Responding to a Form 483 or Warning Letter: A Practical Guide

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I. INTRODUCTION

In general, in responding to a Food and Drug Administration (FDA) Form #483 (notice of inspectional observations, commonly called simply a #483) or to an FDA warning letter, the main goal is to give the agency reason to believe that the responding company henceforth will comply with all of the applicable legal requirements administered or enforced by FDA.[1]

FDA employs different procedures for issuing a #483 and a warning letter. A #483 is issued by one or more FDA investigators at the conclusion of a site inspection, and usually is not reviewed by a compliance officer, district director, or an official in FDA's headquarters before it is issued. An FDA warning letter, on the other hand, is issued by a district director or headquarters official of similar seniority, and only after review by FDA's Office of Chief Counsel.[2] Although a warning letter reflects a greater institutional investment on FDA's part, is approved at a higher level, and, therefore, is a more serious and threatening document than a #483, the same general considerations in forming a company's response to the agency apply to both kinds of document.[3]

FDA's issuance of a #483 or warning letter signals that one or more employees of the agency actively disbelieve that the company was, or currently is, complying with the

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[1] Form #483 derives from section 704(b) of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 374(b) (2000). For a general discussion of Form #483, see FDA, INVESTIGATIONS OPERATIONS MANUAL § 512 (2005), *available at* http://www.fda.gov/ora/inspect_ref/iom/ChapterText/510part2.html#512 (last visited Nov. 28, 2005).

For a general discussion of FDA warning letters, see FDA, REGULATORY PROCEDURES MANUAL § 4-1 (2004), *available at* http://www.fda.gov/ora/compliance_ref/rpm/pdf/ch4.pdf (last visited Nov. 28, 2005).

Although "Notice of Violation" letters and "untitled" letters, in which an FDA official informs an addressee that it appears to have violated the law, do not receive as elaborate an FDA review before issuance as do warning letters, most of this article's comments about responding to a warning letter apply also to responding to such letters.

In this article, the term "company" is used to include any responding entity or individual, including, e.g., a university laboratory, an institutional review board, a clinical investigator, as well as a manufacturer, packer, or distributor. Similarly, comments referring to "good manufacturing practices" may (with some adjustment) extend to good laboratory practices, good practices for the conduct of clinical investigations, and, in general, good practices for conducting any activity subject to regulation by FDA. Although the obvious focus of this discussion is a #483 or warning letter addressing deficiencies in manufacturing practices, the discussion has relevance to #483s, warning letters, and other regulatory communications addressing other types of issues relating to compliance, such as whether a marketed product previously has been approved or cleared by FDA.

[2] FDA, REGULATORY PROCEDURES MANUAL, *supra* note 1, at § 4.1 & EX. 4-1.

[3] A #483 "is intended for use in notifying the inspected establishment's top management in writing of significant objectionable conditions, relating to" products or violations of the FDCA observed during an inspection. FDA, INVESTIGATIONS OPERATIONS MANUAL, *supra* note 1, at § 512. Sections 512.01 and 512.02 outline what FDA believes are "reportable" and "non-reportable" observations for purposes of a #483.

law. The company's response should be designed to persuade the agency that the company now is, or soon will be, in compliance, and that a finding of past noncompliance should not lead FDA to expect future noncompliance by the company.

II. GENERAL POLICIES FOR DEVELOPING A RESPONSE

Although it often is appropriate for a company to explain why past noncompliance occurred and why full compliance cannot be achieved instantly, the theme of excusing past or continuing noncompliance generally should be, at most, subordinate to the theme that the responding company has now achieved or will achieve, and then will maintain, compliance.[4] Because an important part of FDA's mission is law enforcement, the agency generally cannot be expected to tolerate prolonged substantial noncompliance, whatever excuses may be offered for it by the company.[5]

Generally, the benefit of satisfying FDA that the company is on the road to compliance is that, thereafter, the company is likely to be subject only to an ordinary intensity and frequency of inspections, and is unlikely to be the target of an enforcement action based on the earlier violative conduct. The cost of not satisfying FDA is that the company is likely to be subject to extraordinarily intense and more frequent inspections until either FDA's active doubt is removed or the agency takes regulatory action against the company. In addition, failure to remove doubt may delay or prevent approvals of applications to market new products and supplements for modified or additional products.

