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It’s Official: FDA Drops Final Rule On LDTs

Agency Provides Broad Exemption For LDTs Already On Market, Not For Academic Centers

by Brian Bossetta

After much anticipation, the US FDA is set to publish its controversial final rule for regulating laboratory developed tests, which places the tests under the same regulatory purview as other in vitro diagnostics. While the agency opted to include an exemption for LDTs already on the market, it did not provide an exemption for tests developed in academic medical centers.

The US Food and Drug Administration announced its *final rule* for regulating lab-developed tests on 29 April, marking the launch of a new era of in vitro diagnostics.

Notably, the agency’s final rule provides a broader-than-expected exemption for LDTs already on the market as of 6 May, the scheduled date for publication in the Federal Register, while also exempting tests approved by the New York State Clinical Lab Association.

However, the final rule, as expected, does not include carve-outs for academic medical centers, other than a general exemption for tests that target “unmet needs.”

In a recent statement from his office, FDA commissioner Robert Califf reiterated his stance for the agency's action, though he has been vocal in the past stating his preference for legislation and that rulemaking became necessary due to Congressional inaction.

“LDTs are being used more widely than ever before — for use in newborn screening, to help predict a person’s risk of cancer, or aid in diagnosing heart disease and Alzheimer’s. The agency cannot stand by while Americans continue to rely on results of these tests without assurance that they work,” Califf said. “The final rule announced today aims to provide crucial oversight of these tests to help ensure that important health care decisions are made based on test results

that patients and health care providers can trust."

In an email to *Medtech Insight*, Rob Smith, managing director at policy research firm Capital Alpha Partners, embraced the final rule, as he thought the agency would provide only for some "narrower exemptions for low-risks tests."

In Smith's view, the broad exemption for currently marketed LDTs likely reflects the agency's acknowledgement that it does not have the resources to process the inundation of filings anticipated under its proposed rule. (Also see "*Experts Say FDA Isn't Ready For LDT Application Deluge*" - Medtech Insight, 12 Dec, 2023.)

This has been a point of contention all along as the FDA is already swamped.

"The FDA has faced widespread criticism for its slow pace of reviewing millions of e-cigarette marketing submissions and is unlikely to want to place itself in a similar position with a high volume of LDT filings," Smith said.

> ***"The FDA does not have the authority to unilaterally increase its regulatory jurisdiction. Congress needs to take action to clarify the regulatory structure for diagnostic tests." — Bill Cassidy***

The FDA is phasing out its general discretion of LDTs in conjunction with the final rule, which explicitly classifies them as medical devices. The initiative has been the subject of much controversy since Congress again failed to pass the proposed VALID Act at the end of 2022. (Also see "*Diagnostics Reform Out As Congress Reaches Year-End Omnibus Compromise*" - Medtech Insight, 20 Dec, 2022.)

VALID would have provided a legislative fix for diagnostics oversight reform in the US. While the FDA made clear that it preferred a legislative solution, it promised to exercise its rulemaking authority if Congress continued to drag its feet.

And it made good.

In September, the FDA published its proposed rule, which was quickly met with opposition from industry and Republicans on the Hill contending it would stifle innovation. Others questioned whether the FDA had the authority to implement the rule.

Sen. Bill Cassidy, R-LA, issued a statement to that effect in response to the FDA's release of the final rule.

"The FDA does not have the authority to unilaterally increase its regulatory jurisdiction. This rule will undermine access to essential laboratory tests, increase health care costs, and ultimately harm patients. During the pandemic, we saw how too much government interference and red tape delays lifesaving care to Americans," said Cassidy, who is also a physician. "Congress needs to take action to clarify the regulatory structure for diagnostic tests."

But as Rep. Anna Eshoo, D-CA, pointed out in a House committee meeting in March, Congress has repeatedly come up short, despite broad bipartisan support for legislation to address the LDT quandary.

"This is the sixth year for Congress to be grappling with the VALID Act. And we have not acted," Eshoo said. "We have to accept that." (Also see "*Congress Revives Talks On LDTs With Clock Ticking On FDA Rule*" - Medtech Insight, 25 Mar, 2024.)

The FDA and others in favor of the rule, including most Democrats in Congress, have emphasized that LDTs require additional oversight because of their increasing complexity and frequent use for diagnosing life-threatening diseases.

The Final Rule

The FDA says the final rule stems from "years of study and deliberation" by the agency and the public will benefit from LDT manufacturers having to comply with basic FDA requirements as new IVDs enter the market or are significantly modified, such as adverse event reporting, establishment registration and device listing, labeling standards, investigational use requirements and current good manufacturing practices, and premarket review.

