

# **IRB Policy 32: IRB Planned Emergency Waiver**

## **Date: February 16, 2008, revision October 7, 2009**

### **I. Summary Policy**

The policy of both the East Tennessee State University Campus Institutional Review Board (ETSU IRB) and the East Tennessee State University/Veterans Affairs Institutional Review Board (ETSU/VA) IRB is that all applicable rules and regulations will be followed per the regulations for exception from informed consent requirements for Emergency Research.

### **II. Definition**

The conduct of planned research in life-threatening emergencies where the requirement to obtain prospective informed consent has been waived is covered by 21 CFR §50.24. The research plan must be approved in advance by the FDA or DHHS and the IRB, and publicly disclosed to the community in which the research will be conducted.

### **III. Planned Emergency Waivers**

First, the IRB must determine whether the research is subject to FDA or HHS regulations.

In addition, the IRB must determine whether the research is subject to VA regulations. If it is subject to VA regulations, the IRB cannot approve the study as VA policy prohibits the conduct of planned emergency research.

#### **For emergency waivers subject to FDA regulations**

- 1) The IRB may approve an investigation without requiring that informed consent of all research participants be obtained if the IRB (with the concurrence of a licensed physician who is a member of or consultant to the IRB and who is not otherwise participating in the clinical investigation) finds and documents each of the following:
  - a. The human participants are in a life-threatening situation, available treatments are unproven or unsatisfactory, and the collection of valid scientific evidence, which may include evidence obtained through randomized placebo-controlled investigations, is necessary to determine the safety and effectiveness of particular interventions.

- b. Obtaining informed consent is not feasible because of all of the following:
  - The participants will not be able to give their informed consent as a result of their medical condition.
  - The intervention under investigation must be administered before consent from the participants' legally authorized representatives is feasible.
  - There is no reasonable way to identify prospectively the individuals likely to become eligible for participation in the clinical investigation.
- c. Participation in the research holds out the prospect of direct benefit to the participants because of all of the following:
  - Participants are facing a life-threatening situation that necessitates intervention.
  - Appropriate animal and other preclinical studies have been conducted, and the information derived from those studies and related evidence support the potential for the intervention to provide a direct benefit to the individual participants.
  - Risks associated with the investigation are reasonable in relation to what is known about the medical condition of the potential class of participants, the risks and benefits of standard therapy, if any, and what is known about the risks and benefits of the proposed intervention or activity.
- d. The clinical investigation could not practicably be carried out without the waiver.
- e. The proposed investigational plan defines the length of the potential therapeutic window based on scientific evidence, and the investigator has committed to attempting to contact a legally authorized representative for each participant within that window of time and, if feasible, to asking the legally authorized representative contacted for consent within that window rather than proceeding without consent. The investigator will summarize efforts made to contact legally authorized representatives and make this information available to the IRB at the time of continuing review.
- f. The IRB has reviewed and approved informed consent procedures and an informed consent document consistent with §50.25. These procedures and the informed consent document are to be used with participants or their legally authorized representatives in situations where use of such procedures and documents is feasible. The IRB has reviewed and approved procedures and information to be used when providing an opportunity for a family member to object to a participant's participation in the clinical investigation consistent with paragraph g of this section.

