AAHRPP®
Association for the Accreditation of Human Research Protection Programs, Inc.®

October 7, 2011

Jerry Menikoff, M.D., J.D.
Office of Human Research Protections
1101 Wooton Parkway, Suite 200
Rockville, MD 20852

RE: HHS-OPHS-2011-0005



Dear Dr. Menikoff:

The Association for the Accreditation of Human Research Protection Programs, Inc., (AAHRPP) is a nonprofit body that accredits human research protection programs. Currently, 234 organizations from diverse research settings—including hospitals, independent review boards (IRBs), sponsors, universities, and VA facilities—are accredited. In total, these 234 organizations represent more than 1,100 entities that conduct or review research involving humans.

AAHRPP's comments are based on our 10 years of experience and more than 500 site visits to review organizations' IRBs, most of which have assurances with the Department of Health and Human Services (HHS) and oversight activities to protect human research participants. With the exception of the Food and Drug Administration (FDA), no other entity has such extensive, firsthand experience evaluating research. That gives AAHRPP a singular perspective. Our goal in submitting comments is not only to provide the information you have solicited but also to share that perspective with HHS and the Office of Human Research Protections (OHRP). You will note that our comments not only respond to questions raised by HHS and OHRP but also suggest additional opportunities to improve the oversight of research involving human participants.

Although AAHRPP is incorporated as a member association, the accredited organizations and those seeking accreditation are not members. The comments contained in this letter do not necessarily reflect the opinions of the accredited organizations. We have encouraged them to respond to you separately.

AAHRPP applauds HHS for undertaking the important task of revising the regulations to improve protections for human research participants. Despite numerous calls for rulemaking, the regulations have not been substantially revised since 1981. It is a monumental undertaking, as evidenced by the large number of questions posed in the Advance Notice of Proposed Rulemaking entitled, "Human Subjects Research Protections: Enhancing Protections for Research Subjects and Reducing Burden, Delay, and Ambiguity for Investigators" (hereafter referred to as ANPRM).

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The research enterprise has greatly evolved since the regulations were originally written. The publication of this ANPRM is evidence that HHS is aware of the burden placed on IRBs, researchers, organizations, and sponsors by the failure of the current oversight system to keep up with changes in how research is conducted. The ANPRM also indicates that HHS recognizes the need to improve protections for research participants in certain areas.

AAHRPP respectfully submits for your consideration the following comments on the ANPRM. Before we address specific provisions, AAHRPP would like to emphasize what we consider the three overriding issues:

- Protection is paramount. AAHRPP appreciates and, even, agrees that the regulations should be amended to reduce the burdens on IRBs, researchers, organizations, sponsors, and others throughout the research enterprise. However, the first consideration, always, must be the protection of research participants.

- Oversight should vary depending on the potential risk of the research. One reason the current system is overly burdensome is that studies often receive the same level of review, regardless of the potential risk to participants. In some cases, low-risk studies are over-scrutinized; in others, high-risk studies do not receive enough attention.

- Harmonization is critical. Conflicting regulations have long been a source of confusion. The ANPRM presents an opportunity to harmonize the regulations for all Common Rule agencies, increasing the likelihood that IRBs would comprehend and comply with the requirements. This, in turn, would result in improved protections.

On the remaining pages, AAHRPP provides more detailed comments and recommendations on the following:



## I. Need for OHRP to Request Additional Information

Based on some of the questions posed in the ANPRM, we are concerned that OHRP lacks critical pieces of information that should be considered before rulemaking proceeds. For example, several questions ask whether the proposed changes would increase, decrease, or maintain the existing level of protections. OHRP should already have this information and should use it as the basis for justifying specific changes.

If OHRP does not have this information, then it should seek this information before commencing a revision of the current regulations. Further, it would have been helpful to the research community to have baseline data on which to provide thoughtful comments to the ANPRM. As another example, OHRP asks about other types of research that should be considered. OHRP should already be well-versed in the various types of research covered under the federal-wide assurances of compliance, especially since OHRP is the issuing agency. Because we believe the new rules would significantly affect research participants, researchers, organizations, and sponsors, OHRP should issue a request for information before acting on the ANPRM.

