ROPES & GRAY

CORONAVIRUS
INFORMATION & UPDATES

August 25, 2020

HHS Prohibits FDA from Requiring Premarket Review of LDTs, Including During the COVID-19 Emergency

Attorneys
Gregory H. Levine
Beth P. Weinman

On August 19, 2020, the Department of Health and Human Services ("HHS") published a brief announcement on its website that the Food and Drug Administration ("FDA"), an agency within HHS, will not require premarket review of laboratory developed tests ("LDTs"), absent notice-and-comment rulemaking. The announcement — published without fanfare on a subsection of the HHS website devoted to coronavirus testing information and without any corresponding press release or Federal Register notice — reflects a substantial policy reversal with significant implications for FDA's regulation of LDTs in the context of the COVID-19 public health emergency and more generally.

The HHS Announcement

HHS's one-paragraph announcement, entitled "Rescission of Guidances and Other Informal Issuances Concerning Premarket Review of Laboratory Developed Tests," states that FDA "will not require premarket review of [LDTs] absent notice-and-comment rulemaking, as opposed to through guidance documents, compliance manuals, website statements or other informal issuances." HHS states that this announcement is consistent with certain executive orders of President Trump relating to reducing administrative regulation and based on "HHS's ongoing department-wide review of regulatory flexibilities enacted since the start of COVID-19."

HHS states that entities may still "voluntarily" submit a premarket approval application, 510(k) notification, or emergency use authorization ("EUA") request for an LDT and that FDA will adjudicate such a submission. The agency further notes that entities with an active EUA[1] for an LDT to detect the virus causing COVID-19 or its antibodies are "unaffected" by the announcement.

HHS reminds laboratories: "Those opting to use LDTs in their laboratories without FDA premarket review or authorization may do so with the understanding that they would not be eligible for PREP Act coverage absent approval, clearance or authorization[2] and would remain subject to regulation by the Centers for Medicare & Medicaid Services under the Clinical Laboratory Improvement Amendments of 1988, 42 U.S.C. § 263a, and its implementing regulations at 42 C.F.R. pt. 493."

Takeaways for the Clinical Laboratory Industry

HHS's recent announcement upends certain regulatory expectations in place since February 2020, when HHS Secretary Alex Azar determined a public health emergency existed warranting the emergency use of in vitro diagnostic tests to detect and diagnose the virus that causes COVID-19. While prior to the pandemic FDA was not enforcing premarket review requirements for most LDTs, FDA has taken the position that in a public health emergency, it is particularly important for the agency to review information related to an LDT's design, validation and performance characteristics.[3] As former FDA Commissioner Scott Gottlieb explained in late February via Twitter, in the event of a public health emergency, diagnostic tests "not only diagnose serious or life-threatening disease that's not completely understood, but help guide analyses of disease progression and risks to public health.… False negative results can have significant adverse consequences."[4]

Shortly after Secretary Azar's determination that a public health emergency existed related to COVID-19, in late February, FDA issued the first iteration of its "Policy for Coronavirus Disease-2019 Tests During the Public Health Emergency," ("COVID-19 Test Policy") which was intended to address "urgent public health concerns" caused by the pandemic "by helping to expand available testing capabilities in healthcare settings, and reference and commercial laboratories."[5] In this policy, FDA announced that CLIA-certified laboratories meeting the requirements for high complexity testing could begin using laboratory developed diagnostic tests (including molecular and antigen tests) after successfully validating them and notifying FDA of such validation, but only so long as they submitted an EUA request within 15 days of notification. HHS's recent announcement appears to preclude FDA from insisting on EUA submission for lab developed diagnostic tests, thereby reverting to the pre-pandemic status quo for LDTs. The announcement, however, also recognizes that certain advantages come with FDA premarket review (like immunity from liability under the PREP Act) and emphasizes that laboratories still have the option of seeking EUA authorization, 510(k) clearance or premarket approval for LDTs.

