ROPES & GRAY ALERT

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# HHS Proposes Major Overhaul of the Common Rule

On September 8, 2015, the Department of Health and Human Services proposed significant revisions to the Federal Policy for the Protection of Human Subjects ("Common Rule"), the set of federal regulations governing the conduct of clinical research involving human subjects. HHS's notice of proposed rulemaking (NPRM), joined by 15 other federal departments and agencies, marks the first systematic attempt to overhaul the Common Rule since its promulgation in 1991. The NPRM sets forth proposals to modify informed consent for biospecimen research, improve the understandability of consent forms, mandate single institutional review board (IRB) oversight of research, and establish data security safeguards. The NPRM has implications for a wide range of stakeholders across the life sciences and health care industries, including drug and device manufacturers, hospitals, academic medical centers, universities and medical schools, IRBs, contract research organizations, laboratories, and tissue banks.

## Background of NPRM

In 1991, HHS developed a set of regulations, adopted by 15 federal departments and agencies, to create a uniform body of regulations to protect human subjects involved in clinical research. Since then, the nature, volume, and settings of clinical research have changed considerably. While much biomedical research continues to be conducted in academic medical centers, more research is being conducted in outpatient clinics and in physician group practices, as well as in clinical care settings that combine an individual's research and medical data. In addition, the number of biospecimen repositories and large clinical databases has risen dramatically. Research is also expanding in geographic scope, with studies often conducted at multiple domestic and international sites and across research networks. Further, new technologies, including genomic sequencing, are rapidly increasing the data to which investigators have access.

As the nature of research has evolved, so have the types of risks and benefits associated with such research. Large numbers of studies no longer involve direct interaction with research subjects themselves, and instead analyze information obtained from medical records, administrative claims data, existing biospecimens stored in repositories, and other data sources. As a result, the risks related to these types of research studies are largely related to privacy and confidentiality, not physical harm.

On July 26, 2011, the Office of the Secretary of HHS, in coordination with the Executive Office of the President's Office of Science and Technology Policy, published an advanced notice of public rulemaking (ANPRM) to request comment on how current regulations for protecting human subjects who participate in research might be modernized and revised to be more effective. HHS received considerable comments on the ANPRM, as discussed in the NPRM, and revised the proposal based, in part, on public input.

The NPRM aims to "better protect human subjects involved in research, while facilitating valuable research and reducing burden, delay, and ambiguity for investigators." By calibrating regulatory oversight to the risk of harm or danger posed by the research, the NPRM attempts to make more effective and efficient the federal policy for protecting research subjects. Like the ANPRM, the NPRM actively seeks public input on numerous proposals and questions, recognizing that public trust in medical research is essential to its success. The 90-day comment period closes on December 7, 2015, although preliminary indications are that some research entities, networks and associations may request an extension of the response period, based on the broad scope of the NPRM.

## Significant Proposed Changes to the Common Rule

### I. Expanding "Human Subject" to Cover Non-Identified Biospecimens

Currently, the Common Rule applies to the secondary research use of a biospecimen only if the biospecimen is identifiable. The NPRM would expand the Common Rule's definition of "human subject" so that it covers all research uses of biospecimens, irrespective of whether the biospecimens are identifiable. Consent for the secondary research use of biospecimens could be waived in extremely limited circumstances, but otherwise would have to be study-specific or broadly applicable to future, unspecified research ("broad consent"). This particular proposed revision, which was proposed in the 2011 ANPRM, has already elicited strong opposition from many researchers and research associations.

For public comment, the NPRM identifies two alternative approaches, which would expand the definition of "human subject" to include the following:

1. Whole genome sequencing data, or any part of the data generated as a consequence of whole genome sequencing, regardless of the individual identifiability of the biospecimens used to generate such data; or
2. Research use of information produced using a technology applied to a biospecimen that generates information unique to an individual such that it is foreseeable that, when used in combination with publicly available information, the individual could be identified ("bio-unique information").

