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Approved: November 17, 2021.

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Deputy Assistant Secretary of the Treasury.

[FR Doc. 2021-25384 Filed 11-19-21; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA-2020-N-1088]

Microbiology Devices; Reclassification of Nucleic Acid-Based Hepatitis C Virus Ribonucleic Acid Assay Devices, Renamed to Nucleic Acid-Based Hepatitis C Virus Ribonucleic Acid Tests

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is issuing a final order to reclassify nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) devices intended for the qualitative or quantitative detection or genotyping of HCV RNA, postamendments class III devices (product codes MZP and OBF), into class II (general controls and special controls), subject to premarket notification. FDA is renaming and codifying these devices under the classification regulation named “nucleic acid-based hepatitis C virus (HCV) ribonucleic acid tests.” FDA is also identifying the special controls that the Agency believes are necessary to provide a reasonable assurance of safety and effectiveness of these devices.

DATES: This order is effective December 22, 2021.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended, establishes a comprehensive system for the regulation of medical devices intended

for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three classes of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three classes of devices are class I (general controls), class II (general and special controls), and class III (general controls and premarket approval).

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as postamendments devices), are automatically classified by section 513(f)(1) of the FD&C Act into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval unless, and until: (1) FDA reclassifies the device into class I or II or (2) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. FDA determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807, subpart E (21 CFR part 807, subpart E).

A postamendments device that has been initially classified in class III under section 513(f)(1) of the FD&C Act may be reclassified into class I or II under section 513(f)(3) of the FD&C Act. Section 513(f)(3) of the FD&C Act provides that FDA, acting by administrative order, can reclassify the device into class I or II on its own initiative, or in response to a petition from the manufacturer or importer of the device. To change the classification of the device, the proposed new class must have sufficient regulatory controls to provide a reasonable assurance of the safety and effectiveness of the device for its intended use.

FDA relies upon “valid scientific evidence,” as defined in section 513(a)(3) of the FD&C Act and 21 CFR 860.7(c)(2), in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the “valid scientific evidence” upon which the Agency relies must be publicly available (see section 520(c) of the FD&C Act (21 U.S.C. 360j(c))). Publicly available information excludes trade secret and/or confidential commercial information, e.g., the contents of a pending premarket approval application (PMA) (see section 520(c) of the FD&C Act).

FDA published a proposed order in the **Federal Register** of April 2, 2020 (85 FR 18483), to reclassify nucleic acid-

based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA, postamendment class III devices, into class II (general controls and special controls), subject to premarket notification. FDA has considered the information available to the Agency, including the deliberations of the March 22, 2018, Microbiology Devices Panel (2018 Panel), and comments from the public docket and has determined that there is sufficient information to establish special controls to effectively mitigate the risks to health identified in section V of the proposed order, and that these special controls, together with general controls, provide a reasonable assurance of safety and effectiveness when applied to nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA.

Therefore, in accordance with section 513(f)(3) of the FD&C Act, FDA, on its own initiative, is issuing this final order to reclassify nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA from class III to class II (general and special controls).¹

II. Comments on the Proposed Order

On April 2, 2020, FDA published in the **Federal Register** a proposed order to reclassify nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA from class III to class II, subject to premarket notification. The comment period on the proposed order closed on June 1, 2020. In response to the proposed order, FDA received comments from industry, healthcare associations, public health departments, and individual consumers by the close of the comment period, some of which contained one or more comments on one or more issues. We describe and respond to the comments in this section of the document. Certain comments are grouped based on common themes; we grouped similar comments together under the same number and listed them numerically.

¹ FDA notes that the “ACTION” caption for this final order is styled as “Final amendment; final order,” rather than “Final order.” Beginning in December 2019, this editorial change was made to indicate that the document “amends” the Code of Federal Regulations. The change was made in accordance with the Office of **Federal Register**'s (OFR) interpretation of the **Federal Register** Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22) and the Document Drafting Handbook.

