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Permalink

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Journal

Tobacco Control, 29(e1)

ISSN

0964-4563

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Publication Date

2020-12-01

DOI

10.1136/tobaccocontrol-2019-055354

Peer reviewed

Tobacco manufacturer lobbying to undercut minimum price laws: an analysis of internal industry documents

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► Additional material is published online only. To view please visit the journal online (<http://dx.doi.org/10.1136/tobaccocontrol-2019-055354>).

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Received 3 September 2019
Revised 19 November 2019
Accepted 11 December 2019

ABSTRACT

Background Increasing the price of tobacco products has the potential to reduce tobacco consumption.

As other forms of promotion have been increasingly restricted over time, tobacco manufacturers have relied more on trade discounts. Minimum price laws that prevented the use of manufacturer promotions were once common; however in most US jurisdictions these discounts are now legally protected.

Methods We collected tobacco industry documents, state legislation and court cases between 1987 and 2016 to review tobacco manufacturer strategies to change minimum price laws in the USA.

Results Beginning in 2000, tobacco manufacturers lobbied to amend minimum price legislation after state regulators indicated that manufacturer promotions were illegal under existing laws. Companies viewed changing these laws as critical to maintaining tobacco sales, and after the initiation of an industry lobbying campaign, at least 20 states changed the way they calculated tobacco prices.

Conclusions Modifying existing minimum price laws so that manufacturer discounts are no longer protected, and implementing new minimum price policies with comparable scope, would likely increase prices and reduce tobacco use.

INTRODUCTION

Tobacco is the leading preventable cause of mortality in the USA, causing over 480 000 deaths each year.^{1 2} In 1998 the US Master Settlement Agreement (MSA) between 46 states and major tobacco manufacturers restricted existing advertising venues for tobacco, including most forms of outdoor advertising and product placement.³ The 2003 WHO Framework Convention on Tobacco Control (FCTC) committed parties to implementing strong marketing restrictions around the world.⁴ Over the same time, governments increased tobacco excise taxes to generate revenues and reduce smoking prevalence.⁵ Tobacco manufacturer discounts to US cigarette retailers in 2017 totalled \$6.2 billion, representing 70% of advertising costs, up from 43% before the 1998 MSA.^{6 7} These promotions have expanded over time despite the existence of minimum price laws in over half of the states.^{8 9}

The tobacco industry has used targeted lower prices to increase consumption since at least the 1880s¹⁰ and this strategy has escalated as marketing restrictions increase.

Minimum price laws, also known as unfair cigarette sales acts (UCSAs), set a minimum price or minimum markup amount retailers apply to tobacco products above wholesale cost.^{8 9 11} States first

enacted UCSAs in the 1940s and these laws have historically covered at least half of the states.^{12–17}

The stated intent of these laws was to ‘avoid unfair competition and discrimination’.¹² Tobacco wholesalers and retailers were early supporters of UCSAs, which limited potential business cannibalisation by discounters willing to sell tobacco below cost to attract customers. Similar policies, also known as sales-below-cost laws, apply to other products including milk, alcohol and gasoline, and their application has been shown to decrease consumption.^{18–22}

Research has consistently found that increasing tobacco prices reduces consumption.^{23–27} The establishment of minimum prices has been an underappreciated public health intervention; the FCTC, for example, does not suggest extensive regulation on tobacco retailing.²⁸ Minimum price laws have not necessarily led to higher consumer prices.^{9 29–32} Although such laws can increase the cost of tobacco if legal calculations account for manufacturer discounts to retailers, few states do so.^{8 33}

Between 2001 and 2008, legislators in nearly every state with a minimum price law proposed revisions to protect tobacco manufacturers’ ability to offer trade discounts, and at least 20 states changed how they calculated prices. We sought to determine whether this change reflected tobacco industry advocacy. Internal industry documents³⁴ revealed that tobacco manufacturers developed an extensive lobbying campaign to protect trade discounts when calculating legal minimum prices to counter stricter tobacco control laws and market to price-sensitive smokers. Revising minimum price laws to block manufacturer promotions would undercut tobacco industry efforts to reduce the cost of tobacco and promote public health.^{23 28 31 35}

