

**TITLE 45
CODE OF FEDERAL REGULATIONS
PART 46
PROTECTION OF HUMAN SUBJECTS
Subpart A - Federal Policy for the
Protection of Human Subjects (Basic DHHS
Policy for Protection of Human Research Subjects)**



**Q&A by Linda Knowlton, CCRP,
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§46.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any Federal Department or Agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each Department or Agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States.

- (1) Research that is conducted or supported by a Federal Department or Agency, whether or not it is regulated as defined in §46.102(e), must comply with all sections of this policy.
- (2) Research that is neither conducted nor supported by a Federal Department or Agency

but is subject to regulation as defined in §46.102(e) must be reviewed and approved, in compliance with §46.101, §46.102, and §46.107 through §46.117 of this policy, by an Institutional Review Board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by Department or Agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:¹

- (1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.
- (2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or

observation of public behavior, unless:

(i) information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b)(2) of this section, if:

(i) the human subjects are elected or appointed public officials or candidates for public office; or (ii) Federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research involving the collection or study of existing

data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of Department or Agency heads, and which are designed to study, evaluate, or otherwise examine:

- (i) Public benefit or service programs;
- (ii) procedures for obtaining benefits or services under those programs;
- (iii) possible changes in or alternatives to those programs or procedures;
- or (iv) possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or Agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or Agency heads may require that specific research activities or classes of research

activities conducted, supported, or otherwise subject to regulation by the Department or Agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent Federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any State or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a Department or Agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the Department or Agency

head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the Department or Agency head, notices of these actions as they occur will be published in the **Federal Register** or will be otherwise published as provided in Department or Agency procedures.

(i) Unless otherwise required by law, Department or Agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes or research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the Department or Agency head shall forward advance notices of these actions to the Office for Protection from Research Risks, National Institutes of Health, Department of Health and Human Services (DHHS), and shall also publish them in the **Federal Register** or in such other manner as provided in Department or Agency procedures.¹

¹ Institutions with DHHS-approved assurances on file will abide by provisions of Title 45 CFR Part 46 Subparts A-D. Some of the other departments and agencies have incorporated all provisions of Title 45 CFR Part 46 into their policies and procedures as well. However, the exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners, fetuses, pregnant women, or human in vitro fertilization, Subparts B and C. The exemption at 45 CFR 46.101(b)(2), for

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research involving survey or interview procedures or observation of public behavior, does not apply to research with children, Subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

§46.102 Definitions.

(a) *Department or Agency head* means the head of any Federal Department or Agency and any other officer or employee of any Department or Agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or Agency (including Federal, State, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a Federal Department or Agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a Federal Department or Agency solely as part of the Department's or Agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

- (1) data through intervention or interaction with the individual, or
- (2) identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. *Interaction* includes communication or interpersonal contact between investigator and subject. *Private information* includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is

taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an Institutional Review Board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and Federal requirements.

(i) *Minimal risk* means 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.

(j) *Certification* means the official notification by the institution to the supporting Department or Agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

There are three types of accounting for disclosures: general accounting, multiple disclosures to the same person for the same purpose, and research accounting for PHI of 50 or more individuals. General accounting covers the types of items that must be in the disclosure: date, recipient, recipient address if known, and the purpose of the disclosure. If a covered entity makes multiple disclosures to the same person for the same purpose, the covered entity needs to record the date, recipient, recipient address if known, the purpose of the disclosure, frequency, periodicity or number of disclosures, and date of last disclosure. If the covered entity discloses PHI on 50 or more individuals, the covered entity does not need to account individually for them. The covered entity needs to disclose the name of the protocol; description of the protocol or research activity and PHI disclosed; date or period of time during which disclosure occurred or may have occurred, and last date of disclosure; name, address, and phone number of the sponsor and the recipient; and a statement that the PHI may or may not have been disclosed for a particular protocol or research activity. Accounting is not needed for disclosures of PHI in limited data sets with a data use agreement, PHI made with an authorization (or informed consent that meets the transition provisions requirements), PHI to the

individual, disclosures made before April 14, 2003, and disclosures of de-identified health information.

Accounting for disclosures is sometimes necessary for research conducted without authorization. Accounting is needed when discussing PHI with a colleague outside the covered entity, with a waiver of authorization, with decedents' information, preparatory to research, and for public health activities (e.g., adverse event reporting).

On and after the compliance date, individuals will have the right to revoke their authorization. Covered entities may, however, continue to use or disclose PHI that was obtained before a revocation if "necessary to maintain the integrity of the research study." For example, the researcher can continue using PHI to account for a subject's withdrawal from the study.

The covered entity must keep the following types of documentation related to research: authorization form, data use agreement, written revocation, statistical certification of de-identification, waiver of authorization, access to the designated record set, and accounting for disclosures made after the compliance date. The covered entity must keep these documents for six

years from the date of creation or from the date when last in effect, whichever is later.

Institutions must make decisions about how they will handle the Privacy Rule. Researchers should ask questions to prompt this decision-making and clarify how the Privacy Rule will affect them (Table 4).

**TABLE 4
What Researchers Can Do Now
About the Privacy Rule**

1. Ask if you or your institution is subject to the Privacy Rule (a covered entity)
2. Ask who is your institution's privacy official
3. Ask how your institution will train its researchers about the rule
4. Determine if you partner with a researcher or an institution subject to the Privacy Rule
5. List projects that involve the collection, use, or disclosure of PHI
6. Send questions to the Office for Civil Rights (ocrprivacy@oc.dhhs.gov)
7. Help NIH help you. What informational materials would be most helpful to you (e.g., Web site, brochures, FAQs)?

Self Study Quiz - Answer Key

(See Pg. 9)

Answers:

1. b. Research (Section 46.102 d)
2. a. institution (Section 46.102 b)
3. c. IRB approval (Section 46.102 h)
4. a. true (Section 46.101[1])
5. b. false (Section 46.101 h)
6. b. false (Section 46.101 f)
7. d. legally authorized representative (Section 46.102 c)
8. a. true (Section 46.102 f)
9. b. false (Section 46.102 i)
10. c. certification (Section 46.102 j)

NIH Privacy Contacts

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The full OCR/HIPAA Privacy Regulation Text, October 2002, "Standards for Privacy of Individually Identifiable Health Information, as amended," may be found at <http://www.hhs.gov/ocr/combinedregtext.pdf>