To date, FDA has not issued any public statement regarding HHS's announcement, although published media reports, including an August 20 Washington Post article, suggest that FDA officials, including Commissioner Stephen Hahn, may have disagreed with HHS's shift in policy. How FDA will operationalize and implement HHS's announcement and how industry will react to the announcement remain to be seen. Significant open questions include:

- *Will laboratories continue pursuing EUAs for COVID-19 tests voluntarily?*

  HHS's announcement appears to have been intended to increase flexibility for labs developing tests for COVID-19 to decide whether they wish to proceed within or outside FDA's EUA framework. However, significant flexibility already existed under FDA's COVID-19 Test Policy. That policy enabled a CLIA-certified lab meeting the requirements to perform high complexity testing to begin patient testing with a diagnostic LDT prior to FDA's issuance of an EUA, provided that the lab first notified FDA that it has validated the test under CLIA and then submitted an EUA request within 15 business days of the notification. It also permitted such a lab to begin patient testing with their diagnostic tests for COVID-19 without the need for an EUA request at any point, if the laboratory was authorized to do so under state authority.[6] Finally, existing policy permitted a lab to use LDTs for detecting antibodies against COVID-19 without the need for an EUA request, so long as the lab notified FDA that it has validated the test under CLIA and included certain information in test reports. However, FDA required that laboratories not testing solely under state authority notify FDA about their validation efforts, and developers of diagnostic LDTs were expected to submit EUA requests, enabling FDA to grant or deny emergency use authorization depending on test performance.

  HHS's announcement removes FDA's ability to require that diagnostic test data be submitted in an EUA request and thus takes away FDA's ability to prevent a test from being used and marketed if FDA has concerns with the data submitted. While the potential benefits of PREP Act immunity and the imprimatur of FDA's authorization may provide incentives for some labs to continue pursuing the EUA pathway, other labs may determine that the burdens of preparing an EUA and having to comply with its conditions outweigh the potential benefits.

- *What impact will the announcement have on "at-home" sample collection for COVID-19 LDTs?*

  HHS's announcement is unlikely to impact FDA's premarket review of at-home sample collection kits. FDA has

historically regulated specimen collection containers and kits as medical devices distinct from LDTs, and we expect that FDA will conclude that such sample collection kits fall outside the scope of HHS's announcement.

However, under FDA's COVID-19 Test Policy, the agency did not extend pre-EUA enforcement discretion to tests performed on samples collected at home, whether observed by an HCP via telemedicine, or wholly unobserved. FDA has issued EUAs for several at-home sample collection kits (for anterior nasal swabs), and as a condition of these EUAs, the agency has insisted that labs obtain EUAs for each test intended to be used with such authorized kits. FDA has also issued EUAs for tests that are intended for use on saliva or nasal swab samples collected at home, via at-home collection kits authorized within the same EUA. While FDA may continue to insist on premarket review for any kits that are not exempt from premarket review by regulation, it is not clear that FDA can preclude a laboratory from running an unauthorized test on specimens collected at home, using a kit that is EUA authorized or 510(k) cleared for at-home collection of specimens intended for COVID-19 testing.[7]

- *Can laboratories test pooled specimens and market their tests for screening of asymptomatic patients without FDA premarket review?*

  To the extent laboratories decide to proceed outside of the EUA framework, the HHS announcement suggests that FDA will be hard-pressed to restrict use of LDTs on pooled specimens so long as labs appropriately validate their tests on the pool sizes employed. Similarly, the announcement suggests that FDA will be unable to restrict use and marketing of properly validated LDTs for screening of asymptomatic patients.

- *How will FDA interpret the scope of the term LDT?*

  The HHS announcement does not define the term "LDT." FDA might interpret that term narrowly, in line with the agency's longstanding definition of an LDT as a test designed, manufactured and used *within a single laboratory*. FDA is aware, however, that modern laboratory companies often operate in networks with multiple locations. One question FDA will likely need to resolve is whether a test developed for use in multiple laboratories, rather than a single location, will be considered an LDT that does not require premarket review under the new HHS policy.

- *What specific FDA "guidances and other informal issuances" will be rescinded or revised?*

  Notwithstanding that the title of the announcement begins with the phrase "Rescission of Guidances and Other Informal Issuances," the words "rescission," "rescind," and similar terms appear nowhere in the body of the announcement. HHS does not identify what specific FDA guidance documents, compliance manuals, website statements, and other informal issuances are being targeted by the announcement, nor does HHS specifically direct FDA to rescind or revise anything. Nonetheless, in light of the announcement, FDA may rescind or revise certain of its guidance documents and other statements that expressly or impliedly suggest that LDTs may be subject to premarket review.

  For example, in October 2014, FDA issued a controversial draft guidance proposing a framework for regulatory oversight of LDTs, including, among other things, premarket review. FDA announced in November 2016 that it would not finalize this guidance document, yet the draft has never technically been withdrawn or rescinded. Then in January 2017, FDA issued a "discussion paper" regarding another proposed framework for LDTs that included, among other

things, premarket review. In light of HHS's announcement, FDA may formally rescind these documents or at least revise the discussion of premarket review therein. Additionally, FDA's COVID-19 Test Policy is likely to be revised to address HHS's announcement.

