



Maximizing the Effectiveness of Public Health Strategies

Reducing Tobacco Use and Access Through Strengthened Minimum Price Laws

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Higher prices reduce consumption and initiation of tobacco products. A minimum price law that establishes a high statutory minimum price and prohibits the industry's discounting tactics for tobacco products is a promising pricing strategy as an alternative to excise tax increases.

Although some states have adopted minimum price laws on the basis of statutorily defined price "markups" over the invoice price, existing state laws have been largely ineffective at increasing the retail price.

We analyzed 3 new variations of minimum price laws that hold great potential for raising tobacco prices and reducing consumption: (1) a flat rate minimum price law similar to a recent enactment in New York City, (2) an enhanced markup law, and (3) a law that incorporates both elements. (*Am J Public Health*. 2014;104:1844-1850. doi:10.2105/AJPH.2014.302069)

EACH YEAR, APPROXIMATELY 480 000 people die from tobacco-related disease in the United States, making tobacco-related disease the leading cause of preventable death in the nation.¹ In response, state and local

governments have employed a wide variety of policy and programmatic strategies to reduce the burden of tobacco-related disease and death.

Extensive research has shown that when tobacco prices increase, fewer people begin using tobacco, more people quit, and continuing users reduce their consumption.¹⁻⁴ This is especially true for youths and other price-sensitive populations.⁵⁻⁸ The tobacco industry has understood the relationship between tobacco prices and consumption for many years⁵ and has devised numerous strategies to manipulate tobacco prices.^{5,9} In 2011, cigarette manufacturers spent \$7 billion dollars—83.6% of total promotional expenditures—on programs designed to lower the real cost of cigarettes to consumers.¹⁰ Tobacco companies also spent more than \$168 million—37.4% of total promotional spending—on similar strategies to reduce the price of smokeless tobacco.¹¹

We reviewed 3 existing strategies that are currently used to regulate the prices of cigarettes and tobacco products. We have described the advantages and limitations of those strategies and models for 3 novel minimum price laws that could more effectively increase

price, thereby having a greater impact on tobacco consumption.

EXISTING CIGARETTE AND TOBACCO PRICING STRATEGIES

Three primary policy strategies that are intended to directly regulate the price of cigarettes have been employed in the United States: excise taxes, markup-style minimum price laws, and laws prohibiting specific price discounting tactics. Although these strategies can, and should, be used in conjunction with each other, to date they have rarely been used as part of a coordinated pricing strategy.

Excise Taxes

Tobacco taxes are the most common approach that governments use to increase revenue and raise tobacco prices and have been called the single most effective tobacco control intervention.¹² In addition to increasing price, excise taxes generate significant government revenue that can be partially or entirely earmarked for tobacco use prevention and cessation programs, research, or treatment.

Although every state has imposed a cigarette excise tax at some level, increasing taxes

further is not politically feasible in many jurisdictions because of a lack of political will among legislators or a lack of popular support, sometimes coupled with supermajority voting requirements for tax measures and gubernatorial veto power. Moreover, local excise taxes were imposed in only 7 states in 2011, largely owing to state preemption of local taxes.¹³

Furthermore, increasing an excise tax without an accompanying restriction on price discounting does not preclude the tobacco industry from employing additional price reduction programs to blunt the effect for price-sensitive consumers, thereby undermining its public health impact.⁷ For example, after the 2009 federal excise tax increase of \$1.01 per pack, Phillip Morris stated its intention to offset the tax increase with coupons and discounts for smokers who were registered with Marlboro.¹⁴

In short, although excise taxes remain a critical tobacco control strategy, political barriers often prevent tax increases, and the tobacco industry has found ways to dilute the effectiveness of tax increases as a public health intervention by stepping up retail price discounting.



