AAPOR
AMERICAN ASSOCIATION FOR PUBLIC OPINION RESEARCH

AAPOR Response to Notice of Proposed Rulemaking (NPRM) Questions

December 22, 2015

The American Association for Public Opinion Research (AAPOR), the leading association of survey and public opinion research professionals, appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) to strengthen, modernize, and make Federal regulations more effective in protecting human research subjects. We share the government's position that human subjects' protections are a priority throughout the course of our research activities. Overall we agree that some of these proposals would promote the NPRM goals of increasing protections for human subjects while reducing burden, delay, administrative costs, and ambiguity for researchers. Others however, could conceivably add burden, delay, and cost to valuable research while providing no real additional protections to research subjects. We will address these below through our responses to the questions the NPRM poses.

Additionally, many of the proposals we are asked to comment on were not presented in the ANPRM from 2011. Indeed the NPRM appears to be another Advanced Notice for comment on tools, options and HHS guidance that have not yet been developed. Key examples of concern for AAPOR include the proposed online decision tool for determining the exemption status of research, the undeveloped data protection requirements/data security determinations that would serve as alternatives to the HIPPA requirements, the as yet to be determined Secretary's list of minimal risk research, the undetermined list of explicit exclusions, and the proposed template for broad consent.

It should be noted that for several questions AAPOR does not take a position. AAPOR members span a wide range of interests including election polling, market research, statistics, research methodology, evaluation, and healthcare related data collection and education and include producers and consumers of survey and public opinion data from a wide variety of disciplines. As such, some sectors of our membership may hold different views on the value or advisability of some of the NPRM proposals. The responses we provide below address the issues about which we have the most expertise and about which we have reached a consensus that broadly represents the views of our membership.

I. The Rationale for Modernizing the Common Rule
C. Guiding Principles for Proposed Changes

1. Public comment is sought on whether the proposed changes will achieve the objectives of (i) decreasing administrative burden, delay and ambiguity for investigators, institutions, and IRBs, and (ii) strengthening, modernizing, and making the regulations more effective in protecting research subjects.

Classifying most minimal risk surveys as being excluded from IRB review should certainly decrease administrative burden/cost and project delays. Also, removing the need for continuing review of studies where data collection is complete will also help reduce administrative burden. Having almost all research projects go through a single IRB will also reduce delays, burden and lead to less ambiguity. Ambiguity may still be a problem as researchers try to figure out whether or not projects that were

previously put through an expedited review process can now be considered entirely exempt from the IRB process. However, while some of the proposed revisions would enhance human subjects' protections, others such as regulatory requirements for advance notice of research goals and privacy safeguards for proposed exemption categories (see responses to questions 34 and 36 for more detail) would be of dubious value for this purpose and would make the conduct of some types of research more burdensome and costly for researchers.

II. Major Proposals to Modernize the Common Rule

A. Proposed Changes to the Scope and Applicability of the Regulations

1. Expanding the Definition of Human Subject to Cover Research with Non-identified Biospecimens (NPRM at §§__.102(e) and __.101(b)(3)(i))

2. Would providing a definition of biospecimen be helpful in implementing this provision? If so, how might the definition draw a line between when a biospecimen is covered by the Common Rule, and when processing of biological materials (e.g., to create a commercial product used for treatment purposes) has sufficiently altered the materials so that they should not be subject to the regulations? Would only covering biospecimens that include nucleic acids draw an appropriate line?

AAPOR suggests a definition of biospecimen would be helpful to assure consistent understanding of the term, but does not have an opinion on the other two matters in this question.

3. To what extent do the issues raised in this discussion suggest the need to be clearer and more direct about the definition of identifiable private information? How useful and appropriate is the current modifier "may be readily ascertained" in the context of modern genomic technology, widespread data sharing, and high speed computing? One alternative is to replace the term "identifiable private information" with the term used across the Federal Government: Personally identifiable information (PII). The Office of Management and Budget's[45] concept of PII refers to information that can be used to distinguish or trace an individual's identity (such as their name, social security number, biometric records, etc.) alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc. It is acknowledged that replacing "identifiable private information" with "PII" would increase the scope of what is subject to the Common Rule. However, the practical implications of such an expansion, other than the need to ensure that the data are security stored and otherwise protected against disclosure, may be minimal. Public comment is requested on the advantages and disadvantages of such a change.

As noted throughout the NPRM, at the heart of this discussion is a balance of the beneficence of supporting the goals of research while respecting the autonomy of individuals through a transparent and clear articulation of risks, benefits, and alternatives to participating in a research study. AAPOR is a strong advocate of transparency in the discussion of risks to human subjects and believes that the

definition of identifiable private information as it relates to biospecimens needs to be much clearer. Although replacing "identifiable private information" with "personally identifiable information" (PII) might be a step towards harmonizing the concept across policies and regulations, AAPOR is concerned that simply replacing "identifiable private information" with "personally identifiable information" will not promote communication of risks of disclosure to many potential human subjects who are unlikely to be familiar with the scientific concepts and technologies that might be used to identify individuals within and across data sets.

AAPOR supports the development of guidelines for researchers to follow when presenting information about risks and benefits to individuals considering participation as human subjects in research projects, particularly addressing language that must be included when project methodology includes identifiers to link information provided by participants with other information (e.g. existing medical/financial data, other primary data collections).

4. Which of the three proposals regarding the definition of human subject achieves the most reasonable tradeoff between the principles of autonomy (including transparency and level of trust) versus beneficence (as measured by facilitating valuable research)?

The NPRM proposal, expanding the definition of "human subject" to include research involving non-identified biospecimens and creating an exemption for secondary research using biospecimens or identifiable private information, seems to offer the most reasonable tradeoff these principles. AAPOR believes that all three proposals are acceptable in terms of promoting the principle of autonomy. Both alternatives (A and B) appear to give more weight to facilitating valuable research by requiring consent for a more limited scope of research proposals. However, as suggested in NPRM, we are concerned that an unintended consequence of continued evaluation of new technologies to determine what information is subject to the Common Rule could have the opposite effect by introducing continued uncertainty about what is and what is not covered by the Common Rule.

We believe the NPRM proposal is a cautious step towards providing clearer guidelines for investigators and research organizations when considering these protections in research design.

5. Public comment is sought regarding any concerns that you have about each of the three proposals, including concerns about implementation or burden to investigators and institutions.

See previous comment.

2. Explicit Exclusion of Activities from the Common Rule
a. Exclusion of Activities that are Deemed Not Research (NPRM at §___.101(b)(1))
i. Program Improvement Activities (NPRM at §___.101(b)(1)(i))

6. Public comment is sought for whether this excluded activity should simply be discussed in the text of the final rule's preamble, and guidance produced to assist investigators in making such a determination, or whether any other similar exclusions should be addressed.

