ASCO

Federal Policy for the Protection of Human Subjects "Common Rule"

Summary of Final Rule

On January 19, 2017, the Department of Health and Human Services (HHS), along with 15 other federal agencies, published a final rule revising the Federal Policy for the Protection of Human Subjects, also known as the "Common Rule."[1] This regulation governs clinical research involving human subjects conducted or sponsored by the Federal departments and agencies that have adopted the regulations (16 Common Rule departments and agencies).

The revised Common Rule has an interim effective date of July 19, 2018, except for the compliance requirements for single IRB (sIRB) review of cooperative research, which will become effective January 19, 2020. However, during the Trump Administration review of the 2017 final rule and the setting of the current interim implementation date of July 19, **the Administration noted that the final rule may be subject to further delay (if this happens it should be known prior to July 19).**

Below is a summary of several key provisions and changes Institutions and Researchers should prepare to comply with by July 19, 2018. The new regulations do not impact studies approved prior to July 19, 2018.

Provisions and changes include:

- New and Revised Definitions
- New Exemption Categories Regarding Secondary Research
- Elimination of Continuing Review
- Revised Informed Consent Requirements
- Harmonization with Other Agency Guidance
- Guidance on Application to Clinical Data Registries
- Cooperative Research Studies (single IRB)

New and Revised Definitions

The final rule provides new and revised definitions, including: "clinical trial," "human subject," "intervention," "private information," "identifiable private information," "identifiable biospecimen," "minimal risk," "research," and "written or in writing" (to include electronic formats).

- **Clinical Trial -** The final rule added the definition of "clinical trial," which was not defined in the previous version of the Common Rule. A clinical trial is "a research study in which one or more human subjects are prospectively assigned to one or more interventions (which may include placebo or other control) to evaluate the effects of the interventions on biomedical or behavioral health-related outcomes."

- **Human Subject -** The final rule expanded the definition of "human subject" to cover the collection of biospecimens (this does not include non-identified biospecimens). The new definition includes "a living individual about whom an investigator, whether professional or student conducting research: (1) obtains information or biospecimens through intervention or interaction with the individual, and uses, studies, or analyzes the information or biospecimens; or (2) obtains, uses, studies, analyzes, or generates identifiable private information or identifiable biospecimens."

- **Activities deemed not to be research.** The final rule amended the definition of "research" to include four new activities that are deemed to not be "research":

    - Scholarly and journalistic activities (e.g. oral history, journalism, biography, literary criticism, legal research, and historical scholarship);
    - Public health surveillance activities;
    - Collection and analysis of information, biospecimens, or records for criminal justice or criminal investigative purposes; and
    - Certain activities in support of intelligence, homeland, security, defense, or other national security missions.

New Exemption Categories Regarding Secondary Research

The final rule introduced new exemption categories from certain aspects of the Common Rule that relate to secondary research, if certain conditions are met.

- Secondary research for which consent is not required under the Common Rule:
    - Research using protected health information ("PHI") conducted by "covered entities" for "health care operations," "public health activities," or "research," as those terms are defined under the Health Insurance Portability and Accountability Act ("HIPAA") Rules. (This change is intended to eliminate duplication between the Common Rule and HIPAA, so HIPAA requirements will apply in these circumstances).
    - Storage or maintenance for secondary research use of identifiable private information or identifiable biospecimens when broad consent is obtained and if an IRB conducts a limited IRB review.
    - Other exemption categories include educational, benign behavioral interventions, and surveys/interviews.

Elimination of Continuing Review

- The final rule eliminated continuing review for many minimal risk studies (non-clinical research; benign behavioral interventions, consumer preference surveys and research)
- Unless an IRB determines otherwise, continuing review of research is not required if the research:

    - Is eligible for expedited review;

  - Is reviewed by the IRB in accordance with the limited IRB review (new IRB regulatory category) procedure; or
  - Only involves data analysis (including analysis of identifiable information or identifiable biospecimens) or access to follow-up clinical data from procedures that subjects would undergo as part of clinical care.