## II. Purpose of ANPRM

The protection of human research participant is a shared responsibility of researchers, IRBs, organizations, and sponsors. Many of the proposed regulatory revisions are based on a commonly held assumption that oversight of research is not commensurate with the level and nature of the risks involved in a research study. The proposed changes assume that essentially all research studies are treated similarly by IRBs and organizations. This, in turn, leads to 1) unnecessary and excessive oversight of research involving no greater than minimal risk and 2) insufficient oversight of research involving greater than minimal risk or research involving innovative technologies where the risks are largely unknown. Further, the proposed changes assume that, if unnecessary burdens were removed, researchers, IRBs, sponsors, and organizations would be in a better position to provide protections for research participants in the riskier research studies.

AAHRPP supports these assumptions. We have witnessed firsthand the challenges that institutions and IRBs face and the different ways they approach those challenges. Some are more effective than others. AAHRPP has visited institutions that allocate IRB services equally to all research studies. We have seen IRBs that do not take advantage of existing flexibility in regulations, such as making exempt determinations or using the expedited procedure for review of research. We also have reviewed IRBs that have huge research portfolios and few staff to manage the research. In fact, in the metrics collected by AAHRPP, the ratio of full-time equivalent employees to number of protocols decreases as the volume of protocols increases. Based on our experience, AAHRPP agrees that institutional resources could be used more effectively and efficiently if the current regulations were revised to align regulatory requirements and protections with the level and nature of the risks involved in the research.

AAHRPP strongly encourages HHS to alter its approach to the proposed rulemaking so that the primary purpose is to protect human research participants, in keeping with the federal regulations found at Title 45 Code of Federal Regulations Part 46 (referred to hereafter as 45 CFR 46). Each of the existing and proposed regulations should be evaluated based on whether the requirement 1) adds value in protecting human research participant and 2) relates to one of the core ethical principles used to judge whether research is ethically sound. Although the ANPRM states that one of the intentions is to enhance protections for research participants, the apparent primary purpose of the proposed rulemaking seems to be to reduce burden on researchers. We are disappointed that it is not clearly stated in the ANPRM, and not observed in many of the proposed

revisions, that reducing the burden on IRBs is an additional intention—not the principal objective.

AAHRPP recognizes that requiring full compliance with the regulations has significantly increased burdens for researchers, IRBs, sponsors, and organizations, and that the regulations should be examined. But that examination should focus, first, on each regulation's contribution in protecting research participants, preserving the integrity of research, and maintaining public trust. Once it is determined that there would be no compromise in participant protection, reducing unnecessary burdens on IRBs, researchers, and other entities should be aggressively pursued in revising the regulations.

## III. Scope of ANPRM

The ANPRM proposes to require all U.S. institutions that receive some federal funding from Common Rule agencies to apply the regulations to all research, even that which is not federally funded. This requirement is problematic for several reasons:

- It will not achieve the goal of expanding protections to all research involving human participants. For example, the requirement would not cover federal agencies that are not signatories to the Common Rule, such as the National Endowment for the Humanities. Neither would the requirement cover privately funded research, including research funded by voluntary health organizations or certain industry sponsors, such as companies in the food and chemical industries (some research that is not regulated by the FDA or the Environmental Protection Agency).

- It reduces the flexibility claimed for the changes by effectively eliminating an institution's choice to apply its assurance of compliance to non-federally funded research.

- It removes the flexibility an institution currently has to apply equivalent protections when the current regulations are inappropriate, cause burden, or are ethically unsound.

