S.3008/A.3008, Part X

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BILL
S.3008/A.3008, Part X
SUBJECT
Personalized Algorithmic Pricing
DATE
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OPPOSE

The Business Council strongly opposes S.3008/A.3008 TEDE Part X, which adds a new §349-a to General Business Law and amends GBL §396. This proposal has been touted as a pro-consumer bill, yet it is far from being consumer friendly.

The bill defines "dynamic pricing" and "personalized algorithmic pricing" to make it a violation of GBL §349 to "knowingly advertise, promote, label or publish a statement, display, image, offer or announcement of personalized algorithmic pricing using consumer data specific to a particular individual without clear and conspicuous disclosure that states: "THIS PRICE WAS SET BY AN ALGORTIHM USING YOUR PERSONAL DATA." Not only does this create a new private right of action using misguided and loosely defined terms, but the mandatory proposal will require excessive disclosures that will confuse and frighten consumers while inherently making consumers think that a business is maliciously trying to deceive them when they are not.

The bill also prohibits offering prices based on an individual's protected class data. While we believe the intention is to codify existing law and case law, the language of the proposal would ban companies from industry standard, intrinsically pro-consumer/competitive actions such as offering discounted prices or coupons to consumers.

Section 1

At the heart of the bill is the definition of "dynamic pricing," but there appears to be a misunderstanding of what dynamic pricing is, as this bill conflates dynamic pricing with "personalized algorithmic pricing." Dynamic pricing and other automated pricing tools allow a business to change prices for _all customers_ based on market conditions. This provides benefits to both businesses and consumers because it allows businesses to track market conditions, competitor pricing, and inventory to ensure they are offering the lowest prices to consumers. Automated pricing tools have taken us from a time of hand-written price tags and "rough estimate" inventory management to the increased efficiency and greater output stemming in part from these technologies. These automated technologies have allowed NY businesses to become more efficient and compete more adeptly both domestically and internationally—competition that has benefited consumers through lower prices. This has also resulted in increased price transparency for consumers; consumers are savvy and able to easily compare prices amongst

competitors to shop for the best price. Due to these trends, _prices can change several times a day to keep prices competitive for consumers_. Dynamic pricing is not based on a consumer's personal data but rather can rely on a variety of variables such as market trends, supply and demand (inventory), and market competition prices.

Dynamic pricing does not just exist for business or retailers. It can be employed in many ways. For example, New York City employs the use of dynamic pricing in congestion pricing. Rates are different based on a variety of factors; peak vs. off-peak hours, type of vehicle, and whether a driver has an E-Z Pass account. It is safe to assume that an algorithm determines the charge to the driver based on those factors.

Coupling "dynamic pricing" to "personalized algorithmic pricing" does not make sense and will ultimately require that a business add this new disclosure to every price. Further, this proposal will require any offers of promotional pricing or discounts to contain this ominous disclosure if they use any "consumer data", which is broadly defined. Requiring alarming disclosures next to discount offers that use basic, non-sensitive data to provide consumers with lower prices seems entirely mistargeted and an undesirable policy outcome. Consider someone's purchase of shaving razors, their favorite cereal, or paper towels -- this bill would prevent companies from offering that consumer a coupon on those items unless they were emblazoned with an alarming and misguided disclaimer about algorithms. This cannot be the intent. These are categorically pro-consumer practices that occur frequently in retail and should not result in mandatory, ominous disclosures that will needlessly confuse and frighten consumers. Rather, this bill should be refocused to target truly concerning behaviors, such as a business using sensitive consumer data to target individuals with higher prices.

Concerningly, the bill creates a new private right of action under GBL §349. The vague language of this proposal will almost certainly create an opportunity for enterprising plaintiffs' attorneys to go after law-abiding businesses. In 2022, New York households paid on average $7,000 in hidden tort taxes due to New York's ever growing litigious environment, more than $3,000 the national average. Without more focus on the most harmful business practices that discriminate against consumers, plaintiffs' attorneys will take advantage of the law, harming both consumers and businesses. Any discount a company provides could be used against them in any action to allege that the company was offering a "personalized algorithmic price" without disclosure. This will result in over-disclosure as companies attempt to insulate themselves from legal liability, which will also reduce accountability for bad actor businesses. There are also companies who do not offer pricing based on algorithms but are concerned that they would have to make this disclosure because of how it presents offer to consumers based on providing good customer service, but also to avoid unnecessary and costly litigation.

Sections 2 & 3

While the intention may be to codify existing laws and case law, Section 2 of the bill will prohibit businesses from offering different types of discounts, like to families with children or senior discounts. Often, families with children and senior citizens are more price-sensitive and on fixed incomes. This section would prohibit a business, like a grocery store or retailer, from providing coupons or other discounts on products because "by implication" they could infer someone's protected class status. For example, under the bill's language, a business would be prohibited from using past purchasing history to provide a consumer a discount or coupon on the following because the business could "by implication" infer protected class status:

- pre-natal vitamins or tampons *(pregnancy or reproductive health care)*; or
- egg replacement products *(a severe food allergy could be considered a disability under the ADA if it "substantially limits one or more major life activities")*; or
- infant formula or baby food *(age)*.

Further, highly regulated industries, such as financial services and insurance, should be exempt from the entire TEDE Part X proposal. The ambiguous definitions of "consumer data" and "personalized algorithmic pricing" would require disclosure on products (or in the case of "protected class data" would prohibit them from offering products) for which they are required by law or regulation to consider. While this does not appear to be the intent of the legislation, however, it is an unintended consequence.

Section 3-a (Senate One-House bill)

The Senate's one-house bill included an additional provision that would prohibit an online retailer with total annual revenue exceeding one billion dollars from altering a price through dynamic pricing more than once a day. This proposal would prohibit any large online retailer from offering the best, lowest price to a consumer. As discussed earlier in this memo, such automated pricing tools increase price transparency for consumers by allowing businesses to track market conditions and prices to ensure they are offering the best price for consumers. Adoption of this proposal would only be to the detriment of consumers and their pocketbooks.

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At a time when New Yorkers are dealing with an affordability crisis, we should be looking for ways to make things more affordable for New Yorkers, not more expensive.

This proposal is deeply flawed and will have significant unintended consequences for consumers and businesses alike. For these reasons, we urge the Legislature to reject TEDE Part X.