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Full Council
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Amendment A to CB 121267 – Fair Pricing and Transparency ORD

Sponsor: Councilmember Kettle

Prohibit Using Algorithmic-Based Price Discrimination To Increase Prices

Effect: This amendment would prohibit the use of algorithmic-based price discrimination to increase the price of certain goods above the bona fide market price, rather than prohibit any modification of price based on algorithmic-based price discrimination. The specific restrictions on increasing the price of goods varies by type of covered retailer and is listed under the proposed Section 7.35.020.

Because discounts based on personal information would be allowed under this amendment, the amendment would also strike proposed regulations related to discounted prices in the bill. It would also require covered retailers to disclose whether personal information was used in setting any discounted price available to the consumer, rather than the specific eligibility criteria and qualifying tiers for discounts.

Amend Section 1 of CB 121267 as follows:

7.35.010 Definitions

"Aggrieved party" means a consumer or other person who suffers tangible or intangible harm due to a covered retailer or other person's violation of this Chapter 7.35.

"Algorithmic-based price discrimination" means the practice of setting, altering, or manipulating the price of goods offered to a consumer or a segment of consumers, based in whole or in part on monitoring, tracking, or automated analysis of the consumer's behavior, location, demographic characteristics, biometric data, or other personal information, including personal information acquired from a third party or personal information that is collected, gathered, purchased, or collected by a covered retailer using electronic surveillance technology. ((~~"Algorithmic-based price discrimination" includes offering random variations in prices to different consumers.~~))

"Algorithmic-based price discrimination" does not include:

1. The difference in price is based on differences in the delivery costs of providing goods to consumers based on delivery locations, order size, delivery windows, time of day, traffic, or weather conditions and provided the only personal information used in setting such price is the consumers' location information; or

2. The difference in price is based on prices set at the physical-store location that are available to all consumers at the location ((;)).

((3. The difference in price is based on a discounted price available through a manufacturer or third-party funded coupon, provided the covered retailer does not use or share personal information to determine or facilitate determining the amount or the targeting of the distribution of such coupons;

4. The difference in price is the result of a discounted price offered to a consumer terminating or taking steps to terminate a subscription, loyalty program, rewards program, membership, or co-operative membership with a covered retailer, to reestablish a consumer as a membership or subscription enrollee, or to cross-sell a similar or related item to a consumer, provided that the discounted price is available on equal terms to all similarly situated consumers; or

5. The covered retailer offers a discounted price on equal terms to one of the following groups of consumers:

a. All consumers who meet eligibility criteria, such as criteria related to volume purchases, signing up for a mailing list, registering for promotional communications, or participating in a promotional event, provided that any consumer could potentially meet the eligibility criteria;

~~b. All members of a broadly defined and commonly accepted group of consumers, including but not limited to teachers, active or retired military personnel, senior citizens, students, employees of a covered retailer, or residents of a certain area; or~~

~~c. Members, enrollees, or participants in a loyalty, membership, including cooperative memberships, or rewards program that consumers affirmatively purchase or enroll in, subject to the following provisions:~~

~~1) The discounted price is provided to all members of the loyalty program of that covered retailer in Seattle; or~~

~~2) The discounted price is offered to a subset of the loyalty program members based on prior purchase history, provided: any discounted price based on prior purchase history are based only on tiers or groupings of consumer, rather than individualized prices, such tiers are based only on prior purchase data and prior purchase history data is not used to make inferences about the consumer or the consumer's price sensitivities nor is paired, combined, or cross-referenced with any other personal information data except enrollment in the loyalty, membership or rewards program. The Director may issue rules to implement subsection 5.c.2 of this definition, including rules providing for additional restrictions on the use of prior purchase history and permissible tiers.~~))

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7.35.020 Prohibition on algorithmic-based price discrimination

A. A covered retailer may not use an electronic shelf label system to display a price that has been modified using algorithmic-based price discrimination, for goods where a covered retailer is prohibited from using algorithmic-based price discrimination to modify the price of goods, as described in subsection 7.35.020.B.

B. A covered retailer or covered retailer's agent may not use algorithmic-based price discrimination to ((~~modify~~)) increase the price of goods above the bona fide market price, including mandatory fees or charges necessary to receive such goods, for a consumer as follows:

1. A grocery business that has 20 or more retail locations globally, including but not limited to chains or integrated enterprises, may not use algorithmic-based price discrimination to ((~~modify~~)) increase the price of any goods for a consumer above the bona fide market price.

2. A mixed-use grocery business may not use algorithmic-based price discrimination to ((~~modify~~)) increase the price of groceries, diapers, grooming and hygiene products, or over-the-counter drugs for a consumer, above the bona fide market price.

3. A delivery service provider may not use algorithmic-based price discrimination to:

a. ((~~Modify~~)) Increase the price of any goods above the bona fide market price for a consumer ordered for pickup, delivered from, or otherwise provided via a grocery business regardless of the number of retail locations the grocery business operates; or

b. ((~~Modify~~)) Increase the price of groceries, diapers, grooming and hygiene products, or over-the-counter drugs, above the bona fide market price, for a consumer ordered for pickup, delivered from, or otherwise provided via a warehouse or mixed-use store.

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7.35.030 Covered retailer disclosures

A. A grocery business must clearly post the price of goods in a retail location as prescribed by law.

B. A covered retailer must clearly and conspicuously disclose via its internet website, or where the discount is offered, in such a manner that an ordinary consumer would notice and understand, ((:)) whether personal information was used in setting any discounted price available to the consumer.

((~~1. The eligibility criteria for any discounted price based on volume purchases, signing up for a mailing list, registering for promotional communications, or participating in a promotional event under subsection 5.a of the exclusions in the definition of algorithmic-based price discrimination;~~

~~2. The eligibility criteria for any discounted price based on broadly defined and publicly recognized groups of consumers that may qualify for a discounted price under subsection 5.b of the exclusions in the definition of algorithmic-based price discrimination; and~~

~~3. All consumer tiers used for discounted prices based on prior purchase history pursuant to subsection 5.c of the exclusions in the definition of algorithmic-based~~

~~price discrimination, including any criteria or factors for grouping consumers into each tier.~~

~~The Director may issue additional rules requiring disclosures should covered retailer business practices change such that the disclosures in this Section 7.35.030 are insufficient to meet the public policy goals of this Chapter 7.35.~~))

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7.35.050 Covered retailer records

A. A covered retailer shall retain records that document compliance with this Chapter 7.35. The Director may issue rules governing the specific records and form, format, and content of such records needed to constitute compliance with this Section 7.35.050, including the maintenance of a compliance file. Required records may include, but are not limited to ((~~the eligibility criteria for discounted price under subsection 5.a of the exclusions in the definition of algorithmic-based price discrimination, the eligibility criteria for all broadly defined and publicly recognized groups of consumers that may qualify for a discounted price under subsection 5.b of the exclusions in the definition of algorithmic-based price discrimination,~~)) the method of public disclosure under Section 7.35.030, use of consumer prior purchase history, use of consumer tiering, information regarding what data is considered in setting prices based on personal information, and other records that are material and necessary to effectuate the terms of this Chapter 7.35.

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