AAHRPP recommends that OHRP request information about the reasons organizations "uncheck the boxes" on their assurances. For example, we believe that organizations uncheck the box pertaining to the subparts because it is difficult, if not impossible, to apply the requirement in Subpart B that the research contribute to biomedical knowledge when the research study is not a clinical study, e.g., behavioral and social science research. The regulations pertaining to prisoners enrolled in research are outdated as concluded in a report prepared the Institute of Medicine (IOM) in 2006, *Ethical Considerations for Research Involving Prisoners*. It is difficult to apply Subpart D requirements to children enrolled in research that is not clinical in nature. Institutions uncheck the box to apply Subpart A to all research because they find the assurance requirements and inter-institutional agreements burdensome and unnecessary in assuring protections for research participants. Nearly three-quarters of AAHRPP-accredited organizations uncheck one or both boxes, but all accredited organizations apply equivalent and appropriate protections to participants in all research. For example, when

reviewing research involving pregnant women, many change "biomedical knowledge" to "knowledge."

The ANPRM should consider types of research in addition to clinical, behavioral, and social science research and should reflect a broader understanding of the challenges and risks involved in conducting research in different scientific disciplines. The current federal regulations do not adequately address all types of research sponsored by Common Rule agencies, the ANPRM does not address all types of research, and the proposed revisions will create new problems for certain types of research. AAHRPP recommends that OHRP interact with researchers in the behavioral and social sciences, as well as those in the humanities and public health and individuals in the other federal agencies, and use the knowledge gained to address the following issues:

- Oversight of operations research, evaluation research, epidemiologic research, health services research, quality improvement research, historical research, and anthropologic research. IRBs and researchers now are forced to 1) fit these types of research to the current federal requirements or 2) not follow the federal requirements and develop equivalent protections instead.

- Methodologies that involve community members as part of the research team, qualitative methodologies, and methodologies that pose risks to communities as opposed to or in addition to individuals. There is a large and rich literature on community-based participatory research. The National Institutes of Health is currently funding the Clinical and Translational Science Initiative, which involves a community engagement component. Researchers complain that IRBs do not know how to review research that involves "the community." Meanwhile, IRBs struggle to review this research appropriately within a regulatory framework that is best suited for research involving the traditional experiment conducted in a well-controlled environment.

- Documentation of consent. This should be permitted in ways other than signed, written forms. In some cases, other forms of documentation would better capture the consent process; in certain instances, they are the only means of documentation possible (i.e. telephone interviews). Reformulating consent documentation would provide an opportunity to recognize that a substantial number of research participants are illiterate. Currently, when these individuals are enrolled, researchers are noncompliant with the federal regulations. One change to 45 CFR 46.117 should be to state that a written consent document should summarize the information provided to prospective participants rather than embody the elements of informed consent required in 45 CFR 46.116.

- Proposed consent templates. AAHRPP does not recommend that OHRP publish consent templates. Already, IRBs are too rigid in consent document development, often using the precise wording in the 45 CFR 46.116 required elements of informed consent. In fact, many use even the exact order of the elements as written in 45 CFR 46.116. Guidance about elements that are optional, elements that are more important

than others, or formatting sections would be helpful to the research community. Such guidance also would reassure IRBs and researchers that they can exercise flexibility in developing a consent document that is informational and comprehensible.

- Criteria for waiving or altering consent. The criteria found at 46.116(d) need to be refined. We recommend, first, that OHRP separate the criteria for waiving consent from those for altering consent. Surely, the standards should be higher for waiving consent than for altering the characteristics of the consent process or deleting an element of disclosure (element of informed consent). Of the four current criteria, the only meaningful criterion is that the research involves no more than minimal risk. The criterion that the waiver does not adversely affect the rights and welfare of research participants is implemented arbitrarily, inconsistently, and without evidence that it increases protection of participants. If OHRP has a particular notion of what this criterion means, then the criterion should be rewritten so it can be implemented meaningfully by researchers and IRBs. The criterion that the research cannot be carried out without the waiver needs further explanation. With unlimited time and resources, consent could be obtained in virtually every study, but time and money are not limitless. OHRP should clarify the threshold for determining practicability: Is the threshold that it is not practical or is the threshold that it is impossible to carry out the research without the waiver? The fourth criterion generally does not apply to most studies where consent is waived. Criteria for altering the consent process (e.g., waiting time for obtaining consent) or the disclosure of information should be simple and should encourage IRBs to be flexible in making alterations. For example, simply specify that any alteration approved by the IRB must have a protocol-specific justification. Then, leave it to the IRB to determine whether the alteration is justified.