- g. Additional protections of the rights and welfare of the participants will be provided, including, at least all of the following:
- Consultation (including, where appropriate, consultation carried out by the IRB) with representatives of the communities in which the clinical investigation will be conducted and from which the participants will be drawn.
  - Public disclosure to the communities in which the clinical investigation will be conducted and from which the participants will be drawn, prior to initiation of the clinical investigation, of plans for the investigation and its risks and expected benefits.
  - Public disclosure of sufficient information following completion of the clinical investigation to apprise the community and researchers of the study, including the demographic characteristics of the research population, and its results.
  - Establishment of an independent data monitoring committee to exercise oversight of the clinical investigation.
  - If obtaining informed consent is not feasible and a legally authorized representative is not reasonably available, the investigator has committed, if feasible, to attempting to contact within the therapeutic window the participant's family member who is not a legally authorized representative, and asking whether he or she objects to the participant's participation in the clinical investigation. The investigator will summarize efforts made to contact family members and make this information available to the IRB at the time of continuing review.
- h. The IRB is responsible for ensuring that procedures are in place to inform, at the earliest feasible opportunity, each participant, or if the participant remains incapacitated, a legally authorized representative of the participant, or if such a representative is not reasonably available, a family member, of the participant's inclusion in the clinical investigation, the details of the investigation and other information contained in the informed consent document. The IRB shall also ensure that there is a procedure to inform the participant, or if the participant remains incapacitated, a legally authorized representative of the participant, or if such a representative is not reasonably available, a family member, that he or she may discontinue the participant's participation at any time without penalty or loss of benefits to which the participant is otherwise entitled. If a legally authorized representative or family member is told about the clinical investigation and the participant's condition improves, the participant is also to be informed as soon as feasible. If a

participant is entered into a clinical investigation with waived consent and the participant dies before a legally authorized representative or family member can be contacted, information about the clinical investigation is to be provided to the participant's legally authorized representative or family member, if feasible.

- i. The IRB determinations required by 21 CFR §50.24(a) and the documentation required by 21 CFR §50.24(e) are to be retained by the IRB for at least 3 years after completion of the clinical investigation, and the records shall be accessible for inspection and copying by FDA in accordance with §56.115(b) of this chapter.
- j. Protocols involving an exception to the informed consent requirement under this section must be performed under a separate investigational new drug application (IND) or investigational device exemption (IDE) that clearly identifies such protocols as protocols that may include participants who are unable to consent. The submission of those protocols in a separate IND/IDE is required even if an IND for the same drug product or an IDE for the same device already exists. Applications for investigations under this section may not be submitted as amendments under §§312.30 or 812.35 of this chapter.
- k. If an IRB determines that it cannot approve a clinical investigation because the investigation does not meet the criteria in the exception provided 21 CFR §50.24(a) or because of other relevant ethical concerns, the IRB must document its findings and provide these findings promptly in writing to the clinical investigator and to the sponsor of the clinical investigation.
- l. The sponsor of the clinical investigation must promptly disclose this information to FDA and to the sponsor's clinical investigators who are participating or are asked to participate in this or a substantially equivalent clinical investigation of the sponsor, and to other IRBs that have been, or are, asked to review this or a substantially equivalent investigation by that sponsor.

### **For emergency waivers subject to HHS regulations**

- **1)** The Secretary of Health and Human Services (HHS) has waived the general requirements for informed consent for research in which the IRB responsible for the review, approval, and continuing review of the research activity has approved both the activity and a waiver of informed consent and found and documented:

- a. That the research activity is subject to regulations codified by the Food and Drug Administration (FDA) at Title 21 CFR part 50 and will be carried out under an FDA investigational new drug application (IND) or an FDA investigational device exemption (IDE), the application for which has clearly identified the protocols that would include participants who are unable to consent, and
- b. that the requirements for exception from informed consent for emergency research detailed in title 21 CFR section 50.24 have been met relative to those protocols.
- c. The Secretary of Health and Human Services (HHS) has waived the general requirements for informed consent for research in which the IRB responsible for the review, approval, and continuing review of the research has approved both the research and a waiver of informed consent and has found and documented that the research is not subject to regulations codified by the FDA at title 21 CFR part 50 and found and documented and reported to the Office for Protection from Research Risks, Department of Health and Human Services, that all the following conditions have been met relative to the research:
  - The human participants are in a life-threatening situation, available treatments are unproven or unsatisfactory, and the collection of valid scientific evidence, which may include evidence obtained through randomized placebo-controlled investigations, is necessary to determine the safety and effectiveness of particular interventions.
  - Obtaining informed consent is not feasible because:
    - The participants will not be able to give their informed consent as a result of their medical condition.
    - The intervention involved in the research must be administered before consent from the participants' legally authorized representatives is feasible.
    - There is no reasonable way to identify prospectively the individuals likely to become eligible for participation in the research.
  - Participation in the research holds out the prospect of direct benefit to the participants because:
    - Participants are facing a life-threatening situation that necessitates intervention.
    - Appropriate animal and other preclinical studies have been conducted, and the information derived from those studies and related evidence support the potential for the intervention to provide a direct benefit to the individual participants.
    - The risks associated with the research are reasonable in relation to what is known about the medical condition of the potential class of participants, the risks and benefits of