The order of response to the commenters is purely for organizational purposes and does not signify the comment's value or importance nor the order in which comments were received. Please note that in some cases we separated different issues discussed by the same commenter and designated them as distinct comments for purposes of our responses.

(Comment 1) FDA received numerous comments in favor of the proposed reclassification of nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA from class III to class II with special controls.

Commenters stated they believed that special controls, along with general controls, could provide a reasonable assurance of the safety and effectiveness of these devices. In addition, they believed that the decreased regulatory burden resulting from the reclassification could encourage further development of, and provide patients more timely access to, these devices. Overall, there was a general consensus among the commenters that the proposed special controls are necessary and sufficient to mitigate the risks to health of patients presented by these devices and to provide reasonable assurance of the safety and effectiveness of these devices.

(Response 1) Based on the evidence considered, comments received in response to the proposed order, and deliberations of the 2018 Panel, FDA agrees with the commenters that reclassification of nucleic acid-based HCV RNA devices for the qualitative or quantitative detection or genotyping of HCV RNA from class III into class II and that special controls, in addition to general controls, can provide a reasonable assurance of the safety and effectiveness of these devices. In addition, FDA expects that the reclassification of these devices would enable more manufacturers to develop them such that patients would benefit from increased access to safe and effective tests.

(Comment 2) One comment objected to the proposed reclassification of these devices from class III into class II on the basis that the commenter was not provided adequate notification of the proposed reclassification.

(Response 2) FDA disagrees with this comment as FDA provided notice of our proposed reclassification of these devices with the publication of the proposed order in the **Federal Register** on April 2, 2020, in accordance with section 513(f)(3) of the FD&C Act and 21 CFR part 860. In addition, as discussed further in the proposed order, a public

meeting of the 2018 Panel was held where FDA discussed the possible reclassification of nucleic acid-based HCV RNA tests and the Panel members agreed unanimously with the proposal.

(Comment 3) Several commenters had questions about the scope of the proposed reclassification order. Several commenters noted that the proposed reclassification order identified these devices as nucleic-acid based HCV RNA tests for prescription use and suggested that the reclassification order should also include tests intended for over-the-counter (OTC) use. In addition, one commenter suggested that FDA's reclassification order should also include HCV antigen tests, tests for hepatitis A and hepatitis B, and also that the reclassification should include other specimen types for nucleic acid-based HCV RNA tests beyond those identified in the proposed order (*e.g.*, urine or saliva).

(Response 3) These comments are beyond the scope of FDA's proposed reclassification order, which applies only to nucleic acid-based HCV RNA tests that have been previously approved by FDA. FDA has not approved any nucleic acid-based HCV RNA tests intended for OTC use, and FDA believes that a nucleic acid-based HCV RNA test intended for OTC use would be a new type of device not previously classified based on the criteria at section 513(a)(1) of the FD&C Act and, as a result, such postamendments device would be automatically classified into class III by operation of section 513(f)(1) of the FD&C Act.

Similarly, to date, FDA has only approved nucleic acid-based HCV RNA tests intended for use with human serum or plasma, and new specimen types are beyond the scope of FDA's proposed reclassification order.

(Comment 4) Several commenters expressed support of FDA's proposal to rename these devices from "nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) assay devices" to "nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) tests." These commenters believed that the new name for these devices made clear that these are diagnostic tests and is consistent with the naming of similar diagnostic devices.

(Response 4) FDA believes that the new identification name of these devices—"nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) tests"—is both understandable to consumers and industry and is consistent with the naming of similar diagnostic devices and agrees with these commenters. As discussed further below

in section III, FDA on its own initiative has revised the device identification of nucleic-acid based HCV RNA to be codified in § 866.3170(a) (21 CFR 866.3170(a)).

(Comment 5) One commenter suggested that the proposed special control requiring cross-reactivity studies may not be necessary and suggested instead that interfering substance studies be conducted according to "CLSI-EP-7-A2: Interference Testing in Clinical Chemistry: Approved Guideline—Second Edition" (Ref. 1).