## IV. Proposed Excused Category of Research

The ANPRM proposes major changes to the current regulations that permit certain categories of research to be classified as exempt from the regulations. These changes include 1) renaming "exempt" as "excused," 2) adding a category for certain types of behavioral and social science research that goes beyond using only survey methodology but involves only procedures posing no more than minimal risk, 3) assuming that the only risk is informational and requiring the application of the HIPAA regulations to this research, 4) requiring researchers to register "excused" research, 5) not permitting or encouraging IRBs to review such research before it commences, and 6) requiring mandatory auditing of such research.

AAHRPP agrees that the current practice of institutions and IRBs regarding the use of the exempt categories is burdensome and could be much improved, but we do not agree with most of the proposed revisions. We strongly encourage OHRP not to exacerbate the existing confusion by introducing a new term such as "excused." Instead, keep the current exempt categories and permit institutions to use the IRB to make exempt determinations prior to the commencement of the research.

- AAHRPP does not understand how permitting researchers to make their own determinations about whether a study is "excused" from IRB review provides

adequate protection from research risks or reduces burdens on IRBs. Anecdotal evidence from some accredited organizations suggests that between one-quarter and one-third of researchers misclassify research as exempt when it is not exempt. Additionally, AAHRPP has direct knowledge from its accreditation experience that IRBs and organizations do not apply the ethical principles described in the Belmont Report to exempt research. We also believe that OHRP has no enforcement authority over exempt research.

- Exempt determinations should be made by individuals who are knowledgeable about the regulations to protect research participants, know how to apply minimal appropriate protections for participants enrolled in exempt research, and are not conflicted in making the determination. Such individuals could be IRB members but could also be IRB staff.

- The regulations should make clear that exemptions may be applied only to research involving no more than minimal risk. This is a serious deficiency in the current regulations. The regulations should also state that the "no more than minimal risk" criterion applies to children and incompetent adults as well as to competent adults. In addition, the regulations should specify that exempt means "exempt from IRB review and approval"—not from ensuring protections for research participants, adhering to ethical standards, meeting requirements for an abridged consent process, or maintaining confidentiality of identifiable data. A section should be added to the regulations describing minimal protections that should be provided in exempt research.

- AAHRPP supports the proposal to add a new category that would permit exemptions for certain types of research that involve procedures posing no more than minimal risk. We believe that these types of research should not be limited to behavioral and social science research but should include health services research, public health research, evaluation research, and other disciplines where the research procedures involve no more than minimal risk. We do not agree that this category should be limited to competent adults. Certain types of studies involving incompetent adults or children would be appropriate to include in this category, e.g., health education intervention projects or quality improvement research.

- AAHRPP does not understand how HHS would hold an institution responsible for the researchers' determination if the institution or its IRB plays no role in excusing (exempting) research. If the goal of this proposal is to speed up the review process, AAHRPP recommends considering the European Union model, which requires IRBs to process clinical trial reviews within a specified time period. For example, require IRBs to make exempt determinations within two days.

- The ANPRM assumes the only risk in behavioral and social science research is information risk. Although this is accurate for many studies, other studies include physical, social, or psychological risk. The regulations should anticipate that there

will be other types of risks in some proposed studies and should provide flexibility for IRBs to take measures to reduce risks.

- The proposed revisions would require the application of the HIPAA criteria to all research. AAHRPP strongly believes that HIPAA is not the appropriate vehicle to address the information risk posed by behavioral and social science research. HIPAA was enacted for the sole purpose of limiting access to insurance records, and numerous commentaries have been written on the challenges of applying HIPAA to data used in research studies. Expanding the current HIPAA regulations to data other than private health data would only worsen the burden on IRBs and researchers. Furthermore, it would do little, if anything, to improve protections for research participants. Moreover, these proposed revisions do not reflect the recommendations of the IOM concerning ways to reform HIPAA (See the 2009 report, *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*.)

