Emergency Use Authorization

Section 564 of the Federal Food, Drug, and Cosmetic Act

Fact Sheet

Overview

An Emergency Use Authorization (EUA) under Section 564 of the Federal Food, Drug, and Cosmetic Act (FD&C Act)[1] allows for the special use of drugs and other medical products during certain types of emergencies.[2] The EUA authority was added by the Project BioShield Act of 2004, which amended the FD&C Act, among other things.[3]

As of March 2012, Congress is in the process of reauthorizing the Pandemic and All-Hazards Preparedness Act (PAHPA). The U.S. House and Senate have adopted their own versions of reauthorizing legislation, both of which provide greater flexibility for HHS and FDA to approve the use of medical products in emergencies but differ in some specific provisions. Congress is likely to convene a conference committee to reconcile the differences between the bills. The legislation ultimately passed may affect Section 564 and other provisions of the FD&C Act as described below. Please see *ASTHO EUA Current Issues Winter 2012* for more information about reauthorization and its potential impact on EUAs and related issues.

What the Law Does

An EUA permits the use of unapproved medical products (drugs, biologics [e.g., vaccines], and devices [e.g., diagnostics]) or the use of approved medical products in unapproved ways to diagnose, treat, or prevent serious diseases or conditions caused by chemical, biological, radiological, or nuclear (CBRN) agents if certain criteria contained in FD&C Act §564 are met.[3] Under the FD&C Act, drugs, biologics (e.g., vaccines), and devices are required to meet certain requirements for safety and efficacy before they are approved by the Food and Drug Administration (FDA) to treat particular diseases or conditions in specified ways.

Traditionally, there are three phases for the development of drugs under the FD&C Act: pre-investigational new drug (pre-IND); investigational new drug (IND); and a new drug application (NDA).[4] Each of these stages has statutory and regulatory requirements that must be satisfied. An EUA is **not** part of this traditional development pathway; it is a separate process used only during emergencies and is not part of the regular drug approval process.[4] It is not required that a drug proposed for an EUA be at a specific point on the drug development pathway.[4]

The FDA has criteria it must follow under the FD&C Act when it decides whether to issue an EUA. The FDA places conditions on the authorization that must be followed when using a product under an EUA. If a product has been approved by the FDA and is being used according to the FDA label requirements, the product does **not** require that an EUA be issued.[5]

EUAs Issued

- The Project BioShield Act granted EUA authority in 2004. Two EUAs were issued before 2009; one of these EUAs was for the Cities Readiness Initiative (CRI) Postal Model, which pre-positioned doxycycline tablets in emergency kits for USPS workers against inhalational anthrax.[12]
- Most of the EUAs have been issued in response to the 2009 H1N1 outbreak.
- In 2009 and 2010, EUAs were issued for 22 products including pandemic vaccines, antivirals, N95 respirators, and diagnostic tests.
- In 2011, FDA issued EUAs for the mass dispensing of doxycycline and the National Postal Model (NPM) (formerly the USPS CRI Postal Model).[12]
- As of December 2011, only two EUAs are in effect: (1) doxycycline for mass dispensing and (2) NPM kits.[12]

Liability Protections

An EUA authorization under FD&C Act §564 does not contain or confer any tort liability protections by itself.[6] However, medical products authorized under an EUA qualify as countermeasures (e.g., vaccines, drugs, devices) covered under the Public Readiness and Emergency Preparedness (PREP) Act, which provides immunity from tort liability, if the medical products are specified in the PREP Act declaration.[7] Medical products used pursuant to an EUA must be used and administered according to the terms of the EUA and included in the PREP Act declaration for PREP Act

coverage to arise. (See *ASTHO PREP Act Fact Sheet*.) Other federal statutes and programs including but not limited to the Federal Tort Claims Act[8] and the National Vaccine Injury Compensation Program[9] may also provide liability protections depending on the particular circumstances of an event.[6]

How the Law Works

FD&C Act §564 establishes requirements for issuing an EUA: (1) the determination that an emergency exists; (2) the declaration of an emergency; and (3) a finding by the FDA that specified criteria have been met.

Determination that an Emergency Exists

The FD&C Act requires that **one** of the following three cabinet secretaries makes a determination that an emergency exists before an EUA is authorized:

- If the *secretary of the Department of Homeland Security* determines that there currently exists, or is significant potential for, a domestic emergency involving a heightened risk of attack using specified CBRN agents.[1]
- If the *secretary of the Department of Defense (DoD)* determines that there currently exists, or is significant potential for, a military emergency involving a heightened risk to U.S. military forces of attack using specified CBRN agents.[1]
- If the *secretary of the Department of Health and Human Services (HHS)* determines that there is a public health emergency under the Public Health Service Act (PHS Act) §319[10] that affects, or has significant potential to affect, national security and involves specified CBRN agents and diseases or conditions attributable to such agents.[1]

