



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 46 and 75

RIN 0991-AC15

Establishment of Safeguards and Program Integrity Requirements for Health and Human Services-Funded Extramural Research Involving Human Fetal Tissue

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: This is a notice of proposed rulemaking to amend certain regulatory provisions in order to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue from elective abortions.

DATES: Comments must be submitted on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be identified by RIN 0991-AC15. Because of staff and resource limitations, comments must be submitted electronically to www.regulations.gov. Follow the “Submit a comment” instructions.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. Before or after the close of the comment period, the Department of Health and Human Services will post all comments that were received before the end of the comment period on www.regulations.gov. Follow the search instructions on that Web site to view the public comments.

FOR FURTHER INFORMATION CONTACT: Daniel Barry at daniel.barry@hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

In September 2018, the Department of Health and Human Services (HHS) terminated a contract that provided human fetal tissue from elective abortions to the Food and Drug Administration (FDA) for the development of testing protocols. HHS terminated the contract because it was not sufficiently assured that the contract included the appropriate protections applicable to fetal tissue research or met all other procurement requirements. HHS subsequently initiated a comprehensive review of all HHS research involving human fetal tissue from elective abortions to ensure consistency with the statutes and regulations governing such research and to ensure the adequacy of procedures and oversight in light of the serious regulatory, moral, and ethical considerations involved.

Promoting the dignity of human life from conception to natural death is one of the top priorities of President Trump's administration. The audit and review informed the policy process that led to the administration's decision, announced June 5, 2019,¹ to discontinue National Institutes of Health (NIH) intramural research – research conducted within NIH by NIH researchers – involving the use of human fetal tissue from elective abortion. With respect to extramural research (research conducted outside of, but funded by, NIH, *e.g.*, at universities), the administration announced that, for new extramural research grant applications or current research projects in the competitive renewal process (generally every five years) that propose to use fetal tissue from elective abortions and that are recommended for potential funding through NIH's two-level external scientific review process, an ethics advisory board will be convened to review

¹ See Statement from the Department of Health and Human Services, June 5, 2019, available at <https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html>.

the research proposal and recommend whether, in light of the ethical considerations, NIH should fund the research project—pursuant to a law passed by Congress (42 U.S.C 289a-1).

In the same policy statement, HHS announced that it would also undertake changes to its regulations and to NIH grants policy to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue from elective abortions.² In this notice of proposed rulemaking, HHS proposes revisions to its Human Research Subjects Protection Regulations (45 CFR part 46, Subpart B, Additional Protections for Pregnant Women, Human Fetuses, and Neonates) and its grants regulations (45 CFR part 75) to provide additional safeguards concerning the use of such tissue in HHS-funded research. This proposed rule would strengthen informed consent requirements in Subpart B and help ensure compliance with the statutory ban on the provision of valuable consideration for human fetal tissue through clarifying recordkeeping and maintenance requirements for the acquisition of human fetal tissue for research.

II. Background

U.S. Federal regulations governing the protection of human subjects in research have been in existence for more than three decades. Nearly thirty years have passed since the “Common Rule” was adopted by 15 U.S. Federal departments and agencies in an effort to promote uniformity, understanding, and compliance with human subject protections. (HHS adopted the Common Rule in Subpart A of 45 CFR part 46.)

The history of contemporary human subjects protections began in 1947 with the Nuremberg Code, developed for the Nuremberg Military Tribunal as standards by which

² See Statement from the Department of Health and Human Services, June 5, 2019, available at <https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html>.

to judge the human experimentation conducted by the Nazis.³ The Nuremberg Code set forth many of the basic principles governing the ethical conduct of human subjects research. Similar recommendations were made by the World Medical Association in its Declaration of Helsinki: Recommendations Guiding Medical Doctors in Biomedical Research Involving Human Subjects (Helsinki Declaration), first adopted in 1964 and subsequently revised many times.⁴

Basic regulations governing the protection of human subjects in research supported or conducted by HHS (then the Department of Health, Education and Welfare) were first published in 1974, after a series of highly publicized research abuses. The enactment of the 1974 National Research Act (Pub. L. 93–348) created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (National Commission). One of the charges of the National Commission was to identify the basic ethical principles that should underlie the conduct of biomedical and behavioral research involving human subjects and to develop guidelines to assure that such research is conducted in accordance with those principles. In 1979, the National Commission published “Ethical Principles and Guidelines for the Protection of Human Subjects of Research,” also known as the Belmont Report (<http://www.hhs.gov/ohrp/policy/belmont.html>). The Belmont Report identified three fundamental ethical principles for all human subjects research: respect for persons, beneficence, and justice. Like the Nuremberg Code and Helsinki Declaration, the Belmont Report stressed the importance of obtaining informed consent before engaging in human subjects research.

Based on the Belmont Report and other work of the National Commission, HHS revised and expanded its regulations for the protection of human subjects in the late

³ See Nuremberg Code, available at <https://history.nih.gov/display/history/Nuremberg+Code>.

⁴ See World Medical Association, Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects, available at www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/.

1970s and early 1980s. The HHS regulations are codified at 45 CFR part 46, subparts A through E:

- Subpart A: Basic HHS Policy for Protection of Human Research Subjects
- Subpart B: Additional Protections for Pregnant Women, Human Fetuses, and Neonates Involved in Research
- Subpart C: Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects
- Subpart D: Additional Protections for Children Involved in Research
- Subpart E: Registration of Institutional Review Boards

The statutory authority for the HHS regulations derives from 5 U.S.C. 301; 42 U.S.C. 300v-1(b); and 42 U.S.C. 289.

In 1991, 14 other Federal departments and agencies joined HHS in adopting a uniform set of rules for the protection of human subjects, known as the “Common Rule,” identical to subpart A of 45 CFR part 46 of the HHS regulations.

The Common Rule requires that Federally funded investigators in most instances obtain and document the informed consent of research subjects; requires Federally funded research be reviewed by an institutional review board (IRB); and describes the requirements for IRB membership, function, operations, research review, and recordkeeping. The regulations also delineate criteria for, and levels of, IRB review. Currently, except for human subjects research that is determined to be exempt from the regulations, Federally funded research involving human subjects is reviewed by an IRB in one of two ways: (1) by a convened IRB, or (2) through an expedited review process.

Since the Common Rule was first developed, the landscape of research activities has changed dramatically, accompanied by a marked increase in the volume of research. It is estimated that total spending on health-related research and development by the drug

industry and the Federal government has more than tripled since 1990.⁵ While traditional biomedical research conducted in academic medical centers continues to flourish, many studies are now also conducted at community hospitals, outpatient clinics, or physician-based practices. Clinical research is regularly conducted at multiple institutions across the U.S. and other countries. Recruitment firms, bioinformatics specialists, clinical trial coordinating centers, protocol developers, data analysts, contract research organizations (CROs), data and safety monitoring boards, community-based organizations, and other entities have joined investigators and sponsors as part of the clinical research enterprise.

The rapid growth and expansion of human subjects research generated many questions about whether the regulatory framework is adequate and appropriate for the protection of human subjects in the 21st century. Furthermore, decades of experience have revealed a great deal about the functioning—and limitations—of existing regulations, and prompted critical evaluations by the Institute of Medicine (IOM),^{6 7} the U.S. Government Accountability Office,^{8 9 10} and many scholars.^{11 12 13} Federal consideration of such revisions to the regulatory schema, in addition to the issues that suggest a need for revision, is not without precedent. In its 2001 concluding report, the National Bioethics Advisory Commission (NBAC) made 30 recommendations that

⁵ Congressional Budget Office. *Research and Development in the Pharmaceutical Industry*. October 2006.

⁶Federman DD, Hanna KE, Rodriguez LL, eds. *Responsible Research: A Systems Approach to Protecting Research Participants*. Washington, DC: National Academies Press; 2002.

⁷ Nass SJ, Levit LA, Gostin LO, eds. *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*. Washington, DC: National Academies Press; 2009.

⁸ Human Subjects Research: HHS Takes Steps to Strengthen Protections, But Concerns Remain. GAO-01-775T, May 23, 2001.

⁹ Scientific Research: Continued Vigilance Critical to Protecting Human Subjects. T-HEHS-96-102, Mar 12, 1996.

¹⁰ Scientific Research: Continued Vigilance Critical to Protecting Human Subjects. HEHS-96-72, Mar 8, 1996.

¹¹ Kim S, Ubel P, De Vries R. Pruning the regulatory tree: For human-subjects research, maximum regulation does not mean maximum protection. *Nature* 2009;457: 534–535.

¹² Emanuel EJ, Wood A, Fleischman A, *et al*. Oversight of human participants research: Identifying problems to evaluate reform proposals. *Ann Int Med* 2004; 141(4): 282–291.

¹³ Lynn J, Baily MA, Bottrell M, *et al*. The ethics of using quality improvement methods in health care. *Ann Int Med* 2007;146(9):666– 673.

addressed areas including the scope and structure of the oversight system and the level of review applied to research; it emphasized the importance of the informed consent process, documentation and waiver of informed consent, protecting privacy and confidentiality, adverse event reporting, and review of cooperative or multi-site research studies.¹⁴

In January 2017, as part of an Executive Branch-wide update to the Common Rule, HHS promulgated revisions to Subpart A in order to modernize, strengthen, and make the Common Rule more effective. Among other things, the revisions established new requirements regarding the information that must be given as part of the informed consent process to prospective research subjects.¹⁵ The executive summary of the 2017 final rule noted that, “to the extent appropriate, the intent is to eventually amend the other subparts of the HHS human subjects protection regulations in 45 CFR part 46 (subparts B, C, D, and E).”¹⁶

The notice of proposed rulemaking which led to the January 2017 revisions to the Common Rule proposed requiring consent for the use of de-identified biospecimens (but not for the use of biospecimens from deceased individuals, which was outside the scope of the Common Rule). As a result of comments, the Common Rule agencies declined to finalize such requirements in the 2017 Common Rule. *See* Federal Policy for the Protection of Human Subjects, 82 FR 7149, 7150, 7153 (Jan. 17, 2017).¹⁷

¹⁴ National Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants*. Bethesda, MD; 2001.

¹⁵ 82 FR 7150. Examples of provisions of the Common Rule governing informed consent can currently be found at 45 CFR 46.116, 46.117, 46.204, and 46.205.

¹⁶ 82 FR 7151.

¹⁷ For purposes of the 2017 Common Rule, a human subject includes a living person from whom a researcher obtains a biospecimen and, thus, requires informed consent with respect to the use of identifiable biospecimens in research. *See, e.g.*, 45 CFR 46.101(a), 46.102(e) (definition of human subject), 46.104(d)(7), (d)(8). Similarly, under Subpart B, if information associated with fetal material is recorded for research purposes in a manner that living individuals can be identified, they are research subjects. 45 CFR 46.206(b).

However, federal and state courts have recognized the importance of obtaining informed consent prior to conducting medical procedures or research on human subjects, or before tissue taken from an individual is used in research. In the seminal case of *Canterbury v. Spence*, the D.C. Circuit Court of Appeals observed that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .’ True consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”¹⁸ Moreover, it is “normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient’s edification. Thus the physician has long borne a duty, on pain of liability for unauthorized treatment, to make adequate disclosure to the patient.”¹⁹

Subsequent courts have expounded that informed consent is necessary if a patient’s tissue is to be used in research, especially where the physician extracting the tissue or his or her institution has a research or commercial interest. For example, in *Moore v. Regents of University of California*, the California Supreme Court held that, prior to providing medical treatment, a physician must obtain the patient’s informed consent, which requires disclosing all of the physician’s research and economic interests.²⁰ As *Moore* recognized, informed consent is particularly important where the physician extracts human cells for use in subsequent research, since “a physician who treats a patient in whom he also has a research interest has potentially conflicting loyalties. This is because medical treatment decisions are made on the basis of proportionality—weighing the benefits *to the patient* against the risks *to the patient*. . . . A physician who adds his own research interests to this balance may be tempted to order

¹⁸ *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972).

¹⁹ *Id.* at 783.

