Compliance Today - May 2018
Revised Common Rule delay: Evaluating institutional preparedness

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On January 17, 2018 (just two days before the previously revised rule was scheduled to go into effect), an interim rule to delay the implementation and effective dates of the revisions to the Federal Policy for the Protection of Human Subjects (the revised Common Rule) was posted in the Federal Register.[1] This interim rule delayed both the effective and general compliance dates of the requirements of the revised Common Rule until July 19, 2018. In addition to allowing institutions that conduct human research (regulated entities) additional time to prepare for the requirements of the revised Common Rule, the interim rule is intended to provide "additional time for the departments and agencies to seek input from interested stakeholders through a notice and comment rulemaking process that allows for public engagement on the proposal for a further implementation delay."[2] The interim rule was published in response to requests from key stakeholders, including the Association of American Medical Colleges, the Association of American Universities, the Council on Governmental Relations, and the Secretary's Advisory Committee on Human Research Protections (SACHRP), which all cited the revised Common Rule's complexity, the lack of guidance from the Office for Human Research Protections (OHRP), and the requirement to revise and update institutional-based electronic systems as the key drivers for the requested delay.

The gift of an additional six months presents a golden opportunity to re-evaluate institutional preparedness to comply with the requirements of the revised Common Rule.

Organizational and strategic decisions

Noteworthy changes to the revised Common Rule include modifications to the informed consent requirements, the addition of new exempt research categories, new requirements to rely on a single Institutional Review Board (IRB) of record for federally sponsored cooperative research, use of a broad consent, creation of limited IRB review for certain research studies, and changes to continuing review requirements. Compliance with some of the new requirements has not required substantive decision-making, because the requirements are relatively straightforward. For example, the revised Common Rule added new requirements to the elements of informed consent,[3] and it sets forth a new requirement for informed consent documents to begin with a concise and focused presentation of key study information.[4] Meeting these new informed consent requirements is straightforward, and very little decision-making is required on behalf of the institution.

Conversely, setting forth an organizational compliance strategy for some of the more complex provisions in the revised Common Rule requires thoughtful and harmonized decision-making among various institutional officials, including research administrators, general counsel, the chief compliance officer, and others. Decisions on how best to proceed with the applicability and transition to the revised Common Rule, broad consent, and the requirements for continuing review are examples of some of the complex provisions that you may have been grappling with. To elaborate, let's examine the considerations and subsequent decisions that must be made related to these three issues.

Applicability and transition

Applicability of the revised Common Rule is limited to human research conducted or supported by federal agencies that have signed the Common Rule (i.e., federally funded research). This sharply contrasts with the current requirement whereby institutions holding a Federalwide Assurance (FWA) are given an option to voluntarily choose to apply the Common Rule requirements to all non-exempt human research under their jurisdiction, regardless of the source of funding. It has been reported that 31% of accredited FWA-holding institutions have "unchecked the box" on their FWA or did not check the box in the first place, thus limiting jurisdictional applicability of the Common Rule solely to federally funded, non-exempt human research.[5] Many of these institutions have created local policies that reduce the administrative burden on investigators while providing equivalent protections to research participants. For some, state law requires FWA-holding institutions to follow federal requirements governing human research for all research, regardless of funding, thereby requiring the application of the Common Rule requirements to all research they oversee.[6]

With implementation of the revised Common Rule, checking the box will not be an option, and OHRP will not have jurisdiction over any research that is not federally funded. All those institutions that have checked the box (excluding those limited by state law) must establish local institutional standards for oversight of human research studies that are neither federally funded nor subject to FDA regulation. Once institutional decisions are made, policies and procedures must be updated or created to comport with the new institutional standards.

Transition to the revised Common Rule requires that decisions be made regarding applicability of the varying sets of regulations for human research approved prior to the effective date of July 19, 2018. Specifically, your institution's transition plan will require applying the requirements of the revised Common Rule to:

- only studies approved after the effective date of July 19, 2018;
- all studies, regardless of when they were approved; or
- all studies approved after the effective date and some studies approved prior to the effective date.

Similarly, an institutional decision must be made related to the applicability of the revised Common Rule for non-federally funded studies approved by the IRB after the July 19 effective date. Specifically, will your institution require adherence to the revised Common Rule for all research, regardless of funding, or limit applicability of the revised Common Rule requirements solely to federally funded research?

Once institutional decisions are made regarding transition and applicability, care must be given to ensure that the IRB and investigators apply and follow the requisite set of regulations and institutional standards. Potentially, there could be as many as four differing sets of policies and procedures that the IRB and investigators would follow at any given time.

Before July 19, 2018	After July 19, 2018
Pre-July 19, 2018, Common Rule Regulations	Post-July 19, 2018, New Common Rule Regulations
FDA Regulations	Pre-July 19, 2018, Current Common Rule Regulations
Institutional Policies for non-federally funded studies	FDA Regulations
	Institutional Policies for non-federally funded studies

Broad consent, exempt research, and limited IRB review

Under the revised Common Rule, research activities that involve collection, storage, and secondary research use of identifiable private information or identifiable biospecimens are exempt from regulation if broad consent is obtained, the IRB conducts a limited IRB review, and the investigator does not include return of individual results to subjects as part of the research plan.[7] On the surface, implementing these new procedures certainly appears easy enough, but as you begin to consider the requirements, nuances, and ambiguities around broad consent, a very different picture emerges. Let's begin by examining the regulatory requirements of limited IRB review and broad consent.

