From: Donnelly, Janet
To: [redacted]
Subject: RE: Reading Level of informed consent
Date: Thursday, January 30, 2014 10:51:00 AM

Hi [Redacted]-

I sent you a separate email message this morning that I'm happy to talk more about your question if you have time and would like to discuss it. If you would like to talk more about this, please let me know what time you can talk and a good number to reach you. I'll try here to respond as well so you can take a look at the regulations that pertain to this issue.

I can represent what the FDA regulations say, but since I'm aware that you also review HHS studies, I'll include the regulatory reference under 45 CFR too, but if you have specific questions about the HHS regulations at 45 CFR, then you should contact OHRP (I can help you figure out how to do that if necessary).

The FDA regulations do not specifically state that the informed consent form must be written at an eighth grade level. However, I'm sure [Redacted] was referring to the FDA regulations at 21 CFR 50.20 which state:

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Sec. 50.20 General requirements for informed consent.

Except as provided in 50.23 and 50.24, no investigator may involve a human being as a subject in
research covered by these regulations unless the investigator has obtained the legally effective
informed consent of the subject or the subject's legally authorized representative. An
investigator shall seek such consent only under circumstances that provide the prospective subject
or the representative sufficient opportunity to consider whether or not to participate and that
minimize the possibility of coercion or undue influence. The information that is given to the
subject or the representative shall be in language understandable to the subject or the
representative. No informed consent, whether oral or written, may include any exculpatory language
through which the subject or the representative is made to waive or appear to waive any of the
subject's legal rights, or releases or appears to release the investigator, the sponsor, the
institution, or its agents from liability for negligence.
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NOTE: The same regulation can be found at 45 CFR 46.116 for HHS.

As you can see, the FDA regulations require that the information provided to a subject or their legally authorized representative (LAR) be in a language understandable to the subject or LAR. FDA often issues guidance documents to assist in the reading/interpretation of the regulations. FDA guidance does not establish legally enforceable responsibilities but instead provides the Agency's current thinking on a topic and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited. FDA has guidance on informed consent that can be found at http://www.fda.gov/RegulatoryInformation/Guidances/ucm126431.htm that may provide more clarification on the regulatory requirements. The informed consent guidance says:

21 CFR 50.20 General requirements for informed consent

Except as provided in 50.23, no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's rights, or releases or appears to release the investigator, the sponsor, the institution, or its agents from liability for negligence.

The IRB should ensure that technical and scientific terms are adequately explained or that common terms are substituted. The IRB should ensure that the informed consent document properly translates complex scientific concepts into simple concepts that the typical subject can read and comprehend. [emphasis added]

Although not prohibited by the FDA regulations, use of the wording, "I understand..." in informed consent documents may be inappropriate as many prospective subjects will not "understand" the scientific and medical significance of all the statements. Consent documents are more understandable if they are written just as the clinical investigator would give an oral explanation to the subject, that is, the subject is addressed as "you" and the clinical investigator as "I/we." This second person writing style also helps to communicate that there is a choice to be made by the prospective subject. Use of first person may be interpreted as presumption of subject consent, i.e., the subject has no choice. Also, the tone of the first person "I understand" style seems to misplace emphasis on legal statements rather than on explanatory wording enhancing the subject's comprehension.

Subjects are not in a position to judge whether the information provided is complete. Subjects may certify that they understand the statements in the consent document and are satisfied with the explanation provided by the consent process (e.g., "I understand the statements in this informed consent document)." They should not be required to certify

completeness of disclosure (e.g., "This study has been fully explained to me," or, "I fully understand the study.")

Consent documents should not contain unproven claims of effectiveness or certainty of benefit, either explicit or implicit, that may unduly influence potential subjects. Overly optimistic representations are misleading and violate FDA regulations concerning the promotion of investigational drugs [21 CFR 312.7] or investigational devices [21 CFR 812.7(d)] as well as the requirement to minimize the possibility of coercion or undue influence [21 CFR 50.20].

The second paragraph in this excerpt from the guidance gets at your question and the need for the IRB to make sure informed consent forms are written in a way so that the typical subject can read and comprehend the information. The notion that the informed consent form must be written at an eighth grade level seems to have arisen as a "best practice" or a method used by IRBs in informed consent form development to get at the importance of ensuring that the consent form is understandable to subjects. This "best practice" of looking at the level of "readability" of a consent form and ensuring that technical and scientific terms are adequately explained, or substituting more common terms, is one way an IRB can work towards preparing consent forms that can be read and comprehended by the typical subject.

So the FDA regulations require that the informed consent form be understandable to the subject. The mechanism by which IRB's meet this requirement can include "best practices" such as ensuring that the "readability" level of the consent form is at an acceptable level so that the typical subject can read and comprehend the information.

I hope this information is useful. If you need further information and/or have additional questions, please feel free to contact us at the official GCP mailbox, gcp.questions@fda.hhs.gov. You may also find it useful to access the set of redacted GCP e-mails found at http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/RepliestoInquiriestoFDAonGoodClinicalPractice/default.htm since we find that many questions and concerns are repeated over time.

Best Regards,
Janet
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Office of Special Medical Programs, Food and Drug Administration
This communication does not constitute a written advisory opinion under 21 CFR 10.85, but rather is an informal communication under 21 CFR 10.85(k) which represents the best judgment of the employee providing it. This information does not necessarily represent the formal position of FDA, and does not bind or otherwise obligate or commit the agency to the views expressed.

From: [Redacted]
Sent: Wednesday, January 29, 2014 6:54 PM
To: Donnelly, Janet
Subject: Reading Level of informed consent

Dear Miss Donnelly,

I hope this finds you well.

I am making a presentation to research analysts and ICF writers in a few weeks.

I always understood that the language should be written to an eighth grade level. Conversely, many remind me there is no such "regulation" or requirement, only that it be "understandable." I mentioned that to [Redacted]. She quickly reminded me that there was such a regulation, and quoted where it could be found. Unfortunately, we were at lunch, and I promptly forgot to write it down.

I checked CFR 46 and 50, and did not find it. I hope you can help.

Thank you,

[Redacted]