II

110TH CONGRESS
1ST SESSION

S. 736

To provide for the regulation and oversight of laboratory tests.

IN THE SENATE OF THE UNITED STATES

MARCH 1, 2007

Mr. KENNEDY (for himself and Mr. SMITH) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

---

A BILL

To provide for the regulation and oversight of laboratory tests.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Laboratory Test Improvement Act''.

SEC. 2. DEFINITIONS.

(a) IN GENERAL.—

(1) FEDERAL FOOD, DRUG, AND COSMETIC ACT.—Section 201 of the Federal Food, Drug, and Cosmetic Act (referred to in this Act as the

''FFDCA'') (21 U.S.C. 321) is amended by adding at the end the following:

''(rr) DEFINITIONS RELATED TO LABORATORY-DEVELOPED TESTS.—

''(1) ANALYTICAL VALIDITY.—The term 'analytical validity', with respect to a laboratory-developed test, means the extent to which the test can be used to measure accurately and reliably the property or characteristic that the test is intended to measure.

''(2) CLINICAL VALIDITY.—The term 'clinical validity', with respect to a laboratory-developed test, means the extent to which the test can be used for its intended use.

''(3) DIRECT-TO-CONSUMER TEST.—The term 'direct-to-consumer test' means a laboratory-developed test that is not a prescription test.

''(4) INTENDED USE.—The term 'intended use', with respect to a laboratory-developed test, includes—

''(A) determining predisposition of an individual to a disease or condition;

''(B) aiding diagnosis of a disease or condition of an individual;

"(C) aiding decision-making on how to treat a disease or condition of an individual;

"(D) aiding preimplantation genetic diagnosis;

"(E) determining a characteristic of a human embryo or a human fetus;

"(F) determining whether an individual is a carrier of an allele associated with a disease or condition; or

"(G) otherwise obtaining information related to health or disease prevention (including nutrition) for an individual.

"(5) IN VITRO DIAGNOSTIC PRODUCT.—The term 'in vitro diagnostic product' shall have the meaning given the term in section 809.3(a) of title 21, Code of Federal Regulations (or successor regulation).

"(6) LABORATORY-DEVELOPED TEST.—

"(A) IN GENERAL.—The term 'laboratory-developed test' means—

"(i) the use of analytical methods developed by a laboratory to process a biological specimen, whether at 1 laboratory site or multiple sites, to report a test result

to a health care practitioner, a patient, or a consumer; and

''(ii) includes an in vitro diagnostic product that the laboratory has modified, unless such modification requires preclearance or preapproval of such modified in vitro diagnostic product under this Act.

''(B) EXCEPTION.—The term 'laboratory-developed test' does not include—

''(i) the processing of a biological specimen to—

''(I) determine paternity;

''(II) aid in forensics; or

''(III) conduct research if the result of the test is not reported to a health care provider, a patient, or a consumer;

''(ii) an in vitro diagnostic product; or

''(iii) an analyte specific reagent, as defined in section 864.4020 of title 21, Code of Federal Regulations (or successor regulation).

''(7) MANUFACTURER.—The term 'manufacturer', with respect to a laboratory-developed test,

means the laboratory that performs the test to process a biological specimen.

''(8) PRESCRIPTION TEST.—The term 'prescription test' means a laboratory-developed test that is used to process a biological specimen only upon the written or oral authorization, based on a practitioner-patient relationship that is valid under applicable Federal and State laws, of a practitioner licensed by law to administer or use such test.

''(9) TYPE.—A laboratory-developed test shall be considered of the same 'type' as an in vitro diagnostic product if the test and the product—

''(A) use similar analytical methods;

''(B) measure the same, or clinically comparable, properties or characteristics; and

''(C) have the same intended use.''.

(2) APPLICATION OF DEFINITIONS.—Any term that is used in this Act that is defined in subsection (rr) of such section 201 (as added by paragraph (1)) shall, for purposes of this Act, have the meaning given such term in such subsection (rr).

(b) IMPLEMENTATION.—A laboratory-developed test that is a direct-to-consumer test on the date of enactment of this Act shall be deemed to be a prescription test if, on the date that is 60 days after the date of enactment

of this Act and thereafter, such test satisfies the requirements of this Act to be a prescription test.

