final version of the guidance, submit either electronic or written comments on the draft guidance by August 16, 2011.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled "Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Bacillus* spp. Detection" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Beena Puri, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5553, Silver Spring, MD 20993–0002, 301–796–6202.

SUPPLEMENTARY INFORMATION:

I. Background

This draft special controls guidance document was developed to support the proposed classification of in vitro diagnostic devices for *Bacillus* spp. detection, a previously unclassified preamendments device, into class II (special controls). On March 7, 2002, the Microbiology Devices Panel (the Panel) recommended that in vitro diagnostic devices for *Bacillus* spp. detection be classified into class II. The Panel believed that class II with the special controls (guidance document and limitations on the distribution) would provide reasonable assurance of the safety and effectiveness of the device.

After the panel meeting, FDA found three additional in vitro diagnostic devices for *Bacillus* spp. detection to be substantially equivalent to another device within that type. This device has the same intended use as its predicate device but makes use of newer nucleic acid amplification technology (NAAT). While NAAT detection devices exhibit technological differences from the preamendments *Bacillus* spp. detection devices, FDA has determined that they are as safe and effective as, and do not raise different questions of safety and effectiveness than, their predicates. (See section 513(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(i)).)

This draft guidance document identifies the proposed classification regulation and product code and issues of safety and effectiveness that require special controls. Elsewhere in this **Federal Register**, in its publication of the proposed classification regulation, FDA is including proposed distribution limitations as another special control. FDA believes that the special controls described in the draft guidance and the proposed regulation when combined with general controls will be sufficient to provide reasonable assurance of the safety and effectiveness of these devices.

II. Significance of Special Controls Guidance Document

FDA believes that adherence to the recommendations described in this guidance document, if finalized, in addition to general controls, and the special control in the proposed rule, if finalized, will provide reasonable assurance of the safety and effectiveness of in vitro diagnostic devices for *Bacillus* spp. detection classified under § 866.3045 (21 CFR 866.3045). If classified as a class II device under § 866.3045, an in vitro diagnostic device for *Bacillus* spp. detection will need to comply with the requirement for special controls; manufacturers will need to address the issues requiring special controls as identified in the guidance document or by some other means that provides equivalent assurances of safety and effectiveness as well as comply with any additional controls specified in the classification regulation itself.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive "Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Bacillus* spp. Detection," you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1667 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801, and 21 CFR 809.10 have been approved under OMB control number 0910–0485.

The labeling requirement listed in Section 8A, "Intended Use," is not subject to review under the PRA because it is a public disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2) and 21 CFR 1040.10(g)).

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 12, 2011.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2011–12081 Filed 5–17–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2011–N–0103]

Microbiology Devices; Classification of In Vitro Diagnostic Device for Bacillus Species Detection

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to classify in vitro diagnostic devices for *Bacillus* species (spp). detection into

class II (special controls), in accordance with the recommendation of the Microbiology Devices Advisory Panel (the Panel). In addition, the proposed rule would establish as a special control limitations on the distribution of this device. FDA is publishing in this document the recommendations of the Panel regarding the classification of this device. After considering public comments on the proposed classification, FDA will publish a final regulation classifying this device. Elsewhere in this issue of the **Federal Register,** FDA is announcing the availability for comment of the draft guidance document that FDA proposes to designate as a special control for this device.

DATES: Submit electronic or written comments by August 16, 2011. See section IV of this document for the proposed effective date of a final rule based on the proposed rule in this document.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2011–N–0103, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- *FAX:* 301–827–6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2011–N–0103 for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the "Request for Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beena Puri, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5553, Silver Spring, MD 20993–0002, 301–796–6202.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Authority

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (Pub. L. 94–295), the Safe Medical Devices Act of 1990 (SMDA) (Pub. L. 101–629), the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115), the Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Pub. L. 107–250), and the Food and Drug Administration Amendments Act of 2007 (FDAAA) (Pub. L. 110–85), 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) establishes three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the FD&C Act, FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as "preamendments devices." FDA classifies these devices after it: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device. (See also section 513(d) (21 U.S.C. 360c(d)). FDA has classified most preamendments devices under these procedures.