METHODS

Between June 2018 and July 2019, we searched the Truth Tobacco Industry Documents Library³⁴ using established snowball methods.^{36–41} We began with ‘minimum price’ and ‘unfair cigarette sales’; searches were refined using names of states, corporate departments and employees, campaigns by date and materials identified from nearby documents using Bates numbers. We screened documents for relevance and duplication, organised them into a timeline and summarised material when multiple documents made similar claims, with critical claims quoted exactly. Following standard practices, we triangulated these documents and with other sources, including news and research articles and the text of all proposed and passed legislation relative to tobacco from 2000 to 2019, which were drawn from Nexis Uni and state legislative archives.^{42 43}



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To cite: Apollonio DE, Glantz S. *Tob Control* Epub ahead of print: [please include Day Month Year]. doi:10.1136/tobaccocontrol-2019-055354

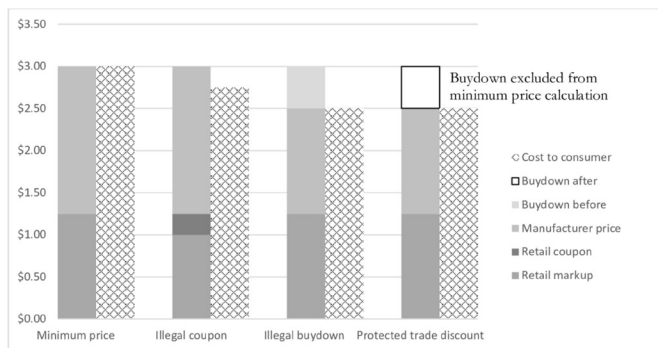


Figure 1 Legal price under different calculations.

Our final analysis included over 100 documents dated between 1987 and 2016. Additional details on methods are provided in the online supplementary file.

RESULTS

UCSAs and manufacturer promotions

A range of tobacco manufacturer promotions can reduce consumer prices, including coupons, which provide a discount to specific purchasers at the point of sale. Manufacturers can also provide promotions to specific retailers through ‘buydowns’.^{12 44} Tobacco manufacturers describe buydowns as “paperless coupon” promotions in which the manufacturer asks a retailer to reduce the price charged for a brand by a specific amount and pays the retailer the difference between its regular selling price and the ‘bought down’ price actually charged to the consumer during the promotion.¹² These targeted promotions allow manufacturers to reduce the costs for specific favoured retailers rather than to reduce prices uniformly. Retailers must qualify for buydowns, often by displaying promotional materials provided by manufacturers and meeting product placement requirements.⁴⁵

After the MSA, tobacco manufacturers lobbied for technical changes to state minimum price laws that reduced the prices consumers paid for cigarettes by excluding manufacturer promotions from the cost of the legally determined price. **Figure 1** shows a simplified example of the different components of ‘minimum price’ and how it could be manipulated.

- ▶ **Legal minimum price** (column 1): The state has set the minimum price of a pack of cigarettes at \$3.00, determining that cost of purchasing a pack of cigarettes from the manufacturer is \$1.75, and adding a retailer markup of \$1.25, which represents the retailer calculated costs (eg, estimated rent and labour). The consumer pays the required minimum price of \$3.00.
- ▶ **Illegal coupon** (column 2): Under minimum price laws, it is illegal for retailers to lower prices by offering a below-calculated-cost retailer-to-consumer coupon. In this example, the illegal \$0.25 coupon would leave the consumer paying \$2.75, which is less than the required minimum price of \$3.00.
- ▶ **Illegal buydown** (column 3): Minimum price laws may also make it illegal for the manufacturers to lower prices for specific retailers by offering a below-calculated-cost manufacturer-to-retailer buydown. In this example, the manufacturer provides an illegal \$0.50 buydown that would leave the consumer paying \$2.50, which is less than the required minimum price of \$3.00.
- ▶ **Protected trade discounts** (column 4): Some states allow manufacturers to lower prices for specific retailers by offering below-calculated-cost manufacturer-to-retailer buydowns. In

this example, the buydown is \$0.50, leaving the consumer to pay \$2.50. The \$0.50 buydown is excluded from the calculation of the minimum price for legal purposes—\$3.00—even though the manufacturer discount reduces the price smokers pay to \$2.50.

