GUIDANCE ON EMERGENCY USE OF A TEST ARTICLE

*Emergency Use:* means the use of a test article on a human subject 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.

*Test Article:* means any drug, biological product, or medical device for human use.

**Emergency Use Criteria:**
Emergency use requires all of the following criteria are met:
1) a life-threatening/severely debilitating condition in which no standard acceptable treatment is available
2) no available approved protocol
3) an investigational agent or device that might be beneficial, in the physician's opinion
4) availability of agent or device from the sponsor or elsewhere
5) an emergency situation in which there is not sufficient time to obtain FDA and IRB approval

**Exemption from Prospective IRB Approval**
Emergency Use of a test article is exempt from prior IRB review and approval, provided that such emergency use is reported to the IRB within 5 working days. Any subsequent use of the test article at the institution is subject to IRB review.

Under FDA regulations, patients given emergency use test articles are considered research subjects and data from the emergency use may be used in research through reporting to the sponsor and the FDA. Under HHS regulations, whenever emergency care is initiated without prior IRB review and approval, the patient may *not* be considered to be a research subject and the data derived from use of the test article may not be used in a prospective systematic investigation designed to develop or contribute to generalizable knowledge.

**Informed Consent Requirements**
Even for an emergency use, the investigator is required to obtain informed consent of the subject or the subject's legally authorized representative, unless both the investigator and a physician who is not otherwise participating in the clinical investigation certify in writing all of the following:
1) The subject is confronted by a life-threatening situation necessitating the use of the test article.
2) Informed consent cannot be obtained because of an inability to communicate with, or obtain legally effective consent from, the subject.
3) Time is not sufficient to obtain informed consent from the subject's legal representative.
4) No alternative method of approved or generally recognized therapy is available that provides an equal or greater likelihood of saving the subject's life.
If immediate use of the test article is, in the investigator's opinion, required to preserve the life of the subject, and time is not sufficient, prior to administering the test article, to obtain an independent physician's opinion, the determinations of the investigator must be reviewed in writing within 5 days after the use of the test article by a physician not otherwise participating in the clinical investigation. In this event, a copy of the independent review must be submitted to IRB within 7 working days after the use of the test article.

TEST ARTICLE: DRUGS AND BIOLOGICS
The emergency use of an unapproved investigational drug or biologic requires an IND. If the intended subject 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 sponsor 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, FDA may authorize shipment of the test article in advance of the IND submission. Requests for such authorization may be made by telephone or other rapid communication means.

**FDA Contacts for Obtaining an Emergency IND**

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<thead>
<tr>
<th>Product</th>
<th>Office/Division to Contact</th>
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<tr>
<td>drug products</td>
<td>Division of Drug Information (HFD-240) 301-827-4570</td>
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<tr>
<td>biological blood products</td>
<td>Office of Blood Research and Review (HFM-300) 301-827-3518</td>
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<tr>
<td>biological vaccine products</td>
<td>Office of Vaccines Research (HFM-400) 301-827-3070</td>
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<td>On nights and weekends</td>
<td>Office of Crisis Management &amp; Emergency Operations Center (HFC-160) 301-443-1240</td>
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The exemption allows for one emergency use of a test article without prospective IRB review. FDA regulations require that any subsequent use of the investigational drug or biologic at the institution have prospective IRB review and approval. FDA acknowledges, however, that it would be inappropriate to deny emergency treatment to second individual if the only obstacle is that the IRB has not had sufficient time to convene a meeting to review the issue [“Emergency Use of an Investigational Drug or Biologic,” FDA Information Sheet, 1998 Update].

The investigator should attempt to contact the Executive Chair of the IRB prior to an emergency use; however, this notification should not be construed as an IRB approval.
Notification will be used by the IRB to initiate tracking to ensure that the investigator files a report within the five day time-frame required by 21 CFR 56.104(c).

**TEST ARTICLE: DEVICES**

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

FDA expects the physician to follow as many subject protection procedures as possible. These include:

1. obtaining an independent assessment by an uninvolved physician;
2. obtaining informed consent from the patient or a legal representative;
3. notifying institutional officials as specified by institutional policies;
4. notifying the Institutional Review Board (IRB); and
5. obtaining authorization from the IDE holder, if an approved IDE for the device exists.

**After-use Procedures:**

After an unapproved device is used in an emergency, the physician should:

1) report to the IRB within five days and otherwise comply with provisions of the IRB regulations;
2) evaluate the likelihood of a similar need for the device occurring again, and if future use is likely, immediately initiate efforts to obtain IRB approval and an approved IDE for the device's subsequent use; and
3) if an IDE for the use does exist, notify the sponsor of the emergency use, or if an IDE does not exist, notify FDA of the emergency use (CDRH Program Operation Staff 301-594-1190) and provide FDA with a written summary of the conditions constituting the emergency, subject protection measures, and results.

Subsequent use of the device may not occur unless the physician or another person obtains approval of an IDE for the device and its use. If an IDE application for subsequent use has been filed with FDA and FDA disapproves the IDE application, the device may not be used even if the circumstances constituting an emergency exist. Developers of devices that could be used in emergencies should anticipate the likelihood of emergency use and should obtain an approved IDE for such uses.

**REFERENCES**


FDA Regulations 21 CFR 312 Investigational New Drug Application

FDA Regulations 21 CFR 812 Investigational Device Exemptions