Changes to Informed Consent per New FDA Guidance on Impact of Revised Common Rule

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Changes are on the horizon for clinical trial informed consent forms (ICF). This Update provides key takeaways for your ICFs in light of the recent FDA guidance entitled, Impact of Certain Provisions of the Revised Common Rule on FDA-Regulated Clinical Investigations (October 2018) (the Guidance). (The Guidance also addresses expedited and continuing IRB review, which we do not discuss here.) While your studies may not be subject to the Common Rule, this harmonizing guidance from FDA will trickle down to informed consents for FDA-regulated studies.

Background

The Common Rule applies to studies supported or conducted by HHS. The Common Rule is very similar, but not identical, to FDA's human subject protection and Institutional Review Board regulations (21 CFR Parts 50 and 56). When a study is regulated by FDA and HHS, both sets of regulations apply. The 21st Century Cures Act directs HHS to try to harmonize the difference between the HHS and FDA human subject protection regulations.

The past few years have witnessed a flurry of activity relating to the Common Rule overhaul. The general compliance date for the revised Common Rule is January 21, 2019. Since FDA has not yet harmonized its regulations with the revised Common Rule, FDA issued this Guidance to reduce confusion and the burden associated with complying with two different sets of regulations.

The Guidance addresses the following subset of ICF changes in the revised Common Rule: (a) changes to the content, organization and presentation of information (Structural b) one new basic and three additional elements of consent (Element Changes).

One Form or Two?

FDA has received questions about whether it would be possible to incorporate the Structural Changes and Element Changes into the consent forms and consent process for FDA-regulated studies or "if it would be necessary to develop two separate informed consent forms, one for federally-conducted/-supported research and another for research regulated by FDA." The Guidance answers that the Structural Changes and Element Changes are "not inconsistent with FDA's current policies and guidances." The Guidance states that this may avoid the need for sponsors and investigators to develop, and IRBs to review, two separate ICFs.

Takeaway

For research institution administrative ease or policy, even if the Common Rule does not apply to their studies, your FDA-regulated studies may see ICF changes driven by the revised Common Rule. Future harmonizing human subject protection guidances to be released by FDA will increase this likelihood.

Key Information at the Beginning

Under the revised Common Rule, the ICF must begin with a short presentation of the key information that is most likely to assist a prospective subject in understanding why he/she may or may not want to participate in the study. (Other structural changes are less game-changing and are not addressed here.)

Takeaway

You should review this "key information" carefully from a risk mitigation perspective, especially given that the subject may not read the rest of the document (in other words, this could create a field day for litigators).

Element Changes

The Guidance addresses the following new basic element and additional elements of informed consent under the revised Common Rule:

Common Rule New Basic Element Regarding Identifiable Information or Specimens

For research that involves the collection of identifiable private information or identifiable specimens, the revised Common Rule requires the ICF to contain one of the following:

For research that involves the collection of identifiable private information or identifiable specimens, the revised Common Rule requires the ICF to contain one of the following:

1. **"A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens and that, after such removal, the information or biospecimens could be used for future research studies or distributed to another investigator for future research studies without additional informed consent from the subject or the legally authorized representative, if this might be a possibility; or**

2. **A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies."**

In other words, the ICF must explain either that (a) the subject's private information or specimens might have the identifiers removed and then the information or specimens could be used or shared with other investigators for future research, if this is a possibility; or (b) the subject's private information or specimens will not be used or distributed for future research, even if the identifiers have been removed.

Takeaways

– Under the revised Common Rule, the ICF needs to address whether the study data and specimens may be used or shared for future research. If yes, then, per "A" above, the ICF needs to explain that the subject's identifiers may be removed, after which the "cleaned" data and specimens may be used or shared with other investigators for future research without additional consent (if a possibility).

– In a desire to create data repositories and tissue banks, research institutions may present option A as their default language and not offer B as an option. If you do not want sites to contribute your study data or study specimens to repositories or tissue banks, consider option B. By contrast, if you want the flexibility to conduct future research, review the ICF carefully to see if the site has added A or B to the ICF template, and revise it accordingly.

– The HIPAA term of art "de-identified" is not used. Instead, the Guidance says, "the identifiers might be removed." This distinction needs to be coordinated with the HIPAA authorization and data use restrictions in the clinical trial agreement.

– While not mentioned in this Guidance, from a privacy and consumer protection standpoint, the ICF should caution subjects that, even if identifiers are removed, it may be possible to re-identify the subject.

Common Rule New Additional Elements

Under the revised Common Rule, the ICF, when appropriate, shall include:

1. **A statement that the subject's biospecimens (even if identifiers are removed) may be used for commercial profit, and whether the subject will or will not share in this commercial profit;**
2. **A statement regarding whether clinically relevant research results, including individual research results, will be disclosed to subjects and, if so, under what conditions; and**
3. **For research involving biospecimens, whether the research will (if known) or might include whole genome sequencing (i.e., sequencing of a human germline or somatic specimen with the intent to generate the genome or exome sequence of that specimen).**

Takeaway

Element B – whether and under what conditions "clinically relevant research results" will be disclosed to subjects – could be another field day for litigators, not to mention an ethics issue. You should carefully review the details of this type of statement.

Final Takeaways

– If the trial site introduces unpalatable language into the ICF, you should check to see if the language is driven by the revised Common Rule. If yes, keep in mind that the Common Rule does not apply to FDA-regulated studies. This may create leeway for revisions.

– More change is on the horizon. To harmonize the human subject protection and IRB regulations with the revised Common Rule, FDA plans to issue three more guidances.

– Stay tuned, particularly regarding secondary research, as this is an increasingly hot topic for informed consents, HIPAA authorizations and clinical trial agreements.

– Informed consents coming out of research institutions and IRBs may not be "business as usual."

Access the FDA Guidance.

If you have any questions or would like more information about these developing issues, please contact the following:

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