

New York State Guidelines for Clinical Laboratory Business Model Compliance

No person shall own or operate a clinical laboratory located in or accepting specimens from New York State (NYS) unless a valid permit has been issued. See PHL Section 575.

Purveyors of clinical laboratory services (laboratories) that seek to operate in NYS¹ under a distributive model² or a business model designed to make testing available directly to consumers should use this guidance to determine if the model is in compliance with NYS rules prior to or concurrent with application for a NYS clinical laboratory permit and your submission of laboratory-developed (LDT) test validation data.

Understanding compliance risks associated with your particular model of doing business in NYS is especially important if you operate under a distributive model,² under which one firm purchases laboratory services³ that generate raw data, and then translates, transforms, converts, interprets or otherwise manipulates or augments the raw data to render it actionable for patient care and/or medical management.

A clinical laboratory permit would not be required for the entity responsible for the post-analytic phase of testing, i.e., data management and production of a clinically actionable test report IF that entity is a currently registered NYS-licensed sole practitioner -- or professional practice comprised of physicians and/or nurse practitioners organized as a professional corporation (PC) or professional limited liability corporation (PLLC) -- and testing is conducted by the practice's employees for patients of the practice. See PHL 579. NYS, based on Education Law, holds that only natural persons may be licensed to practice medicine, and therefore, with specific statutory exceptions, corporations are prohibited from practicing medicine. See NY Education Law Section 6527 and NY Business Law Section 1501.

Permit applicants should consult their own legal counsel in developing a business model that is compliant with NYS rules. See text of Health Department laws and regulations referenced in this guidance are available at www.wadsworth.org/labcert/TestApproval/index.htm.

Business model information for distributive models should be compiled jointly and signed by representatives of all involved entities. Only the information solicited in this document needs to be co-submitted. If certain responsive information is proprietary, it should be so marked and separated from the other materials being submitted jointly.

¹ "Operate in" means to accept and analyze specimens originating in NYS, regardless of the location of the facility accepting the specimens or issuing a report. *Operate in* is synonymous with *conduct business in*.

² A distributive model involves two or more entities providing separate components of an overall testing service, with a single laboratory report issued to the end-user of the clinical information (i.e., the practitioner who ordered the test). NYS's Clinical Laboratory Reference System provides oversight of all phases of specimen workflow, from patient preparation to issuance of an actionable result. The model may include two entities partnering in the pre-analytic phase (test requisition, specimen collection and handling), and/or the analytic phase for target selection (SNPs, sequence), with one partner fully responsible for the post-analytic phase of testing, i.e., data management and production of a clinically actionable test report. Integrity of information systems and data transfer, analytical validity of the data analysis, and quality systems for continuous improvement and complaint management are all pertinent to oversight of the partner responsible for the post-analytic phase. It is generally expected that each entity in this arrangement meets the NYS PHL definition of a laboratory and requires a laboratory permit. Limited exceptions as stipulated in NYS PHL Section 579 may apply.

³ For purposes of this guidance document, "purchase of laboratory services" refers to specimen processing services that generate raw data and which require a laboratory permit, just as is required for other preparatory services, such as histological preparation of tissue or culture of lymphocytes for cytogenetic examination.

Business Model Construction – Who Does What

Applicable rules: PHL Section 571 et seq.; 10 NYCRR Subpart 58-1

Any entity that generates analytical (raw) data (e.g., SNP, protein or RNA expression profiles) from laboratory analysis of a human specimen originating in NYS and/or translates or manipulates such data, including informatics analysis⁴ must hold a valid NYS clinical laboratory permit in the appropriate category as determined by the Department. Post-translation results include, but are not limited to, predictive classifiers for disease, conditions and health outcomes based upon the generation of SNP, RNA expression or protein profiles.

The **primary applicant**⁵ is the person or entity that issues a clinical meaningful, actionable report of test results containing information rendered, deduced, concluded or translated from the laboratory's raw data from examination of a human specimen. Such test results include, but are not limited to, predictive classifiers for disease, conditions and health outcomes based upon SNP, protein or RNA expression profiles.