Minimum Price Laws

Before 2013, 24 states and the District of Columbia had enacted legislation requiring cigarettes to be sold at higher than a statutory minimum price.¹⁵ These state-level cigarette minimum price laws generally have been modeled after each other and therefore have many common characteristics. Most notably they are all “markup”-style laws requiring a minimum percentage markup at both the distributor and retailer levels, starting with the invoice price as a baseline (i.e., the retail price must be a specified percentage higher than the wholesale price, and the wholesale price must be a specified percentage higher than the invoice cost to the distributor). These laws were mostly enacted decades ago to help small retailers by preventing unfair business practices such as loss leader sales—selling cigarettes at a loss to lure customers and recouping lost profits through the sale of other products that the customer is likely to buy once inside the store.¹⁵

An analysis of scanner data (retail purchase information gathered electronically at the point of sale) has shown that retail cigarette prices are not higher in states with minimum price laws, in part because existing laws merely prohibit the sale of tobacco below cost or require only a very small percentage markup.¹⁶ In addition, existing state minimum price laws include significant loopholes that undermine their effectiveness, such as allowing coupons and other discounts to reduce the sale price below the statutory minimum.

In November 2013, the New York City Council adopted a

minimum price ordinance (referred to as the Sensible Tobacco Enforcement ordinance) as a public health measure that addresses many of the loopholes that have been identified in state minimum price laws.¹⁷ The New York City ordinance establishes a single “flat rate” minimum price for cigarettes and little cigars and prohibits certain price discounting tactics. The ordinance may be implemented any time after June 18, 2014, after a federal district court judge rejected constitutional challenges the National Association of Tobacco Outlets raised that were very similar to those it argued unsuccessfully against in the Providence, Rhode Island, ordinance prohibiting industry price reduction practices (discussed next).¹⁸ Although it will not yield evaluation data for some time, the ordinance contains many of the provisions that should be included in a strong minimum price law.

Prohibitions on Industry Price Reduction Practices

A third type of pricing strategy that is currently employed in a limited number of jurisdictions prohibits specific price discounting schemes, such as the redemption of coupons or multipack offers. These types of laws have generated interest in recent years but have been adopted in only 2 jurisdictions thus far, Providence, Rhode Island, and New York City, and are therefore relatively untested. Moreover, they require careful crafting to avoid unintended loopholes. For example, because the tobacco industry employs a broad array of tactics to lower retail prices (and continually devises new tactics), it is difficult to

craft a policy that addresses every foreseeable category and permutation of industry price discounting tactics. Therefore, to remain effective this type of policy must be revised periodically as new industry strategies emerge.

Moreover, the tobacco industry and retailers will continue to claim that some industry price reduction practices are constitutionally or statutorily protected because they constitute “promotion” or “commercial expression.” These legal issues have begun to play out in courts of law but likely will not be resolved for many years.

Nonetheless, there remains great interest in laws directly prohibiting the retail price manipulation tactics of the tobacco industry. In January 2012, the City of Providence, Rhode Island, adopted a tobacco pricing ordinance that prohibits tobacco retailers in the city from redeeming coupons, selling multipack tobacco products, and offering certain pricing discounts for tobacco products.¹⁹ New York City’s Sensible Tobacco Enforcement legislation contains similar provisions.¹⁷

The National Association of Tobacco Outlets led a coalition that sued the City of Providence, challenging the constitutionality of the ordinance on preemption and First Amendment grounds.²⁰ In September 2013, the First Circuit Court of Appeals affirmed the lower court’s ruling that the law does not violate the First Amendment, finding that the limitations relate to sales practices and not to protected commercial speech.²¹ That same conclusion supported the court’s finding that the law is not preempted by the Federal Cigarette Labeling and

Advertising Act (FCLAA), which preempts state or local regulations limiting the advertising or promotion of cigarettes.²¹

This favorable ruling on the Providence ordinance could lead to more laws prohibiting retail price manipulation tactics. Although these types of laws may never be sufficiently comprehensive to address all retail price discounting tactics, they can be an effective complement to both excise taxes and minimum price laws.

CRAFTING A MORE EFFECTIVE MINIMUM PRICE LAW

Whereas existing state-level minimum price laws were enacted to protect economic competition, a strongly crafted law that establishes high minimum prices and eliminates loopholes can be adopted as a public health measure designed to increase prices and reduce consumption of tobacco products. This purpose is significant legally, but it is also significant for building popular and political support. The health risks of tobacco use are overwhelming and well documented; those risks can be used to persuade policymakers and the public about the need for this type of intervention.

