

allotted to each commenter and the approximate time each comment is to begin and will select and notify participants by June 2, 2023.

*Transcript:* Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at <https://duke.is/5ca3k>. The transcript will also be available at <https://www.regulations.gov> and may be viewed at the Dockets Management Staff (see **ADDRESSES**).

Dated: April 12, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023-08066 Filed 4-14-23; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2023-N-0249]

#### Authorization of Emergency Use of an In Vitro Diagnostic Device in Response to an Outbreak of Mpox; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the issuance of an Emergency Use Authorization (EUA) (the Authorization) under the Federal Food, Drug, and Cosmetic Act (FD&C Act) in response to an outbreak of mpox. FDA has issued an Authorization for an in vitro diagnostic device as requested by Cue Health, Inc. The Authorization contains, among other things, conditions on the emergency use of the authorized product. The Authorization follows the August 9, 2022, determination by the Secretary of Health and Human Services (HHS) that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves monkeypox virus. On the basis of such determination, the Secretary of HHS declared, on September 7, 2022, that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection and/or diagnosis of infection with the monkeypox virus, including in vitro diagnostics that detect and/or diagnose infection with non-variola *Orthopoxvirus*, pursuant to the FD&C Act, subject to terms of any authorization issued under that section. The Authorization, which includes an

explanation of the reasons for issuance, is reprinted in this document.

**DATES:** The Authorization is effective as of March 17, 2023.

**ADDRESSES:** Submit written requests for single copies of an EUA to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request or include a Fax number to which the Authorization may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorization.

**FOR FURTHER INFORMATION CONTACT:** Kim Sapsford-Medintz, Office of Product Evaluation and Quality, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3216, Silver Spring, MD 20993-0002, 301-796-0311 (this is not a toll-free number).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Section 564 of the FD&C Act (21 U.S.C. 360bbb-3) allows FDA to strengthen public health protections against biological, chemical, radiological, or nuclear agent or agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. With this EUA authority, FDA can help ensure that medical countermeasures may be used in emergencies to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by biological, chemical, radiological, or nuclear agent or agents when there are no adequate, approved, and available alternatives (among other criteria).

##### **II. Criteria for EUA Authorization**

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) a determination by the Secretary of Homeland Security that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of Defense that there is a military emergency, or a significant potential for a military emergency, involving a

heightened risk to U.S. military forces, including personnel operating under the authority of title 10 or title 50, U.S. Code, of attack with (A) a biological, chemical, radiological, or nuclear agent or agents or (B) an agent or agents that may cause, or are otherwise associated with, an imminently life-threatening and specific risk to U.S. military forces;<sup>1</sup> (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of Homeland Security pursuant to section 319F-2 of the Public Health Service (PHS) Act (42 U.S.C. 247d-6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Under section 564(h)(1) of the FD&C Act, revisions to an authorization shall be made available on the internet website of FDA. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use in an actual or potential emergency when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), 512, or 515 of the FD&C Act (21 U.S.C. 355, 360(k), 360b, or 360e) or section 351 of the PHS Act (42 U.S.C. 262), or conditionally approved under section 571 of the FD&C Act (21 U.S.C. 360ccc).

<sup>1</sup> In the case of a determination by the Secretary of Defense, the Secretary of HHS shall determine within 45 calendar days of such determination, whether to make a declaration under section 564(b)(1) of the FD&C Act, and, if appropriate, shall promptly make such a declaration.

FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA<sup>2</sup> concludes: (1) that an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that (A) the product may be effective in diagnosing, treating, or preventing (i) such disease or condition or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section

<sup>2</sup> The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; (4) in the case of a determination described in section 564(b)(1)(B)(ii) of the FD&C Act, that the request for emergency use is made by the Secretary of Defense; and (5) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under section 564(c)(4) of the FD&C Act.