In practice, such calculations are usually more complicated because legal minimum prices are often determined by calculating discounts and markups on a percentage basis.⁴⁶

The 1990s: new (and sometimes illegal) manufacturer price promotions

Before the 1990s, states applied minimum price laws to protect wholesalers and retailers from discount outlets and the laws drew little attention from manufacturers.^{47–49} In 1987, when Nevada distributors convinced legislators to introduce an UCSA, the Tobacco Institute (the manufacturers’ lobbying organisation at the time) took no position on the bill.⁵⁰

In the early 1990s, UCSAs began interfering with new price promotions created by tobacco manufacturers. In 1993, Philip Morris learnt that not all retailers were able to use an intended price promotion to lower prices because some operated in states with minimum price laws.⁵¹ In 1994, for example, state regulators found that Ohio and Pennsylvania retailers violated state law by selling Philip Morris products below legally mandated prices.⁵² In response, the Pennsylvania Distributors Association, a trade association of tobacco wholesalers and retailers, advocated to modify the state’s UCSA to allow manufacturer promotions.⁵³ That same year, Lorillard executives found that Minnesota’s law could block their price promotions⁵⁴ and Minnesota wholesalers forwarded a letter from the state’s Department of Revenue to Philip Morris’ sales department stating that its manufacturer rebates were illegal.⁵⁵

By 1995, RJ Reynolds tracked and classified state UCSAs to determine how ‘strict’ they were, and whether they affected manufacturers or were ‘not enforced’.^{56–59} In 1996, Philip Morris noted that Minnesota’s law prohibited its buydowns.^{60 61} In 1998, Philip Morris and local tobacco retailers complained to the New Jersey Deputy Attorney General that the state’s UCSA should not apply to manufacturer promotions.^{62 63} In 1999, RJ Reynolds realised that in Arkansas, ‘all buydowns from cigarette manufacturers are not legal ... This will have impact on how we handle discounts’⁶⁴ and Philip Morris noted internally that the state was enforcing the law such that ‘nothing will be sold below state minimum’.⁶⁵

After the MSA: illegal price promotions become more important to manufacturers

In 2000, RJ Reynolds’ government relations group described manufacturers’ increasing concerns about state minimum price laws,^{66 67} noting that UCSAs limited the types, manner, cost and flexibility of manufacturer promotions, which were needed ‘to stimulate cigarette sales’.⁶⁸

The current environment surrounding the cigarette industry has caused manufacturers to promote more regularly, to offer higher price discounts and to target promotions more specifically to certain types of consumers or retail outlets. Causes for these increases in activity and value are:

- ▶ MSA regulation (which restricts traditional advertising venues).
- ▶ Higher excise taxes.
- ▶ Higher production costs.
- ▶ Competition for fewer smokers
- ▶ Competition from (discount brands) (bullets in original).⁶⁸

In March 2000, the Iowa Department of Revenue and Finance Compliance Division told tobacco distributors that it would 'become more aggressive in the enforcement' of the state's UCSA.⁶⁹ In April 2000, New York State regulators determined that manufacturer promotions could not be used to reduce retail prices.⁷⁰ In response, RJ Reynolds' sales departments complained to the company's government relations and legal departments that 'long standing [manufacturer promotion] programs are now considered a violation [of state law]'.⁷⁰ The Philip Morris Corporate Affairs division expressed similar concerns.⁷¹ By May 2000, it became clear to manufacturers that their post-MSA marketing strategies to reduce consumer prices were illegal under most existing minimum price laws.^{12 72 73}

The RJ Reynolds' government relations team summarised the problem for the sales and management groups in 2000:

[M]ost states ... stipulate that cigarette wholesalers and retailers in the state must be granted the same prices uniformly across the state in order for any pricing program to be legal ... Recently, the methods used by manufacturers to effect promotions have changed. In addition to the frequency and value of these promotions has increased. These changes have taken place because of changes in allowable methods for marketing cigarettes (ie, MSA restrictions) ... This has resulted in more selective placement of promotions, as opposed to placement with all wholesalers and/or retailers in a state ... some states have begun to restrict or even ban some forms of manufacturers' promotions [particularly buydowns] as a violation of their UCSAs ...¹²

The team noted that this situation created 'significant problems in effectively marketing ... consumers will be faced with consistently higher prices...¹² UCSAs were blocking the companies' use of selective price promotions as marketing devices.

