FEHB Program Carrier Letter

All FEHB Carriers

U.S. Office of Personnel Management
Healthcare and Insurance

Letter No. 2018-10 **Date: July 30, 2018**

Fee-for-Service [8] Experience-rated HMO [8] Community-rated [8]

SUBJECT: Update on Coverage for FDA Approved Drugs, Devices and Biological Products

This letter supersedes guidance published in Carrier Letter No. 2014-13 on coverage of U.S. Food and Drug Administration (FDA) approved drugs, devices and biological products. This updated guidance provides information on FDA approval pathways and the extent to which FEHB carriers are expected to defer to FDA determinations.

In Section 6 of all FEHB brochures, carriers are required to exclude "experimental or investigational procedures, treatments, drugs or devices" from coverage. For certain drugs, devices and biological products that are approved through the FDA pathways summarized in Table 1 below, you may not deny coverage based on experimental or investigational exclusion. In addition, as with all other covered benefits, prescribed drugs, devices or biological products must be medically necessary and appropriate for the member's condition for the member to receive coverage.

Table 1:

Summary Chart: FDA Approval Pathways:

Name/Classification	**Product Type**	**Decision Authority**
CDER New Drug Application	Drugs	Defer to FDA
Premarket Approval	Devices	Defer to FDA
Category B/Non-Experimental/Investigational	Devices	Carrier determination
Premarket Notification – 510(k)	Devices	Carrier determination
Humanitarian Exemption	Devices	Carrier determination
CBER New Drug Application	Biologicals	Defer to FDA
CBER Biologics License Applications	Biologicals	Defer to FDA
Biosimilars	Biologicals	Defer to FDA
Interchangeable Biosimilars	Biologicals	Defer to FDA
Fast Track	Drugs, Devices & Biologicals	Defer to FDA

All categories in Table 1 are described in detail in the following paragraphs.

FDA Approved Drugs[1]
Under the Federal Food, Drug and Cosmetic Act, a drug is considered investigational until the FDA Center for Drug Evaluation and Research (CDER) evaluates the new drug application (NDA) and finds that the sponsor has provided "substantial evidence" that the drug was proven safe and effective for its intended use. Once such a finding is made, FDA approves the drug for marketing and no longer considers it investigational. We expect all FEHB carriers to accept this FDA approval and not deny benefits based upon a separate determination for their plan that the drug is experimental or investigational.

FDA Approved Medical Devices[2]

FDA classifies medical devices as Class I, II and III, where Class I includes devices with the lowest risk and Class III includes those with the greatest risk. The class to which a device is assigned determines the type of review and approval pathway FDA requires. Some types of laboratory diagnostic testing, including certain genetic tests, are submitted for approval through the FDA medical device program. The Premarket Approval process and the 510(k) process are also used for some devices regulated by the FDA Center for Biologics Evaluation and Research. When this is the case, carriers should follow the same processes for these items as for other devices in the same category. Details of device approval pathways are described below.

- The Premarket Approval (PMA) for devices is similar to the pathway for new drug approval and typically requires clinical trials. Approval is based on FDA determination that the application contains sufficient scientific evidence to assure that the device is safe and effective for its intended use(s). If a device or laboratory test has gone through the PMA, FEHB carriers may not deny coverage on the basis that it is experimental or investigational.
- "Category B" Non-experimental/investigational devices. This category includes items that are considered safe and effective because other manufacturers obtained FDA approval for a similar device. They represent a new generation of a previously approved device or one similar to what another manufacturer already offers. Studies may be required to establish evidence related to the specific device or to assess incremental risk. Carriers should consider the FDA's decision, along with other available information, but may make an independent determination whether such devices are experimental or investigational.
- In the 510(k) or Premarket Notification (PMN), FDA clears new medical devices that are determined "substantially equivalent" to a previously marketed one. This clearance level rarely requires clinical trials. The vast majority of new medical devices enter the marketplace via this pathway. Carriers should consider the FDA decision, along with other available information, but may make an independent determination whether such devices are experimental or investigational.
- Humanitarian Device Exemption (HDE).[3] Under provisions of the Safe Medical Devices Act of 1990, a Humanitarian Use Device is intended to diagnose or treat a condition that affects fewer

[1] http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm

[2] http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/

[3] http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/DeviceApprovalsandClearances/HDEApprovals

than 4,000 individuals in the United States per year. While HDEs are similar to the premarket approval process, they are exempt from the effectiveness requirements. Scientifically valid clinical investigations demonstrating that the devices are effective for their intended purpose are not required. However, FDA must receive sufficient information to determine that the probable benefit to health outweighs the risk of injury or illnesses, taking into account the risks and benefits of alternative devices or treatments. Carriers should consider the FDA decision, along with other available information, but may make an independent determination whether such a device is experimental or investigational.