FDA refers to devices that were not in commercial distribution before May 28, 1976, as "postamendments devices." These devices are classified automatically by statute (section 513(f)) of the FD&C Act (21 U.S.C. 360c(f)) 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; (2) FDA issues an order classifying the device into class I or class II in accordance with section 513(f)(2) of the FD&C Act (21 U.S.C. 360(f)(2)), as amended by FDAMA; or (3) FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)), to a predicate device that does not require premarket approval. The Agency determines whether a postamendments device is substantially equivalent to a predicate device by means of premarket notification procedures described in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807.

A person may market a preamendments device that has been classified into class III through premarket notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the FD&C Act (21 U.S.C. 360e(b)) requiring premarket approval. Consistent with the FD&C Act and the regulations, FDA consulted with the Panel, regarding the classification of this device.

B. Regulatory History of In Vitro Diagnostic Devices for Bacillus Spp. Detection

After the enactment of the Medical Device Amendments of 1976, FDA undertook to identify and classify all preamendments devices, in accordance with section 513(b) of the FD&C Act (21 U.S.C. 360c(b)). However, in vitro diagnostic devices for *Bacillus* spp. detection were not identified and classified in this initial effort. FDA subsequently identified several preamendments devices for *Bacillus* spp. detection, including *Bacillus* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify bacillus-like organisms in clinical specimens, antigens used to identify antibodies to *B. anthracis* (anti-toxin and anti-capsular) in serum, and bacteriophage used for differentiating *B. anthracis* from other *Bacillus* spp. based on susceptibility to lysis by the phage.

Consistent with the FD&C Act and the regulations, FDA held a Panel meeting on March 7, 2002, regarding the classification of the preamendments in vitro diagnostic devices for *Bacillus* spp. detection. After the Panel meeting, FDA found three additional in vitro diagnostic devices for *Bacillus* spp. detection to be substantially equivalent to another device within that type. These three devices have the same intended use as their predicate devices, but make use of newer nucleic acid amplification technology (NAAT). While they exhibit technological differences from the preamendments *Bacillus* spp. detection devices, FDA has determined that they are as safe and effective as, and do not raise different

questions of safety and effectiveness than, their predicates. (See section 513(i) of the FD&C Act (21 U.S.C. 360c(i).)

II. Panel Recommendation

During a public meeting held on March 7, 2002, the Panel made the following recommendation regarding the classification of in vitro diagnostic devices for *Bacillus* spp. detection (Ref. 1).

A. Identification

FDA is proposing the following identification based on the Panel's recommendation and the available information. An in vitro diagnostic device for *Bacillus* spp. detection is used to detect and differentiate among *Bacillus* spp. and presumptively identify *B. anthracis* (*B. anthracis*) and other *Bacillus* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of anthrax and other diseases caused by *Bacillus* spp. This device may consist of *Bacillus* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify bacillus-like organisms in clinical specimens; or bacteriophage used for differentiating *B. anthracis* from other *Bacillus* spp. based on susceptibility to lysis by the phage; or antigens used to identify antibodies to *B. anthracis* (anti-toxin and anti-capsular) in serum. Bacillus infections include anthrax (cutaneous, inhalational, or gastrointestinal) caused by *B. anthracis,* and gastrointestinal disease and non-gastrointestinal infections caused by *Bacillus cereus* (*B. cereus*).

B. Classification Recommendation

The Panel recommended that in vitro diagnostic devices for *Bacillus* spp. Detection be classified into class II. The Panel believed that class II with the special controls (special controls guidance document and distribution limitations) would provide reasonable assurance of the safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register,** FDA is announcing the availability of the guidance document that will serve as a special control for this device.

C. Summary of Reasons and Data To Support the Recommendations

At the March 7, 2002, meeting, the Panel considered information from the literature presented by FDA (Refs. 2 to 5), information presented at the meeting by representatives from the United States Army Medical Research Institute for Infectious Diseases (USAMRIID) who shared the historical perspective on their institution's use of devices for the detection of *B. anthracis* and their personal experience using these devices, and the Panel's personal knowledge and experience.

Evidence presented to the Panel addressed how the preamendments devices of this type work and some of their limitations. Bacteriophage tests are used for differentiating *B. anthracis* from other *Bacillus* spp. based on susceptibility to lysis by the phage. They have been shown to specifically lyse vegetative *B. anthracis* and not *B. cereus* strains, although the phage can fail to lyse rare strains of *B. anthracis. Bacillus* spp. antisera tests conjugated with a fluorescent dye (immunofluorescent reagents) are used to microscopically visualize specific binding with cultured bacteria. Gram positive rods with capsules that fluoresce is presumptive evidence for identification of *B. anthracis* and must be confirmed with further testing. Antigen tests are used to identify antibodies to *B. anthracis* (anti-toxin and anti-capsular) in serum. They can be used for confirmation of anthrax if the patient survives the disease, because early antibiotic treatment does not abrogate antibody expression. However, such serological testing is most useful for monitoring responses to anthrax vaccines and for epidemiological investigations.