### III. The Authorization

The Authorization follows the August 9, 2022, determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves monkeypox virus. Notice of the Secretary's determination was provided in the **Federal Register** on August 15, 2022 (87 FR 50090). On the basis of such determination, the Secretary of HHS declared, on September 7, 2022, that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection and/or diagnosis of infection with the monkeypox virus, including in vitro diagnostics that detect and/or diagnose infection with non-variola *Orthopoxvirus*, pursuant to section 564

of the FD&C Act, subject to the terms of any authorization issued under that section. Notice of the Secretary's declaration was provided in the **Federal Register** on September 13, 2022 (87 FR 56074). On March 17, 2023, having concluded that the criteria for issuance of the Authorization under section 564(c) of the FD&C Act are met, FDA issued an EUA to Cue Health, Inc., for the Cue Mpox (Monkeypox) Molecular Test, subject to the terms of the Authorization. The Authorization, which is included below in its entirety after section IV of this document (not including the authorized versions of the fact sheets and other written materials), provides an explanation of the reasons for issuance, as required by section 564(h)(1) of the FD&C Act. Any subsequent revision to the Authorization can be found from FDA's web page at: <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>.

### IV. Electronic Access

An electronic version of this document and the full text of the Authorization is available on the internet at: <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>.

BILLING CODE 4164-01-P



March 17, 2023

Sharon Young  
Senior Manager, Regulatory Affairs  
Cue Health, Inc.  
4980 Carroll Canyon Road, Suite 100  
San Diego, CA 92121

Device: Cue Mpx (Monkeypox) Molecular Test  
EUA Number: EUA230004  
Company: Cue Health, Inc.  
Indication: This test is authorized for the qualitative detection of DNA from monkeypox virus (clade I/II)<sup>1</sup> in human lesion swab specimens (i.e., swabs of acute pustular or vesicular rash) from individuals suspected of mpx<sup>2</sup> by their healthcare provider. Emergency use of this test is limited to authorized laboratories.  
Authorized Laboratories: Laboratories certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. §263a, that meet requirements to perform high, moderate, or waived complexity tests. Testing is authorized for use at the Point of Care (POC), i.e., in patient care settings operating under a CLIA Certificate of Waiver, Certificate of Compliance, or Certificate of Accreditation.

Dear Sharon Young:

This letter is in response to your<sup>3</sup> request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of your product,<sup>4</sup> pursuant to Section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. §360bbb-3).

<sup>1</sup> On August 12, 2022, following a meeting convened by the World Health Organization (WHO) monkeypox virus variants were renamed to align with current best practices under the International Classification of Diseases and the WHO Family of International Health Related Classifications (WHO-FIC). This letter will refer to the former Congo Basin (Central African) clade as clade one (I) and the former West African clade as clade two (II). Refer to: <https://www.who.int/news/item/12-08-2022-monkeypox--experts-give-virus-variants-new-names>.

<sup>2</sup> On November 28, 2022, following a series of consultations with global experts, the World Health Organization (WHO) began using a new preferred term "mpox" as a synonym for monkeypox, the disease cause by the monkeypox virus. Refer to: <https://www.who.int/news/item/28-11-2022-who-recommends-new-name-for-monkeypox-disease>.

<sup>3</sup> For ease of reference, this letter will use the term "you" and related terms to refer to Cue Health, Inc.

<sup>4</sup> For ease of reference, this letter will use the term "your product" to refer to the Cue Mpx (Monkeypox) Molecular Test used for the indication identified above.

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On August 9, 2022, pursuant to Section 564(b)(1)(C) of the Act, the Secretary of the Department of Health and Human Services (HHS) determined that there is a public health emergency, or a significant potential for a public health emergency, that affects or has a significant potential to affect national security or the health and security of United States citizens living abroad that involves monkeypox virus.<sup>5</sup> Pursuant to Section 564 of the Act, and on the basis of such determination, the Secretary of HHS then declared on September 7, 2022 that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection and/or diagnosis of infection with the monkeypox virus, including in vitro diagnostics that detect and/or diagnose infection with non-variola *Orthopoxvirus*, subject to the terms of any authorization issued under Section 564(a) of the Act.<sup>6</sup>

FDA considered the totality of scientific information available in authorizing the emergency use of your product for the indication above. A summary of the performance information FDA relied upon is contained in the “Cue Mpox (Monkeypox) Molecular Test Instructions for Use.” There is an FDA-cleared test for the qualitative detection of non-variola *Orthopoxvirus*, that includes monkeypox virus, but this is not an adequate and available alternative to your product.<sup>7</sup>

Having concluded that the criteria for issuance of this authorization under Section 564(c) of the Act are met, I am authorizing the emergency use of your product, described in the Scope of Authorization of this letter (Section II), subject to the terms of this authorization.

