Mark Your Calendars: This Halloween, Don’t Miss FDA’s LDT Webinar

The U.S. Food and Drug Administration (FDA) has announced an upcoming **webinar** on its **proposed rule** on the regulation of laboratory developed tests (LDTs).

The webinar is scheduled for **October 31, 2023 from 1:00 – 2:00 PM ET** and will include an overview of the proposed rule, a description of the proposed phaseout of FDA’s general enforcement discretion approach to LDTs, and a question and answer session. Stakeholders must submit questions by **October 23, 2023** to be considered for the discussion.

For our detailed analysis of the 83-page proposed rule, please see our two-part Insight series: **Part I: Underpinnings of FDA’s Proposed Rule** and **Part II: FDA’s Proposed Phaseout Policy – Key Considerations & Open Questions**.

If you have questions on the proposed rule or its potential impact, contact the authors or a member of the **Goodwin Life Sciences Regulatory & Compliance** team.

FDA Proposes Phased Approach to Regulating Laboratory Developed Tests

On September 29, 2023, the U.S. Food and Drug Administration (FDA) posted and scheduled for publication its long-awaited **proposed rule** concerning FDA regulation of laboratory developed tests (LDTs). If enacted, the proposed rule would amend the Agency’s regulations to make explicit that in

vitro diagnostic products (IVDs) are devices under the Federal Food, Drug, and Cosmetic Act; and this includes when the manufacturer of the IVD is a laboratory.

Upon finalization of the rule, FDA proposes to phase out its general "enforcement discretion" approach for LDTs so that tests manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs.

Comments to the proposed rule are due 60 days after the date of publication of the proposed rule in the Federal Register. We will provide our full analysis of the proposed rule in the coming days. Contact the authors or a member of the Goodwin **Life Sciences Regulatory & Compliance** team for any questions.

LDT Proposed Rule Remains Under OIRA Review

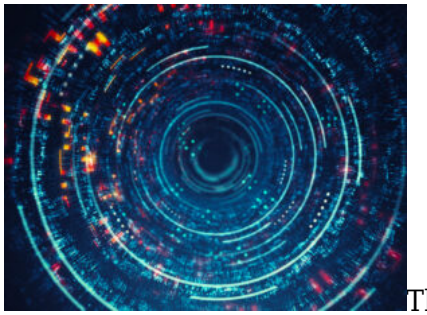
Throughout August 2023, the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President ("OIRA") has **held stakeholder meetings** regarding a proposed rule which, if enacted, would amend the U.S. Food and Drug Administration's ("FDA's") regulations to make explicit that laboratory developed tests ("LDTs") are devices under the Federal Food, Drug, and Cosmetic Act. The next stakeholder meeting on the proposed rule is scheduled for September 6, 2023.

Per its **website**, OIRA received the proposed rule from FDA on July 26, 2023. The proposed rule was initially **published** this past spring on the Biden Administration's Unified Agenda of Regulatory and Deregulatory Actions with a target publication date of August 2023. The forthcoming stakeholder meeting on September 6th suggests that OIRA may continue its review process well into September, if not later.

The publication of the proposed rule would mark the first significant FDA action on LDTs since its two 2014 draft guidances (available **here** and **here**) and 2017 **discussion paper**. The proposed rule is also expected to be controversial after prior U.S. Department of Health & Human Services statements concerning regulation of LDTs and legislative attempts to further define the LDT regulatory framework. Once cleared by OIRA, the proposed rule will be published in the Federal Register and subject to public comment.

We will continue to monitor for updates on the LDT proposed rule. Contact Goodwin Life Sciences Regulatory & Compliance team members for any questions.