(Response 5) FDA disagrees with this comment and believes that the special control requiring cross-reactivity studies that include samples from HCV RNA negative subjects with other causes of liver disease, including autoimmune hepatitis, alcoholic liver disease, chronic hepatitis B virus, primary biliary cirrhosis, and nonalcoholic steatohepatitis, when applicable, is necessary to provide a reasonable assurance of the safety and effectiveness of these devices (see § 866.3170(b)(2)(iv)). FDA also believes that specifying a standard explicitly as part of the special controls that manufacturers must follow is not necessary and would prohibit the use of a new standard in the event that the version of the standard specified in the special controls is revised and/or updated.

(Comment 6) One commenter suggested that FDA provide additional details regarding the study design and analysis required for devices intended for the quantitative detection of HCV RNA by the special control in § 866.3170(b)(4)(C). In addition, the commenter requested clarification on the requirement for clinical studies for nucleic-acid based HCA RNA tests intended for Point of Care (PoC) use and inquired whether the sample size for such studies should be larger than for the other clinical studies required by the special controls.

(Response 6) FDA disagrees with this comment and does not believe that additional specificity is required to provide a reasonable assurance of the safety and effectiveness of these devices because the appropriate sample size for a required study may be influenced by the technology at issue and/or type of device under review.

FDA recommends that device manufacturers interested in obtaining FDA feedback on their study design submit a pre-submission (Ref. 2). In addition, FDA publishes our decision summaries for previously approved or cleared devices for in vitro diagnostic testing on our website and these summaries can be useful aids for

manufacturers to obtain information on the study designs used to support the marketing authorizations of other nucleic-acid based HCV RNA tests (Refs. 3 and 4).

III. The Final Order

Based on the information discussed in the preamble to the proposed order (April 2, 2020), the comments received for the proposed order, the 2018 Panel deliberations (Ref. 5), and FDA's experiences over the years in reviewing these devices, FDA concludes that special controls, in conjunction with general controls, will provide a reasonable assurance of the safety and effectiveness of nucleic-acid based HCV RNA tests. FDA is adopting its findings under section 513(f)(3) of the FD&C Act, as published in the preamble to the proposed order. FDA is issuing this final order to reclassify nucleic acid-based HCV RNA devices intended for the qualitative or quantitative detection or genotyping of HCV RNA from class III to class II, and to establish special controls by revising 21 CFR part 866. In this final order, the Agency has identified the special controls under section 513(a)(1)(B) of the FD&C Act that, together with general controls, provide a reasonable assurance of the safety and effectiveness of these devices.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to provide a reasonable assurance of the safety and effectiveness of nucleic-acid based HCV RNA tests. Therefore, these devices are not exempt from premarket notification requirements. Persons who intend to market a new nucleic-acid based HCV RNA device intended for the qualitative or quantitative detection or genotyping of HCV RNA must submit to FDA a premarket notification, obtain clearance, and demonstrate compliance with the special controls included in this final order, prior to marketing the device.

These devices are assigned the generic name "nucleic-acid based hepatitis C virus ribonucleic acid tests" and are identified as in vitro diagnostic devices intended for prescription use as an aid in the diagnosis of HCV infection in specified populations, and/or as an aid in the management of HCV-infected patients including guiding the selection of genotype-specific treatment in individuals with chronic HCV infection. These tests are intended for use with

human serum or plasma. These tests are not intended for use as a donor screening test for the presence of HCV antibodies in blood, blood products, or tissue donors.

Under this final order, nucleic acid-based HCV RNA tests are identified as prescription use only devices and as such, nucleic acid-based HCV RNA tests must satisfy prescription labeling requirements for in vitro diagnostic products (see 21 CFR 809.10(a)(4) and (b)(5)(ii)). Under 21 CFR 807.81, the device continues to be subject to 510(k) requirements.

