



Facing Hereditary Cancer EMPOWERED

May 22, 2022

U.S. Senate Committee on Health, Education, Labor & Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

Re: VALID Act (H.R.4128 / S.2209) Feedback

Dear Senators:

We are writing to provide feedback on the most recent version of the Verifying Accurate Leading-edge IVCT Development (VALID) Act. Our organization represents millions of Americans with or at increased risk of hereditary cancers. The community we serve relies heavily on laboratory developed tests and *in vitro* diagnostics to identify those with an inherited predisposition to cancer and to guide treatment of those diagnosed with disease.

Below, we have detailed our top 4 areas of concern and feedback:

1. **Moderate-risk category** is a welcome addition, however clarification is needed around how Moderate-risk tests would be managed specifically differentiating them from tests deemed to be Low-risk.
2. **Technology certification** places undue emphasis on test accuracy without incorporating interpretation of results and therefore, impact on patient risk. Lack of expiration is imprudent and may result in patient harm.
3. **Grandfathering** of currently marketed tests is not acceptable in perpetuity.
4. **Post-marketing authority** of the FDA must be sufficiently clear to create meaningful protection for consumers.

1. Risk Categories

We appreciate the addition of a Moderate-risk category to encompass tests that do not lead to immediate harm or death if inaccurate but are either irreversible (e.g., surgical procedures) or delay or alter care that is life-sustaining (e.g., cancer treatment).

Many of the tests for patients undergoing genetic testing impact decision-making about cancer treatment or prophylactic surgery, and while risk is not immediate—it is irreversible. Risk-reducing surgeries have life-altering consequences. Similarly, delay of appropriate treatment may have a significant life-threatening impact. For example, national medical guidelines recommend that women with BRCA genetic mutations undergo risk-reducing, bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes) and consider risk-reducing mastectomy to mitigate their significant cancer risk. An inaccurate test result could lead to unnecessary, life- and body-altering

surgery. Alternatively, it may result in treatment delay or health insurance denials of appropriate treatments, screening and risk-reduction measures, which can have life-threatening ramifications.

The inclusion of a Moderate-risk category for tests that are not immediately life-threatening if inaccurate, but have the potential for substantial harmful impact over a patient's lifetime (e.g., due to irreversible decisions such as surgery or modification of treatment) is beneficial to patients. However, the pathway for approval of Moderate-risk tests needs to be clarified. Tests deemed "Moderate-risk" should be subject to oversight and evaluation by the FDA for test accuracy and whether potential harm can be adequately mitigated.

Technology certification as currently drafted excludes High-risk tests but not Moderate-risk tests. Evaluation of whether a given Moderate-risk test is appropriate for technology certification is needed. Additionally, modifications under a technology certification could alter the risk category for the test. As written, no oversight of risk similarity occurs. Moderate-risk tests should also be excluded from technology certification.

2. Technology Certification

The VALID Act provision for technology certification is too broad and includes potentially High- or Moderate-risk tests. As written, laboratories that do multiple tests may choose a technology certification that allows the laboratory to submit one, representative test as proof of proficiency. Approval of a technology certification application would permit a laboratory to market tests with similar clinical and analytical validity within the scope of the order—a single technology. A premarket application can serve as a representative test for technology certification.

While some tests may be sufficiently similar to a reviewed and approved test, others using the same or comparable platforms may differ in diagnostic or clinical accuracy that would impact interpretation and intended use. For example, next generation sequencing (NGS) as a platform may have verifiable accuracy in one portion of the genome but its analytic validity may differ in other regions due to the particular sequence in question.

Furthermore, as depicted, technology certification places an undue emphasis on diagnostic accuracy and similarity of test protocols while insufficient weight is placed on clinical accuracy or differences in the interpretation of test results with respect to its intended use and indications. Because the evaluation of tests is driven by the risk to patients, there is a need to adequately incorporate whether interpretation of test results (clinical accuracy) is sufficiently similar to an approved test, or not.

A single test example may not adequately convey the clinical accuracy for a range of tests. For example, next generation sequencing (NGS) as a platform may have a verifiable accuracy of sequence results but dissimilar clinical validity—interpretation of that result and its bearing on patient health could differ dramatically with different genes or mutations. The proposed technology certification places unwarranted emphasis on analytical test evaluation and insufficient weight on the clinical accuracy or interpretability of the results for diagnostic decision-making. This process for certifying an entire class of tests based on the diagnostic accuracy of the test bypasses review of key information that impacts patient risk.

