ROPES & GRAY ALERT

FDA Regulatory ▪ Health Care

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FDA Issues Immediately Effective Guidance Allowing Waiver of Informed Consent for Minimal Risk Research

The United States Food & Drug Administration (FDA) has issued a guidance document announcing its intention not to object to an IRB's waiving or altering the informed consent requirements for an FDA-regulated clinical investigation that presents no more than minimal risk and involves adequate human subjects protections. The guidance, which takes effect immediately, aligns FDA's policy on waiving informed consent with the "Federal Policy for the Protection of Human Subjects" (the Common Rule) (45 C.F.R. part 46, subpart A), which since 1991 has permitted an IRB to waive informed consent requirements for minimal risk research in certain circumstances.

Background

Members of the research community have expressed frustration that FDA's regulations on human subjects protection have not contained a provision permitting the waiver of informed consent for minimal risk research, in contrast to the Common Rule. The inability, under FDA regulations, to obtain from an IRB a waiver of informed consent has, among other things, prevented retrospective medical records research conducted under waiver of consent from being qualified to be used in FDA submissions. With an emphasis on "real world evidence" for use in FDA regulatory determinations and with increasing scientific value of results of "big data" studies – many of which are typically infeasible without provision for waiver of consent – the need for FDA regulations to allow waiver of consent for minimal risk research has become increasingly obvious. Indeed, in 2014 and 2016, the HHS Secretary's Advisory Committee on Human Research Protections (SACHRP) recommended to the HHS Secretary that FDA harmonize its regulations with the Common Rule regarding waiver of informed consent. Congress, as part of a larger effort to promote harmonization between FDA regulations and the Common Rule, addressed the issue in December 2016 when it included a provision in the 21st Century Cures Act[1] amending the Federal Food, Drug, and Cosmetic Act (FDCA) to permit the HHS Secretary to allow a waiver of informed consent for research involving no more than minimal risk to human subjects, assuming appropriate safeguards to protect the rights, safety, and welfare of subjects. This provision of the 21st Century Cures Act requires FDA through regulation to describe and define the conditions under which an IRB can waive informed consent for FDA-regulated minimal risk research.

New FDA Policy on Waiver of Informed Consent

FDA has taken the interim step of promulgating its new guidance, which immediately permits an IRB overseeing a clinical investigation subject to FDA regulations to waive or alter the informed consent requirements under circumstances that mirror those currently found in the Common Rule at 45 C.F.R. section 46.116(d). Specifically, an IRB may waive informed consent if it finds and documents that:

1. The clinical investigation involves no more than "minimal risk" to subjects;[2]
2. The waiver or alteration will not adversely affect the rights and welfare of the subjects;
3. The clinical investigation could not practicably be carried out without the waiver or alteration; and
4. Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

[1] See section 3024 of Pub. L. 114-255.

[2] "Minimal risk" is defined in the FDA regulations to mean that the "probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests" (21 C.F.R. sections 50.3(k) and 56.102(i)). The Common Rule contains the same definition of "minimal risk" (45 C.F.R. section 46.102).

Notably, revisions to the Common Rule that issued on January 19, 2017, and that are expected to take effect on January 19, 2018 (and that were the subject of an earlier Ropes & Gray Alert, available here), revised the requirements for a waiver of informed consent to include an additional criterion, *i.e.*, that "if the research involves using identifiable private information or identifiable biospecimens, the research could not practicably be carried out without using such information or biospecimens in an identifiable format." Currently, the FDA guidance does not include this additional criterion, but FDA will consider including this new criterion in any waiver provision that it adopts as it revises its regulations to harmonize with those of the Common Rule.

Next Steps

FDA intends to revise its human subjects protection regulations to permit waiver or alteration of informed consent, but issued the guidance to announce immediately its policy of enforcement discretion in regard to such waivers. FDA plans to withdraw the guidance after it promulgates regulations permitting waiver or alteration of informed consent for research that presents no more than minimal risk and involves adequate human subject protections.

FDA's new policy will facilitate pharmaceutical, biotechnology and medical device companies in collecting real world evidence and data from low-risk research activities, such as observational or retrospective studies or registries, and using those results to support regulatory submissions to FDA. FDA's announcement also is expected to benefit *in vitro diagnostic* device manufacturers (including developers of genomic testing software) that develop and validate assays by allowing for research using biospecimens to be conducted without consent when the risks to subjects are no more than minimal.

Although this guidance is immediately in effect, FDA will consider all comments received and will revise this guidance when appropriate. We will continue to monitor new developments with respect to this policy. 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.