There are 3 alternative approaches to a stronger minimum price law: a flat rate law, an improved markup law, and a hybrid law that incorporates elements of both. Although a state or municipality can adopt each of these approaches, most local governments (except for those in the largest cities and counties) probably lack the personnel and infrastructure



necessary to effectively implement a minimum price law.

Flat Rate Minimum Price Law

A flat rate minimum price law simply establishes an explicit baseline statutory minimum price below which tobacco products may not be sold (e.g., \$8.00 per package of cigarettes) and requires the minimum price to be adjusted annually on the basis of inflation. Rather than affecting the price of all cigarettes (or tobacco products), products that are usually priced above the statutory minimum would be unaffected, whereas all products that are typically priced below the minimum price must be removed from the market if the price is not increased.

Although this approach is untested, New York City’s Sensible

Tobacco Enforcement legislation (signed into law in November 2013) establishes a flat rate minimum price of \$10.50 for a package of cigarettes and an equivalent floor for little cigars.¹⁷ This law, which also prohibits many specific price discounting tactics, is the first in the United States to establish a flat rate minimum price.

Stronger Markup Minimum Price Law

Existing markup minimum price laws have not been effective at increasing the overall price of cigarettes because of the industry discounting strategies and other loopholes that bring prices below the statutory minimums. A stronger markup law would require retail percentage

markups that are higher than those that currently exist and eliminate loopholes that allow sales below the statutory minimum price.

Nonetheless, enforcement challenges will persist for a policy that establishes a separate minimum price for all brands of cigarettes on the basis of the invoice price the tobacco industry sets. For effective enforcement, both retailers and government officials will need to monitor minimum prices for all brands sold in the state to ensure compliance and will also need to ensure that invoice costs and markups are accurately calculated. Although this will require diligent enforcement, it can work effectively with a coordinated effort among the government agencies involved in enforcing tax laws and

other laws requiring inspections in the retail environment.

Hybrid Minimum Price Law

A third option is a combination of the 2 approaches—to establish a flat rate minimum price and require a substantial percentage markup for all products above the flat rate minimum.

This approach is the most comprehensive; it increases the price of higher tier brands and eliminates deeply discounted brands that sell below the statutory minimum (Table 1).

COMPARISON OF THREE MINIMUM PRICE APPROACHES

Although the 3 approaches have commonalities, significant

TABLE 1—Characteristics and Market Effects of Proposed Model Minimum Price Laws

Type of Minimum Price Law	Description	Characteristics and Potential Effect on Market
1. Flat rate minimum price	Sets a specific floor price below which no tobacco product may be sold	<p>Would create a baseline minimum price, simplifying implementation and enforcement.</p> <p>Tobacco companies could continue to set their own retail prices as long as they are above the amount established by law. “High end” tobacco products would be unaffected by law.</p> <p>Requires automatic inflationary adjustments in the law or updates at regular intervals to keep pace with inflation.</p>
2. Markup minimum price	Requires high minimum percentage markup at the retail level from an identified baseline price (e.g., list price or wholesale price)	<p>Would not require adjustments for inflation.</p> <p>Would create a distinct minimum price for each of the hundreds of brands of tobacco products on the market, and the minimum prices would change over time, complicating compliance and enforcement.</p> <p>Tobacco companies may be able to manipulate the base cost identified in the law to lower the minimum retail price.</p>
3. Hybrid flat rate or markup law	Requires high minimum percentage markup at the retail level and sets a specific price floor below which no tobacco product may be sold	<p>Would create both a baseline minimum price and a product-specific minimum price for each of the hundreds of brands of tobacco products above the baseline floor price.</p> <p>As with the flat rate price alone, this approach requires inflationary adjustments.</p> <p>Tobacco companies still may be able to manipulate the base cost on which the markup is based to lower minimum price.</p>



differences exist in reach, implementation, and enforcement.