2000–2010: tobacco manufacturers revised laws to protect price promotions

In May 2000, the RJ Reynolds' government relations group created a list of states with minimum price laws that it believed were 'most likely to create a "New York-Style" promotional crisis ... [A]ny state listed below [could] institute a full or partial promotional ban based on existing law'.¹² The company divided the states with minimum price laws into categories indicating perceived likelihood of enforcement, noting additional states where existing law did not affect promotional activity (table 1).¹² They complained that states were unwilling to 'administer laws flexibly'.⁷⁴

To address this concern, in June 2000 RJ Reynolds, the manufacturer that had self-identified as most dependent on price

promotions,⁷⁵ began a coordinated campaign in collaboration with regional directors at Brown & Williamson, Lorillard and Philip Morris to amend state minimum price laws to permit manufacturer promotions.^{76 77} As of July 2000, these companies had collected the text of existing state laws for legal review. Lawyers working for the RJ Reynolds' government relations groups concurred with state regulators that most state laws either 'expressly' banned manufacturer promotions or clearly intended to do so.^{78–80} The industry group determined that working directly with enforcement agencies or litigating was unlikely to be successful due to regulatory efforts to reduce tobacco use, and because prior court challenges of pricing restrictions had failed.⁶⁸ Following this determination, RJ Reynolds' government relations group began drafting amendments to existing state laws to specifically allow manufacturer promotions.^{78–80}

By August 2000, the RJ Reynolds-led lobbying effort had created a list of 'allies by state',⁸¹ although it expressed concern that there had been 'erosion of support'.⁸² At the same time, it developed plans to intervene in states that were most likely to enforce their laws.^{83–85} In September 2000 meeting, the lobbying team concluded that 'the best course of action is to concentrate the initial efforts in states where the risk of excessive enforcement under current law is considered to be the greatest'.⁸⁶ In Ohio, for example, RJ Reynolds' regional sales directors believed enforcing state law as written would 'alter or eliminate the company's marketing practices'.⁸⁷ As a result, the group concluded that 'acquiescence (is) not a viable option'.⁶⁸

In November 2000, the lobbying group finalised proposed amendments to state laws. '[M]anufacturers promotions do not fall within the operation of the UCSA ... states with UCSAs can still protect wholesalers and retailers from unfair competition within each group because wholesalers and retailers would still be prohibited from selling below cost ... at the same time, manufacturers could run promotions benefiting consumers without fear of challenge under these laws'.⁸⁸ Amending existing laws would allow manufacturers to discount the cost of cigarettes to consumers by excluding manufacturer promotions from minimum price calculations, legalising an actual cost to consumers below the nominal legal minimum price (figure 1, column 4). The lobbying team focused on amending state laws because 'legislation can specifically address concerns, can be pursued prior to the development of an emergency situation, can be quietly abandoned if badly received, if successful, conclusively fixes the problem'.⁶⁸

In December 2000, RJ Reynolds' lobbying team picked five states as priority targets, although it did not describe the reasoning behind these choices.⁸⁹ In statements drafted for advocacy, they argued that '[s]tate unfair cigarette laws should not be used to bar manufacturer price promotions' because if they did, 'such promotions will be driven out of the tobacco industry' leading consumers to purchase cigarettes in lower tax localities (emphasis in original).⁹⁰ In contrast, the company knew, based on internal research, that most consumers would not travel to lower-cost areas.⁹¹ That month, as RJ Reynolds anticipated, the Nebraska Department of Revenue determined that manufacturer promotions could not be used to reduce consumer prices under existing law.⁹²

At the beginning of 2001, RJ Reynolds' government relations' second highest priority, after blocking tobacco tax increases, was to preserve manufacturer price promotions by changing state laws^{93 94}; Lorillard expressed similar concerns.⁹⁵ RJ Reynolds' lobbying team added five more states to its 2001 target list.⁹⁶ By February 2001, the RJ Reynolds' government relations team advocated to change minimum price laws to protect

Table 1 States classified by their likelihood of enforcing minimum price laws according to RJR in 2000¹²

Most likely	Somewhat likely	Least likely	'No problems'
Arkansas	Connecticut	Delaware	California
Iowa	Indiana	District of Columbia	Colorado
Massachusetts	Maryland	Kentucky	Hawai'i
Nebraska	Mississippi	Louisiana	Idaho
New Jersey	Montana	Minnesota	Maine
Ohio	Rhode Island	Nevada	North Dakota
Pennsylvania	Wisconsin	Oklahoma	Wyoming
		South Dakota	
		Tennessee	
		West Virginia	

RJR, RJ Reynolds.