²⁰ See *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990).

a scientifically useful procedure or test that offers marginal, or no, benefits to the patient.”²¹ Courts in other states have since recognized that informed consent is required prior to conducting research or performing various medical procedures.²²

Many states have banned or placed strict limits on using human fetal tissue in research.²³ Those states that have not banned human fetal tissue research often require the consent of the pregnant woman for the fetal tissue donation.²⁴

The research and medical communities have also recognized the importance of obtaining informed consent before engaging in human fetal tissue research. In June 2016, the American Medical Association (AMA) issued a Code of Medical Ethics Opinion (Code of Ethics Opinion) that listed several steps that physicians involved in human fetal tissue research should take, including obtaining the informed consent of the pregnant woman.²⁵ The AMA recognized that the use of fetal tissue for research purposes “raises a number of ethical considerations, including the degree to which a woman’s decision to have an abortion might be influenced by the opportunity to donate fetal tissue.”²⁶ It further recognized that “[c]oncerns have also been raised about potential conflicts of interest when there is possible financial benefit to those who are involved in the retrieval, storage, testing, preparation, and delivery of fetal tissues.” Consequently, “[t]o protect the interests of pregnant women as well as the integrity of science,” the Code of Ethics

²¹ *Id.* at 484 (emphasis in original).

²² *See, e.g., T.D. v. N.Y. State Office of Mental Health*, 228 A.D.2d 95, 116 (N.Y. App. Div. 1996) (describing New York law regarding informed consent for being a human research subject); *DeGennaro v. Tandon*, 873 A.2d 191, 189-197 (Conn. App. 2005) (collecting cases requiring informed consent prior to undergoing medical procedures).

²³ *E.g.*, Ariz. Rev. Stat. Ann. § 36-2302 (2016); Ark. Code Ann. § 20-17-802 (2019); Fla. Stat. Ann. § 390.0111 (2018); Ky. Rev. Stat. Ann. § 436.026; La. Rev. Stat. Ann. § 40:1061.24 (2015); Me. Rev. Stat. Ann. tit. 22, § 1593; Mass. Gen. Laws Ann. ch. 112, § 12J (2008); Mich. Comp. Laws § 333.2685; Minn. Stat. Ann. § 145.422; Mo. Ann. Stat. § 188.036; N.D. Cent. Code § 14-02.2-01; N.D. Cent. Code §§ 14-02.2-02; N.M. Stat. Ann. § 24-9A-3; Ohio Rev. Code Ann. § 2919.14; Okla. Stat. Ann. tit. 63, § 1-735; R.I. Gen. Laws § 11-54-1; S.D. Codified Laws § 34-23A-17; Utah Code Ann. § 76-7-310; Wyo. Stat. Ann. § 35-6-115 (2017).

²⁴ *E.g.*, 17 CA ADC § 100085 (2019).

²⁵ AMA Code of Medical Ethics Opinion 7.3.5, available at <https://www.ama-assn.org/delivering-care/ethics/research-using-human-fetal-tissue>.

²⁶ *Id.*

Opinion stated that physicians who are involved in research that uses human fetal tissue should:

- Not “offer[] money in exchange for fetal tissue.”
- “In all instances, obtain the woman’s voluntary, informed consent,” including for fetal tissue from a miscarriage (spontaneous abortion) for research. Under the Code of Ethics Opinion, informed consent includes a “disclosure of the nature of the research including the purpose of using fetal tissue, as well as informing the woman of a right to refuse to participate.”
- When fetal tissue from an induced abortion is used for research purposes, ensure that:
 - “The woman’s decision to terminate the pregnancy is made prior to and independent of any discussion of using the fetal tissue for research purposes.”
 - “Decisions regarding the technique used to induce abortion and the timing of the abortion in relation to the gestational age of the fetus are based on concern for the safety of the pregnant woman.”
- “Ensure that health care personnel involved in the termination of a pregnancy do not benefit from their participation in the termination.”²⁷

HHS research and human research protection components have also adopted policies and provided guidance on research involving human fetal tissue. Subpart B requires that such research “be conducted only in accord with any applicable Federal, State, or local laws and regulations regarding such activities”; the regulations further direct that “[n]o inducements, monetary or otherwise, will be offered to terminate a

²⁷ *Id.* The Code of Ethics Opinion also addresses the use of fetal tissue in transplantation research or clinical care.

pregnancy” and that “[i]ndividuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.” 45 CFR 46.206(a), 46.204(h)-(i). Following enactment of the NIH Revitalization Act of 1993 – which amended the Public Health Service Act to add (among other provisions) section 498A (42 U.S.C. 289g-1), establishing certain requirements for research on fetal tissue transplantation, and section 498B (42 U.S.C. 289g-2), barring valuable consideration in connection with the acquisition, receipt, or transfer of human fetal tissue – the Office for Human Research Protections issued guidance on fetal tissue transplantation research.²⁸ In the January 2007 HHS Grants Policy Statement,²⁹ HHS included specific provisions on research on human fetal tissue and transplantation of human fetal tissue. In the Grants Policy Statement, HHS noted that “[t]he scientific and ethical challenges associated with research utilizing human fetal tissue make it imperative that researchers and their organizations be fully aware of and in compliance with the Federal requirements,” noting particularly section 498B of the Public Health Service Act.³⁰ It also noted the additional requirements of section 498A with respect to research on human fetal tissue transplantation.³¹ Given its pre-eminent role in conducting and funding biomedical research, NIH has also issued guidance on human fetal tissue in research. For example, on August 14, 2015, it released “Reminder of Legal Requirements Regarding the Acquisition and Use of Human Fetal Tissue for Research Purposes,” NOT-OD-15-143. In that notice, NIH reminded its grantees and contractors that “research involving human fetal tissue must be conducted in accordance with applicable Federal, State and local laws, regulations, and policies, including the NIH

²⁸ See, e.g., Fetal Tissue Transplantation Research Guidance (2003), available at <https://www.hhs.gov/ohrp/regulations-and-policy/guidance/fetal-tissue-transplantation/index.html>.

²⁹ HHS Grants Policy Statement (Jan. 1, 2007), available at <https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf>.

³⁰ See HHS Grants Policy Statement (Jan. 1, 2007) at II-16, available at <https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf>.

³¹ *Id.* at II-17 - II-18.

Grants Policy Statement,” making specific reference to the Public Health Service Act provisions and to 45 CFR 46.204(h)-(j) and 46.206.³² Early the following year, in 2016, NIH released its policy, applicable to both NIH intramural research investigators and extramural researchers, NIH “Policy on Informed Consent for Human Fetal Tissue Research.”³³ In that notice, NIH, which is “committed to ensuring that research involving human fetal tissue is conducted responsibly and meets the highest ethical standards,” stated that “NIH-funded research involving human fetal tissue must be conducted in compliance with all applicable federal, state, and local laws and regulations. . . .”³⁴ NIH further noted that “[c]urrent federal laws and regulations require informed consent for research involving the transplantation of human fetal tissue and for research with human fetal material associated with information that can identify a living individual” and that “[m]ost states require informed consent for the use of fetal tissue in research. Accordingly, NIH expects *informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue.*”³⁵ NIH further noted that “[w]hen obtaining primary human fetal tissue for research purposes, NIH expects grantees and contractors to maintain appropriate documentation, such as an attestation from the health care provider or a third party supplier, that informed consent was obtained at the time of tissue collection.”³⁶ In October 2018, these expectations and requirements became part of NIH’s Grants Policy Statement.³⁷

³² See Reminder of Legal Requirements Regarding the Acquisition and Use of Human Fetal Tissue for Research Purposes, NOT-OD-15-143 (Aug. 14, 2015), *available at* <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-143.html>.

³³ See NIH Policy on Informed Consent for Human Fetal Tissue Research, NOT-OD-16-033 (Feb. 11, 2016), *available at* <https://grants.nih.gov/grants/guide/notice-files/not-od-16-033.html>.

³⁴ *Id.*

³⁵ *Id.* (emphasis added).

³⁶ *Id.* FDA’s Staff Manual Guides also contains guidance for FDA-funded or conducted research involving human fetal tissue. See FDA Staff Manual Guides, Volume IV – Agency Program Directive, General or Multidiscipline, Research Involving Human Fetal Tissue, SMG 9001.3 (Feb. 11, 2016).

³⁷ October 2018 NIH Grants Policy Statement, Section 4.1.14, *available at* https://grants.nih.gov/grants/policy/nihgps/html5/section_4/4.1.14_human_fetal_tissue_research.htm.

As noted above, in September 2018, HHS initiated a comprehensive review of all HHS research involving human fetal tissue from elective abortions to ensure consistency with statutory and regulatory requirements and to ensure the adequacy of procedures and oversight of such research in light of the serious regulatory, moral, and ethical considerations involved.. As part of this audit and review, HHS personnel reviewed the contracts (or purchase orders, as applicable) executed by personnel at NIH for the acquisition of human fetal tissue from elective abortions, and sought to obtain, from the organizations that supplied such tissue to the NIH researchers, copies of the required informed consents for the donation of the fetal tissue for research purposes, as well as documentation that valuable consideration was not sought or given in connection with the transfers of fetal tissue. One tissue procurement organization, which procured human fetal tissue for a number of NIH intramural research projects, provided its template informed consent document. It, however, refused to produce any executed informed consents or documentation of its compliance with laws and NIH policies on the informed consent of the mother to donate the fetal tissue for research, and would not make any representations to HHS that such informed consents had been obtained. The organization also declined to provide HHS with financial documentation for HHS to assess compliance with federal prohibitions on valuable consideration. Informed consents were obtained from two other organizations, an academic institution that maintains a tissue bank and another private tissue procurement organization, which provided fetal tissue for two intramural research projects. While HHS's inability to obtain information from one tissue procurement organization to confirm compliance with informed consent requirements and the bar on valuable consideration occurred in the context of HHS's audit of intramural research involving human fetal tissue from elective abortions, and there are other sources from which researchers can and do obtain human fetal tissue, the organization at issue also provides human fetal tissue to a number of NIH-funded

extramural researchers. As a result, HHS also became concerned that grantees, or those from whom fetal tissue had been obtained by grantees, may not always have readily available documentation of informed consents for fetal tissue research, or documentation that valuable consideration was not provided in exchange for human fetal tissue in connection with HHS-funded research, notwithstanding NIH's policy requirements and section 498B of the Public Health Service Act (42 U.S.C. 289g-2(a)), which prohibits acquiring, receiving, or otherwise transferring human fetal tissue for valuable consideration if the transfer affects interstate commerce.

Building on these developments, in June 2019, HHS announced the Administration's new policy with respect to human fetal tissue research. That announcement included a commitment to undertake changes to HHS regulations and to NIH's grants policy to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue.

NIH began implementing the Administration's policy with the issuance of Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT-OD-19-128.³⁸ In that notice, NIH outlined for its extramural research community the new requirements and review considerations with respect to research supported by NIH that involves the proposed use of human fetal tissue obtained from abortions in extramural applications for grants, cooperative agreements, and research and development (R&D) contracts. It "remind[ed] the community of expectations to obtain informed consent from the donor for any NIH-funded research using [human fetal tissue]."³⁹ The notice included requirements for a justification for the use of human fetal tissue for the proposed research; for planned written, voluntary, informed consent process

³⁸ See Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT-OD-19-128 (July 26, 2019), available at <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-19-128.html>.