The Panel recommended prescription use of the device, with the added restrictions that use of these devices be limited to persons with specific training or experience in the applicable testing methods, and only in facilities under the oversight of public health laboratories, so that the laboratories would coordinate and communicate with state and local public health directors and that performance of the device in the laboratory hands might be systematically collated for interagency review (including FDA).

The Panel believes that in vitro diagnostic devices for *Bacillus* spp. should be classified into class II because special controls, in addition to general controls, would provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance.

D. Risks to Health

Based on the Panel's discussion and recommendations, and FDA's experience with these devices, we believe the following are risks to health associated with the use of the device type.

Failure of in vitro diagnostic devices for *Bacillus* spp. detection to perform as indicated or an error in interpretation of results may lead to misdiagnosis and improper patient management or inaccurate epidemiological information that may contribute to inappropriate public health responses. FDA believes that this type of device presents risks associated with a false negative test result, and a false positive test result, as explained below. In addition, there may be risks to laboratory workers resulting from handling cultures and control materials.

A false positive result may lead to a medical decision causing a patient to undergo unnecessary or ineffective treatment, as well as inaccurate epidemiological information on the presence of anthrax disease in a community. A false negative result may lead to delayed recognition by the physician of the presence or progression of disease and inaccurate epidemiological information to control and prevent additional infections. A false negative result could potentially delay diagnosis and treatment of infection caused by *B. anthracis* or other *Bacillus* spp.

Because handling the quality control organisms and those potentially present in the specimen may pose a risk to laboratory workers, use of these products and the needed laboratory control materials would be restricted to laboratories with the appropriate biosafety facilities and training.

E . Special Controls

The Panel suggested the following special controls: (1) That FDA partner with the Centers for Disease Control and Prevention (CDC), USAMRIID, and other appropriate Agencies involved in laboratory performance issues to develop practical ways to evaluate the performance of these devices; (2) that appropriate biosafety handling of the diagnostic specimens be followed; and (3) that FDA develop testing guidelines to include recommendations on specimen selection, procedures, interpretation of results, and possibly public health notification.

Based on the Panel's discussion and recommendations, FDA believes that, in addition to general controls, the special controls discussed in the following paragraphs are adequate to address the risks to health.

FDA believes that the draft guidance document entitled "Class II Special Controls Guidance Document: "In Vitro Diagnostic Devices for *Bacillus* spp. Detection" and limitations on distribution of these devices, set forth in the proposed classification regulation, will help to address the issues identified previously and provide a reasonable

assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register,** FDA is announcing the availability for comment of the draft of the guidance document that is proposed to serve as a special control for this device. The class II special controls guidance provides information on how to meet premarket (510(k)) submission requirements for the assays in the sections that discuss performance characteristics and labeling. The performance characteristics section describes studies to demonstrate appropriate performance and control against assays that may otherwise fail to perform to acceptable standards. The labeling section addresses factors such as directions for use, quality control and precautions for use and interpretation.

In addition, FDA proposes to require as a special control in the proposed classification regulation that distribution of the device be limited to laboratories with experienced personnel who have training in principles and use of microbiological culture identification methods and infectious disease diagnostics, and with appropriate biosafety equipment and containment. As noted, the Panel was concerned that these devices be used by personnel sufficiently skilled to maximize their performance and to appropriately interpret and make use of test results. FDA believes that this proposed distribution limitation will appropriately help assure the safe and effective use of these devices, and that it is consistent with the intent of the Panel in its discussion of limitations on the use of the devices and on monitoring of test results.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

Identified risks	Mitigation measures
A false negative test result may lead to delay of therapy and progression of disease and epidemiological failure to promptly recognize disease in the community.	Device description—Recommended. Performance Studies—Recommended. Labeling—Recommended. Limited Distribution—Required.
A false positive test result may lead to unnecessary treatment and incorrect epidemiological information that leads to unnecessary prophylaxis and management of others.	Device description—Recommended. Performance Studies—Recommended. Labeling—Recommended. Limited Distribution—Required.
Biosafety and risks to laboratory workers handling test specimens and control materials	Labeling—Recommended. Limited Distribution—Required.

