Summary of 2009-2010 Legislative Accomplishments

NCPA and community retail pharmacy had a number of notable legislative victories in the 111th Congress, which just concluded. Many of these achievements were contained in the healthcare reform legislation that was signed by the President in March 2010. These victories were achieved with the strong grassroots support of NCPA’s membership. This document summarizes some of the legislation passed by this Congress that affects community pharmacy:

P.L. 111-148, Patient Protection and Affordable Care Act (Health Care Reform)

Medicaid Generic Drug Pharmacy Reimbursement (AMP) Fixed

NCPA has long advocated for a permanent legislative solution to reverse the severe Medicaid generic drug cuts that would have resulted from the Deficit Reduction Act of 2005. Provisions in the health care reform bill reverse some of these cuts by improving the definition of Average Manufacturers Price (AMP) so that it includes only manufacturers’ sales to retail pharmacies, increasing the AMP. It also directs the Center for Medicare and Medicaid Services (CMS) to set Medicaid Federal Upper Limit (FUL) for reimbursement of generics at a rate of “no less than 175% of average weighted AMP”. These factors combined should help ameliorate some of the cuts that would have taken place had the original law gone into effect.

In addition, NCPA secured report language to the bill that encourages the Secretary to increase the reimbursement even higher for small independent community pharmacies. This increase in the FUL is especially important now because the bill also expands Medicaid coverage – starting in 2014 - to individuals up to 133% of the Federal poverty level. This is expected to add 16 million more individuals to the Medicaid program.

Pharmacy Benefit Manager (PBM) Transparency Included in Health Exchanges

This is the first federal requirement for oversight and accountability in the PBM marketplace. PBMs, like CVS Caremark, Medco Health Solutions, and Express Scripts, Inc., act as prescription drug middlemen and are hired by many health plan sponsors and insurance companies to administer drug coverage. As part of the new law, PBMs will be required to confidentially disclose important financial information to the Secretary of Health and Human Services for those health plans operating in new health insurance exchanges and Medicare Part D plans.

Transparency helps to level the playing field between mail order and community pharmacy by encouraging plans to hold PBMs accountable for excessive profits and the tactics used to drive those profits up. These new state-based exchanges are set to begin in 2014. These provisions also establish an important initial Federal framework for the regulation of these unregulated entities. This framework can be enhanced in the future.
Pharmacists Exempted from Medicare DME Accreditation Requirement

The bill provides an exemption for most pharmacies from the burdensome accreditation requirements associated with providing Medicare DME, and changes current law so that pharmacy accreditation requirements are not effective until January 2011. (Pharmacies that want to competitively bid would still be required to be accredited regardless). Specifically, a pharmacy can be exempt from the accreditation requirements if the pharmacy:

* Has total Medicare DME billings that are 5 percent or less of total prescription sales;
* Has had no adverse fraud or abuse determination against it for the last 5 years;
* Submits an attestation that its total Medicare DMEPOS billings are and continue to be less than a rolling three year average of five percent of total pharmacy sales; and
* Submits documentation to the Secretary (based on a random sample of pharmacies) that would allow the Secretary to verify the information.

Pharmacist-Delivered Medication Therapy Management Services Expanded

The health care reform bill envisions an expanded patient care role for pharmacists in new healthcare system models. These new responsibilities will help assure more appropriate use of prescription medications, especially for those patients who have chronic illnesses. These include pharmacist roles in accountable care organizations, medical homes, “transition of care” teams, and medication reconciliation activities.

The bill also includes a Medication Therapy Management (MTM) grant program that will help test new and innovative methods to provide medication therapy management, which will help to reduce the estimated $290 billion in health care expenditures that result from inappropriate medication use or non-compliance with taking medications. Senators Mikulski (D-MD) and Cochran (R-MS), two senior Appropriations Committee members, have voiced their support by urging the Secretary of Health and Human Services to make funding this grant program a priority.

Medicare Part D “Donut Hole” Closed

Every year, millions fall into the Medicare Part D benefit's coverage gap or "donut hole" in which the patient pays the full cost of drugs until the catastrophic coverage kicks in. In 2010, these patients received a $250 rebate. Starting January 1, 2011, patients will pay 50% of a brand name drug's cost in the coverage gap, a figure that will be reduced to 25% over the next 10 years. For generics in 2011, the patient will pay 93% of the total negotiated price, which will also phase down to 25% by 2020.

