ROPES & GRAY ALERT

FDA Regulatory ▪ Health Care ▪ Digital Health

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21st Century Cures Act – Provisions Relating to Regulation of Clinical Research

On December 13, 2016, President Obama signed into law the 21st Century Cures Act (the Act), just days after it passed in the U.S. House of Representatives and Senate. With an overarching goal of advancing biomedical innovation, the Act makes numerous changes to laws that govern Food and Drug Administration (FDA) programs, clinical research regulations, and Medicare coverage and reimbursement rules.

To see Ropes & Gray's analysis of key provisions of the Act, please click on the hyperlinks below:

- Promoting Drug Development
- Development Incentives for Certain Classes of Drugs
- Medical Device Innovation
- Digital Health
- Reimbursement & Fraud and Abuse

Partners in Ropes & Gray's FDA Regulatory practice have also recorded a podcast to discuss some key implications of the Act for biopharmaceutical and medical device manufacturers. Click here to listen to the podcast.

The Act seeks, in part, to minimize administrative (including federal and institutional) requirements, and to promote the broad availability of clinical research data, with adequate security and privacy measures, to advance medical product innovation. This Alert highlights key changes related to research funding, to FDA's regulation of clinical research involving drugs and devices as part of medical innovation reform, and to rules governing the privacy and security of health information used for research purposes. These provisions have 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/medical schools, institutional review boards, and contract research organizations.

Protection of Human Research Subjects [Section 3023].[1]

This provision simplifies and facilitates researcher compliance by aiming to harmonize differences between the Health and Human Services (HHS) Human Subject Regulations at 45 C.F.R. Part 46 (the Common Rule) and FDA Human Subject Regulations. The Secretary of HHS is required to modify the two sets of regulations to reduce regulatory duplication and unnecessary delays, to facilitate multisite research, and to incorporate local considerations, community values, and protections of vulnerable populations. While the Common Rule and FDA regulations largely overlap in substance, this effort to streamline clinical research subject to both sets of authorities is intended to minimize administrative and regulatory hurdles that some saw unduly to delay the commencement or conduct of research involving human subjects.

Informed Consent Waiver or Alteration for Clinical Investigations [Section 3024].

[1] Cited sections refer to the relevant provisions in the Act.

This provision modifies the investigational drug and device statutory authorities to allow for waiver or alteration of informed consent if the proposed clinical testing poses no more than minimal risk to human subjects, and includes appropriate safeguards to protect subjects' rights, safety, and welfare. Prior to the Act, HHS Human Subject Regulations permitted an IRB to waive or alter informed consent for certain low-risk research, while the Federal Food, Drug, and Cosmetic Act (FDCA) did not contain a similar provision. Now, Congress has removed the statutory barrier and authorized FDA to permit an IRB to waive or alter informed consent for FDA-regulated minimal-risk research if the subjects are protected adequately. The nature of the safeguards is not described in the provision, but FDA may adopt in whole, or in large part, the protections contained in the Common Rule, such as the requirement that the waiver or alteration not adversely affect the rights and welfare of the subjects, that the research could not practicably be carried out without the waiver or alteration, and that, whenever appropriate, the subjects will be provided with additional pertinent information after the study ends.

Central Institutional Review Boards for Medical Device Studies [Section 3056].

This provision removes the statutory requirement that medical device clinical investigations be overseen by a "local" IRB. By striking "local," this provision allows all clinical trials of FDA-regulated medical products to be overseen by a central IRB, as is permitted for drug and biological product studies.[2] Oversight of a multicenter clinical study of a medical device by a single, central IRB, in contrast to multiple local IRBs, may expedite the review and approval process by minimizing administrative burdens, costs, and delays.

Beau Biden Cancer Moonshot and NIH Innovation Projects [Section 1001].

The Act promotes an expanded role of the NIH in funding high-risk research with the potential to lead to medical breakthroughs by providing a significant funding boost of nearly $4.8 billion over ten years to the NIH for certain specific initiatives. In particular, the Act allocates $1.8 billion for Vice President Joe Biden's Cancer Moonshot to accelerate cancer research; $1.455 billion for President Obama's Precision Medicine Initiative, which focuses on individualized treatment approaches; $1.511 for the Brain Research Through Advancing Innovative Neurotechnologies (BRAIN) Initiative; and $30 million for clinical research to advance regenerative medicine using adult stem cells. The Act attempts to ensure accountability in the expenditure of such funds by requiring a work plan and annual report. This gives the NIH the power to invest significantly in medical innovation, offering researchers at universities and medical centers opportunities for further research grants toward research on cancer, neurobiology, and genetic medicine.

Reducing Administrative Burden for Researchers [Section 2034].