³⁹ *Id.* (citing NOT-OD-16-033).

for cell/tissue donation; and for budget information and justification for the quantity, type, and source of human fetal tissue, as well as a certification that valuable consideration has not been provided for the acquisition of such tissue. The notice outlined NIH's expectations for the contents of the informed consents (and related assurances): language that the informed consent for donation of human fetal tissue was obtained by someone other than the person who obtained the informed consent for abortion, occurred after the informed consent for abortion, and would not affect the method of abortion; no enticements, benefits, or financial incentives were used at any level of the process to incentivize abortion or the donation of human fetal tissue; and the informed consent was signed by both the woman and the person who obtained the informed consent. NIH also indicated that the NIH award recipient should have documentation from the human fetal tissue donating organization assuring adherence to the requirements of the informed consent process and documentation that human fetal tissue was not obtained or acquired for valuable consideration; the awardee would be expected to provide such assurance for each year of the award such research is conducted for the life of the award and to maintain this documentation in accordance with the NIH Record Retention and Access policy.⁴⁰

As the next step in this process, HHS now proposes to make modifications to 45 CFR part 46 Subpart B, which provides additional protections for pregnant women, human fetuses and neonates involved in research, and 45 CFR part 75, which implements standard requirements for administrative and financial management of Federal awards. The decision to amend HHS's regulations was the result of HHS's comprehensive review of HHS research involving human fetal tissue from elective abortions. Given the serious

⁴⁰ *Id.* The notice also required that the application describe plans for the treatment of human fetal tissue and its disposal when the research was complete, as well as assurances that such treatment and disposal would be consistent with such plans. *Id.*

regulatory, moral, and ethical considerations involved, HHS concluded that it is appropriate to (1) clearly identify, in regulation, the minimum requirements for informed consent for the donation and use of human fetal tissue in research, especially when the fetal tissue is obtained from elective abortions; (2) impose certain requirements to help ensure compliance with the statutory bar on the provision of valuable consideration for human fetal tissue. These conclusions also follow from consideration of the authorities described above, the views of the medical community, State laws, and a comprehensive review of the use of human fetal tissue in research by HHS. HHS recognizes that, with respect to informed consent, this proposal goes beyond the approach taken by the Common Rule (in subpart A) with respect to biospecimens. However, HHS has long recognized the need for additional research protections for certain vulnerable populations or certain types of research—hence, the existence of Subparts B, C, and D—and believes that the additional protections proposed here are warranted to protect the interests of pregnant women and the integrity of science, as well as the serious moral and ethical considerations noted above. With respect to research involving human fetal tissue, this proposed rule would also align Subpart B more expressly with NIH policy and the AMA’s Code of Ethics Opinion on the need for informed consent. HHS considered making no changes to 45 CFR part 46 subpart B and part 75, or making more limited changes. However, HHS has determined that a rulemaking is necessary to, among other things, adopt, clarify, or strengthen safeguards and program integrity requirements and, thus, to ensure compliance with the federal statutes and policies addressing the use of human fetal tissue in HHS-funded research.

III. Summary of the Notice of Proposed Rulemaking

HHS proposes to amend 45 CFR part 46, subpart B, Protection of Human Subjects, Additional Protections for Pregnant Women, Human Fetuses and Neonates

Involved in Research, and 45 CFR part 75, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, in the following ways:

A. Definitions, § 46.202.

HHS is proposing to add a paragraph (i) to § 46.202. Paragraph (i) would provide that, for purposes of Subpart B of 45 CFR Part 46, human fetal tissue shall have the definition ascribed to it in 42 U.S.C. 289g-1(g), namely “tissue or cells obtained from a dead human embryo or fetus after a spontaneous or induced abortion, or after a stillbirth.” While HHS proposes to define the term consistent with the statutory definition applicable to fetal tissue transplantation research and the prohibition on valuable consideration, many of the provisions proposed below would only apply to human fetal tissue derived from elective abortions and to HHS-funded research involving such tissue.

For the purpose of implementing the June 2019 policy through NOT-OD-19-128, NIH provided a more technical definition of research involving human fetal tissue from elective abortions as “research involving the study, analysis, or use of primary [human fetal tissue], cells, and derivatives, and human fetal primary cell cultures obtained from elective abortions” and stated that it includes (1) human fetal primary or secondary cell cultures, whether derived by the investigator or obtained from a vendor; (2) animal models incorporating human fetal tissue from elective abortions, including obtaining such models from a vendor; (3) derivative products from elective abortion tissues or cells such as protein or nucleic acid extracts; and (4) any human extra-embryonic cells and tissue, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi, if obtained from the process of elective abortion.” NIH noted that this definition is consistent with the statutory definition that HHS proposes to adopt here for purposes of these regulations. To provide further specificity about the issue, NIH excluded certain types of research from the definition of research involving human fetal tissue from elective abortion, namely (1) human fetal primary or secondary cell cultures, if cells were

not derived from an elective abortion; (2) already-established (as of June 5, 2019) human fetal cell lines (e.g., induced pluripotent stem cell lines from human fetal tissue, immortalized cell lines, differentiated cell lines); (3) derivative products from human fetal tissue or cells (e.g., DNA, RNA, protein) if not derived from elective abortion; (4) human extra-embryonic cells and tissue, including, but not limited to, umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi if not derived from elective abortion; (5) human fetal cells present in maternal blood or other maternal sources; (6) embryonic stem cells or embryonic cell lines; and (7) research on transplantation of human fetal tissue from elective abortion for therapeutic purposes (because of the statutory provision(s) addressing such research, i.e., National Institutes of Health Revitalization Act of 1993, Pub. L. 103-43, sec. 113, 107 Stat. 126_ (June 10, 1993), which generally prohibits the imposition of a policy that precludes HHS from conducting or supporting any research on the transplantation of human fetal tissue for therapeutic purposes).

NIH noted that its definition of research involving human fetal tissue from elective abortions is consistent with the statutory definition. As HHS proposes to adopt the statutory definition for these regulations, HHS is of the belief that this proposed definition is consistent with the definition adopted in the NIH notice, for purpose of implementing the enhanced review requirements, including review of such research proposals that fall within a fundable scoring range by ethics advisory boards, pursuant to 42 U.S.C. 289a-1. Taking into consideration the different purposes and scope of the proposed regulation (which would apply to research involving all human fetal tissue, regardless of whether it was obtained from elective abortion) and the NIH notice (addressing research involving only human fetal tissue from elective abortion), HHS contemplates adopting the statutory definition with the express clarifications that (1) human fetal tissue includes human fetal primary tissue, cells from such tissue, and

primary cell cultures; derivative products (including protein or nucleic acid extracts) from such tissues/cells; and any human extra-embryonic cells and tissues, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi; and (2) human fetal tissue does not include established human fetal cell lines (including immortalized cell lines, induced pluripotent stem cell lines from human fetal tissue, and differentiated cell lines; human fetal cells present in maternal blood or maternal sources; and secondary use of data from human fetal tissue. HHS seeks comment on whether it would be appropriate to incorporate some or all of the specificity of the definition (and/or the exclusions from the definition) contained in the NIH notice; if so, which aspects of that definition (and/or the exclusions) should be incorporated into the definition for the purpose of this proposed rule; and if the contemplated express clarifications noted immediately above strike the right balance.

B. Research involving pregnant women or fetuses, § 46.204.

HHS proposes to add paragraph (k) to § 46.204, which governs research involving pregnant women or fetuses. Section 46.204 currently has two provisions which address abortion. Section 46.204(h) states that “[n]o inducements, monetary or otherwise, will be offered to terminate a pregnancy.” Similarly, § 46.204(i) currently requires that “[i]ndividuals engaged in research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.” Proposed paragraph (k) would require that the pregnant woman provide informed consent before the human fetal tissue obtained from the woman is used in HHS-funded research. Subpart A of the Common Rule generally requires that, before research is conducted on a human research subject, the human subject must provide informed consent, but not for unidentifiable biospecimens.⁴¹ As discussed previously, state law generally requires informed consent

⁴¹ 45 CFR 46.116, 46.117.

for participation in research, as well as informed consent for the donation of tissue for research. In light of the serious ethical and moral considerations presented by the use of fetal tissue for research purposes, as well as to protect the interests of pregnant women (and the integrity of science), HHS proposes that the requirement for informed consent for tissue donation should apply to research involving human fetal tissue. Because the fetus cannot provide informed consent, it is appropriate to obtain the informed consent of the woman from whom the fetal tissue would be obtained. Such a requirement was included in the 2016 AMA Code of Ethics Opinion.⁴² For these reasons, HHS proposes to add these requirements in paragraph (k). HHS, however, does not propose to include in proposed paragraph (k) all statements that should be included in such an informed consent. HHS further proposes that the requirement for such informed consent would apply with respect to donations of fetal tissue by women occurring after the effective date of the final rule.

HHS proposes that paragraph (k) would also establish specific requirements in order to meet informed consent requirements in this unique context:

- *The pregnant woman’s consent must be documented on a written informed consent form that is signed by the pregnant woman and written in plain language that is clear and easily understandable. As explained in *Canterbury v. Spence*, true consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.⁴³ This cannot occur if the pregnant woman’s options are presented using complex medical jargon. For this reason, in promulgating its 2017 revisions to the Common Rule, HHS “considered a growing body of literature that suggests*

⁴² AMA Code of Medical Ethics Opinion 7.3.5, available at <https://www.ama-assn.org/delivering-care/ethics/research-using-human-fetal-tissue>.

⁴³ *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972).

informed consent forms have grown too lengthy and complex, adversely affecting their ability to effectively convey the information needed for prospective participants to make an informed decision about participating in research.”⁴⁴ For the pregnant woman’s consent to be informed, the consequences of her decision must be written in plain language that is clear and easily understandable.

Moreover, the pregnant woman’s consent should be documented in writing.

Requiring such documentation would also minimize costs by reducing uncertainty and the risk of subsequent disputes or litigation.

- *The form documenting the informed consent must include a statement that there have been and will be no enticements, benefits, or financial incentives to incentivize the donation or acquisition of human fetal tissue, or the abortion (if any) from which such tissue is obtained.* This would require participants to document that they are following federal and state law. The Public Health Service Act already makes it unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce. *See* 42 U.S.C. 289g-2. Many states also forbid persons from providing enticements, benefits, or financial incentives to donate human fetal tissue.⁴⁵ HHS proposes that the statement also indicate that no enticement, benefit or financial incentive was provided to incentivize the abortion – as a mechanism to ensure that persons do not evade the statutory prohibition on providing valuable consideration for human fetal tissue by providing incentives

⁴⁴ 82 FR 7211.

⁴⁵ *See, e.g.*, CA HLTH & S § 125320 (“A person may not knowingly, for valuable consideration, purchase or sell embryonic or cadaveric fetal tissue for research purposes pursuant to this chapter.”); CO ST § 25-2-111.5 (“No physician or institution that performs procedures for the induced termination of pregnancy shall transfer such tissue for valuable consideration to any organization or person that conducts research using fetal tissue.”); IN ST 35-46-5-1.5 (making it a Level 5 felony to intentionally acquire, receive, sell, or transfer fetal tissue); MO ST 188.036 (“No person shall offer any inducement, monetary or otherwise, to the mother or father of an unborn child for the purpose of procuring an abortion for the medical, scientific, experimental or therapeutic use of the fetal organs or tissue.”).

for the abortion. Furthermore, after conducting its review, HHS has determined that it is unlikely that persons involved in human fetal tissue research would provide enticements, benefits, or financial incentives to incentivize an abortion, without also seeking to incentivize the human fetal tissue donation.

- *The form documenting the informed consent must permit the pregnant woman to choose to donate fetal tissue for research or to decline to donate fetal tissue for research.* In order for informed consent for the donation of human fetal tissue to be truly voluntary, the donor has to understand that the donation decision is truly voluntary and that she can choose to donate the fetal tissue or can choose to decline to donate the fetal tissue. HHS proposes to require including both options on the form; it believes that this would help to ensure that the informed consent is truly voluntary.
- *The form documenting the informed consent must be signed by both the pregnant woman and the individual obtaining the informed consent for the donation, with both individuals attesting to the truth of the statements in the form.* Given the serious moral and ethical considerations involved in human fetal tissue donation, it is appropriate to propose to require written documentation that the donor has provided informed consent and that the individual obtaining the informed consent has acted properly. Requiring both individuals' signatures would reduce costs by reducing the risks of litigation or other disputes – and assist HHS and the research grant recipient ensure compliance with the statutory and regulatory requirements.

These provisions would be applicable to all donations of human fetal tissue, regardless of whether the tissue was obtained from an elective abortion. This requirement is based on principals of informed consent or on a statute with respect to human fetal tissue, both of which are independent of the methods by which the fetal tissue is obtained.

Where the human fetal tissue is to be obtained from an elective abortion, HHS further proposes that the informed consent include several additional provisions:

- *The pregnant woman's informed consent must be obtained after the decision to have an abortion has been conclusively made and informed consent for the abortion has been obtained.* This proposed requirement would be consistent with Congressional intent and the views of the medical community. Congress required that research on the transplantation of human fetal tissue that is funded or conducted by HHS can only occur if the attending physician who obtains the tissue declares that the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for the donation of the tissue for use in research. 42 U.S.C. 289g-(b)(2)(A)(i). Likewise, the 2016 AMA Code of Ethics Opinion states that physicians involved in research that uses human fetal tissue should ensure that the woman's decision to terminate the pregnancy is made prior to, and independent of, any discussion of using the fetal tissue for research purposes. Congress and the AMA recognize that a woman may not be truly providing informed consent to a human fetal tissue donation if the decision to donate is intermingled with the decision about whether to have an abortion.
- *The pregnant woman's informed consent must be obtained by an individual other than the individual who obtained the informed consent for the pregnant woman's abortion.* This proposed requirement would help ensure that the decision whether to donate human fetal tissue is independent of the decision whether to have an abortion.
- *The pregnant woman must be at or over the age of majority in the jurisdiction in which the pregnant woman's donation is made.* American law has long recognized that important decisions about medical procedures should

generally be made by adults.⁴⁶ That is all the more so in this unique context that raises serious moral and ethical concerns. Accordingly, HHS proposes to impose this requirement with respect to the donation of human fetal tissue.

