'Walking Dead' legislation in Washington

By Tom Schatz, June 1, 2015

President Reagan once said "there is nothing more permanent than a temporary government program." A corollary to that axiom is that bad bills and regulations that are supposedly dead and buried can always rise again.

Perfect examples of such zombie legislation are H.R. 244, the MAC Transparency Act, and H.R. 793/S. 1190, the Ensuring Seniors Access to Local Pharmacies Act of 2015.

The bills attempt to resurrect several provisions of a Centers for Medicare and Medicaid Services (CMS) proposed rule that was dropped in March 2014. Someone should call TV character Rick Grimes from "The Walking Dead."

Medicare Part D is one of the few government programs whose price tag has consistently come in below Congressional Budget Office (CBO) cost estimates. Former CBO Director Douglas Holtz-Eakin noted that in 2004, CBO projected that Part D's cost by 2012 would be approximately $123 billion; it was $55 billion.

The program's success is due in large part to hard-nosed negotiations among pharmaceutical companies, pharmacy benefit managers (PBMs) and pharmacies. Under a provision of the Part D statute, the secretary of the Department of Health and Human Services is prohibited from interfering with these negotiations, such as setting prices.

Therefore, when CMS offered a proposed rule on Jan. 10, 2014 that would have made dozens of changes to Part D, several of which struck at the heart of the non-interference clause, the reaction was swift and effective. Members of Congress, insurers, taxpayer organizations and patient groups demanded that CMS drop proposed policy changes that would reduce the number of drug plans PBMs could offer to beneficiaries in each Medicare Part D service region; intrude into the robust pricing negotiations among pharmaceutical firms, PBMs and pharmacies; and meddle with preferred pharmacy networks that are specifically created to increase competition and drive down prescription drug costs for beneficiaries.

Even though CMS dropped these concepts like a hot potato (two months in Washington being the equivalent of two seconds anywhere else), three bills have been introduced that raise some provisions from the dead. The titles sound innocuous — after all, it is hard to oppose bills that promise "seniors access to local pharmacies," which makes it seem like they currently have nowhere to go — or like bills that promise more transparency. But tacky titles and pithy acronyms often mask lousy legislation.

Among other unhelpful provisions, the MAC Transparency Act would force PBMs to disclose proprietary financial information, which in turn would increase both direct costs and litigation costs. As Emory University Associate Professor Joanna Shepherd pointed out in her May 2013 *Cornell Law Review* article, "Is More Information Always Better?," such "regulations foster tacit collusion" and reduce the ability of PBMs to "negotiate discounts with pharmacies and rebates with drug manufacturers."

The Ensuring Seniors Access to Local Pharmacies Act of 2015 would be even more damaging because it would force PBMs to accept any independent pharmacy (the "any willing pharmacy" policy) to participate in their preferred network if one or more of their stores is located in a "medically underserved area." But the Health Resources and Services Administration (HRSA) defines "medically underserved" as a lack of primary medical care, dental or mental health providers, not pharmacies.

A July 2014 report by the Moran Company analyzed legislation similar to H.R. 793/S. 1190 that was introduced in 2014 and found that these requirements "might appear ... to be limited in geographic scope," but an analysis of HRSA data "indicates that 94.77 percent of all Medicare Part D enrollees reside in counties meeting at least one of the 'underserved area' criteria established in this legislation." The study estimated "that enactment of this legislation would increase federal mandatory spending by $21.32 billion over the 2015-2024 scoring window."

The Federal Trade Commission's March 7, 2014 comment to CMS's Jan. 10, 2014 proposed rule noted that "any willing pharmacy provisions threaten the effectiveness of selective contracting with pharmacies as a tool for lowering costs. Requiring prescription drug plans to contract with any willing pharmacy would reduce the ability of plans to obtain price discounts based on the prospect of increased patient volume and thus impair the ability of prescription drug plans to negotiate the best prices with pharmacies."

Confidential and intense negotiations occur among manufacturers, PBMs and retail pharmacies behind the scenes every day. Preferred pharmacy networks are functioning perfectly well. Medicare Part D beneficiaries and taxpayers have been pleased about the results.

There is no reason to reanimate disagreeable and unpleasant things that should remain buried.

Schatz is president of Citizens Against Government Waste.