

 <b>Research Integrity Office</b>	<b>Human Research Protection Program</b> Regulatory Sheet	
Title: Emergency Use of Unapproved Medical Devices	Date Effective 10/31/2007	Supersedes P&P dated: N/A
	Identification #	Page 1 of 4

#### BACKGROUND

The Food and Drug Administration recognizes that emergencies arise where an unapproved device may offer the only possible life-saving alternative, but:

- (1) An IDE for the device does not exist; or
- (2) The proposed use is not approved under an existing IDE; or
- (3) The physician or institution is not approved under the IDE.

#### SCOPE

This policy details the emergency use of medical devices which have not been approved by the IRB.

#### AUTHORITY

Under 21 CFR §312.36, the need for an investigational drug may arise in an emergency situation that does not allow time for submission of an IND in accordance with 312.23 or 312.34. In such a case, FDA may authorize shipment of the drug for a specified use in advance of submission of an IND.

FDA Information Sheets [www.fda.gov/oc/ohrt/irbs/devices.html](http://www.fda.gov/oc/ohrt/irbs/devices.html)

#### I. POLICY

- A. Emergency use of a test article may not be used to circumvent the general requirement for prior IRB review and approval. The exemption allows for one emergency use of a test article without prospective IRB review, however, OHSU will not deny treatment to a second individual if the IRB has not had sufficient time to convene.
- B. The emergency use exemption of an investigational drug, biologic or device is permitted *only* if each of the following conditions exist as outlined in 21 CFR 56.102(d):
  1. A life-threatening or severely debilitating situation exists necessitating the use of the investigational drug, biologic or device;
  2. No generally acceptable alternative treatment is available; and
  3. Because of the immediate need to use the drug, biologic or device, there is not sufficient time to use existing procedures to obtain IRB approval for the use.
- C. When emergency treatment is initiated without prior IRB review and approval, the patient data may not be included as research data in a prior or subsequent IRB-approved project.
- D. An unapproved device may be used in human subjects only if it is approved for clinical testing under an approved application for an Investigational Device Exemption (IDE) under section 520(g) of the Act [21 U.S.C. 360(j)(g)] and 21 CFR part 812.
- E. The physician may not conclude that an "emergency" exists in advance of the time when treatment may be needed based solely on the expectation that IDE approval procedures may require more time than is available. Physicians should be aware that FDA expects them to exercise reasonable foresight with respect to potential emergencies and to make appropriate arrangements under the IDE procedures far enough in advance to avoid creating a situation in which such arrangements are impracticable.

#### II. PROCEDURE

##### A. Conditions for the Emergency Use Provision

1. *Determination of Need*

- a. The providing physician should determine if the Emergency Use criteria have been met (see I.B above).
- b. The providing physician should also assess the potential for benefits from the unapproved use of the device and have substantial reason to believe that benefits will exist.

2. *Prospective IRB Review Not Possible:*

- a. If full board OHSU IRB review and approval is possible, the responsible individual (medical professional) should pursue the prospective IRB review.
- b. ONLY IF treatment of a life-threatening condition is necessary before the IRB approval is made, does the Emergency Use Provision (Exemption from Prior IRB Review and Approval) apply.

3. *IND Required for Drugs/Biologics:*

- a. The emergency use of an unapproved investigational drug or biologic requires an IND. If the intended subject does not meet the inclusion 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 manufacturer's IND.
- b. The need for an investigational drug or biologic may arise in an emergency situation that does not allow time for submission of an IND or amendment of the manufacturer's IND. In such a case, only the FDA may authorize shipment of the test article in advance of the IND submission (or amendment). Requests for such authorization may be made by telephone or other rapid communication means to the FDA [21 CFR 312.36].

4. *Informed Consent Required:*

- a. Even for an emergency use, *the physician is required to obtain informed consent* of the patient or the patient's legally authorized representative unless both the PI and a physician who is not otherwise participating in the patient's care certify in writing all of the following [21 CFR 50.23(a)]:
  - i. The subject is confronted by a life-threatening situation necessitating the use of the test article;
  - ii. Informed consent cannot be obtained because of an inability to communicate with, or obtain legally effective consent from, the subject;
  - iii. Time is not sufficient to obtain consent from the subject's legal representative; and
  - 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.