- *The form documenting the informed consent must include a statement that the decision to have an abortion and the method of abortion have not been affected by the decision whether to donate human fetal tissue.* This would require documentation that the requirement concerning the order in which the informed consents are obtained, above, has been met. It would also ensure that the pregnant woman's consent to the human fetal tissue donation is informed and independent, since the method of abortion would not be affected by the decision whether to donate human fetal tissue.

HHS proposes to provide, in an appendix to the preamble, sample informed consent form provisions, as guidance to regulated entities on the type of informed consent form provisions that would comply with the proposed informed consent requirements. This proposal would provide certainty to the regulated entities that they have sufficiently obtained informed consent and met the requirements of this proposed rule. However, the use of the sample provisions would not be required, and relevant parties would be free to use their own language in a form for informed consent for the donation of human fetal tissue as long as the form meets the proposed requirements. HHS seeks comment on the contents of sample informed consent form provisions.

C. Research involving pregnant women or fetuses, § 46.206.

HHS proposes to add paragraphs (c), (d), (e), (f), (g), (h), and (i) to § 46.206.

⁴⁶ See *Moore*, 793 P.2d at 483 (“[A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.”) (quoting *Cobbs v. Grant*, 8 Cal. 3d 229, 242 (1972)); *Canterbury*, 464 F.2d at 780 (“The root premise is the concept, fundamental in American jurisprudence, that ‘[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.’”) (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

Paragraph (c) would require that, at all stages in the process to acquire or otherwise obtain human fetal tissue for use in research, there would be no enticements, benefits, or financial incentives provided to the pregnant woman or attending physician to incentivize the occurrence of an abortion or the donation or acquisition of human fetal tissue. HHS proposes to add this paragraph for the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Paragraph (c) would help implement 42 U.S.C. 289g-2 and specify what is required by that provision in the context of research involving pregnant women, fetuses, or human fetal tissue.

Paragraph (d) would require that no person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the acquisition of the fetal tissue or with any abortion that may be the source of the human fetal tissue used or to be used in the research. HHS proposes to add paragraph (d) for some of the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Permitting a person to provide valuable consideration for costs associated with the abortion that is the source of the human fetal tissue could impact the decision whether to donate human fetal tissue which should be independent of the decision whether to have an abortion. Moreover, permitting a person to provide valuable consideration for such costs could enable the person, by claiming they are merely paying for the costs of the abortion and not the human fetal tissue, to circumvent the prohibition on providing valuable consideration for human fetal tissue. If a person could provide valuable consideration for the abortion, enforcement actions arising out of payments for human fetal tissue would frequently face evidentiary questions about whether the payment was for the costs associated with the abortion, rather than the human fetal tissue.

Paragraph (e) would require that no person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide

valuable consideration for the costs associated with the donation or acquisition of human fetal tissue. HHS proposes to add paragraph (e) for some of the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Furthermore, paragraph (e) would (1) eliminate any uncertainty about whether 42 U.S.C. 289g-2's prohibition on providing valuable consideration for the acquisition, receipt, or transfer of human fetal tissue applies to human fetal tissue research, and (2) specify what is required to comply with that provision in the human fetal tissue research context.

Paragraph (f) would define “valuable consideration” for purposes of paragraphs (d) and (e) as all payments other than payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. Paragraph (f) is in accord with 42 U.S.C. 289g-2(e)(3), which provides that “valuable consideration” does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. Paragraph (f) would also provide certainty to those involved in human fetal tissue research, by making clear that the enumerated costs are the only ones that do not constitute “valuable consideration” for purposes of § 46.206.

Paragraph (g) would emphasize that human fetal tissue may be used in research only if an informed consent that meets the applicable requirements of § 46.204(k) has been obtained with respect to the tissue donation. HHS proposes that the requirement would apply with respect to donations of fetal tissue by women where the initial donation occurs after the effective date of the final rule.

Paragraph (h) would provide that human fetal tissue from elective abortions can only be used in research conducted or funded by HHS if the human fetal tissue is acquired or otherwise obtained from Federal or State Governments, Federal or State Government-owned entities, universities, colleges, accredited degree-granting institutions of higher education, or university hospitals or other academic medical centers. In this

context that implicates serious moral and ethical considerations, HHS is committed to ensuring that research conducted using human fetal tissue has been obtained through appropriate procedures, including that the informed consent associated with the donation of fetal tissue is truly voluntary and not performed on an ad hoc basis or by those who are not sufficiently qualified. Thus, this proposed requirement would establish additional safeguards to ensure that the procurement of human fetal tissue is conducted by organizations or institutions that are familiar with, and accustomed to complying with, informed consent requirements and that are regularly subject to oversight by HHS – and is not obtained by organizations or individuals that are not qualified to implement such requirements, that are not otherwise subject to regulation and oversight by HHS, and that accordingly may not respond to requests for access to records. HHS also believes that paragraph (h) strengthens program integrity by making sure that the entities obtaining human fetal tissue for research are substantially more likely to comply with these requirements, especially in a manner that complies with the concerns expressed by Congress when it placed limits on the use of human fetal tissue in the Public Health Service Act.

Paragraph (i) requires that, once human fetal tissue is no longer to be used in research, it shall be treated respectfully and disposed of reasonably and in compliance with any additional laws or regulations imposed by applicable state law. By its statutory enactments, Congress has expressed that members of the public should proceed carefully when their actions involve human fetal tissue. HHS believes that paragraph (i) would further implement this concern at minimal burden. Many states and accredited academic

institutions have already adopted statutes or policies with similar requirements.⁴⁷ HHS asks for comment on this proposed regulatory requirement and the contours of such proposed requirement.

D. Access to records, § 75.364.

HHS's grants regulations, at § 75.364(a), provide that, among others, the HHS awarding agency, HHS Inspector General, and the Comptroller General of the United States, or any of their authorized representatives, "must have the right of access to any documents, papers, or other records" of the non-Federal entity (that is, the recipient of HHS funds) which are "pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts" – including "timely and reasonable access to personnel for the purpose of interview and discussion related to such documents." 45 CFR 75.364; *see also* 2 CFR 200.337 (OMB uniform administrative requirements). HHS proposes to add a paragraph (a)(1), which would specifically require that non-Federal entities that engage in human fetal tissue research pursuant to a Federal award provide the HHS awarding agency, the Inspector General, the Comptroller General of the United States, and the pass-through entity or any of their authorized representatives, with a right of access to (1) all informed consent forms obtained by the non-Federal entity for human fetal tissue research, which may be redacted with respect to the name and signature of the woman (for privacy purposes); (2) all documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration; (3) all documents, papers, or other records as are necessary to establish that federal funds were not used to acquire or otherwise obtain the human fetal

⁴⁷ *See, e.g.*, AR Code § 20-17-801; GA ST § 16-12-141.1 (2017); IN ST § 16-34-3-4 (2016); SD ST § 34-25-32.4; University of Minnesota Policy Statement Regarding Acquisition, Use, and Disposition of Donated Human Fetal Tissue for Transplantation Research, *available at* <https://policy.umn.edu/research/fetalresearch>.

tissue from elective abortions; and (4) personnel familiar with the foregoing documents, for purposes of interview and discussion related to such documents.

Paragraph (a)(1) would impose little, if any, additional burdens or costs. 45 CFR 75.364(a) already requires that the HHS awarding agency, inspectors general, the Comptroller General, and any of their authorized representatives have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. Paragraph (a)(1) would simply provide clarity to recipients involved in human fetal tissue research by specifying certain categories of the documents, papers, and records (and personnel) for which a right of access must be provided. Because of the unique context and serious regulatory, ethical, and moral considerations involved in human fetal tissue research, HHS believes it would be beneficial to specifically remind this subset of recipients in advance of the documents, papers, and records (and personnel) for which HHS has a right of access. Moreover, a 2016 House of Representatives committee report found that certain institutional review boards lacked records regarding their oversight of fetal tissue research and transplantation, and the committee was unable to obtain access to records that could determine whether fetal tissue was obtained for valuable consideration.⁴⁸ Because of the uncertainty over whether required documents are being maintained, HHS proposes to reiterate that recipients must maintain required documents and provide the HHS awarding agency, among others, with access to such documents and personnel upon request. Paragraph (a)(1) would therefore also strengthen program integrity.

By its statutory enactments, Congress has expressed that members of the public should proceed carefully when their actions involve human fetal tissue and that valuable

⁴⁸ See, e.g., Final Report of the Select Investigative Panel of the Energy & Commerce Committee (Dec. 30, 2016), at xxi, xxvii, xxviii, xxix, xxxi, xxxviii, 16.

consideration should not be provided in order to acquire human fetal tissue. HHS proposes, below, that federal funds not be used to acquire human fetal tissue from elective abortions; HHS believes that it is particularly important to be good stewards of federal funds in this context. Given the aforementioned concerns, HHS believes that recipients should be able to document that valuable consideration was not provided to acquire human fetal tissue and that federal funds were not used to acquire human fetal tissue from elective abortions.

HHS also proposes to add a paragraph (d), which would provide that, for purposes of § 75.364, “human fetal tissue” shall have the definition ascribed to it in 49 U.S.C. 289g-1. Paragraph (e) would clarify for recipients what is meant by “human fetal tissue,” and would define that term in a way that conforms to the definition provided by Congress. As with the proposed definition of “human fetal tissue” for purposes of Subpart B of 45 CFR Part 46, HHS believes that this proposed definition is consistent with the definition adopted in the NIH notice for purpose of implementing the enhanced review requirements. Similarly, HHS contemplates adopting the statutory definition with the express clarifications that (1) human fetal tissue includes human fetal primary tissue, cells from such tissue, and primary cell cultures; derivative products (including protein or nucleic acid extracts) from such tissues/cells; and any human extra-embryonic cells and tissues, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi; and (2) human fetal tissue does not include established human fetal cell lines (including immortalized cell lines, induced pluripotent stem cell lines from human fetal tissue, and differentiated cell lines; human fetal cells present in maternal blood or maternal sources; and secondary use of data from human fetal tissue. HHS seeks comment on whether it would be appropriate to incorporate some or all of the specificity of the definition (and/or the exclusions from the definition) contained in the NIH notice; if so, which aspects of that definition (and/or the exclusions) should be incorporated into

the definition for the purpose of this proposed rule; and if the contemplated express clarifications noted immediately above strike the right balance.

E. Expenses associated with acquiring certain human fetal tissue for research, § 75.478.

In its grants regulation in 45 CFR part 75, HHS addresses certain select items of costs and identifies certain costs that are or are not allowable under HHS's funding awards.⁴⁹ HHS proposes to add § 75.478. Section 75.478 would provide that expenses associated with the acquisition of human fetal tissue from elective abortions for use in research are not allowable expenses under Federal awards from an HHS awarding agency. As a result of the comprehensive review that HHS undertook and in light of the serious regulatory, moral, and ethical considerations involved, HHS has concluded that such costs should not be allowable – that is, they are not expenses that should be borne by the taxpayer through the federal research award. HHS would continue to fund research involving such human fetal tissue, consistent with the June 5, 2019 policy,⁵⁰ but it proposes that funds from HHS research awards could not be used for the acquisition of human fetal tissue from elective abortions. HHS encourages the recipients of HHS awards for research involving human fetal tissue from elective abortions to obtain human fetal tissue by donation or no-cost material transfer agreement.

IV. Request for Comment

HHS seeks comment on all aspects of this proposed rule and the model informed consent form provisions, including the likely impacts of the proposed rule, as compared to the status quo. HHS also seeks comment on its regulatory impact analysis.

⁴⁹ See, e.g., 45 CFR 75.420 - 75.475 (general provisions for selected items of cost), 75.476 – 75.477 (HHS selected items of cost).

