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Hearing on "Evaluating Approaches to Diagnostic Test Regulation and the Impact of FDA's Proposed Rule"
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Good morning and thank you, Chairwoman McMorris Rodgers, Ranking Member Pallone, Subcommittee Chair Guthrie, Ranking Member Eshoo, and subcommittee members for the opportunity to testify. My name is Zach Rothstein and I am the Executive Director of AdvaMedDx, a Division of the Advanced Medical Technology Association ("AdvaMed"). AdvaMed is the world's largest medical technology association, and AdvaMedDx is a Division within the association governed by a separate Board of Directors comprised of CEOs and business leaders of the world's leading manufacturers of *In Vitro* diagnostic ("IVD") tests, instruments and other materials needed to perform tests. Our members, which range from large established firms to pre-revenue startups, are among the world's most innovative companies. They have successfully brought to market, nationwide and accessible to patients of all backgrounds, exceptionally sophisticated, groundbreaking, and technologically advanced diagnostic products, all while operating within the existing FDA medical device framework.

Diagnostic tests are a cornerstone of patient care and the modern health care system. Many diagnostic tests that are performed by clinical laboratories are test "kits" developed by our members that are either exempt from FDA premarket review or have received FDA clearance or approval as an IVD device, and which can be used in more than one laboratory. Other diagnostic

tests are developed by a laboratory as a Laboratory Developed Test ("LDT") solely for use in that laboratory, often utilizing instruments and other materials made by our members. In a growing number of instances, laboratories, some of which are AdvaMed members, have received FDA clearance or approval for these LDTs.

1. The Fragmented Regulatory Landscape For Diagnostic Testing

Diagnostic tests provide vital information at every stage of patient care through detection and diagnosis of disease, identification of increasingly personalized therapeutic options, and determination of how long, and in what manner, a particular treatment should be pursued. The Clinical Laboratory Improvement Amendments of 1988 ("CLIA") regulates laboratories, with a focus on overall laboratory operations and laboratory performance.[1]

While CLIA oversees laboratory operations, neither CLIA nor the Centers for Medicare & Medicaid Services ("CMS"), which administers many aspects of the CLIA program, requires premarket evaluation of a test's accuracy and clinical validity, and CMS has limited insights into the postmarket performance of the test. As CMS has previously stated in testimony before this Subcommittee, CLIA does not regulate the clinical validity of a test, that is, the accuracy with which the test identifies, measures, or predicts the presence or absence of a clinical condition or

[1] 42 U.S.C. § 263a; 42 C.F.R. § 493 *et seq*.

predisposition in a patient.[2] Further, the Agency has testified that "CMS does not have scientific staff capable of reviewing complex medical and scientific literature in determining clinical validity. This expertise resides within the FDA."[3]

In contrast, FDA's review of devices for safety and effectiveness, in the context of IVD devices, focuses on clinical, as well as analytical, validity. The Food, Drug, and Cosmetic Act ("FDCA") establishes a risk-based framework for all medical devices, which are defined under the law to include tests "intended for use in the diagnosis of disease or other conditions"—such as IVDs.[4] The FDCA's regulatory framework for all devices is designed to provide a reasonable assurance of safety and effectiveness for patients. This is achieved through premarket review for IVDs, when necessary, registration in a public database, along with general and often special controls and a variety of postmarket requirements, including but not limited to maintaining a quality system, reporting adverse events and malfunctions, and reporting voluntary recalls.[5]

Currently, as a practical matter, regulatory oversight of a particular type of diagnostic test depends upon what entity developed the test. Under FDA's policy of enforcement discretion, most LDTs have not been subject to active regulation as IVD devices, with many notable

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[2] Hearing Before the Subcommittee on Health of the Committee on Energy and Commerce, House of Representatives (Nov. 15, 2015) at p. 40, available at https://www.govinfo.gov/content/pkg/CHRG-114hhrg99657/pdf/CHRG-114hhrg99657.pdf; *see also* CMS Fact Sheet on Laboratory Developed Tests, *available at* https://www.cms.gov/regulations-and-guidance/legislation/clia/downloads/ldt-and-clia_faqs.pdf.

[3] *Id.* at p. 25.

[4] 42 U.S.C. § 321(h)(1)(B).

