



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1271

[Docket No. FDA-2014-N-1484]

Revisions to Exceptions Applicable to Certain Human Cells, Tissues, and Cellular and Tissue-Based Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or Agency or we) is issuing this final rule to amend certain regulations regarding donor eligibility, including the screening and testing of donors of particular human cells, tissues, and cellular and tissue-based products (HCT/Ps), and related labeling. This final rule is in response to our enhanced understanding in this area and in response to comments from stakeholders regarding the importance of embryos to individuals and couples seeking access to donated embryos.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number found in brackets in the heading of this final rule into the “Search” box and follow the prompts, and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jessica T. Walker, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

- A. Purpose of the Final Rule
- B. Summary of the Major Provisions of the Final Rule
- C. Legal Authority
- D. Costs and Benefits

II. Background

- A. Need for the Regulation/History of This Rulemaking
- B. Summary of Comments to the Proposed Rule
- C. General Overview of the Final Rule

III. Legal Authority

IV. Comments on the Proposed Rule and FDA Response

- A. Introduction
- B. Description of General Comments and FDA Response
- C. Purpose and Scope of the Final Rule (§ 1271.1)
- D. Donor Screening (§ 1271.75)
- E. Exceptions From the Requirement of Determining Donor Eligibility (§ 1271.90)
- F. Labeling Requirements (§ 1271.370)

V. Effective Date

VI. Economic Analysis of Impacts

VII. Analysis of Environmental Impact

VIII. Paperwork Reduction Act of 1995

IX. Federalism

## I. Executive Summary

### A. Purpose of the Final Rule

FDA is issuing this final rule to amend certain regulations regarding donor eligibility, including the screening and testing of donors of particular HCT/Ps, and related labeling. We are finalizing these changes in response to our enhanced understanding in this area and in response to comments from stakeholders regarding the importance of embryos to individuals and couples seeking access to donated embryos.

### B. Summary of the Major Provisions of the Final Rule

FDA is amending existing regulations to provide additional flexibility to HCT/P establishments to make available for reproductive use embryos originally intended for reproductive use for a specific individual or couple when those embryos are subsequently intended for directed or anonymous donation. Specifically, this rulemaking redesignates the current Title 21 of the Code of Federal Regulations (CFR) 1271.90(b) (§ 1271.90(b)) to new § 1271.90(c), and would insert a new § 1271.90(b) entitled “Exceptions for reproductive use” to clarify that if an embryo was originally intended for reproductive use for a specific individual or couple, its use for directed or anonymous donation, would not be prohibited under § 1271.45(c), even when the applicable donor eligibility requirements under part 1271, subpart C, are not met. FDA also clarifies that we are not creating an exception for deficiencies that occurred in making the donor eligibility determination for either the oocyte donor or the semen donor as required

under § 1271.45(b), or for deficiencies in performing donor screening or testing, as required under §§ 1271.75, 1271.80, and 1271.85.

The final rule also requires appropriate labeling for embryos that would describe the donor eligibility status of the individual donors whose gametes were used to form the embryo. The content of the labeling is not different from that required under current regulations. Consistent with current regulations, the intent of the labeling is to help ensure that physicians have specific and accurate information to provide to recipients for use in making informed medical decisions.

### C. Legal Authority

FDA has authority for this rulemaking under section 361 of the Public Health Service Act (PHS Act) (42 U.S.C. 264). Under section 361 of the PHS Act, FDA may issue and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable disease between the States or from foreign countries into the States.

### D. Costs and Benefits

Because this rule imposes no additional regulatory burdens, the costs associated with this rule are expected to be minimal.