### II. Excluded Activities

The NPRM proposes to create a new section of the regulation for research that would be *excluded* from the Common Rule. The NPRM identifies 11 specific types of excluded activities, some of which are "exempt" under the current Common Rule. Unlike exempt research, "excluded" activities would not be expected to undergo any institutional, administrative or IRB review to determine whether the activity is excluded. Rather, investigators would be responsible for self-determining whether their research is excluded. Even though a research activity may be excluded, the NPRM articulates an expectation that such research still be conducted consistent with the principles outlined in the Belmont Report. The following categories of activities, among others, would be considered "excluded" under the NPRM:

1. <u>Activities not considered "research"</u>
   a. **Program improvement activities**

      This category includes data collection and analysis, including the use of biospecimens, for an institution's own internal operational monitoring and program improvement purposes, if the data collection and analysis is limited to the use of data or biospecimens originally collected for any purpose other than the currently proposed activity, or is obtained through oral or written communications with individuals (e.g., surveys or interviews). An example of an activity that would satisfy this exclusion is a survey of hospital patients to evaluate and improve the quality of delivered meals. An example of an activity that would not satisfy this exclusion is a prospective observational study of patient treatments to analyze the comparative effectiveness of two different standard of care treatments frequently used to treat the same medical condition.

   b. **Quality assurance and quality improvement programs**

      This exclusion covers quality assurance or improvement activities involving the implementation of an accepted practice to improve the delivery or quality of care or services, if the purposes are limited to altering the utilization of the accepted practice and collecting data or biospecimens to evaluate the effects on the utilization of the practice. This exclusion would encompass quality improvement activities aimed at implementing practices that are already accepted, with the goal of improving the delivery or quality of treatments or services. This exclusion would permit measuring and reporting provider performance data for practice management, clinical, or administrative uses. As proposed, this exclusion does not include

evaluations of different accepted practices, however, such as activities designed to determine whether a particular accepted medical treatment is or is not more effective than another accepted treatment.

c. **Public health surveillance**

This exclusion category would encompass public health surveillance activities, including the collection and testing of biospecimens, necessary to allow public health authorities to assess potential public health signals. FDA's adverse event reporting systems would fall within this proposed exclusion.

2. Activities that are sufficiently low-risk and subject to other independent controls
   a. **Collection or study of publicly available or non-identifiable information**

This exclusion would cover research involving the collection or study of information that has been or will be acquired solely for non-research activities or was acquired for research studies other than the proposed research study, if (1) the sources are publicly available; or (2) the information is recorded by the investigator in such a manner that human subjects cannot be identified, directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects or otherwise conduct an analysis that could lead to creating individually identifiable private information. This category would not include the secondary research use of biospecimens.

b. **HIPAA-covered activities**

The NPRM proposes this category to cover activities that are regulated under the HIPAA Privacy Rule. These activities involve risks related only to privacy and confidentiality, and are already subject to independent controls provided by HIPAA. Specifically, the NPRM proposes that research involving the use of protected health information by a HIPAA-covered entity for "health care operations," "public health activities," or "research," as those terms are defined under the HIPAA Rules, would be excluded from the Common Rule. This proposed exclusion would not apply if the investigator who receives and uses individually identifiable health information for a research study is not part of an entity that is subject to the HIPAA Rules, even if the entity disclosing the individually identifiable health information to the investigator is itself covered by the HIPAA Rules.

3. Activities that are low-risk and "do not meaningfully diminish subject autonomy"

The NPRM proposes to exclude secondary research use of a non-identified biospecimen that is designed only to generate information about the person that is already known. This exclusion would include the development and validation of certain tests and assays (such as research to develop a diagnostic test for a condition using specimens from individuals known to have the condition and those known not to have the condition) and quality assurance and control activities.

## III. Exempt Research

The current Common Rule's exemption categories continue in the NPRM, either as exemptions or exclusions (and thus not subject to administrative or IRB review). The NPRM proposes an important modification to the exemption regulations to assist investigators and institutions in making timely and accurate exemption determinations – namely, the development by federal departments and agencies of a voluntary "exemption determination tool" or algorithm. If a person puts accurate information about the study into the tool, the tool would indicate whether the study is exempt. Institutions would be able to rely on the use of the federally developed tool as a "safe harbor" for this determination, so long as the information that has been provided to the tool is accurate. Use of the tool would be voluntary.

The NPRM describes the following types of exemptions:

1. Low-risk interventions subject only to documentation requirements

   The NPRM proposes a new class of exempt research involving benign interventions in conjunction with the collection of data from an adult subject. "Benign interventions" would be brief in duration, harmless, painless, not physically invasive, and not likely to have a significant adverse lasting impact on the subjects. In addition, the investigator would have to have no reason to think the subjects would find the interventions offensive or embarrassing. As examples, the NPRM mentions research activities in which a subject is asked to read materials, review pictures or videos, play online games, solve puzzles, or perform cognitive tasks. The subject would have to prospectively agree to the intervention and data collection, and: (a) the information obtained would have to be recorded in such a manner that human subjects could not be identified directly or through identifiers linked to the subjects; or (b) any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation.