- AAHRPP believes that the requirement for mandatory auditing will, contrary to the stated goals of the revisions, increase burden on researchers, IRBs, and organizations and not enhance protections for research participants. The ANPRM does not address what happens to a research study or research participants when the auditors find a study that was incorrectly "excused."

- AAHRPP recommends that OHRP issue guidance for IRBs and researchers on what information should be submitted so that an exempt determination can be made accurately. The same detail that is provided in a protocol for a clinical trial is not needed for a 10-minute survey. IRBs often err in requiring too much information to make exempt determinations.

## V. Harmonization

Harmonization of regulations and guidance is critical to preserving the integrity of the oversight system. But harmonization of written regulations alone is not sufficient. Federal agencies must also interpret and implement regulations consistently.

Since 1991, when the "Common Rule" was adopted, several Common Rule agencies have issued additional rules. These include Department of Veterans Affairs, Department of Defense, Department of Justice (DOJ), Environmental Protection Agency, and Department of Education (ED). The result is a patchwork system of protection that sets up IRBs, institutions, and researchers to be noncompliant.

Unless all federal agencies adopt and implement the same rules, this ANPRM will further increase the inconsistencies in an already flawed oversight system. AAHRPP strongly urges that HHS avoid duplicating the situation that currently exists for financial conflict of interest (COI), which is governed by competing regulations from FDA, HHS, and the National Science Foundation. More disheartening, the COI rules for the FDA and HHS are more disparate now than they were prior to the most recent HHS revisions (formerly PHS regulations). Unless these revisions are implemented consistently by different

federal agencies, the revisions may, as with COI rules, result in less consistency than current practice.

It is disappointing that the ANPRM does not address the following:

- Harmonization with FDA regulations and the work of the Subcommittee on Harmonization of the Secretary's Advisory Committee on Human Research Protections (SACHRP), which is identifying areas for harmonization in the HHS, FDA, and HIPAA regulations. These three different sets of rules, alone, cause significant burden for IRBs and researchers. Add the requirements from other federal agencies, and it is virtually impossible to reconcile the inconsistencies at the institutional level. In fact, our experience with organizations seeking accreditation is many make errors in reconciling the inconsistencies at the institutional level.

- Harmonization of regulations for protecting vulnerable populations. The National Bioethics Advisory Commission (NBAC) (See the 2001 report, *Ethical and Policy Issues in Research Involving Human Participants*) conducted a survey of federal agencies on their sponsorship of research involving pregnant women, prisoners, children, and other vulnerable groups. At that time, virtually all Common Rule agencies sponsored research involving vulnerable individuals, yet only HHS has Subparts B, C, and D to protect pregnant women and fetuses, prisoners, and children, respectively. FDA and ED adopted Subpart D; DOJ has regulations covering research involving prisoners. At a minimum, Subpart A, the "Common Rule," should address vulnerability. Better would be for all Common Rule agencies to adopt Subparts B, C, and D, with revisions that give IRBs more flexibility in implementation of the requirements in the Subparts. This type of harmonization would reduce burden on IRBs and researchers and enhance protections for vulnerable research participants.

- Revisions to the concept of vulnerability. The current federal regulations define vulnerability in terms of coercion or undue influence on an individual's ability to provide voluntary consent to participate in a research study. This definition is narrow in scope and does not reflect other types of vulnerability that affect prospective research participants. Any proposed rulemaking should take into consideration different types of vulnerability and provide more protections for highly vulnerable individuals.

## VI. Reduction of Burden

If HHS wishes to reduce burden on IRBs, institutions, and researchers without compromising protections for research participants, the following regulatory requirements should be eliminated:

- The requirement that institutions have assurances of compliance. This requirement provides no protections for research participants. Instead, it serves as a mechanism for OHRP to inspect institutions and hold them compliant with the regulations. OHRP has used assurances to create inter-institutional and other types of agreements that have created tremendous paperwork burdens for institutions. FDA, which regulates

some of the most risky research, does not use assurances. The value, purpose, and logistics of assurances should be reviewed. OHRP should consider using the funding vehicles (e.g., grants, cooperative agreements, and contracts) as a means for holding funded institutions to be both compliant with the regulations to protect research participants and accountable to OHRP.