Despite temptation, the goal of removing FDA's doubt normally should not be compromised by venting exasperation with the agency, seeking to undermine FDA's confidence in its own investigator(s), or trying to show that the agency is incompetent in the relevant scientific or technical discipline. Such digressions are likely to be counterproductive.

The company's response is an attempt-to-persuade—its task is one of advocacy. Offending the audience is unlikely to achieve a favorable reaction from that audience. Company personnel involved in drafting the response to the agency should imagine themselves in the positions of FDA compliance officials, who receive an endless stream of such responses—sometimes filled with invalid denials of deficiencies, unpersuasive excuses for failures, attacks on the performance and competence of FDA investigators, and unrealistic assertions of lofty commitments and promises of future improvements. Those involved at the company should ask themselves what it would take to persuade *them* that their company henceforth really will comply (not just *try* to comply, but *succeed* in complying and staying in compliance).

Nevertheless, it is crucial to examine whether a blanket agreement with FDA's criticisms of the company' past performance will have serious adverse consequences for the company in future litigation against FDA or others (e.g., plaintiffs in products liability or securities actions). Agreement with FDA's criticisms generally can be used against the company as an admission. FDA usually is more interested in explanations of what a

[4] Of course, in unusual situations where a company believes FDA may seek punishment for past conduct (through, e.g., criminal prosecution or a civil penalty) or where the circumstances of past conduct are material to other kinds of agency action (e.g., disqualification, withdrawal of approval of a product), it is likely to be desirable to make a full presentation of exculpatory and mitigating circumstances and any other reasons why an enforcement action is unwarranted.

[5] The agency's willingness to tolerate continuing noncompliance by a company may be increased where the product at issue fills a critical medical need that cannot otherwise be met, the noncompliance does not, to a material extent, adversely affect the ability of the product to meet that need, and the company is making all reasonable efforts to achieve compliance at the earliest feasible time. A company asking FDA to acquiesce in prolonged noncompliance on the ground that the company's product fills a critical medical need that otherwise cannot be met bears a heavy burden of persuasion, and the company should prepare its argument with particular thoroughness and care.

company will be doing in the future to comply with regulatory requirements than in confessions of past sins.

Commonly, however, a shared understanding by the company and FDA as to why observed noncompliance occurred in the past is necessary for agreement that a company's plan for remedying past noncompliance and ensuring future compliance is adequate. Consequently, avoiding damaging admissions, while simultaneously satisfying FDA, often requires considerable thought and careful writing by the company.

Sometimes, the proper way to remove doubt as to a company's commitment and competence to comply with regulatory requirements is to persuade the agency that the asserted basis for its #483 or warning letter is mistaken: that, when FDA examines the situation properly, the agency will conclude there is no basis for doubt about the company's future compliance because there was no earlier violation. The #483 or warning letter may be wrong about what is required by the relevant statute, regulation, guidance document, agency policy, company commitment in a marketing application or other previous interaction with the agency, or accepted standard applicable to the matter at issue. It also may reflect a misunderstanding or disregard by the agency of certain facts or an incorrect factual assumption. It may reflect a scientific error. A district office may be pursuing a legal interpretation or policy contrary to that of the relevant headquarters office. Generally, where it appears that one of these circumstances has led to the #483 or warning letter, the company response should point it out—in the manner most likely to persuade the agency to recognize and acknowledge its mistake (i.e., calmly, respectfully, clearly, cogently, and with supporting citation(s) and documentation).

In most circumstances, the agency has not made a mistake: the deficiencies it claims to have observed are real. In those circumstances, the removal of doubt generally depends mainly on three elements: understanding, commitment, and resources.

A. *Understanding the Problem*

A showing that a company has the ability to, and probably will, comply with the law generally begins with a demonstration to FDA that the company understands four things: 1) what the applicable law requires, 2) what aspect or aspects of the company's operations were deficient, 3) what the root cause or causes of the deficiency were, and 4) what is needed to bring the company into compliance and keep it there.

