

The Federal Government's Regulatory Burden on American Health Care Has Increased By More Than Half in a Decade

By John R. Graham

Key Points

- The last decade is generally considered as one of regulatory restraint, but the facts show otherwise.
- The volume of federal regulations on Medicare and Medicaid, private health insurance, and providers' behavior has increased dramatically since 1998-1999.
- The notion that the federal government needs an overly complex "reform" bill of more than 2,000 pages in order to regulate health care adequately is unfounded.

Politicians who want to increase the federal government's control of Americans' access to medical services under the banner of "reform" describe the status quo as some kind of Wild West, where nobody has protection against greedy insurers, incompetent doctors, or dangerous hospitals. The facts show otherwise. As I have described previously, even with respect only to "reforming" health insurance alone, the egregious practices described by the ruling faction (such as cancelling a policy once a beneficiary becomes ill) have been illegal under federal law for more than a decade, and also under state laws.¹

If there are "loopholes" in the current laws that need filling, it is beyond belief that it would require more than 2,000 pages of legislation to do the job. It is almost impossible to describe how bloated both the House and Senate bills have become.

Compare them to the legislation passed in 1965 that created entirely new programs, Medicare and Medicaid: President Johnson signed Public Law 89-97 in July of his first elected term – and it was a mere 137 pages long!²

Since establishing Medicare and Medicaid in 1965, the federal government has made three significant incursions into the regulation of private health insurance. These were via the Employee Retirement Income Security Act (ERISA, 1974), Consolidated Omnibus Budget Reconciliation Act (COBRA, 1986), and the Health Insurance Portability and Accountability Act (HIPAA, 1996). The federal government has also intruded into the regulation of providers through HIPAA and other actions, such as establishing the National Practitioner Database.

Overall, the federal regulatory burden on American health care has increased by more than one-half in the last 10 years.

In 2003, the Republican-majority Congress passed the Medicare Modernization Act, the only legislation in the last 10 years that approximated “reform.” This act, however, was designed to *reduce* federal control over access to medical care. It established a Medicare drug benefit that was offered by private insurers, not the government. Further, it established Health Savings Accounts, which allow people to control more of their own health dollars. Nevertheless, the last decade has not been one of regulatory restraint, contrary to popular myth.

This article adds to the literature on the federal regulatory burden on health care by counting the change in the number of pages in the *Code of Federal Regulations* devoted to three areas of health care: Medicare and Medicaid, regulation of private health insurance, and regulation of providers.³ It does not address the regulation of drugs or medical devices for safety and efficacy, a subject I have previously addressed.⁴ Table 1 summarizes the results. Overall, the federal regulatory burden on American health care has increased by more than one-half in the last 10 years.

The greatest regulatory burden, perhaps unsurprisingly, is in Medicare and Medicaid. The October 2008 revision of the CFR included 2,688 pages dedicated to the Centers for Medicare and Medicaid Services.⁵ The October 1998 version had 1,881 pages.⁶ This is a 48 percent increase.

With respect to private health insurance, there are only 183 pages of regulations: the current Labor Code includes 75 pages of regulations, and the Public Welfare Code also contains 108 pages of regulations on group and individual coverage.⁷ This might not look like much, but 10 years earlier, the total was only 96: 36 in the Labor Code and 60 in the Public Welfare Code.⁸

The Public Welfare Code contains 109 pages of rules governing providers, e.g. the National Practitioners Database, HIPAA, and administrative regulations on health plans and providers.⁹ A mere 10 years earlier, the number of pages was only seven!¹⁰ Remarkably, this massive regulatory increase happened during a period when the federal government did *not* express an interest in increasing its control over our access to medical services. It happened nonetheless and the federal government, as the numbers show, is now very interested in increasing control over our access to medical services.