## II. Background

### A. Need for the Regulation/History of This Rulemaking

Under the authority of section 361 of the PHS Act, by delegation from the Surgeon General and the Secretary of Health and Human Services, FDA may make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases. Communicable diseases include, but are not limited to, those transmitted by viruses, bacteria, fungi, parasites, and transmissible spongiform encephalopathy agents. Certain diseases

are transmissible through implantation, transplantation, infusion, or transfer of HCT/Ps derived from donors infected with those diseases. To prevent the introduction, transmission, or spread of such communicable diseases, we consider it necessary to require establishments to take appropriate measures to prevent the use of HCT/Ps from infected donors. FDA regulates HCT/Ps intended for implantation, transplantation, infusion, or transfer into a human recipient under part 1271 that was issued under the authority of section 361 of the PHS Act. Part 1271 requires HCT/P establishments to screen and test donors for relevant communicable disease agents and diseases, to prepare and follow written standard operating procedures for the prevention of the spread of communicable diseases, and to maintain records. Part 1271 also requires that for most HCT/Ps, the donor must be determined to be eligible, based on the results of screening and testing for relevant communicable disease agents and diseases. In most cases, a donor who tests reactive for a particular communicable disease, or who possesses clinical evidence of, or risk factors for, communicable disease agents and diseases, would be considered ineligible, and HCT/Ps from that donor would not ordinarily be used.

FDA has published three final rules that make up part 1271. In the Federal Register of January 19, 2001 (66 FR 5447), we published regulations requiring HCT/P establishments to register and list their HCT/Ps with FDA (registration final rule). In the Federal Register of May 25, 2004 (69 FR 29786), we published regulations requiring most donors to be tested and screened for relevant communicable disease agents and diseases (donor eligibility final rule). In the Federal Register of November 24, 2004 (69 FR 68612), we published regulations requiring certain HCT/P establishments to follow current good tissue practice (CGTP), which governs the methods used in, and the facilities and controls used for, the manufacture of HCT/Ps,

recordkeeping, and the establishment of a quality program (CGTP final rule). These regulations apply to HCT/Ps recovered on or after May 25, 2005.

As part of our ongoing effort to implement our framework for regulating HCT/Ps, in the Federal Register of May 25, 2005 (70 FR 29949), we issued an interim final rule entitled “Human Cells, Tissues, and Cellular and Tissue-Based Products; Donor Screening and Testing, and Related Labeling” (2005 interim final rule), which had an effective date simultaneous with publication. This interim final rule was then adopted without change in the Federal Register of June 19, 2007 (72 FR 33667), in the final rule entitled “Human Cells, Tissues, and Cellular and Tissue-Based Products; Donor Screening and Testing, and Related Labeling” (2007 final rule). The 2007 final rule amended regulations regarding the screening and testing of donors of HCT/Ps, timing of specimen collection, record retention requirements, and related labeling requirements in response to public comments concerning the importance of cryopreserved embryos to individuals seeking access to donated embryos. The 2007 final rule also added an exception to the donor eligibility requirements in § 1271.90(a)(4) for cryopreserved embryos that, while originally exempt from the donor eligibility requirements because the donors were sexually intimate partners, are later intended for directed or anonymous donation.

In recent years, industry and the medical community have expressed concerns that the exception added by the 2007 final rule does not fully address the need for access to cryopreserved embryos. The stakeholders have raised concerns that the current regulations still unduly restrict the use of embryos that were originally intended for personal reproductive use, and therefore impose limitations on individuals and couples involved in family building. In response to these concerns, FDA published the proposed rule “Revisions to Exceptions Applicable to Certain Human Cells, Tissues, and Cellular and Tissue-Based Products” in the

Federal Register of December 31, 2014 (79 FR 78744). The proposed rule intended to increase access to embryos for reproductive use by expanding the current exceptions to the prohibitions on use under § 1271.90, providing HCT/P establishments with the flexibility to make available any embryo originally formed for reproductive use for a specific individual or couple and now intended for reproductive use in a directed or anonymous donation, provided that specific criteria are met, including requirements for labeling.

#### B. Summary of Comments to the Proposed Rule

We received approximately 10 comment letters on the proposed rule by the close of the comment period. We received comments from academia, professional organizations, and individuals. The comments were balanced between those expressing support for the proposed rule and those raising concerns about how the proposed exception will impact public health. They addressed the following topics: Purpose and scope of the final rule, donor screening, exceptions from the requirement of determining donor eligibility, and labeling requirements.