⁴For purposes of this guidance, informatics analysis, as part of a laboratory test approved by the Department, is translation of raw data generated from the analysis of a human specimen, its component or derivative, into information that is clinically meaningful and actionable by a reasonably-informed practitioner. Actionable information includes, but is not limited to, risk of predisposition to a condition or disease. Informatics analysis employs computing resources to apply an algorithm, which may be laboratory-developed and/or based on the published population studies. Test results produced by informatics analysis generally do not constitute a medical interpretation, but rather contain information that is then subjected to medical interpretation within the context of a physician-patient relationship. See Also the Reporting Section below.

⁵The primary applicant may fulfill both roles (i.e., generates the raw data that is subjected to informatics analysis or other translation prior to reporting).

Please include the following information for the **primary applicant** with your initial permit application or validation data submission, marked ATTENTION: Regulatory Affairs.

- P1. Name, address and NYS clinical laboratory Permanent Facility Identifier PFI) (if assigned) of primary company, including web addresses.
- P2. A contact person and e-mail or telephone number for legal and business-related inquiries.
- P3. The PFI of the facility from which the primary applicant purchases analytical services; if no PFI has been assigned, provide name and contact information.
- P4. Whether the algorithm for translation of analytical raw data (the laboratory-developed method used by your firm) been validated, and when validation data was or will be submitted to the Department.
- P5. Your business classification, e.g., business corporation, professional corporation, partnership, limited liability corporation, professional limited liability company, etc.
- P6. The page(s) from the contract/agreement with the secondary applicant for purchased services illustrating that the contract includes a statement to the effect that both parties must comply with all applicable state and federal laws, and the provisions that designate to one party activities or legal obligations that the second party would routinely handle or encumber if operating independently (e.g., informed consent for genetic testing).
- P7. The content and source(s) for consumer and practitioner-oriented educational materials accessible prior to the ordering of a test. Web address is sufficient.
- P8. If specimen is not self-collected, a description of how collectors are identified and compensated.

- P9. A description of marketing processes and target audience(s). Is testing marketed directly to consumers using mass media? A description of your activities, if any, in the following areas: facilitating consumer access to testing, including providing referrals; marketing directly to consumers; serving as a conduit for resale of tests, including reports of results, performed by another entity.
- P10. If additional translation of raw data will be offered subsequent to the original test request (i.e., for a new panel or disease not previously offered) describe the process for making consumers and practitioners who have already accessed your services aware of the new tests available.
- P11. Is additional/alternative use of your test results is envisioned (e.g., sale of de-identified data to a pharmaceutical company or research institution)? If yes, provide a copy of the requisite research consent form, and describe how consumer privacy is protected.
- P12. Regarding websites and information access portals, is consumer-oriented information readily available? Is information specifically for practitioners readily available?

For purposes of this guidance, the **secondary applicant**⁶ is the person or entity that generates raw data from examination of a human specimen, including, but not limited to, SNP, protein or RNA expression profiling, and transfer that data to another party (the primary applicant) for subsequent translation into clinically meaningful, actionable test results that are reported to the ordering practitioner by the primary applicant.

⁶The primary applicant may fulfill both roles (specimen analysis and data translation). In the case of a single applicant (same permit, same location, same ownership), the applicant need only specify whether it has submitted validation data for the analytical method(s) that will be used.

