

# Changes to 45 CFR 46

**Effective January 21, 2019**

## For purposes of 45 CFR 46, the following activities are deemed **NOT** to be research:

- **Scholarly and journalistic activities (e.g., oral history, journalism, biography, literary criticism, legal research, and historical scholarship)**, including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.
- Certain public health surveillance activity conducted, supported, requested, ordered, required, or authorized by a public health authority.
- Collection and analysis of information, specimens, or records, by or for a criminal justice agency for certain criminal justice or investigative purposes, and certain authorized operational activities for national security purposes.

## Has the revised Common Rule changed the definition of human subject?

The regulatory definition of human subject **remains substantively unchanged** in the revised Common Rule. The definition has not been expanded. However, there have been **clarifications to the wording** that **make explicit OHRP's current interpretation** of the definition included in the pre-2018 Common Rule.

**Here are some important clarifications to the wording that make explicit OHRP's current interpretation of the definition included in the pre-2018 Common Rule:**

- **Define the data.** The pre-2018 Common Rule referred to “data” obtained by an investigator through intervention or interaction with the individual, but **in the revised Common Rule, “data”** is replaced with **“information or biospecimens”** for clarity.
- **Note the new language.** Language has been added to clarify OHRP's understanding of the meaning of **“obtaining”** in the pre-2018 Common Rule's definition of human subjects. The definition also now specifies what is meant by an **identifiable biospecimen**, and includes a **requirement** for Common Rule departments and agencies to **reexamine the meaning of “identifiable private information” and “identifiable biospecimen”**.
- **Assess the analytic technologies.** The revised definition also includes a provision requiring the Common Rule departments and agencies to assess whether there are **analytic technologies that should be considered** by investigators to generate “identifiable private information.”
- **Nonidentifiable private information.** Secondary research with **nonidentifiable private information** is not considered to involve human subjects and hence does not need IRB review.

# Changes to Exempt Categories

## Category 1

- A new restriction has been added that the research must not be likely to adversely impact the student's opportunity to learn required educational content or the assessment of educators who provide instruction.

# Changes to Exempt Categories (continued)

## Category 2

- **The word ONLY has been added** so that it is clear only the listed activities can be done;
- **An additional requirement** has been added to the second applicability criterion: the disclosure of the subjects' responses outside the research would **not reasonably be damaging to the subjects' educational advancement;**
- **Expanded in scope** such that even when sensitive identifiable information is recorded, this category applies **provided the IRB determines there are adequate privacy and confidentiality protections in the study.**

# Changes to Exempt Categories (continued)

## Category 3

- This new category applies to research involving benign behavioral interventions with adults who prospectively agree to the research, **when the information collected is limited to verbal or written responses, including data entry or audiovisual recordings.** The criteria for when Category 3 applies to such research is the same as for Category 2. It never applies to biomedical research.

# Changes to Exempt Categories (continued)

## Category 4

- Private information and biospecimens **no longer have to be in existence prior** to the start of the research;
- If an investigator records information about individuals in a nonidentifiable manner, the investigator **must not attempt to re-identify** or contact the research subjects;
- **Two new exempt provisions:**
  - (1) When the investigator's secondary use of the identifiable private information is regulated under HIPAA as "healthcare operations," "research," or "public health."
  - (2) When the secondary research is conducted by or on behalf of a federal department or agency, using data collected or generated by the government for nonresearch purposes, and the information is subject to federal privacy standards and other requirements specified in the exemption.



# Changes to the Exempt Categories (cont.)

## Category 5

- Currently applies to research that is designed to study, evaluate, improve, or otherwise examine public benefit or public service programs, if the research is conducted by a federal department or agency. **This has been expanded to include research that is also supported by a federal department or agency** (for example, through a grant of funding).

## Category 6

- No Changes

# Changes to Exempt Categories (cont.)

## Category 7

- **A new exemption** in the revised Common Rule that covers the storage or maintenance of identifiable private information or identifiable biospecimens for secondary research.

# Changes to Exempt Categories (cont.)

## Category 8

- **A new exemption** in the revised Common Rule that covers the secondary research use of identifiable private information or identifiable biospecimens originally obtained for non research purposes or for research other than the current proposal.

### **There are four requirements that must be satisfied to use category 8:**

- (1) **broad consent** must be obtained from the subjects for the secondary research use of their identifiable materials,
- (2) **documentation or waiver** of documentation of informed consent must be obtained,
- (3) **an IRB must conduct a limited review** to make certain determinations relating to privacy and confidentiality protections and broad consent,
- (4) **investigators cannot include the return of individual research** results to subjects in the study plan.

# Are there changes to the basic elements of informed consent in the revised Common Rule?

**There is one new element** that has been added to the basic elements of informed consent at §116(b). This new element **requires a notice about whether participants' information or biospecimens collected as part of the current research** might be stripped of identifiers and used for other research in the future. The purpose of this is to increase transparency by letting participants know that it might happen. If potential participants find it objectionable, they may not want to participate in the study.

**Consent forms will need to say either that information or biospecimens collected for the research might be stripped of identifiers and used in other research in the future, or that this will not happen.**

Note that this is **only about future research use of information and biospecimens that will be stripped of identifiers**. Consent for the future use of identifiable private information and identifiable biospecimens for future unspecified research is covered under the section for “broad consent,” or could also occur under conditions where an IRB determines that a waiver of informed consent is appropriate.

# Waiving Documentation of Informed Consent

## 45 CFR 46 117(c)

**An IRB may waive the requirement for the investigator to obtain a signed informed consent form for some or all subjects if it finds any of the following:**

- That the only record linking the subject and the research would be the informed consent form and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject (or legally authorized representative) will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern,
- That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context,
- If the subjects or legally authorized representatives are members of a distinct cultural group or community in which signing forms is not the norm, that 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.

# Requirements for Waiver or Alteration of Informed Consent

## 45 CFR 46 116(f)(3)

**In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:**

- The research involves no more than minimal risk to the subjects;
- The research could not practicably be carried out without the requested waiver or alteration;
- 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;
- The waiver or alteration will not adversely affect the rights and welfare of the subjects; and
- Whenever appropriate, the subjects or legally authorized representatives will be provided with additional pertinent information after participation.

## Under the revised Common Rule, continuing review is not required for:

- Research that is eligible for expedited review,
- Exempt research conditioned on limited IRB review,
- Research that has completed all interventions and now only includes analyzing data, even if the information or biospecimens are identifiable,
- Research that has completed all interventions and now only includes accessing follow-up clinical data from clinical care procedures.
- **Importantly, the IRB can override this default and still choose to require continuing review, as long as the IRB documents the decision and the rationale for this decision.**
- USD policy requires annual renewal for all IRB submissions

# Broad Consent

**§46.116** (d) Elements of broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens.

- 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 nonresearch purposes) is permitted as an alternative to the informed consent requirements in paragraphs (b) and (c) of this section.

**See §46.116 subsection for the required elements of broad consent.**