Internal operations and program improvement activities are already excluded from Common Rule regulatory requirements, so explicit exclusion is intended to clarify what is considered and not considered research. However, as is well documented in the literature, determining when the technical definition of research does not apply to certain systematic data collections that are intended only as internal operations or program improvement has proved problematic and occasionally controversial, so it is important that exclusion criteria be clear. The proposed language seems to serve that purpose, as it includes any type of patient feedback or use of existing data but excludes from exemption prospective comparative effectiveness studies if they include two different standard of care treatments (unless all data obtained prospectively is via surveys or interviews) if the data collection and analysis is limited to the use of data or biospecimens originally collected for any purpose other than the currently proposed activity, or is obtained through oral or written communications with individuals (e.g., surveys or interviews).

AAPOR believes it is important to produce guidance, with annotated examples, that will assist investigators in making the distinctions between what does and does meet criteria for inclusion in the excluded category. Otherwise, the projected reduction in IRB burden will not be met.

7. Public comment is sought for whether biospecimens should not be included in any of these exclusion categories, and if so, which ones.

AAPOR has no comment on activities that are not considered "research" (the first six exclusions).

AAPOR urges that the definition of the term "biospecimen," discussed above, include clarification or guidance on collections of biospecimens that might be considered low risk.

v. Public Health Surveillance (NPRM at §___.101(b)(1)(v))

8. Public comment is requested on whether the parameters of the exclusions are sufficiently clear to provide the necessary operational guidance, or whether any additional criteria or parameters should be applied to clarify or narrow any of these exclusions.

AAPOR takes no position on this issue.

b. Exclusion of Activities that are Low-risk and Already Subject to Independent Controls (NPRM at §___.101(b)(2))

iii. Educational Tests, Survey Procedures, Interview Procedures, or Observation of Public Behaviors (NPRM at §___.101(b)(2)(i))

9. Public comment is requested on the extent to which covering any of these activities under the Common Rule would substantially add to the protections provided to human research subjects.

AAPOR agrees with rationale for excluding these activities from common rule coverage, mainly because consent is inherent in participation, and risks are generally confined to disclosure of non-sensitive information.

10. Public comment is sought on whether this exclusion should only apply to research activities in which notice is given to prospective subjects or their legally authorized representatives as a regulatory requirement. If so, please comment on what kind of information should be included in the notice such as the research purpose, privacy safeguards, contact information, ability to opt- out, etc. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence?

Requiring pre-notification is a good way to strike that balance. Providing a description of the research, including whether identifiable information will be collected and if so how it will be used (including whether it will be linked or combined with other supplemental data), protected, and retained; and contact information to allow questions to be asked or to request not to be contacted.

11. Public comment is sought regarding whether it is reasonable to rely on investigators to make self-determinations for the types of research activities covered in this particular exclusion category. If so, should documentation of any kind be generated and retained?

Investigators can easily apply these exclusionary criteria to making self-determinations – either the data collected without identifiers, or if identifiers are collected, it is subject to other existing legislative protections. The exception might be in determining level of risk in asking sensitive questions. In certain circumstances, e.g. asking about suicidality, risks are higher than minimal and mitigation protocols should be reviewed by an IRB.

Requiring retention of documentation would not add any protection but may be desirable if there were required audits of exclusion decisions. Some kind of documentation could be generated and retained, for example, a basic record of the exclusion decision, perhaps generated by an online exclusion decision tool. However, if there are no audits, requiring documentation would be meaningless unless such documentation were tracked or reviewed, which raises the question – who would be responsible for tracking, checking or verifying such documentation? If IRB were tasked with this, then it would end up being similar to a request for an exempt determination.

12. Public comment is sought regarding whether some or all of these activities should be 106 exemptions rather than exclusions.

Since risks are higher for surveys that include questions that have the potential to trigger severe emotional states, or elicit information that requires immediate action, there is an argument for requiring exemption review that would require IRB approval to ensure adequate mitigation.

13. Public comment is sought regarding whether these exclusions should be narrowed such that studies with the potential for psychological risk are not included. Are there certain topic areas of sensitive information that should not be covered by this exclusion? If so, please provide exemplary language to characterize such topic areas in a manner that would provide clarity for implementing the Rule.

Possible topic areas potentially requiring mitigation plans may include (but are not limited to) questions or screeners that ask about depression, anxiety, history of abuse, exposure to trauma, PTSD, and suicidality, depending on the context.

14. For activities captured under the third element of this exclusion, do the statutory, regulatory, and other policy requirements cited provide enough oversight and protection that being subject to expedited review under the Common Rule would produce minimal additional subject protections?

In general, yes. However, none of the existing requirements would ensure protections in the case of questionnaires that carry psychological risk.

If so, should the exclusion be broadened to also cover secondary analysis of information collected pursuant to such activities?

Yes, provided the information subject to secondary analysis does not include identifiers.

15. Public comment is requested on the extent to which excluding any of these research activities from the Common Rule could result an actual or perceived reduction or alteration of existing rights or protections provided to human research subjects. Are there any risks to scientific integrity or public trust that may result from excluding these research activities from the Common Rule?

To ensure that no reduction of protections occurs, exclusion criteria must distinguish between truly low risk instruments that ask general, ordinarily-sensitive questions (e.g. income, age) that are not likely to trigger acute psychological states, and those that have the potential for higher risk, which should be reviewed by an IRB to ensure sufficient mitigation plans are in place.

iv. Research Involving the Collection or Study of Information that has been or will be Collected (NPRM at §___.101(b)(2)(ii))

16. Public comment is sought regarding whether it is reasonable to rely on investigators to make self-determinations for the types of research activities covered in this particular exclusion category. If so, should documentation of any kind be generated and retained?

This exclusion refers to a modification of existing exemption category 4, removing the requirement that data must already exist at the time the study begins, thus allowing the use of data that is collected for research or non-research purposes after the study commences. There is no direct interaction with humans, and the research does not add any risk to the subjects, thus it is entirely reasonable to rely on investigators to make self-determinations in this exclusion category (which does not include bio-specimens). Again, it will be important to provide actionable guidance with annotated examples to guide investigators in making those self-determinations. Better, however, would be to develop an online exclusion determination tool that would provide documentation for audit purposes that the investigator used the tool to make the determination.

17. Public comment is requested on the extent to which covering any of these activities under the Common Rule would substantially add to the protections provided to human research subjects. Is there a way in which this exclusion should be narrowed?

For the reasons provided in #16, covering these activities under the Common Rule would not substantially add to human subjects protections.

Public comment is also sought regarding whether activities described here should appear as an exclusion or as an exemption.