#### **I. Criteria for Issuance of Authorization**

I have concluded that the emergency use of your product meets the criteria for issuance of an authorization under Section 564(c) of the Act, because I have concluded that:

1. The monkeypox virus can cause a serious or life-threatening disease or condition, to humans infected by this virus;
2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that your product may be effective in diagnosing infection with the monkeypox virus, and that the known and potential benefits of your product when used for diagnosing infection with the monkeypox virus, outweigh the known and potential risks of your product; and
3. There is no adequate, approved, and available alternative to the emergency use of your product.<sup>8</sup>

<sup>5</sup> 87 FR 50090 (August 15, 2022)

<sup>6</sup> 87 FR 56074 (September 13, 2022)

<sup>7</sup> To date, the FDA-cleared CDC Non-variola *Orthopoxvirus* Real-time PCR Primer and Probe Set (Product Code: PBK; DEN070001, K181205, K221658, K221834, K222558) is the only test available in the United States with FDA clearance for the detection of non-variola *Orthopoxvirus* DNA, including vaccinia, cowpox, monkeypox and ectromelia viruses at varying concentrations. Available information indicates that timely detection of mpox cases in the United States requires wide availability of diagnostic testing to control the spread of this contagious infection and there is currently a need for additional diagnostic testing for monkeypox virus in the United States.

<sup>8</sup> No other criteria of issuance have been prescribed by regulation under Section 564(c)(4) of the Act.

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## II. Scope of Authorization

I have concluded, pursuant to Section 564(d)(1) of the Act, that the scope of this authorization is limited to the indication above.

### Authorized Product Details

Your product is a isothermal nucleic acid amplification assay intended for the qualitative detection of DNA from monkeypox virus (clade I/II), in human lesion swab specimens (i.e., swabs of acute pustular or vesicular rash) from individuals suspected of mpox by a healthcare provider. The test is run using the Cue Health Monitoring System (Cue Reader), the Cue Mpox (Monkeypox) Molecular Test Cartridge, the Cue Sample Wand, and the Cue Health Application (App) on a compatible mobile smart device named on the Cue Health website at [www.cuehealth.com](http://www.cuehealth.com).

Testing is limited to laboratories certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 42 U.S.C. §263a, that meet requirements to perform high, moderate, or waived complexity tests. Testing is authorized for use at the Point of Care (POC), i.e., in patient care settings operating under a CLIA Certificate of Waiver, Certificate of Compliance, or Certificate of Accreditation.

Results are for the identification of monkeypox virus (clade I/II) DNA which is generally detectable in human pustular or vesicular lesion specimens during the acute phase of infection. Positive results are indicative of the presence of monkeypox virus (clade I/II) DNA; clinical correlation with patient history and other diagnostic information is necessary to determine patient infection status. Positive results do not rule out bacterial infection or co-infection with other viruses. The agent detected may not be the definite cause of disease. Negative results obtained with this device do not preclude monkeypox virus infection and should not be used as the sole basis for treatment or other patient management decisions. Negative results must be combined with clinical observations, patient history, and epidemiological information.

Your product, when used with the Cue Health Monitoring System (Cue Reader), the Cue Mpox (Monkeypox) Molecular Test Cartridge, the Cue Sample Wand, and the Cue Health App downloaded on a compatible mobile smart device,<sup>9</sup> automates all aspects of nucleic acid testing including sample preparation, nucleic acid extraction and amplification, and detection of the monkeypox virus (clade I/II) nucleic acid targeted sequences using isothermal nucleic acid amplification technology in a single-use cartridge as described in the authorized labeling (described below). The Cue Mpox (Monkeypox) Molecular Test includes the materials (or other authorized materials as may be requested under Condition O. below) described in the “Cue Mpox (Monkeypox) Molecular Test Instructions for Use.”

<sup>9</sup> Compatible smartphone includes Apple iPhone running Operation System (iOS) 13 or later versions of the iOS, Apple iPad models with iPadOS version 13.0 or later versions with Bluetooth Standard 4.2 or later (Bluetooth 5.0 preferred), and Android Phones running OS 9.0 (API level 28) or later versions with display size 5.5” or higher; Bluetooth Standard 4.2 or later (Bluetooth 5.0 preferred), Wi-Fi dual-band 2.4GHz and 5 GHz (5 GHz preferred). Additional smartphone models as may be requested, and for which you receive appropriate authorization, in accordance with Condition O. below.