- The requirement that IRBs review grant applications (45 CFR 46.118). Grant applications may not contain research protocols, and research protocols may be revised significantly after the peer review process. Further, if there is information relevant to protecting human research participants in the grant application, that information should be included in the protocol. This would 1) ensure the IRB reviews the relevant information and 2) reduce the unnecessary burden of forcing the IRB to look in multiple places for relevant protocol information. This requirement was probably included in the federal regulations by the original authors as a means to ensure that funded research was reviewed by the IRB. The content of grant applications has changed drastically in the past 30 years, and the IRB's role in reviewing grants, if any, needs to reflect these changes.

- The requirement that institutions or IRBs report the following to government regulatory agencies: suspensions and terminations of IRB approval, unanticipated problems (other than unanticipated adverse events) involving risks to subjects or others, or serious or continuing non-compliance. With the exception of reporting unanticipated adverse events to FDA, these reporting requirements add no value for research participants and would add unnecessary burden for institutions, IRBs, and OHRP, which should review the reports.

## VII. Requirement for Single IRB Review

AAHRPP supports the proposed requirement that a single IRB review multi-site studies. This positive revision would harmonize the requirement of IRB review of multi-site studies in the Common Rule with FDA regulations. The revision also would set a much clearer expectation of the responsibilities of local IRBs that currently review multi-site research. In clinical trials and other large multi-site studies (e.g., epidemiological studies), local IRBs have a false expectation that they can change the protocol, leading to frustration and unnecessary burden on the local IRB. Local IRBs are limited to 1) deciding whether the local institution will participate in the study and 2) slightly altering the consent process and document to meet local institutional requirements. Currently, local changes to consent documents pose significant burdens on researchers, and there is no evidence they improve protections.

If HHS proceeds with a requirement for single IRB review of multi-site studies, guidance will be required to clarify the role of the local IRB, if any, or of the institution. In addition, guidance will be required to explain how the requirement for single IRB review would apply to different types of multi-site studies, such as clinical trials, epidemiologic studies, and smaller multi-site studies (e.g. a community-based intervention study involving two to five local institutions). If HHS is considering the requirement for single IRB review only for clinical trials, then it should so state; otherwise, it must clarify how

the requirement for single IRB review is to be applied to a wide range of multi-site studies. Guidance will also be needed on the role of the single IRB following initial review, such as for continuing review, review of modifications to the approved research, addition of research sites, and other post-approval monitoring issues including the relationship between the IRB and a data monitoring committee (such as a data and safety monitoring board). Guidance will be required on applying state laws, identifying and managing individual financial COI, validating the experience and expertise of members of the research team, and funding the single IRB.

The selection process of the single IRB for review of a specific study is critical. The IRB must have the appropriate expertise and experience to review the proposed research and the capacity to review the protocol and sites participating in the study. Regulations or guidance should specify the criteria for selecting a single IRB. Just as industry pays for IRB services for multi-site trials, granting agencies and other private organizations will need to build in costs for IRB services much as they do for other coordinating functions, such as data coordinating centers. A single IRB review model will fail if it is not sufficiently funded.

Regulation or guidance should delineate the responsibilities of the single reviewing IRB and the research sites, any shared responsibilities, and any responsibilities that may be negotiated by the reviewing IRB and the research site. OHRP must be clear on whether it will hold the institution, the IRB, or the researcher responsible for specific regulatory requirements—and on who is liable when a problem emerges. OHRP also must find another mechanism besides the inter-institutional agreement if regulations require the use of single IRB review for multi-site studies. Ideally, OHRP could establish its enforcement authority through the funding vehicle or through the current IRB registration system.