Again, for the reasons provided in #16, requiring exemption review would not substantially add to human subjects protections.

v. Research Conducted by a Government Agency using Government-Generated or Government-Collected Data (NPRM at §___.101(b)(2)(iii))

18. Public comment is sought on whether this or a separate exclusion should also include research involving information collected for non-research purposes by non-federal entities where there are comparable privacy safeguards established by state laws and regulations, or whether such non-federally conducted research would be covered by the proposed exemption at §__.104(e)(2).

Yes, this exclusion could cover non-federal research if there were a requirement of a basic, publicly available record, similar to but more streamlined than the exemption determination documentation. Rationale: as long as non-federal entity can establish that their safeguards are comparable, the costs for this would be low (if the entity does ongoing work in this area so the investment in establishing that

the safeguards are comparable, costs would be mitigated). Because the laws and regulations that non-federal agencies are subject to may vary from the more established ones for federal entities, this additional requirement may be worth the cost. Finally, this exclusion more appropriately covers this type of information, not §__.104(e)(2).

19. Public comment is requested on the extent to which covering any of these activities under the Common Rule would substantially add to the protections provided to human research subjects.

If the "research conducted by a federal department or agency using government-generated or government collected information obtained for nonresearch purposes" is (a) research that asks subjects to provide additional non-excluded and non-exempted information, and (b) using government information includes linkage to the information collected in (a), this research should be subject to the Common Rule. The first sentence of the "(1) NPRM Proposal" could be changed to emphasize this by adding the following word: "The third category of low-risk research activities excluded from the proposed rule at §ll.101(b)(2)(iii) is research conducted by a federal department or agency using ONLY government-generated or government collected information obtained for nonresearch purposes…" Rationale: In some cases where federal research involves collecting non-exempt and non-excluded information that is identifiable, and linking it to the government information collected for nonresearch purposes, the new information generated may be more sensitive than the sum of its parts, and may no longer qualify as "low risk." However, if the research uses only the government information collected for nonresearch purposes, covering this research under the Common Rule would not add to protections.

20. Public comment is sought regarding whether it is reasonable to rely on investigators to make self-determinations for the types of research activities covered in this particular exclusion category. If so, should documentation of any kind be generated and retained?

Yes, self-determination of exclusion is reasonable and yes, some kind of documentation should be generated and retained, for example, a basic record of the exclusion decision, perhaps generated by an online exclusion decision tool. Guidance, training, and knowledge support for self-determination should be developed.

21. Public comment is sought regarding whether some or all of these activities should be exemptions rather than exclusions.

Exclusion is the proper designation.

vi. Certain Activities Covered by HIPAA (NPRM at §___.101(b)(2)(iv))

22. Public comment is requested on whether the protections provided by the HIPAA Rules for identifiable health information used for health care operations, public health activities, and research activities are sufficient to protect human subjects involved in such activities, and whether the current process of seeking IRB approval meaningfully adds to the protection of human subjects involved in such research studies.

HIPAA rules address types of information per se and not how it is collected or stored. Not designed for social science research, there are many times that the HIPAA rules unnecessarily constrain research data collection (e.g., in much social research, the collection of county or zip code will not allow identification at the level of person). Even with the allowances granted within HIPAA (e.g., first 3 zip digits if area pop is 20,000+), HIPAA rules do not adequately address the privacy risks associated with much social science research. IRB approval may provide an important alternative to HIPAA to allow for minimal-risk social science research. In general, AAPOR agrees that research already covered under HIPAA rules provides sufficient protections to qualify for exclusion, but only for minimal risk studies.

23. Public comment is sought regarding to what extent the HIPAA Rules and HITECH adequately address the beneficence, autonomy, and justice aspects for the collection of new information (versus information collected or generated in the course of clinical practice, e.g., examination, treatment, and prevention). Should this exclusion be limited to data collected or generated in the course of clinical practice? If additional data collection is allowable, should it be limited to what is on the proposed Secretary's list of minimal risk activities (discussed in more detail below in II.F.2 of this preamble)?

See above – HIPAA Rules (and enforcement via HITECH) were not designed for research contexts – exclusion should be limited to data collected during the course of clinical practice. We cannot comment on whether allowable additional data collection should be limited to what is on the Secretary's list of minimal risk activities until we see what is on the as yet to be developed list.

24. Public comment is requested on whether additional or fewer activities regulated under the HIPAA Privacy Rule should be included in this exclusion.

AAPOR takes no position on this issue.

c. Applicability of Exclusions to the Subparts

25. Should research involving prisoners be allowed to use any or all of the exclusions found at §__.101(b)(2) and (3), as currently proposed?

As we can still see the possibility of coercion even for low-risk studies, AAPOR thinks that the proposed exclusions should not apply to research involving any of the protected classes.

26. Are there certain provisions within the broader categories proposed at §__.101(b)(2) and (3) to which the subparts should or should not apply?

No.

3. Proposed Exemptions (NPRM at §__.104)
a. Making Exempt Research Determinations (NPRM at §__.104(c))

27. Public comment is sought regarding how likely it would be that institutions would allow an investigator to independently make an exempt determination for his or her own research without additional review by an individual who is not involved in the research and immersed in human research protection e.g., a member of the IRB Staff.

AAPOR believes it likely that decision-making would be shared in some fashion at most institutions, but it is impossible to comment on how likely this would happen without having seen the online decision tool.

28. Public comment is sought regarding whether an investigator would be able to contrive his or her responses to the automated exemption decision tool in order to receive a desired result i.e., an exempt determination, even if it does not accurately reflect the research activities.

While most investigators have great integrity, it is absolutely possible and likely that some would "game" the system for a variety of reasons, depending on what the decision tool looks like.

29. Public comment is sought on whether it would be more appropriate for some of the exempt categories than others to rely on the exemption determination produced by the decision tool where investigators themselves input the data into the tool, or whether there should be further administrative review in such circumstances.

Yes – first category of lowest risk.

30. Public comment is sought regarding whether relying on the exemption determination produced by the decision tool where investigators themselves input the data into the tool as proposed would reduce public trust in research.

Yes, -- there is some risk that trust would be compromised, but a well-designed, validated decision tool could possibly enhance public trust.

31. Public comment is sought regarding how likely it would be that institutions would rely on such a decision tool to provide a safe harbor for an investigator making a determination that the proposed research qualifies for an exemption, or whether developing such a tool would not be worthwhile, and whether institutions would be able to adequately manage exemption determinations without the use of the decision tool.

An exemption determination decision tool may be helpful but in conjunction with some audit mechanism to help reduce likelihood of exploitation by investigators. However it is impossible to speculate on the likelihood that institutions would rely on such a decision tool given that the tool cannot yet be vetted.

32. Public comment is sought regarding what additional information should be required to be kept as a record other than the information submitted into the decision tool, for example, a study abstract, the privacy safeguards to be employed, or any notice or consent document that will be provided.

