Emergency Use of an Investigational Drug, Biologic or Device

Introduction

The emergency use provision in the FDA regulations (21 CFR 56.102d) is an exemption from prior review and approval by the IRB for the purposes of patient care. It allows for one emergency use of a test article. Any subsequent use of the investigational product must have prospective IRB review and approval.

This does not include the “off-label” use of approved medical products in the practice of medicine.

Definitions

Emergency Use – (21 CFR 56.102d) means the use of a test article on a patient in a life-threatening situation in which no standard acceptable treatment is available, and in which there is not sufficient time to obtain IRB approval.

Unapproved Medical Device – is a device that is utilized for a purpose, condition, or use for which the device requires, but does not have, an approved application for premarket approval or an approved application for an IDE.

Life-threatening – Diseases or conditions where the likelihood of death is high unless the course of the disease is interrupted. The condition need not be immediately life-threatening or expected to result in immediate death, but rather requires intervention before review at a convened meeting of the IRB is feasible.

Severely debilitating – Diseases or conditions that cause major irreversible morbidity. Examples of severely debilitating conditions include blindness, loss of arm, leg, hand or foot, loss of hearing, paralysis or stroke.

Test Article – means any drug (including a biological product for human use), medical device for human use, human food additive, color additive, electronic product, or any other article subject to regulation under the act or under sections 351 and 354-360F of the Public Health Service Act (42 U.S.C. 262 and 263b-263n).

Emergency Exemption from Prospective IRB Approval
The FDA requires all of the following conditions exist to justify the emergency use of an unapproved investigational drug, biologic or device:

1. The patient has a life-threatening or severely debilitating disease or condition;

2. There are no standard or generally recognized alternative treatment options with an equal or greater likelihood of treating the patient’s condition; and

3. The patient’s condition requires immediate intervention before review at a convened meeting of the IRB is possible to avoid major irreversible morbidity or death.

Permission for Emergency Use may only be granted one time for one patient under the conditions listed above. If any of the above conditions do not apply, or if there is a desire to use the test article again on the same or different patient, an IRB Application, protocol and informed consent form must be submitted for review and approved by the Full IRB Board prior to use of the test article.

FDA regulations do not allow expedited IRB approval in emergency situations. The IRB must convene and give full board approval of the emergency use or, if the above conditions are met and it is not possible to convene a quorum within the time available, the emergency use may proceed without IRB Approval.

When emergency medical care is provided without prior IRB review and approval:

1. The patient may not be considered a research subject.
2. The emergency care data may not be combined with research data.
3. The outcome may not be reported as research activity.

**Treating Physician Responsibilities Prior to the Emergency Use:**

1. Determine whether the emergency use criteria have been met.
2. Assess the potential for benefits from the unapproved use of the test article.
3. Contact the manufacturer of the investigational drug or device to determine if it has an IND/IDE in place that will permit emergency use of the test article on a patient outside of a controlled clinical trial. If no IND/IDE is in place, the manufacturer should contact the FDA to request shipment of the device in advance of the IND/IDE submission.

4. Notify the IRB office of the intended emergency use by submitting the Emergency Use Request/Notification Form and the Consent for Emergency Treatment with an Investigational Drug/Biologic Device. These documents can be found on the IRB website at www.utsouthwestern.edu/irb under the Forms page.

5. Once the required documentation is provided to the IRB, an IRB Chair will review and sign the form. The IRB Chair review includes an assessment of the situation, confirmation that the regulatory criteria for emergency use are met, and the consent document. A copy of the signed form will be forwarded to the treating physician for recordkeeping purposes. Note: This acknowledgement by an IRB Chair does not constitute IRB approval.

6. Upon request, the IRB will provide a written acknowledgement indicating the IRB is aware of the intended use of a test article if necessary for shipment of the test article.

7. Obtain written consent from the patient or the patient’s legally authorized representative, unless the criteria for an exception to informed consent are met. Since emergency use is not research, a HIPAA Research Authorization is not required.

**Treating Physician Responsibilities After the Emergency Use:**

1. Notification should occur prior to the emergency use when possible. If the emergency use must occur outside of normal business hours and there is no time to notify the IRB of the intended use, the treating physician must report the emergency use to the IRB within five (5) working days by submitting the Emergency Use Request/Notification Form (this document can be found on the IRB website at www.utsouthwestern.edu/irb under the Forms page) and a copy of the informed consent.