As part of the process for issuance of this final order and on its own initiative, FDA has identified previously approved nucleic-acid based HCV RNA tests for use as an aid in diagnosis of HCV infection without prior evidence of HCV antibodies. In this final order, FDA has revised the device identification of nucleic-acid based HCV RNA tests to be codified in § 866.3170(a) to clarify that nucleic acid-based HCV RNA tests can include devices used as an aid for diagnosis of HCV infection in specified populations without prior evidence of HCV antibodies because FDA believes that it may be appropriate to use these devices as a one-step diagnostic assay and in the absence of evidence of HCV antibodies.

IV. Codification of Orders

Prior to the amendments in the Food and Drug Administration Safety and Innovation Act (Pub. L. 112-144) (FDASIA), section 513(e) of the FD&C Act provided for FDA to issue regulations to reclassify devices. Although section 513(e), as amended by FDASIA, requires FDA to issue final orders rather than regulations, it also provides for FDA to revoke previously issued regulations by order. FDA will continue to codify classifications and reclassifications in the Code of Federal Regulations (CFR). Changes resulting from final orders will appear in the CFR as changes to codified classification determinations or as newly codified orders. Therefore, under section 513(e)(1)(A)(i), as amended by FDASIA, in this final order, we are proposing to codify the classification of nucleic-acid based hepatitis C virus ribonucleic acid tests in the new § 866.3170, under which nucleic-acid based HCV RNA tests would be reclassified into class II.

V. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment

nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved FDA collections. 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. 3501-3521). The collections of information in part 807, subpart E have been approved under OMB control number 0910-0120; the collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910-0485; and the collections of information in 21 CFR part 820 have been approved under OMB control number 0910-0073.

VII. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they also are available electronically at <https://www.regulations.gov>. References without asterisks are not on public display at <https://www.regulations.gov> because they have copyright restrictions. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. Clinical and Laboratory Standards Institute. *Interference Testing in Clinical Chemistry; Approved Guideline—Second Edition*. CLSI document EP07-A2. Wayne, PA: Clinical and Laboratory Standards Institute; 2005.
- *2. "Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program—Guidance for Industry and Food and Drug Administration Staff," issued May 7, 2019 (available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/requests-feedback-and-meetings-medical-device-submissions-q-submission-program>).
- *3. FDA's Premarket Approval Database available on FDA's website at <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfPMA/pma.cfm>.
- *4. FDA's 510(k) Premarket Notification Database available on FDA's website at <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfPMN/pmn.cfm>.
- *5. Transcript of the FDA Microbiology Devices Panel Meeting, March 22, 2018

(available at <https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/BloodVaccinesandOtherBiologics/BloodProductsAdvisoryCommittee/UCM630139.pdf>).

List of Subjects in 21 CFR Part 866

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for part 866 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 866.3170 to subpart D to read as follows:

§ 866.3170 Nucleic acid-based hepatitis C virus ribonucleic acid tests.

(a) *Identification.* A nucleic acid-based hepatitis C virus (HCV) ribonucleic acid (RNA) test is identified as an in vitro diagnostic device intended for prescription use as an aid in the diagnosis of HCV infection in specified populations, and/or as an aid in the management of HCV-infected patients including guiding the selection of genotype-specific treatment in individuals with chronic HCV infection. The test is intended for use with human serum or plasma. The test is not intended for use as a donor screening test for the presence of HCV antibodies in blood, blood products, or tissue donors.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) For all nucleic acid-based HCV RNA tests, the labeling required under § 809.10(b) of this chapter must include:

(i) A prominent statement that the test is not intended for use as a donor screening test for the presence of HCV RNA from human cells, tissues, and cellular and tissue-based products.

(ii) A detailed explanation of the principles of operation and procedures for performing the assay.

(iii) A detailed explanation of the interpretation of results.

(iv) Limitations, which must be updated to reflect current clinical practice and disease presentation and management. These limitations must include, but are not limited to, statements that indicate:

(A) The specimen types for which the device has been cleared and that use of

this test kit with specimen types other than those specifically cleared for this device may result in inaccurate test results.

(B) When applicable, that assay performance characteristics have not been established in populations of immunocompromised or immunosuppressed patients or, other populations where test performance may be affected.