#### C. General Overview of the Final Rule

FDA is adopting as final, without material change, the proposed rule to amend certain regulations regarding donor eligibility and related labeling.

We are making revisions to the following FDA regulations:

1. Amendments to § 1271.90

Section 1271.90 sets forth exceptions where HCT/P establishments are not required to make a donor eligibility determination under § 1271.50 or to perform donor screening or testing under §§ 1271.75, 1271.80, and 1271.85. We are adding language to the exceptions listed in this section to provide clarity and update the regulation by allowing for an embryo originally intended for reproductive use for a specific individual or couple, to be subsequently used for

directed or anonymous donation, even when the donor eligibility requirements under part 1271, subpart C are not met.

We are amending § 1271.90 as follows:

- Changing the heading of this section by deleting “from the requirement of determining donor eligibility,” and inserting “other” before “exceptions.” The heading for § 1271.90 will read “Are there other exceptions and what labeling requirements apply?” We made this change for clarity; the new heading will be more accurate.
- Changing § 1271.90(a)(3) by replacing “exempt” with “excepted,” which is the term used in the introductory title for this provision. Thus, this change will make the language more consistent. The beginning of § 1271.90(a)(3) will read, “Cryopreserved cells or tissue for reproductive use, other than embryos, originally excepted....”
- Changing current § 1271.90(a)(4) by replacing “exempt” with “excepted”.
- Redesignating current § 1271.90(b) as § 1271.90(c) and adding a new paragraph (b) to § 1271.90.
- Changing newly designated § 1271.90(c) by removing “paragraph (a)” and adding in its place “paragraphs (a) and (b)” in the introductory text, revising § 1271.90(c)(2) to replace “(b)(6)” with “(c)(6)”, and by adding “recovery or” before “cryopreservation” in new § 1271.90(c)(6) to clarify that some testing and screening activities may take place before recovery of the gametes, not just before cryopreservation of the embryos.

## 2. Section 1271.90(b)

We are redesignating the current § 1271.90(b) to § 1271.90(c), and adding a new § 1271.90(b) entitled “Exceptions for reproductive use.” Under finalized § 1271.90(b), an embryo originally intended for reproductive use for a specific individual or couple that is subsequently intended for directed or anonymous donation is excepted from the prohibition on use under § 1271.45(c) even when the applicable donor eligibility requirements under part 1271, subpart C are not met. Accordingly, when an establishment fails to comply with applicable donor eligibility requirements under part 1271, subpart C, the establishment will not be prohibited from making available for reproductive use such embryos for reproductive purposes in accordance with this section. The exception from the prohibition on use does not create an exception for deficiencies that occurred in making the donor eligibility determination for either the oocyte donor or the semen donor as required under § 1271.45(b), or for deficiencies in performing donor screening or testing, as required under §§ 1271.75, 1271.80, and 1271.85.

We note that the language we are adding to the exceptions currently listed in § 1271.90 is additive. It creates an additional exception for the use of certain reproductive HCT/Ps that are not currently excepted, but it does not impact or restrict the exceptions currently provided for in the regulations.

### 3. Section 1271.90(c)

Under § 1271.90(c), HCT/P establishments must prominently label an HCT/P described in § 1271.90(a) and (b). The labeling requirements are intended to help ensure that physicians have specific and accurate information to provide to recipients for use in making informed medical decisions.

The nonsubstantive change to § 1271.90(c)(2) clarifies that the labeling requirements contained in § 1271.90(c)(2) do not apply to reproductive cells or tissue labeled in accordance

with § 1271.90(c)(6). The change to § 1271.90(c)(6) includes “recovery or” before the word “cryopreservation”. Thus, the § 1271.90(c)(6) provision requires HCT/P establishments to prominently label an HCT/P described in § 1271.90(a)(3) or (a)(4) with “Advise recipient that screening and testing of the donor(s) were not performed at the time of recovery or cryopreservation of the reproductive cells or tissue, but have been performed subsequently” for HCT/Ps described in § 1271.90(a)(3) or (a)(4). This change is made to recognize that some testing and screening activities may take place even before recovery of HCT/Ps, not just before cryopreservation.

