Statement of the
National Community Pharmacists Association

"The War on Drugs Meets the War on Pain: Nursing Home Patients Caught in the Crossfire"

United States Senate Special Committee on Aging

March 24, 2010
Chairman Kohl, Ranking Member Corker, and Members of the Committee. The National Community Pharmacists Association (NCPA) is pleased to provide a statement for the hearing record on the impact of current DEA activities on the ability of community pharmacies to serve the medication needs of residents of long term care facilities, especially as it relates to the dispensing of controlled substances. We commend you for holding this hearing given the impact that these policies are having today on the quality of care being received by these individuals.

NCPA represents the interests of pharmacist owners, managers, and employees of more than 22,700 independent community pharmacies across the United States. NCPA has a strong interest in this issue because independent community pharmacies provide prescription drugs and related services to more than 50 percent of all long-term care beds in the United States.

**DEA Enforcement Actions Impacting Resident Care**

The DEA has recently started enforcing an interpretation of the Controlled Substances Act (CSA) that has made it more difficult to provide needed prescription medications to long term care residents in a timely manner. For years, it has been standard practice in long-term care facilities to allow the nurse to relay information between the physician and the pharmacist. For example, the nurse, acting as the physician’s agent, may fax prescriptions for Schedule II-V substances written by the physician for a resident in a long-term care facility to the dispensing pharmacy. This delegation results in prompt patient care, which is particularly important in the context of pain management.

DEA’s refusal to continue to recognize the long-established nurse-as-agent paradigm in the long-term care setting—as exists in the hospital setting—threatens the timely administration of critical medications used to treat residents’ pain. In nursing homes, hospice, and other long-term care environments a physician is not always physically on site. As a result, nurses play a vital role in monitoring the resident’s condition, communicating information such as vital signs to physicians, recording the practitioner’s verbal orders, and ensuring that those orders are carried out.

Currently, long-term care facilities serve a resident population that is chronically ill with multiple concurrent disease states requiring medication treatment. The fragility of these residents requires the timely administration of medications. A resident’s need for medications, including those used to treat severe pain, can arise at any time. The DEA has decided that Schedule III-V controlled substance prescriptions require a call between the pharmacist and the physician for a verbal order, while Schedule II controlled substances require a hard-copy prescription from the prescriber or, more often, a faxed copy thereof.
As a result, when the resident needs a pain medication in the middle of the night or on the weekend, two pathways are currently available under the law: 1) the nursing staff can contact the treating physician and ask the physician to authorize an emergency verbal prescription with the pharmacist for a Schedule II medication; or 2) the nursing staff can contact the treating physician who can then fax an order for a new prescription to the pharmacy.

In the former case, once the nurse receives confirmation from the pharmacist that the physician phoned in the emergency order, she may remove the authorized medication from an emergency kit (if available) which contains non-patient specific medications and is stored at the long-term care facility. The burden then falls on the pharmacist to track down the prescribing physician to request a written prescription in order to fulfill the recordkeeping requirements of the DEA.

In effect, this creates a system in which pharmacists are reduced to threatening prescribers with DEA notification for noncompliance. On one hand, pharmacists risk damaging vital collaborative relationships if they report a physician to the DEA for failing to write the required prescriptions; on the other, they risk losing their right to practice pharmacy if they don’t report noncompliant prescribers. This system is not in line with long-established practices in long-term care facilities and creates burdens that have the effect of limiting timely access to needed pain relief medications as well as straining the relationship between practitioners.

Importance of Chart Orders

Similar to the hospital environment, medical charts in the long-term care setting are used to record, monitor, and make necessary changes to a patient’s medication therapy. “Chart orders” currently used in both the hospital and long-term care settings are an abbreviated form of prescriptions that are used to communicate the physician’s directions for the patient to be carried out by the nursing staff. The nurse may record the physician’s verbal order in the patient’s clinical record, creating what is known as a “chart order”, and makes sure that the physician’s orders are acted upon.

Under current practice, if a physician orders a new drug or makes any change in a patient’s drug regimen, it is the nurse’s responsibility to create and fax the chart orders to the pharmacy so that the pharmacy can dispense the medication. Through this process, nurses ensure that medications are acquired in a timely manner to meet residents’ changing and emergent medical needs.

However, in 2001, the DEA stated in a Federal Register notice that, “…a pharmacist may only fill an order issued by a physician and communicated by the physician or the physician’s agent. Since no legal agency relationship exists between the long-term care facility nurse and the physician, this widely-used system is not in compliance with legal requirements.”
DEA provided little notice and inadequate education for this change in policy, which does not easily flow from the traditional definition and use of the term “agency” in the healthcare context.

Further, this interpretation is not carried over to the hospital environment where nurses routinely practice as agents of the physician. Under 21 U.S.C. § 802(3): “The term "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser…” On its face, this definition, as used by the Controlled Substances Act, does not preclude the use of nurses not directly employed by physicians from acting as their agents (nurses acting as agents in hospitals are also not employed by the physicians with whom they work).

**Conclusion**

In the practice of long-term care pharmacy, any delay in providing a resident with needed pain medication places the resident in unnecessary discomfort and violates quality of care standards. The pharmacist thus faces the ethical and legal dilemma of not filling a prescription for a resident in pain and violating practice standards or violating DEA’s interpretation of the Controlled Substances Act.

NCPA strongly urges that DEA immediately suspend actions against pharmacies that are trying to serve the legitimate needs of their long-term care residents. Then solutions such as registering facilities with the DEA, providing a comprehensive physician education program, and e-prescribing should be weighed. We cannot wait for a legislative or regulatory fix – which could take years. While we would want to work with Congress and the DEA on a permanent fix, an immediate solution is needed now.

NCPA stands ready to work with the DEA as well as our partners in the Quality Care Coalition for Patients in Pain on a solution. If DEA doesn’t take action, Congress must ensure patients have access to needed medications via legislation to amend the Controlled Substances Act. Time is of the essence as current policies and DEA activity has caused needless instances of patient harm. DEA must act quickly to implement interim guidance addressing the “nurse as agent” issue until such time permanent changes can be achieved.

Thank you for the opportunity to submit this statement for the record.