- The IRB must document the rationale for conducting continuing review if any of the above conditions are met. FDA still requires annual continuing review for FDA-regulated studies.

Revised Informed Consent Requirements

- Informed consent must begin with "a concise and focused presentation of the key information that is most likely to assist a prospective subject, or legally authorized representative, in understanding the reasons why one might or might not want to participate in the research. Institutions should update template informed consent forms to meet this requirement.
- The consent "must be organized and presented in a way that facilitates comprehension." The rule does not preclude the use of electronic formats for obtaining consent.
- Elements of new informed consent include:
  - Statement explaining the purpose, procedures, and reasonably foreseeable risks and discomforts of the research;
  - Statement that biospecimens may be used for commercial profit (when applicable), and whether or not the subject will share in that profit;
  - Statement regarding whether clinically relevant research results will be returned to subjects, and under what conditions; and
  - Statement specifically for research involving biospecimens about whether the research will or might include whole genome sequencing.
- Broad consent (*e.g.* prospective consent to unspecified future research) may be obtained in lieu of informed consent for secondary research use, storage, and maintenance of identifiable private information and identifiable biospecimens. Recommendations for a Broad Consent Template: **https://www.hhs.gov/ohrp/sachrp-committee/recommendations/attachment-d-august-2-2017/index.html**
- IRBs do not need to obtain informed consent in instances of obtaining information or biospecimens for the purpose of screening, recruiting, or determining the eligibility of prospective subjects, under certain circumstances.
- For research involving collection of identifiable private information or identifiable biospecimens, subjects should be provided with:
  - A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens; and
  - The information or biospecimens could be used for future research studies or distributed to another investigator for future research studies without additional informed consent, where applicable; *OR*
  - A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies.

- Each clinical trial conducted or supported by a Federal department or agency must have an approved consent form, and this form must be posted online on a publicly available federal Web site that will be established as a repository for such forms.

Harmonization with Other Agency Guidance

- The Common Rule previously did not require that agencies harmonize their guidance on application of the Common Rule. The final rule states that guidance can only be issued after consultation with the other sixteen Federal departments and agencies that adopted the Common Rule, unless the consultation is not feasible.
- The final rule requires the Secretary of HHS to issue guidance to assist IRBs in assessing privacy and confidentiality protections.

Guidance on Application to Clinical Data Registries

- Section 511 of the Medicare Access and CHIP Reauthorization Act of 2015 ("MACRA") requires HHS to provide guidance on how the Common Rule applies to clinical data registries. In an effort to provide such guidance, the preamble to the final rule states that the final rule does not apply to clinical data registry activities in the following circumstances:
    - Activities not conducted or supported by a Common Rule department or agency;
    - Activities that do not meet the definition of research, such as many quality improvement activities (for example, the creation of a registry designed to provide information about the performance quality of providers, and whose design is not influenced or altered to facilitate research, is not covered by the final rule even if it is known that the registry will be used for research studies);
    - Research studies that only involve obtaining and analyzing nonidentified information because it would not involve a "human subject";
    - Activities that qualify for an exemption; or
    - Institutions that release identifiable private information obtained in the course of patient clinical care to a clinical data registry for research because it is not engaged in "human subjects" research.

Cooperative Research Studies (Single IRB) – effective January 19, 2020

- A single IRB must approve cooperative studies for research (projects that involve more than one institution) conducted in the United States, except where:
    - More than a single IRB review is required by law (including tribal law); or
    - Research for which any Federal department or agency supporting or conducting the research determines and documents that the use of a single IRB is not appropriate.
- The reviewing IRB will be identified by the Federal department or agency supporting or conducting the research or proposed by the lead institution subject to the acceptance of such Federal department or agency.
- Documentation specifying the responsibilities of each entity, when research takes place at an institution in which IRB oversight is outsourced.

- Common Rule agencies and departments will be given authority to enforce compliance against IRBs that are not operated by an Federalwide Assurance (FWA)-holding institution.
- The effective date for this provision is January 19, 2020. The NIH Single IRB (sIRB) requirement was effective as of January 25, 2018.