#### 4. Amendment to § 1271.370

Section 1271.370 sets forth labeling requirements in addition to those that apply under §§ 1271.55, 1271.60, 1271.65, and 1271.90. Because, as discussed previously, this rule redesignates the current labeling requirements under § 1271.90(b) to § 1271.90(c), we are amending § 1271.370(b)(4) to revise the reference from § 1271.90(b) to § 1271.90(c).

### III. Legal Authority

FDA is issuing this final rule under the authority of section 361 of the PHS Act (42 U.S.C. 264). Under section 361 of the PHS Act, FDA may issue and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable disease between the States or from foreign countries into the States. It is important to recognize that HCT/Ps recovered in one State may be sent to another for processing, and then shipped for use throughout the United States, or beyond. FDA has been involved in many recalls where HCT/Ps processed in a single establishment have been distributed in many States. In any event, intrastate transactions affecting interstate communicable disease transmission may also be regulated under section 361 of the PHS Act. (See Louisiana v. Mathews, 427 F. Supp. 174, 176 (E.D. La. 1977));

Independent Turtle Farmers of Louisiana, Inc. v. United States of America, et al., 2010 U.S. Dist. LEXIS 31117). This final rule incorporates changes in response to our enhanced understanding of the uses of certain types of HCT/Ps in specific situations and in response to comments from stakeholders regarding the importance of embryos to individuals and couples seeking access to donated embryos.

#### IV. Comments on the Proposed Rule and FDA Response

##### A. Introduction

We received approximately 10 comment letters on the proposed rule by the close of the comment period, each containing one or more comments on one or more issues. We received comments from academia, professional organizations, and individual consumers.

We describe and respond to the comments in sections IV.B through IV.F. We have numbered each comment to help distinguish among different comments. We have grouped similar comments together under the same number, and, in some cases, we have separated different issues discussed in the same comment and designated them as distinct comments for purposes of our responses. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which the comments were received.

##### B. Description of General Comments and FDA Response

Several comments made general remarks supporting the proposed rule without focusing on a particular proposed provision. In the following paragraphs, we discuss and respond to such general comments.

(Comment 1) There were several comments that were in support of the proposed rule and suggested that we provide even more guidance on donor eligibility, screening, and testing of

donors of reproductive cells. One suggestion was that FDA's donor eligibility, screening, and testing requirements closely parallel American Society of Reproductive Medicine/Society for Assisted Reproductive Technology guidelines.

(Response) FDA acknowledges and appreciates the supportive comments. We appreciate the interest in additional guidance for the screening and testing of donors of reproductive cells. We continue to review existing regulations with respect to providing additional guidance or modifying these regulations as appropriate, in the future.

(Comment 2) One comment asked if the final rule would be applied retrospectively to embryos formed and cryopreserved on or after May 25, 2005.

(Response) Yes, the final rule applies to embryos formed and cryopreserved on or after May 25, 2005.

### C. Purpose and Scope of the Final Rule (§ 1271.1)

(Comment 3) One comment noted that preventing the spread of communicable disease protects the population and the family receiving the donation. Two comments suggested that the proposed rule conflicts with FDA regulations that serve to prevent the introduction, transmission, and spread of communicable disease. One comment expressed concern that the proposed rule appears to relax the testing requirements for donors and conflicts with the PHS Act, specifically section 361, that provides FDA with the authority to make and enforce regulations "to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from State or possession into any other State or possession" (42 U.S.C. 264(a)). This commenter's interpretation of the proposed rule is that it removes the requirement for reproductive tissue donors to be tested, and only requires reproductive tissue donor testing "when possible." According to the comment, FDA seems to posit informed

consent as an adequate response to the health risks faced by recipients of donated embryos. The commenter would like FDA to strike the qualifier “when possible” from the text of the proposed rule because the commenter believes this approach would provide a greater level of protection to the recipient than the proposed rule and preserve FDA’s intention of relaxing the current donor eligibility regulations in the interest of family building.