5. *Prompt Reporting Required:*

- a. If, in the physician's opinion, immediate use of the test article is required to preserve the subject's life, and if time is not sufficient to obtain an independent physician's determination that the four conditions above apply, the clinical investigator should make the determination and, **within 5 working days after the use of the article**, have the determination reviewed and evaluated in writing by a physician who is not participating in the clinical investigation.
- b. The physician must notify the IRB within 5 working days after the use of the test article [21 CFR 50.23(c)].

**B. OHSU IRB Required Reporting and Review**

1. In order to exercise the Emergency Use Provision (for Exemption from Prior IRB Review), the following procedures must be followed:

a. *Pre-Emergency Use Notification:*

- i. The physician seeking to provide life-saving treatment with an investigational drug, device, or biologic should notify the IRB that he or she is prepared to

exercise the "Emergency Use Provision" (where possible, using any available means, such as fax, phone, email, or other method).

- ii. This notification should not be construed as an IRB approval. Rather, the IRB uses the prior notification to initiate tracking to ensure that the investigator files a report within the five day time-frame required by 21 CFR 56.104(c).

**b. Pre-Emergency Use Research Participant Protections:**

- i. OHSU requires that the physician authorizing the use of the device follow as many subject protection procedures as possible, including:
  - Obtaining an independent assessment by an uninvolved physician;
  - Obtaining informed consent from the patient or a legal representative;
  - Notifying institutional officials as specified by clinical/institutional policies;
  - Notifying the OHSU Institutional Review Board (IRB); AND
  - Obtaining authorization from the IND/IDE holder (as appropriate).

**c. Post-Emergency Use Report:**

- i. Following the treatment of an individual under the "Emergency Use Provision" the treating physician must justify the "Emergency Use", as follows:
- ii. Describe how the individual treated was in a *life-threatening situation* in which no standard acceptable treatment was available and in which there was not sufficient time to obtain OHSU IRB approval;
- iii. Document when contact was made to the IRB and what information was transmitted;
- iv. Justify why prospective IRB review was not possible;
- v. Identify how the requirements for an IND were met (if applicable - see several options, above); and
- vi. Identify the informed consent process used

**d. Subsequent Use:**

- i. Any subsequent use of the test article is subject to prospective OHSU IRB review.

**e. IRB Chairperson Review:**

- i. The IRB chairperson ( or knowledgeable designee) will review reports of "Emergency Use" (both prospective reports and retrospective reports) to determine:
  - Whether the circumstances meet the regulatory requirement; and
  - To determine whether informed consent was obtained or waived in accordance with FDA regulations.

**C. Special Issues**

1. The FDA notes that in the event that a device is to be used in circumstances meeting the criteria listed above, the device developer must notify the Center for Devices and Radiological Health (CDRH), Program Operation Staff by telephone (301-594-1190) immediately after shipment is made. [Note: an unapproved device may not be shipped in anticipation of an emergency.] Nights and weekends, contact the Division of Emergency and Epidemiological Operations (202-857-8400).
2. Some manufacturers will agree to allow the use of the test article, but their policy requires "an IRB approval letter" before the test article will be shipped. If it is not possible to convene a quorum of the IRB within the time available, the OHSU IRB may send the sponsor a written statement that the IRB is aware of the proposed use and considers the use to meet the requirements of 21 CFR 56.104(c). Although, this is not an "IRB approval," the acknowledgment letter has been acceptable to manufacturers and has allowed the shipment to proceed.

### III. DEFINITIONS

- A. **Emergency use of an investigational drug, biologic or device:** the use of an investigational article with 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 approval from the IRB.
- B. **Life-threatening:** diseases or conditions where the likelihood of death is high unless the course of the disease is interrupted and diseases or conditions with potentially fatal outcomes, where the end point of clinical trial analysis is survival. The criteria for life threatening do not require the condition to be immediately life threatening or to immediately result in death. Rather, the subjects must be in a life-threatening situation requiring intervention before review at a convened meeting of the IRB is feasible.
- C. **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.
- D. **Unapproved medical device:** a device that is used for a purpose or condition for which the device requires, but does not have, an approved application for premarket approval under section 515 of the Federal Food, Drug and Cosmetic Act.