Declaration of an Emergency

If an emergency has been determined to exist, the HHS secretary can declare an emergency justifying the authorization of an EUA under FD&C Act §564.[1,6] The §564 declaration of emergency is different from a determination of public health emergency under PHS Act §319 and a declaration of a public health emergency under the PREP Act. The HHS secretary's declaration of an emergency triggering an EUA specifies the CBRN agents and the products covered under the EUA.[11] The FDA is required to publish notice of each EUA in the *Federal Register*. In making the decision to declare an emergency justifying an EUA, the HHS secretary reviews information submitted in support of the EUA and may consult an EUA work group of federal officials.[6] One emergency declaration can support multiple EUAs.[4]

Issuance of the EUA

Once the HHS secretary has declared an emergency justifying the EUA, the FDA commissioner may issue the EUA after consultation with the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) (if feasible and appropriate given the emergency) and upon meeting statutory and other criteria.

- ***Requests for EUA***—FD&C Act §564 does not address the precise processes and data requirements for requesting and reviewing an EUA for specific products. In a guidance document, the FDA anticipates EUA requests will be submitted by government agencies (e.g., CDC, DoD) or private entities (e.g., medical product manufacturers).[2,6] The type and amount of information needed to support an EUA request depends on the nature of the declared emergency and the proposed product for which the EUA is requested.[2,6] Types of information the FDA recommends to support an EUA request include, but are not limited to, a description of the product and its intended uses, rationale behind the product's use under an EUA, available safety and efficacy data, and proposed labeling and instructions for the product's use.[2,6] The FDA reviews EUA requests on a case-by-case basis using the scientific data available at the time and the circumstances of the emergency.[2,6]

Practice Notes

- Understand the criteria under which an EUA can be issued and the conditions of authorization the FDA can place on use of EUA products.
- Understand the liability implications when using EUA products and the extent of PREP Act and other legal protections.
- Identify how your state plans to inform providers, the public, etc., about EUA products before and during an emergency.

- ***Criteria for EUA Authorization***—The FDA will issue an EUA if the FDA commissioner finds all of the following:
  - The CBRN agent specified in the declaration of emergency can cause a serious or life-threatening disease or condition.
  - Based on the scientific evidence available, it is reasonable to believe that the product may be effective in diagnosing, treating, or preventing the disease or condition specified in the declaration of emergency or caused by another medical product to diagnose, treat, or prevent a disease or condition caused by the specified agent.
  - The known and potential benefits outweigh the known and potential risks of the product when used to diagnose, prevent, or treat the serious or life-threatening disease or condition that is the subject of the declaration.
  - There is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating the disease or condition.[1,5,6]

  The FDA commissioner issues a letter that authorizes the EUA. The letter must state: (1) the diseases or conditions the product may be used to diagnose, prevent, or treat within the scope of the EUA; (2) the known and potential benefits of the product; (3) conclusions concerning the safety and potential effectiveness of the product; (4) an assessment of the available scientific evidence; and (5) required and additional conditions of authorization.[1]

- ***Conditions of Authorization***—The FDA may establish conditions on the use of a product under an EUA. For unapproved products, FD&C Act §564 requires the FDA commissioner (to the extent practicable given the circumstances of the emergency) to establish certain required conditions on an EUA that the commissioner finds necessary or appropriate to protect public health and permits the commissioner to establish other conditions that he or she finds necessary or appropriate to protect public health.[2] Such conditions include:
  - A requirement to disseminate information (e.g., fact sheets) to healthcare professionals or authorized dispensers and prospective patients or other consumers regarding the EUA, the product's significant known and potential benefits and risks, and the extent to which such benefits and risks are unknown.
  - Available alternatives and their benefits and risks.
  - For prospective patients and consumers, the option to accept or refuse the product, any consequences of refusal, and alternatives to the product.
  - Other conditions such as restricted advertising, distribution, and administration; adverse event reporting and monitoring; data collection and analysis; recordkeeping and records access; and compliance with Current Good Manufacturing Practice (CGMP).[2,6]

  For unapproved uses of approved products, certain of the above conditions as well as other conditions may be required in an EUA.[2,6] These may include labeling requirements and the distribution of appropriate information in addition to label information.[1]

- ***Duration and Termination***—The EUA is in effect for one year from the date of issuance or for as long as the HHS secretary's §564 emergency declaration is in effect, whichever is shorter.[1,5] The emergency declaration can be renewed. The EUA can be amended and may be revoked earlier if the criteria for issuance are no longer met or revocation is appropriate to protect public health or safety.[6]