[5] *See* 21 C.F.R. § 807 (registration and listing); 21 C.F.R. pt. 803 (adverse event and malfunction reporting).

exceptions. For example, dozens of LDTs have received FDA clearance or approval as devices under the FDCA, including tests used in cancer screening, diagnosis, and treatment decisions, opioid use disorder, toxicology, clinical chemistry (including kidney function), genetic risk factor, hemophilia, and chronic weight management. LDTs have also received humanitarian device exemptions ("HDEs") and investigational device exemptions ("IDEs").

2. Congress Should Pass Diagnostics Regulatory Reform

We understand the important role that FDA plays in ensuring the safety and effectiveness of IVD devices, but we have been a consistent advocate for improvements to the current regulatory framework. AdvaMedDx strongly supports legislative reform to modernize the device framework so that it is tailored to provide an appropriate, risk-based oversight program for innovative IVDs—including test "kits," LDTs, and the instruments upon which these assays (tests) run. Indeed, the current regulatory framework for diagnostics was established decades ago and has remained fundamentally unchanged despite dramatic advancements in the field. That is why we have supported, and continue to support, comprehensive legislative reform that would result in a modernized regulatory framework that spurs innovation and access to testing and is applied to all diagnostic tests based on their level of risk. An updated framework, reflective of the unique nature of diagnostics, is essential to fostering innovation and ensuring patients and clinicians have confidence in the accuracy and validity of all tests. We appreciate the interest of members of Congress from both sides of the aisle on this issue in recent years, and the leadership of Reps. Bucshon and DeGette in developing the Verifying Accurate Leading-

Edge In Vitro Clinical Test Development ("VALID") Act.[6] We welcome the opportunity now to renew these efforts.

Ultimately, all stakeholders share an interest in a regulatory framework specifically designed for diagnostic tests that ensures that patients and providers can be confident that tests perform as intended for their clinical use, and that facilitates rapid innovation that can improve diagnostics, screening, and treatment decisions. This modernized regulatory framework should include, at a minimum, the following elements:

- **FDA Oversight**—A modernized, unified regulatory framework for all diagnostic tests should be overseen by FDA under the FDCA.

- **Review Standard Tailored to IVDs and Ensures Patient Safety**—The framework should include a premarket review standard that is clearly defined for diagnostics as analytical and clinical validity. This standard should apply the gold standard of safety and effectiveness in a manner that is specifically tailored for diagnostic tests to ensure accurate and high-quality tests.

- **Transparency for Patients and Providers**—A public repository of critical, descriptive information about each test offered to patients and providers should exist and include the

[6] VALID Act of 2023, H.R. 2369, 118th Cong. (2023).

pathway by which a test is marketed, substantiated claims of intended use, summary analytical and clinical validation information, and conformance with standards.

- **Risk-Based, Flexible Framework**—The framework should provide for a risk-based and flexible approach to regulation. FDA review and oversight resources should be squarely focused on tests, and on modifications to existing tests, that pose greater risks to patients, while exempting from premarket review low-risk, well-established tests, and utilizing mitigating measures to support a least-burdensome regulatory approach.

- **Ensuring Access to Testing for Unmet Needs**—A modernized regulatory approach to IVDs must provide a reasonable path to market for tests that meet an unmet need, including for pediatric patients and rare disorders, some of which do not fall within the humanitarian device exemption yet are critical to public health.

- **Modernized Review Pathways**—Updated review pathways should provide FDA necessary oversight tools while accommodating innovation and improvements in testing. These reforms would build upon recent legislative reforms applicable to devices generally, such as predetermined change control plans.[7] AdvaMedDx supports, among other ideas, an approach under which FDA would review a representative test, demonstrating the developer has robust validation processes, and afterwards the

[7] Food and Drug Omnibus Reform Act of 2022 (FDORA), Pub. L. No. 117-328, 136 Stat. 5807.

developer could bring validated tests utilizing the same technology (or fixed combination of technologies) to market. A well-designed, appropriately implemented program can help advance a least-burdensome approach to diagnostics and promote high-quality diagnostic innovation.

- **Point-of-Care ("POC"), Including Home Testing**—A crucial aspect of a modernized framework must recognize that point-of-care diagnostics are critical to the future of healthcare. CLIA-waived tests (*e.g.*, physician offices, clinics) play a vital role to support public health, including advancing health equity. The COVID public health emergency demonstrated the value in POC testing, including at-home testing, and at-home sample collection. With the increasing need for timely POC diagnostics from emerging infectious disease to antibiotic resistance, and the benefits of broader access to testing in reducing health disparities, such technologies are integral to support access and timely care for patients.