AAPOR recommends that key privacy safeguard information and any consent language used should be kept as a record for audit purposes.

33. Public comment is sought regarding the value of adding an auditing requirement.

Random audits of 10% annually seem reasonable.

b. Exemptions Subject to the Documentation Requirements of §__.104(c) and No Other Section of the Proposed Rule

i. Research Conducted in Established or Commonly Accepted Educational Settings (NPRM at §__.104(d)(1); current Rule at §__.101(b)(1))

34. Public comment is sought on whether this exemption category should only apply to research activities in which notice that the information collected will be used for research purposes is given to prospective subjects or their legally authorized representatives as a regulatory requirement, when not already required under the Privacy Act of 1974. If so, comment is sought on what kind of information should be included in the notice, such as the research purpose, privacy safeguards, contact information, etc. Comment is also sought on how such a notice should be delivered, e.g., publication in a newspaper or posting in a public place such as the school where the research is taking place, or by individual email or postal delivery. Note that other requirements, such as those of the Family Educational Rights and Privacy Act (FERPA) or the Protection of Pupil Rights Amendment, may also

apply. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence?

AAPOR agrees that research in educational settings that could have a detrimental effect on students' ability to learn and teacher evaluations should not be part of this exemption. However we do not see how providing public notice of the research goals, privacy safeguards, etc. provides better protections than providing informed consent for parents of minors and child assent. Further, schools and school systems generally are very protective of student instructional time, and would likely not approve research in their schools that negatively affected that time.

35. Public comment is sought on whether the privacy safeguards of §__.105 should apply to the research included in §__.104(d)(1), given that such research may involve risk of disclosure of identifiable private information.

AAPOR believes that the privacy safeguards of §__.105 should not be applied to research covered under this section unless the disclosure of identifiable private information could reasonably put subjects at risk. That said, it is impossible to completely answer this question without having seen the Secretary's list of alternatives to the HIPAA requirements. AAPOR is highly committed to transparency, and if the Secretary's list were a practical alternative for social and behavioral research, then perhaps applying the safeguards would be appropriate.

ii. Research and Demonstration Projects Conducted or Supported by a Federal Department or Agency (NPRM at §__.104(d)(2); current Rule at §__.101(b)(5))

36. Public comment is sought on whether this exemption category should only apply to research activities in which notice is given to prospective subjects or their legally authorized representatives as a regulatory requirement. If so, comment is sought on what kind of information should be included in the notice, e.g., the research purpose, privacy safeguards, or contact information. Also comment on how such a notice should be delivered; e.g., publication in a newspaper or posting in a public place, or by individual email or postal delivery. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence? In many cases, it may be that individual notice or consent to all potentially affected persons before the research or demonstration commences is ordinarily impossible in the conduct of such studies. For example, if a research or demonstration project will affect all
inhabitants of a large geographic area (e.g., a housing, a police patrol, a traffic control, or emergency response experiment), or all clients or employees of a particular program or organization or setting will be subject to a new procedure being tested (e.g. a new approach to improving student performance, a new anti-smoking or anti-obesity program, a new method for evaluating employee performance),

would it be possible to make participation voluntary for all affected individuals, or even to identify and inform all affected individuals in advance?

AAPOR agrees that it would be beneficial to clarify the language regarding what types of projects are covered under this exemption, and especially that it include public benefit and service programs that a Common Rule department or agency does not itself administer through its own employees but funds through external grants or contracts. However, we do not see how requiring advance notice of these projects enhances human subjects' protection, while adding burden to the researchers. AAPOR is on record as being a leader in promoting transparency, but in many cases it would be impossible to deliver this notice.

37. Public comment is sought on whether this exemption category is appropriate based on the recognition that alternative processes are in place in which ethical issues raised by research in public benefit or service programs would be addressed by the officials who are familiar with the programs and responsible for their successful operation under state and federal laws, rather than meeting specific risk-based criteria, or whether risk limitations should be included, and if so, what those limitations should be. Though long-standing, this exemption has never identified specific risk-based criteria, or risk limitations to bound the type of projects that may be covered. When originally promulgated, the exemption did stipulate that following the review of such projects, if the Secretary determines that the research or demonstration project presents a danger to the physical, mental, or emotional well-being of a participant or subject, then written informed consent would be required. Public comment is sought on whether to limit the risk that can be imposed on subjects while using this exemption, and if so, how to characterize those limits in a clear fashion. If more than minimal risk interventions are included, public comment is sought on whether, for transparency, this should be made clear in the regulatory text.

Interventions that pose more than minimal risk to subjects should not be covered by this exemption.

With regard to the issue of risks encountered by participants in such research or demonstration projects, comments are also sought regarding the argument that any and every demonstration project involving changes in public benefit or service programs (e.g., water or sewage treatment programs or pollution control programs, programs involving educational procedures, or programs involving emergency procedures related to extreme weather events, etc.) exposes those affected to possible risks of some kind. In this regard, those risks are ordinarily and perhaps always no different in kind or magnitude than those involved in simply making the change in procedures without using research tools to evaluate them. For example, health care providers could be required to perform certain sanitation reforms to prevent patient infections whether or not such reforms were first tested in practice through a research or demonstration project. It is common for all Federal departments and agencies that regulate private or public organizations to impose conditions of participation in public programs providing for safety, program integrity, financial reporting, etc. Public comment is sought regarding whether there

should be conditions (e.g., an individual notice or consent requirement) imposed on such research or demonstration projects involving public benefit or service programs which might lead to significant impediments or limitations on testing and evaluation before or after being imposed program-wide. Would the effect of imposing expensive or impracticable conditions on public benefits or services evaluations be to reduce the number of such evaluations and consequently to expose program participants to increased risk through exposure to untested reforms?

We agree that the effect of imposing expensive or impracticable conditions on public benefits or services evaluations would likely be to reduce the number of such evaluations and consequently to expose program participants to increased risk through exposure to untested reforms.

38. Public comment is sought on whether the existing privacy safeguards for such activities, including the Privacy Act, HIPAA rules, and other federal or state privacy safeguards provide sufficient independent controls, or whether other safeguards such as the privacy safeguards of §__.105 should be applied.

AAPOR believes the existing privacy safeguards are sufficient for these activities and further privacy safeguards would be redundant.

iii. Research involving benign interventions in conjunction with the collection of data from an adult subject (NPRM at §__.104(d)(3))

39. Public comment is sought on whether this exemption category should only apply to research activities in which notice is given to prospective subjects or their legally authorized representatives as a regulatory requirement. If so, comment is sought on what kind of information should be included in the notice, such as the research purpose (if authorized deception is not utilized), privacy safeguards, contact information, etc. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence?