III. Proposed Classification

FDA agrees with the Panel's recommendation that in vitro diagnostic devices for *Bacillus* spp. detection should be classified into class II because special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device, and there is sufficient information to establish special controls to provide such assurance.

IV. Proposed Effective Date

FDA proposes that any final regulation based on this proposal become effective 30 days after its date of publication in the **Federal Register**.

V. Environmental Impact

The Agency has determined that under 21 CFR 25.34(b) this classification 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. Analysis of Impacts

A. Introduction

FDA has examined the impacts of the proposed rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Order 12866 directs Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this proposed rule is not a significant regulatory action as defined by the Executive Order.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because of the minor impact expected from this proposed rule, the Agency proposes to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $135 million, using the most current (2009) Implicit Price Deflator for the Gross National Product. FDA does not expect this proposed rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Objective

The objective of the proposed regulation is to ensure the continued safety and effectiveness of in vitro diagnostic test kits for the identification of potential *Bacillus* (*Bacillus* spp.) infections.

C. Baseline

Since the 1950s, diagnostic tests have been used to detect *Bacillus* spp., differentiate between species, and identify *B. anthracis* from culture isolates or clinical specimens. Over the 10-year period 1999 to 2009, there have been approximately 8,000 such tests (using the estimated annual testing rate), the vast majority of which were for the purposes of proficiency testing and training. No accidents have been reported associated with these tests.

There are currently five diagnostic test kits cleared from different manufacturers, as well as devices developed by CDC and Department of Defense. The CDC test kits have been distributed to approximately 114 laboratories that belong to the national LRN (Laboratory Response Network). Kits are able to test between 10 and 100 samples depending on the testing capability of the different test kits. The alternative to using in vitro diagnostic test kits to identify potential exposure to

B. anthracis is to use blood, fluid, and tissue specimens to grow cultures that may be used to identify the bacillus. This method is more time-consuming and presents risks that the disease (if present) will progress and be more difficult to treat when identified. It also means increased patient anxiety while the culture is growing, whether the patient has been exposed or not. A patient that may have contracted inhalational anthrax would be expected to have high levels of anxiety while awaiting diagnosis. The diagnostic test kits offer significant public health benefits by providing rapid diagnosis that can both save lives by identifying patients with anthrax and rapidly beginning treatment as well as avoiding unnecessary prophylactic treatments for patients that are found to not have the bacillus.

Currently most marketed diagnostic test kits have extremely high predictive values. Sensitivities of these devices (proportion of positive patients correctly identified by the test) have been tested to be over 99 percent and specificities (proportion of negative patients correctly identified by the test) approach 100 percent.

However, after the 2001 incident of inhalational anthrax exposures, there was an increased public awareness of the risk of contracting anthrax due to the media publicity that surrounded the event. Fourteen manufacturers reacted to this increased public attention by submitting inquiries to FDA about obtaining marketing clearance for additional products that would diagnose the presence of the bacillus. Two of the 14 inquiries have resulted in diagnostic products getting cleared through the Premarket Notification (510(k)) process and one manufacturer submitting an Investigational Device Exemption (IDE). The remaining manufacturers expressed interest but decided not to conduct the necessary investigations to ensure the safety and effectiveness of the test kits.

The increased level of public attention and concern towards potential inhalational anthrax exposures that result from any incident (such as in 2001) is likely to have similar responses from potential manufacturers in the future. In the absence of this proposed rule, there will continue to be ambiguity as to the specific testing criteria for the device to be cleared for marketing. In addition, FDA resources will be spent responding to these inquiries for potential products that are not destined to be marketed.

D. The Proposed Regulation

We are proposing to classify anthrax diagnostic test kits as Class II, and designate special controls. The special controls include limitations of distribution for all *Bacillus* spp. detection devices and the special controls guidance will include recommendations for the performance data, quality control information, and labeling. This guidance document will be unlikely to affect the number of laboratory tests for *Bacillus* spp. or the number of tests used for training purposes. Generally, these recommendations are already being practiced. The document is also not likely to result in any procedural changes in how laboratories handle the diagnostic test kits because we have been interacting with manufacturers individually to ensure safety and effectiveness and the guidance document is designed to clearly articulate the best current practices. The proposed rule will ensure that information provided to manufacturers and users of these diagnostic test kits is consistent and appropriate and limit distribution to laboratories that have experienced personnel and appropriate biosafety equipment.