1. *Applicable Requirements*

Fundamental to the company's future compliance is its understanding of what the applicable law requires. Removal of FDA's doubt about a company's ability to comply depends on the company's exhibiting such an understanding to the agency. If FDA continues to doubt that a company really has grasped what the law requires, the agency will continue to doubt the company's ability to bring itself into, and consistently maintain, compliance, no matter what commitments the company makes and what resources it brings to bear on the situation.

Thus, there is a serious credibility cost to an attempt to defend the plainly indefensible—whether an indefensible interpretation of applicable legal requirements or of scientific principles or of factual matters observed by FDA. The attempt suggests that the company truly does not understand what the applicable legal requirements or scientific principles are or cannot face the plain facts, and, in effect, does not know the difference between right and wrong. When a response argues that a deficient manufac-

turing practice complies with good manufacturing practices or quality system requirements, it intensifies doubt by FDA instead of reducing it.

Where the facts and the science are not in dispute, the #483 or warning letter has taken the position that a violation has occurred, and serious adverse collateral consequences are not a risk, generally it is far preferable to acknowledge (or at least not dispute) the violation, and to move on to address the root cause(s) and corrective action(s).[6]

In some fields (e.g., manufacturing, clinical investigations, and laboratory procedures), what the law requires are "current good" practices. Those practices are not specified in the Federal Food, Drug, and Cosmetic Act (FDCA) and are described only in very general terms in FDA's regulations. However, companies can resort to a variety of other kinds of materials, principally FDA guidance documents and professional literature. In those fields, understanding what the law requires involves familiarity with what those materials require. In-house or outside experts familiar with FDA guidance documents and the professional literature may make valuable contributions to a company's response, and may even sharpen and strengthen a company's understanding of the applicable requirements.

2. *The Deficiency*

Ordinarily, a #483 or warning letter specifies a deficiency by quoting or paraphrasing a general requirement and stating certain factual particulars that, in the FDA employee's view, constitute a violation of that requirement. Where the applicable facts are not in dispute, the response should confirm the company's understanding of the nature of the problem observed by the agency, or at least not suggest a lack of such understanding. If FDA doubts that a company understands a problem, it is likely that the agency will doubt that a company's proposed solution is adequate.

If a company truly is confused about the meaning of a poorly worded observation in a #483 or warning letter, it may be wise to call FDA to obtain clarification from the official who signed the document. Oral clarification by FDA may quickly remove the company's confusion, and make possible a timely and effective written response by the company. An assertion in the *written* response that the company does not understand FDA's observation in a #483 or warning letter may be poorly received by FDA, particularly if the agency believes that the company's claim of confusion is unreasonable.

In most circumstances, although a #483 or warning letter signals that a company needs to rectify deficient conditions, it does not signal that FDA has concluded that particular company personnel are unwilling or unable to comply in the future. If asked about specific company personnel, FDA employees usually will state, in substance, that the agency is not in the business of making personnel decisions for regulated companies. Nevertheless, where FDA personnel, in fact, have no confidence in a company's employees responsible for compliance, they may well question the company's ability or willingness to comply and may indirectly convey doubts about particular company employees. Company management should listen carefully for any signals from FDA personnel that question the competence, motivation, or integrity of company personnel. Where senior company management suspects, but is not certain, that FDA distrusts company personnel responsible for compliance, senior management may seek to obtain

[6] A company undergoing an FDA inspection should be vigilant about hearing and quickly acting on oral comments by the FDA investigator(s). When possible, a company should correct an observed deficiency during the inspection. Doing so may persuade the investigator(s) not to include the corrected deficiency on a #483. Even if the deficiency appears on a #483, the company should ask the investigator to acknowledge on the #483 that the deficiency was corrected during the inspection.

more information by requesting a meeting with FDA officials for an overall discussion of the company's compliance.

There may be circumstances where a company should relieve employees whose performance has been seriously deficient of those responsibilities that relate to the violation(s) observed by the FDA investigator(s). Although generally it is unfair and unwise to treat one or two employees as scapegoats, in some circumstances FDA will not conclude that a company is on the path to compliance until it has replaced the individual(s) who caused the past violations.