- **Diagnostic Instrument Innovation**—A modern framework should provide reform to ensure continued innovation in modern diagnostic instruments (sometimes referred to as "platforms"). As part of a risk-based approach, well-designed policies should incentivize the development of new, as well as improvements to, existing instruments. For instance,

we recommend codification of FDA's longstanding, pro-innovation policy known as the Replacement Reagent and Instrument Family Policy ("RRIFP").[8]

- **Transition that Prevents Disruptions**—Adoption of a modernized regulatory approach should be undertaken in a manner that avoids undue disruption to the testing market and does not result in delays in test reviews, by using an appropriate implementation timeline, providing for sufficient guidance and education about the new framework and review procedures, and providing necessary appropriated resources to support implementation.

3. FDA's Proposed Rule Clarifies that *In Vitro* Diagnostics are Devices, Including When Manufactured by a Laboratory

In the absence of comprehensive legislative reform, FDA has initiated rulemaking to clarify that an IVD that meets the statutory definition of a device is a device, regardless of whether the manufacturer of the test is a laboratory.[9] The Agency has taken this step after more than a decade of efforts to bring clarity to LDT regulation through other means such as guidance. Throughout these efforts, FDA received feedback and criticism from a variety of stakeholders

[8] FDA Guidance for Industry and FDA Staff: Replacement Reagent and Instrument Family Policy for In Vitro Diagnostic Devices (Aug. 2022), *available at* https://www.fda.gov/media/111186/download.

[9] Medical Devices; Laboratory Developed Tests, 88 Fed. Reg. 68,006 (Oct. 3, 2023).

that the Agency should undertake notice and comment rulemaking before changing its policy of enforcement discretion.[10]

Now that FDA has initiated rulemaking to clarify that the regulatory definition of IVDs applies even if the manufacturer of the IVD is a laboratory, the Agency will need to address how to implement this new rule, and has sought comment on the impact of the regulation on certain patient populations and types of LDTs. However, as noted above, dozens of LDTs have been approved or cleared as devices under the law, and have received IDEs for use in clinical trials—all of which are grants of authorization that are only available to devices under the law.[11] Some of our members have invested, and continue to invest, significant research and development efforts to achieve FDA authorization under the FDCA for LDTs.

Over time, FDA's exercise of enforcement discretion for LDTs has been identified by many stakeholders, as well as FDA, as a growing gap in diagnostics oversight.[12] FDA initially chose to exercise enforcement discretion for LDTs because they were typically lower-risk tests with well-established test methods or used in low volume. Today, however, many LDTs developed and offered by laboratories include even the most complex, high-risk and advanced molecular

[10] In addition to numerous private stakeholders arguing for notice and comment rulemaking, during the Trump Administration, the General Counsel of the Department of Health and Human Services opined that, while at least some LDTs would meet the statutory standards for regulation as a medical device, the Agency should undertake notice and comment rulemaking to adopt a policy of active regulation.

[11] 21 U.S.C. 321(h)(1).

[12] *See, e.g.,* 88 Fed. Reg. 68,006.

diagnostics—such as genetic tests that guide choices among cancer treatments or tests used in the diagnosis and treatment of common and serious or life-threatening disorders.

Even the most innovative test is only valuable if patients and providers can have confidence that it is analytically and clinically valid, and its performance is monitored and assessed postmarket. As it stands now, not all tests, even if they are used for moderate- or high-risk purposes, are subject to those premarket and postmarket assurances. We recognize that the regulatory system for diagnostics should be improved, and that doing so would benefit *all* test developers, and most importantly, patients, by supporting access to trusted, reliable, and cutting-edge diagnostics.

4. Reform Will Increase Investment in, and Deployment of, Diagnostics

Maintaining two very different oversight mechanisms for tests that are used for the same clinical purposes, with the differences in regulatory oversight often opaque to providers and patients, is not favorable for public health. Moreover, it stifles investment in, and deployment of, IVDs nationwide due to the market dynamics and incentives it fosters.

Regulatory certainty is crucial for fostering a favorable environment for innovation. A unified oversight program would clarify regulatory expectations, reducing the ambiguity that currently hampers investment decisions. A clear regulatory landscape is instrumental in encouraging innovation of new and improved diagnostic tests.

5. Conclusion

Diagnostics regulatory reform is a critical topic for patients and public health, and for ensuring that providers have access to the most high-quality, innovative diagnostics in the future. We appreciate that this Committee has re-initiated consideration of IVD regulation, and thank you for the opportunity to participate in this hearing. We look forward to continued engagement with Congress on this issue.