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Your product requires control materials (or other authorized control materials as may be requested under Condition O. below) that are described in the “Cue Mpox (Monkeypox) Molecular Test Instructions for Use,” and “Cue Mpox (Monkeypox) Molecular Test Quick Reference Instructions (QRI).” Your product also requires the use of additional authorized materials and authorized ancillary reagents that are not included with your product and are described in the authorized labeling described below.

The labeling entitled “Cue Mpox (Monkeypox) Molecular Test Instructions for Use,” “Cue Mpox (Monkeypox) Molecular Test Quick Reference Instructions (QRI),” “Cue Health Monitoring System User Manual,” and the “Cue Get Started Here” quick start guide, (available at <https://www.fda.gov/medical-devices/emergency-use-authorizations-medical-devices/monkeypox-emergency-use-authorizations-medical-devices>), the “Cue Health App” and the following fact sheets pertaining to the emergency use, are required to be made available as set forth in the Conditions of Authorization (Section IV), and are collectively referred to as “authorized labeling”:

- Fact Sheet for Healthcare Providers: Cue Health, Inc. – Cue Mpox (Monkeypox) Molecular Test
- Fact Sheet for Patients: Cue Health, Inc. – Cue Mpox (Monkeypox) Molecular Test

The above described product, when accompanied by the authorized labeling provided as set forth in the Conditions of Authorization (Section IV), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by applicable federal law.

I have concluded, pursuant to Section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of your product, when used consistent with the Scope of Authorization of this letter (Section II), outweigh the known and potential risks of your product.

I have concluded, pursuant to Section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that your product may be effective in diagnosing infection with the monkeypox virus, when used consistent with the Scope of Authorization of this letter (Section II), pursuant to Section 564(c)(2)(A) of the Act.

FDA has reviewed the scientific information available to FDA, including the information supporting the conclusions described in Section I above, and concludes that your product (as described in the Scope of Authorization of this letter (Section II)) meets the criteria set forth in Section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of your product under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of HHS's determination under Section 564(b)(1)(C) of the Act described above and the Secretary of HHS's corresponding declaration under Section

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564(b)(1) of the Act, your product is authorized for the indication above.

### III. Waiver of Certain Requirements

I am waiving the following requirements for your product during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of your product, but excluding Subpart H (Acceptance Activities, 21 CFR 820.80 and 21 CFR 820.86), Subpart I (Nonconforming Product, 21 CFR 820.90), Subpart O (Statistical Techniques, 21 CFR 820.250) and Subpart M (Complaint Files, 21 CFR 820.198).

### IV. Conditions of Authorization

Pursuant to Section 564(e) of the Act, I am establishing the following conditions on this authorization:

#### Cue Health, Inc. (You) and Authorized Distributor(s)<sup>10</sup>

- A. Your product must comply with the following labeling requirements pursuant to FDA regulations: the intended use statement (21 CFR 809.10(a)(2), (b)(2)); adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)); appropriate limitations on the use of the device including information required under 21 CFR 809.10(a)(4); and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).
- B. Your product must comply with the following quality system requirements pursuant to FDA regulations: 21 CFR 820 Subpart H (Acceptance Activities, 21 CFR 820.80 and 21 CFR 820.86), Subpart I (Nonconforming Product, 21 CFR 820.90), Subpart O (Statistical Techniques, 21 CFR 820.250), and Subpart M (Complaint Files, 21 CFR 820.198).
- C. You and authorized distributor(s) must make your product available with the authorized labeling to authorized laboratories.
- D. You and authorized distributor(s) must make available on your website(s) the authorized labeling.
- E. You and authorized distributor(s) must make available “Cue Mpox (Monkeypox) Molecular Test Instructions for Use,” “Cue Mpox (Monkeypox) Molecular Test Quick Reference Instructions (QRI),” “Cue Health Monitoring System User Manual,” “Cue Get Started Here” quick start guide related to the use of your product on your website(s) and via the Cue Health Application (Cue Health App). Additionally, you must provide the opportunity to request a copy of the above named authorized labeling

<sup>10</sup> “Authorized Distributor(s)” are identified by you, Cue Health, Inc., in your EUA submission as an entity allowed to distribute your product.