Pre-EUA

Since EUA conditions are established when the EUA is issued, public health officials will not know all of the expected requirements of a particular authorization in advance of an emergency. As a result, state and local officials will have to comply with conditions for which they might not be able to effectively plan. While the law does not allow the FDA to preauthorize an EUA before the determination and declaration of an emergency, the process of requesting an EUA can begin before the actual emergency occurs.[4] A "pre-EUA" request can be submitted to the FDA based on

likely situations such as potential anthrax attacks or smallpox outbreaks.[4] Planners speculate about what the emergency might be and the products that could be used in those situations.[4] A pre-EUA allows the FDA to begin work on fact sheets and other documentation.[4] If an emergency is declared and the EUA is formally requested, the FDA can conduct a final review of the pre-EUA materials and make any substantive changes as needed.[4] The FDA will work with the states to ensure that any changes are included in final materials.[4] Even without a pre-EUA, public health officials can begin planning based on the list of potential conditions identified by the FDA in its 2007 document *Guidance—Emergency Use Authorization of Medical Products*.[6, 4]

How the Law Affects States

States have been significantly impacted by the use of EUAs during emergencies. During H1N1, the FDA issued numerous EUAs—many more than in prior years—for antivirals, diagnostic devices, and N95 masks. The public's general concerns about perceived vaccine and drug safety issues also seemed to influence their views about medical products covered under EUAs. Healthcare professionals were unfamiliar with the EUA mechanism and how to use products authorized under it. Healthcare professionals and others dispensing EUA-authorized products were concerned about potential liability issues. However, EUA authority has provided an important legal mechanism to make medicines quickly available to respond to an emergency when their availability through regular FD&C Act/FDA processes might be delayed or be accompanied by burdensome procedures within the context of an emergency response.

Because of the relative newness of the EUA authority, public and private sector entities alike are still assessing the requirements for using EUA products and the liability protections available under the PREP Act when medical countermeasures are used under EUAs. States are encountering EUA products as part of the materiel deployed in the federal Strategic National Stockpile (SNS), as well as medicines that may have be granted extended expiration dates under the federal Shelf Life Extension Program (SLEP) (see *ASTHO Fact Sheets on SNS* and *SLEP*).

Sources

[1] Federal Food, Drug, and Cosmetics Act, as amended. Codified at 21 U.S.C. 301 et seq.

[2] U.S. Food and Drug Administration. "Emergency Use Authorizations Questions and Answers" webpage. Available at www.fda.gov/NewsEvents/PublicHealthFocus/ucm153297.htm. Accessed January 31, 2012.

[3] Project BioShield Act of 2004. Pub. L. No. 108-276.

[4] *Medical Countermeasures Dispensing: Emergency Use Authorization and the Postal Model, Workshop Summary*. Institute of Medicine (US). Forum on Medical and Public Health Preparedness for Catastrophic Events. Washington, DC. National Academies Press. 2010. Available at www.ncbi.nlm.nih.gov/books/NBK53126/pdf/TOC.pdf. Accessed January 31, 2012.

[5] U.S. Food and Drug Administration and the U.S. Centers for Disease Control and Prevention. "Emergency Use Authorization" online course. Available at www.bt.cdc.gov/training/eua/index.html. Accessed January 31, 2012.

[6] U.S. Food and Drug Administration. *Guidance—Emergency Use Authorization of Medical Products*. July 2007. Available at www.fda.gov/RegulatoryInformation/Guidances/ucm125127.htm. Accessed January 31, 2012.

[7] Public Readiness and Emergency Preparedness Response Act of 2005. Pub. L. No. 109-148. Codified in the Public Health Service Act at 42 U.S.C. §§ 247d-6d, 247d-6e.

[8] Federal Tort Claims Act, as amended. Codified at 28 U.S.C. §§1346(b), 2671-2680.

[9] Health Resources and Services Administration. "National Vaccine Injury Compensation Program (VICP)" webpage. Available at www.hrsa.gov/vaccinecompensation/default.htm. Accessed January 31, 2012.

[10] Public Health Service Act §319. Codified at 42 U.S.C. § 247d.

[11] Sherman S. U.S. Dept. of Health and Human Services. "Public Health Emergency Authorities: Determinations and Declarations." Presentation at *Federal, State, and Local Public Health Preparedness* meeting. Baltimore, Maryland. December 14-15, 2010. Available at www.fda.gov/EmergencyPreparedness/Counterterrorism/ucm247676.htm. Accessed January 31, 2012.

[12] U.S. Food and Drug Administration. "Emergency Preparedness and Response: Emergency Use Authorization" webpage. Available at www.fda.gov/EmergencyPreparedness/Counterterrorism/ucm182568.htm. Accessed January 31, 2012.

This document was compiled in August-December 2011 and reflects the laws and programs current at the time. It reflects only selected portions of the laws relevant to public health emergencies; it is not intended to be exhaustive of all relevant legal authority. This resource is for informational purposes only and is not intended as a substitute for professional legal or other advice. The document was funded by CDC Award No. 1U38HM000454 to the Association of State and Territorial Health Officials; Subcontractor PI Elliott, Logan Circle Policy Group LLC.