Noncigarette Tobacco Products and Evaluation

Each of the 3 approaches can be used to establish a minimum price for both cigarettes and noncigarette tobacco products. As cigarette use among youths significantly declined between 2003 and 2011, the prevalence rate for other tobacco products such as cigars, hookahs, dissolvable tobacco, and electronic cigarettes have increased among youths.²² Therefore, a pricing strategy that increases the prices of these products is critical to address youths' use and initiation.

Calculating the appropriate minimum price for other tobacco products, however, will be challenging because of the variation in the number and type of different noncigarette tobacco products, including smokeless tobacco and electronic smoking devices. Combining a minimum price law with a minimum package size requirement (such as the 20-per-pack minimum for cigarettes) could help create uniformity for noncigarette tobacco products. In addition, state laws that tax other tobacco products at a rate designed to be equivalent to cigarettes can provide guidance for calculating an equivalent minimum price for some noncigarette products; establishing minimum prices for other products will likely require input from state tax professionals and public health economists.

Also, to determine whether a strong minimum price law is an effective tobacco control strategy,

it is critical to evaluate whether the law actually results in higher tobacco prices and its effect on consumption patterns and ultimately smoking rates. Therefore, a strong policy must incorporate an evaluation component, regardless of which approach is used.

Different Effects of Flat Rate and Markup Laws

Flat rate, markup, and hybrid minimum price laws share the goal of raising prices high enough to reduce consumption, but the approaches differentially affect tobacco products at different price points.

A flat rate law would bar the sale of very cheap products that historically are sold below the minimum price (except perhaps those that are normally priced very close to the minimum price, for which the price may be slightly increased to comply with the law). Higher end products, priced above the floor price, would be unaffected by the law. By contrast, a markup law does not completely eliminate any products. All brands become more expensive by a certain percentage, but very cheap products may still exist. A hybrid approach combines the effects of both a flat rate and a markup law. All tobacco product prices would increase, and very cheap products would be eliminated from the market altogether.

Implementation and Enforcement Considerations

No law is effective without an effective implementation and enforcement plan. A flat rate law resulting in a single minimum price is much simpler for retailers

and enforcement officials than a markup or a hybrid law, which results in a different price for each brand. But even a markup law does not necessarily require creating entirely new enforcement procedures; any minimum price law could be incorporated with other laws that are monitored in the retail environment. For example, every state enforces its tobacco tax laws, often through retail inspections that could be expanded to include price inspections as well. In addition, most states and many local governments effectively use tobacco retailer licensing to enforce not only tax laws but also other laws in the retail environment (such as youth access laws).²³ A minimum price law could be incorporated into a licensing system as a separate condition of the license.

By leveraging existing enforcement mechanisms, it is more likely the law will be properly enforced. Nonetheless, insufficient enforcement has been one of the primary reasons (along with industry discounting and modest markup percentages) that existing minimum price laws have not resulted in higher prices.¹⁶ To avoid the same problem, a specific enforcement plan must be developed along with a minimum price policy, designating a primary enforcing agency, mandating a minimum number of compliance inspections, and instituting a system to monitor enforcement efforts to determine if changes are necessary.

Eliminating Loopholes

Eliminating loopholes is also necessary for a successful law. A

common loophole in most existing minimum price laws is that they do not prohibit coupons and other discounts that drive the ultimate sale price below the statutory minimum.¹⁵

A strong policy must address this loophole by prohibiting common discounting tactics the tobacco industry uses, such as coupon and multipack offers. This type of prohibition is not widely employed but is an effective complement to both excise taxes and minimum price laws. An estimated 55.4% of adults who smoke use some price minimizing strategy and save an average of \$1.27 per pack.²⁴ Failure to address coupons, multipack offers, and other common discounts would significantly undermine the effectiveness of any minimum price law.

In addition to the loophole allowing coupons and other discounts, many existing laws allow a retailer to sell products below the statutory minimum price to match a competitor's prices.²⁵ This type of exception makes sense for a law designed to promote economic competition but is not appropriate in a law designed to protect public health.