Please include the following information on the secondary applicant:

- S1. Name, address and NYS clinical laboratory Permanent Facility Identifier (if assigned), including web addresses.
- S2. A contact person and e-mail or telephone number for legal and business-related inquiries.
- S3. Whether the algorithm for generation of analytical raw data (the laboratory-developed method used by your firm) has been validated, and when validation data was or will be submitted to the Department.
- S4. Your business classification, e.g., business corporation (Inc.), professional corporation, partnership, limited liability corporation, professional limited liability company, etc.
- S5. Page(s) from the contract/agreement with the primary applicant illustrating that the contract has been executed (or will be on (date)) and agreed to by corporate executives.
- S6. Describe what extent is the data set generated by your laboratory driven by the primary applicant. Are other parties (in addition to the primary applicant) offered this service?
- S7. Are data generated that will not be provided to the primary applicant for prediction of disease, conditions and health outcomes? If yes, is the additional data retained by your firm as the generator?.
- S8. Briefly describe technical service provided, i.e. singleplex, multiplex or whole genome analysis. Please include the method used, including platform and specimen type(s). NOTE: A full description of the test method will be required as part of your validation submission.
- S9. Describe the extent to which data exported to the primary applicant is medically actionable (useable by a reasonably-knowledgeable practitioner) without further translation, conversion, or manipulation.

- S10. Specify if an additional/alternative use of your analytical data is envisioned (sale of de-identified data to a pharmaceutical company, research institution, or party other than the primary applicant identified in this application).
- S11. Any specific activities or legal obligations the primary applicant will handle under this business model that your laboratory would routinely handle if operating independently.
- S12. Describe your activities, if any, serving as a core laboratory for 2 or more firms that purchase laboratory data for subsequent translation or manipulation by a second party.
- S13. Describe how you would ensure compliance with NYS rules while you are in the application process, i.e., unlicensed to test NYS specimens, absent wholesale reliance on your contract partner.

Test Authorization Procedures

**Applicable rules: PHL section 238-a; PHL Section 576b; PHL Section 577
PHL Section 585 et seq. 10 NYCRR Subpart 34-2; and
10 NYCRR Section 58-1.7**

While direct to consumer marketing is allowable in NYS, direct consumer access to tests is not. Almost all tests must be ordered by authorized persons⁷. In NYS, the person authorizing laboratory tests is typically a registered NYS-licensed medical practitioner. A list of authorized persons is available on our website. The authorized person must: (1) use the result in his/her professional practice; (2) be substantially and meaningfully involved⁸ (i.e., using professional judgment) in ordering and interpretation of laboratory tests, including assessing potential benefit of testing to the particular test subject, and provides subject-specific medical interpretation of results towards treatment, to prevent or ameliorate, or to counsel regarding possible occurrence of a condition for which an increased risk has been identified; AND (3) have no compensation arrangement with the analytical laboratory generating the data, the laboratory translating the raw data into clinically meaningful information, or a reseller of the test results.

Whenever the test subject is situated in NYS, an out of state medical provider involved in ordering testing must be licensed and registered to practice in NYS. Laboratory testing of NYS residents receiving medical care while situated outside NYS is subject to federal and state law governing laboratory testing at the location of the medical care.

Physician professional misconduct provisions of Education Law Section 6530 prohibit exercising undue influence on the patient, including the sale of services to “exploit the patient for the financial gain of a third party” and ordering excessive tests not warranted by the patient’s condition and that are not medically indicated. Similar provisions apply to nurse practitioners. See 8 NYCRR Section 29.

A laboratory may make available to consumers a list of NYS-licensed practitioners that have professional experience using its services, provided the listed practitioners are not offered and do not receive direct or indirect compensation or any inducement (i.e., money or other valuable consideration) to appear on such list or to authorize test orders for the laboratory.

Genetic counseling services rendered to a consumer/test subject must be limited to an explanation or non-medical interpretation of a test result. To do otherwise may invoke the inducements provisions of PHL Section 587, which, in part, prohibit compensation for referral of services. Any communication, including written or oral test results and genetic counseling, between the test subject and laboratory staff or contractors, must be authorized in writing by the practitioner at the time testing is ordered. See the Reporting of Test Results Section.

If additional translation of raw data will be offered subsequent to the original test request (i.e., for a new panel or disease not previously offered) the practitioner must again provide written authorization, and obtain a signed informed consent covering each new test to be performed or disease or condition to be identified.