"Compliance with these time-tested regulatory measures will put patients in a better position to understand and have confidence in IVDs regardless of where they are manufactured," the rule states. "FDA believes that the benefits of this rulemaking will become more and more pronounced over time, as new IVDs come on the market and as the circumstances in which we exercise enforcement discretion narrow."

The FDA disagrees with stakeholder arguments that IVDs created by labs are so fundamentally different from, or better than, other IVDs that they should not fall under the FDA's oversight.

"But these commenters are not able to point to differences that logically sustain that position," the agency says.

> *"The FDA recognizes that DoD and VHA have statutory mandates to provide for the care of specific populations in their systems. Additional oversight by FDA would not be an efficient use of government resources in these circumstances." — US FDA*

The final rule also points out that while some LDTs are subject to CLIA – Clinical Laboratory Improvement Amendments, federal standards regulating testing facilities that were enacted in 1988 and administered by Medicare – CLIA "is not a substitute for FDA oversight."

Phase-Out

The FDA will phase out its general discretion approach for LDTs over a four-year period, and the final rule establishes a risk-based approach to implementing the new enforcement policies, which could be complete by 2028:

- Stage 1, or one year after the final rule's publication, the FDA will begin to impose medical device requirements for medical device reporting (MDRs) and correction and removal reporting on LDTs;
- Stage 2, or two years after publication, the agency will end enforcement discretion around requirements other than MDRs, corrections and removal reporting, quality system regulations, and premarket review requirements for the tests;
- Stage 3, or three years after the publication, the FDA will begin enforcing quality systems regulations on LDTs;
- Stage 4, or three and half years after publication, that agency will begin to apply premarket review requirements for high-risk IVDs; and
- Stage 5, or four years after publication, the FDA will stop using enforcement discretion for moderate-risk and low-risk LDTs that require premarket submissions.

Considered Comments

In its final rule, the FDA says it considered the more than 6,500 comments it received on publishing its initial draft of the rule and made various changes to the phaseout policy based on some of them. (Also see "*FDA Receives Thousands Of Opinions On Proposal To Regulate LDTs As Comment Period Comes To A Close*" - Medtech Insight, 1 Dec, 2023.)

For example, along with its broader exemptions of currently marketed LDTs and New York State approved tests, the FDA plans to exercise enforcement discretion and “generally not enforce” requirements for LDTs manufactured and performed within the Veterans Health Administration (VHA) or the Department of Defense (DoD).

“The FDA recognizes that DoD and VHA have statutory mandates to provide for the care of specific populations in their systems and have existing oversight and enforcement groups within their respective systems,” the final rule states. “Additional oversight by FDA would not be an efficient use of government resources in these circumstances."

The FDA also notes that its general enforcement discretion approach has never applied to tests that are intended as blood donor screening or human cells, tissues, and cellular and tissue-based products required for infectious disease testing; tests intended for emergencies, potential emergencies, or material threats; or direct-to-consumer tests.

Jeff Allen, president and CEO of Friends of Cancer Research, highlighted parts of the final rule that describe certain situations in which the agency’s general enforcement discretion may continue to ensure access to diagnostic tests and minimize burdens to laboratories and developers.

He cited LDTs approved by New York, those that address unmet needs, and those marketed prior to the issuance of the final rule that have not been modified.

“This flexibility in implementation of the final rule is based on significant public input and will help FDA implement consistent oversight to ensure that tests meet performance requirements no matter where they are developed,” he said.

Allen added, however, that he hopes Congress will continue to work on legislation establishing a regulatory framework tailored toward innovative diagnostic tests.

Despite dwindling prospects for Congress taking on LDTs, Smith said he believes the final rule is “largely geared toward generating momentum for legislation to grant FDA-specific authority over LDTs.”

In the absence of that, Smith expects the final rule will generate legal challenges alleging FDA overreach.

“The four-year implementation period and the time it takes for a legal challenge to play out would theoretically provide an opportunity for Congress to move some rebranded version of the VALID Act over the next session,” Smith said.

Lisa Dwyer, a partner at the law firm King & Spalding, said the final rule does not change the nature of the decades-long battle over whether FDA has jurisdiction over LDTs.

"It just shifts the battlefield from FDA to the courts," she said. "Given the controversial nature of the rule, we expect a legal challenge. Regardless of who wins in the courts, it's likely that the battle will ultimately shift back to Congress."

In the meantime, the clock is ticking.

The rule takes effect 60 days after publication in the federal register, which would be on or around 5 July.