POTENTIAL UNINTENDED CONSEQUENCES OF A MINIMUM PRICE LAW

A law establishing a high minimum retail price for tobacco products has potential unintended consequences that should be monitored and evaluated as the law is implemented. When contemplating potential unintended consequences, it is important to note that the goal of a strong



minimum price law is to reduce tobacco use and initiation and that a pricing law should be implemented as part of a comprehensive tobacco control strategy that includes both policy and programmatic interventions to change social norms around tobacco use and assist users to quit.

Foremost, because smoking rates among low-income populations are higher than are those in other income groups, a price increase for cigarettes and other tobacco products has the potential to impose a disproportionate financial burden on these individuals, especially those who are addicted.²⁶ However, because low-income tobacco users are also particularly responsive to price changes, a price increase should lead to the largest declines in smoking among this group,^{26–28} especially as part of an overall strategy supplemented with culturally appropriate interventions designed to facilitate smoking cessation in low-income communities and communities of color and to reduce the prevalence of tobacco in these communities.²⁹

Because the highest rates of tobacco-related illness occur within low-income communities, the anticipated health benefits occur at a higher rate among disadvantaged individuals. However, low-income tobacco users who do not change their behavior by quitting or cutting back will pay disproportionately more for their cigarettes when prices rise.

Higher tobacco prices may lead price-sensitive smokers to respond by purchasing cheaper cigarettes from outside the state on the contraband market.³⁰ For a strong

minimum price law to effectively reduce tobacco use, it is critical that a state or local government adopt and enforce equally strong laws prohibiting sales of contraband tobacco products.

Even if cigarette users are not driven to a contraband market, they may experiment with other tobacco products, as some degree of tobacco product substitution occurs when cigarette prices are high relative to the price of smokeless and other tobacco products.³¹ For this reason, an effective policy should also mandate minimum prices for other tobacco products, coupled with cessation programs and policies to limit the availability of all tobacco products in low-income neighborhoods, which have been hit the hardest by the negative effects of tobacco use.

LEGAL ISSUES

A law that mandates a specific price structure for a heavily regulated product like tobacco raises several legal issues. The FCLAA and the First Amendment to the US Constitution are raised in nearly every legal challenge to a tobacco control intervention and federal antitrust laws are relevant to a pricing regulation. The goal is to develop price-related policies that avoid running afoul of these 3 legal hurdles.

Federal Cigarette Labeling and Advertising Act Preemption

The FCLAA states, “No requirement or prohibition based on smoking and health shall be

imposed under state law with respect to the advertising or promotion of any cigarettes.”³² In 2009, the federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) added language to FCLAA to allow state or local governments to impose “specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”³³ (Note that FCLAA applies only to cigarettes and not to other tobacco products.)

Because a minimum cigarette price policy is designed to protect public health and is a law “based on smoking and health,” FCLAA would be a potential legal barrier if (1) a court were to find that this type of regulation, including the prohibition on coupons or multipack offers, constitutes a “requirement . . . with respect to . . . promotion of any cigarettes”³² and (2) none of the exceptions the Tobacco Control Act inserts apply.

No court has analyzed a minimum price law under FCLAA, which has most often been analyzed in the context of distribution of free samples of cigarettes. In those cases, the courts have interpreted “promotion” quite broadly and often turned to the word’s dictionary definition.³⁴ Indeed, 4 of the 5 courts that have taken up the issue have determined that distribution of free cigarette samples constitutes promotion.³⁵ By contrast, the California Supreme Court found exactly the opposite—that distribution of free cigarette samples is not promotion—and strongly suggested that a minimum price law would also not regulate promotion.³⁶ In light of

this judicial conflict, the industry will argue that minimum price legislation that prohibits specific discounting tactics also constitutes a regulation of promotion under the FCLAA.