(Response) As stated previously, we consider it necessary that establishments take appropriate measures to prevent the use of HCT/Ps from donors infected with communicable diseases. Part 1271 requires HCT/P establishments to screen and test donors for relevant communicable disease agents and diseases, and to maintain records. Part 1271 also requires for most HCT/Ps that the donor must be determined to be eligible, based on the results of screening and testing for relevant communicable disease agents and diseases. We have retained the qualifier “when possible” in § 1271.90(a)(4) to provide HCT/P establishments with the flexibility to make available any embryos originally formed for reproductive use for a specific individual or couple and now intended for reproductive use in a directed or anonymous donation, provided that specific criteria are met, including requirements for labeling.

The final rule provides for the continued applicability of labeling requirements for embryos intended for reproductive use that would be excepted from the prohibition on use. The rule requires prominent labeling that describes the donor eligibility status of the individual donors whose gametes were used to form the embryo. The required labeling will provide information to the treating physician to permit discussion of the potential risks of communicable disease with the recipient.

#### D. Donor Screening (§ 1271.75)

(Comment 4) Some of the comments expressed concern about the risk of accepting an unscreened donation. Another comment noted that eligibility of the HCT/P donor must be assessed prior to usage to ensure the safety of recipients, their offspring, and the public as a whole; and furthermore, ensuring the proper screening of the donor's HCT/P enables the control of the spread of disease.

(Response) We agree that the proper screening of HCT/P donors minimizes the risk of introducing, transmitting, or spreading communicable diseases. As stated in the proposed rule, we consider it necessary to require establishments to take appropriate measures to prevent the use of HCT/Ps from infected donors. Part 1271 requires HCT/P establishments to screen and test donors for relevant communicable disease agents and diseases, and to maintain records. Part 1271 also requires, for most HCT/Ps, that donor be determined to be eligible, based on the results of screening and testing for relevant communicable disease agents and diseases. In most cases, a donor who tests reactive for a particular communicable disease, or who possesses clinical evidence of, or risk factors for, a communicable disease agent and disease, would be considered ineligible, and cells or tissues from that donor would not ordinarily be used.

(Comment 5) A few comments expressed the belief that the proposed rule will allow for better genetic profiling. One of those comments stated that labeling will make it easier to identify particular genotypes for research. Another comment stated that genetically profiling all donors and to the extent possible all embryos will reduce the risk of recipients of embryos giving birth to children with serious genetic disorders. The commenter asked FDA to require establishments to genetically screen all donors and the embryo when possible.

(Response) These comments address a topic that is outside the scope of this rulemaking.

#### E. Exceptions From the Requirement of Determining Donor Eligibility (§ 1271.90)

(Comment 6) One comment sought transparency as to which embryos are excepted and requested specific examples of how the rule provides additional flexibility to make embryos available for directed and anonymous donation. Specifically, the commenter asked whether donation would be allowed when the embryo was originally intended for transfer to a sexually intimate partner, where one of the gamete providers (either a directed or anonymous donor) would be considered ineligible based on screening and testing.

(Response) The rulemaking provides additional flexibility to make embryos available when there have been changes in the original plans for use of the embryos. Under finalized § 1271.90(b), an embryo originally intended for reproductive use for a specific individual or couple that is subsequently intended for directed or anonymous donation is excepted from the prohibition on use under § 1271.45(c) even when the applicable donor eligibility requirements under part 1271, subpart C are not met. Accordingly, when an establishment fails to comply with applicable donor eligibility requirements under part 1271, subpart C, the establishment will not be prohibited from making available for reproductive use such embryos for reproductive purposes in accordance with this section. The exception from the prohibition on use does not create an exception for deficiencies that occurred in making the donor eligibility determination for either the oocyte donor or the semen donor as required under § 1271.45(b), or for deficiencies in performing donor screening or testing, as required under §§ 1271.75, 1271.80, and 1271.85.

We note that the change we are making to the exceptions currently listed in § 1271.90 is additive. It creates an additional exception for the use of certain reproductive HCT/Ps that are not currently excepted, but it does not impact or restrict the exceptions currently provided for in the regulations.

