DEPARTMENT OF HEALTH AND HUMAN SERVICES
Food and Drug Administration

Revocation of the Human Tissue Intended for Transplantation Regulations and Human Dura Mater

Docket No. FDA-2020-N-1519

Preliminary Regulatory Impact Analysis
Initial Regulatory Flexibility Analysis
Unfunded Mandates Reform Act Analysis

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I. Introduction and Summary

A. Introduction

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations "shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." We believe that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed rule, if finalized, would not create new regulatory responsibilities for small entities, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The

current threshold after adjustment for inflation is $156 million, using the most current (2019) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

B. Summary of Costs and Benefits

This proposed rule would remove the obsolete regulations under part 1270 (21 CFR Part 1270) for human tissue intended for transplantation into a human recipient and 21 CFR 882.5975 for human dura matter. These regulations only apply to certain tissue derived from a human body and recovered prior to May 25, 2005. We believe it is highly unlikely any such human tissues remain available for use today. The proposed rule therefore is not anticipated to result in any compliance costs to the industry. We expect the economic impact on the FDA resulting from removing an obsolete regulation to be minimal.

Table 1 summarizes the estimated benefits and costs of the proposed rule, if finalized. Annualized over 10 years, the estimated benefits (i.e. cost savings) of the proposed rule would be $0 at both the 3 and 7 percent discount rate. The present value of the estimated benefits (i.e., cost savings) of the proposed rule would also be $0 at both the 3 and 7 percent discount rate. The annualized costs of the proposed rule, if finalized, would be $0 at both 3 and 7 percent discount rate. The present value of costs of the proposed rule would also be $0 at both 3 and 7 percent discount rate.

Table 1: Summary of Benefits, Costs and Distributional Effects of Proposed Rule

Category		Primary Estimate	Low Estimate	High Estimate	Units			Notes
					Year Dollars	Discount Rate	Period Covered	
Benefits	Annualized Monetized $millions/year	$0	$0	$0	2019	7%	10 years	
		$0	$0	$0	2019	3%	10 years	
	Annualized Quantified							
	Qualitative	Field investigators would no longer need to reference the obsolete regulations, resulting in very minor cost savings for the FDA in terms of employee time.						
Costs	Annualized Monetized $millions/year	$0	$0	$0	2019	7%	10 years	
		$0	$0	$0	2019	3%	10 years	
	Annualized Quantified					7%		
						3%		
	Qualitative							
Transfers	Federal Annualized Monetized $millions/year					7%		
						3%		
	From/ To	From:			To:			
	Other Annualized Monetized $millions/year					7%		
						3%		
	From/To	From:			To:			
Effects	State, Local or Tribal Government: None Small Business: None Wages: None Growth: None							

In line with Executive Order 13771, in Table 2 we estimate present and annualized values of costs and cost savings over an infinite time horizon. The present value of the net costs and cost savings would be $0 at both 3 and 7 percent discount rate.

Table 2. EO 13771 Summary Table (in $ Millions 2016 Dollars, Over an Infinite Time Horizon)

Item	Primary Estimate (7%)	Lower Estimate (7%)	Upper Estimate (7%)	Primary Estimate (3%)	Lower Estimate (3%)	Upper Estimate (3%)
Present Value of Costs	$0	$0	$0	$0	$0	$0
Present Value of Cost Savings	$0	$0	$0	$0	$0	$0
Present Value of Net Costs	$0	$0	$0	$0	$0	$0
Annualized Costs	$0	$0	$0	$0	$0	$0
Annualized Cost Savings	$0	$0	$0	$0	$0	$0
Annualized Net Costs	$0	$0	$0	$0	$0	$0

II. Preliminary Economic Analysis of Impacts

A. Background

Part 1270, "Human Tissue Intended For Transplantation", became effective in 1997 (July 29, 1997; 62 FR 40444). It required establishments engaged in the recovery, screening, testing, processing, storing, or distributing of human tissues to perform specified minimum required medical screening and infectious disease testing and document such screening and testing for each human tissue, for inspection by the FDA. Furthermore, it included provisions for the inspection of such establishments and for retaining, recalling, or destroying human tissue upon a finding that human tissue may be

in violation of the regulations. This was an emergency measure to protect the public health against human tissue that had incomplete or no documentation establishing its freedom from communicable diseases. During a 1993 hearing on appropriate oversight for human tissue banking before the Subcommittee on Regulation, Business Opportunities and Technology of the Committee on Small Business, testimony described how human tissue from foreign sources had been offered for sale in the United States with little documentation of appropriate screening and testing (Ref. 1). The rule set minimal requirements to prevent the transmission of communicable diseases from human tissue intended for transplantation.

Effective on May 25, 2005, the FDA published three final rules in part 1271 (21 CFR Part 1271) to broaden the scope of human tissue products subject to regulation to include human cells, tissues, and cellular and tissue based products (HCT/Ps), and to include more comprehensive requirements for preventing the introduction, transmission and spread of communicable disease. These revised regulations required firms to register and list their HCT/Ps with the FDA, determine donor eligibility, and follow current good tissue practices for HCT/Ps. The part 1271 requirements were intended to improve protection of the public health. Because the FDA believed retrospective application of part 1271 to human tissue recovered before the effective date would have been impractical, part 1271 only applied to HCT/Ps recovered on or after May 25, 2005. The part 1270 requirements continued to be used for tissue recovered before this date. In the new rules applicable to HCT/Ps, the FDA noted its intention to revoke part 1270 in the future when no remaining human tissue would be regulated under part 1270 (Refs. 2-3).