2. Collection of sensitive information about human subjects (except biospecimens), subject to documentation requirements and standards for data security

   This category would include a new exemption for secondary research use of identifiable private information originally collected for non-research purposes if prior notice has been given to the individuals that such information may be used in research. Under the current NPRM, IRBs frequently waive consent for research involving the secondary use of identifiable private information, particularly when the data sets are large or drawn from multiple institutions. In such circumstances, IRBs often impose privacy and data security protection requirements. Under the NPRM, this proposed exemption category would require that privacy safeguards be in place, thus obviating the need for IRB review.

3. Research involving biospecimens or identifiable private information, subject to documentation requirements, standards for data security, informed consent, and limited IRB review

   The NPRM proposes to require that consent be obtained for the research use of non-identified (and identified) biospecimens, but allows for broad consent for those future uses, provided that a template HHS-created consent form is used.

   a. **Storage or maintenance of biospecimens or identifiable private information for secondary research use**

      This exemption would cover the storage or maintenance for secondary research use of biospecimens or identifiable private information that has been or will be acquired for research studies other than for the proposed research study, or for non-research purposes, if (a) written consent for the storage, maintenance, and secondary research use of the information or biospecimens is obtained using the broad consent template that the Secretary of HHS will develop, though oral consent may be sufficient under certain conditions; and (b) the reviewing IRB conducts a limited IRB review of the process through which broad consent will be sought, and, in some cases, whether the standards for data security are met.

   b. **Secondary research use of biospecimens or identifiable private information if broad consent has been sought and obtained for the storage, maintenance, and secondary use**

      This exemption would encompass research involving the use of biospecimens or identifiable private information that has been stored or maintained for secondary research use, if consent for the storage, maintenance, and secondary research use of the information and biospecimens has been obtained. If the investigator anticipates that individual research results will be provided to a research subject, then the research is not exempted and instead must be reviewed by the IRB, and standard informed consent for the research must be obtained.

## IV. Changes to Required Elements of Informed Consent

The NPRM proposes to modify the informed consent regulations to facilitate shorter and more understandable consent forms. The proposal aims to address unduly long documents in which important information may be difficult for a subject to find.

1. Facilitate understandability

   The NPRM emphasizes the need that a consent form first provide essential information that a reasonable person would want to know in order to make an informed decision about whether to participate, and to provide an opportunity to discuss that information. The NPRM would require that the information in consent forms be organized and presented in a way that does not merely provide lists of isolated facts, but rather facilitates the prospective subject's understanding of the reasons why one might or might not want to participate.

2. Presentation of information

   The NPRM also proposes that in obtaining informed consent, the investigator be required to present first the Common Rule-required information, before providing other information, if any, to the subject. Under this proposal, the consent document would only include the elements of consent that were required by the Common Rule, with any other information included in an appendix. The NPRM intends for this scheme to shorten consent forms substantially and avoid burying key information in a long and overly complex document.

3. HIPAA authorization combined with informed consent

   The NPRM proposes to clarify that if a HIPAA authorization is combined with a consent form, the required authorization elements must be included in the consent document and not the appendices.

4. New basic element of informed consent

   Under the NPRM, research with non-identified data would continue to be regarded as not involving "human subjects." The NPRM thus proposes that a new element of informed consent be required to ensure that subjects are informed of the possibility that identifiers could be removed from collected data, and then the non-identified data could be used for secondary research studies without the Common Rule protections. The new basic element of consent would apply to all research collecting identifiable private information. Based on the investigator's plans, the consent form would need to inform subjects either that (1) identifiers might be removed from the data and that the non-identified data could be used for future research studies or distributed to another investigator for future research studies without additional informed consent from the subject; or (2) the subject's data collected as part of the research would not be used or distributed for future research studies, even in a non-identified form. The NPRM anticipates that few investigators would elect to offer the option to restrict the future research use of non-identified data, in part because of the challenges of marking and tracking such decisions.

5. New additional elements of informed consent

   The NPRM also proposes three additional elements of consent that would require that prospective subjects (1) be informed that their biospecimens may be used for commercial profit and whether the subject will or will not share in this commercial profit; (2) be informed whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and (3) be provided with an option to consent, or refuse to consent, to investigators recontacting the subject to seek additional information or biospecimens or to discuss participation in another research study.