Table 1: Number of Pages in Code of Federal Regulations Addressing Medical Services and Health Insurance, 1998-1999 to 2008-2009

	1998-1999	2008-2009	Increase
Medicare and Medicaid	1,811	2,688	48%
Private Health Insurance (e.g. ERISA, COBRA and HIPAA)	96	183	91%
Provider Regulation (e.g. National Practitioner Database, HIPAA)	7	109	1,457%
Total Pages	1,914	2,980	56%

Source: Author’s analysis of *Code of Federal Regulations*

The U.S. Department of Health & Human Services is not a big emitter of regulations by page-count, but it overwhelms other departments with respect to issuing *expensive* regulations. According to an analysis of new rules in the pipeline as of December 2008, the federal government was working on 4,004 rules, of which 236 were from the U.S. Department of Health and Human Services (HHS). However, the law also requires agencies to report how many of their rules under construction will impose an annual cost of at least \$100 million.

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The U.S. HHS reported that just under one-fifth of its rules, 44, would cost at least \$100 million. Less than four percent of the rules under construction from other departments breach this hurdle.¹¹ (14 of

the HHS' rules relate to agencies other than the Centers for Medicare and Medicaid Services, such as the Food and Drug Administration, so this measurement covers broader ground than my analysis. On the other hand, it excludes health-insurance regulations under construction by the U.S. Department of Labor.)¹²

These regulations are costly: The net burden of health regulation in the United States reached \$169.1 billion in 2002, or an average of \$1,500 per family, according to professor Christopher J. Conover of Duke University. Annually, these regulations kill 4,000 more Americans than die from lack of health insurance: 22,000 versus 18,000.¹³ Interpolating from his analysis, about one-third of the regulatory burden comes from the states, and the rest from the federal government.¹⁴

Not all regulation is bad: Indeed, professor Conover estimates that federal health-insurance and privacy protections for consumers provide a net benefit.¹⁵ Nevertheless, the evidence does not support the notion that the federal government needs to pass an overly complex health "reform" bill in order to regulate our access to medical services.

Endnotes

- ¹ John R. Graham, "Meet the New Boss, Same As the Old Boss: President Obama's Best Health 'Insurance' Reforms Were Passed in 1997," *Health Policy Prescription*, Vol. 7, No. 9 (September 2009).
- ² A scanned copy of the printed bill is online at <http://www.brockport.edu/~govdoc/SocPol/lk8997.html>.
- ³ About a decade ago, a number of sources claimed that there were 132,000 pages of Medicare rules and regulations. However, I have not been able to determine the source of such an estimate. I suspect that it includes the billing codes that Medicare requires to process claims. See, e.g., Robert E. Nesse, "The Demographics and Economics of Chronic Disease," *Health Affairs*, Web Exclusive, February 13, 2002, p. W125.
- ⁴ John R. Graham, *Leviathan's Drug Problem: Federal Monopoly of Pharmaceutical Regulation and Its Deadly Cost* (San Francisco: Pacific Research Institute, March 2009).
- ⁵ 42 CFR 400.200-505.19, 1000.10-1008.59 (October 2008).
- ⁶ 42 CFR 400.200-498.103, 1000.10-1008.59 (October 1998).
- ⁷ 29 CFR 2590.606.1-2590.736 (July 2009); 45 CFR 144.101-150.465 (October 2008).
- ⁸ 29 CFR 2590.701.1-2590.736 (July 1999); 45 CFR 144.101-148.220 (October 1998).
- ⁹ 45 CFR 60.1-61.66, 160.101-164.534 (October 2008).
- ¹⁰ 45 CFR 60.1-60.14 (October 1998).
- ¹¹ Author's analysis of Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (Washington, DC: Competitive Enterprise Institute, May 28, 2009), pp. 17-21.
- ¹² *Ibid.*, pp. 39-41.
- ¹³ Christopher J. Conover, *Health Care Regulation: A \$169 Billion Hidden Tax*, Policy Analysis No. 527 (Washington, DC: Cato Institute, October 4, 2006), p. 1.
- ¹⁴ John R. Graham, *U.S. Index of Health Ownership*, 3rd edition (San Francisco: Pacific Research Institute, 2009), p. 5.
- ¹⁵ Christopher J. Conover, *Health Care Regulation: A \$169 Billion Hidden Tax*, p. 12.