(Comment 7) One comment recommends that the term “embryos formed for autologous use” not be used in conjunction with embryos. The commenter reasons that after a sperm or oocyte form an embryo, the embryo should not be considered autologous, given the definition at § 1271.3(a).

(Response) We agree with the comment and are not adopting, as part of the final rule, the term “embryos formed for autologous use”. Likewise, we are not adopting, as part of the final rule, the reference to § 1271.90(a)(1) in § 1271.90(a)(4).

#### F. Labeling Requirements (§ 1271.370)

(Comment 8) Several comments were in support of labeling because it allows the physician to fully discuss the risks of any communicable disease and it allows the patient to make a fully informed decision. One commenter noted that factors affecting decisions of an HCT/P recipient may outweigh the expert advice of medical doctors. Another comment referenced § 1271.90(c)(6) of the proposed rule (embryo labeling requirements) that states establishments are required to “advise recipients that screening and testing of the donor(s) were not performed at the time of recovery or cryopreservation of the reproductive cells or tissues, but have been performed subsequently.” The comment further states that “Description of the Proposed Rule” provides that these labeling requirements are “based on the expectation that a physician will be closely involved in the decision of the embryo and the recognition that physicians are under legal and ethical obligations that require them to discuss the risks of communicable disease transmission stemming from the use of HCT/Ps.” The comment asked that FDA revise the rule to expressly require establishments to counsel recipients on the risk of disease.

(Response) We agree that the recipients should be fully informed about the risk of communicable disease before accepting an embryo for implantation; however, we decline to make the suggested change. As stated in the preamble of the proposed rule, the proposed labeling requirements are based on the expectation that a physician will be closely involved in the decision to use an embryo and the recognition that physicians are under legal and ethical obligations that require them to discuss the risks of communicable disease transmission stemming from the use of HCT/Ps. FDA relies on physicians to meet these obligations when discussing procedures involving HCT/Ps with recipients. Further, we expect that a recipient would be fully informed of the risks involved in using an embryo for reproductive purposes as finalized under § 1271.90(b) even when the donor eligibility requirements under part 1271, subpart C are not met.

(Comment 9) One comment suggested that while a labeling requirement that is tiered according to the risks may mitigate the risks, it does not go far enough in abolishing the risks.

(Response) As described under proposed § 1271.90(c)(2) through (6), an embryo originally intended for reproductive use for a specific individual or couple that is subsequently intended for directed or anonymous donation must be labeled as applicable. We acknowledge that the labeling requirement will not abolish all risks of implanting those embryos. Rather, as stated in the proposed rule, the required labeling would provide information to the treating physician to permit discussion of the potential risks of communicable diseases with the recipient. Our expectation is that the recipient will become fully informed of the risk when the donor eligibility requirements under part 1271, subpart C are not met, so that the recipient can make a well informed decision about receiving the embryo.

#### V. Effective Date

This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

#### VI. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the costs associated with this rule are expected to be minimal, we certify that the rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$146 million, using the most current (2015) Implicit Price Deflator for the Gross

Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

This rule amends certain regulations regarding donor eligibility and labeling related to the screening and testing of donors of particular HCT/Ps. The final rule will provide additional flexibility to HCT/P establishments to make available for reproductive use embryos originally intended for reproductive use for a specific individual or couple and subsequently intended for directed or anonymous donation. Specifically, the final rule will clarify that if an embryo was originally intended for reproductive use for a specific individual or couple, its use for directed or anonymous donation would not be prohibited under § 1271.45 (c), even when the applicable donor eligibility requirements under part 1271, subpart C are not met. This exception from prohibition for use would not create an exception for deficiencies that occurred in making the donor eligibility determination for either the oocyte donor or the semen donor as required under § 1271.45(b), or for deficiencies in performing donor screening or testing, as required under §§ 1271.75, 1271.80, and 1271.85. The final rule also requires appropriate labeling that describes the donor eligibility status of the individual donors whose gametes were used to form the embryo.