## V. Broad Consent to the Storage, Maintenance, and Secondary Research Use of Biospecimens and Identifiable Private Information

Since broad consent is a different form of informed consent than study-specific consent, the proposed requirements for broad consent are separately listed and would include several of the basic and additional elements of informed

consent, but not all, and would include several additional required elements. The proposed elements of broad consent are intended to ensure that the individual would be provided with sufficient information to make an informed decision about whether to agree to provide broad consent for a wide variety of research that may be unforeseen at the time when consent is being sought.

1. General elements of broad consent

   The NPRM would require that broad consent include a general description of the types of research that may be conducted with information and biospecimens, the types of information or biospecimens that might be used in research, and the types of institutions that might conduct research with the biospecimens or information.

2. Research material covered by broad consent

   The NPRM proposes to require that the broad consent provide a clear description of the types of biospecimens or information that would be covered by the consent. The consent must describe the types of biospecimens or information that were or will be collected and the period of time during which biospecimen or information collection will occur. However, the period of time cannot exceed 10 years from the date of consent. For research involving children as subjects, the time period cannot exceed 10 years after parental permission is obtained or until the child reaches the legal age for consent, whichever period is shorter. However, time limitations would not apply to biospecimens or information initially collected for research purposes because such materials generally would be described in the consent document for the study that would be generating the research biospecimens or information. In contrast, in the non-research context, it is recognized that the biospecimens and information that the subject would be asked to permit to be stored or maintained and used for a wide range of secondary research studies would not be as readily understood as in the research context, since such non-research collections are usually less predictable or defined.

3. Ability to withdraw consent

   The NPRM includes an element of broad consent that would require that subjects be informed that at any time and without penalty or loss of benefits to which the subject is otherwise entitled, they may withdraw consent, if feasible, for research use or distribution of the subject's information or biospecimens. However, information that has been stripped of identifiers might not be traceable. Thus, it might not be feasible to withdraw consent for future use or distribution. The statement must make clear that the information or biospecimens that already have been distributed for research use may not be retrieved.

4. Public posting of non-identifiable data

   The NPRM also proposes an element of broad consent related to the public posting of non-identifiable data about a subject. This proposed element of broad consent would include an option, if relevant, for an adult subject to consent or refuse to consent, to the inclusion of the subject's data, with removal of the identifiers listed in the HIPAA Privacy Rule, in a database that is publicly available and openly accessible to anyone. Under this provision, the consent document would be required to note the option prominently, and to include a description of the risks associated with public access to the data. Alarmingly, this provision appears to be fundamentally at odds with increasing regulatory requirements, including those imposed by EMA and some journals, that all such subject-level de-identified data be posted publicly or otherwise be made available to third-party researchers.

5. Broad consent template

   To facilitate the use of broad consent, the NPRM proposes that the Secretary of HHS will publish in the Federal Register broad consent templates that would contain all of the required elements of consent. The NPRM notes that at least two broad consent templates would be developed: one for information and biospecimens originally collected in the research context, and another for information and biospecimens originally collected in the non-research context.

## VI. Waiver of Informed Consent and Documentation

1. Interpretation of "practicably"

   While the NPRM regulatory text does not propose to modify "practicably," the preamble offers insight into how OHRP interprets the standard. OHRP states its agreement with the Secretary's Advisory Committee on Human Research Protections (SACHRP), which has identified the following concepts to help an IRB determine whether the research could not be practicably carried out without the waiver of consent: (1) scientific validity would be compromised if consent were required; (2) ethical concerns would be raised if consent were required; (3) there is a scientifically and ethically justifiable rationale why the research could not be conducted with a population from whom consent can be obtained; and (4) practicability should not be determined solely by considerations of convenience, cost, or speed.

2. New waiver criterion

   The NPRM proposes to add a new waiver criterion, which would require that, for research involving access to or use of identifiable biospecimens or identifiable information, the research could not practicably be carried out without accessing or using identifiers. The NPRM modeled this on the similar criterion in the HIPAA Privacy Rule, which requires that the research could not practicably be conducted without access to and use of the protected health information.

3. Waiver for research involving biospecimens

   Additional, more stringent waiver conditions would apply to research involving biospecimens. Specifically, the NPRM proposes that (1) there be "compelling scientific reasons" for the research use of the biospecimens; and (2) the research could not be conducted with other biospecimens for which informed consent was or could be obtained. The NPRM proposes that the Common Rule prohibit IRBs from waiving informed consent if individuals were asked and refused to provide broad consent to the storage and maintenance for secondary research use of biospecimens and identifiable private information.

