes effect

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Key areas for amendment in CT

- Discount and loyalty program exemptions
 - Overbroad discount exemption (Sec. 501(c)(2)(A))
 - Insufficient guardrails for protecting consumers (Sec. 501(c)(2)(C))
 - Unnecessary exemption (Sec. 501(c)(2)(D))
- Insufficient enforcement (lack of a private right of action)

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Overbroad discount exemption

- Sec. 501(c)(2)(A) allows companies to use surveillance pricing to offer consumers a discounted price for purposes such as
 - “retaining a consumer as a customer”
 - “reestablishing a consumer as a customer”
 - “attracting a consumer as a new customer”
 - “cross-selling an item to a consumers” or
 - “reengaging a lapsed customer”
- Basically any discount a company wants to offer can fit within one of these categories, risking a loophole so big that it swallows the rule
- Recommend striking entirely or replacing with a limited exemption for retaining a customer that has taken steps toward canceling a subscription, etc.

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Individualized discounts and loyalty programs

- Sec. 501(c)(2)(C) aims to exempt 3 kinds of individualized discounts:
 - General publicly available discounts that anyone can qualify for (15% off for signing up for emails, buy one get one free, etc.)
 - Common group-based discounts for specific subsets of the population (senior discounts, teacher discounts, etc.)
 - Discounts for enrolling in a loyalty or rewards program

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Individualized discounts and loyalty programs

- These discounts can all be fair and desirable pricing practices, but certain guardrails should be added
 - Specific discount, eligibility criteria, and any conditions must be **publicly disclosed**
 - Any consumer who meets eligibility criteria should be able to access the discount on equal terms
 - Personal data should be collected/used only if **functionally necessary** to offer the discount (age for senior discount, etc.), and companies should be prohibited from combining that with personal data about consumers from other sources

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Unnecessary exemption

- Sec. 501(c)(2)(D) exempts “correcting a price resulting from a pricing error or resetting a price following a system or network outage”
- These actions should not require the use of personal data or be specific to individual consumers, meaning they do not fall within the surveillance pricing definition in the first place
- Businesses can correct a pricing error or reset prices after a network outage without this exemption, so it should be struck

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These changes protect discounts

- Our recommended amendments allow a huge range of consumer discounts, including many of the discounts consumers rely on today
- These guardrails simply ensure transparency and fairness
- There is clear evidence that “personalized” discounts and loyalty programs are where most surveillance pricing practices hide
- Exempting these practices entirely without any restrictions will mean CT consumers aren’t really protected

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Stronger enforcement

- EPIC strongly urges the Legislature to add a private right of action
- Essential remedy for consumer protection laws that allows residents to enforce their own rights
- Sheer volume of instances of surveillance pricing is too much for any one agency to handle, especially on top of additional enforcement obligations
- NJ and Seattle both have PRAs in their laws

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Questions?

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