⁵⁰ See Statement from the Department of Health and Human Services, June 5, 2019, available at <https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html>.

V. Regulatory Impact Analysis

HHS has examined the impacts of this proposed rule as required under Executive Order 12866 on Regulatory Planning and Review, 58 FR 51,735 (Oct. 4, 1993); Executive Order 13563 on Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011); Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Feb. 3, 2017); the Regulatory Flexibility Act (Pub. L. 96-354 (Sept. 19, 1980) (codified as amended at 5 U.S.C. 601–612)) and Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002); section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-04, 109 Stat. 48 (Mar. 22, 1995)); Executive Order 13132 on Federalism, 64 FR 43255 (Aug. 4, 1999), Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 847 (Mar. 29, 1996) (codified as amended at 5 U.S.C. 801–808)) (commonly known as the Congressional Review Act); section 654 of the Treasury and General Government Appropriations Act of 1999 (the Assessment of Federal Regulation and Policies on Families); and the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Executive Orders 12866 and 13563 Determination

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to Executive Order 12866 and reaffirms the principles, structures, and definitions governing regulatory review established there. For significant regulatory actions, Executive Order 12866 requires “an assessment, including the underlying analysis,” of benefits and costs “anticipated from the regulatory action.” Executive Order 12866, §§ 6(a)(3)(C), 3(f)(1).

The Office of Management and Budget (OMB) has determined this proposed rule is a “significant regulatory action” under Executive Order 12866, § 3(f)(4), in as much as it raises novel legal or policy issues that arise out of legal mandates, the President's priorities, or the principles set forth in an Executive Order, but that it is not economically significant in that it will not have an annual effect on the economy of greater than \$100 million in one year. Thus, the Office of Management and Budget has reviewed it. Under Executive Order 13563, in proposing this rule, HHS has attempted to promote coordination, simplification, and harmonization; has sought to identify means to achieve regulatory goals that are designed to promote innovation; and has ensured the objectivity of any scientific and technological information and processes used to support this proposed rule.

Summary of and Need for Proposed Rule

HHS recognizes that conducting and funding research involving human fetal tissue from abortions presents serious regulatory, moral, and ethical considerations. The principle of informed consent is central to the practice of medicine, as well as to human subjects research. Federal and state laws and policies recognize the importance of informed consent, not only for research involving human subjects, but also for the donation of human tissue and cells for research purposes. This informed consent is especially important when the tissue being donated is human fetal tissue and the source of such tissue is elective abortions. Congress has similarly recognized the moral and ethical issues implicated by the acquisition of human fetal tissue and the use of human fetal tissue in research: It amended the Public Health Service Act to, among other things, make it unlawful “for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration” – which “does not include reasonable payments associated with the transportation, implantation, processing, preservation,

quality control, or storage of human fetal tissue” – if the transfer affects interstate commerce.

As a result of a comprehensive review of HHS research involving human fetal tissue from elective abortion and in light of the serious regulatory, moral and ethical considerations involved, HHS determined that it would be appropriate to undertake changes to its regulations to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue. These safeguards and program integrity requirements relate to the informed consent process and the statutory bar on the provision of valuable consideration in connection with the transfer of human fetal tissue. HHS believes that additional informed consent statements and procedures are needed to ensure that (1) the informed consent to the donation of human fetal tissue from abortion is in fact voluntary and informed, and not motivated by any enticements, benefits, or financial considerations, and (2) there is separation between the decision and consent for abortion and the decision on the donation of fetal tissue, such that the abortion decision is not influenced by considerations relating to the research, including the potential contribution to biomedical research that could cure disease, advance understanding of diseases, and the like. Similarly, HHS desires to strengthen recipients’ understanding of, and compliance with, the informed consent requirements and the statutory bar on the provision and receipt of valuable consideration for human fetal tissue by ensuring access to records relating to such issues for oversight purposes.

Accordingly, the proposed rule would:

- Require, prior to conducting research on human fetal tissue, that informed consent, including certain statements, be obtained from the pregnant woman;
- Prohibit providing enticements, benefits, or financial incentives to the pregnant woman or attending physician to incentivize the occurrence of an abortion or human fetal tissue donation;

- Prohibit providing valuable consideration for costs associated with obtaining human fetal tissue or the abortion (if any) that is the source of the human fetal tissue;
- Mandate that research involving human fetal tissue from elective abortions can only use human fetal tissue that is acquired or otherwise obtained from a Government, Government-owned entities, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center;
- Require that human fetal tissue be treated respectfully and disposed of reasonably when no longer to be used in research;
- Require HHS recipients that engage in human fetal tissue research to provide HHS, inspectors general, and the Comptroller General with a right of access to all informed consent forms obtained for human fetal tissue research, and documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration and that federal funds were not used to acquire or otherwise obtain the human fetal tissue; and
- Provide that expenses associated with the acquisition of human fetal tissue for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

Alternatives Considered

HHS carefully considered several alternatives, but rejected the potential alternatives for a number of reasons:

- Alternative 1: Not taking any action. HHS concluded that this alternative was unacceptable because of the serious regulatory, moral and ethical considerations

involved with respect to research involving human fetal tissue from elective abortions.

- Alternative 2: Making no changes to 45 CFR Part 46, Subpart B or to part Part 75, but issuing guidance on (1) best practices for (and the elements that should be included in) informed consent for the donation of human fetal tissue for research, (2) the documentation that should be maintained with respect to compliance with the statutory bar on valuable consideration for the transfer of human fetal tissue, and (3) encouraging the practice of obtaining human fetal tissue by donation or non-cost material transfer agreement. HHS concluded that this alternative would be inadequate because the guidance mechanism (1) did not seem commensurate with the nature and seriousness of the issue and (2) may not be sufficient to permit HHS to conduct appropriate oversight and ensure compliance with/enforce the identified informed consent standards and the bar on valuable consideration.
- Alternative 3: Make more limited changes to 45 CFR Part 46, Subpart B and Part 75, such as by (1) requiring that, with respect to research involving human fetal tissue from elective abortions, HHS-funded projects obtain informed consent for the donation of human fetal tissue from elective abortion, without specifying any required content of the informed consent document; or (2) clarifying recordkeeping and access requirements. HHS concluded that this alternative would be inadequate because, among other reasons, it would not ensure that the informed consent process included measures and statements to ensure that the informed consent was truly voluntary and truly informed and that no consideration or inducements had been provided for the human fetal tissue.

Expected Benefits and Costs of the Proposed Rule

HHS expects several benefits from this proposed rule. The proposed rule would provide better assurance of compliance with federal statutory requirements with respect

to the acquisition and use of human fetal tissue in research. It would better align federal and state law with respect to informed consent for the use of fetal tissue in research, and ensure the uniformity across HHS/NIH grants with respect to the elements of informed consent for the donation of human fetal tissue for research. It would strengthen the informed consent process. It would also strengthen HHS's ability to conduct oversight of, and monitor compliance on, these issues (informed consent, bar on valuable consideration). While maintaining, consistent with the Public Health Service Act, the ability of NIH to fund research involving human fetal tissue from abortion, this proposed rule would also ensure that – in light of the serious moral and ethical issues involved – the costs associated with such human fetal tissue would not be borne by the federal taxpayer.

HHS believes that the costs associated with the proposed rule will be de minimis. In the main, the costs would consist of the administrative costs to the relevant recipients to (1) become familiar with the requirements of the final rule; (2) update their informed consent documents; and (3) update their grant policies and procedures (or compliance manuals) on grant record retention to reflect certain information retention requirements, practices concerning treatment and disposal of human fetal tissue, the bar on valuable consideration, and the unallowability of costs associated with the acquisition of human fetal tissue from abortion.

Familiarization Costs. NIH is the only HHS component that funds grants, cooperative agreements, or R&D contracts for research involving human fetal tissue. Between FY 2015 and FY 2019, NIH funded between approximately 120 and 178 research projects involving the use of human fetal tissue from abortions each year, including between 15 and 55 new research projects per year; with NIH-funded projects usually having a five year project period, most such annually funded research projects represented renewals, revisions, extensions, or continuations. The entities that hold the

NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children's hospitals, biomedical research institutions and several corporations. Many of these entities hold multiple NIH grants, cooperative agreements, or R&D contracts for research involving the use of human fetal tissue. In FY 2019, there were a total of 71 unique institutions with active NIH awards for research involving human fetal tissue. Thus, to ensure that costs are not underestimated, for purposes of estimating the costs associated with this rulemaking, HHS will use 80 as the number of organizations that would be affected by this proposed rule. Given the size and sophistication of these entities, the task of familiarization would likely fall to the equivalent of a lawyer in the entities' law departments. According to the U.S. Bureau of Labor Statistics,⁵¹ lawyers have a mean hourly rate of \$69.86. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or \$139.72. The changes proposed in the proposed rule are straightforward and easy to understand. Accordingly, HHS estimates that it would take a recipient approximately an hour to become familiar with the requirements if the proposed rule is finalized as proposed. HHS, thus, concludes that the total cost for recipient familiarization with such a final rule would total \$11,177.60 (\$139.72 x 80).

Informed Consent and Informed Consent Forms. As noted above, since not later than 2016, NIH has conveyed to researchers working with human fetal tissue that receive NIH grants for such research that (1) NIH-funded research involving human fetal tissue must be conducted in compliance with all applicable federal, state, and local laws and regulations⁵²; (2) most states require informed consent for the use of fetal tissue in

⁵¹ U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at* https://www.bls.gov/oes/current/oes_nat.htm.

⁵² *See* 45 CFR 46.206(a).

research; and (3) NIH expects informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue. *See* NOT-OD-16-033; NIH Grants Policy Statement, Sec. 4.1.14. Recently, NIH informed grantees, contractors, and applicants that it expects such informed consent forms to contain certain statements that are consistent with the statements proposed in this proposed rule. *See* NOT-OD-19-128. In addition, the AMA has indicated, through its 2016 Code of Ethics Opinion, that physicians who are involved in research that uses human fetal tissue should, in all instances, obtain the woman's voluntary, informed consent. Although there is currently no express requirement for such informed consent, based on the foregoing, it is HHS's understanding that informed consent is generally obtained from the donor for NIH-funded research involving human fetal tissue. HHS assumes that recipients have an informed consent form that they use or require their contractors to use in obtaining the informed consent to the donation of human fetal tissue. Accordingly, the only costs HHS expects that recipients would incur associated with the proposed informed consent requirements would be the costs to update such forms. Such a task would again likely fall to the equivalent of a lawyer in the entities' law departments. According to the U.S. Bureau of Labor Statistics,⁵³ lawyers have a mean hourly rate of \$69.86. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or \$139.72. The informed consent requirements in the proposed rule are straightforward and easy to understand – and HHS has provided sample informed consent form provisions. Accordingly, HHS estimates that it would take a recipient approximately an hour to update its informed consent for the donation of human fetal tissue from elective abortion for research. HHS, thus, concludes that the costs likely to be incurred to update informed consent forms as a result of the proposed informed

⁵³ U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at* https://www.bls.gov/oes/current/oes_nat.htm.

consent requirements (proposed §§ 46.204(k) and 46.206(g)) would total \$11,177.60 (\$139.72 x 80).

Although HHS believes that most, if not all, recipients of NIH awards for research involving human fetal tissue have processes in place to obtain informed consent for the donation of human fetal tissue for research, HHS recognizes that some may not conduct a process to obtain informed consent for the donation that is separate and independent from the process to obtain informed consent for the abortion. As set forth in greater detail in the Paperwork Reduction Act section of this regulatory impact analysis, and using NIH intramural data as a proxy, HHS estimates that, on an annual basis, each research project would need to conduct the informed consent process for the donation of human fetal tissue an average of 8 times, in order to obtain the amount of human fetal tissue needed for each research project, for a total of 1,059.2 informed consent processes per year. Assuming the informed consent process requires 10-15 minutes of a registered nurse's time, this results in a total of between 176.89 and 264.8 burden hours per year for the separate and independent informed consent process, or between \$13,174.77 and \$19,722.30 in total annual costs. This suggests a total annual burden of between 2.21 and 3.31 hours per unique recipient, and cost on an annual basis (undiscounted) for each unique recipient of between \$164.68 and \$246.53 for a separate and independent informed consent process for the donation of human fetal tissue for research.⁵⁴

Prohibitions on Valuable Consideration. The proposed substantive prohibitions on valuable consideration in proposed § 46.206(c)-(f) merely reiterate current statutory requirements with respect to the provision or receipt of valuable consideration associated

⁵⁴ As noted below, in that section, HHS believes that most, if not all, recipients obtain informed consents for the donation of human fetal tissue for research and that many recipients utilize or require the utilization of a separate and independent informed consent process. Accordingly, these estimates represent HHS's estimate of the total cost of a separate and independent informed consent process on an annual basis, not the likely incremental costs resulting from this proposed rule. However, HHS will use these costs for simplicity of analysis in this proposed rule.

with the transfer of human fetal tissue. Accordingly, HHS does not believe that recipients would incur any additional or incremental costs as a result of these proposed requirements.