E. Impact of the Proposed Regulation

If the proposed regulation is implemented, potential marketers of these kits would clearly know what criteria and what evidence would be needed to ensure clearance of their devices. In addition, laboratory personnel would have assurance that they were handling the test kits appropriately, thus both ensuring the predictive value of the test kits were maximized and any potential risk of exposure to pathogens due to careless handling of the test kits remain minimized. That being said, we do not expect any change from current conditions that would result from the proposed regulation. The current predictive values of the test kits are already extremely high. Of the five products currently cleared, there were no reports of false positive (specificity of 100 percent) and few reports of false negatives (estimated sensitivity of 99.6 percent combining all products). Therefore, we do not expect any change in either use of the test kits by laboratories or in the predictive value of the test kits in patients. The proposed rule will, however, provide additional levels of assurance that the test kits will provide accurate and timely diagnosis and the proper laboratory procedures will maintain the safe and effective use of the test kits.

F. Costs

The costs of the proposed rule are due to manufacturers' ensuring that product labeling will be consistent with the language suggested in the guidance document as well as likely periodic quality control testing to ensure that marketed test kits maintain levels of safety and effectiveness. The costs associated with ensuring consistent labeling are expected to be minor. The labeling recommendation is based on the labeling of the currently cleared devices and little or no change from current conditions is expected. Nevertheless, we have estimated that manufacturers may incur minor revisions to their labels in response to the new guidance after regulatory staff review and compare current labeling language and design to the language and design recommendations (including photographs or diagrams) proposed in the guidance document. To account for these reviews and any possible labeling revisions, we have estimated that typical label changes for typical medical devices or diagnostic products would cost manufacturers approximately $2,200 per label change per brand. This estimate is based on market driven label revisions and was derived from estimates for a variety of devices similar to test kits (Cost Analysis of the Labeling and Related Testing Requirements for Medical Glove Manufacturers, Eastern Research Group (ERG), 2002) and account for only simple language and design alterations. We have further estimated that changes of this sort typically occur about every 5 years in response to market changes and improvements to the specific product. The manufacturers of each of the 4 currently marketed test kits are likely to review and perhaps revise labels for a total cost of $8,800. Over an expected 5-year evaluation period (based on a typical labeling cycle), the annualized cost of reviewing and revising labels is only $1,900 (3-percent annual discount rate) or $2,100 (7-percent annual discount rate).

In addition, the draft guidance document will include a description of the quality control tests recommended to ensure the safety and effectiveness of the diagnostics. While these tests are currently used to develop marketed products, it is possible that the frequency of testing to ensure continued quality may increase as a result of the proposed rule. We have estimated that additional quality control testing may require expenditures of as much as $100 per product per year for each brand. This cost is based on a sampling of typical laboratory control tests (including ELISHA, Lowry, and other ASTM (American Society for Testing of Materials) recommended tests) for

devices (ERG, 2002). Therefore, for the duration of a 5-year evaluation period, we expect the industry may incur additional quality control testing costs of about $400 per year.

The proposed rule is designed to articulate current practices for the currently marketed test kits. However, because of this regulatory classification, it is possible that these additional activities will result in minor cost increases. We have estimated that the proposed rule could result in, at most, annualized costs of approximately $2,300 (3 percent) or $2,500 (7 percent).

G. Benefits

There are unlikely to be any direct public health benefits of the proposed rule, because the rule articulates current industry practice and does not change the expected use of the diagnostic product. However, the proposed regulation is designed to ensure continued quality of this important diagnostic tool. The *Bacillus* spp. test kit provides important public health benefits through rapid diagnosis and thus, rapid treatment of a fatal disease, or rapid identification that treatment is not necessary. The absence of this diagnostic test kit, or even a decrease in the performance of the kit, would increase the negative outcomes of any future anthrax event, including increases in potential mortalities. The proposed regulation will provide additional assurance that the current level of public health protection is maintained.

In addition, it is possible that any slight label revisions or standardization of information in the labeling, as well as an increased emphasis on laboratory training, may decrease the likelihood of potential mishandling of either the diagnostic test kits or the test medium. There is currently no way to quantify this effect because there has been no reported exposure or risk associated with these diagnostic tests or the test medium in this country. We acknowledge that it is possible that mishandling could occur in the future and it is possible that clear, consistent instructions may avoid some potential future mishandling, but cannot quantify any benefit based on this eventuality.