AAPOR believes that notice should be given to prospective subjects and it should include information about the research purpose, how data will be protected, the right to withdraw participation at any time, and investigators contact information. We do not believe it is practical to carry out deception research with prospective agreement from subjects to be deceived. Thus deception research should not be included in the exemption category unless some post intervention debriefing is required. The only other scenario we can envision where this would work was if subjects were part of a subject pool that were regularly used for research and agreed as a condition of being in the pool, that some research they would be asked to participate in may involve deception as to the research purpose. These subjects should still be debriefed post intervention.

40. Public comment is sought regarding what improvements could be made to the language describing the type of interventions in this exemption category so as to make clear what interventions would or would not satisfy this exemption category.

The proposed language in the NPRM is sufficient unless deception studies are included in this category. If they are, clearer language is needed describing what is meant by prospective agreement by the subject for 'authorized' deception.

41. Public comment is sought on whether it is reasonable, for purposes of this exemption, to rely on the exemption determination produced by the decision tool where investigators themselves input the data into the tool, or whether there should be further administrative review in such circumstances.

We cannot comment without seeing the decision tool.

iv. Taste and Food Quality Evaluation and Consumer Acceptance Studies (NPRM at §__.104(d)(4); current Rule at §__.101(b)(6))

42. Public comment is sought on whether this exemption category should be narrowed to apply only to research activities in which notice is given to prospective subjects or their legally authorized representatives as a regulatory requirement. If so, comment is sought on what kind of information should be included in the notice such as the research purpose, privacy safeguards, contact information, etc. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence? Should prospective subjects be given the explicit opportunity to opt out of such research?

In general, prospective subjects should be given the opportunity to opt out, but for the rest of this question, AAPOR takes no position on this issue.

c. Exemptions Subject to the Documentation Requirements of §__.104(c) and the Privacy Safeguards Described in §__.105

43. Public comment is sought on the concept of requiring such minimum safeguards and limitations on disclosure, as well as whether the requirements of the proposed §__.105 would constitute a broadening of IRB responsibilities rather than a streamlining of the implementation of responsibilities that many IRBs already adopted. If an institution does view this as an inordinate broadening of responsibilities, does the institution currently have in place alternative mechanisms for ensuring data security and participant privacy in a research context? Suggestions for alternative approaches to meeting public expectation that federally sponsored research safeguard their data and protect privacy are sought during this public comment period.

It is difficult to comment because as the NPRM acknowledges, it is difficult to assess the implications of using the Secretary's list that has not yet been developed. We do appreciate that the Rule includes the requirement that public comment will be solicited on the proposed minimum safeguards when developed. The proposal mentions that where "IRB members have additional expertise, they may choose to deviate from the Secretary's list" yet there is no mention of how that would work in practice. Would IRBs be required to add Information Technology staff to the IRB? This would be an added burden. Many institutions have well developed data security policies that investigators must follow.

44. Public comment is sought regarding whether the proposed Rule's information security requirements for biological specimens and identifiable private information are highly technical and require a level of expertise not currently available to most IRBs. Do these security requirements unrealistically expand IRB responsibilities beyond current competencies?

Yes! These requirements would necessitate either asking IRB members to make judgments they are not qualified to make or adding IT personnel to the IRB.

ii. Research Involving Educational Tests, Surveys, Interviews, or Observation of Public Behavior if the Information is Recorded with Identifiers and even if the Information is Sensitive (NPRM at §__.104(e)(1))

45. Public comment is sought on whether the proposed exemption regarding the use of educational tests, survey procedures, interview procedures, or observation of public behavior (§__.104(e)(1)) should be applied to research involving the use of educational tests with children and whether it should also be applied to research involving the use of survey or interview procedures with children. If so, for research involving children, should the permissible survey or interview topics be limited in some way?

We do not believe research involving children should be exempt, even for educational tests or survey procedures. It would be difficult to develop a list of topics that this research would be limited to, since what is appropriate to subjects may vary by context. This is why IRBs have experts in child welfare to comment on these types of research.

46. Public comment is sought on whether this exemption category should only apply to research activities in which notice is given to prospective subjects or their legally authorized representatives as a regulatory requirement. If so, comment is sought on what kind of information should be included in the notice such as the research purpose, privacy safeguards, contact information, etc. Would requiring notice as a condition of this exempt research strike a good balance between autonomy and beneficence? Should prospective subjects be given the explicit opportunity to opt out of such research?

AAPOR believes that notice should be given to prospective subjects and it should include information about the research purpose, how data will be protected, the right to withdraw participation at any time, and investigators contact information. Yes, prospective subjects should be given the explicit opportunity to opt out.

47. Public comment is sought on whether it is reasonable, for purposes of this exemption, to rely on the exemption determinations produced by the decision tool where investigators themselves input the data into the tool, or whether there should be further administrative review in such circumstances?

We cannot comment without seeing the decision tool.

48. Public comment is sought on whether this exemption category should be narrowed such that studies with the potential for psychological risk are not included. Are there certain topic areas of sensitive information that should not be covered by this exemption? If so, please provide exemplary language to characterize such topic areas in a manner that would provide clarity for implementing the Rule.

We agree that this category should be narrowed so that studies with the potential for psychological risk are not included, but note that more guidance would be needed defining this term. Some obvious topic areas, such as suicide ideation, sexual abuse, domestic violence, child abuse, bullying (in research with children if ultimately included in this exemption) are some that may pose these risks in certain contexts.

iii. Secondary Research Use of Identifiable Private Information (NPRM at §__.104(e)(2))

49. Public comment is sought on the types of research that should fall under the proposed exemption. Should the proposed exemption be available to all types of research using identifiable data collected for non-research purposes or should the exemption be available only to a more limited subset of research? For example, should the proposed exemption apply only for research using records and information already subject to comprehensive privacy and other protections in other Federal laws (e.g., records held by the Federal Government subject to the Federal Privacy Act, or records governed by HIPAA or FERPA)?

Depending upon the scope of the exemption, the relationship between this exemption and the exemption proposed at §__.104(f)(2) would need to be clarified. Since a major justification for including this exemption is to reduce burden on IRBs, should the proposed exemption apply only to research for which IRBs typically waive informed consent, that is, where the research could not practicably be carried out without a waiver of informed consent, and the rights and welfare of subjects will not be adversely affected by the waiver? Finally, is there a sufficient need for this exemption at all given the other proposed exclusions and exemptions?