SEC. 3. LABORATORY-DEVELOPED TESTS DEEMED MEDICAL DEVICES.

Section 520 of the FFDCA (21 U.S.C. 360j) is amended by adding at the end the following:

''(o) LABORATORY-DEVELOPED TESTS.—Any laboratory-developed test shall be deemed to be a device under section 201(h).''.

SEC. 4. REPORTING ON AND PUBLIC DISCLOSURE ABOUT LABORATORY-DEVELOPED TESTS.

(a) LABELING OF INTENDED USE AND REGULATORY STATUS OF LABORATORY-DEVELOPED TESTS AND TEST RESULTS.—

(1) IN GENERAL.—Section 520(o) of the FFDCA, as added by section 3, is amended by—

(A) striking ''TESTS.—Any'' and inserting the following: ''TESTS.—

''(1) IN GENERAL.—Any''; and

(B) adding at the end the following:

''(2) TEST RESULTS; LABELING.—

''(A) IN GENERAL.—Any statement by the manufacturer of the result of a laboratory-developed test reported to a health care practitioner, a patient, or a consumer, and any label-

ing for the test, shall prominently and conspicuously include—

"(i) the intended use of the test; and

"(ii) if the test has not been cleared or approved under this Act for such intended use, a statement that the test has not been cleared or approved under this Act for such intended use.

"(B) EFFECT.—The statement required under subparagraph (A) shall not include a statement that the test is investigational or not lawfully marketed.".

(2) IMPLEMENTATION.—The requirements of paragraph (2) of such section 520(o) shall take effect on the date that is 60 days after the date of enactment of this Act.

(b) REGISTRATION OF MANUFACTURERS AND LISTING OF LABORATORY-DEVELOPED TESTS.—The requirements of section 510 of the FFDCA (21 U.S.C. 360) with respect to the registration of the manufacturer of a laboratory-developed test and the listing of a laboratory-developed test shall take effect on the date that is 270 days after the date of enactment of this Act.

(c) ADVERSE EVENT REPORTING FOR LABORATORY-DEVELOPED TESTS.—The requirements of section 519 of

the FFDCA (21 U.S.C. 360i) with respect to records and reports on a laboratory-developed test shall take effect on the date that is 1 year after the date of enactment of this Act.

(d) PUBLIC DATABASE OF INFORMATION ON VALIDITY OF LABORATORY-DEVELOPED TESTS.—

(1) IN GENERAL.—Section 520(o) of the FFDCA, as amended by subsection (a), is amended by adding at the end the following:

"(3) DATABASE ON INFORMATION OF ANALYTICAL AND CLINICAL VALIDITY.—

"(A) IN GENERAL.—

"(i) SUBMISSION.—Unless a laboratory-developed test is cleared under section 510(k) or approved under section 515 or 520(m) for its intended use, the manufacturer of the test shall electronically submit to the Secretary information (in a form specified by the Secretary and certified as truthful and accurate) on the analytical and clinical validity of the test for its intended use.

"(ii) ANALYTIC INTENDED USE.—If the intended use of a laboratory-developed test is limited solely to the measurement of

an analytical property or characteristic, the manufacturer of the test shall not submit any information with respect to the clinical validity of the test under clause (i) other than the following statement: 'This test is intended to measure only the property or characteristic that is reported as a result of use of the test. The test is not intended to be used to diagnose or screen for any disease or condition, or to otherwise aid in decision-making with respect to health, and this laboratory makes no representations as to its usefulness for any such purpose.'.

''(B) INCLUSION.—The Secretary shall provide for the automated inclusion of the information submitted under subparagraph (A) in a database of such information on all laboratory-developed tests that shall be available to, and searchable by, the public on the Internet website of the Food and Drug Administration.