However, the response of potential marketers of *Bacillus* spp. test kits to the publicity that surrounded the 2001 anthrax event indicates that a potential benefit could be derived from clearly articulating the tests needed to provide sufficient data to ensure adequate safety and effectiveness of these products. By having consistent and easily available criteria, potential marketers will easily be able to ascertain whether or not to pursue market clearance. The availability of this information is expected to result in better, and perhaps fewer, potential marketing applications that may arise in response to future incidents of public inhalation anthrax exposure. Of course we hope that future events do not occur; however, there is a low level of probability that an incident could occur in the future. We have estimated the annual probability of a public inhalational anthrax incident to be approximately between 2 percent and 5 percent based on historical occurrences. We received 14 inquiries in regards to obtaining clearances which have resulted in 3 applications and 2 clearances. Using the success rate of 14 percent (2 successes from 14 inquiries), we expect a reduction of approximately 0.24 to 0.6 unsuccessful inquiries or applications each year. (Twelve unsuccessful inquiries or applications multiplied by the annual probability of an incident). The estimated effort to potential marketers of contacting FDA, obtaining advice concerning the clearance process, and preliminarily preparing a marketing application is estimated to take approximately 5 days of review, market research, and internal decisionmaking. The mean salary for employees within NAICS 325413 (In Vitro Diagnostic Substance Manufacturing) is approximately $80,000 (Census, 2007). A week of FTE (full-time employee) time would thus have an average cost to manufacturers of about $1,500. By avoiding unnecessary (and ultimately unsuccessful) inquiries for potential marketing applications, we expect the proposed rule to result in savings of between $400 and $900 per year. ($1,500 multiplied by 0.24 and 0.6 avoided inquiries each year).

In addition, FDA resources will not be spent responding to inquiries or reviewing unsuccessful applications that would not be submitted with the clear information that would be the result of the proposed rule. The average FDA full-time equivalent employee is valued at approximately $130,000, including salary, benefits, overhead, and support). Responding to inquiries concerning a potential application may consume a few hours of resources per inquiry while reviewing an application may consume as much as 2 weeks of review time. On average, we expect each avoided inquiry or application to save approximately 8 hours of FDA resources. Thus, with the clear information available as a result of the proposed rule, FDA is expected to save between $100 and $300 per year ($130,000 divided by 235 days times 0.24 and 0.6 annual inquiries avoided).

Thus, we estimate the proposed regulation will result in quantifiable benefits of avoiding unnecessary inquiries and potential applications to be between $500 and $1,200 per year. We believe that the unquantified benefits of providing an additional level of quality assurance, maintaining the predictive value of the marketed test kits, and avoiding any potential future laboratory errors cannot be estimated, but represent real benefits to the public health.

H. Alternatives to the Proposed Rule

We identified four plausible alternatives to the proposed rule.

1. Continue to regulate as an unclassified device. This alternative would not provide an assurance of safety and effectiveness and would continue the current level of inconsistent information for potential new marketers.

2. Regulate this diagnostic test as a Class I device. Because sufficient information was available to develop special controls for this device, this alternative, which would require general controls only, was not considered sufficient for the potential risks of this device.

3. Regulate this diagnostic test as a Class III device. Premarket approval and clinical data collection are not appropriate for the potential risks of this device, which are more appropriately dealt with using the proposed special controls. Classifying the test as Class III would increase the cost of marketing the devices without an increase in assurances of safety and effectiveness.

4. Regulate this diagnostic test as a Class II device with alternative special controls. The proposed guidance document is sufficient to provide assurances of safety and effectiveness. Other potential special controls were deemed to not be cost-effective and not provide additional assurances of safety and effectiveness.

I. Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because of the minor costs to manufacturing entities attributable to the proposed rule, the Agency believes the proposed rule will not have a significant economic impact on a substantial number of small manufacturing entities. In addition, the proposed rule will not affect testing laboratories because we do not expect any change in current use of the diagnostic test kit.

