

will be deemed feasible unless, before use of the test article, both the investigator (e.g., clinical laboratory director or other responsible individual) and a physician who is not otherwise participating in the clinical investigation make the determinations and later certify in writing all of the following:

(i) The human subject is confronted by a life-threatening situation necessitating the use of the investigational in vitro diagnostic device to identify a chemical, biological, radiological, or nuclear agent that would suggest a terrorism event or other public health emergency.

(ii) Informed consent cannot be obtained from the subject because:

(A) There was no reasonable way for the person directing that the specimen be collected to know, at the time the specimen was collected, that there would be a need to use the investigational in vitro diagnostic device on that subject's specimen; and

(B) Time is not sufficient to obtain consent from the subject without risking the life of the subject.

(iii) Time is not sufficient to obtain consent from the subject's legally authorized representative.

(iv) There is no cleared or approved available alternative method of diagnosis, to identify the chemical, biological, radiological, or nuclear agent that provides an equal or greater likelihood of saving the life of the subject.

(2) If use of the investigational device is, in the opinion of the investigator (e.g., clinical laboratory director or other responsible person), required to preserve the life of the subject, and time is not sufficient to obtain the independent determination required in paragraph (e)(1) of this section in advance of using the investigational device, the determinations of the investigator shall be made and, within 5 working days after the use of the device, be reviewed and evaluated in writing by a physician who is not participating in the clinical investigation.

(3) The investigator must submit the documentation required in paragraph (e)(1) or (e)(2) of this section to the IRB within 5 working days after the use of the device.

(4) An investigator must disclose the investigational status of the in vitro

diagnostic device and what is known about the performance characteristics of the device in the report to the subject's health care provider and in any report to public health authorities. The investigator must provide the IRB with the information required in § 50.25 (except for the information described in § 50.25(a)(8)) and the procedures that will be used to provide this information to each subject or the subject's legally authorized representative at the time the test results are provided to the subject's health care provider and public health authorities.

(5) The IRB is responsible for ensuring the adequacy of the information required in section 50.25 (except for the information described in § 50.25(a)(8)) and for ensuring that procedures are in place to provide this information to each subject or the subject's legally authorized representative.

(6) No State or political subdivision of a State may establish or continue in effect any law, rule, regulation or other requirement that informed consent be obtained before an investigational in vitro diagnostic device may be used to identify chemical, biological, radiological, or nuclear agent in suspected terrorism events and other potential public health emergencies that is different from, or in addition to, the requirements of this regulation.

[46 FR 8951, Jan. 27, 1981, as amended at 55 FR 52817, Dec. 21, 1990; 64 FR 399, Jan. 5, 1999; 64 FR 54188, Oct. 5, 1999; 71 FR 32833, June 7, 2006]

§ 50.24 Exception from informed consent requirements for emergency research.

(a) The IRB responsible for the review, approval, and continuing review of the clinical investigation described in this section may approve that investigation without requiring that informed consent of all research subjects 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:

(1) The human subjects are in a life-threatening situation, available treatments are unproven or unsatisfactory, and the collection of valid scientific

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evidence, which may include evidence obtained through randomized placebo-controlled investigations, is necessary to determine the safety and effectiveness of particular interventions.

(2) Obtaining informed consent is not feasible because:

(i) The subjects will not be able to give their informed consent as a result of their medical condition;

(ii) The intervention under investigation must be administered before consent from the subjects' legally authorized representatives is feasible; and

(iii) There is no reasonable way to identify prospectively the individuals likely to become eligible for participation in the clinical investigation.

(3) Participation in the research holds out the prospect of direct benefit to the subjects because:

(i) Subjects are facing a life-threatening situation that necessitates intervention;

(ii) 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 subjects; and

(iii) Risks associated with the investigation are reasonable in relation to what is known about the medical condition of the potential class of subjects, the risks and benefits of standard therapy, if any, and what is known about the risks and benefits of the proposed intervention or activity.

(4) The clinical investigation could not practicably be carried out without the waiver.

(5) 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 subject 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.

(6) 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 subjects 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 subject's participation in the clinical investigation consistent with paragraph (a)(7)(v) of this section.

(7) Additional protections of the rights and welfare of the subjects will be provided, including, at least:

(i) 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 subjects will be drawn;

(ii) Public disclosure to the communities in which the clinical investigation will be conducted and from which the subjects will be drawn, prior to initiation of the clinical investigation, of plans for the investigation and its risks and expected benefits;

(iii) 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;

(iv) Establishment of an independent data monitoring committee to exercise oversight of the clinical investigation; and

(v) 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 subject's family member who is not a legally authorized representative, and asking whether he or she objects to the subject'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.

(b) The IRB is responsible for ensuring that procedures are in place to inform, at the earliest feasible opportunity, each subject, or if the subject remains incapacitated, a legally authorized representative of the subject, or if such a representative is not reasonably available, a family member, of the subject'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 subject, or if the subject remains incapacitated, a legally authorized representative of the subject, or if such a representative is not reasonably available, a family member, that he or she may discontinue the subject's participation at any time without penalty or loss of benefits to which the subject is otherwise entitled. If a legally authorized representative or family member is told about the clinical investigation and the subject's condition improves, the subject is also to be informed as soon as feasible. If a subject is entered into a clinical investigation with waived consent and the subject dies before a legally authorized representative or family member can be contacted, information about the clinical investigation is to be provided to the subject's legally authorized representative or family member, if feasible.

(c) The IRB determinations required by paragraph (a) of this section and the documentation required by paragraph (e) of this section 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.

(d) 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 subjects 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. Applica-

tions for investigations under this section may not be submitted as amendments under §§312.30 or 812.35 of this chapter.

(e) If an IRB determines that it cannot approve a clinical investigation because the investigation does not meet the criteria in the exception provided under paragraph (a) of this section 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. 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 IRB's that have been, or are, asked to review this or a substantially equivalent investigation by that sponsor.

[61 FR 51528, Oct. 2, 1996]

§ 50.25 Elements of informed consent.

(a) *Basic elements of informed consent.* In seeking informed consent, the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental.

(2) A description of any reasonably foreseeable risks or discomforts to the subject.

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research.

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject.

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained and that notes the possibility that the Food and Drug Administration may inspect the records.

(6) For research involving more than minimal risk, an explanation as to