These considerations also bear on the question of who should sign a company's formal response to a #483 or warning letter. Commonly, the response should be from the management of the operating unit whose performance is criticized in the #483 or warning letter or, sometimes, if different, the addressee on the warning letter. The company's response should demonstrate the operating unit's awareness of its deficiencies and its willingness and ability to comply henceforth.

Where, however, noncompliance has been observed repeatedly in FDA inspections of that operating unit's operations or where a particular instance of noncompliance is egregious, FDA may strongly doubt the willingness or ability of the management of that unit to achieve and maintain compliance, and a response from that management may leave FDA dissatisfied. In this situation, it may be best that the signatory be a more senior official above the level of the operating unit in which the violation(s) occurred.[7]

It may even be warranted for senior management to demonstrate direct personal involvement in addressing FDA's concerns. Involvement of senior management may be especially beneficial for medical device manufacturers. FDA has been following whether senior managers of device manufacturers are involved in compliance issues.

One way a company can demonstrate to FDA its understanding of a problem is to recount to the agency a search by the company for similar or related problems at the same or other facilities operated by the company. If the agency has observed that certain machinery was cleaned inadequately between batches made during the day shift at a particular facility, the company should investigate and report to FDA whether there has been a similar deficiency in the cleaning of other machinery on that shift, or in the cleaning of machinery on other shifts in the same facility, or at other facilities. This point will be considered further in the discussion of coming into compliance.

Demonstrating an understanding of a deficiency reflects a kind of competence. Earnest good will is not sufficient under the FDCA; those who market regulated products also must show competence, including competence in correcting deficiencies noted by FDA.

3. *Root Cause(s) of the Problem*

Simply correcting an observed violation and telling FDA that it has been corrected is not, by itself, an adequate response to a #483 or warning letter. FDA has told regulated firms repeatedly that FDA investigators are not a company's quality control department.

[7] It is theoretically possible, but almost always counterproductive, for a company to have an outsider sign the company's response. Such an approach might be considered where FDA's observations suggest a very real risk of criminal prosecution, the company has very few employees who might sign the response, and any of them who did sign it would risk self-incrimination. A response signed by an outsider surely would be a signal to FDA that conditions at the company are dire, and the agency would have no basis for confidence that current management would achieve compliance. Even in the scenario described, it might be better for a current manager to sign a response that does not discuss past events and only makes statements about the future (e.g., that the company will not operate until an inspection by a reputable consultant shows that it is ready for an inspection by FDA and the agency has an opportunity to conduct an inspection).

FDA expects that, when it reports to a company an observation of an apparent violation, the company will correct that violation *and* seek out (and correct) any similar violations that were not noted by the agency. FDA expects a company to focus on the root cause(s) of the observed violation, so that similar violations that were not observed by FDA will be corrected before the agency discovers them in future inspections.

Critical to persuading FDA that a proposed corrective action plan will address the problem observed by the agency in an adequate manner, and will bring the company into sustained compliance, is a persuasive showing that the plan addresses the root cause or all root causes of the observed problem. The company needs to show the agency, therefore, that it has identified, or at least has made an adequate effort to identify, the root cause(s).

The elements of such a showing to FDA may include: 1) a thorough description of the company's investigation to determine the root cause(s), including any testing that was done; 2) a discussion of alternative theoretically possible root causes that were rejected; and 3) a discussion of any additional circumstances that support the conclusion that the identified root cause is the correct one. The very discipline of describing these elements to FDA may suggest further lines of inquiry or analysis that the company should pursue. A company's exhibition to FDA in the response to a #483 or warning letter of its logical, analytically sound, systematic, and comprehensive approach to identifying the root cause(s) and developing a plan of corrective action(s) is an important element in the effort to remove the agency's doubt that the company can, and will, prevent most deficiencies on its own, will find those that do occur, and will correct them appropriately.