⁷ NYS Public Health Law Section 576b limits direct to consumer testing (DTC) to tests with the same purpose as tests approved by the FDA for sale to the public on a direct or over-the-counter basis without a prescription. Genetic testing is not available as direct-to-consumer testing in NYS; genetic tests must be ordered by a person authorized by law to use laboratory test results in his or her profession. Genetic testing includes analyses that result in the generation of SNP, protein or RNA expression profiles, as well as using algorithms to translate that data into actionable information. Genetic testing includes diagnostic and predispositional testing that identifies germline changes using SNP, protein and RNA expression profiles; however, evaluation of acquired (or non-inherited) changes (e.g., using RNA expression profiling for classification of cancer) does not require informed consent.

⁸ “Substantially and meaningfully involved” is used herein to describe the Department’s expectation for practitioner involvement with the patient within a patient-physician relationship, minimally including the practitioner taking a medical history and maintaining patient-specific medical records. While there is no express prohibition against a practitioner’s ordering tests based solely on information from telephonic and/or electronic communication with a patient (i.e., distance medicine), the Department expects that such an arrangement meets practice standards for the requisite physician-patient relationship. The ordering of excessive testing or failure to document medical necessity are factors that may be considered for professional malpractice sanctions.

NOTE: applicants will be asked to provide detailed information regarding test ordering forms/formats when they submit validation packages to the Department.

Please provide responses to the following with either an initial permit application or validation data submission, marked ATTENTION: Regulatory Affairs.

- T1. Describe how and by whom services/tests are ordered. Describe how you make consumers aware of the need for an authorized order, and the extent to which you encourage consumers to involve their own physicians.
- T2. Describe your marketing approach. (i.e., via Internet website direct to consumers; awareness and education programs targeting primary care physicians)
- T3. Does either firm maintain a list of practitioners who have experience with the test(s) offered? Is this list available to consumers? If, yes, how is it described to consumers?
- T4. Describe what security measures are in place (i.e. access password control) for test requisitions and other electronic records
- T5. Identify the source(s) for consumer and practitioner-oriented educational materials accessible prior to (in the pre-consent phase) and at the time of test authorization
- T6. Who provides initial (pre-test) contact with patient/consumer? Describe content and timing of such communication.
- T7. For how long is ongoing communication (interaction with laboratory) or web-access available to the ordering provider? to the consumer?
- T8. Describe the process of post-test counseling, delivery of results or advisories to the consumer. Are genetic counselors employed? Independent contractors? Describe the process for accessing genetic counseling services and identify the intended recipient(s) of the services.

Payment Arrangements and Money Flow

Applicable rules: PHL section 238-a; PHL Section 585 et seq. 10 NYCRR Subpart 34-2; 10 NYCRR Section 58-1.7

A practitioner may not be paid for his or her services from an all encompassing fee collected by a laboratory or its agent for testing, and a laboratory may not offer payment. Practitioner services include, but not limited to, test authorization, educating his or her patient about testing, obtaining informed consent and providing a medical interpretation of test results. Fee-splitting is prohibited by a broad provision of law that essentially allows no compensation relationship, in cash or in kind, between a practitioner and a laboratory. See PHL Sections 587(1) and (2).

An ordering practitioner cannot have a financial relationship with the laboratory to which he or she is referring specimens. PHL 238-a prohibits a practitioner from referring a specimen to a laboratory with whom the practitioner has a direct or indirect financial relationship. Under the distributive model, a practitioner compensated by the primary applicant would have an indirect financial relationship with the laboratory providing analytical services to the primary applicant, and could not refer specimens to that laboratory. If one company performs both components of the test (analysis of the specimen and analyses of the data), the practitioner would be prohibited from referring specimens to that company if a compensation arrangement exists between the company and the practitioner.

