ML STRATEGIES

Instacart Agrees to Settlement in FTC Lawsuit Over Deceptive Marketing Tactics and AI-Driven Pricing — AI: The Washington Report

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VIEWPOINT TOPICS

- Artificial Intelligence

Main Points

- The FTC sued Instacart for deceptive practices including misleading “free delivery,” unclear satisfaction guarantees, undisclosed fees, and unlawful free-trial-to-paid memberships. Instacart has now reached a $60 million settlement to refund hundreds of thousands of consumers and impose future compliance restrictions.
- Investigations found that Instacart’s algorithmic pricing experiments led to significant price disparities (up to 23% higher for some users), exacerbating consumer frustration amid already high grocery prices and raising concerns about fairness and transparency.
- The case reinforces that traditional consumer protection laws apply to AI-enabled markets. While the White House’s AI Action Plan promotes innovation and minimal new regulation, it preserves FTC authority to enforce transparency, consent, and fairness in automated systems.
- The action highlights a growing divide between consumer advocates, who argue automated and personalized systems can scale consumer harm and require strong enforcement, and industry groups, who warn that aggressive enforcement may chill AI innovation, investment, and competitive experimentation.

FTC’s Settlement Action Against Instacart Reinforces Need for AI Systems Regulation

The Federal Trade Commission (FTC) sued Instacart for engaging in numerous deceptive tactics against consumers through unclear labels and disclosures, resulting in raised grocery prices and recurring memberships without consent. Instacart has agreed to settle through paying $60 million in refunds to affected customers.

Other internal and external research had already shown how Instacart’s AI-driven pricing experiments impacted various family budgets. It was found that some quoted prices to consumers were up to approximately 23% higher than those shown to others, even for the same cart and time.

This AI-powered pricing tool, known as Eversight, allows for retailers to conduct price tests to gauge reactions of consumers and efficiency to higher and lower prices across different categories of items. Instacart’s website noted that grocers who use this tool “see revenue growth of 1 to 3%.” Instacart claimed these tests were randomized and, among other companies utilizing this tool, was scrutinized, emphasizing that “consumers deserve to know when they are being placed into pricing tests. The FTC should require a prominent on-screen label,” as stated by Sen. Chuck Schumer (D-NY).

The practice of dynamic pricing raised concerns and increased consumer frustration with grocery prices already being at significantly higher levels. Reports from several nonprofit consumer advocacy groups found that the prices of items in Instacart baskets varied by an average of 7% across 437 shoppers in four cities testing for the same items at the same stores. Shortly after, the FTC sent Instacart a civil investigative demand for further information on Eversight.

This recent enforcement action against Instacart is an example of how traditional consumer protection principles continue to apply in increasingly automated and technology-driven markets. It reinforces that representations made and marketed to consumers about pricing, fees, or savings must be transparent, regardless of them being generated or influenced by algorithms or other advanced technologies.

The **AI Action Plan** released by the White House this past summer, while emphasizing the importance of fostering innovation and competition in artificial intelligence, does not carve out exemptions from existing consumer protection laws. It explicitly preserves and reinforces the role of agencies such as the FTC in addressing unfair or deceptive practices involving AI-enabled systems, **as we previously covered**. The enforcement action is grounded in traditional consumer protection law by addressing false advertising, undisclosed fees, and unfair practices harming shoppers. In contrast, the AI Action Plan leans toward market-friendly AI adoption and minimal federal constraints, leaving Big Tech and startups to consider how AI systems interact with consumer rights.

In the complaint, three components of Instacart's deceptive tactics were highlighted:

"Free Delivery" Promotion

Instacart often advertised "free delivery" to new consumers on their first three orders, insinuating the absence of additional fees. This promotion was alleged to be false, as every order placed for delivery requires additional "service fees" to be paid for consumers to get their items delivered. In the complaint, the FTC stated that Instacart misrepresented certain charges by another name, despite functioning the same as delivery fees, whether they were service fees or small order add-ons. Both are related to delivery, with Instacart using them to offset costs.

There was an alleged failure to prominently disclose that service fees may apply, and consumers would only see this upon reaching the checkout screen at the end. Instacart's own internal research found that consumers felt this offer to be a "bait and switch," with many users spending significant time on orders only to be met with hidden fees.