An axiom of adequate systems for the assessment of human conduct is that deficiencies do not just happen; always, there is a cause or set of causes. The logic of the inquiry into the root cause(s) of an observed deficiency in manufacturing practices is a series (commonly, a long series) of questions that begin with "why," such as:

- *Why was the machinery not properly cleaned?* Because the standard operating procedure (SOP) was inadequate. (The inquiry does not stop with the inadequacy of the SOP.)
- *Why was there an inadequate SOP?* Because the machinery had been modified, but the old SOP had not been updated.
- *Why had the old SOP not been updated?* Because nobody thought to update it.
- *Why did no one think to update the old SOP?* Simple human error. This is not an adequate response to FDA. Precisely because humans commonly err, good practice requires that there be *systems* to prevent and correct human error, and other systems to prevent the errors that nevertheless do occur from affecting products shipped for use or other outputs of the regulated activity (e.g., data from a clinical investigation or laboratory procedure). A company's acceptance of "human error" as an adequate explanation for a deficiency reflects its failure to internalize the axiom that there always is a correctable cause. Although sustained perfection is unattainable, a failure to seek it is likely to lead to results that are less than what, in fact, is attainable. The demand of "current good practices" is to use all reasonable means to seek to achieve sustained perfection.
- *Who was responsible for ensuring that the SOP was updated?* If no one was responsible, then there was a deficiency in the assignment of managerial responsibilities. Why was there such a deficiency?

- *Why did that employee not discharge that responsibility?* Was there a lack of knowledge that SOPs must be updated when the subject matter to which they relate changes? In that case, the cause may be that the employee is unqualified for the responsibility—and should be replaced by someone more likely to ensure compliance—or at least needs further training. Why did an inadequately qualified or inadequately trained employee have that responsibility?
- *Was the employee unaware of the modification of the machinery?* In that case, the cause may relate to an inadequate system of internal communications. Why was the system of internal communications deficient?
- *Was the employee simply slow in getting around to having the SOP updated?* In that case, the cause may be a lack of motivation, a failure of communication, or a lack of resources. Why was there inadequate motivation, communication, or resources?

This series of questions can go on until the asking of a further question would be pointless. Identification of when a company reaches that juncture is a matter of common sense and judgment.

Sometimes, despite diligent efforts by the company, the root cause(s) of a problem cannot be determined. Before reaching that conclusion, however, a company should consider using outside resources (e.g., experts in the relevant technologies, systems, or scientific disciplines) to confirm the reasonableness of the company's inability to discover the root cause(s) of the problem. Where the root cause(s) cannot be determined, the response to the #483 or warning letter should describe the company's investigative efforts. The investigation should have been as systematic, comprehensive, and thorough as reasonably could be expected; and the company's response should describe the investigation in a manner that supports an inference that it was adequate even though unsuccessful.

An SOP for conducting investigations of deficiencies might usefully include a checklist of general questions to guide the company's inquiries. Reviewing the checklist may help ensure that an investigation is adequate in scope, depth, and intensity.

4. *A Corrective Action Plan*

Corrective action may encompass many types of action: 1) stop the immediate deficient performance (e.g., by shutting down an operation until it has been brought into compliance); 2) stop any undesirable effects of the deficient performance (e.g., cease shipments and conduct a recall); 3) search for, identify, and stop any similar or related deficiencies in other company operations, and stop any undesirable effects of those deficiencies; 4) design and implement a remedy or remedies for the root cause(s) of the deficiency or deficiencies and intermediate causes; 5) monitor and audit the remedy or remedies to determine whether compliance is achieved and sustained; 6) integrate what has been learned from this experience into other company systems (e.g., the design of products and manufacturing processes, quality control, quality assurance, and compliance auditing procedures, job descriptions, training, and budgeting processes); and 7) document all of the foregoing.

The response's description of the corrective action plan should reflect the company's thorough understanding not only of what is needed to correct the immediate problem, but also of the general principles (part of "current good practices") that should govern any long-term program to correct any observed deficiency. Perhaps the aspect of a response that is most likely to remove agency doubt about a company's future compliance is a

demonstration that the company really has internalized and made operational these general principles. Such a demonstration may support an FDA conclusion that a company has a reasonable expectation of substantial future compliance across the board.

Where the company cannot identify a root cause, the corrective action plan should include elements sufficient to support a reasonable belief that the unidentified cause nevertheless probably has been corrected or, at least, prevented from materially adversely affecting the company's outputs.

