CENTER FOR
Science IN THE
Public Interest
The nonprofit publisher of Nutrition Action

April 8, 2024

The Honorable Richard Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Revesz,

The undersigned organizations support the regulation of laboratory-developed tests (LDTs) by the Food and Drug Administration (FDA) in order to ensure that patients and doctors are getting results that are clinically meaningful and accurate. LDTs are diagnostic tests that are developed and used in a single laboratory.[1] They have become increasingly important in clinical practice but have evaded regulation by FDA for decades.[1] LDTs that are inaccurate or not supported by scientific evidence put patients at risk for adverse health outcomes and increase healthcare costs.[2]

FDA's proposed rule, titled *Medical Devices: Laboratory Developed Tests*, clarifies the agency's intent to regulate LDTs as devices under the Federal Food, Drug, and Cosmetic Act (FD&C Act). The rule also proposes a policy to phase out its current enforcement discretion approach for LDTs over 4 years, meaning that LDTs would generally fall under the same risk-based enforcement approach as other diagnostic tests.

Historically, FDA has chosen not to exercise its authority to regulate LDTs under the FD&C Act, and as a result, it does not know how many tests are on the market.[3] In FDA's economic analysis of the proposed rule, it estimated that there are approximately 1,200 labs that manufacture LDTs and over 80,000 LDTs on the market, with almost 100 labs entering the market and close to 8,000 LDTs introduced each year. This is too large a market with too large an impact upon U.S. health care to remain unregulated.

Currently, the primary oversight over LDTs is by the Centers for Medicare and Medicaid Services (CMS) under the Clinical Laboratory Improvement Amendments.[3,4] However, CMS regulation focuses on laboratory operations rather than test performance.[5] FDA oversight would be much more comprehensive and include review of device effectiveness, manufacturer claims and labeling, and adverse event reporting. Even CMS agrees that FDA has the authority to regulate LDTs and the expertise to do so.[5] Further, FDA's Regulatory Impact Analysis (RIA) includes examples of FDA-regulated tests that perform better than comparable non-regulated LDTs.

The benefits of FDA regulation of LDTs under the proposed rule greatly outweigh its costs. FDA conservatively estimated that the overall benefit of LDT regulation would be $22.3 billion at a 3% discount rate compared to $5.6 billion in annual estimated costs (not including user fees and additional costs to FDA) over 20 years. This amounts to about $4 in benefits for every $1 in costs associated with the proposed rule.

The estimated benefits of regulation of LDTs were largely based on the health benefits from a reduction in problematic LDTs for COVID-19 and heart disease and the benefits from avoiding payment for inaccurate COVID-19 and non-invasive prenatal tests. FDA noted that these benefits are likely underestimated as they do not account for benefits related to other conditions, the non-health benefits to the health care system, or reduced costs in lawsuits.

Last year, CSPI filed a lawsuit against EpicGenetics for making inaccurate claims of accuracy for its fibromyalgia test.[6] The test was one of 20 examples of problematic LDTs included in a 2015 FDA report.[7] FDA's RIA cites several additional examples of such lawsuits. Also mentioned in the RIA was a 2022 pilot study in which a reference sample was created with known genetic variants related to cancer treatment.[8] Only about one-third of labs (7 out of 19) accurately identified all the genetic variants in the sample.

The proposed rule closes a major loophole in FDA regulation and will improve patient access to reliable tests. Without knowledge of the content of the final rule, we cannot comment on the specific proposals; however, the proposed rule had several strengths:

1. It removed the regulatory distinction between LDTs and non-LDT IVDs.
2. It proposed a gradual, risk-based phase-out of FDA's general enforcement approach that will give the industry adequate time to come into compliance with FDA's device requirements, while allowing the agency to gather information on the LDT market and prioritize review of high-risk tests.
3. It included no blanket exemption for LDTs currently on the market, low-risk tests, those for rare diseases, or those developed and used by Academic Medical Centers (AMCs).

There is an urgent need to finalize FDA's rule. The House Energy and Commerce Subcommittee on Health held a hearing on the rule this month in which many of the witnesses and several Representatives supported a legislative approach to the oversight of LDTs. While we would not oppose a legislative solution, Congress has repeatedly failed to act; the VALID Act has failed to pass each of the last four years. In fact, the one act Congress has taken has been to encourage FDA to finalize its rule for LDT regulation in the House FY24 agriculture appropriations report.[9] Moreover, FDA's proposed rule addresses some of our concerns with the VALID Act in ways that will benefit patients. We are also approaching the end of a presidential term with a rule potentially subject to review under the Congressional Review Act. All of this leaves FDA no choice but to act quickly to finalize this rule.

FDA should use its existing authority to its full extent to protect public health. We welcome the opportunity to discuss this with you further. We have enclosed a letter from two former FDA Commissioners in support of the proposed rule. Please contact Stephanie Rogus at

srogus@cspinet.org with any questions.

Sincerely,

Center for Science in the Public Interest
CURED Nfp (Campaign Urging Research for Eosinophilic Diseases)
Doctors for America
Elijah-Alavi Foundation
FARE (Food Allergy Research and Education)
International Center for Technology Assessment
International FPIES Association (IFPIES)
Medical Device Problems
MRSA Survivors Network
National Center for Health Research
Our Bodies Ourselves
Patient Safety Action Network
Stupid Cancer, Inc.
USA Patient Network
U.S. PIRG
Washington Advocates for Patient Safety
Woodymatters

CC:
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[4] Clinical Laboratory Improvement Amendments of 1988. P.L. 100-578.
[5] U.S. Centers for Medicare and Medicaid Services. *FDA and CMS Statement: Americans Deserve Accurate and Reliable Diagnostic Tests, Wherever They are Made*. 2024. https://www.cms.gov/newsroom/press-releases/fda-and-cms-statement-americans-deserve-accurate-and-reliable-diagnostic-tests-wherever-they-are. Accessed March 20, 2024.
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[9] U.S. House Appropriations Committee. *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, 2024*. 2024. https://www.congress.gov/118/crpt/hrpt124/CRPT-118hrpt124.pdf.