The proposal to require single IRB review for only domestic research sites assumes that all domestic sites are similar and that foreign sites (those outside the U.S.) are so different that a single IRB review would not be sufficient. Foreign sites that wish to, and are legally able to, should be permitted to use the single IRB review model.

AAHRPP supports a risk-proportionate model for review and oversight of research. The recommendations made thus far in this letter are in keeping with that model. Additionally, we recommend the following:

- Permit someone other than an IRB member to review certain types of research. This change could provide adequate protections for research participants and reduce burden on IRBs. It would be important, however, for institutions to define the competence criteria for such individuals.

- Eliminate the expedited review categories. Instead, 1) declare all research involving minimal risk as eligible for review using the expedited procedure and 2) define which procedures involve no more than minimal risk (e.g., low radiation doses).

- Revise the definition of minimal risk. Several advisory commissions, including NBAC and SACHRP, have deliberated on the definition of minimal risk. The definition should refer to the risk of harms and discomforts ordinarily encountered in the daily life "of the average person." It should not be based on harms or discomforts encountered in the daily lives of patients, the participants in clinical research, or any other specific populations where the daily risk of harms and discomforts is higher. Further, the definition should be easily applied to non-clinical research by referring not only to the performance of routine medical and psychological examinations or tests but also to educational or school tests and routine telephone or Internet surveys. In other words, the definition should reference experiences that are familiar and routine in the daily life of the average person.

## VIII. Need for Education Requirement

The ANPRM is an excellent opportunity to add an education requirement for IRB members and researchers. Although some argue that education does not translate into behavior change, AAHRPP has witnessed a tremendous change in the competence of IRB members and researchers in applying ethical standards and the federal regulations to the oversight of research. We believe this change is largely the result of the proliferation of education programs offered within institutions and by professional associations and for-profit education companies.

If HHS proceeds with rulemaking that gives more responsibilities to IRB members and researchers, it will be essential that they be properly trained to carry out these new responsibilities. There is no evidence that simply changing regulations will have the desired result. Organizations would be more likely to implement the changes with the appropriate flexibility if they receive education on how to do so.

## IX. Need for Delineation of Researcher and Research Staff Responsibilities

The Common Rule does not address the roles and responsibilities of researchers and research staff in protecting human research participants. AAHRPP strongly encourages HHS to add a section to the regulations on responsibilities of researchers and research staff. The addition of the section would not add burden to researchers; it should make clear what most researchers and staff are already doing. The value, though, in adding such a section would be to clearly state that protecting research participants is a shared responsibility and to reduce any confusion that might exist. As a start to writing regulations, AAHRPP recommends using the standards we apply to researchers and research staff:

- Researchers and research staff know which of the activities they conduct are overseen by the IRB, and they seek guidance when appropriate.

- Researchers and research staff identify and disclose financial interests according to organizational policies and regulatory requirements and, with the organization, manage, minimize, or eliminate financial COI.

- Researchers employ sound study design in accordance with the standards of their discipline. Researchers design studies in a manner that minimizes risks to participants.

- Researchers determine that the resources necessary to protect participants are present before conducting each research study.

- Researchers and research staff recruit participants in a fair and equitable manner.

- Researchers use consent processes and methods of documentation appropriate to the type of research and the study population, emphasizing the importance of comprehension and voluntary participation to foster informed decision-making by participants.

- Researchers and research staff have a process to address participants' concerns, complaints, or requests for information.

- Researchers and research staff are qualified by training and experience for their research roles, including knowledge of applicable laws, regulations, codes, and guidance; relevant professional standards; and the organization's policies and procedures regarding the protection of research participants.

- Researchers maintain appropriate oversight of each research study, as well as research staff and trainees, and appropriately delegate research responsibilities and functions.

- Researchers and research staff follow the requirements of the research protocol or plan and adhere to the policies and procedures of the organization and to the requirements or determinations of the IRB.

- Researchers and research staff follow reporting requirements in accordance with applicable laws, regulations, codes, and guidance; the organization's policies and procedures; and the IRB's determinations.