There are currently five cleared diagnostic kits for the identification of *Bacillus* spp. marketed by five companies. These companies are classified in the In Vitro Diagnostic Substance Manufacturing Industry (NAICS 325413) by the Census of Manufacturers. This industry is typified by small entities. For this industry, the Small Business Administration classifies any establishment with 500 or fewer employees as small. The typical establishment in this industry employs only about 120 employees, so virtually every company is small. Value of shipments for this industry is approximately $50,000,000 per establishment. The expected annualized cost per affected establishment ($800) represents less than 0.002 percent of annual shipments.

Testing Laboratories (NAICS 541380) are considered small by the Small Business Administration if they generate $12,000,000 or less in annual revenue. There is no change in activity expected by this industry from the proposed rule, so we do not expect any impact on laboratories.

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires Agencies to "construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute." Federal law includes an express preemption provision that preempts certain state requirements "different from or in addition to" certain Federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic* v. *Lohr* 518 U.S. 470 (1996); *Riegel* v. *Medtronic,* 552 U.S. 312 (2008). The special control regarding limited distribution set out in the proposed regulation, if finalized, would create a requirement. The other special controls, if finalized, would create "requirements" to address each identified risk to health presented by these specific medical devices under 21 U.S.C. 360k, even though product sponsors may have flexibility in how they meet those requirements. Cf. *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–42 (9th Cir. 1997).

VIII. Paperwork Reduction Act of 1995

FDA concludes that this proposed rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520) is not required.

The proposed rule would establish as special control a draft guidance document that refers to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control no. 0910–0120. The collections of information in 21 CFR part 801 and 21 CFR 809.10, regarding labeling, have been approved under OMB control no. 0910–0485.

IX. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding this proposed rule. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

X. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. We have verified all Web site addresses, but we are not responsible for subsequent changes to the Web sites after this document publishes in the **Federal Register**.

1. Transcript of the FDA Microbiology Devices Panel meeting, March 7, 2002, at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfAdvisory/details.cfm?mtg=348.*

2. Abshire, T.G. *et al.,* "Validation of the use of gamma phage for identifying *Bacillus anthracis,*" 102nd American Society for Microbiology Annual Meeting poster #C122, 2001.

3. Brown, Eric R. and William B. Cherry, "Specific identification of *Bacillus anthracis* by means of a variant bacteriophage," vol. 96, *Journal of Infectious Disease,* p. 34, 2001.

4. Brown, Eric R. *et al.,* "Differential diagnosis of *Bacillus cereus, Bacillus anthracis* and *Bacillus cereus* var. *mycoides,*" vol. 75, *Journal of Bacteriology,* p. 499, 1957.

5. Buck C.A. *et al.,* "Phage isolated from lysogenic *Bacillus anthracis,*" vol. 85, *Journal of Bacteriology,* p. 423, 1963.

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, it is proposed that 21 CFR part 866 be amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

1. The authority citation for 21 CFR part 866 continues to read as follows:

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

2. Section 866.3045 is added to subpart D to read as follows:

§ 866.3045 In vitro diagnostic device for Bacillus spp. detection.

(a) *Identification.* An in vitro diagnostic device for *Bacillus* spp. detection is used to detect and differentiate among *Bacillus* spp. and presumptively identify *Bacillus anthracis* and other *Bacillus* spp. from cultured isolates or clinical specimens as an aid in the diagnosis of anthrax and other diseases caused by *Bacillus* spp. This device may consist of *Bacillus* spp. antisera conjugated with a fluorescent dye (immunofluorescent reagents) used to presumptively identify bacillus-like organisms in clinical specimens; or bacteriophage used for differentiating *B. anthracis* from other *Bacillus* spp. based on susceptibility to lysis by the phage; or antigens used to identify antibodies to *B. anthracis* (anti-toxin and anti-capsular) in serum. Bacillus infections include anthrax (cutaneous, inhalational, or gastrointestinal) caused by *B. anthracis,* and gastrointestinal disease and non-gastrointestinal infections caused by *B. cereus.*

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

(1) FDA's guidance document entitled: "Class II Special Controls Guidance Document: In Vitro Diagnostic Devices for *Bacillus* spp. Detection; Guidance for Industry and FDA." See § 866.1(e) for information on obtaining this document.

(2) The distribution of these devices is limited to laboratories with experienced personnel who have training in principles and use of microbiological culture identification methods and infectious disease diagnostics, and with appropriate biosafety equipment and containment.