- *Will HHS's shift in policy be maintained if there is a new presidential administration in January?*

  Whether a Democratic administration under Joe Biden would disagree with HHS's deregulatory announcement and decide to rescind it remains to be seen. Notably, the Democratic Chairman of the House Energy and Commerce Committee, Frank Pallone, Jr., has already raised concerns about HHS's announcement. On August 20, Pallone demanded a briefing from HHS Secretary Azar regarding the announcement and "an explanation of why HHS is doing this now when the need for accurate tests is so critical."[8]

Potential Impact Beyond the Current COVID-19 Emergency

HHS's announcement does not question FDA's long-standing position that it has the statutory authority to regulate LDTs as medical devices, and that its historic LDT policies have been grounded in enforcement discretion. Nor does the announcement address any aspect of FDA regulatory oversight other than "premarket review." Further, the announcement acknowledges that FDA could, at least theoretically, seek to impose premarket review requirements for LDTs through notice and comment rulemaking, though FDA efforts to assert its regulatory authority over LDTs have stalled in recent years and FDA appears to have resigned itself to waiting for congressional action. It is possible HHS's announcement could spur Congress to take such action. However, with an election looming in just over two months, the passage of LDT legislation by the current Congress, such as the VALID Act introduced earlier this year (and discussed in a Ropes & Gray March 2020 Alert), remains unlikely.

In any event, in the near term, HHS's policy shifts are likely to make enforcement of premarket review requirements for LDTs virtually impossible even if a new administration reverses course. Further, labs that do not pursue EUAs or 510(k) clearance will also lose the advantage of clearly defined conditions of use and authorized labeling that may serve as a sort of safe harbor as they market and implement their testing services. While FDA will not be able to pursue enforcement for failure to comply with premarket review requirements, false and misleading labeling and promotional claims will continue to be fair game for FDA, FTC and the Department of Justice under applicable consumer protection and fraud statutes.

Ropes & Gray will continue to monitor developments in this area. If you have any questions, please contact any member of Ropes & Gray's FDA regulatory practice or your usual Ropes & Gray advisor.

1. The list of COVID-19 tests with active EUAs is available here: https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#LDTs.
2. The Public Readiness and Emergency Preparedness ("PREP") Act provides immunity from legal liability to covered persons for losses relating to the administration of use of covered medical countermeasures. *See, e.g.*, 42 U.S.C. §§ 247d-6d(i)(1) (defining "covered countermeasure" to include, among other things, a "qualified pandemic or epidemic product"), 247d-6d(i)(7) (defining "qualified pandemic or epidemic product" to require, among other things, that the product be approved or cleared by FDA, be subject to an active investigational new drug application or investigational device exemption, or be authorized for emergency use by FDA).
3. See, e.g. Untitled Letter to Viracor-IBT Laboratories, dated Oct. 21, 2016, available at https://www.fda.gov/media/100842/download (last visited August 24, 2020); It Has Come to Our Attention Letter to MD Biosciences, dated March 4, 2016, available at https://www.fda.gov/media/96214/download (last visited August 24, 2020)
4. See Scott Gottlieb (@ScottGottliebMD), Twitter, (Feb. 24, 2020, 9:11 AM), https://twitter.com/ScottGottliebMD/status/1231944758261665795.
5. For the original policy, see FDA, *Policy for Diagnostics Testing in Laboratories Certified to Perform High-Complexity Testing under Clinical Laboratory Improvement Amendments (CLIA) Prior to Emergency Use Authorization for Coronavirus Disease-2019 During the Public Health Emergency* (Feb. 29, 2020). For the current version, see FDA, *Policy for Coronavirus Disease-2019 Tests During the Public Health Emergency (Revised): Immediately in Effect Guidance for Clinical Laboratories, Commercial Manufacturers, and Food and Drug Administration Staff* (May 11, 2020), *available at* https://www.fda.gov/media/135659/download.
6. In its COVID-19 Test Policy, FDA requested that states intending to authorize COVID-19 LDTs under state authority inform FDA of their intention to do so, but did not require such notification.
7. It is also not clear what position FDA will take with respect to use of legally marketed specimen collection kits intended for at-home collection, but not specifically indicated for use with COVID-19 diagnostic tests.
8. "Pallone Demands Briefing on HHS Decision to Bypass FDA and Allow Lab Developed COVID-19 Tests to Come to Market Without Review" (Aug. 20, 2020), *available at* https://energycommerce.house.gov/newsroom/press-releases/pallone-demands-briefing-on-hhs-decision-to-bypass-fda-and-allow-lab.