   The NPRM also clarifies that waivers of informed consent might not be permitted for research subject to FDA regulation. However, as described in our Ropes & Gray LLP 21st Century Cures Alert, the House-passed version includes a provision that would authorize FDA to promulgate waiver regulations consistent with the Common Rule.

4. Recruiting subjects

   The NPRM includes a provision to allow an IRB to approve a research proposal in which investigators, for eligibility screening and recruitment, obtain identifiable private information from prospective human subjects of research without informed consent, provided that the research proposal includes an assurance that the investigator will implement standards for protecting the obtained information. Under the current Common Rule, IRBs generally waive the requirement for informed consent, which the NPRM views as burdensome and unnecessary to protect subjects, and is not consistent with FDA's regulations, which do not require informed consent or a waiver of informed consent for such activities.

5. Posting of consent forms

   As an additional means of increasing transparency and facilitating the development of more informative informed consent forms, the NPRM proposes that a copy of the final version of the consent form for clinical trials conducted or supported by a Common Rule department or agency would need to be posted on a publicly available Federal website. Within 60 days after the trial closes to recruitment, the awardee or the federal department or agency conducting the clinical trial would be required to post the consent document, the name of the clinical trial and information about whom to contact for additional details about the trial. As the NPRM explains, "[t]he primary purpose of this provision is to improve the quality of consent forms in federally funded

research by assuring that—contrary to current practices, under which it is often very difficult to ever obtain a copy of these documents—they eventually would become subject to public scrutiny." With this extra layer of public oversight, likely involving plaintiffs' attorneys, academics, and researchers, it would be recommended that institutions, sponsors, investigators, and IRBs should exercise additional care and precision when developing, drafting, and reviewing consent forms.

6. Culturally distinct groups

   The NPRM would provide that if subjects are members of a distinct cultural group or community for whom signing documents is not the norm, so long as the research presents no more than minimal risk of harm to subjects and provided there is an appropriate alternative mechanism for documenting that informed consent was obtained, the requirement to obtain a signed consent form may be waived. The study documents must include a description as to why signing forms is not the norm for the distinct cultural group or community.

**VII. Cooperative Research**

One of the most significant changes proposed by the NPRM is the mandate that all institutions located in the United States engaged in cooperative research rely on a single IRB as their reviewing IRB for that study. The reviewing IRB would be selected by the federal department or agency supporting or conducting the research, or by the lead institution if there is no such funding agency or department. This requirement would not apply to (1) cooperative research for which more than single IRB review is required by law (e.g., FDA-regulated devices); or (2) research for which the federal department or agency supporting or conducting the research determines and documents that the use of a single IRB is not appropriate for the particular study.

The NPRM clarifies that this proposal would not relieve any site of its other obligations under the regulations to protect human subjects. Although a local IRB may conduct its own additional internal review, such a review would not be binding on the local site if not adopted by the single IRB, nor would its terms be enforced by OHRP.

**VIII. Data Security Standards**

In recognizing that IRBs often lack expertise in fully evaluating privacy and confidentiality risks, the NPRM proposes to set uniform standards that would help to assure appropriate privacy and confidentiality protections to all subjects. The NPRM proposes to require that investigators and institutions implement reasonable and appropriate safeguards for protecting against risks to the security or integrity of biospecimens or identifiable private information, as well as reasonably protect the information and biospecimens from any intentional or unintentional use, release, or disclosure. The NPRM would allow investigators and institutions to implement either: a list published by the Secretary of HHS of specific measures that an institution or investigator can use to meet the requirements, or safeguards that meet the standards in the HIPAA rules.

**IX. Harmonization of Agency Guidance**

The NPRM includes a provision that would require that federal guidance on the requirements of the Common Rule be issued only after consultation, to the extent appropriate, with other Common Rule departments and agencies, if feasible. While FDA is not a Common Rule agency, the preamble specifies that FDA intends to modify its regulations in light of this NPRM, to the extent appropriate, considering its unique statutory framework and regulatory mission. The preamble further states that FDA and OHRP will continue to work together in developing guidance on their respective regulatory requirements that are found both in FDA regulations and in the Common Rule, to the extent feasible.

**X. Cover Unaffiliated IRBs Not Operated by an Institution Holding a Federalwide Assurance**

The NPRM proposes to add a new provision that would authorize Common Rule departments and agencies to enforce compliance directly against unaffiliated IRBs that are not operated by an assured institution. This would address concerns about OHRP's current practice of enforcing compliance with the Common Rule through the

institutions that are engaged in human subjects research, even in circumstances when the regulatory violation is directly related to the actions of an external IRB. The NPRM also proposes that the institution and the IRB should establish and follow written procedures identifying the compliance responsibilities of each entity.

