May 6, 2020

FDA Walks Back Enforcement Discretion for Commercially Manufactured Serology Tests

Introduction

On May 4, 2020, the U.S. Food and Drug Administration ("FDA") issued an update to its "Policy for Diagnostic Tests for Coronavirus Disease-2019 during the Public Health Emergency," walking back its enforcement discretion policy for commercially manufactured serology test kits for the detection of SARS-CoV-2 antibodies.[1] That policy did not require manufacturers to obtain FDA emergency use authorization ("EUA") for their serology tests.[2]

In its revised policy, FDA states that it will not object to the distribution by commercial manufacturers of serology tests after validation and notification to FDA, but only for up to ten business days before the manufacturer submits an EUA request. This policy change applies not only to new tests, but also to tests currently on the market under FDA's previous policy. Because serology tests currently marketed under enforcement discretion should already be validated, FDA believes ten business days from the date of publication of the agency's updated guidance is a reasonable period of time to prepare and submit an EUA request. Thus, commercial manufacturers of currently marketed serology tests must now submit EUA requests to FDA no later than May 18.

Background

On February 29, in response to a significant shortage in COVID-19 diagnostics, FDA issued an immediately in effect COVID-19 testing policy encouraging certain laboratories to begin using diagnostic tests for the detection of SARS-CoV-2 before FDA reviewed EUA requests for those tests. That initial policy applied only to laboratories certified to perform high-complexity testing consistent with requirements under the Clinical Laboratory Improvement Amendments (CLIA). Laboratories were expected to validate their tests before using them, notify FDA of such validation, and prepare and submit EUA requests to FDA within fifteen business days of test validation.

On March 16, FDA updated and significantly expanded its testing policy. For laboratories, the update created an additional, optional pathway to begin marketing COVID-19 diagnostic tests authorized by the regulatory agency responsible for regulating clinical laboratory testing in the state where the laboratory is located. So long as the state notified FDA of its intention to exercise its authority to regulate such tests in its state, FDA would not conduct further review of or issue an EUA for tests authorized under state authority. The March 16 update also created a new pathway allowing commercial manufacturers to develop and distribute COVID-19 diagnostic test kits for use by laboratories or healthcare workers at the point of care, after the manufacturers validated the tests, notified FDA, and posted instructions for use and performance characteristics for the tests on their website. The policy required manufacturers to submit an EUA request within 15 business days of validating the test. Finally, the updated policy announced that FDA would not object to the development and distribution by commercial test manufacturers, or the development and use by CLIA-certified high-complexity laboratories of serology tests to detect antibodies to SARS-CoV-2, so long as such entities complied with FDA notification and labeling requirements. This policy did not require EUA submissions for such serology tests, regardless of whether they were commercially manufactured or developed by a qualified laboratory. This enforcement discretion did not, however, extend to tests for use at home, including at-home specimen collections, as testing or collection by lay users posed additional concerns requiring FDA review.

FDA has faced significant criticism of its policy decision not to require EUAs for serology tests. As FDA itself has noted, manufacturers of numerous serology tests offered for importation or already in the U.S. market have fraudulently claimed that their products are FDA-approved or authorized, or that they are permitted to be used for at-home testing. In addition, many such tests have performed poorly during an independent evaluation by NIH's National Cancer Institute. These factors have led FDA to reverse course in its most recent update to its COVID-19 testing policy.[3]

In addition, recognizing the utility of validation work conducted by NIH, FDA created a streamlined pathway to market for certain independently validated serology tests. On April 28, 2020, FDA issued an umbrella EUA governing a specific category of serology tests referred to as "lateral flow" or "Enzyme-linked immunosorbent assay (ELISA)" tests following independent validation by NIH's National Cancer Institute, or by another government agency designated by FDA, and FDA confirmation that the tests meet the EUA's authorization criteria.[4] Commercial tests authorized under the umbrella EUA may only be performed in authorized laboratories, and new serology tests can be added to the EUA only after submission to FDA of information set forth in the scope of authorization and agency confirmation that the applicable performance and labeling criteria have been met.

