Emergency Use of Investigational Drugs, Biologics or Devices

I. Purpose

The emergency use provision in FDA regulations is an exemption from the requirements for prior review and approval of research by the IRB. The exemption, which must meet the specific conditions described in the regulations, allows for one emergency use of an investigational drug or biologic or unapproved medical device in a life-threatening situation for which no standard acceptable treatment is available and when there is not sufficient time to obtain IRB approval.

This policy outlines the requirements for emergency uses of investigational drugs or biologics, emergency uses of unapproved medical devices, and exceptions to the requirements for informed consent in emergency situations.

II. Definitions

**Emergency Use**: Use of an investigational drug or biologic or unapproved medical device for a human subject in a life-threatening situation for which no standard acceptable treatment is available and when there is not sufficient time to obtain IRB approval. [21CFR56.102(d)].  
*Note: Under FDA regulations, emergency use is a category of research (i.e., clinical investigation) that is exempt from the requirements for IRB review.*

**Unapproved Medical Device**: A device used for a purpose or condition for which the device would require but does not have premarket approval or an approved investigational device exemption (IDE) from FDA.

**Investigational Device Exemption (IDE)**: An application that permits a medical device that would otherwise be required to comply with an existing performance standard or to have premarket approval by FDA to be legally shipped for a clinical investigation.

**Investigational New Drug Application (IND)**: An application that permits an investigational drug that would otherwise be required to have premarket approval by FDA to be legally shipped for a clinical investigation.

**Test Article/Investigational Product**: A test article/investigational product is any drug, biologic, or medical device for human use, or human food additive, color additive, electronic product, or any other article subject to FDA regulations

**Compassionate Use**: Use of an investigational drug or biologic or unapproved medical device for a single subject (or small group of subjects) with a serious disease or condition, who does not meet the requirements for inclusion in a clinical investigation,
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and for whom no standard acceptable treatment is available. Prior FDA and IRB approval are required for compassionate use.

Note: The terms compassionate use and emergency use are not synonymous.

Life-threatening: Refers to diseases or conditions where the likelihood of death is high unless the course of the disease is interrupted; also diseases or conditions with potentially fatal outcomes.

Severely Debilitating: Refers to diseases or conditions that cause major irreversible morbidity (e.g., blindness, loss of limb, loss of hearing, paralysis, or stroke). This does not include “pre-existing” (e.g., chronic) diseases or conditions with major morbidity.

III. General Information

The emergency use of an investigational drug or biologic or unapproved medical device is research involving human subjects as defined by FDA regulations. All emergency uses are subject to the requirements of the Office of Human Research Protection Human Research Protection Program, except as described by this policy.

Note: The emergency use of a drug, biologic, or device does not meet the DHHS definition of research involving human subjects.

The use of a marketed drug, biologic, or medical device for an indication that is not listed in the FDA-approved product labeling (i.e., “off label” use) for an individual in a life-threatening situation does not constitute an emergency use as defined by FDA regulations. Regulations and institutional policy do not limit the authority of physicians to provide such emergency “medical care” to patients in life-threatening situations; however, physicians and other healthcare providers are responsible for complying with applicable state laws and other institutional requirements regarding all uses of drugs, biologics, and medical devices.

Limitations of Emergency Use

The emergency use exemption allows for a single use or single “course of treatment” (e.g., multiple doses of an antibiotic) of an investigational drug or biologic or unapproved medical device without prior IRB review. FDA regulations require that any subsequent use of the investigational product at the same institution receive IRB review and approval before the product is used again. Investigators are encouraged to evaluate the likelihood of a similar need occurring again, and if future use is likely, immediately initiate efforts to obtain IRB review and approval of a protocol to permit further use of the investigational drug, biologic, or device.

Emergency use of an investigational drug or biologic or unapproved medical device must be differentiated from “planned emergency research” in life-threatening situations. Planned emergency research is research conducted in emergency settings with subjects
who cannot provide informed consent because of their life-threatening medical conditions (e.g., comparison of methods for providing cardiopulmonary resuscitation) and who do not have an available legally authorized representative. Unlike emergency uses, planned emergency research must be approved in advance by FDA (or DHHS) and the IRB and publicly disclosed to the community in which the research will be conducted.

IV. Criteria for Emergency Use

According to FDA regulations, the emergency use exemption may be used if all of the following conditions are met:

- The use involves a test article/investigational product.
- The individual for whom the test article is intended is in a life-threatening situation. A life-threatening situation does not have to be immediately life-threatening or immediately resulting in death. Life-threatening also includes severely debilitating.
- No standard acceptable treatment is available. And the individual for whom the test article is intended does not meet the enrollment criteria for an existing IRB-approved study or an approved study does not exist.
- An intervention is needed before review at a convened meeting of the IRB. Therefore, there is not sufficient time to obtain IRB approval.

V. Prior Notification of Emergency Use

The Clinical Research Pharmacy must be notified (as applicable) of the intended emergency use of an investigational drug or biologic to arrange for the product’s shipment and proper storage, dispensing, and accountability.