New Requirements for Long Term Care Pharmacies

The health care reform bill requires Part D plans to use specific dispensing techniques to reduce pharmaceutical waste in long term care facilities. In order to reduce waste associated with unused medications, starting in 2012, Medicare Part D drug plans and MA-PD plans must have in place utilization management techniques such as daily, weekly, or automated dose dispensing to reduce the quantities of Part D drugs dispensed to enrollees residing in long-term care facilities. CMS published a proposed regulation in November that would implement this policy for brand name drugs only, and allow some small pharmacies an additional year to comply.
Small Business Provisions Included

The health care reform bill includes provisions that would penalize some businesses that do not provide health insurance and whose employees purchase plans through the exchange. However, there are no penalties on businesses with 50 or fewer employees that do not provide health care coverage. We believe many small pharmacies will benefit from this “50 or fewer employees” exception. The bill also includes small business tax credits to encourage small employers to purchase insurance for their employees, but NCPA is concerned about the income caps and other eligibility requirements. NCPA worked cooperatively with other small business groups to repeal the new IRS 1099 reporting requirements, which go into effect in 2012. These were not repealed in 2010, but are expected to be repealed in 2011.


The healthcare reform law substantially expands the number of entities eligible to obtain pharmaceutical price discounts under the 340B program. These 340B entities are supposed to provide discounted prescription medications to uninsured and under insured individuals. However, there have been numerous reports that eligible entities are using these 340B drugs for other patients, such as a hospital’s own employees and for patients that have full commercial private insurance. NCPA will continue to oppose any 340B expansions without a limitation on patient definition. We believe this program should be reserved for the indigent and truly uninsured.

NCPA also continues to work with Congress and other affected groups to repeal the new IRS 1099 reporting requirements, as well as find a way to further delay or repeal the prohibition on allowing patients to use funds in FSA accounts for non-prescription items without a prescription. As of January 2011, only those OTC items that are purchased with a prescription are eligible for reimbursement.

CVS/Caremark

Dozens of members of Congress sent letters to the Federal Trade Commission (FTC) asking that the Agency investigate the anti-consumer and anti-competitive practices of CVS Caremark - the giant integrated retailer and PBM mail order operation. Now two years into its investigation, we are hopeful that the FTC may be getting ready to take action against the company to protect consumers from their harmful practices.


The National Defense Authorization Act for FY2011 prohibits the Department of Defense (DOD) from increasing TRICARE retail pharmacy copayments through September 2011. As a result, copays at retail community pharmacies cannot increase beyond $3 for a 30 day supply of generic drugs; $9 for a 30 day supply of preferred brand drugs; and $22 for a 30 day supply of non-formulary brand drugs. Without this prohibition, the DOD could increase copays to incentivize the use of the TRICARE mail order pharmacy.

S. 3987 - Red Flag Program Clarification Act of 2010

Congress voted to approve NCPA-supported legislation to remove pharmacists from the scope of the FTC “Red Flags” rule. The “Red Flags” rule was geared toward financial institutions and other creditors, requiring such entities to develop and implement identity theft prevention and detection programs. Unfortunately, many small businesses, including pharmacies, were covered by the rule although they would never be considered “financial institutions” or “creditors”.
This legislative victory was of particular importance because, had pharmacies not been excluded from the new FTC requirements, many pharmacies offering services such as “house accounts” and charge accounts would have been required to comply with new unduly burdensome FTC requirements.

**S. 3397 – The Secure and Responsible Drug Disposal Act**

This legislation improves on and encourages existing voluntary prescription drug disposal programs like NCPA’s Dispose My Meds. Most notably, the legislation authorizes the U.S. Attorney General to issue new regulations (under the Controlled Substances Act) that could allow community pharmacies offering disposal programs to accept controlled substances, which presently can only be turned in to law enforcement officials. The law also allows for the disposal of controlled substances by long term care facilities for patients that have expired.

**Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312)**

On December 17th, the President signed a historic $858 billion tax cut extension and reform bill that will have significant impact on community pharmacies and their employees. A summary of the provisions of the bill, compliments of NFIB, is provided below:

- **All expiring lower income tax rates from 2001 and 2003 will be extended.** This means no small business owner will see their individual taxes go up next year. It also means that lower capital gains and dividend rates will remain in place. These are two year extensions.
- **The Estate Tax will not go back to a 55% rate with a low $1 million exemption.** Small business owners can plan for a two year estate tax of 35% and a $5 million per spouse exemption.
- **The Alternative Minimum Tax is patched for two years, so 26 million taxpayers will be protected from this tax increase.**
- **100% deduction for qualified business investments in 2011.** This builds on the generous expensing provisions included in the Small Business Jobs Act that included a $500,000 limit for qualified equipment and up to $250,000 in renovations (a completely new change to the expensing law). **Bottom line** – just about every small business can write-off the full amount of investments they want to make in 2010 and 2011.
- **In addition, for 2012 the expensing limit will be $125,000 instead of falling to $25,000.**
- **Every worker (including small business owners) in America will see a 2% cut in their Social Security payroll tax for 2011.** For example, a worker making $40,000 will pay $800 less in payroll taxes.