Summary of the NPRM Concerning Biospecimens
(Compiled by SACHRP)

Requiring Consent for the Storage, Maintenance, and Secondary Research Use of Biospecimens and Identifiable Data (§§_.102(e) and_.116(c))

The NPRM would expand the scope of “human subject” to include a living individual about whom an investigator (whether professional or student) conducting research “[o]btains, uses, studies, or analyzes biospecimens.”¹ The NPRM would cover all biospecimen collections for research and all research uses of biospecimens, regardless of whether the biospecimens are identifiable or de-identified, if those biospecimens are collected or used in federally-funded research or “clinical trials,” as defined in the NPRM.² Under the NPRM, the storage, maintenance, and secondary research use of biospecimens could be exempt from the Common Rule if the research satisfies documentation of exemption, broad consent, institutional review,³ and data security protection requirements.⁴ If the investigator anticipates that individual research results will be returned to a research subject, the biospecimen research cannot be exempted and instead must be reviewed by the IRB, and standard informed consent for the research must be obtained.⁵

Broad Consent Requirements (§_.116(c))

Under the NPRM, broad consent for future research use of biospecimens would include certain basic elements, additional elements, and new elements. For the storage, maintenance, or secondary research use of the biospecimens to be exempt under §_.104(f) of the NPRM, an HHS-provided broad consent template must be used.⁶

The existing basic elements for informed consent that must also be included in broad consent are: (1) a description of reasonably foreseeable risks or discomforts; (2) a description of any benefits to the subject or to others that may reasonably be expected; (3) a statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained; and (4) an explanation of whom to contact for answers to pertinent questions about the research and subjects’ rights, and whom to contact in the event of research-related injury.

¹§_.102(e)(1).
²“Clinical trial” means “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.” §_.102(b). The NPRM would apply the Common Rule to all clinical trials, irrespective of funding source, if: (i) the clinical trials are conducted by an institution that receives federal funding for non-exempt and non-excluded human subject research; (ii) the clinical trials are not subject to FDA regulation; and (iii) the clinical trials are conducted at an institution located within the U.S. §_.101(a)(2).
³Under the NPRM, limited IRB review would entail only an IRB’s determination that: (i) procedures for obtaining broad consent for storage, maintenance, and secondary research use of biospecimens will be conducted in accordance with the first paragraph of §_.116, and (ii) if there will be a change for research purposes in the way the biospecimens are stored or maintained, the privacy and information protection standards are satisfied for the creation of any related storage database or repository. §_.111(a)(9).
⁴§_.104(f).
⁵§_.104(f)(2)(ii).
⁶§§_.104(f) and_.116(d). If the HHS-established broad consent template is not used, the broad consent and the secondary research use would be subject to IRB review (80 Fed. Reg. at 53966).
Further, the NPRM proposes new additional elements applicable to all informed consent, which also must be included in broad consent forms: (1) a statement that the subject’s biospecimens may be used for commercial profit and whether the subject will or will not share in this commercial profit; (2) a statement explaining whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and (3) an option for the subject to consent, or refuse to consent, to investigators’ re-contacting the subject to seek additional information or biospecimens or to discuss participation in another research study.

In addition, the NPRM would prescribe certain consent elements unique and specific to broad consent, including: (1) a general description of (i) the types of research that may be conducted with biospecimens/information, (ii) the information that is expected to be generated from the research, (iii) the types of biospecimens/information that might be used in research, and (iv) the types of institutions that might conduct research with the biospecimens/information; (2) a clear description of the types of biospecimens/information that were or will be collected and the period of time during which biospecimen/information collection will occur; (3) a description of the period of time during which an investigator can continue to conduct research on the biospecimens/information (can be indefinite); (4) a statement that subjects may at any time, and without penalty or loss of benefits, withdraw consent, if feasible, for research use or distribution of the subject’s biospecimens/information, though biospecimens/information already distributed for research use may not be retrieved; and (5) 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.

As part of the description of 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, the NPRM would permit the collection to include all biospecimens and information from the subject’s medical record or other records existing at the institution at the time informed consent is obtained. However, the period of time during which biospecimen or information collection can occur cannot exceed 10 years from the date of consent. For research involving children as subjects, that time period cannot exceed 10 years after parental permission is obtained, or until the child reaches the legal age for consent to the treatments or procedures involved in the research, whichever time period is shorter. Importantly, the time limitations do not apply to biospecimens or information initially collected for research purposes.

*Waiver Criteria (§.116(f))*

The NPRM proposes to add a new generally applicable waiver criterion that would only permit waiver of consent for research involving access to or use of identifiable biospecimens or identifiable information if the research could not practicably be carried out without accessing or
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using identifiers.\(^7\) The criterion is modeled on the HIPAA Privacy Rule, which requires that the research could not practically be conducted without access to and use of the protected health information.\(^8\)

In addition, the NPRM would impose two more stringent waiver conditions for research involving biospecimens.\(^9\) First, there must be “compelling scientific reasons” for the research use of the biospecimens. Second, the research “could not be conducted with other biospecimens for which informed consent was or could be obtained.” Finally, the NPRM would 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.

Exclusion for Certain Assay Research (§.101(b)(3)(i))

The NPRM proposes to exclude from Common Rule jurisdiction certain activities that are low-risk human subjects research that “do not meaningfully diminish subject autonomy.” The only type of research that would fall within the exclusion would be the secondary research use of non-identified biospecimens designed only to generate information about the individual “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), quality assurance and control activities, and proficiency testing.

Broad Consent Template (§.116(d))

The NPRM proposes that the HHS Secretary will establish and publish in the Federal Register for public comment, broad consent templates containing all required elements of consent. The NPRM would not require IRB review of the broad consent template, if no changes are made. HHS would develop at least two broad consent templates, one for biospecimens originally collected in the research context, and another for biospecimens originally collected in the non-research context.

Transition Provisions (§.101(k)(2))

The NPRM would not apply to research involving the use of prior collections of biospecimens if: (1) the biospecimens were “collected for either research or non-research purposes before the compliance date; and (2) the research use “occurs only after removal of any individually identifiable information associated with the biospecimens.”

\(^7\) §.116(f)(1)(iii).
\(^8\) 45 CFR 164.512(i)(2)(ii)(C).
\(^9\) §.116(f)(2).