Where an observed problem already has been corrected by the time a company responds to FDA, documentation of the correction should be attached to the response. Ideally, a company should discover all its deficiencies before FDA finds them. Where FDA discovers an operational deficiency the company was unaware of, there may be, in addition to that deficiency, a further deficiency in the company's self-corrective system (e.g., quality assurance or auditing). If prior FDA inspections also found deficiencies, the company response might well address how the company will improve its self-corrective system.

If in the course of reviewing its operations a company discovers a deficiency FDA did not include in the #483 or warning letter and presumably is unaware of, the company faces the question whether to report that deficiency to FDA in its response.[8] In each such situation, a judgment has to be made after consideration of all the relevant circumstances, including the recent history of the company's dealings with FDA. Disclosing the problem (and corrective action) to FDA may help persuade the agency that the company truly is committed to compliance with regulatory requirements, but also may lead the agency to inspect for any additional deficiencies and/or to demand more rigorous corrective action. Failing to tell FDA, however, may lead to serious difficulties with the agency if it later discovers the deficiency and believes the company should have disclosed it previously.[9]

Documentation of a company's actions serves multiple purposes in FDA's regulatory universe. Because FDA is not continuously present on a company's premises, documentation is a critical tool for FDA's performance of its regulatory function. Documentation generally is contemporaneous evidence that the documented activity actually occurred, and it provides useful factual details about the activity. FDA compliance personnel commonly act on the premise that a required activity that has not been documented probably did not occur.

Documentation, itself, reflects an investment of time and effort, and thus provides some evidence of the company's seriousness of purpose in attaining compliance. It also may communicate a company's awareness of the importance of documentation as a part of "current good practices," and the company's awareness of its importance to FDA. In addition, the discipline of creating formal documentation may enhance a company's performance of the documented activity by drawing attention to aspects of it that otherwise might have been overlooked or inadequately considered. Finally, because documentation normally includes the signature or initials of the person responsible for the documented activity, it provides personal accountability and the benefits thereof.

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[8] In some circumstances, a company has a legal obligation to report a problem to FDA, e.g., certain adverse events associated with a drug, *see* 21 C.F.R. § 314.80 (2005); and certain malfunctions of medical devices, *see* 21 C.F.R. pt. 803; and, where a deficiency is sufficiently serious to warrant a recall, FDA expects the recalling company to notify it so that it can monitor the recall and assess its adequacy, *see generally* 21 C.F.R. §§ 7.40-7.59. This article assumes that, in the situation discussed in the text, no such obligation applies, and no recall is involved.

[9] *See* John R. Fleder, *A Voluntary Disclosure Program for FDA—The Time Has Come*, 54 FOOD & DRUG L.J. 389 (1999).

B. *Commitment*

To be persuasive, a demonstration of the company's commitment to achieve and then maintain compliance with applicable regulatory requirements must go well beyond a mere bald assertion to FDA of the company's commitment. In general, and depending on the circumstances, the company should include in its response 1) a well thought out, comprehensive, and reasonably detailed plan for addressing the observed deficiencies in a manner that will achieve and maintain compliance; 2) a reasonably detailed timetable with specific milestone dates; 3) an indication that, if the time for achieving compliance will stretch out over several months or more, periodic interim progress reports will be made to the agency; 4) an expression of willingness to expend the necessary financial and personnel resources to correct the identified problems; and 5) where warranted in a serious case, independent external verification of the adequacy of the corrective action plan and of its current and future implementation.

Talk is cheap—a detailed corrective action plan is not. The quality of the thought (as well as the overall time and effort) reflected in the plan is an indicator of the company's seriousness of purpose. An appropriate investment in the corrective action plan supports an inference that there will be an appropriate investment by the company in its implementation.

Milestone dates establish a basis for accountability. Achieving compliance may depend on a series of steps, some of which may be outside the company's control (e.g., a new machine must be ordered and received; a report must be received from a consultant). A company does not want to, and generally should not, commit to milestone dates it does not have a high degree of confidence it will meet. Yet, a company must be mindful that, for FDA, a company's noncompliance while the regulated activities continue and outputs are produced and distributed becomes progressively less tolerable as time passes. With both perspectives in view, the company should exhibit an appropriate sense of urgency, should propose a reasonable timetable, should fully justify whatever delay will occur, and should be prepared to respond to probing questions and comments by FDA.