(C) Test results are to be interpreted by qualified licensed healthcare professionals in conjunction with the individual's clinical presentation, history, and other laboratory results.

(2) For all nucleic acid-based HCV RNA tests, the design verification and validation must include:

(i) Detailed device description, including the device components, ancillary reagents required but not provided, and an explanation of the device methodology. Additional information appropriate to the technology must be included such as design of primers and probes, rationale for the selected gene targets, specifications for amplicon size, and degree of nucleic acid sequence conservation.

(ii) For devices with assay calibrators, the design and nature of all primary, secondary, and subsequent quantitation standards used for calibration as well as their traceability to a standardized reference material that FDA has determined is appropriate (*e.g.*, a recognized consensus standard). In addition, analytical testing must be performed following the release of a new lot of the standard material that was used for device clearance or approval, or when there is a transition to a new calibration standard.

(iii) Documentation and characterization (*e.g.*, determination of the identity, supplier, purity, and stability) of all critical reagents (including nucleic acid sequences for primers and probes) and protocols for maintaining product integrity.

(iv) Detailed documentation of analytical performance studies conducted as appropriate to the technology, specimen types tested, and intended use of the device, including, but not limited to, limit of detection (LoD), upper and lower limits of quantitation (ULoQ and LLoQ, respectively), linearity, precision, endogenous and exogenous interferences, cross reactivity, carryover, matrix equivalency, and sample and reagent stability. Samples selected for use in analytical studies or used to prepare samples for use in analytical studies must be from subjects with clinically relevant circulating genotypes

in the United States. Cross-reactivity studies must include samples from HCV RNA negative subjects with other causes of liver disease, including autoimmune hepatitis, alcoholic liver disease, chronic hepatitis B virus, primary biliary cirrhosis, and nonalcoholic steatohepatitis, when applicable. The effect of each claimed nucleic-acid isolation and purification procedure on detection must be evaluated.

(v) Risk analysis and management strategies, such as Failure Modes Effects Analysis and/or Hazard Analysis and Critical Control Points summaries and their impact on test performance.

(vi) Final release criteria to be used for manufactured test lots with appropriate evidence that lots released at the extremes of the specifications will meet the claimed analytical and clinical performance characteristics as well as the stability claims.

(vii) Multisite reproducibility study that includes the testing of three independent production lots.

(viii) All stability protocols, including acceptance criteria.

(ix) Final release test results for each lot used in clinical studies.

(x) Analytical sensitivity and specificity of the test must be the same or better than that of other cleared or approved tests.

(xi) Lot-to-lot precision studies, as appropriate.

(3) For devices intended for the qualitative detection of HCV RNA, in addition to the special controls listed in paragraphs (b)(1) and (2) of this section, the design verification and validation must include detailed documentation of performance from a multisite clinical study. Performance must be analyzed relative to an FDA cleared or approved qualitative HCV RNA test, or a comparator that FDA has determined is appropriate. This study must be conducted using appropriate patient samples, with appropriate numbers of HCV positive and negative samples in applicable risk categories. Additional genotypes must be validated using appropriate numbers and types of samples. The samples may be a combination of fresh and repository samples, sourced from within and outside the United States, as appropriate. The study designs, including number of samples tested, must be sufficient to meet the following criteria:

(i) Clinical sensitivity of the test must have a lower bound of the 95 percent confidence interval of greater than or equal to 95 percent.

(ii) Clinical specificity of the test must have a lower bound of the 95 percent

confidence interval of greater than or equal to 96 percent.

(4) For devices intended for the quantitative detection of HCV RNA, the following special controls, in addition to those listed in paragraphs (b)(1) and (2) of this section, apply:

(i) Labeling required under § 809.10(b) of this chapter must include a prominent statement that the test is not intended as a diagnostic test to confirm the presence of active HCV infection, when applicable.

(ii) Design verification and validation must include the following:

(A) Detailed documentation of the following analytical performance studies conducted as appropriate to the technology, specimen types tested, and intended use of the device, including but not limited to: LoD, ULoQ and LLoQ. LoD, LLoQ, and linearity studies must demonstrate acceptable device performance with all HCV genotypes detected by the device.