FDA's Updated Enforcement Policy for Serology Tests

In explaining its policy reversal, FDA noted that its original decision to exercise enforcement discretion for commercial manufacturers of serology tests rested on a belief that "a higher level of flexibility was appropriate for antibody tests than for molecular tests that detect the presence of the virus that causes COVID-19, since antibody tests are not meant for use to diagnose active SARS-CoV-2 infection."[5] The agency further noted that its initial policy had permitted the early use of antibody tests "to begin to answer critical population-level questions about the prevalence of COVID-19 infections in different communities, and whether the presence of antibodies conveys immunity, and, if so, for how long," which could help inform future use of such tests.[6]

Since that time, however, FDA has issued several EUAs for serology tests, streamlined the authorization process for tests independently evaluated by NIH, and become aware of significant numbers of poorly performing or fraudulently marketed tests. These developments appear to have changed the cost/benefit ratio underpinning the agency's initial policy.

FDA's most recent guidance explains further that the agency never intended its policy to allow "unscrupulous actors" to claim falsely that their tests were FDA authorized or approved, were appropriate to diagnose COVID-19, or were permitted for at-home testing (which requires an EUA).[7] The large number of misleadingly marketed tests and those that have performed poorly highlighted the need for greater agency scrutiny of serology tests marketed by commercial manufacturers and parallel enforcement action to address non-compliant actors. FDA claims to have taken action against firms unlawfully marketing their tests by, among other things, detaining and refusing admission to illegitimate test kits offered for importation at the border, and has vowed to continue doing so.

The agency is also advising states, hospitals, and consumers to be on high alert for illegitimate tests and is continuing to provide updated information and educational materials to states and health care partners, to inform purchasing decisions about serology tests.[8] In addition to the steps FDA has been taking to prevent the importation of illegitimate serology tests, manufacturers of unauthorized, fraudulently marketed, or otherwise poorly performing tests may find themselves the subject of FDA Warning Letters, safety alerts, or even civil seizure or injunction actions if they do not cease distribution of such tests.

What the Updated Policy Leaves Unchanged

FDA's updated COVID-19 testing policy leaves unchanged its prior policies allowing commercial manufacturers and laboratories that develop SARS-CoV-2 diagnostic tests (as opposed to antibody detection tests) to distribute or use the tests for a reasonable time prior to EUA submission. The updated policy also preserves the ability of states to authorize the development and use of diagnostic tests without an EUA. Finally, while the updated policy "encourages" the submission of EUA requests for laboratory developed serology tests, it does not require EUA authorization for such tests. Instead, laboratories CLIA-certified for high-complexity testing can continue to develop and use serology tests, where such tests have been validated, notification has been provided to FDA, and recommended information is included in test reports as described in FDA's updated testing policy.

FDA has explained that it is requiring EUAs for commercially manufactured serology tests only, and not laboratory developed tests, because commercially manufactured tests have the potential to be distributed more broadly than laboratory developed tests. However, FDA has also noted that it will take action in connection with laboratory developed tests if questions or concerns arise about inappropriate marketing or poor performance of such tests.

Conclusion

FDA's reversal of enforcement discretion in connection with the distribution of commercially manufactured serology tests will require manufacturers of currently marketed tests to act quickly so that they can submit EUA requests to FDA no later than May 18, 2020. FDA's updated policy provides EUA templates for such serology test submissions, as well as new, specific performance threshold recommendations for specificity and sensitivity for all serology test developers. Manufacturers should pay close attention to these FDA guidelines and, if they wish to depart from them, should have a clear scientific justification for doing so.

FDA's public statements explaining its decision to require EUA submissions for these tests highlight its concern about fraudulently marketed and poorly performing tests, and its intention to take enforcement action against any entities that fail to comply with its updated policy. While the agency's focus appears to be on commercial manufacturers of serology tests for now, it has signaled its willingness to pursue laboratories that fraudulently market tests, market them for unapproved or unauthorized uses, or that otherwise fail to comply with FDA requirements.

1. Policy for Diagnostic Tests for Coronavirus Disease-2019 during the Public Health Emergency (updated May 4, 2020) (last visited May 5, 2020).
2. Policy for Diagnostic Tests for Coronavirus Disease-2019 during the Public Health Emergency (updated March 16, 2020)
3. *See* Washington Post article: FDA steps up Scrutiny of coronavirus antibody tests to ensure accuracy (last visited May 4, 2020); New York Times article: FDA Orders Companies to Submit Antibody Test data (last visited May 4, 2020).
4. *See* Serology IVD Umbrella Emergency Use Authorization Letter, FDA (last visited May 5, 2020).
5. *See* Insight into FDA's Revised Policy on Antibody Tests: Prioritizing Access and Accuracy (last visited May 4, 2020).
6. *Id.*
7. *Id.*
8. *Id.*