

An open letter to Shelley Grant, MHSA, Branch Chief,
Blood Stem Cell Transplantation Program, Division of Transplantation Healthcare Systems Bureau, Health
Resources and Services Administration 5600 Fishers Lane, Room 12C-06, Rockville, Maryland 20857

Comment on Change to the Definition of “Human Organ” Under Section 301 of the National Organ Transplant Act of
1984. Health Resources and Services Administration, HHS. RIN 0906-AB02.

We are professional ethicists in the fields of business ethics, medical ethics, and/or normative ethics.

The Department of Health and Human Services issued a Notice of Proposed Rulemaking on
October 2, 2013. The proposed rule (hereafter: “the Rule”) would append “bone marrow” with “and
other hematopoietic stem/progenitor cells without regard to the method of their collection.”

This Rule would effectively reverse the decision in *Flynn v. Holder* before the U.S. District Court of
Appeals for the Ninth Circuit.¹ That decision holds that compensating donors of hematopoietic
stem/progenitor cells (hereafter: “hematopoietic cells”) through a procedure called apheresis was not
contrary to the National Organ Transplant Act.

We oppose the Rule. We maintain that the ethical arguments against a compensatory model for
hematopoietic cell donation through apheresis (hereafter: “the compensatory model”) fail. We further
maintain that significant ethical considerations speak in favor of the compensatory model, and
therefore against the Rule.

Below, we respond to the ethical arguments offered in favor of the Rule: that the compensatory
model would result in wrongful exploitation (§1); that the compensatory model would promote the
view that human beings, their bodies, or subparts thereof, are mere commodities (§2); and that the
compensatory model would incentivize donation for personal gain over donation from altruistic
motives (§3). Given the ethical importance of avoiding preventable death and the strong likelihood
that the compensatory model would help avoid preventable death, as well as the ethical importance
of free choice, we conclude that the Rule is unethical (§4).

1. The Rule is unethical, both because it constitutes a ban on a practice that would help avoid
preventable death, and because it limits freedom of choice in the absence of ethical grounds for
such limitation.
 - 1.1. The Rule, if enacted, may result in a greater number of preventable deaths. Approximately
1,000 people die each year for want of a matching donor. There is every reason to believe
that the compensatory model can reduce the number of preventable deaths. Given the
ethical importance of avoiding preventable death, removing an incentive for provision of
hematopoietic cells is unethical, barring the presence of overriding ethical concerns.
 - 1.2. Strong ethical grounds are required for limitations on free choice. This requirement is only
strengthened when the choice is regarded by some as their best option. The Rule would
remove what some consider their best option. While there may be cases where removing
an option improves people’s situation, there is no reason to believe that this is such a case,
especially given the limited burdens incurred through apheresis, as detailed in §2.1.
 - 1.3. As argued below, worries about wrongful exploitation (§2), worries about regarding the
human body or any subpart thereof or human labor as a commodity (§3), and the ethical
importance of altruism (§4), are not, individually or jointly, sufficient to override either the
ethical importance of avoiding preventable death or the ethical presumption in favor of free
choice.

¹ *Flynn v. Holder*, 665 F.3d 1048 (9th Cir. 2011).

2. The Rule is intended, as we understand it, to avoid wrongful exploitation. We agree that wrongful exploitation is a significant worry. However, a compensatory model would not be wrongfully exploitative in this case.
 - 2.1. Unlike aspiration, apheresis is a non-invasive procedure. There is no significant risk to the donor. The donation is very much like a blood donation. In most cases recovery, which is generally minimal or non-debilitating, lasts one week. Additionally, unlike kidneys and other organs for which ethical concerns about wrongful exploitation arise, hematopoietic cells quickly regenerate. Donors do not permanently “lose” a part of themselves. As the burdens here are negligible, they provide no grounds for concern about wrongful exploitation.
 - 2.2. Proponents of the Rule have provided no evidence that the compensation for hematopoietic cells would be low, or that only poor or desperate people would be willing to donate for compensation. Even middle and upper-class citizens may be willing to donate hematopoietic cells for compensation, just as such citizens now donate eggs or sperm for compensation. Proponents of the Rule have therefore provided no evidence that either the level of compensation or the expected poverty or desperation of the donating population provide grounds for concern about wrongful exploitation.

3. The Rule is intended, as we understand it, to avoid promotion of the view that human beings, their bodies, subparts thereof, or human labor are appropriately viewed as commodities.² Insofar as anything compensated for is a commodity, it is trivially true that the compensatory model promotes the view that hematopoietic cells are commodities. But this is ethically irrelevant. The relevant ethical concern is that the compensatory model would promote the view that human beings (etc.) are “mere” commodities, meriting no more ethical regard than other mere commodities, such as cars or clothing. However, there is no evidence that the compensatory model would promote this view.
 - 3.1. There is no evidence that compensation for blood and blood plasma donations, nor for sperm and egg donations, has promoted the view that people or their blood, sperm, or eggs are mere commodities.
 - 3.2. In some states, commercial surrogacy is legal. There is no evidence that this practice has promoted the view that either women or their reproductive labor are mere commodities in these states, as compared to those in which commercial surrogacy is prohibited by law.
 - 3.3. We pay Presidents, members of the military, police officers, teachers, actors, artists, and so on. There is no evidence that compensating them for their labor promotes the view that they or the services they provide – protection, education, artistic expression – are mere commodities.
 - 3.4. Proponents of the Rule have provided no evidence that the compensatory model, in contrast with similar practices referenced above, would promote the view that donors or their hematopoietic cells are mere commodities.

4. The Rule is intended, as we understand it, to avoid incentivizing donation for monetary gain over donation from altruistic motives. We agree that altruism is desirable, and that we need to be careful when considering policies to preserve and promote altruistic and benevolent motives and actions. However, we consider this argument unpersuasive.
 - 4.1. The compensatory model leaves open the possibility of donors’ rejecting compensation, or the operation of a parallel non-compensatory model. Some blood drives use compensation, others do not. Blood donors, by comparison, have the option of donating with or without compensation.
 - 4.2. Compensation and altruism are not mutually exclusive. In many cases, people who are compensated are motivated simultaneously (or even primarily) by altruistic impulses. This is true of many teachers and members of the military. There is no reason to believe that a

² See S. Rep. No. 98-382, at 17 (1984), 1984 U.S.C.C.A.N. 3975 at 3982 (“[H]uman body parts should not be viewed as commodities”).

compensated hematopoietic cell donor would be solely motivated by personal financial gain.

- 4.3. Compensation may be spent in an altruistic fashion. For example, compensation may be donated to a charity or used to pay for a loved one's education or health care. The fact that someone is compensated does not entail that she has non-altruistic or otherwise selfish or crass motives.
5. In our view, none of the moral objections to the compensatory model stand in this case. Furthermore, there is a strong moral presumption against standing in the way of a model that would avoid preventable deaths. We conclude that the Rule is unethical, and should not be enacted.

*Signed,**

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** The views expressed are those of the signatories and are not necessarily shared by the institutions with which they are affiliated.*

† One of Peter's former students founded Hemeos, a company looking to offer compensation for hematopoietic cell donation