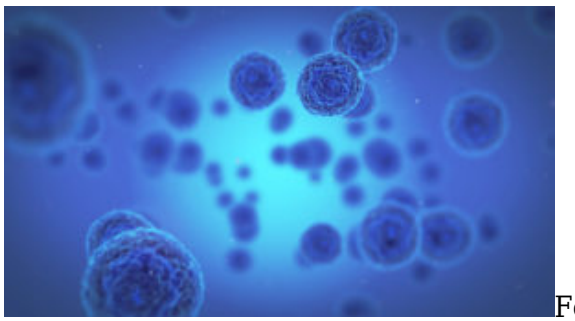
FDA Issues Artificial Intelligence/Machine Learning (AI/ML)-Enabled Device Software Functions Draft Guidance



The U.S. Food and Drug Administration recently issued its **draft guidance** entitled "Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning (AI/ML)-Enabled Device Software Functions." The draft guidance follows the passage of the Food and Drug Omnibus Reform Act of 2022 (FDORA), which explicitly authorized the Agency to approve or clear Predetermined Change Control Plans (PCCPs).

We summarize some of the key takeaways from FDA's draft guidance. Read the client alert **here**.

Field Alert Reporting: Supplier Contracting Implications for Drug Developers



For emerging companies establishing their first supply chains, ensuring notification requirements in supply agreements for when commercial-stage

manufacturing issues arise may not be top of mind. However, it is important for drug developers whose contracts enable continuation of a supply arrangement into the commercial-stage to be familiar with the U.S. Food and Drug Administration's (FDA's) field alert reporting (FAR) requirements for new drug application (NDA) and abbreviated new drug application (ANDA) holders to ensure adequate communication between developers and their suppliers.

By way of background, the FAR regulations at 21 C.F.R. §§ 314.81(b)(1) and 314.98(b) require NDA and ANDA holders to notify their FDA field office (using an Form FDA 3331a) within three business days of "receipt" of: (1) information concerning any incident that causes a distributed drug product or its labeling to be mistaken for, or applied to, another article; or (2) information concerning any bacteriological contamination, or any significant chemical, physical, or other change or deterioration in the distributed drug product, or any failure of one or more distributed batches of the drug product to meet the specification established for it in its approved application. In brief, timely notification by suppliers really *does matter* here and should not extend past one business day if at all possible.

This past summer, the FDA issued **final guidance** clarifying reporting timelines and the facts and circumstances that trigger submission of FARs. Amongst other things, the FDA clarified that the FAR requirements apply to *all* products marketed under an NDA or ANDA, including positron emission tomography drugs, designated medical gases, and combination products containing a drug constituent part. However, products that are only marketed abroad pursuant to a foreign approval with non-U.S. labeling are not subject to FDA's FAR requirements. FDA also clarified that report-triggering events are not limited to active ingredient issues but can also include issues related to inactive ingredients, processing aids, and packaging.

Additional key takeaways include:

- FARs are required even when a problem is identified and corrected within the three business day reporting window.
- FARs are required even when a problem is identified beyond the three business day reporting window; however, a Form FDA 483 finding can result from the failure to submit timely FARs.
- Day "0" for calculation of the three business day reporting window is the day information triggering the report was received, *even if received by a third-party contractor or supplier*.
- Follow-up or final FARs are recommended but not required if significant new information is received.
- Separate initial FARs are required for a problem impacting drug products covered by multiple applications, but if conducting a single investigation into the issue after submitting the initial FARs, any follow-up can be provided in a single follow-up or final FAR.
- Investigations into issues identified with undistributed products should consider whether those issues may exist in distributed products, triggering a FAR.
- Possible changes or deterioration in distributed products triggering FARs include contamination by bacteria, yeast, mold, virus or other microorganisms.
- Issues leading to recalls do not release an NDA or ANDA holder from FAR reporting responsibility.

Overall, FDA's FAR requirements necessitate prompt or immediate notification of any information discovered by suppliers that could trigger a FAR for NDA and ANDA holders. For supplier agreement negotiations, requiring prompt or immediate notification of issues in clinical-stage agreements positions a developer well to require the same in the commercial stage when FAR requirements apply. Additionally, in the commercial stage, FARs can prompt unannounced FDA for cause inspections and can also lead to expensive product recalls, so early notification, investigation, and remediation of issues warranting a FAR submission can help minimize potential liability and resource expenditure to remedy any issues that arise.