''(C) NOTICE.—The Secretary may give written notice to the manufacturer of a laboratory-developed test that—

''(i) the information submitted by the manufacturer for such test under subparagraph (A)—

''(I) does not adequately demonstrate the analytical validity of the test for its intended use;

''(II) does not adequately summarize the peer-reviewed biomedical literature about the clinical validity of the test for its intended use;

''(III) relies on, or includes, information or data on the clinical validity of the test for its intended use that has not been published in a peer-reviewed biomedical journal;

''(IV) does not adequately demonstrate the clinical validity of the test for its intended use; or

''(V) does not demonstrate that the analytical validity or the clinical validity of such test for its intended use is comparable to the analytical validity or the clinical validity, as the case may be, of an in vitro diagnostic product of the same type that has

been cleared under section 510(k) or approved under section 515 or section 520(m); and

''(ii) information about an intended use that is not limited solely to the measurement of an analytical property or characteristic, as provided for in the statement described under subparagraph (A)(ii), has been included—

''(I) with a result of the test reported by the manufacturer to a health care practitioner, a patient, or a consumer; or

''(II) in labeling for the test.

''(D) SECOND NOTICE.—The Secretary shall provide to the manufacturer of a laboratory-developed test that has received a notice under subparagraph (C) a second notice if—

''(i) the manufacturer has submitted corrected information under subparagraph (A) for such test within 90 days of having received a notice under subparagraph (C); and

''(ii)(I) 1 or more of subclauses (I) through (V) of subparagraph (C)(i) applies to such corrected information; or

''(II) the manufacturer has failed to include in such corrected information necessary information about the intended use referred to in subparagraph (C)(ii).''.

(2) IMPLEMENTATION.—

(A) ELECTRONIC SUBMISSION.—Not later than 1 year after the date of enactment of this Act, the Secretary of Health and Human Services (referred to in this Act as the ''Secretary'') shall develop a portal on the Internet website of the Food and Drug Administration through which the information required by paragraph (3) of such section 520(o), as added by this subsection, shall be submitted to the Secretary.

(B) ELECTRONIC CERTIFICATION.—The Secretary shall require as a condition of submitting the information required by paragraph (3) of such section 520(o) that an individual submitting such information certify electronically the truthfulness and accuracy of such information.

(C) PUBLICLY ACCESSIBLE DATABASE OF INFORMATION.—Not later than 1 year after the date of enactment of this Act, the Secretary shall develop a database of the information submitted under paragraph (3) of such section 520(o) that shall be available to, and searchable by, the public on the Internet website of the Food and Drug Administration and to which such information shall be automatically included upon submission.

(D) LITERATURE REVIEWS AND CLINICAL VALIDITY.—Not later than 270 days after the date of enactment of this Act, the Secretary shall issue a guidance document to facilitate the use of reviews of the peer-reviewed biomedical literature and other information and data about the clinical validity of laboratory-developed tests and in vitro diagnostic products when clearing or approving such tests and products under the FFDCA.

(E) MODIFICATIONS.—Not later than 18 months after the date of enactment of this Act, the Secretary shall issue a guidance document to clarify when modifications to a laboratory-developed test require updating of the information

submitted under paragraph (3) of such section 520(o). To the extent practicable, under such guidance, modifications to a laboratory-developed test under such paragraph (3) shall be required under the same circumstances as the submission of a report under section 510(k) of the FFDCA (21 U.S.C. 360(k)) or a supplemental premarket application under section 515 of the FFDCA (21 U.S.C. 360e) is required for modifications to a laboratory-developed test or an in vitro diagnostic product that is cleared or approved under the FFDCA.

(F) SUBMISSION OF INFORMATION.—The requirements of paragraph (3) of such section 520(o) shall take effect on the date that is 18 months after the date of enactment of this Act.

SEC. 5. CLASSIFICATION AND FDA REVIEW OF LABORATORY-DEVELOPED TESTS.

(a) CLASSIFICATION OF LABORATORY-DEVELOPED TESTS.—

(1) IN GENERAL.—Section 520(o) of the FFDCA, as amended by section 4, is amended by adding at the end the following:

''(4) CLASSIFICATION.—

''(A) IN GENERAL.—Notwithstanding section 513(f)(1), a laboratory-developed test shall be classified in class II, as defined in section 513(a)(1)(B), subject to both general and special controls.

