DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006D–0347]

Draft Guidance for Industry, Clinical Laboratories, and FDA Staff on In Vitro Diagnostic Multivariate Index Assays; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance entitled ''Draft Guidance for Industry, Clinical Laboratories, and FDA Staff on In Vitro Diagnostic Multivariate Index Assays.'' This draft guidance addresses the definition and regulatory status of a class of in vitro diagnostic devices referred to as In Vitro Diagnostic Multivariate Index Assays (IVDMIAs). The guidance also addresses premarket and postmarket requirements with respect to IVDMIAs. An IVDMIA employs data, derived in part from one or more in vitro assays, and an algorithm that usually, but not necessarily, runs on software, to generate a result that diagnoses a disease or condition or is used in the cure, mitigation, treatment, or prevention of disease.

DATES: Submit written or electronic comments on this draft guidance by [*insert date 90 days after date of publication in the* **Federal Register**].

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Draft Guidance for Industry, Clinical Laboratories, and FDA Staff on In Vitro Diagnostic Multivariate Index Assays'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220),

Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 240–276–3151. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Courtney Harper, Center for Devices and Radiological Health (HFZ- 440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 240–276–0490, ext. 162.

SUPPLEMENTARY INFORMATION:

I. Background

The definition of a device is set forth at section 201(h) of the Federal Food, Drug and Cosmetic Act (the act) (21 U.S.C. 321(h)). It provides in relevant part: ''The term 'device' * * * means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is * * * (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals * * *'' (21 U.S.C. 321(h)). An IVDMIA is a test system that employs data, derived in part from one or more in vitro assays, and an algorithm that usually, but not necessarily, runs on software, to generate a result that diagnoses a disease or condition

or is used in the cure, mitigation, treatment, or prevention of disease. An IVDMIA is therefore a device within the meaning of the act.

FDA is aware of some confusion about the regulation of IVDMIAs that are developed by and used in a laboratory. We believe this confusion derives in part from FDA's approach to regulation of laboratory-developed tests that use commercially available ASRs and other commercially available, FDA-regulated components. FDA seeks to dispel the existing confusion and clarify its approach to regulation of IVDMIAs with this guidance document.

Some of the apparent confusion is associated with the rules that classify and regulate analyte specific reagents (ASRs) that move in commerce (hereinafter ASR rule) (§§ 864.4020, 809.10(e), and 809.30 (21 CFR parts 864 and 809)). The ASR rule does not extend to tests developed in-house by clinical laboratories using commercially available ASRs and used exclusively by that laboratory, or ASRs created in-house and used exclusively by that laboratory for in-house testing. (November 21, 1997 **Federal Register**, 62 FR 62243, 62249.) While FDA stated in the preamble to the final ASR rule that ''clinical laboratories that develop [in-house] tests are acting as manufacturers of medical devices and are subject to FDA jurisdiction under the act,'' 62 FR 62249, FDA chose not to extend the rule to such tests and it has generally exercised enforcement discretion over laboratory-developed ASRs and laboratory-developed tests that use commercially available and laboratory-developed ASRs.

FDA took this approach because it believed it was regulating ''the primary ingredients of most in-house developed tests,'' and because it believed that laboratories certified as high complexity under the Clinical Laboratory Improvement Amendments, 42 U.S.C. 263a, ''have demonstrated expertise and

ability to use ASRs in test procedures and analyses.'' (62 FR 62249 (emphasis added)).

FDA believed it was regulating the primary ingredients of most in-house tests because it was regulating the common elements of in-house tests, including most ASRs (§ 864.4020), general purpose reagents (§ 864.4010), general purpose laboratory equipment (21 CFR 862.2050), other laboratory instrumentation (21 CFR part 864, subpart D), and controls (21 CFR 862.1660). IVDMIAs include elements, as described in the section on ''Definition and Regulatory Status of IVDMIAs'' of this guidance, that are not among these primary ingredients of in-house tests and that, therefore, raise safety and effectiveness concerns.

Also, as stated previously, FDA decided to exclude laboratory-developed tests from the ASR rule due to its confidence in high-complexity laboratories' ability to use ASRs. The manufacture of an IVDMIA involves steps that are not synonymous with the use of ASRs and that are not within the ordinary ''expertise and ability'' of laboratories that FDA referred to when it issued the ASR rule. Therefore, IVDMIAs do not fall within the scope of laboratory-developed tests over which FDA has generally exercised enforcement discretion. FDA intends to issue guidance regarding those laboratory-developed tests over which it has in the past generally exercised, and over which it intends to continue to exercise, enforcement discretion. IVDMIAs must meet pre- and post-market device requirements under the act and FDA regulations, including premarket review requirements in the case of class II and III devices.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized will represent the agency's current thinking on IVDMIAs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. To receive ''Draft Guidance for Industry, Clinical Laboratories, and FDA Staff on In Vitro Diagnostic Multivariate Index Assays,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 240–276–3151 to receive a hard copy. Please use the document number 1610 to identify the guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance

documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 807.87 have been approved under OMB control number 0910–0120; the collections of information in §§ 809.10 and 809.30 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR 814.20 have been approved under OMB control number 0910–0231; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR part 820 have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR part 803 have been approved under OMB control number 0910–0437.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: September 1, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 06–????? Filed ??–??–06; 8:45 am]

BILLING CODE 4160–01–S