Disposal of Human Fetal Tissue. It is HHS's understanding that the proposed requirement for the respectful treatment and disposal of human fetal tissue when such tissue is no longer needed for research (proposed § 46.206(i)) is consistent with good clinical practice on the part of researchers. Accordingly, HHS believes that recipients would incur de minimis costs, if any, as a result of this proposed requirement.

Updating of Policies and Procedures (or Manuals). HHS would classify, as grant administration requirements, the proposed requirements on the sourcing of human fetal tissue for research; on access to grant-related information pertaining to informed consent, valuable consideration, and use of grant funds; and on the unallowability of costs associated with the acquisition of human fetal tissue (proposed §§ 46.206(h), 75.364(a), and 75.478). It is HHS's understanding that requirements such as these proposed requirements are generally reflected in the grant administration or compliance policies and procedures (or manuals) that are maintained by recipients of the size and sophistication of those that tend to receive NIH grants for research involving human fetal tissue – and that recipient personnel tend to consult such documents in connection with their activities. Accordingly, HHS believes that the only costs that recipients would incur as a result of these proposed requirements would likely be associated with the updating of such policies and procedures (or manuals). Given the size and sophistication of these entities, the task of familiarization would likely fall to the equivalent of a lawyer in the entities' law departments or a compliance officer in their compliance offices. According to the U.S. Bureau of Labor Statistics, lawyers have a mean hourly rate of \$69.86,⁵⁵ and

⁵⁵ U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, available at https://www.bls.gov/oes/current/oes_nat.htm.

compliance officers have a mean hourly rate of \$35.03.⁵⁶ HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or \$139.72 for lawyers, and \$70.06 for compliance officers. HHS believes that the updating of such documents would likely take a total of two hours – and assumes that half of the work would be completed by compliance officers and half would be completed by lawyers. Accordingly, HHS estimates that the total cost incurred by recipients as a result of the proposed requirements would be \$16,782.40 ((\$139.72 + \$70.06) x 80).

Records and Access to Records and Personnel. HHS proposes to amend its current provision requiring awardees to provide access to records relating to a recipient's award to specify that recipients of awards for research involving human fetal tissue would need to provide access on the part of HHS, the Inspector General, GAO, and others, to specific grant-related information. All of the information that is specifically referenced in proposed § 75.364(a)(1) is already subsumed within the existing § 75.364(a). Accordingly, HHS does not believe that the proposed records access requirements would add any incremental burden.

Acquisition of Human Fetal Tissue. HHS proposes to limit the sources from which HHS recipients for research involving human fetal tissue can obtain human fetal tissue from abortion and to preclude the inclusion of any expenses associated with the acquisition of human fetal tissue from elective abortion in allowable costs that could be charged against HHS award funds. The proposed limitation on the sources of human fetal tissue from abortion should not have any impact on the costs associated with the acquisition of such tissue because the statutory bar on the provision of valuable consideration in connection with the transfer of human fetal tissue provides a statutory

⁵⁶ U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, available at <https://www.bls.gov/oes/current/oes131041.htm>.

limit on the ability of tissue procurement organizations and other organizations to seek to take advantage of such a regulatory limitation to exact higher consideration. To the extent that recipients currently incur permissible costs associated with the acquisition of human fetal tissue from elective abortions, HHS acknowledges that the proposal to exclude human fetal tissue from elective abortion from allowable costs under HHS research grants, cooperative agreements, and R&D contracts would effect a transfer of costs from HHS (through its awards) to the recipients of such research awards. Prior to NIH's July 2019 notice, recipients had not been required to separately identify or account for such expenditures of award funds, so HHS and NIH do not have complete data on the expenses incurred by awardees with respect to the acquisition of human fetal tissue from elective abortions. Accordingly, HHS uses the costs incurred by intramural NIH researchers to acquire human fetal tissue from elective abortions as a proxy. During the HHS review and audit, it reviewed NIH documentation with respect to intramural research involving human fetal tissue and the expenditures made to acquire such tissue in fiscal year (FY) 2018; NIH also provided information concerning intramural projects involving human fetal tissue, and the expenditures made with respect to them, in FY 2015. In FY 2015, intramural researchers incurred a total of \$26,915 in the acquisition of such tissue across 14 research projects, for an average expenditure of \$1,922.50 per project. And in FY 2018, intramural researchers incurred a total of approximately \$55,195 to acquire human fetal tissue across approximately 12 research projects, for an average expenditure of \$4,599.58 per project. Across the two fiscal years, the average annual expenditure for fetal tissue per project was, thus, \$3,261.04. Assuming that award recipients needed to acquire human fetal tissue for each project each year – an

assumption that would tend to overestimate costs⁵⁷ – this would suggest transfer costs of \$3,261.04 per project per year, for a total annual cost of \$431,761.70 and an average annual cost per unique recipient of \$5,397.02 (132.4 projects x \$3,261.04 cost per project per year / 80 unique recipients).⁵⁸

Except for the potential costs of the separate informed consent process and the acquisition of human fetal tissue from elective abortions, these costs would be one-time costs that would be experienced in the first year of implementation. Accordingly, if all recipients that receive HHS funds for research involved human fetal tissue were to implement the proposed requirements,⁵⁹ HHS estimates that these proposed requirements if finalized as proposed would impose first year costs (including both one-time costs and annual cost of the informed consent process and the acquisition of fetal tissue) totaling between \$484,074.07 and \$490,621.60, with cost per unique recipient of between \$6,050.92 and \$6,132.77. Thereafter, there would be total annual costs (undiscounted) of

⁵⁷ It is likely that researchers do not need to obtain human fetal tissue for their HHS-funded research projects annually. In addition, it is likely that some researchers and projects obtained such tissue through no-cost material transfer agreements. However, since HHS lacks knowledge as to how often funded research projects would need to obtain such tissue or how much would need to be expended to acquire such tissue – and the frequency and expense could vary from project to project – for purposes of the analysis of the regulatory impact of this proposed rule, HHS will assume that each project has to acquire human fetal tissue from abortion on an annual basis.

⁵⁸ If only new research projects need to acquire fetal tissue from elective abortions, this would suggest total transfer costs of \$92,613.54 per year, and an average annual cost per unique recipient of \$1,157.67 (28.4 projects x \$3,261.04 cost per project per year / 80 unique recipients).

HHS notes that in FYs 2015 and 2018, the largest expenditure by an intramural research project for fetal tissue was \$21,400 and \$25,785, respectively, for an average of \$23,592.50. Even if this number is used as the proxy for the annual expense that the recipient of an award for research involving human fetal tissue might incur to acquire such tissue – and it is assumed that every research project would incur such expenditures each year – this only results in a total annual expenditure of \$3,123,647 (\$23,592.50 x 132.4 projects), and an average annual cost per unique recipient of \$39,045.59 (132.4 projects x \$23,592.50 / 80 unique recipients).

⁵⁹ If recipients have already acquired all of the human fetal tissue needed for the funded research – which could be the case especially for those organizations that have received grant renewals, revisions, extensions, or continuations – they may conclude that they do not need to undertake any action associated with some of the proposed requirements. This would reduce the costs that such recipients would incur to implement any final rule resulting from this proposed rule.

\$444,936.47 to \$451,484 and \$5,561.70 to \$5,643.55 per unique recipient (again, undiscounted).⁶⁰

Executive Order 13771

The White House issued Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This rule, while significant under Executive Order 12866, will impose de minimis costs and, therefore, is not anticipated to be a regulatory or deregulatory action under Executive Order 13771. HHS's human subjects protection regulations permit HHS-funded or conducted research involving human fetal tissue to be conducted only in accord with any applicable Federal, State, or local laws and regulations regarding such activities. Current federal law and regulations require informed consent for human fetal tissue transplantation research and research with human fetal tissue with associated information that can identify a human being. In addition, most states require informed consent for the use of fetal tissue in research – and NIH has indicated that it expects informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue. As a result, HHS expects that HHS recipients conducting such research would incur only de minimis costs to become

⁶⁰ If the average of the highest annual intramural expenditures for fetal tissue is used to calculate the annual expenditure to acquire fetal tissue, the total first year costs (including both one-time and annual costs of fetal tissue acquisition) would range from \$3,175,959.37 to \$3,182,506.90, with total first year costs per unique recipient ranging between \$39,699.49 and \$39,781.65. Thereafter, total annual costs (undiscounted) would total \$3,136,821.77 to \$3,143,369.30, with annual costs (undiscounted) of \$39,210.27 to \$39,292.12 per unique recipient.

familiar with the regulation, to update their informed consent forms to include the specific statements proposed in this proposed rule, to obtain the necessary informed consents, to properly dispose of human fetal tissue, and to update their grants policies and procedures (or compliance manuals). Federal law already prohibits the transfer of human fetal tissue for valuable consideration, and federal regulation gives HHS the right of access to any documents, papers, or other records of Department recipients which are pertinent to the award. Public comments will inform the ultimate designation of this rule.

Regulatory Flexibility Act

HHS has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612). The RFA requires an agency to describe the impact of a proposed rulemaking on small entities by providing an initial regulatory flexibility analysis unless the agency expects that the proposed rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include proprietary firms meeting the size standards of the Small Business Administration (SBA)⁶¹; nonprofit organizations that are not dominant in their fields; and small governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)-(6).

⁶¹ In the health care sector, from which the Department draws many of its biomedical research recipients, SBA considers businesses to be small by virtue of having less than between \$8.0 million and \$41.5 million in average annual revenues, depending on the particular type of business. See U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective August 19, 2019 (sector 62), available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf. Inasmuch as colleges, universities and professional schools (e.g., medical schools) and other educational institutions may also receive Department funding to conduct biomedical research, the other sector from which the Department may draw recipients is the educational services sector, where the relevant small business sizes range from \$12.0 million to \$30.0 million in annual revenues. *Id.* (sector 61).

HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities.

Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking reinforces the requirements of the RFA and requires HHS to notify the Chief Counsel for Advocacy of the Small Business Administration if the final rule may have a significant economic impact on a substantial number of small entities under the RFA.

Executive Order 13272, 67 FR 53461 (Aug. 16, 2002).

As discussed, the proposed rule would

- Require, prior to conducting research on human fetal tissue, that informed consent be obtained from the pregnant woman;
- Prohibit providing enticements, benefits, or financial incentives to the pregnant woman or attending physician to incentivize the occurrence of an abortion or human fetal tissue donation;
- Prohibit providing valuable consideration for costs associated with obtaining human fetal tissue or the abortion (if any) that is the source of the human fetal tissue;
- Mandate that research involving human fetal tissue from elective abortions can only use such human fetal tissue that is acquired or otherwise obtained from a Government, a Government-owned entity, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center;
- Require that human fetal tissue be treated respectfully and disposed of reasonably when no longer to be used in research;
- Require HHS recipients that engage in human fetal tissue research to provide HHS, inspectors general, and the Comptroller General with a right of access to all informed consent forms obtained for human fetal tissue research, and documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration and that federal funds were not used to acquire or otherwise obtain the human fetal tissue; and
- Provide that expenses associated with the acquisition of human fetal tissue from elective abortion for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

NIH is the only HHS component that funds grants, cooperative agreements, or R&D contracts for research involving human fetal tissue. Between FY 2015 and FY 2019, NIH funded between approximately 120 and 178 research projects involving the

use of human fetal tissue from abortions each year, including between 15 and 55 new research projects per year; with NIH-funded projects usually having a five year project period, most such annually funded research projects represented renewals, revisions, extensions, or continuations. The entities that hold the NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children's hospitals, biomedical research institutions and several corporations. Many of these entities hold multiple NIH grants, cooperative agreements, or R&D contracts for research involving the use of human fetal tissue; in FY 2019, there were a total of 71 unique institutions with active NIH awards for research involving human fetal tissue.⁶²

Even if all of the entities that receive such NIH awards were considered small entities by virtue of their size or nonprofit status,⁶³ the proposed rule would not have a serious impact on a significant number of small entities. The proposed rule would not impose significant burdens not already imposed by federal or state law. As discussed above, if the proposed rule is finalized as proposed, each unique NIH awardee would likely experience, at most, first year costs (including both one-time costs, the cost of the separate informed consent process for the donation of human fetal tissue, and the cost of acquiring fetal tissue) totaling between \$6,050.92 and \$6,132.77, associated with the incremental burden of the requirements proposed in this proposed rule and, thereafter, \$5,561.70 to \$5,643.55 per year in expenses for the separate informed consent process

⁶² In the regulatory impact analyses, HHS is using 80 as the number of unique organizations that would be affected by the proposed rule, to ensure that costs are not underestimated.