The requirements of limited IRB review have been added to the §___.111, regulatory criteria for research approval, and the following determinations must be made to satisfy the requirements of limited IRB review:

1. Broad consent for storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens is obtained;
2. Broad consent is appropriately documented or a waiver of documentation is appropriate; and
3. If there is a change made for research purposes in the way the identifiable private information or identifiable biospecimens are stored or maintained, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

Of note, limited IRB review can be conducted by the expedited procedure, and continuing review of activities granted approval (i.e., exemption) by the limited IRB review procedure is not required.

Broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens (collected for either research studies other than the proposed research or non-research purposes) is permitted as an alternative to the informed consent requirements in §___.116(b) and (c). If the subject or the subject's legally authorized representative is asked to provide broad consent, the new requirements of §___.116(d) must be met.

The revised rule does not permit an IRB to waive informed consent for the storage, maintenance, or secondary research use of identifiable private information or identifiable biospecimens if an individual was asked and then refused to provide broad consent.

Having reviewed the requirements for broad consent, you can readily identify multiple ambiguities that require clarification in the form of guidance from OHRP prior to implementation. As discussed in the July 26, 2017, SACHRP Recommendations for Broad Consent:[8]

1. **How is refusal to consent defined?** The revised Common Rule does not delineate whether an individual's silence, non-responsiveness, and/or express declination to give broad consent would constitute "refusal to consent" to broad consent.
2. **Who are the parties bound by a refusal to give broad consent?** The parties bound by refusal to give broad consent are not identified in the revised Common Rule. We must understand whether refusal to provide broad consent applies to all institutions, investigators, and IRBs, or whether refusal is limited to the specific requesting party.
3. **What must be included in the description of the types of future research** that may be conducted under

broad consent? The revised Common Rule requires that the broad consent document include a description of the types of future research that may be conducted. The generality (or specificity) of the description is not described in the revised Common Rule.

4. **What are the responsibilities of the reviewing IRB** when performing limited review to ensure that broad consent was obtained and documented appropriately? This becomes particularly problematic when identifiable tissue or data have been collected at another institution and then transferred to an investigator at your institution.

Moreover, information technology solutions must be updated, developed, and implemented prior to operationalizing broad consent. Without a robust IT infrastructure, it will be extremely difficult to track those individuals who have been approached for broad consent and their responses. IT solutions must also include the capacity to track and communicate to investigators the scope of future research permitted under the broad consent, and they must be able to track individuals who affirmatively provided broad consent but then wish to retract consent at a later date.

Finally, it is important to point out that the institutional decisions related to broad consent will have a direct effect on exemptions and limited IRB review. Specifically, if your institution does not allow broad consent, you will not need to include exempt categories 7 or 8, and your utilization of limited IRB review will be reserved solely for research performed under exempt categories 2 and 3.[9]

Continuing review

Under current regulation, continuing review of non-exempt research by the IRB is required at least annually.[10] Continuing review is an opportunity for the IRB to re-review the research study and to reconsider and reapply the regulatory requirements for research approval as set forth at §___.111. In addition, many IRBs use continuing review to assess enrollment status, investigator compliance, and other protocol-related matters.

Under the revised Common Rule, the requirement for continuing review of many additional types of research has been eliminated. Specially, the revised Common Rule eliminates the requirement of IRB review for research eligible for expedited review, research reviewed by the IRB in accordance with limited IRB review, or research that has progressed to the point that it involves data analysis only or accessing follow-up clinical data from procedures that subjects would undergo as part of routine clinical care.[11] The IRB may determine that continuing review is otherwise required even if the conditions of §___.109(f)(1) are met. In this scenario, the IRB must document the rationale for requiring continuing review.[12] Moreover, investigators who otherwise would not be required to undergo continuing review are still obligated to report various developments, such as unanticipated problems or proposed changes of the study, to the IRB.

From the perspective of protecting research participants, it seems practical to eliminate a formal IRB continuing review of minimal-risk research. The majority of these continuing reviews are conducted by the expedited procedure and do not require review by the convened IRB committee. Frankly, most of the regulatory criteria for minimal-risk research are easily satisfied when considered at the time of continuing review. For example, minimal-risk research that has been granted a waiver of informed consent will continue to satisfy the conditions of §___.111(a)(1)-(6). However, the provisions related to confidentiality of data[13] may require reconsideration, depending on the protocol-specific data collection and storage methodologies.

Institutions must decide how to proceed in light of the regulatory revisions related to continuing review. If your institution chooses to follow the new requirements and not require continuing review of minimal-risk research, how will assurances be made to investigators that they are continuing to follow the protocol, that they report

certain required changes to the IRB, and that research data that may include protected health information is secure? To err on the side of cautious conservativism, some institutions have elected to require continuing review as an institutional policy. Others have elected to require an abbreviated continuing review process, often referred to as a "check-in" whereby certain key provisions (e.g., overall status of the research, data storage) related to the research are reviewed.