Human dura mater was in commercial distribution before the enactment of the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act. FDA codified the classification and the class II special control guidance document for human dura mater by adding §882.5975 to the device regulations in Title 21 CFR (December 18, 2003; 64 FR 70436). Prior to the effective date of the part 1271 requirements, May 25, 2005, human dura mater was regulated as a medical device under § 882.5975. As stated in part 1271, human dura mater is defined under 21 CFR 1271.3(d) as a HCT/P and as such is regulated under section 361 of the PHS Act and the requirements of part 1271. Accordingly, FDA clarified that the device classification contained in § 882.5975 is only applicable for human dura mater recovered prior to the effective date of the part 1271. (June 24, 2011; FR 76 36993).

Most human tissues can be stored for a maximum of five years, with the longest storage time being ten years. Since it has been over a decade since 2005, the FDA does not believe there are any human tissues, including human dura mater, intended for transplant left in storage that would be in date and, which would be subject to part 1270 or § 882.5975. All HCT/Ps recovered after May 25, 2005, are already subject to part 1271, "Human Cells, Tissues, and Cellular and Tissue-Based Products." Industry and the FDA are required to follow these newer regulations and will not be impacted by the removal of part 1270. Therefore, the regulations under part 1270 and § 882.5975 are outdated and obsolete.

B. Market Failure Requiring Federal Regulatory Action

This proposed rule revokes the obsolete regulations under part 1270 for human tissue intended for transplantation. Obsolete rules can result in confusion and inefficiencies. The market forces alone cannot correct this without us issuing another rule. By removing the outdated regulation, we would reduce inefficiencies related to keeping obsolete FDA regulations on the books.

C. Purpose of the Proposed Rule

If finalized, this proposed rule would remove the regulations under part 1270 for human tissue intended for transplantation and § 882.5975 for human dura mater recovered prior to May 25, 2005. Any tissues collected in or prior to 2005 have long since expired. Thus, the FDA does not believe there are currently any tissues intended for transplantation remaining in inventory that would be subject to these regulations. Therefore, the regulations proposed to be removed are obsolete.

This proposed rulemaking is part of the FDA's efforts to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification following Executive Order 13777 of February 24, 2017.

D. Baseline Conditions

Baseline conditions refer to the state of human tissue transplant regulation prior to the proposed rule, which would revoke obsolete regulations applying to human tissues collected before 2005. As of 2018, there are 2,349 HCT/P firms registered with the FDA,

which includes 2,114 located in the United States and 235 foreign registrants that offer for import HCT/Ps into the U.S.[1] Because we believe there are no human tissues currently in storage to which part 1270 or § 882.5975 applies, no firms engaged in the recovery, screening, testing, processing, storage, or distribution of human tissue would be affected by the proposed rule. There is no change from baseline. We request comment on our estimation of the baseline.

E. Benefits of the Proposed Rule

Because the obsolete regulation is no longer in use anywhere, its removal would have no quantifiable cost savings for industry or the FDA. Revoking it would not increase industry flexibility.

There may be qualitative benefits we are unable to estimate at this time. Once removed, there would no longer be any inefficiencies due to keeping obsolete regulations on the books. FDA would save a small amount of employee time as a result of field inspectors no longer needing to reference the outdated regulations in safety manuals.

Industry and the FDA would largely maintain their current practices following the proposed rule. There are no quantifiable cost savings. FDA requests comments on the benefits of the proposed rule.

[1] Based on data from the Human Cell and Tissue Establishment Registration (HCTERS) Public Query application at https://www.fda.gov/vaccines-blood-biologics/biologics-establishment-registration/human-cell-and-tissue-establishment-registration-hcters-public-query-application. This query was made on October 8, 2019 and content on HCTERS is current as of March 22, 2018.

F. Costs of the Proposed Rule

We believe there would be no costs to the industry from the proposed rule, if finalized, because the regulations it would revoke (part 1270 and § 882.5975) only apply to human tissue recovered prior to 2005, and the FDA does not believe there is any such tissue in storage. The proposed rule, if finalized, would not require performance of any additional tasks and, therefore, would not impose any additional regulatory burden on the industry. There would be no cost to industry in understanding the proposed rule because part 1270 does not apply to establishments currently engaged in the recovery, screening, testing, processing, storage, or distribution of human tissue. FDA requests comments on the costs of the proposed rule.

G. International Effects

We believe that if finalized, this rule would not result in any costs or benefits to either domestic or foreign firms because it would repeal obsolete regulations in part 1270 and § 882.5975. Therefore, it would not have any effect on foreign or domestic manufacturer practices and we do not expect there to be any significant international effects.

H. Analysis of Regulatory Alternatives to the Proposed Rule

An alternative would be to take no action. Under this alternative, part 1270 and § 882.5975 regulations would stay on the books but continue to not be used. This would

have no benefits, but could potentially cause confusion to anyone seeking to understand the regulations concerning human tissues.

III. Initial Small Entity Analysis

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule does not add any new regulatory burden on the industry, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. This document serves as the Initial Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

IV. References

1. The Internet Archive. 1993. “Full text of “Regulation of human tissue banks: hearing before the Subcommittee on Regulation, Business Opportunities, and Technology of the Committee on Small Business, House of Representatives, One Hundred Third Congress, first session, Washington, DC, October 15, 1993”.” Retrieved January 2020 from https://archive.org/stream/regulationofhuma00unit/regulationofhuma00unit_djvu.txt.
2. 66 FR 5447 at 5448; January 19, 2001
3. 69 FR 68611, November 24, 2004