

## **American Clinical Laboratory Association Presentation**

### **Public Meeting on In Vitro Diagnostic Multivariate Index Assays**

**February 8, 2007**

The American Clinical Laboratory Association (ACLA) is the association that represents local, regional and national hospital and independent clinical laboratories. ACLA members have significant interest in any discussion of the safety and effectiveness of laboratory testing services. ACLA thanks FDA for scheduling this public meeting and the opportunity to speak on the issues.

ACLA strongly supports the goal of the draft guidance – namely to dispel the recent confusion and lack of clarity regarding FDA regulation of certain laboratory developed tests. Unfortunately this guidance falls way short of that goal.

Firstly, FDA Guidance Documents, as acknowledged by the agency, do not—and cannot—establish legally enforceable responsibilities. As best, they describe FDA's current thinking and as such should be viewed as recommendations. It is very troubling that FDA is seeking to change substantially its longstanding policy not to regulate laboratory-developed tests as “unapproved medical devices and to introduce major new regulatory obligations on clinical laboratories by way of a 5 page draft guidance document. A draft guidance document cannot be the vehicle that FDA uses to inform laboratories and in vitro diagnostic (IVD) device manufacturers of complex changes in regulatory requirements that materially affect their ability to formulate stable short and long term business plans.

Secondly, the draft guidance does not clarify – instead it introduces confusion for laboratories and IVD manufacturers. This confusion already is having a negative impact on investment in highly novel and rapidly advancing areas of laboratory medicine, like genomic assays, because it introduces untenable regulatory uncertainty. The policy announced in the draft guidance will lead to delay in the introduction of new tests thus stifling innovation in the field of personalized medicine which holds so much promise for improved and more efficient healthcare. The draft guidance is inconsistent with the soon-to-be-released report announced by HHS that discusses the importance of removing regulatory barriers that can stymie advancements in personalized health care.

Thirdly, fundamental differences between the regulatory approaches of the FDA and of CMS, built into their respective regulatory schemes for medical devices versus clinical laboratories, respectively, make simultaneous compliance with both sets of regulation virtually impossible.

The draft guidance attempts to identify a “narrow niche of devices, whether commercially distributed or laboratory developed, that is subject to FDA regulation rather than enforcement discretion”. The guidance further sets out

three interlocking criteria to define the IVDMA test system that FDA now wishes to regulate – use of clinical data, an algorithm, and a result that cannot be interpreted by a health care professional without the help of the test’s developer.

This approach to defining an IVDMA as a new and unapproved medical device is so broad and vague that no one can determine how far it may reach in extending FDA’s regulation of clinical laboratories. A laboratory professional or physician reading the draft guidance will find many well established tests that use clinical data and algorithms to produce patient-specific results and that should not require any expansion of regulation beyond that imposed by CLIA and state regulators. ACLA has brought examples of those tests to the attention of FDA. FDA officials responded that it is not their intent to include these well-established tests under this guidance. FDA asked for help in narrowing the guidance and suggested that any laboratory that is in doubt about the regulatory requirements should contact FDA to ask for help. The issues raised by this guidance are far too important and critical to be negotiated in a guidance document environment or left to a highly subjective “we will know it when we see it” approach.

One of the most troubling aspects of the draft guidance is that it reverses widely accepted and understood FDA policy regarding the regulation of laboratory developed tests and proposes substantial new burdens on laboratories without explaining its reasons for acting and acting now. In other words, specifically, what is the “problem” that FDA aims to “solve” with this new policy? This lack of explanation and clarity demonstrates that more needs to be done to craft an approach to the issues – including an unambiguous and understandable set of criteria to separate those tests that will be subject to FDA regulation from those tests that will not be required to comply with FDA regulations. Therefore, ACLA asks that FDA withdraw this guidance document and use the formal notice-and-comment rule making process to allow the full transparency and protections for public comment and dialogue that this important policy shift warrants.

Another overarching concern is that laboratory services do not fit into FDA’s medical device regulatory scheme. Clinical laboratories provide a service, not a commercially distributed product. As such, there is no commercially distributed medical device for FDA to regulate. The appropriate regulatory scheme for clinical laboratories is the one that Congress designed to regulate laboratories: the Clinical Laboratory Improvement Amendments of 1988 (CLIA). CLIA is a comprehensive set of rules that Congress enacted to ensure the accuracy and reliability of all laboratory tests, and hence the health and safety of those tested. Whatever concerns the agency has with laboratory testing, once fully articulated, could be fully considered through proper interpretation, clarification, and perhaps some strengthening of CLIA as well as stronger enforcement.

There are very important and fundamental differences and redundancies between FDA and CLIA regulatory approaches which will make simultaneous compliance with both sets of regulations difficult, impractical and stifle innovation. FDA requires Quality System Regulations to produce essentially identical

products from the first kit to the last. This ensures that each approved commercially distributed product will perform in multiple settings as expected. CLIA, on the other hand, operates as a QA/QC "package" so that each individual laboratory on a daily basis can responsibly perform thousands of different laboratory tests with an assurance of quality.

Other differences and redundancies between FDA and CLIA regulatory approaches exist in the areas of labeling requirements, test modification, and inspections. But most importantly CLIA explicitly allows for the timely ability to modify tests to incorporate the latest medical knowledge and enhancements. FDA has consistently stressed the importance of smart regulation and following the least burdensome approach. The future of genetic testing will include numerous IVDMIA test applications. ACLA is concerned with the ability of FDA resources to keep pace with not only the initial approvals but with the ongoing approval of valuable test modifications that contribute to medical innovation and improved patient care.

In conclusion, ACLA believes that the IVDMIA Guidance should be withdrawn, any concerns with laboratory testing should be fully articulated and that the appropriate regulatory scheme for clinical laboratories is the one that Congress designed to regulate laboratories: CLIA.

Thank you for the opportunity to present.