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documents in paper form, and after such request, you must promptly provide the requested labeling at no additional cost.

- F. You and authorized distributor(s) must inform authorized laboratories and relevant public health authorities of this EUA, including the terms and conditions herein, and any updates made to your product and authorized labeling.
- G. Through a process of inventory control, you and authorized distributor(s) must maintain records of the authorized laboratories to which your product is distributed and the number of your product distributed.
- H. You and authorized distributor(s) must collect information on the performance of your product. You must report any significant deviations from the established performance characteristics of your product of which you become aware to the Division of Microbiology (DMD)/Office of Health Technology 7 (OHT7): Office of In Vitro Diagnostics /Office of Product Evaluation and Quality (OPEQ)/Center for Devices and Radiological Health (CDRH) (via email: [CDRH-EUA-Reporting@fda.hhs.gov](mailto:CDRH-EUA-Reporting@fda.hhs.gov)).
- I. You and authorized distributor(s) are authorized to make available additional information relating to the emergency use of your product that is consistent with, and does not exceed, the terms of this letter of authorization.

**Cue Health, Inc. (You)**

- J. You must register and list consistent with 21 CFR Part 807 within one month of this letter.
- K. You must notify FDA of any authorized distributor(s) of your product, including the name, address, and phone number of any authorized distributor(s).
- L. You must have a signed agreement with each authorized distributor that distribution of the authorized product must be consistent with this Letter of Authorization.
- M. If requested by FDA, you must submit associated documents and records related to your quality system for FDA review within 48 hours of the request.
- N. You must provide authorized distributor(s) with a copy of this EUA and communicate to authorized distributor(s) any subsequent amendments that might be made to this EUA and its authorized accompanying materials (e.g., Fact Sheets).
- O. You may request modifications to this EUA for your product, including to the Scope of Authorization (Section II in this letter) or to the authorized labeling, including requests to make available additional authorized labeling specific to an authorized distributor. Such additional labeling may use another name for the product but otherwise must be consistent with the authorized labeling, and not exceed the terms of authorization of this



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letter. Any request for modification to this EUA should be submitted to DMD/OHT7/OPEQ/CDRH and require appropriate authorization from FDA.

- P. You must have lot release procedures and the lot release procedures, including the study design and statistical power, must ensure that the tests released for distribution have the clinical and analytical performance claimed in the authorized labeling.
- Q. If requested by FDA, you must submit lot release procedures to FDA, including sampling protocols, testing protocols, and acceptance criteria, that you use to release lots of your product for distribution in the U.S. If such lot release procedures are requested by FDA, you must provide it within 48 hours of the request.
- R. You must evaluate the analytical limit of detection and assess traceability of your product with any FDA-recommended reference material(s) if requested by FDA.<sup>11</sup> After submission to and concurrence with the data by FDA, you must update your labeling to reflect the additional testing. Such labeling updates will be made in consultation with, and require concurrence of, DMD/OHT7/OPEQ/CDRH.
- S. You must have a process in place to track adverse and report to FDA pursuant to 21 CFR Part 803.
- T. You must evaluate the impact of monkeypox viral mutations on your product's performance. Such evaluations must occur on an ongoing basis and must include any additional data analysis that is requested by FDA in response to any performance concerns you or FDA identify during routine evaluation. Additionally, if requested by FDA, you must submit records of these evaluations for FDA review within 48 hours of the request. If your evaluation identifies viral mutations that affect the stated expected performance of your device, you must notify FDA immediately (via email: [CDRH-EUA-Reporting@fda.hhs.gov](mailto:CDRH-EUA-Reporting@fda.hhs.gov)).
- U. If requested by FDA, you must update your labeling within 7 calendar days to include any additional labeling risk mitigations identified by FDA regarding the impact of viral mutations on test performance. Such updates will be made in consultation with, and require concurrence of, DMD/OHT7/OPEQ/CDRH.
- V. If requested by FDA, you must further evaluate the clinical performance of your product using fresh natural clinical specimens in an FDA agreed upon post authorization clinical evaluation study. After submission to and concurrence with the data by FDA, you must update the authorized labeling to reflect the additional testing. Such labeling updates will be made in consultation with, and require concurrence of, DMD/OHT7/OPEQ/CDRH.
- W. You must make available an FDA agreed upon positive control material for use with your product within 3 months of the date of this letter (unless otherwise agreed to with

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<sup>11</sup> Traceability refers to tracing analytical sensitivity/reactivity back to an FDA-recommended reference material. FDA may request, for example, that you perform this study in the event that we receive reports of adverse events concerning your product.