standard therapy, if any, and what is known about the risks and benefits of the proposed intervention or activity.

- d. The research could not practicably be carried out without the waiver.
- e. The proposed research protocol defines the length of the potential therapeutic window based on scientific evidence, and the investigator has committed to attempting to contact a legally authorized representative for each participant within that window of time and, if feasible, to asking the legally authorized representative contacted for consent within that window rather than proceeding without consent. The investigator will summarize efforts made to contact representatives and make this information available to the IRB at the time of continuing review.
- f. The IRB has reviewed and approved informed consent procedures and an informed consent document in accord with Sections 46.116 and 46.117 of title 45 of the Code of Federal Regulations. These procedures and the informed consent document are to be used with participants or their legally authorized representatives in situations where use of such procedures and documents is feasible. The IRB has reviewed and approved procedures and information to be used when providing an opportunity for a family member to object to a participant's participation in the research consistent with paragraph (b)(7)(v) of this waiver.
- g. Additional protections of the rights and welfare of the participants will be provided, including, at least all of the following:
  - Consultation (including, where appropriate, consultation carried out by the IRB) with representatives of the communities in which the research will be conducted and from which the participants will be drawn.
  - Public disclosure to the communities in which the research will be conducted and from which the participants will be drawn, prior to initiation of the research, of plans for the research and its risks and expected benefits.
  - Public disclosure of sufficient information following completion of the research to apprise the community and researchers of the study, including the demographic characteristics of the research population, and its results.
  - Establishment of an independent data monitoring committee to exercise oversight of the research.
  - If obtaining informed consent is not feasible and a legally authorized representative is not reasonably available, the investigator has committed, if feasible, to attempting to contact within the therapeutic window the participant's family member who is not a legally authorized representative, and asking whether he or she objects to the participant's participation in the research. The investigator will summarize efforts made to contact family members and make this information available to the IRB at the time of continuing

review. In addition, the IRB is responsible for ensuring that procedures are in place to inform, at the earliest feasible opportunity, each participant, or if the participant remains incapacitated, a legally authorized representative of the participant, or if such a representative is not reasonably available, a family member, of the participant's inclusion in the research, the details of the research and other information contained in the informed consent document. The IRB shall also ensure that there is a procedure to inform the participant, or if the participant remains incapacitated, a legally authorized representative of the participant, or if such a representative is not reasonably available, a family member, that he or she may discontinue the participant's participation at any time without penalty or loss of benefits to which the participant is otherwise entitled. If a legally authorized representative or family member is told about the research and the participant's condition improves, the participant is also to be informed as soon as feasible. If a participant is entered into research with waived consent and the participant dies before a legally authorized representative or family member can be contacted, information about the research is to be provided to the participant's legally authorized representative or family member, if feasible.

For the purposes of this waiver *family member* means any one of the following legally competent persons: spouses; parents; children (including adopted children); brothers, sisters, and spouses of brothers and sisters; and any individual related by blood or affinity whose close association with the participant is the equivalent of a family relationship.

Because of special regulatory limitations relating to research involving prisoners (subpart C of 45 CFR part 46), and research involving fetuses, pregnant women, and human in vitro fertilization (subpart B of 45 CFR part 46), this waiver is inapplicable to these categories of research. In addition, the IRB can not approve planned emergency research that is subject to VA regulations.

References:

21 CFR 50.24

Federal Register Vol 61, No. 192, pages 51531-51533