May 16, 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 follow-up and expand upon on feedback provided regarding the Verifying Accurate Leading-edge IVCT Development (VALID) Act. Our organizations represent millions of Americans who will be profoundly affected by the sweeping changes proposed in the VALID Act. The communities we serve rely 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 3 areas of concern and feedback:

1. Current high- and low-**risk categories** inadequately reflect test impact on patients.
2. **Grandfathering** of currently marketed tests is not acceptable in perpetuity.
3. **Technical certificatio**n places undue emphasis on test accuracy without incorporating interpretation of results and therefore, impact on patient risk.

1. Risk Categories

Current risk categories inadequately reflect the risk of tests. The High risk and Low risk categories present a false dichotomy. There is need for 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).

The **High-risk category** applies to tests which "presents unreasonable risk for serious or irreversible harm or death to a patient or patients, or would otherwise cause serious harm to the public health" or "is potentially likely to result in the absence, significant delay, or discontinuation of life-supporting or life-sustaining medical treatment."

In contrast, the **Low-risk category** applies to tests that either:

A. "would cause minimal or no harm, or minimal or no disability, or <u>immediately reversible</u> harm, or would lead to only a remote risk of adverse patient impact or adverse public health impact, taking into account the degree to which the technology for the intended use of an in vitro clinical test or category of tests is well characterized and the criteria for performance of the test or category of tests are well-established for the intended use, the clinical circumstances under which the in vitro clinical test or category of tests is used, and the availability of other tests (such as confirmatory or adjunctive tests)"

-OR-

B. "would cause a serious adverse health consequence, harm that is reversible, a delay in necessary treatment that is not life-supporting or life-sustaining, or would lead to a serious risk of adverse patient experience or adverse public health impact, but applied mitigating measures have the capacity to ensure the test meets the standard described in subparagraph (A)"

For patients undergoing genetic testing that impacts decision-making about cancer treatment or prophylactic surgery, risk is not immediate—but 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.

Tests affecting this situation are not adequately categorized as High-risk or Low-risk. A Moderate-risk category is needed 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). 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.

2. Grandfathering

Grandfathering all extant tests will result in inadequate protection for consumers. This legislation is proposed exactly because there are tests currently marketed that are of concern to consumers. While we recognize that the number of currently marketed tests would require time for FDA review them, should this legislation become law, we propose that tests currently on the market not be grandfathered in perpetuity but rather have required review within a reasonable time (within 5-7 years) after enactment of this legislation.

3. Technical Certification

The VALID Act provision for technical certification is too broad and includes potentially high-risk tests. As written, laboratories that do multiple tests may choose a technology certification which allows the laboratory to submit one, representative test as proof of proficiency for technology certification. Approval of a technology certification application would allow 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 of the test. For example, next generation sequencing (NGS) as

a platform may have verifiable accuracy in one portion of the genome but may be less accurate in other regions due to the particular sequence in question.

Furthermore, as depicted, technical 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 particular application. 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 however, interpretation of that result and its bearing on patient health differs dramatically in different regions of the genome with different genes or mutations. The proposed technical 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.

Additional Concerns

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

- The proposed exemptions are too wide-ranging and include cross-referenced tests. This ultimately puts 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.
- Consumers should be given information about the level of review a test has undergone. Tests should be labeled and provide transparency about the level of review, including those that have been grandfathered or are available via technology certification.
- 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.
- Test reports vary greatly in their layout and the ability for patients and/or inexperienced providers to understand results. VALID should support the use of a common report template with patient-accessible language, making it easier to understand test results and related implications.
- 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
- The bill includes a provision that exempt tests can also be subject to post-market approval; it is unclear how that would take place.

As patient advocacy organizations, we are committed to ensuring the safety of the communities we serve. It will be difficult for us to support this legislation if our key concerns are not adequately addressed. We would greatly appreciate the opportunity to engage and further discuss the feedback provided. If you have any questions or would like to schedule a meeting to gain additional inside into our communities' perspectives, please contact Lisa Schlager at lisas@facingourrisk.org.

Respectfully,

AliveAndKickn
Colon Cancer Alliance for Research & Education for Lynch Syndrome
FORCE: Facing Our Risk of Cancer Empowered
HIS Breast Cancer Awareness
Hope for Stomach Cancer
Living Beyond Breast Cancer
National Patient Advocate Foundation
Ovarian Cancer Research Alliance
SHARE Cancer Support
Sharsheret | The Jewish Breast & Ovarian Cancer Community
Tigerlily Foundation
Young Survival Coalition