⁶³ Some of the entities receiving NIH awards for research involving the use of human fetal tissue are public colleges or universities that may be considered components of state governments and, thus, not small entities for purposes of RFA. Similarly, some of the entities are major private colleges or universities, medical schools, academic medical centers, or hospitals that may be nonprofit organizations that are considered dominant in their fields and, thus, also not small entities for purposes of RFA.

and for unreimbursed expenses to acquire fetal tissue for the research.⁶⁴ As noted above, the entities that hold the NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children’s hospitals, biomedical research institutions and several corporations. These entities generally correspond to the following North American Industry Classification (NAIC) codes and small entity size guidelines⁶⁵:

Industry	NAIC Code	Small Entity Size Guideline	3% Impact on Revenue
Colleges, Universities and Professional Schools	611310	\$30 million in annual revenue	\$900,000
HMO Medical Centers	621491	\$35 million in annual revenue	\$1,050,000
General Medical and Surgical Hospitals	622110	\$41.5 million in annual revenue	\$1,245,000
Specialty (except Psychiatric and Substance Abuse) Hospitals	622310	\$41.5 million in annual revenue	\$1,245,000
Research and Development in the Physical, Engineering and Life Sciences (except Nanotechnology and Biotechnology)	541715	1,000 employees	

As noted above, HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities. The estimated potential impact on recipients of HHS/NIH awards for research involving human fetal tissue is significantly lower than three percent of the annual revenues of small entities in the relevant industries. Thus,

⁶⁴ If the average of the highest annual intramural expenditures for fetal tissue is used to calculate the annual expenditure to acquire fetal tissue, the first year costs (including both one-time and annual costs of fetal tissue acquisition) per unique recipient would range between \$39,699.49 and \$39,781.65. Thereafter, annual costs (undiscounted) would total \$39,210.27 and \$39,292.12 per unique awardee, associated with the costs of the separate informed consent process and of acquiring human fetal tissue.

⁶⁵ See https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019%2C%202019_Rev.pdf.

HHS anticipates that this rulemaking, if finalized, would have minimal economic impact – and would not have a significant impact on a substantial number of small entities. HHS anticipates that the information disclosures that would be required by the rule would, to the extent they would result in a change from current practice, allow affected individuals to make better informed decisions and allow affected entities to better deploy resources in line with established requirements for HHS recipients. As a result, HHS has determined, and the Secretary certifies, that this proposed rule would not have a significant impact on a substantial number of small entities.

HHS seeks comment on this analysis of the impact of the proposed rule on small entities, and the assumptions that underlie this analysis.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires that covered agencies prepare a budgetary impact statement before promulgating a 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 million in 1995 dollars, updated annually for inflation. Currently, that threshold is approximately \$154 million. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. HHS has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$154 million or more in any one year. Accordingly, HHS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and

local governments or has federalism implications. Executive Order 13132, 64 FR 43255 (Aug. 10, 1999). HHS does not believe that this proposed rule would (1) impose substantial direct requirements costs on State or local governments; (2) preempt State law; or (3) otherwise have Federalism implications. Thus, the Department has determined that this proposed rule does not impose such costs or have any Federalism implications.

Executive Order 12866 directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions. Executive Order 12866 at 6(a)(3)(B). Executive Order 13175 further directs that agencies respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments. Executive Order 13175 at 2(a). HHS does not believe that the proposed rule would implicate the requirements of Executive Orders 12866 and 13175 with respect to tribal sovereignty.

The proposed rule would add specificity to federal and state law requirements with respect to informed consent for the donation of human fetal tissue for HHS-funded or conducted research and to federal law requirements on the maintenance of documentation with respect to compliance with federal law on informed consent and the bar on the receipt of valuable consideration for human fetal tissue. Some HHS grants for research involving human fetal tissue may be held by state colleges or universities. However, HHS anticipates that the proposed rule would have only minimal impacts on such state colleges and universities. Therefore, HHS has determined that this proposed rule would not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement under Executive Order 13132, and that the rule would not implicate the requirements of Executive Orders 12866 and 13175 with respect to tribes.

Congressional Review Act

Title E of the Small Business Regulatory Fairness Enforcement Act of 1996, also known as the Congressional Review Act, defines a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. 804(2). Based on the analysis of this proposed rule under Executive Order 12866, OMB has determined that this proposed rule would not likely to result in an annual effect of \$100,000,000 or more, and would not otherwise be a major rule for purposes of the Congressional Review Act.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being.⁶⁶ If the determination is affirmative, then the department or agency must prepare an impact assessment to address criteria specified in

⁶⁶ Pub. L. 105-277, Div. A, § 654, 112 Stat. 2681-480, 2681-528 (Oct. 21, 1998), codified at 5 U.S.C. 601 note.

Before implementing regulations that may affect family well-being, an agency is required to assess the actions as to whether the action

- (1) strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;
 - (2) strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;
 - (3) helps the family perform its functions, or substitutes governmental activity for the function;
 - (4) increases or decreases disposable income or poverty of families and children;
 - (5) action’s proposed benefits justify the financial impact on the family;
 - (6) may be carried out by State or local government or by the family; and
 - (7) establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.
- 5 U.S.C. 601 (note).

the law.⁶⁷ HHS has determined that these proposed regulations would not have an impact on family well-being, as defined in the Act.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended (44 U.S.C. 3501–3520), agencies are required to provide a 60-day notice in the Federal Register and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that agencies solicit comment on (1) whether the information collection is necessary and useful to carry out the proper functions of the agency; (2) the accuracy of the agency’s estimate of burden of the proposed collection of information; (3) the quality, utility, and clarity of the information to be collected (and ways to enhance the same); and (4) recommendations to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information and technology.

In accordance with these requirements, HHS is soliciting public comments on the following proposed requirements that may implicate the PRA. These proposed collection of information requirements relate to the proposal to require informed consent for the donation of human fetal tissue for research (45 CFR 46.204(k), 46.206(g)) and the proposal to expressly require access to certain records (45 CFR 75.364(a)(1)).

Informed Consent for the Donation of Human Fetal Tissue. HHS proposes to require, among other things, that (1) informed consent for the donation of human fetal tissue for research purposes be obtained from the woman; (2) the informed consents

⁶⁷ If a regulation may affect family well-being, the head of the agency is required to submit a written certification to the director of OMB and to Congress that the regulation has been assessed and to provide an adequate rationale for implementation of a regulation that may negatively affect family well-being. *Id.*

contain certain specific statements and be signed by both the woman and the person obtaining the informed consent; and (3) the informed consent for donation be obtained after the abortion decision has been made and informed consent has been provided for the abortion and person obtaining the informed consent be someone other than the person who obtains the informed consent for the abortion procedure. Current federal human subjects protection regulations at 45 CFR 46.206 requires that HHS-funded research involving human fetal tissue be conducted only in accord with any applicable federal, state, or local laws and regulations. As noted above in more detail, (1) most states require informed consent for the use of fetal tissue in research; (2) since early 2016, NIH has expressed the expectation that “informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue”⁶⁸; and (3) an AMA Ethics Opinion, issued in June 2016, indicates that “physicians who are involved in research that uses human fetal tissues should . . . [i]n all instances, obtain the woman’s voluntary, informed consent in keeping with ethics guidance”⁶⁹ Accordingly, HHS believes that all entities receiving NIH funding for research involving the use of human fetal tissue have an informed consent form for the donation of human fetal tissue and that such informed consent is being obtained in most, if not all, instances.

HHS recognizes that it proposes to require certain specific statements in the informed consents that may not currently be contained in such informed consent forms. Above, HHS estimated that it would take each recipient approximately one hour of attorney time to update its informed consent form for the donation of human fetal tissue

⁶⁸ See NIH Policy on Informed Consent for Human Fetal Tissue Research, NOT-OD-16-033 (Feb. 11, 2016), *available at* <https://grants.nih.gov/grants/guide/notice-files/not-od-16-033.html>; October 2018 NIH Grants Policy Statement, Section 4.1.14, *available at*

https://grants.nih.gov/grants/policy/nihgps/html5/section_4/4.1.14_human_fetal_tissue_research.htm..

⁶⁹ AMA Code of Medical Ethics Opinion 7.3.5, *available at* <https://www.ama-assn.org/delivering-care/ethics/research-using-human-fetal-tissue>.

from elective abortion.⁷⁰ Thus, HHS estimated 80 burden hours at 200% of the wage rate for an attorney, or a total of \$11,177.60.

HHS estimates that an informed consent process for the donation of human fetal tissue that is independent of, and separate from, the process of obtaining informed consent for the abortion procedure might take between 10 and 15 minutes per informed consent. HHS expects that a nurse would be assigned to obtain the informed consents. Mean hourly wages for nurses range from \$23.32 for licensed practical nurses to \$53.77 for nurse practitioners. HHS believes that it is likely that such tasks would be assigned to registered nurses. According to the Bureau of Labor Statistics,⁷¹ registered nurses have a mean hourly rate of \$37.24. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or \$74.48. HHS does not have information on the number of times informed consent would need to be sought, in order to obtain the donation of human fetal tissue necessary on an annual basis for extramural research projects. Accordingly, HHS uses the likely number of informed consents that would have been necessary with respect to the human fetal tissue acquired by intramural NIH researchers for intramural research projects, using the number of human fetuses from which tissue was obtained as a further proxy for the number of informed consents. During the HHS review and audit, it reviewed NIH documentation with respect to the acquisition of human fetal tissue for intramural research projects in FY 2018; NIH also provided information concerning on-going intramural research projects involving human fetal tissue. In FY 2018, intramural researchers engaged in approximately 12 intramural research projects involving human

⁷⁰ In that regard, HHS proposes to provide sample informed consent form provisions for voluntary use by recipients in an appendix to this preamble. To the extent that recipients used the sample informed consent form provisions, it would tend to reduce burden on recipients.

⁷¹ U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at* <https://www.bls.gov/oes/current/oes291141.htm>.

fetal tissue, and acquired human fetal tissue from approximately 45 fetuses, for an average of 3.75 per project. Accordingly, HHS proposes to estimate that, on an annual basis, each research project involving human fetal tissue would need to obtain an average of 4 informed consents for donation of human fetal tissue, for a total of 529.6 informed consents (4 x 132.4, the average number of extramural research projects involving human fetal tissue). HHS recognizes that not every woman who is asked to donate human fetal tissue would agree; accordingly, HHS will estimate that the informed consent process would need to be conducted an average of 8 times per project in order to obtain the necessary human fetal tissue. On an annual basis, this results in a total of between 176.89 and 264.8 burden hours for a separate and independent informed consent process for the donation of human fetal tissue, for a total of between \$13,174.77 and \$19,722.30. This suggests a total annual burden of between 2.21 and 3.31 hours per unique recipient, and cost on an annual basis (undiscounted) for each unique recipient of between \$164.68 and \$246.53 for a separate and independent informed consent process for the donation of human fetal tissue for research.