This rule will provide greater accommodation of individuals and couples wanting access to embryos originally intended for reproductive use for a specific individual or couple, while continuing to emphasize the applicability of the donor eligibility screening and testing requirements for individual gamete donors. The final rule will provide HCT/P establishments with the flexibility to make embryos originally intended for reproductive use for a specific individual or couple now available for directed or anonymous donation, provided that specific criteria are met. Consistent with current regulations, the labeling requirements will help ensure

that physicians have specific and accurate information to provide to recipients for use in making informed medical decisions. Because this rule imposes no additional regulatory burdens, the costs associated with this rule are expected to be minimal.

#### VII. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### VIII. Paperwork Reduction Act of 1995

The labeling requirements contained in this final rule are not subject to review by the Office of Management and Budget (OMB) because they do not constitute a “collection of information” under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C 3501-3520). Rather, the requirement to label HCT/Ps in accordance with the final rule is a “public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public” (5 CFR 1320.3(c)(2)). Therefore, FDA concludes that these requirements in this document are not subject to review by OMB because they do not constitute a “collection of information” under the PRA.

#### IX. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism

implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

#### List of Subjects in 21 CFR Part 1271

Biologics, Drugs, Human cells and tissue-based products, Medical devices, Reporting and recordkeeping requirements.

Therefore, under the Public Health Service Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 1271 is amended as follows:

#### PART 1271--HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS

1. The authority citation for part 1271 continues to read as follows:

Authority: 42 U.S.C. 216, 243, 263a, 264, 271.

2. In §1271.90:

- a. Revise the heading;
- b. Revise paragraph (a)(3) introductory text;
- c. Revise paragraph (a)(4);
- d. Redesignate paragraph (b) as paragraph (c);
- e. Add a new paragraph (b);
- f. Revise newly designated paragraph (c) introductory text;
- g. Revise newly designated paragraph (c)(2); and
- h. Revise newly designated paragraph (c)(6).

The revisions and additions read as follows:

#### § 1271.90 Are there other exceptions and what labeling requirements apply?

(a) \* \* \*

(3) Cryopreserved cells or tissue for reproductive use, other than embryos, originally excepted under paragraphs (a)(1) or (a)(2) of this section at the time of donation, that are subsequently intended for directed donation, provided that:

\* \* \* \* \*

(4) A cryopreserved embryo, originally excepted under paragraph (a)(2) of this section at the time of recovery or cryopreservation, that is subsequently intended for directed or anonymous donation. When possible, appropriate measures should be taken to screen and test the semen and oocyte donors before transfer of the embryo to the recipient.

(b) Exceptions for reproductive use. An embryo originally intended for reproductive use for a specific individual or couple that is subsequently intended for directed or anonymous donation for reproductive use is excepted from the prohibition on use under § 1271.45(c) even when the applicable donor eligibility requirements under subpart C of this part are not met. Nothing in this paragraph creates an exception for deficiencies that occurred in making the donor eligibility determination for either the oocyte donor or the semen donor as required under § 1271.45(b), or for deficiencies in performing donor screening or testing, as required under §§ 1271.75, 1271.80, and 1271.85.

(c) Required labeling. As applicable, you must prominently label an HCT/P described in paragraphs (a) and (b) of this section as follows:

\* \* \* \* \*

(2) “NOT EVALUATED FOR INFECTIOUS SUBSTANCES,” unless you have performed all otherwise applicable screening and testing under §§ 1271.75, 1271.80, and 1271.85. This paragraph does not apply to reproductive cells or tissue labeled in accordance with paragraph (c)(6) of this section.

\* \* \* \* \*

(6) “Advise recipient that screening and testing of the donor(s) were not performed at the time of recovery or cryopreservation of the reproductive cells or tissue, but have been performed subsequently,” for paragraphs (a)(3) or (a)(4) of this section.

§ 1271.370 [Amended]

3. Amend § 1271.370(b)(4) by removing “§ 1271.90(b)” and by adding in its place “§ 1271.90(c)”.

Dated: June 16, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016-14721 Filed: 6/21/2016 8:45 am; Publication Date: 6/22/2016]