The exemption should not be broadened, and further limited in only the following way: It should be more explicitly limited to secondary uses "that only involve secondary use of identifiable private information that was collected for non-research purposes", as stated in the NPRM Goal for §__.104(e)(2). That is, only when there is no linkage of the identifiable information to other information in the proposed study. To clarify this, the first sentence of "(4) The NPRM Proposal" should include the following change, to read: "The NPRM proposal here is for a new exemption covering the secondary research use THAT ONLY USES identifiable private information that has been or will be acquired for non-research purposes, if the following are met:" The exemption should be available to all other types of research, even beyond those, in the example given, those "using records and information already subject to comprehensive privacy and other protections in other Federal Laws…" Rationale: a significant source of informational risk would be use that, regardless of documentation and safeguards, links (without the subject's informed consent) the identifiable private information that was for non-research purposes with other identifiable information unknown to the subject so as to generate new information that might be more sensitive than the sum of its parts. This scenario might have been considered by IRBs under the current Rule, but in the NPRM proposal there may not be a clear enough position taken. In contrast, another exemption, d. (1) Exemption for the Storage or Maintenance of Biospecimens or Identifiable Private Information for Secondary Research Use (NPRM at §II.104(f)(1)) states that it "does not exempt the creation of any data or the actual new collection of any biospecimens…"

Other than the above clarification, the exemption should not be otherwise changed to limit it to only research for which IRBs typically waive informed consent. Rationale: the determination of what is "typical" would be judgmental and too variable to characterize.

This exemption may partially overlap with other exclusions and exemptions (particularly .104(f)(2)), but there is a sufficient need for it. The focus of .104(f)(2) is primarily on biospecimens, and its treatment of other identifiable information that is more sensitive and may require limited IRB review of security and informed consent.

50. Public comment is sought regarding whether the proposed exemption should be limited to research in which individuals had been informed of the potential future research use of their information, and given the opportunity to opt out of having their identifiable private information used for research. If the proposed exemption should be limited in this way, what information should be included in the opportunity to opt out? If the opportunity to opt out is made a condition of the exemption category how should it be structured (e.g., how long and under what circumstances should it remain in effect) and what, if any, impact should the opt out have on other provisions of the rule, such as the ability of an IRB to waive informed consent for a subsequent research study using the individual's information? Are there other or alternative mechanisms that should be required to respect individuals' autonomy and other interests?

No. Rationale: it is impractical for the subject to be given a clear explanation of the benefits of the secondary research to balance the risks in their informed consent decision to opt out, because the scope and purpose of secondary research opportunities is unlikely to be known. If the subject can be informed of specific future research use, and those limitations were not unduly restrictive on researchers, then an opportunity to opt out may be practical. An important mechanism that would respect subjects' interests would be to restrict its secondary use to only the contents of the original information without linkage to other information not related to its original content.

51. Public comment is sought regarding what should constitute notice for purposes of this exemption category. Given the many different types of data that would be covered by this provision (e.g., data from private entities used for social or behavioral science research, government records for which laws already establish standards for notice, and data publicly available for harvesting from the internet), would it be possible to develop a uniform "notice" requirement? What type of notice, in terms of its dissemination and scope, should be considered to meet this requirement of the proposed exemption? With regard to the dissemination of the notice, should the notice requirement be permitted to be fulfilled through a general public notice, not specifically directed to individuals who are potential research subjects, such as the notice allowable under the Privacy Act? Would a prominent notice posted in all clinics or other relevant public places where information will be collected be acceptable? Should each individual whose data could be used receive their own notice, such as is required of direct treatment providers covered by the HIPAA Privacy Rule? With regard to the content of the notice required by this proposed exemption, what kind of information should be included in the notice, such as the types of research that might be conducted, privacy safeguards, contact information, etc.?

Instead of a uniform "notice," multiple notices should be developed that are relevant to the broadest categories of data types that have meaningful distinctions. This could also be addressed by developing guidance and standards for how notices should be composed and administered.

52. Public comment is sought on whether, on the other hand, prior notice is necessary. Is the notice requirement proposed for this exemption a meaningful and important measure to respect individual autonomy, particularly if the notice requirement could be fulfilled through a general public posting? Current practices suggest that IRBs will frequently waive informed consent for studies involving the secondary use of identifiable private information collected for non-research purposes. If the exemption were to exclude the notice requirement, but continue to require application of the data security and privacy safeguards of §__.105 and restrict the use of identifiable private information to only purposes of the specific research for which the investigator obtained the information, would the exemption better strike a reasonable balance between respect for persons and beneficence, while eliminating the current requirement for IRB review?

Prior notice of some kind is important, even if the dissemination of the notice is imperfect. Rationale: the subject otherwise has no chance for prior knowledge that their information will be subject to ongoing use. The decision of whether or not to make information available for secondary use is not strictly a matter of documentation and information security, but also of transparency, even if not all subjects can be expected to see the notices without searching for them, and even in the absence of informed consent. Given evidence of heightened public concern about the unknown use of personally identifiable private data, creating a research environment that did not acknowledge and mitigate these concerns would be detrimental to the public trust in research as well as respect for persons.

53. Public comment is sought as to whether this exemption would provide appropriate protections for research conducted by clinical data registries, while enabling these research activities to proceed without delay, and what should be included in guidance regarding such activities. Public comment is sought regarding the extent to which other exclusions or exemption categories would apply to research conducted by clinical data registries, such that the conditions of this exemption category would not apply.

AAPOR takes no position on this issue.

d. Exemptions Subject to the Documentation Requirements of §__.104(c), the Privacy Safeguards Described in §__.105, Limited IRB Review as Described in §__.111(a)(9), and Broad Consent in Accordance with §__.116(c)
2) Exemption for Secondary Research Use of Biospecimens or Identifiable Private Information where Broad Consent has been Sought and Obtained (NPRM at §__.104(f)(2

54. Public comment is sought on whether the NPRM's proposal of exemption §__.104(f)(2) is the best option, or whether there is a better way to balance respect for persons with facilitating research.

Exemption as described is the best option (but no position on the treatment of disclosing medical research results/findings to subjects; on the other hand, subject-provided answers to non-biospecimen identifiable private information, for example that obtained by a survey or interview, would be already known to the subject, and if he or she wanted a copy of their answers there would be no additional risk to providing that to the subject).

55. Public comment is sought on whether and how the provision regarding the return of research results in the proposed exemption §__.104(f)(2) should be revised.

AAPOR takes no position on this issue.

56. Public comment is sought on whether there should be an additional exemption that would permit the collection of biospecimens through minimally invasive procedures (e.g., cheek swab, saliva).

AAPOR takes no position on this issue.

e. Applicability of Exemptions to the Subparts (NPRM at §__.104(b); current Rule at Footnote 1)

57. Public comment is sought on whether research involving prisoners should be permitted to apply any or all of the exemption categories found at proposed §__.104, either if the research consists mostly of non-prisoners and only incidentally includes some number of prisoners, as proposed in the NPRM, or if the research intends to involve prisoners as research subjects.

AAPOR takes no position on this issue.