DMD/OHT7/OPEQ/CDRH). After submission of details about the positive control material to, and review of and concurrence with the positive control material by FDA, you must update your product labeling if requested by FDA. Such additional labeling updates must be made in consultation with, and require concurrence of, DMD/OHT7/OPEQ/CDRH prior to implementation.

- X. You must further evaluate the near LoD performance of your product in an FDA agreed upon post authorization study within 4 months of the date of this letter (unless otherwise agreed to with DMD/OHT7/OPEQ/CDRH). After submission to and concurrence with the data by FDA, you must update authorized labeling to reflect the additional testing, if requested by FDA. Such labeling updates will be made in consultation with, and require concurrence of, DMD/OHT7/OPEQ/CDRH.
- Y. You must submit to DMD/OHT7/OPEQ/CDRH within 3 months of the date of this letter your plan and anticipated timeline to establish and maintain a quality system that is appropriate for your product's design and manufacture, and that meets the requirements of either the 2016 edition of ISO 13485 or 21 CFR Part 820.

#### **Authorized Laboratories**

- Z. Authorized laboratories that receive your product must notify the relevant public health authorities of their intent to run your product prior to initiating testing.
- AA. Authorized laboratories using your product must have a process in place for reporting test results to healthcare providers and relevant public health authorities, as appropriate.
- BB. Authorized laboratories using your product must include with test result reports, all authorized Fact Sheets. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.
- CC. Authorized laboratories using your product must use your product as outlined in the authorized labeling. Deviations from the authorized procedures, including the authorized instruments, authorized extraction methods, authorized clinical specimen types, authorized control materials, authorized other ancillary reagents and authorized materials required to use your product are not permitted.
- DD. Authorized laboratories must have a process in place to track adverse events and report to you (Cue Customer Technical Support 833-283-8378) and to FDA pursuant to 21 CFR Part 803.
- EE. All operators using your product must be appropriately trained in performing and interpreting the results of your product, use appropriate personal protective equipment when handling your product, and use your product in accordance with the authorized labeling.

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**Cue Health, Inc. (You), Authorized Distributor(s) and Authorized Laboratories**

- FF. You, authorized distributor(s), and authorized laboratories must collect information on the performance of your product and must report any significant deviations from the established performance characteristics of your product of which they become aware to DMD/OHT7/OPEQ/CDRH (via email: [CDRH-EUA-Reporting@fda.hhs.gov](mailto:CDRH-EUA-Reporting@fda.hhs.gov)). In addition, authorized distributor(s) and authorized laboratories report to you (833.283.8378 or [support@cuehealth.com](mailto:support@cuehealth.com)).
- GG. You, authorized distributor(s), and authorized laboratories using your product must ensure that any records associated with this EUA, are maintained until otherwise notified by FDA. Such records must be made available to FDA for inspection upon request.

**Conditions Related to Printed Materials, Advertising and Promotion**

- HH. All descriptive printed matter, advertising and promotional materials relating to the use of your product shall be consistent with the authorized labeling, as well as the terms set forth in this EUA and meet the requirements set forth in section 502(a), (q)(1), and (r) of the Act, as applicable, and FDA implementing regulations.
- II. No descriptive printed matter, advertising or promotional materials relating to the use of your product may represent or suggest that this test is safe or effective for the detection of monkeypox virus or other non-variola orthopoxviruses.
- JJ. All descriptive printed matter, advertising and promotional materials relating to the use of your product shall clearly and conspicuously state that:
- This product has not been FDA cleared or approved, but has been authorized for emergency use by FDA under an EUA;
  - This product has been authorized only for the detection of nucleic acid from monkeypox virus, not for any other viruses or pathogens; and
  - The emergency use of this product is only authorized for the duration of the declaration that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection and/or diagnosis of infection with the monkeypox virus, including in vitro diagnostics that detect and/or diagnose infection with non-variola *Orthopoxvirus*, under Section 564(b)(1) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3(b)(1), unless the declaration is terminated or authorization is revoked sooner.