## X. Other Issues

Several questions relate to specific issues about the review process. AAHRPP strongly encourages HHS to consider the following:

- Emphasizing the process of consent rather than the documentation of consent, which is the focus of 29 questions in the ANPRM. As written, the ANPRM takes the research community a step backward in viewing consent as merely a document.

- Giving researchers flexibility in deciding what information should be provided during the consent process. Current requirements for disclosures are paternalistic: they include the information that researchers think participants want to know rather than what should be disclosed. Certain disclosures do not make sense and are even ethically inappropriate for certain types of research. One example: including a

statement about not enrolling or withdrawing will not result in a loss of benefits when there are no benefits to lose.

- Deleting disclosures that do not apply to certain types of behavioral and social science research or epidemiologic research. These include, but are not limited to, a statement about reasonably foreseeable risks and a statement that there will be no penalty for withdrawing from the study. The criteria for deleting these disclosures (i.e. alteration of the consent process) are so difficult to meet that they are included. Providing bad information is ethically unsound.

- Revising the regulations or providing guidance to address which individuals may serve as legally authorized representatives. IRBs are confused about who may serve as a legally authorized representative because state laws, with rare exception, do not address the research context.

AAHRPP supports allowing flexibility in applying the criteria for approval of research, especially for those studies involving no more than minimal risk. In keeping with this position, we recommend the following:

- Currently, some of the criteria of approval found at 45 CFR 46.111 allow IRBs flexibility because they recognize the criteria should be applied "when appropriate." Consistent with the stated goals of the proposed revisions, this flexibility should be extended to all the criteria of approval.

- For almost all research, IRBs decide in inconsistent and arbitrary ways whether the provisions to protect the privacy interests of research participants are adequate because IRBs confuse privacy interests of participants with provisions to maintain confidentiality of identifiable data. Unfortunately, privacy has been conflated with confidentiality through HIPAA. AAHRPP recommends separating the two criteria in regulations. We also recommend that OHRP issue guidance on what is required of the IRB in judging 1) whether the provisions to protect privacy interests of participants are adequate and 2) whether the provisions to maintain confidentiality of identifiable data are adequate.

- In its current form, the criterion for addressing protections for certain types of vulnerable individuals is useless. AAHRPP recommends that OHRP provide additional rules or guidance to specify the additional protections required for these individuals.

Finally, AAHRPP offers the following two responses to specific issues raised in the ANPRM:

- AAHRPP supports giving IRBs the authority to decide how frequently to review approved research (continuing review). Whether the interval of review is one year, a shorter period of time, a longer period of time, or not at all should depend on the level and nature of risk posed by the research. IRBs should be given this authority for all

research, regardless of risk. Currently, IRBs routinely approve studies for one year, even if the study ends within weeks or months of commencement (e.g., Phase 1 clinical trials). Permitting IRBs to decide an appropriate continuing review period for each study will also force IRBs to more carefully consider each study and not act like automata in issuing one-year approval periods.

- AAHRPP does not support mandatory reporting by IRBs when they choose to override provisions for use of the expedited review procedure. This creates a new burden on IRBs and organizations and might take away from protections for research participants. HHS' current position that the regulations are a "floor" not a "ceiling" is appropriate and should be maintained.

In closing, AAHRPP would like again to voice our support for amending and improving the regulations to protect human research participants. Although the current regulations are outdated and lacking in some areas, for the most part they provide appropriate protections to research participants. We encourage HHS to keep most of the current regulatory framework but to refine and add regulations where needed and, most important, to harmonize the conflicting multiple regulations. Guidance on implementation of the regulations would go a long way toward reducing unnecessary burden on IRBs, researchers, and organizations. Currently, parties often overreact to confusion caused by lack of clarity in the regulations and inconsistent enforcement by the Common Rule agencies.

We would be pleased to work with HHS and OHRP as they continue to evaluate revising the regulations to protect research participants. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Marjorie A. Speers, Ph.D.
President and CEO