58. Would it be preferable for language at §__.104(b)(2) to resemble the 2002 epidemiologic waiver criteria and state that the exemptions apply except for research where prisoners are a particular focus of the research?

AAPOR takes no position on this issue.

59. Is the proposed application of the exemptions to subparts B and D appropriate?

AAPOR takes no position on this issue.

B. Proposed Changes to Obtaining, Waiving, and Documenting Informed Consent (§§__.116 and ___.117)

1. Required elements of informed consent (NPRM at §__.116(a), (b))

60. What topics should be addressed in future guidance on improving the understandability of informed consent?

Consent forms that are written to clearly communicate the benefits and risks of an individual's participation in research are essential to the concept of respecting the autonomy of human subjects. AAPOR strongly encourages that guidance on improving the understandability these forms to the populations that are invited to participate in research. Risks to the confidentiality of participants' data, including biospecimens and data derived from biospecimens are especially important in regards to explaining risks.

2. Broad Consent to the Storage, Maintenance and Secondary Research Use of Biospecimens and Identifiable Private Information (NPRM at §__.116(c), (d))

61. Public comment is sought on whether broad consent to secondary research use of information and biospecimens collected for non-research purposes should be permissible without a boundary, or whether there should be a time limitation or some other type of limitation on information and biospecimens collected in the future that could be included in the broad consent as proposed in the NPRM. If a time limit should be required, is the NPRM proposal of up to 10 years a reasonable limitation? Would a limitation related to an identified clinical encounter better inform individuals of the clinical information and biospecimens that would be covered by a broad consent document?

AAPOR takes no position on this issue.

62. Public comment is sought on whether all of the elements of consent proposed at §__.116(c) should be required for the secondary use of biospecimens or identifiable private information originally collected as part of a research study that was conducted without consent because either the original research study met an exclusion or exempt category of research, or a waiver of consent was approved by an IRB.

Yes, but if the elements are required for study information obtained prior to the date of effect of the new Rule, only a short retrospective time limitation should be imposed. Rationale: If the original study was conducted without consent, or met an exclusion, or an IRB waiver was granted because any of those conditions was allowed under the Current Rule, some of the elements should be waived, because of the practical difficulties of complying with the broad consent for studies conducted in the past, such as informing the subject that they may withdraw consent. The requirement of obtaining consent for public posting that has not yet taken place, however, should remain applicable.

63. Public comment is sought on whether oral consent should be permissible in limited circumstances as proposed under exemption §II.104(f)(1).

AAPOR believes that properly documented oral consent is acceptable.

64. Would research subjects continue to be appropriately protected if the definition of "legally authorized representative" were broadened to include individuals authorized by accepted common practice to consent on behalf of another individual to participation in clinical procedures? If the definition of "legally authorized representative" was broadened in this way, public comment is sought on the interpretation of "accepted" and "common" as these terms would be used in the revised definition.

AAPOR believes that the definition of "legally authorized representative" (LAR) should be broadened by accepted common practice to consent on behalf of another individual to participation in clinical procedures. The interpretation of "accepted" and "common" would be expanded as proposed by the

NPRM to include standards in a state that define hierarchies or identify individuals who may provide legally acceptable consent, for clinical (non-research) purposes, on behalf of others who cannot consent for themselves.

3. Waiver of Informed Consent or Documentation of Informed Consent (NPRM at §§__.116(e), (f) and __.117)

65. Public comment is sought on how the waiver criterion regarding "practicably" at §II.116(d)(3) could be explicitly defined or otherwise clarified (e.g., what term should replace "practicably"?).

AAPOR agrees with the recommendation that the term 'practicably' be clarified using the language that is included in the SACHRP comments. In particular, that research is not practicable if it "could not be carried out without a waiver. Thus it is impracticable to perform the research and not just impracticable to obtain consent." Additional text from this same comment on the criteria that can be used to judge if a study is not practicable could also be added:" (1) Scientific validity would be compromised if consent was required; (2) ethical concerns would be raised if consent were required; (3) there is a scientifically and ethically justifiable rationale why the research could not be conducted with a population from whom consent can be obtained; (4) practicability should not be determined."

66. Public comment is sought on the proposed differences between the criteria for waiving informed consent for the research use of biospecimens versus identifiable information.

AAPOR agrees with this proposed new requirement.

67. Public comment is sought on whether the proposal to permit an IRB to waive consent for research involving the use of biospecimens should be included in the regulations.

AAPOR agrees with this proposal.

68. Public comment is sought on the proposal to permit an IRB to waive consent for the secondary use of biospecimens or information originally collected for research purposes, even if the original research study required subjects' informed consent.

Not permitting a waiver should encourage investigators to include a broad consent when conducting studies. We see this as good and would therefore not want ability to waive consent.

69. Public comment is sought regarding how likely investigators are to seek broad consent for the use of identifiable private information (as contrasted with biospecimens), given that there are provisions within the NPRM that would make it easier to do such research without consent (such as the new exemption at §II.104(e)(2)). In this regard, note that the NPRM proposal to prohibit waiver of consent by an IRB if a person has been asked for broad consent and refused to provide it might create a disincentive on the part of investigators from choosing to seek broad consent for research involving

secondary use of identifiable private information. Given the costs and time and effort involved in implementing the system for obtaining broad consent for the use of identifiable private information and tracking when people provide consent or refuse to do so, are the benefits to the system likely to outweigh the costs, and if so, should the broad consent provisions be limited to obtaining broad consent for research use of biospecimens?

We believe that it is unlikely that this option would discourage obtaining a broad consent. We also do not believe the costs of implementing a broad consent are too onerous and should be acceptable for identifiable data.

70. Public comment is sought on the proposed prohibition on waiving consent when an individual has been asked to provide broad consent under §ll.116(c) and refused. In particular, how would this prohibition on waiving consent affect the secondary research use of identifiable private information? If an individual was asked to provide such consent, should the absence of a signed secondary use consent be considered a refusal? Does this prohibition on waiving consent for the secondary use of identifiable private information create a disincentive for institutions to seek broad secondary use consent and instead seek a waiver of consent from an IRB? Under what circumstances, if any, would it be justified to permit an IRB to waive consent even if an individual declined or refused to consent?

It does not seem ethical to waive consent for secondary use if the respondent has refused to provide broad consent. Consent, as documented in the study, should be used as proof of consent. For example, if the study is requiring a signed consent form, then the absence of a signed form should be treated as a refusal.

C. Proposed Changes to Protect Information and Biospecimens (NPRM at §__.105)

71. Public comment is sought regarding whether particular information security measures should be required for certain types of information or research activities and, if so, what measures and for what types of information or research. Specifically, should the safeguards be calibrated to the sensitivity of the information to be collected?