The emergency use of your product as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

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#### V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of in vitro diagnostics for detection and/or diagnosis of infection with the monkeypox virus, including in vitro diagnostics that detect and/or diagnose infection with non-variola *Orthopoxvirus*, is terminated under Section 564(b)(2) of the Act or the EUA is revoked under Section 564(g) of the Act.

Sincerely,

//s//

Jeffrey E. Shuren, M.D., J.D.  
Director  
Center for Devices and Radiological Health  
Food and Drug Administration

Enclosure

Dated: April 12, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

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**BILLING CODE 4164-01-C**

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Announcement of the Second Meeting of the 2025 Dietary Guidelines Advisory Committee

**AGENCY:** U.S. Department of Health and Human Services (HHS); Office of the Assistant Secretary for Health (OASH); and U.S. Department of Agriculture (USDA), Food, Nutrition, and Consumer Services (FNCS).

**ACTION:** Notice.

**SUMMARY:** The Departments of Health and Human Services and Agriculture announce the second meeting of the 2025 Dietary Guidelines Advisory Committee (Committee). This meeting will be open to the public virtually.

**DATES:** The second meeting of the 2025 Dietary Guidelines Advisory Committee will be held on May 10, 2023, 9 a.m. to 3:30 p.m. ET.

**ADDRESSES:** The meeting will be accessible online via livestream and recorded for later viewing. Registrants will receive the livestream information prior to the meeting.

**SUPPLEMENTARY INFORMATION:**

**Authority and Purpose:** Under Section 301 of Public Law 101-445 (7 U.S.C. 5341, the National Nutrition Monitoring and Related Research Act of 1990, Title III), the Secretaries of HHS and USDA are directed to publish the *Dietary Guidelines for Americans* jointly at least every five years. See 88 FR 3423, January 19, 2023, for notice of the first meeting of the 2025 Dietary Guidelines Advisory Committee, the complete Authority and Purpose, and the Committee's Task. The 2025 Dietary Guidelines Advisory Committee is formed and governed under the provisions of the Federal Advisory Committee Act (FACA), Public Law 92-463, as amended (5 U.S.C., App).

**Purpose of the Meeting:** The Committee will meet to discuss their prioritization of the scientific questions proposed by the Departments (see [www.DietaryGuidelines.gov](http://www.DietaryGuidelines.gov)) and share draft plans for their review of the scientific evidence. In accordance with FACA, deliberations of the Committee will occur in a public forum.

**Meeting Agendas:** A detailed agenda will be announced in advance of the meeting at [www.DietaryGuidelines.gov](http://www.DietaryGuidelines.gov). The agenda will include presentations by each subcommittee and deliberation by the full Committee regarding the prioritization of scientific questions and initial draft protocol development and discussion of plans for future Committee work.

**Public Comment:** Public comments to the Committee opened on January 19, 2023 and will remain open throughout the Committee's deliberations. Comments may be submitted at <https://www.regulations.gov/document/HHS-OASH-2022-0021-0001>.

**Meeting Registration:** This Committee meeting is open to the public. The meeting will be accessible online via livestream and recorded for later viewing. Registration is required for the livestream. To register, go to [www.DietaryGuidelines.gov](http://www.DietaryGuidelines.gov) and click on the link for "Meeting Registration."

Closed captioning will be available to all participants. Individuals who need accommodations should contact Kara Beckman ([Kara.Beckman@hhs.gov](mailto:Kara.Beckman@hhs.gov)). Requests should be made at least five business days in advance of the meeting.

Meeting materials for each meeting will be accessible at [www.DietaryGuidelines.gov](http://www.DietaryGuidelines.gov). Materials may be requested by email at [dietaryguidelines@hhs.gov](mailto:dietaryguidelines@hhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Designated Federal Officer, 2025 Dietary Guidelines Advisory Committee, Janet M. de Jesus, MS, RD; HHS/OASH/ODPHP, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852; Phone: 240-453-8266; Email [DietaryGuidelines@hhs.gov](mailto:DietaryGuidelines@hhs.gov). Additional information is