''(B) CLASS III.—Notwithstanding subparagraph (A), a laboratory-developed test shall be classified in class III if—

''(i) the Secretary gives notice to the manufacturer of such test that such test meets the requirements of section 513(a)(1)(C) to be in class III;

''(ii)(I) such test is intended for use in the diagnosis of a contagious disease or condition that is highly likely to result in a fatal outcome; and

''(II) prompt, accurate diagnosis of the disease or condition offers the opportunity to mitigate the public health impact of the disease or condition; or

''(iii) such test is intended for use in donor screening of a disease or condition for which the Secretary has recommended or required testing to—

''(I) safeguard the blood supply;

''(II) establish the safe use of blood and blood products; or

''(III) establish the safe use of tissue and tissue products.

''(C) CLASS I.—Notwithstanding subparagraph (A), the Secretary may classify a laboratory-developed test in class I if such test meets the requirements of section 513(a)(1)(A) to be in class I.''.

(2) IMPLEMENTATION.—

(A) CLASS III.—The Secretary may not give notice under paragraph (4)(B)(i) of such section 520(o) to the manufacturer of a laboratory-developed test that is not a direct-to-consumer test before the date that is 2 years after the date of enactment of this Act.

(B) CLASS I.—The Secretary may not classify a type of laboratory-developed test in class I under paragraph (4)(C) of such section 520(o) before the date that is 18 months after the date of enactment of this Act.

(C) SPECIAL CONTROLS.—Not later than 2 years after the date of enactment of this Act, the Secretary shall identify in guidance documents whether there are special controls to

which all laboratory-developed tests, subcategories of such tests, or specific such tests shall be subject under section 514 of the FFDCA (21 U.S.C. 360d).

(b) CLEARANCE AND APPROVAL OF LABORATORY-DEVELOPED TESTS.—

(1) IN GENERAL.—Section 520(o) of the FFDCA, as amended by subsection (a), is amended by adding at the end the following:

"(5) APPLICATION OF SECTION 510(k), SECTION 515, OR SECTION 520(m).—A laboratory-developed test shall be exempt from the requirements of section 510(k), section 515, and section 520(m), except that the manufacturer of a laboratory-developed test shall submit—

"(A) a report under section 510(k) if—

"(i) the test is classified in class II; and

"(ii) the test is—

"(I) a direct-to-consumer test;

"(II) a test for which the manufacturer has not submitted corrected information under paragraph (3)(A) within 90 days of having received a notice under paragraph (3)(C); or

"(III) a test for which the Secretary has given second notice under paragraph (3)(D) to the manufacturer of such test; or

"(B) an application under section 515 or section 520(m), as appropriate, if such test is classified in class III.".

(2) IMPLEMENTATION.—

(A) DIRECT-TO-CONSUMER TESTS.—The requirement to submit a report under section 510(k) of the FFDCA (21 U.S.C. 360(k)) or an application under section 515 or section 520(m) of the FFDCA (21 U.S.C. 360e or 360j(m)), as the case may be, under paragraph (5) of such section 520(o), as added by this subsection, for a direct-to-consumer test as provided in clause (ii) of such paragraph shall take effect on the date that is 180 days after the date of enactment of this Act.

(B) CLASS II PRESCRIPTION TESTS.—The requirement to submit a report under such section 510(k) under paragraph (5) of such section 520(o) for a class II prescription device shall take effect on the date that is 90 days after the date of the notice to the manufacturer of such

test referred to in subclause (II) or (III) of paragraph (5)(A)(ii) of such section 520(o).

(C) CLASS III PRESCRIPTION TESTS.—The requirement to submit an application under such section 515 or such section 520(m) under paragraph (5) of such section 520(o) for a class III prescription device shall take effect on the date that is—

(i) 1 year after the date on which the Secretary gives notice to the manufacturer of such test that such test is classified in class III as provided under paragraph (4)(B)(i) of such section 520(o); or

(ii) 1 year after the date of enactment of this Act if such test is classified in class III as provided under clause (ii) or (iii) of paragraph (4)(B) of such section 520(o).