1. The IRB Chair (or designee) of the appropriate IRB will be notified of an investigator’s intent to use an investigational drug or biologic or unapproved medical device for emergency use. Notification may be made in person, electronically (e.g., by telephone, fax, or email), or in writing.

2. The investigator must submit the following information to the IRB:
   i. A signed memo that includes the following:
      a) Demographic information without Protected Health Information (PHI) to include subject initials, gender, age, race, etc.
      b) Explanation of the life-threatening situation necessitating the emergency use
      c) Description of standard treatment(s) previously used and/or why available options are not acceptable.
      d) Name of the test article/investigational product to be used
      e) IND or IDE number provided by the FDA, if available
ii. Copy of the FDA Emergency Investigational New Drug Application (EIND) approval letter, if available
iii. Copy of the consent form (see Section VI), if applicable
iv. Additional documents as requested by the IRB

3. The IRB Chair (or designee) will review the submitted information and determine if the FDA’s criteria for emergency use has been met.

4. The IRB will issue an acknowledgment letter. This acknowledgment of the emergency use does not constitute an IRB approval of the research but rather acknowledges the submission meets FDA’s criteria for emergency use. Some manufacturers or sponsors will agree to the emergency use of an investigational drug or biologic, but require this letter from the IRB prior to shipping the product.

VI. Informed Consent Requirements

Investigators are required to obtain the informed consent of the subject or the subject’s legally authorized representative in an emergency use situation. The investigator is responsible for creating a consent form using the GRU Emergency Use Consent Template located in the IRBNet Forms and Templates library. All of the basic elements of informed consent (and any applicable additional elements) are to be provided, unless the situation meets the conditions for exception described below.

The product manufacturer or sponsor may provide a consent document for emergency use which will provide information needed when using the GRU Emergency Use ICD Template.

Exception to the Requirements for Informed Consent

When informed consent cannot be obtained, both the investigator and an independent physician who is not otherwise involved in the emergency use must document in the subject’s medical record and in the memo referenced in V.3 above that all of the following conditions apply:

i. The subject is confronted by a life-threatening situation necessitating the use of the investigational drug or biologic or unapproved medical device

ii. Informed consent cannot be obtained because of an inability to communicate with or obtain informed consent from the subject

iii. Time is not sufficient to obtain informed consent from the subject’s legally authorized representative
iv. 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 time is not sufficient to obtain an independent physician’s determination that the criteria for an exception to the requirements for informed consent (described above) are met, and in the investigator’s opinion the immediate use of the investigational product is required to preserve the subject’s life, the investigator must do both of the following:

i. Document in the subject’s medical record that the four criteria for an exception to the requirements for informed consent apply.

ii. Obtain an independent physician review and evaluation of the investigator’s determination in writing within 5 working days

VII. IND Requirements for Emergency Uses of Drugs and Biologics

The emergency use of an investigational drug or biologic requires an IND. To obtain an emergency use IND, an investigator should contact the product manufacturer or sponsor to determine if the investigational drug or biologic can be made available for the emergency use under the company’s IND. Alternatively, if the manufacturer or sponsor will not provide the investigational product under its IND, an investigator may contact FDA directly to obtain authorization for the company to ship the drug or biologic for the specific emergency situation in advance of an IND submission.

VIII. IDE Requirements for Emergency Uses of Unapproved Medical Devices

FDA approval prior to emergency use or shipment of an unapproved medical device is not required. The emergency use may involve a device that does not have an existing IDE, a device used in a way that is not approved under an existing IDE, or a physician who is not named as an investigator on the IDE. Whenever possible, authorization should be obtained from the sponsor (if an IDE exists for the device) before the emergency use.

In addition to determining that the criteria for emergency use are met and prior to the emergency use, investigators are required by the FDA to document in the patient’s medical record:

i. Assessment of the potential for benefit from the use of an unapproved device and to have “substantial reason” to believe that benefits will occur

ii. An independent physician’s assessment (not involved in the emergency use) of the subject
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If the device has an existing IDE and the investigator could not obtain authorization from the sponsor prior to the emergency use, the investigator is responsible for reporting to the sponsor within five working days. The emergency use of an unapproved device must be reported to FDA by the sponsor (if an IDE exists for the device) within five working days of the time the sponsor learns of the use. If no IDE exists, the investigator is responsible for reporting the emergency use directly to FDA.

IX. Reporting Requirements

1. Reporting to the IRB

Investigators are required to submit the following information within 5 working days after use of the investigational product:
   i. A signed memo containing the following information:
      1. Name of the investigational product
      2. FDA IND/IDE number
      3. Demographic information without personal identifying information (ie: subject initials, gender, age, race, etc.)
      4. Date of Use
      5. Outcome summary
      6. Summary of reportable events that occurred related to the emergency use

2. Other Reporting Requirements

The sponsor and the FDA have specific reporting times that differ with each emergency use. The letter and/or communication provided by the sponsor/FDA will include specifics as to when reporting is needed and what should be included. Please note that these reports are time specific and if not received can result in cancellation of the emergency use.