"100% Satisfaction Guarantee" Protection

Instacart advertises that consumers can receive a 100% satisfaction guarantee and a refund if they are not fully satisfied with their services. This has been alleged to be misleading, as many consumers who were seeking refunds — e.g., for late deliveries — received appeasement in forms of credit that can only be used for future orders instead of original payment. The amount refunded was also almost always less than what the customer originally paid.

Per the written terms of Instacart's guarantee, it is only applicable to the fees paid on the order instead of the total cost. Previously, customers were able to access a self-service interface on Instacart's website and mobile app to report issues with orders and receive refunds without having to contact customer service. In 2022, the refund option was hidden to shift more consumers toward credits rather than refunding to the original form of payment.

Unlawful "Free Trials" into Paid Instacart+ Memberships

Instacart has a membership available for purchase, Instacart+, which allows for members to receive $0 delivery fees on orders over $10. Plans include a $99 annual membership and a monthly membership of $9.99 per month. To further entice consumers, Instacart provides several free trials, one specifically taking place for 14 days. Aside from the fine print at the bottom of screens on the mobile platform, there is no specific distinction on the amount that will be charged once the free trial ends, often it being the $99 annual membership.

The fine print ensures consumers that they can "cancel anytime," yet when consumers realize they have been charged for a full membership without their consent and attempt to cancel it, they do not receive refunds despite not having placed any orders after being charged. The FTC asserted that there is no clear distinction of which membership is going to be charged and no consensual way for consumers to agree to continuing their subscription after the trial.

Next Steps for Instacart

Instacart has agreed to pay $60 million in refunds to settle the claims; the funds will be routed into a refund program and distributed to consumers who were charged misleading fees or enrolled in Instacart's recurring membership without clear consent. The FTC has stated that this payout will reach hundreds of thousands of affected customers, representing the wide-scale impact of Instacart's practices over many years.

Additionally, under the FTC's proposed settlement order, Instacart will be prohibited from making future misrepresentations about delivery costs, service fees, and guarantees per refunds, and will no longer be able to automatically enroll customers in paid memberships unless they opt in. Instacart has also been asked to bar its pricing tools driven by AI and various algorithms to ensure customers see accurate totals "at a time when families are working hard to stretch their grocery budgets."

Future Moves for Tech Companies and Consumer Protection

Consumer advocacy groups support the FTC's action, arguing that it demonstrates the continued relevance of traditional consumer protection laws as AI is developed. They emphasize that AI-enabled systems can increase harm at scale as well as the need for enforcement when deceptive practices are automated or personalized, signifying that companies must proactively audit AI tools for consumer harm to prevent such risks.

In contrast, several industry stakeholders and innovation-focused policy groups warn that aggressive enforcement could slow AI adoption and experimentation. An editorial in the *Wall Street Journal* and other pro-market commentators argue that algorithmic pricing tests and personalized user experiences are tools that can increase efficiency and consumer choice if properly deployed. They prefer federal guidance over enforcement-driven regulation surrounding AI compliance, with concerns that over-regulation may deter investment and disadvantage US companies in global competition.

Legal and policy experts argue that while the White House's AI Action Plan emphasizes deregulation and national competitiveness, it does not preempt agencies like the FTC from applying established statutes to AI-enabled conduct. The *Tech Policy Press* stated that it "stifles local initiatives to uphold civil rights and shield communities from biased AI systems." Companies are often then faced with dual options of fewer AI-specific rules but continued exposure to enforcement under general consumer protection standards.

Ultimately, the FTC's settlement order of Instacart highlights the unresolved tension at the center of AI governance and how best to encourage innovation and efficiency without eroding basic consumer protections. As pro-market voices caution that aggressive enforcement can impact beneficial experimentation, the FTC's action affirms that automation does not absolve companies of transparency, consent, or fairness obligations.

We will continue to monitor, analyze, and issue reports on these developments. Please feel free to contact us if you have questions about current practices or how to proceed.

Authors

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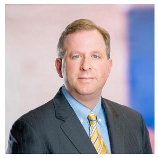

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