October 26, 2011

Jerry Menikoff, MD, JD
Office for Human Research Protections
Department of Health and Human Services
1101 Wootton Parkway, Suite 200
Rockville, Maryland 20852

Docket #: HHS-OPHS-2011-0005

Dear Dr. Menikoff:

The American Association for Clinical Chemistry (AACC) welcomes the opportunity to comment on the Department of Health and Human Services' July 26, 2011 proposed rule, which suggests changes to the current Common Rule governing federally funded human subject research. We support the Department's efforts to ensure that consumers are appropriately informed of their rights and the privacy of their personal health information maintained. Although we support the adoption of open-ended consent language, we recommend that HHS policy permit the continued use of leftover, de-identified specimens.

Our primary concern is that the HHS proposed rule would require that health care providers obtain "written consent for research use of any biospecimens collected for clinical purposes," including de-identified excess specimens. This suggestion would alter the longstanding HHS policy that permits clinical laboratories, researchers, and other providers to utilize these leftover samples for improving patient care as long as the patient identifiers have been removed. AACC is worried that this proposed change, if implemented, could hinder laboratory quality control efforts, stifle test innovation, and increase regulatory costs.

Currently, clinical laboratories rely upon residual de-identified samples to validate the analytic performance of a broad variety of assays and to validate or develop new tests. These studies typically require only very small sample volumes and so do not require additional samples from the patient. The investigator uses only patient samples that would normally be discarded, and key clinical information (e.g., age, gender, diagnosis) associated with the specimen. The purpose of these studies is to verify the accuracy of these tests, not the well-being of any patient. We believe the use of these specimens should remain 'excused' from new research requirements.

In addition, many diagnostic manufacturers sponsor studies utilizing such leftover, de-identified specimens without informed consent. If a laboratory has to contact clinicians to solicit samples for method validation studies where the clinician has to sit down and explain the study to the patient, this would not only increase the costs of new test development, it would complicate the process of being able to do translational research as there are not many physicians with the time available to participate in research that is not related to their department or field of interest. Limiting access to these specimens may delay the introduction of new innovative tests, as well as increase their costs to the consumer.

Another reason why keeping the use of leftover, de-identified specimens is important is that although the proposed rule states that providers could develop and include standard, open-ended consent language in their admissions document, it assumes that all patients will agree. Many patients, however, may not, while others may have questions—each of which may create new challenges for researchers. Also staff may need to be hired, or reassigned, each incurring additional costs to the provider at a time when health care budgets are very tight. AACC is concerned that this general informed consent policy may introduce sample selection bias into these studies through a variety of mechanisms, including:

- Possible demographic differences between those individuals permitting use of their excess specimens from those who 'opt-out' denying researchers access to them.
- Individuals within emergency room and critical care settings may be barred from participating in clinical studies because their physicians and/or IRBs may consider the time needed to explain and obtain informed consent as disruptive to providing immediate patient care.
- Health care providers may not have personnel available 24 hours a day to explain and obtain patient consent for leftover samples, resulting in many institutions only using specimens obtained during normal, 9-5 working hours, when someone is available to explain the pertinent issues to the patient and obtain consent. This may result in certain patient populations being systematically excluded from important clinical studies, thus adversely affecting the validity of some comparisons and distorting the overall findings.

The HHS proposal asks whether the new consent rules should be applied only prospectively, thus grandfathering existing biospecimens**.** Many specimens in existing repositories are already de-identified, with only the medical condition and demographic data available. In these instances, it would be impossible to go back and get informed consent and this valuable clinical resource would be rendered useless if any rules requiring consent were enforced retrospectively. Therefore, we urge that any changes be implemented in only a prospective manner.

By way of background, AACC is the principal association of professional laboratory scientists--including MDs, PhDs and medical technologists. AACC's members develop and use chemical concepts, procedures, techniques and instrumentation in health-related investigations and work in hospitals, independent laboratories and the diagnostics industry worldwide. The AACC provides international leadership in advancing the practice and profession of clinical laboratory science and its application to health care. If you have any questions, please call me at (314) 362-0194, or Vince Stine, PhD, Director, Government Affairs, at (202) 835-8721.

Sincerely,

Ann M. Gronowski, PhD
President, AACC