AAPOR agrees that the information security measures should calibrated to the sensitivity and type of information collected. The basic principles recommended by the NPRM are acceptable, including limiting the access to physical biospecimens or data to those who need access and assuring that access to electronic information is authorized for appropriate use. We also agree that the IRB can accept the adoption of specific standards which apply for research covered by HIPAA, the E-Government Act, the Privacy Act or the specific statutory requirements under federal government statistical agencies as listed in the NPRM (e.g., CIPSEA).

72. Are the proposed limitations on re-disclosure more or less restrictive than necessary? Are there additional purposes for which re-disclosure of biospecimens or identifiable private information should be permitted?

AAPOR agrees that the standards proposed for re-disclosure strike the right balance.

D. Harmonization of Agency Guidance (NPRM at §__.101(j))

73. Will the proposed language at §__.101(j) be effective in achieving greater harmonization of agency guidance, and if not, how should it be modified?

The proposed language addresses the issue of promoting harmony amongst the many different Federal agencies. Perhaps adding some language that would describe situations in which agencies need not consult with other agencies (e.g., impractical or infeasible) prior to issuing guidance would be helpful.

E. Cooperative Research (NPRM and Current Rule at §__.114) and Proposal to Cover Unaffiliated IRBs Not Operated by an Institution Holding a Federalwide Assurance (NPRM at §__.101(a))

74. Is mandated single IRB review for all cooperative research a realistic option at this time? Please provide information about the likely costs and benefits to institutions. Will additional resources be necessary to meet this requirement in the short term? Should savings be anticipated in the long run?

Single IRB review for cooperative research seems like a realistic goal given that the overriding goals of these changes are to streamline the review process and ensure consistency between Federal agencies and their research partners. Delays in time-sensitive research due to multiple IRB review and inconsistent guidance among involved IRBs often occur with multiple IRB reviews. However, while it is a realistic goal, it would not be a realistic option for many institutions unless there were a mechanism to reduce the variability of IRBs in their interpretation of the Common Rule and federal regulations. Until this is addressed, there should be a way for institutions to opt out (i.e. not make it mandatory).

75. What areas of guidance would be needed for institutions to comply with this requirement? Is there something that OHRP could do to address concerns about institutional liability, such as the development of model written agreements?

OHRP needs to ensure that the party responsible for the IRB review is written into the cooperative research contract with all parties agreeing to abide by the single IRB guidelines. Those model written agreements would also need to make clear that any institutional liability for adverse events or investigator misconduct are the responsibility of the IRB/institution of record.

76. Would it be useful for this requirement to include criteria that Federal departments or agencies would need to apply in determining whether to make exceptions to the use of a single IRB requirement? If so, what should these criteria be?

AAPOR doesn't see a compelling argument for providing such criteria. First, it might increase the number of cooperative agreements that seek such exceptions which defeats the goal of moving to a single IRB review requirement. Second, depending on the wording of the criteria, it is likely that the criteria will lead to ambiguity in terms of who seeks these exemptions.

77. Are the exceptions proposed appropriate and sufficient, or should there be additional exceptions to this mandate for single IRB review than those proposed in the NPRM? If additional exceptions should be included, please provide a justification for each additional exception recommended.

We see no compelling reason in providing any additional exceptions.

78. Is three years appropriate timing to establish compliance with this provision?

Yes.

F. Changes to Promote Effectiveness and Efficiency in IRB Operations
2. Expedited Review Procedures and the Definition of "Minimal Risk" (NPRM at §§__.110 and __.102(j))

79. How often should the Secretary's list of minimal risk activities be updated? Should advice be solicited from outside parties when updating the list?

The list of minimal risk activities should be updated more frequently at the beginning of the passage of the new common rule, followed by less frequent updates over time. Certainly having outside parties review the list of minimal risk activities is a good strategy.

80. Is this Secretarial list of minimal research activities a useful tool for the research community, or does it represent a loss of IRB flexibility in risk determination?

It could be a useful tool that could make for more consistent IRB guidance and decisions, but it is impossible to say for certain without seeing what activities are on the Secretary's list.

G. Proposed Changes to IRB Operational Requirements
1. Proposed Criteria for IRB Approval of Research (NPRM at §___.111)

81. What should IRBs consider when reviewing the plans for returning research results, for example, what ethical, scientific, or clinical concerns?

The role of IRB's should continue to be focused on protecting human subjects.

82. Is the §___.111(a)(3) and (b) focus on issues related to coercion or undue influence in research with vulnerable populations, and not other considerations related to vulnerability, appropriate? Note that this focus also appears in proposed §___.107(a).

Yes, focusing on coercion or undue influence with vulnerable populations covered by the research studies seems appropriate.

83. Should pregnant women and those with physical disabilities be included in the category of subpopulations that may be vulnerable to coercion or undue influence?

It is reasonable to include pregnant women and those with physical and mental disabilities in the category of subpopulations that may be vulnerable to coercion or undue influences. The determination of coercion or undue influence would depend on the research study – a study about nutrition might be fine, while a study about getting pre-natal care could potentially be considered coercive. IRBs should continue to review this research.

2. Proposed Revisions to IRB Operations, Functions, and Membership Requirements

84. Should populations be considered vulnerable for reasons other than vulnerability to coercion or undue influence? Are the proposed categories appropriate?

Populations that are heavily studied might be vulnerable to research fatigue.

H. Other Proposed Changes

1. Proposal to Extend the Common Rule to All Clinical Trials (with Exceptions) (NPRM at §__.101(a)(1))

85. Public comment is sought on whether there might be unintended consequences from the clinical trials expansion proposed in the NPRM in §__.101(a)(2)(i)). Unintended consequences may include an increase in burden or costs, or an inappropriate redistribution of costs.

AAPOR takes no position on this issue.

86. Public comment is sought as to whether the criterion that the policy extends to all clinical trials conducted at an institution that receives federal support (see the NPRM at §__.101(a)(2)(i)) should be further clarified in some way. For example, should it specify a timeframe for support (e.g., within the past number of years), or a minimum monetary threshold value?

AAPOR takes no position on this issue.

87. Public comment is sought on whether the definition of clinical trial (NPRM at §__.102(b)) should include additional explanation of what is encompassed by the term behavioral health-related outcomes.

AAPOR takes no position on this issue.

2. Changes to the Assurance Process (NPRM at §§__.103 and __.108; current Rule at §__.103**)**

88. Would protection to human subjects in research be enhanced if OHRP conducted routine 691 periodic inspections to ensure that the membership of IRBs designated under FWAs satisfy the requirements of §__.107?

If OHRP does this, it should balance periodic inspections with other third party reviews. Institutions already subject to FDA inspections, or those that undergo voluntary accreditation should be excluded. Other institutions could be periodically inspected