2. If the emergency use involved ionizing radiation, the Radiation Safety Office must also be notified within 5 days working days of the emergency use by calling 214-648-2493.

3. The FDA regulations require the treating physician to submit a written follow-up report to the IRB within five (5) working days of the emergency use. This
report may be in the form of a memorandum, and should include a description of the clinical outcome resulting from the use of the test article.

4. Evaluate the likelihood of a similar need for the use of the test article occurring again, and if future use is likely, immediately initiate efforts to obtain an IRB approval protocol and IND/IDE for subsequent uses.

5. If applicable, comply with the reporting requirements for Adverse Events reporting via the ERGO AE reporting tool. For more information on AE reporting, please see the guidance located on the IRB website at www.utsouthwestern.net/irb under the Study Management page.

6. Emergency use reports may be submitted to the manufacturer. However, since this data is not research data collected with prospective IRB approval, these reports may only be provided to the manufacturer with the understanding that such data may not be complied with research data for publications or other reports.

**Exception from Informed Consent Requirement: (21 CFR 50.23)**

The treating physician is required to obtain clinical informed consent of the patient or the patient’s legally authorized representative unless both the treating physician and a physician who is not otherwise participating in the patient’s care or the use of the test article both certify the following in writing:

1. The patient is confronted by a life-threatening situation necessitation the use of the test article;
2. Informed consent cannot be obtained from the subject because of an inability to communicate with, or obtain legally effective consent from, the patient;
3. Time is not sufficient to obtain consent form the subject’s legal representative; and
4. There is no alternative method of approved or generally recognized therapy that provides an equal or greater likelihood of saving the life of the patient.

**Obtaining an Emergency IND:**

The emergency use of an unapproved investigational drug or biologic requires an approved application for an Investigational New Drug (IND). If the intended patient does not meet the criteria of an existing study protocol, or if an approved study protocol does not exist, the usual procedure is to contact the manufacturer and determine if the drug or biologic can be made available for the emergency use under the company’s IND.
The need for an investigational drug or biologic may arise in an emergency situation that does not allow time for submission of an IND. In such a case, the FDA may authorize shipment of the test article in advance of the IND submission (21 CFR 312.36). Requests for such authorization may be made by telephone or other rapid communication means as noted below.

**When no IDE is available:**

The FDA recognizes that emergencies arise where an unapproved drug or device may offer the only possible life-saving alternative, but an IND/IDE for does not exist, or the proposed use is not approved under an existing IND/IDE, or the physician or institution is not approved under the IND/IDE. Using its enforcement discretion, the FDA has not objected if a physician chooses to use an unapproved drug or device in such an emergency, provided that the physician later justifies to the FDA that an emergency actually existed (by using the emergency use guidelines as stated above).

**FDA Division Contact Information:**

<table>
<thead>
<tr>
<th>Product</th>
<th>Office/Division to Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>drug products</td>
<td>Division of Drug Information (HFD-240)</td>
</tr>
<tr>
<td></td>
<td>301-827-4570</td>
</tr>
<tr>
<td>biological blood products</td>
<td>Office of Blood Research and Review (HFM-300)</td>
</tr>
<tr>
<td></td>
<td>301-827-3518</td>
</tr>
<tr>
<td>biological vaccine products</td>
<td>Office of Vaccines Research (HFM-400)</td>
</tr>
<tr>
<td></td>
<td>301-827-3070</td>
</tr>
<tr>
<td>devices</td>
<td>Center for Devices and Radiological Health (CDRH)</td>
</tr>
<tr>
<td></td>
<td>301-594-1190</td>
</tr>
<tr>
<td>On nights and weekends</td>
<td>Office of Crisis Management &amp; Emergency Operations Center</td>
</tr>
<tr>
<td></td>
<td>(HFC-160)</td>
</tr>
<tr>
<td></td>
<td>301-443-1240</td>
</tr>
</tbody>
</table>

**IRB Contact Information:** (prior to use of the unapproved drug or biologic)

- During normal business hours, call 214-648-3060, or fax 214-648-2171

**For Further FDA Guidance on Emergency Use of Test Articles:**

http://www.fda.gov/oc/ohrt/irbs/devices.html#emergency