NYS is a direct-bill state, which means that the laboratory must directly bill the test subject or certain enumerated parties (e.g., insurer), without markup or pass-through a middleman (test resellers or test facilitators)⁹; See Direct Billing Law (PHL Section 586). The purveyor to purveyor exception applies only to financial interactions between two NYS-permitted laboratories, such that one laboratory may purchase a service from another laboratory, and bill the test subject or other responsible party a global charge which includes the cost of purchased services and an administrative fee.

⁹ A laboratory may engage the services of a marketing firm to design and implement advertising and outreach programs. A laboratory may not offer testing indirectly to NYS consumers through the Internet activities of a middleman if that arrangement includes the middleman's accepting payment for the laboratory services (acting as a pass-through), marking-up the laboratory's charges for tests, and/or failing to provide evidence that testing was appropriately authorized.

Please provide responses to the following with either an initial permit application or validation data submission, marked ATTENTION: Regulatory Affairs.

- M1. Describe or provide a copy of contract provisions for flow of money or other compensation between the primary and secondary applicants (actual dollar amounts may be redacted). If specimen analysis is a purchased service, describe how the charge for that service is billed.
- M2. Does either applicant's ownership include NYS-licensed physicians or registered NYS-licensed nurse practitioners? If yes, describe these owners' activities relative to testing services.
- M3. Are registered NYS-licensed physicians or registered NYS-licensed nurse practitioners employed by either applicant? If yes, in what capacity? Is either type of provider compensated as an independent contractor? Describe conditions of compensation (i.e., per diem, per order).
- M4. Describe or refer to contract provisions for flow of money or other compensation between the applicant(s) and any "affiliated" practitioners.

- M5. Describe to whom and by what mechanism the consumer pays for testing and what is included in that charge. Who bills the consumer? Provide break down of charges (proportionate figures in lieu of actual dollar values is acceptable). Is the consumer's medical insurance charged?
- M6. Does your firm employ sales people? If yes, how are they compensated? Are genetic counselors involved in sales and marketing? Describe how any specimen collector is compensated.
- M7. If counseling services are included in the global fee paid by the consumer, can the counseling component of the fee be waived if declined or determined to be in violation of NYS rules?

Informed Consent and Confidentiality

**Applicable rule: Civil Rights Law Section 79I
federal HIPAA**

The Department expects that NYS-licensed clinical laboratories are fully compliant with privacy and security measures required under the federal Health Insurance Portability and Accountability Act (HIPAA), and maintain the confidentiality of all medical information, including test results. The Department does not enforce HIPAA, but may refer incidents of noncompliance uncovered as a result of NYS activities to the federal authorities.

NYS prohibits genetic testing without the prior written authorization (informed consent) of the test subject, which includes very specific criteria enumerated in the Civil Rights Law Section 79I.¹⁰

¹⁰ The Civil Rights Law is enforced by the NYS Office of the Attorney General. As a practical matter, the patient's medical provider (i.e., licensed practitioner) is primarily responsible for ensuring that the patient has given written informed consent for each test that the provider orders. Typically, that provider could be held accountable for keeping the informed consent records. It is noteworthy that the NYS Attorney General has prosecuted a hospital for failing to ensure that informed consent was obtained for laboratory testing arranged by the hospital's laboratory.

The authorizing practitioner must maintain the signed informed consent documents in the patient's medical file; the laboratory(ies) need not retain a copy (although many do so by choice). The party holding the specimen and party holding the data both must know what the tested person has said about specimen retention and authorized release of the results to specified others. Therefore, even when specimens are de-identified, the consent process must include information on practices for retention and disclosure of genetic information and the necessary detail about the test(s) to be performed and the disposition of the specimen. The facility that accepts the specimen must know the location or address from which the specimen was shipped to determine jurisdictional requirements and for NY specimens must know what the tested individual has specified regarding specimen retention and release of results to designated parties. It may be possible to develop a joint consent document that could include information from both parties.