This would represent the collection of information burden associated with the proposed informed consent requirements if no recipients of NIH funding for research involving human fetal tissue were otherwise obtaining such informed consents. However, as discussed in greater detail above, because of the state law requirements, the previous NIH policy statements, and the AMA Ethics Opinion, as well as the size and sophistication of such NIH recipients, HHS believes that most, if not all, recipients obtain informed consents. Furthermore, the AMA Ethics Opinion emphasized that physicians engaged in research that uses human fetal tissue should ensure that “[t]he woman’s decisions to terminate the pregnancy is made prior to and independent of any discussion of using the fetal tissue for research purposes,” which suggests that the process to discuss, and obtain informed consent for, donation of human fetal tissue for research purposes

should be separate from and independent of the informed consent for the abortion, and NIH's Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research. NOT-OD-19-128, indicated that NIH expected that the informed consent for donation of human fetal tissue would be obtained by someone other than the person who obtained the informed consent for the abortion and would occur after the informed consent for abortion. Based on the foregoing, HHS estimates that 80% to 100% of NIH's recipients obtain informed consent for the donation of human fetal tissue and that 50% of such recipients already require a separate and independent informed consent process for the donation of human fetal tissue, utilizing different personnel from, and occurring after, the informed consent to the abortion. These estimates would suggest that (1) 40 recipients would not experience any additional burden from the proposed informed consent provisions because they are already using a separate informed consent process for donation of human fetal tissue; (2) up to 20% (or 16 recipients) might experience the full per-recipient burden identified above as a result of the proposed requirements because they are not conducting any informed consent process; and (3) at least 30% (or 24 recipients) would experience some burden because they would need to divide their current informed consent process into two processes. For example, the informed consent for donation of human fetal tissue, when combined with the informed consent for abortion, may take a shorter period of time as compared to two separate and independent processes because of the need to repeat certain information in the second process. However, there could be some cost savings if the health care provider conducting the informed consent for the donation of human fetal tissue was paid at a low hourly rate than the health care provider conducting the informed consent for the abortion.

Access to certain records. HHS proposes expressly to require that recipients provide access to informed consent forms for research involving human fetal tissue and such records as are necessary to establish that such tissue was not obtained or transferred

for valuable consideration and that federal funds were not used to acquire or otherwise obtain human fetal tissue. HHS believes that this merely makes express recipients' current recordkeeping and access obligations. HHS's grants regulations currently require that recipients provide access to the recipient's records pertinent to the federal award. 45 CFR 75.364; *see also* 2 CFR 200.337 (OMB uniform administrative requirements). NIH has made its expectations on maintenance and access to records regarding NIH-funded research involving human fetal tissue clear: For example, in NIH Policy on Informed Consent for Human Fetal Tissue Research,⁷² NIH stated that, "[w]hen obtaining primary human fetal tissue for research purposes, NIH expects grantees and contractors to maintain appropriate documentation . . . that informed consent was obtained at the time of tissue collection"; such "policy will be included in the terms and conditions of grant and cooperative agreement awards as well as contracts issued for research involving human fetal tissue." Further, in NIH-OD-19-128,⁷³ NIH indicated that all grants and cooperative agreements awarded with, or adding, human fetal tissue on or after September 25, 2019 would include certain terms and conditions, including that the recipient has documentation from the donating organization of compliance with the requirements of the informed consent process and documentation that the human fetal tissue was not obtained or acquired for valuable consideration. Accordingly, the proposed records access provision merely provides specificity to the general requirement in 45 CFR 75.364(a), which parallels 2 CFR 200.337(a), but does not impose any new information collection requirements.

HHS solicits public comment on the potential burden associated with the proposed requirements that would impose collection of information requirements, as

⁷² NIH-OD-16-033 (Feb. 11, 2016), *available at* <https://grants.nih.gov/grants/guide/notice-files/not-od-16-033.html>.

⁷³ Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT-OD-9-128 (July 26, 2019), *available at* <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-19-128.html>.

outlined in this section, including HHS's assumptions and analysis, as well as on each of the required issues under section 3506(c)(2)(A) of the PRA with respect to each of these proposed requirements. HHS asks for public comment on the proposed information collection, including what additional benefits may be cited as a result of this proposed rule. Comments regarding the collection of information proposed in this proposed rule must refer to the proposed rule by name and docket number as indicated under **ADDRESSES** by the date specified under **DATES**.

These information collection requirements will be submitted to OMB for review and approval.

Appendix to the Preamble—Model Informed Consent Form Provisions

HHS provides these model informed consent form provisions for comment. This is only model language to illustrate the proposed informed consent provisions in this proposed rule. HHS contemplates providing updated guidance upon publication of the final rule. These model provisions would help regulated entities more easily comply with the informed consent provisions of this proposed rule, assuming the rule is finalized as proposed. However, use of such model provisions would not be required for compliance with this proposed rule. In addition, the language could be amended to more accurately reflect the understandings of the fetal tissue donor and the particular situations. These or similar provisions may be incorporated into a regulated entity's informed consent form for donation of fetal tissue. These concepts only address concepts and requirements set forth in this proposed rule, and alone are not sufficient to result in legally sufficient informed consent for the donation of fetal tissue under State law and do not include some formalities and substantive provisions that are required or typically included in legally sufficient informed consents. Reliance on these model provisions is not sufficient for compliance with state law and does not replace consultation with a lawyer. Furthermore,

a regulated entity may want to include other provisions that are related to this proposed rule, but that HHS has not proposed through this proposed rule.

Model Informed Consent for Human Fetal Tissue Donation Provisions⁷⁴

It is important to us that your preferences and beliefs are respected.

If you are willing to donate fetal tissue, the following statements apply:

- I already have completed my consent form for the abortion.
- My decision about whether to donate fetal tissue will not affect how or when my abortion is done. Regardless of what I decide, the doctor will complete my abortion in the usual way.
- The fetal tissue that I donate may be kept for many years and may be used for various research purposes.
- The doctor performing the abortion will not benefit in any way from my decision.
- I will not receive any payment, benefit, or other incentives for donating tissue.
- I will not receive any medical benefit from any research conducted with the donated fetal tissue.
- The research using the donated fetal tissue may have commercial potential, but I will not receive any financial or other benefit from any commercial development from the research.
- I am [insert the age of majority in the jurisdiction where the informed consent is being signed] or older.
- My preferences about donating fetal tissue for research will not affect my care today or in the future at [insert name of facility].

I have had an opportunity to discuss this with my provider and my questions have been answered.

Please mark the statement that best matches your preference:

I consent to donating fetal tissue for research.

I do not want to donate fetal tissue to be used for research.

Date and Time: _____

Patient Name: _____

Patient Signature: _____

Attestation of Provider

I attest that

- All options were presented to the patient.
- I have documented the patient's preferences.

⁷⁴ Words or phrases contained in brackets are intended as instructions to users of these model provisions and are not intended to be included in the informed consent form provisions.

- All relevant laws and regulations will be followed in completing the abortion.
- The patient’s decision to donate fetal tissue will not affect the manner, methods and/or procedures used to perform the abortion, nor will it affect the timing of the abortion. The abortion will be performed in the same way, regardless of the patient’s decision on fetal tissue donation.
- I am not the individual who obtained the informed consent for the patient’s abortion.
- No payments, in cash or in kind, were offered or provided to the patient for the donation of human fetal tissue. Neither [insert name of facility] nor I have provided, or obtained, any valuable consideration for the human fetal tissue.

Date and Time: _____
 Provider Name, Title, and ID Number: _____
 Provider Signature: _____

Witness:
 Date and Time: _____
 Name of Witness: _____
 Signature of Witness: _____

List of Subjects

45 CFR Part 46

Human research subjects, Reporting and record-keeping requirements, Research.

45 CFR Part 75

Accounting, Administrative practice and procedure, Cost principles, Grant programs, Grant programs—health, Grants administration, Hospitals, Nonprofit organizations reporting and recordkeeping requirements, and State and local governments.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 46 and 75 as follows:

PART 46—PROTECTION OF HUMAN SUBJECTS

1. The authority citation for part 46 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 503(b)(2)(2); 41 U.S.C. Ch. 13; 42; U.S.C. 216(b); 42 U.S.C. 289(a); 42 U.S.C. 289g-1; 42 U.S.C. 289g-2.

2. Amend § 46.202 by adding paragraph (i) to read as follows:

§ 46.202 Definitions.

* * * * *

(i) Human fetal tissue shall have the definition ascribed to the term in 42 U.S.C. 289g-1(g).

3. Amend § 46.204 by adding paragraph (k) to read as follows:

§ 46.204 Research involving pregnant women or fetuses.

* * * * *

(k) Notwithstanding any provisions to the contrary in this Part, HHS-funded research involving human fetal tissue obtained by donation from a pregnant woman occurring after [the effective date of the final rule] may not occur without the written informed consent of the pregnant woman from whom the human fetal tissue was obtained.

(1) For purposes of this paragraph (k), informed consent requires that:

(i) The pregnant woman’s consent be documented on a written informed consent form that is signed by the pregnant woman and written in plain language that is clear and easily understandable (“Informed Consent Form”);

(ii) The Informed Consent Form include a statement that there have been and will be no enticements, benefits, or financial incentives exchanged for the donation or acquisition of human fetal tissue or the abortion (if any) from which such tissue was obtained;

(iii) The Informed Consent Form permit the pregnant woman to choose to donate fetal tissue for research or to decline to donate fetal tissue for research; and

(iv) The Informed Consent Form be signed by both the pregnant woman and the individual obtaining the informed consent for the donation, with the latter attesting to the truth of the statements in the form.

(2) With respect to human fetal tissue obtained from elective abortions, informed consent also requires that:

(i) The pregnant woman's informed consent be obtained after the decision to have an abortion has been conclusively made and informed consent for the abortion has been obtained;

(ii) The pregnant woman's informed consent be obtained by an individual other than the individual who obtained the informed consent for the pregnant woman's abortion;

(iii) The pregnant woman be at or over the age of majority in the jurisdiction in which the pregnant woman's donation is made; and

(iv) The Informed Consent Form include a statement that the decision to have an abortion and the method of abortion have not been affected by the decision whether to donate human fetal tissue.

4. Amend § 46.206 by adding paragraphs (c) through (i) to read as follows:

§ 46.206 Research involving, after delivery, the placenta, the dead fetus or fetal material.

* * * * *

(c) At all stages in the process to acquire or otherwise obtain human fetal tissue for use in research, there shall be no enticements, benefits, or financial incentives provided to the pregnant woman or attending physician to incentivize the occurrence of an abortion or the donation or acquisition of human fetal tissue.

(d) No person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the abortion that is the source of the human fetal tissue used or to be used in the research.

(e) No person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the donation or acquisition of human fetal tissue.

(f) For purposes of paragraphs (d) and (e) of this section, the term “valuable consideration” includes all payments other than reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.

(g) Human fetal tissue obtained by donation from a woman occurring after [the effective date of the final rule] may be used in research only if an informed consent that meets the applicable requirements of § 46.204(k) has been obtained with respect to the tissue.

(h) Research involving human fetal tissue can use human fetal tissue from elective abortions only if such tissue is acquired or otherwise obtained from a Federal or State Government, a Federal or State Government-owned entity, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center.

(i) Once human fetal tissue is no longer to be used in research, it shall be treated respectfully and disposed of reasonably and in compliance with any additional laws or regulations imposed by applicable state law.

**PART 75—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST
PRINCIPLES, AND AUDIT REQUIREMENTS FOR HHS AWARDS**

5. The authority citation for 45 CFR part 75 continues to read as follows:

Authority: 5 U.S.C. 301.

6. Amend § 75.364 by adding paragraph (a)(1), adding and reserving paragraph (a)(2) and adding paragraph (d) to read as follows:

§ 75.364 Access to records.

(a) * * *

(1) For non-Federal entities that engage in human fetal tissue research pursuant to a Federal award, the HHS awarding entity, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to:

(i) copies of the informed consent forms signed by each pregnant woman who is the source of human fetal tissue used by the non-Federal entity in research, which may be redacted with respect to the name and signature of the woman;

(ii) all documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration, as that term is defined in 45 CFR 46.206(f);

(iii) all documents, papers, or other records as are necessary to establish that federal funds were not used to acquire or otherwise obtain the human fetal tissue from elective abortions; and

(iv) personnel familiar with such documents, for purposes of interview and discussion concerning such documents, at reasonable times and locations.

(2) [Reserved]

* * * * *

(d) For purposes of this section, “human fetal tissue” shall have the definition ascribed to the term in 42 U.S.C. 289g-1(g).

7. Add § 75.478 to subpart E to read as follows:

§ 75.478 Expenses associated with acquiring human fetal tissue for research.

Expenses associated with the acquisition of human fetal tissue from elective abortions for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

Dated: December 29, 2020.

Alex M. Azar II,

Secretary,

Department of Health and Human Services.