(c) REMOVAL OF LABORATORY-DEVELOPED TESTS FROM THE MARKET.—Section 520(o) of the FFDCA, as amended by subsection (b), is amended by adding at the end the following:

''(6) FAILURE TO MAKE SUBMISSION; NON-CLEARANCE OR DISAPPROVAL.—The manufacturer of a laboratory-developed test—

''(A) may commence and continue to report, or offer to report, a result of such test to any person until the date that—

''(i)(I) the manufacturer is required to submit information under paragraph (3)(A); and

''(II) the manufacturer fails to submit such information;

''(ii)(I) the manufacturer has received a notice under paragraph (3)(C); and

''(II) the manufacturer has failed to submit corrected information under paragraph (3)(A);

''(iii)(I) the manufacturer is required to submit under paragraph (5)—

''(aa) a report with respect to such test under section 510(k); or

''(bb) an application under section 515 or 520(m); and

''(II) the manufacturer fails to submit such report or application, as the case may be;

''(iv) the report with respect to such test under section 510(k) is not cleared by the Secretary; or

"(v) approval of such application is denied by the Secretary; and

"(B) shall immediately cease to report, or offer to report, a result of such test to any person on such date.".

SEC. 6. INSPECTION OF LABORATORIES; EXEMPTION FROM REQUIREMENT FOR FDA TO INSPECT EVERY 2 YEARS.

Section 520(o) of the FFDCA, as amended by section 4, is amended by adding at the end the following:

"(7) INSPECTION.—The requirement of section 510(h) with respect to the inspection of a registered establishment at least once in every 2-year period shall not apply to a manufacturer of a laboratory-developed test that is classified in class II, unless section 510(h) applies to such establishment because of a drug or another device classified in class II or III.".

SEC. 7. THE CLINICAL LABORATORY IMPROVEMENT AMENDMENTS OF 1988.

(a) COMPLIANCE WITH THIS ACT.—Compliance with the requirements under this Act shall have no effect on the obligation to comply with any requirement under section 353 of the Public Health Service Act (42 U.S.C. 263a).

(b) COMPLIANCE WITH CLIA OF 1988.—Except as provided in subsection (c), compliance with the requirements under section 353 of the Public Health Service Act (42 U.S.C. 263a) shall have no effect on the obligation to comply with any requirement of this Act.

(c) GOOD MANUFACTURING PRACTICE REQUIREMENTS AND CLIA OF 1988.—For a laboratory-developed test, compliance with the requirements under section 353 of the Public Health Service Act (42 U.S.C. 263a) shall be deemed to satisfy the requirements under section 520(f) of the FFDCA (21 U.S.C. 360j(f)) unless and until, after providing for public comment, the Secretary issues a final guidance document—

(1) in which the Secretary finds that—

(A) compliance with the requirements under such section 353 does not satisfy the requirements under such section 520(f); and

(B) compliance with the requirements of such section 520(f) are necessary to protect the public health;

(2) explaining the least burdensome approach for manufacturers of laboratory-developed tests to comply with the requirements of such section 520(f); and

(3) providing for coordination of inspection efforts to ensure compliance with such section 353 and such section 520(f).

(d) RULEMAKING BY SECRETARY.—

(1) PROPOSED RULE.—Not later than 1 year after the date of enactment of this Act, the Secretary shall issue a proposed rule to establish a specialty area under section 353 of the Public Health Service Act (42 U.S.C. 263a) for laboratory-developed tests to acquire genetic information, including mutations, genotypes, gene expression, and chromosomal structure.

(2) FINAL RULE.—

(A) IN GENERAL.—The Secretary shall issue a final rule not later than the date that is 3 years after the date of enactment of this Act, which shall be effective 1 year after the date such rule is issued.

(B) CONTENT.—Such final rule shall include standards for proficiency testing of such laboratory-developed tests, as provided under section 353 of the Public Health Service Act (42 U.S.C. 263a).

(3) EFFECT OF FAILURE TO ISSUE FINAL RULE.—If the Secretary fails to issue the final rule

on or before the date that is 3 years after the date of enactment of this Act, such laboratory-developed tests shall be subject to the requirements of such section 520(f) after such date and until such final rule becomes effective.

SEC. 8. ENHANCED REIMBURSEMENT UNDER FEDERAL HEALTH PROGRAMS.

The Secretary shall develop a mechanism to provide enhanced reimbursement under Federal health programs for in vitro diagnostic products and laboratory-developed tests that are cleared under section 510(k) of the FFDCA (21 U.S.C. 360(k)), or approved under section 515 or 520(m) of such Act (21 U.S.C. 360e or 21 U.S.C. 360j).

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary for each of fiscal years 2007 through 2010 to carry out this Act.

○