**XI. Continuing Review of Research**

The NPRM proposes to eliminate continuing review for minimal risk studies that qualify for expedited review, unless the reviewer documents why continuing review should occur. For studies initially reviewed by a convened IRB, continuing review would not be required, unless specifically mandated by the IRB, after the study reaches the stage when it involves either (a) analyzing data (including identifiable private information), or (2) accessing follow-up clinical data from procedures that subjects would undergo as part of standard care for their medical condition or disease.

**XII. Expedited Review Procedures**

The NPRM would allow expedited review to occur for studies on the Secretary's list unless the IRB reviewer(s) determine(s) that the study involves more than minimal risk. This is in contrast to the current Common Rule, which requires that an IRB use the expedited review procedure only if the IRB reviewer determines that the research involves no more than minimal risk. Therefore, this proposed change represents a change in the default position: research included on the Secretary's list only involves minimal risk, unless the IRB makes a determination that the research is actually greater than minimal risk.

**XIII. IRB Review of Research Plan for Returning Results**

As a new criterion for IRB approval, the NPRM provides that if an investigator proposes a research plan for returning clinically relevant results to subjects, the IRB must determine that the plan is appropriate. IRBs do not need to determine whether there should be a plan for returning individual research results. The NPRM recognizes that challenges can arise regarding return of individual research results when it is not clear if the findings have clinical validity or utility, or when the knowledge imparted may cause psychological distress or social harm.

**XIV. Extend the Common Rule to All Clinical Trials**

The NPRM would extend the scope of the policy to cover all "clinical trials," regardless of funding source, conducted at a U.S. institution that receives federal funding for non-exempt human subjects research. The NPRM defines "clinical trial" to be 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. The purpose of this expanded scope is to ensure that clinical trials that otherwise would not be covered by a set of federal research ethics regulations are covered. If a clinical trial is already subject to FDA jurisdiction but not Common Rule jurisdiction, that clinical trial would not also be subject to the Common Rule.

**XV. Effective Dates and Compliance Dates**

The NPRM states that the effective date of the final rule will be one year after publication in the Federal Register. The compliance date of the new rules generally would also be one year from the publication of the Final Rule, except for the new rules covering all biospecimens and the mandate of a single reviewing IRB, for which the compliance date would be three years.

**XVI. Transition Provisions: Use of Prior Collections of Biospecimens**

The NPRM states that research involving the use of prior collections of biospecimens is permitted if the biospecimens were collected for either research or non-research purposes before the effective date of the final rule, and the individually identifiable information associated with the biospecimens has been removed.

**XVII. Definition of "Legally Authorized Representative"**

The preamble of the NPRM seeks comment on the definition of a "legally authorized representative" (LAR), though the regulatory text does not offer a proposal. The current Common Rule defines LAR as an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research. The NPRM preamble notes that this definition has been problematic for states in which there is no applicable law permitting an LAR to consent in either a clinical or a research context. In the absence of such a law, generally community or other standards (such as institutional policies) define hierarchies or identify individuals who may provide legally effective consent, for clinical (non-research) purposes, on behalf of others who cannot consent for themselves. The NPRM seeks comment on whether a revision that would expand the current definition to also permit an LAR to be defined by an accepted common practice standard that is used in a state for determining who can legally consent to clinical care would be consistent with the ethical principles underlying the Common Rule.

## Benefits and Costs

As stated above, the goals of the NPRM include facilitating research and reducing regulatory burden. Researchers have expressed concern, however, with the compliance costs associated with obtaining consent for secondary research of biospecimens and identifiable private information. HHS recognizes there are approximately 9 million individuals' biospecimens collected for research annually and that the compliance costs associated with the NPRM would be considerable, but asserts that these costs are outweighed by other cost savings in the proposal as well as non-quantifiable benefits from improved human subjects protections and regulatory uniformity.

## Next Steps

The NRPM includes extensive and substantive revisions to the Common Rule. The NPRM seeks active public engagement on the proposed codified text, on the numerous questions identified for public comment, and on the alternative schemes discussed in the preamble. As the NPRM accurately acknowledges, public trust in the research enterprise is imperative to the success and effectiveness of any changes to the Common Rule. The proposed rule will be open for public comment until December 7, 2015.

If you have any questions about the proposed revisions or how the NPRM may affect your organization, please contact any member of Ropes & Gray's health care or life sciences practices or your usual Ropes & Gray advisor.