manufacturer promotions in eight more states.⁹⁷ The same month Lorillard sued the New York Department of Taxation to reinstate Lorillard's price promotions.⁹⁸ In March, legislators introduced multiple bills to protect manufacturer discounts; in Arkansas, for example, a bill sought to 'clarify that cigarette manufacturers buy down (or paperless coupons) for reducing the retail sales price of cigarettes sold by Arkansas retailers do not violate the provisions of the Unfair Cigarette Sales Act'.⁹⁹

In April 2001, the RJ Reynolds' lobbying team reported that amendments of state minimum price laws to protect manufacturer promotions were introduced in Louisiana¹⁰⁰ and passed in West Virginia.¹⁰¹ In May, RJ Reynolds reported both regulatory setbacks and legislative successes.¹⁰²⁻¹⁰⁴ By June, nine states had introduced amendments to protect manufacturer promotions, including Minnesota; many used language drafted by RJ Reynolds' lobbyists.^{103 105-107} At the end of 2001, five states had passed legislation that changed the method of calculating prices and one had relaxed regulatory enforcement (Nebraska).^{106 108-115} RJ Reynolds received occasional input from counterparts at Lorillard and Brown & Williamson throughout this time period.

At the beginning of 2002, RJ Reynolds' government relations team believed that amendments protecting manufacturer promotions would pass in at least four more states that year, might pass in another and were unlikely in one more.¹¹⁶⁻¹²⁰ The team later noted that its bill was enacted in Ohio in June¹²¹; ultimately at least three states modified their method of calculating prices in 2002.¹²¹⁻¹²³

In 2003, Lorillard's 2001 lawsuit against the New York Department of Taxation to protect industry promotions failed, as the company had originally anticipated in drafting a plan that focused on legislative advocacy.¹²⁴ Its legislative efforts had been more successful. RJ Reynolds' lobbyists reported in March 2003 that new bills had been introduced in seven states.^{125 126} At the end of 2003, nine states had amended legislation on cigarette price calculations.¹²⁷⁻¹³⁵ A year-end report prepared for RJ Reynolds by the management consulting firm Booz Allen Hamilton noted that 18 of the 26 states with minimum price laws protected manufacturer promotions, and that 'we don't expect mandated price increases in any of the states'.¹³⁶

RJ Reynolds noted in its retail plans for 2004 that it would continue to expand manufacturer promotions.¹³⁷ In 2004 and 2005, modifications of price calculations passed in two additional states.^{138 139} Minimum price laws were also undervalued by governments outside the US; in 2006, the European Union (EU) supported the tobacco industry's position on minimum price laws by preventing six member states from creating them.^{140 141}

In 2007, RJ Reynolds created a 'New Growth Innovation Roadmap' that ranked the threat of existing and potential regulation from 'Important' to 'Not important'. The company's worst-case 5-year scenario planning explained that addressing minimum price regulation was 'Important' because 'states (could) ban differential discounting by interpretation of fair trade laws'.¹⁴² RJ Reynolds' October 2008 internal corporate report concurred, noting that discounting was important 'to marketplace performance. We use the \$2.5 billion (we spend on) discounting to negotiate with (retailers)'.¹⁴³

At least one more state amended its cigarette price calculation in 2008.¹⁴⁴ In 2000, RJ Reynolds had ranked states by their likelihood of creating a 'promotional crisis' due to regulatory agencies enforcing existing laws (table 1). By 2009, after the company's lobbying campaign, 71% of the states it identified as 'most likely' to do so had modified their laws, as well as 57% of those identified as 'somewhat likely', half of those listed as 'least likely' and a handful of others.

DISCUSSION

Beginning in 2000, tobacco manufacturers sought to modify state minimum price laws and their enforcement because price promotions had become critical to attracting and retaining consumers after stricter tobacco control policies, particularly the MSA, eliminated or restricted traditional marketing options. When manufacturers realised that existing state minimum price laws made their promotional techniques illegal, they sought to change them to allow tobacco manufacturers to continue to manipulate consumer prices. Proposed modifications to state minimum price laws drew limited attention or opposition from health advocates at the time.¹⁴⁵

A 2015 University of Chicago report on state tobacco laws found that of the 31 states with minimum price laws, 26 protected manufacturer promotions and that only four had adjusted the amount or percentage by which they marked up prices since 2005.³³ Protecting manufacturer promotions in minimum price laws undercuts these laws' public health effectiveness; these promotions reduce the consumer costs of tobacco so much so that consumers in states with these laws pay prices comparable with consumers in states without them.^{23 33 35} Rapid development of alternative tobacco products further undercuts the effectiveness of existing laws. Even states with minimum price laws apply them primarily to combustible cigarettes; only seven states cover other nicotine and tobacco products.³³ Current minimum price laws are ineffective not only because they allow manufacturer promotions, but also because their scope is generally limited to a single product type: combustible cigarettes.