Dated: *May 12, 2011.*

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2011–12088 Filed 5–17–11; 8:45 am]

BILLING CODE 4160–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2011–10; Order No. 727]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is noticing a recently-filed Postal Service petition to initiate an informal rulemaking proceeding to consider changes in analytical principles. Proposal Two involves changes affecting cost models for evaluating competitive Negotiated Service Agreements. This notice informs the public of the filing, addresses preliminary procedural matters, and invites public comment.

DATES: *Comments are due:* June 13, 2011.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx*. Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: On May 10, 2011, the Postal Service filed a petition pursuant to 39 CFR 3050.11 asking the Commission to initiate an informal rulemaking proceeding to consider changes in the analytical principles approved for use in periodic reporting.[1] Proposal Two is a set of four changes that the Postal Service first presented in its FY 2010 Annual Compliance Report (ACR) modifying the cost models that are used to evaluate Negotiated Service Agreements (NSAs) for competitive products. These cost models were included in USPS–FY10–NP27 in that docket.

The Petition notes that in its FY 2010 Annual Compliance Determination, the Commission made a preliminary determination that these four changes constitute changes to analytical principles that require prior Commission approval before being incorporated in an ACR.[2] The Postal Service notes that the purpose of its Petition is to obtain the Commission's approval of the referenced changes for use in future ACRs, even though some of the changes could be viewed as corrections to its models not requiring advance Commission approval. Petition at 1.

The four changes for which the Postal Service seeks approval are:

1. The addition of a cost avoidance for Priority mailpieces;
2. The inclusion of D-Report adjustments; [3]
3. The incorporation of the CRA adjustment for Alaska Air Priority transportation; and
4. Changes in the distribution of other costs for Parcel Select and Parcel Return Service.

In the material supporting these changes, the Postal Service asserts that including them in the NSA cost models better matches the characteristics of the mail volume for the NSAs in question. It characterizes inclusion of the D-Report and the Alaska Air adjustments as rectifying previous omissions from these models. It notes that the change in the distribution of "Other" costs for Parcel Select is made necessary by the inclusion of the D-Report adjustment.

The Postal Service explains that if the D-Report adjustment is made, it will comprise the majority of "Other" costs. Since the D-Report adjustment is computed as a cost per piece, it contends, "Other" costs should be distributed on a per-piece basis, rather than treated as proportionate to mail processing, transportation, and delivery costs. It says that for consistency, a similar adjustment should be made to the costs of Parcel Return Service. *Id.* at 4.

More detailed descriptions of the proposed changes can be found in USPS–RM2011–10/NP1, which is filed under seal.

It is ordered:

1. The Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider a Proposed Change in Analytical Principles (Proposal Two), filed May 10, 2011, is granted.
2. The Commission establishes Docket No. RM2011–10 to consider the matters raised by the Postal Service's Petition.
3. Interested persons may submit comments on Proposal Two no later than June 13, 2011.
4. The Commission will determine the need for reply comments after review of the initial comments.
5. John P. Klingenberg is appointed to serve as the Public Representative to represent the interests of the general public in this proceeding.
6. The Secretary shall arrange for publication of this notice in the **Federal Register.**

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2011–12202 Filed 5–17–11; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0372; FRL–9307–4]

Approval and Promulgation of Air Quality Implementation Plans; California; Determination of Termination of Section 185 Fees

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to determine that the State of California is no longer required to submit or implement section 185 fee program State Implementation Plan (SIP) revisions for the Sacramento Metro 1-hour ozone nonattainment area (Sacramento Metro Area) to satisfy anti-backsliding requirements for the 1-hour ozone standard. The Sacramento Metro Area consists of both Sacramento and Yolo counties and portions of four adjacent counties (Solano, Sutter, Placer and El Dorado). This proposed determination ("Termination Determination") is based on complete, quality-assured and certified ambient air quality monitoring data for 2007–2009, showing attainment of the 1-hour ozone National Ambient Air Quality Standard (1-hour ozone NAAQS or standard), which is due to permanent and enforceable emission reductions implemented in the area. Complete and

[1] Petition of the United States Postal Service Requesting Initiation of a Proceeding to Consider a Proposed Change in Analytical Principles (Proposal Two), May 10, 2011 (Petition).

[2] *See* Docket No. ACR2010, FY 2010 Annual Compliance Determination, March 29, 2011, at 141.

[3] The D-Report is one of six reports used to develop the Cost and Revenue Analysis (CRA). In the D-Report, the Postal Service provides attributable, product-specific, and volume variable costs for each product.