3. Grandfathering

Grandfathering all extant tests will result in inadequate protection for consumers. The regulatory reform proposed in this legislation is needed for the future, but also because there are currently marketed tests that are of concern. We recognize that the number of existing tests would require time for FDA review and propose that tests currently on the market not be grandfathered in perpetuity. Rather, these tests should be required to undergo FDA review within a reasonable period (within 5-7 years) after initiation of this regulatory framework.

4. Post-Market Authorities

The FDA needs the clear authority to ensure the validity and quality of all tests on the market, including grandfathered tests and tests approved for use under a technology certification order.

Similarly, FDA must have sufficient post-market authority to preserve patient safety. Regulators need continuous insight into the performance of tests once they have reached the market, and the ability to request information from developers about the validity and quality of their tests. When a test appears to be delivering inaccurate and/or unreliable information to patients and providers, it is imperative that FDA have authority to take action, such as putting additional safeguards in place to mitigate risks or requiring that the test be removed from the market. As written, VALID does not provide these assurances and presents a risk to public health and patient safety as a consequence.

The Special Rule proposed for grandfathered tests (those with insufficient scientific evidence to support analytical or clinical validity) should also be applicable to tests under Technology Certification. This would facilitate the reassessment of tests accorded Technology Certification as needed.

An example of need for post-market authority is in the genetic testing area. With the expansion of genetic testing in recent years, we have seen an increase in fraudulent practices—often targeting our most vulnerable citizens. In the majority of cases, individuals with little or no healthcare background or genetics training marketed and facilitated genetic testing for a hereditary predisposition to cancer (e.g., BRCA and similar genetic mutations) at community health fairs, senior centers, nursing homes, etc.

In some cases, those tested never received their test results. In other cases, the results were delivered by individuals who should not be engaged in the collection, interpretation or communication of medical information. As noted above in the comments regarding risk categories, inappropriate genetic testing or misinterpretation of results can lead to serious adverse outcomes for patients and their families. Our organization has filed complaints against several labs and companies—with the OIG, FTC, and state attorneys general—for false claims and unscrupulous behavior. It is important to note that we reached out to the FDA but were told that this exceeded its authority because the agency has no oversight of LDTs unless they are FDA-cleared or -authorized. CLIA also indicated that it lacks authority in this matter.

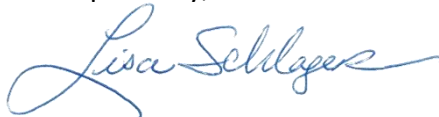
Additional Concerns

While the above reflect our primary issues with the proposed bill, we have a number of additional concerns including:

- **Funding and personnel resources.** The current draft does not provide FDA with the necessary resources to implement the changes proposed in the legislation. Of particular concern is the lack of authorization for funding that FDA will need in the years immediately after enactment, before user fees can be collected, as well as the restrictive statutory limits on total user fees available to the agency in the future.
- The proposed **exemptions** are too wide-ranging and ultimately put patients at risk.
- **Expiration of technology certification** does not negate the certification. This is unacceptable. Certification expiration must be taken seriously and a mechanism for timely recertification should be put in place.
- **Transparency of review level.** Consumers should be provided with information about the level of review a test has undergone. Tests should be **labeled** to provide transparency about the level of review, including those that have been grandfathered or are available via technology certification.
- **Adverse event documentation.** Lab errors need to be documented as **adverse events** and this information must be made available to the public so providers and patients can choose reliable vendors for their tests.
- **Ability to request data.** There are inadequate provisions to ensure that the FDA can **request data** about a test as needed; FDA will require additional authority to request information from test developers and remove poorly performing tests, even if they are available via grandfathering or technology certification.
- **Post-market approval.** The bill includes a provision that exempt tests can also be subject to post-market approval; it is unclear how that would take place.
- **Bracketed text.** The proposed bill has a significant amount of bracketed text. This is concerning because use and interpretation of the bracketed language may significantly affect implementation. Clarification is needed to ensure accurate and consistent application of the law.

We would greatly appreciate the opportunity to engage and further discuss the feedback provided. We would like to request that the committee convene a hearing for this bill to allow input from patients, their families and patient advocate organizations. Moreover, we would like the ability to provide feedback on the final bill once the language is “finalized.”

Respectfully,



Vice President, Public Policy
301-961-4956
LisaS@facingourrisk.org