The Act aims to harmonize regulations and policies across research funding agencies to minimize administrative burden. The Act directs HHS to lead a review by research funding agencies of all regulations and policies related to the disclosure of financial conflicts of interest and to implement measures to reduce administrative burdens on researchers. The most recent regulatory revisions, in 2011, included requirements for investigators to disclose financial conflicts of interest in public presentations of NIH-funded clinical research results and to request addenda to previously published presentations. This provision requires HHS, within two years of enactment, to review and harmonize all such regulations and policies in order to reduce administrative burdens on researchers, including through revisions to reporting timelines and updates to NIH training modules, as appropriate. NIH also will be required to implement measures reducing the administrative burdens related to monitoring of sub-recipients of NIH grants, such as considering exemptions from sub-recipient monitoring requirements and implementing alternative grant structures that obviate the need for sub-recipient monitoring. The Act also requires the Commissioner of the FDA, the Secretary of HHS and the Secretary of Agriculture to review and revise regulations and policies governing the care and use of laboratory animals in order to reduce administrative burden on investigators. These changes would provide incentives that have the potential to decrease research and drug development costs for NIH funding recipients.

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[2] *See* FDA Guidance on "Using a Centralized IRB Review Process in Multicenter Clinical Trials" (March 2006).

Collaboration and Coordination to Enhance Research [Section 2038].

The Act encourages collaboration between NIH-funded clinical research projects, allowing for an increased number of subjects studied and utilization of diverse study populations, and increasing accountability for national research institutions to include diverse populations in clinical research. It calls on the NIH, when assessing research priorities, to include data on study populations of clinical research that specifies the inclusion of women, minority groups and relevant age categories; that is disaggregated by research area, condition, and disease categories; and that is to be made publicly available on the NIH website. The NIH must also ensure that national research institutes and national centers foster collaboration between clinical research projects that conduct research involving human subjects and collect similar data, and encourage such collaboration to allow for increased numbers of subjects and utilization of diverse populations. This provision also increases the reporting obligations for national research institutions, requiring triennial (instead of biennial) reports to include the number of women and minority groups included as clinical research subjects.

Accessing, Sharing, and Using Health Data for Research Purposes [Section 2063].

The Act requires HHS to issue guidance clarifying that the HIPAA Privacy Rule does not prohibit remote access to health information for research purposes as long as applicable security and privacy safeguards are maintained and the PHI is not copied or otherwise retained by the researcher. It also requires HHS to issue guidance regarding authorizations for "future research purposes." In addition to a sufficient description of the research purposes, such an authorization must include a specific expiration date or event, or provide instructions on how the authorization may be revoked. The Act also establishes a working group to study and report on whether the uses and disclosures of PHI for research purposes under HIPAA should be modified to allow greater availability of PHI while protecting individuals' privacy rights.

Privacy Protection for Human Research Subjects [Section 2012].

In an attempt to promote greater participation in research, the Act strengthens privacy protections for individuals participating in research projects in which sensitive information is collected, including research on mental health and research on the use and effect of alcohol and other psychoactive drugs. Under existing law, HHS (acting through NIH) may issue, in its discretion, "certificates of confidentiality" that protect investigators and institutions from being compelled to release names or other identifying information of research subjects in connection with federal, state, or local civil, criminal, administrative, legislative, or other proceedings. (HIPAA does not provide such protection, as it generally permits disclosure of PHI in the course of judicial or administrative proceedings.) The Act strengthens the existing protections by (i) *requiring* HHS to issue such certificates in connection with all federally funded research involving the collection of identifiable sensitive information (non-federally funded researchers will be permitted to apply for such certificates, which HHS may continue to issue at its discretion), (ii) expanding the universe of protected information to include not just names and other "identifying characteristics"—*e.g.*, an address, social security or other identifying number—but any other information for which there is even a "very small risk, as determined by current scientific practices or statistical methods," of identification (a definition that is similar to the HIPAA standard for de-identification via expert determination), and (iii) clarifying that such information shall not be admissible as evidence or used for any purpose in any lawsuit or other judicial, legislative, or administrative proceeding, except with the individual's consent.

Protection of Identifiable and Sensitive Information [Section 2013].

The Act strengthens privacy protections by preventing use of the Freedom of Information Act (FOIA) to gain access to biomedical information about an individual. The Act allows HHS to protect individual biomedical research data from being disclosed publicly under FOIA requests if there is even a "very small risk" that the data could be used to identify the individual. Any HHS determination to exempt information from disclosure must be made in writing, be accompanied by a statement of the basis for the determination, and be made available to the public in responses to FOIA requests.

Data Sharing [Section 2014].

In order to facilitate greater sharing of data, the Act allows NIH to require grant recipients to share, "to the extent feasible," scientific data generated from NIH grants. Such data sharing must be consistent with all applicable federal laws and regulations, including laws and regulations for protection of human research participants, proprietary interests, confidential commercial information, and the intellectual property rights of the funding recipient. The Act does not otherwise specify the mechanics of such data sharing.

Increased Inclusion of Underrepresented Populations in Clinical Trials [Section 2044].

The Act encourages the National Institute on Minority Health and Health Disparities to include within its strategic plan ways to increase representation of underrepresented populations in clinical research.

If you have any questions, please contact any member of Ropes & Gray's FDA regulatory or health care practices or your usual Ropes & Gray advisor.