(B) Detailed documentation of clinical performance testing from either:

(1) A multisite clinical study with an appropriate number of clinical samples from chronically HCV infected patients in which the results are compared to an FDA-cleared or approved quantitative HCV RNA test, or a comparator that FDA has determined is appropriate. This study must include a sufficient number of HCV positive samples containing an analyte concentration near the LLoQ to describe performance at this level. Clinical samples must cover the full range of the device output and must be consistent with the distribution of these genotypes in the U.S. population. Clinical samples may be supplemented with diluted clinical samples for those viral load concentrations that are not sufficiently covered by natural clinical specimens, or

(2) A clinical study with prospectively collected samples demonstrating clinical validity of the device.

(C) Detailed documentation of a qualitative analysis near the lower end of the measuring range demonstrating acceptable performance when used as an aid in diagnosis.

(5) For devices intended for HCV RNA genotyping, in addition to the special controls listed in paragraphs (b)(1) and (2) of this section, design verification and validation must include the following:

(i) Detailed documentation of an analytical performance study demonstrating the LoD for all HCV genotypes detected by the device.

(ii) Detailed documentation, including results, of a multisite clinical study that

assesses genotyping accuracy (*i.e.*, the proportion of interpretable results that match with the reference method result) and the genotyping rate (*i.e.*, the proportion of results that were interpretable).

(6) For any nucleic acid-based HCV RNA test intended for Point of Care (PoC) use, the following special controls, in addition to those listed in paragraphs (b)(1) and (2) of this section, apply:

(i) Clinical studies must be conducted at PoC sites.

(ii) Additional labeling must include a brief summary of the instructions for use that are appropriate for use in a PoC environment.

Dated: November 16, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–25379 Filed 11–19–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2020–N–1082]

Microbiology Devices; Reclassification of Certain Hepatitis C Virus Antibody Assay Devices, Renamed to Hepatitis C Virus Antibody Tests

AGENCY: Food and Drug Administration, Department of Health and Human Services (HHS).

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is issuing a final order to reclassify certain hepatitis C virus (HCV) antibody assay devices intended for the qualitative detection of HCV, postamendments class III devices (product code MZO) into class II (general controls and special controls), subject to premarket notification. FDA is renaming and codifying these devices under the classification regulation named “hepatitis C virus (HCV) antibody tests.” FDA is also identifying the special controls that the Agency believes are necessary to provide a reasonable assurance of safety and effectiveness of these devices.

DATES: This order is effective December 22, 2021.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended, establishes a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three classes of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three classes of devices are class I (general controls), class II (general and special controls), and class III (general controls and premarket approval).

Devices that were not in commercial distribution prior to May 28, 1976 (generally referred to as

postamendments devices), are automatically classified by section 513(f)(1) of the FD&C Act into class III without any FDA rulemaking process.¹ Those devices remain in class III and require premarket approval unless, and until, (1) FDA reclassifies the device into class I or II, or (2) FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. FDA determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807), subpart E, of the regulations.

A postamendments device that has been initially classified in class III under section 513(f)(1) of the FD&C Act may be reclassified into class I or II under section 513(f)(3) of the FD&C Act. Section 513(f)(3) of the FD&C Act provides that FDA, acting by administrative order, can reclassify the device into class I or II on its own initiative, or in response to a petition from the manufacturer or importer of the device. To change the classification of the device, the proposed new class must have sufficient regulatory controls to provide a reasonable assurance of the safety and effectiveness of the device for its intended use.

FDA relies upon “valid scientific evidence,” as defined in section 513(a)(3) of the FD&C Act and

¹ HCV antibody assay devices for the qualitative detection of HCV with intended uses outside the scope of the classification under 21 CFR 866.3169 are considered postamendments devices that are subject to classification under section 513(f)(1) of the FD&C Act or, if the relevant requirements are met, under section 513(f)(2) of the FD&C Act.