In general, in estimating the time needed to achieve compliance, a company should estimate the time needed if all goes well, and then add a margin to provide for unforeseen contingencies. To make an informed estimate of the time needed to achieve compliance, the company needs to understand all of the actions, especially the critical path actions that are part of achieving compliance. The margin should be the smallest period that is sufficient to provide a high degree of confidence that compliance will be achieved within the specified time.

To select an appropriate margin, the company needs to understand the potential bottlenecks and other obstacles to timely achievement of compliance. Consideration of potential obstacles may extend to such matters as financial constraints (where a relatively large expenditure for equipment or the design of new systems may be involved), internal bureaucracy (e.g., processing of new personnel by the human resources department), the time needed to recruit new employees or to train current or new employees on new systems, delays by suppliers, or the time needed to qualify new equipment.

It is far better to set a target date that is realistic and very likely to be met than an earlier one that initially would be more pleasing to FDA but that is not very likely to be met. FDA will note any dates by which the company has promised compliance. Failure to meet the commitment dates probably will erode whatever confidence FDA has in the company's prospects for compliance. Indeed, the agency is likely to view a missed

commitment date as yet another (and more recent) sign that the company cannot be trusted to fulfill its responsibilities.

If FDA believes that a company has allowed itself too much time to achieve compliance, FDA generally will so inform the company, which then will have an opportunity to defend its overall estimate. To some extent, the company's credibility with FDA is likely to depend on the persuasiveness of that defense. Anticipating the defense it may have to make may help a company select an appropriate target date for a commitment.

Consequently, those responsible for preparing the response to FDA may need to consult widely within the company to confirm that all company units whose work is necessary to meet the commitment understand (and agree with) what will be required of them. Where timeliness also depends on the performance of outsiders, they, too, should be consulted and pressed for commitments to specific achievable deadlines.

Written reports generated by or for a company that assess some regulatory aspect(s) of its operations provide transparency and facilitate accountability. In serious cases where, for some reason, transparency is extraordinarily important, it can be increased by providing FDA with copies of specified types of documents generated internally or by consultants.

In some circumstances, sharing with FDA a company's consultant's independent final assessment of the adequacy of the company's corrective action plan or implementation can help reduce the agency's doubts about future compliance. Promises to share with FDA an as yet unwritten assessment, however, may carry a heavy price. For example, if a company promises FDA that the company will share written assessments by an outside consultant, the company bears the risk that one or more of the assessments will not be as favorable as the company had hoped and expected. Moreover, disclosure of such assessments to FDA may make it impossible to protect them from disclosure to other parties in litigation.[10] Therefore, although such sharing with FDA may be warranted, a company should weigh the benefits and risks of such disclosure in the light of its own particular circumstances.

C. *Resources*

Compliance depends not only on understanding what is required in the particular circumstances and intending to comply, but also on having the resources needed for compliance. Those resources are human and material.

FDA believes that, if a company within its jurisdiction does not have and cannot obtain the resources needed to comply with regulatory requirements, the company should shut down. Willingness on FDA's part to tolerate a temporary out-of-compliance situation depends on the agency believing, *inter alia*, that the company is mobilizing adequate resources to achieve and maintain compliance. Where FDA believes that such mobilization depends on senior management, the agency will have little to no sympathy for the company if it believes that the relevant senior managers are devoting insufficient attention and resources to compliance because they are focused on selling products or other matters.[11]

[10] Where an outside expert assessment is needed solely or predominantly to enable a lawyer (whether in-house counsel or outside counsel) to provide legal advice or some other legal service, rather than to enable the company to conduct its operations properly, the assessment may be addressed to counsel and may be protected by the attorney-client privilege. An attempt to extend the privilege to documents whose sole or predominant purpose is operational, however, is likely to fail if a challenge is raised in an adversarial setting.

[11] Sometimes, a small company appears to be simply incapable of reaching compliance, even if it changes personnel and obtains additional compliance-related resources. In such a circumstance, management needs to consider whether to cease making FDA-regulated products. Continuance of noncompliant operations within FDA's jurisdiction runs the risk of serious enforcement action by the agency.