Whenever specimen or DNA is to be retained beyond the 60 days allotted in 79I, and whenever de-identified material or information (i.e., specimen, DNA, or profile data) is provided to any other party for research, written consent may be executed by a line for initials embedded in the appropriate point in the joint consent document in order for consumers to be able to opt into such research. If the research involves use of identifiable material or information, circumstance-specific informed consent, separate from the testing consent, and approved by an IRB must be executed.

An "informed consent" document should be written for an 8th grade comprehension level.

NOTE: applicants will be asked to provide detailed information regarding informed consent processes when they submit genetic testing validation packages to the Department.

Please provide responses to the following with either an initial permit application or validation data submission, marked ATTENTION: Regulatory Affairs.

- C1. If you intend to offer genetic testing, briefly identify who solicits informed consent from the consumer, who compiles test-specific information, how consent is effectuated, and who retains signed documents or access to electronic versions. This information should be a brief summary or flowchart representation of the informed consent process that is described in greater detail in the test validation package for genetic testing.
- C2. Describe the materials and information provided to the ordering practitioner to use in informing patients about genetic tests, and the extent the practitioner is able to customize the information to patient needs.
- C3. Specify how retention procedures for genetic data are in compliance with NYS Civil Rights Law. Describe how informed consent is obtained for retention or research use of genetic data, both identified and deidentified.
- C4. For all testing, if analytical (raw) data and/or information from its translation are retained, please describe what security procedures are in place to protect privacy. Describe policies and procedures that are designed to prevent in-house disclosure of confidential information to only those employees with a “need to know.”
- C5. Describe security and privacy protections in place or required by contractual conditions for each entity involved in the business arrangement, including processes to ensure confidentiality of analytical (raw) data and/or information from its translation, from specimen intake to reporting of test results.

Reporting of Test Results

Applicable rule(s): **PHL Section 577(1); 10 NYCRR Sections 58-1.9 and 58-1.11; 10 NYCRR Section 34-2.11**

The entity that translates raw data from SNP, protein or RNA expression profile data into clinically meaningful, actionable information (including risk of being predisposed to a disease) is required to issue a report of test results to the ordering practitioner. Biomarker data must also be presented as a formal report, and include all information necessary for the ordering practitioner to render a medical interpretation based on test results.¹¹ Laboratories need exercise caution that translation of data does not cross the line to medical interpretation.

The practitioner may authorize the laboratory to subsequently or simultaneously release a true and exact copy of the test report to the test subject; such authorization must be test-specific and may not be a “blanket” authorization for more than one test event for a specific person.

Results may be transmitted electronically, provided appropriate security measures are in place. Reports of test results must meet conditions set forth in above-cited rules, including that the test subject must receive a “true and exact” copy of the report send to the ordering practitioner. Laboratories should refrain from providing information that could be construed by the test subject to be medical interpretation and/or advise.

¹¹ The ordering practitioner is responsible for interpreting test results within the context of the test subject’s personal or familial medical history, and to conduct or arrange for follow up care and referrals (e.g., genetic counseling), as needed. Patient-specific medical interpretation of test results is limited to a physician; a nurse practitioner may interpret test results consistent with his or her practice agreement with a collaborating physician.

NOTE: applicants will be asked to provide a sample practitioner-oriented report and, if different, a sample of a consumer-oriented report when they submit validation packages to the Department. Sample reports should include all interpretive and educational information routinely provided to the consumer and practitioner with test results.

Please provide responses to the following with either an initial permit application or validation data submission, marked ATTENTION: Regulatory Affairs.

- R1. Who provides initial post-test contact with patient? Describe content and timing of such communication under differing circumstances (e.g., acceptable and indeterminate results).
- R2. If the business model is distributive, which applicant issues a report to the practitioner?
- R3. Describe how reports are released or made accessible to the consumer and ordering practitioner, including the relative timing of report release. If reports are accessible online, describe the procedures in place that protect the privacy of the test subject and confidentiality of the information.
- R4. Describe your website consumer information pages and sites/pages specific to information for practitioners. Describe lines of ongoing communication (telephone consultation, web access) available to the consumer.