Price promotions have allowed manufacturers to attenuate the effects of state and local excise tax increases, which would otherwise reduce cigarette consumption by raising consumer prices. Legal protection of manufacturer promotions under minimum price laws has allowed the tobacco industry to blunt the effects of increased taxes, and led to price promotions becoming the tobacco industry's largest share of advertising.⁶ Many states and countries have not established minimum price laws at all.

The efforts of tobacco manufacturers to undercut the effectiveness of minimum price laws were unrepeated at the time they happened, and these policies have remained largely unchanged for over a decade. More recently, however, localities have addressed tobacco discounts. In 2013, Providence, Rhode Island banned price discounting with support from the Centers for Disease Control and Prevention and the Tobacco Control Legal Consortium; this intervention was specifically designed to address weaknesses in the state law and survived multiple tobacco industry lawsuits.¹⁴⁶ In 2014, New York City established a floor price for cigarettes and little cigars¹⁴⁷ and expanded the scope and minimum price in 2018¹⁴⁸; Chicago created a similar policy in 2016.³³ This example demonstrates the opportunities for localities, states and countries to implement laws and policies that limit promotions and reduce manufacturers' ability to manipulate prices, unless state or national preemption prevents them from doing so. These cases also suggest that tobacco companies' recent efforts to rebrand themselves as 'good corporate citizens' are discarded when tobacco sales are threatened.

Our findings have limitations. Tobacco industry documents provide incomplete information and corporate lobbyists have incentives to overstate their effectiveness. To address this, we sought to validate their claims about bills introduced and legislation enacted in external archives. Certain potentially relevant documents were marked as confidential or privileged communication, and so not public.^{149 150} Although our findings suggest that tobacco companies successfully lobbied multiple states to

change their laws given the use of industry-generated language in proposed and enacted legislation, states may have enacted these changes for independent reasons. There is limited research on ways that tobacco companies using specific pricing promotions for different product lines (eg, premium vs discount brands); having these data would be useful in enforcing and modifying tobacco control policies addressing prices.

Although tobacco control advocates have devoted little attention to minimum price laws as policy interventions,²⁸ these laws can work in tandem with tax increases to raise prices and reduce tobacco use and health disparities.²³ As long as tobacco price discounts are protected by state law, these benefits will not be realised. Revising and expanding minimum price laws to eliminate manufacturer promotions and cover alternative nicotine and tobacco products could further reduce tobacco use and tobacco-induced disease.

What this paper adds

What is already known on this subject

- ▶ Although multiple jurisdictions have laws that set a minimum price for tobacco, typically consumers in jurisdictions with these laws pay prices comparable with consumers in jurisdictions without them. This is caused in part because many existing laws allow tobacco manufacturers to provide discounts that lower consumer prices below the legal minimum price.

What important gaps in knowledge exist on this topic

- ▶ Despite increasing interest in revising minimum price laws so that they account for trade discounts in the calculation of legal prices, the original justification for privileging manufacturer promotions in these laws is unclear.

What this paper adds

- ▶ Our research identifies how minimum price laws were originally formulated, and how they were later amended to protect manufacturer promotions. Tobacco manufacturers view these promotions as critical to retaining current smokers.

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Contributors DEA and SG conceived and designed the paper, interpreted the results, reviewed and revised the manuscript in preparation for publication and read and approved the final manuscript. DEA wrote the first draft.

Funding This study was funded by National Cancer Institute (<http://dx.doi.org/10.13039/100000054>) grant number: 087472.

Competing interests None declared.

Patient consent for publication Not required.

Provenance and peer review Not commissioned; externally peer reviewed.

Data availability statement Data are available in a public, open access repository. The data used in this paper are publicly accessible from the Truth Tobacco Industry Document Library at <https://www.industrydocuments.ucsf.edu/tobacco/>.

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