FDA Approved Biological Products[4]

The FDA Center for Biologics Evaluation and Research (CBER) regulates biological products, such as blood component derivatives, immunoglobulins, and vaccines. Cellular and Gene Therapy Products are approved through this pathway.[5] Devices associated with blood donor testing are also regulated as biological products. There are several FDA application routes for this category described below and in Table 1 at the beginning of this letter:

- CBER oversees a New Drug Application process for biological products. This process ensures the drug/biological is safe and effective in its proposed use(s), the benefits outweigh the risks, the proposed labeling is appropriate, and the manufacturing methods include quality controls. As with FDA approved drugs, we expect all FEHB carriers to accept FDA approval and not deny benefits on the basis that the biological product is experimental or investigational.
- The Biologics License Application (BLA) is a request to introduce a biologic product. The process requires manufacturing information, pre-clinical studies, clinical studies, and labeling information. Once the FDA approves the biologic for marketing and no longer considers it investigational, we expect all FEHB carriers to accept this FDA approval and not deny benefits based upon a separate determination that the biologic is experimental or investigational.
- Biosimilars. In accordance with the Biologics Price Competition and Innovation Act of 2009, the FDA released draft guidelines in 2012 addressing biosimilars or follow-on biological product development. A biosimilar is a biological product that is highly similar to and has no clinically meaningful differences from an existing FDA-approved reference product.[6] We expect all FEHB carriers to accept FDA decisions when the agency has approved an application for licensure and found the product to be a biosimilar.
- Certain biosimilar products are also considered "interchangeable" by FDA, meaning they can be expected to provide the same clinical result as a reference product. Whether or not interchangeable products may be substituted at the pharmacy is determined by state law.

[4]http://www.fda.gov/BiologicsBloodVaccines/DevelopmentApprovalProcess/BiologicsLicenseApplicationsBLAProcess
[5]https://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/default.htm
[6]https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/TherapeuticBiologicApplications/Biosimilars/ucm580419.htm

Special Circumstances Regarding Drugs, Devices and Biological Products

- FDA Fast Track. FDA makes determinations regarding drugs, devices and biological products intended to treat serious or life-threatening conditions through the Accelerated Approval, Breakthrough Therapy, and Fast Track processes. Such approvals signify that, based on assessment of preliminary studies, the product provides meaningful therapeutic benefits to individuals over existing treatments. FDA may approve products subject to a requirement that the sponsor conduct further clinical trials post-approval to confirm the effect on clinical outcomes. Carriers must accept these FDA determinations and may not use such post-marketing approval trials as justification to deny benefits on the basis that the items are experimental or investigational.
- Emergency Use. FDA has protocols to authorize use of an experimental drug or biologic product in an emergency situation. A similar process is available for individuals who do not meet criteria of an existing study protocol; when an approved study protocol does not exist; or to gain access to experimental drugs showing promise in clinical testing for serious or immediately life-threatening conditions while final clinical evaluation and the FDA review are conducted. Each Emergency Use decision is unique to the facts of a specific case. FDA authorization to use such a drug or product in extreme circumstances is not a determination that the drug/product is no longer experimental. In emergency situations or in the cases outlined above, carriers should carefully consider all available information (including federal and state mandated 'right to try' laws where applicable) when determining coverage. As a reminder, Carrier Letter No. 2012-09 requires that FEHB carriers provide coverage for approved clinical trials.

Other Pathways to Market

OPM recognizes that companies commonly market laboratory diagnostic tests through pathways other than those available through the FDA. For example, CMS regulates laboratories that perform testing on patient specimens in order to ensure accurate and reliable test results and approves Clinical Laboratory Improvement Amendments (CLIA) certificates. The CLIA program regulates the laboratories, while the FDA ensures that devices are safe and effective for market use. A product may be marketed with only a CLIA certificate and without FDA approval. When a test is marketed under a CLIA certificate or any other non-FDA pathway, we rely on carriers to carefully consider all relevant information before making coverage determinations.

For several categories described in this letter, FEHB carriers should consider the FDA's determination, along with other available information, before making an independent decision as to whether a drug, device or biological product is covered or excluded as experimental/investigational. For these categories, carriers should review relevant medical evidence and consider, if applicable, Medicare coverage decisions and state mandates.

Finally, the FDA recognizes that there may be circumstances under which "good medical practice and the best interests of the patient" prompt physicians to prescribe a product for "an indication not in the approved labeling".[7] In such cases, FEHB carriers must cover drugs prescribed for off-label use if the

[7] https://www.fda.gov/regulatoryinformation/guidances/ucm126486.htm

medication can be legally prescribed, it is supported by clinical evidence from established compendia and is consistent with generally accepted medical practice.

If you have questions, please contact your Health Insurance Specialist.

Sincerely,

Alan P. Spielman
Director
Healthcare and Insurance