However, it is important to note that the sampling cases were all decided before FCLAA was amended by the Tobacco Control Act. Even if a minimum price law or prohibitions against price discounting tactics were found to fall within the scope of FCLAA (which is uncertain and likely depends on the court), if challenged, both stand a good chance of being upheld under the exceptions the Tobacco Control Act added for regulations affecting the “manner, but not the content” of promotion.³³

The trial and appellate courts that decided the case upholding the Providence, Rhode Island, ordinance banning coupon redemption (but not distribution) and multipack sales are the only courts to discuss the “manner” exception at length as of the time of drafting of this article. Both courts concluded that the Providence ordinance does not regulate the content of the promotional materials but merely how cigarettes can be sold and purchased and therefore is not preempted by FCLAA.²¹ If other courts were to follow the lead of the First Circuit Court of Appeals (which reviewed the Providence case), FCLAA would similarly pose no barrier to a strong minimum price policy.

First Amendment

The First Amendment to the US Constitution forbids the government from making any law “abridging the freedom of speech.”



In addition to protecting the expression of private individuals, in the past 40 years the First Amendment has also been interpreted to protect corporate advertising and promotion—in legal terms, “commercial speech.”³⁷ Under Supreme Court case law, this has come to mean that the right of corporations to advertise and promote their products and services can outweigh the government’s right to regulate commercial speech to safeguard public health, safety, and welfare.³⁸

However, the First Amendment poses no barrier to a policy that focuses solely on prices and sales practices and does not regulate advertising and promotion.³⁹ For that reason, a strong minimum price law that prohibits specific discounting practices should be framed as an intervention that solely addresses pricing practices with the goal of reducing consumption of tobacco products. Even so, the tobacco industry would likely argue that the First Amendment is implicated by a minimum price policy that also prohibits discounting practices such as coupons and multipack offers, characterizing these discounts as protected commercial speech.

In September 2013, the First Circuit Court of Appeals analyzed just such a First Amendment challenge, again involving the Providence pricing ordinance that prohibits the redemption (but not distribution) of coupons and sales of tobacco multipacks.²¹ The appellate court found no First Amendment violation, because the restrictions were merely a means to control the price of tobacco products and did not

implicate commercial speech at all—the law did not restrict the tobacco companies’ ability to distribute coupons and advertise and promote their products.²⁰

In light of this decision, a strong minimum price policy can establish a statutory price for sales of cigarettes and tobacco products and prohibit price reductions through coupons or multipack offers. To be effective, the law should not prohibit advertising or promotion, which could trigger First Amendment protections. Rather, the policy should focus narrowly on restricting certain sales practices to avoid First Amendment concerns.

Antitrust Laws

Antitrust laws are a low hurdle to a pricing law but bear mentioning because of the close relationship between price and antitrust historically. Federal and state antitrust laws generally prohibit private conduct that interferes with free and open competition.⁴⁰ In other words, they forbid businesses from engaging in anticompetitive collusion or attempts to monopolize, and they prohibit laws that foster or require such private collusion.

Existing minimum price laws for cigarettes are themselves antitrust laws, because they are intended to prohibit large retailers from using cigarettes as a loss leader to drive out competition in the marketplace. The minimum price laws should not violate antitrust laws as long as they are unilaterally imposed by the government—without allowing involvement of tobacco manufacturers, wholesalers, and retailers in

creating pricing restrictions and setting the minimum price.⁴¹

CONCLUSIONS

There are several policy approaches to directly regulate the retail price of tobacco products, including excise taxes, antiprice discounting laws, and existing minimum price laws. Although each of these policies can be effective at reducing consumption of and access to tobacco products, a tightly drafted and comprehensive minimum price law that causes a substantial increase in the price of tobacco while banning price discount tactics could address some of the political and practical challenges that have been identified with existing price-related policies.

Although there are different approaches to establish a strong minimum price, a flat rate law has several advantages for implementation and enforcement and eliminates very cheap products. For states with the appropriate enforcement infrastructure, a hybrid approach could be even stronger and would create a major deterrent for youths experimenting with tobacco and a strong incentive for current smokers to quit. ■

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This article was accepted April 23, 2014.

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All authors contributed to the research and drafting of the article.

Acknowledgments

This article was partially funded by the National Institutes of Health/National Cancer Institute (grant U01 CA154281).

Human Participant Protection

No protocol approval was necessary because no human participants were involved.

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41. *Fisher v. City of Berkeley*. 475 U.S. 260, 270 (1986).