Hogan Lovells

FDA Inspection Readiness

Presentation for IDFA

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Agenda

- **Preparing for an FDA inspection**
  - Establishing company procedures
  - Policies on key issues
- **Managing an FDA inspection**
  - Product and environmental sampling
  - Records requests
- **Inspection follow up**
  - Response to 483
  - Response to positive testing results

Part 1:

Preparing for an FDA Inspection

Pre-Inspection Preparations

- Develop a company inspection file
- Designate and train the individuals that will accompany the inspector
  - Typically the plant manager will accompany the inspector
  - Also is appropriate for someone from corporate headquarters to accompany the inspector
  - These people should be trained and need to know their rights and responsibilities
- Decide on policies for sensitive issues
  - Photographs
  - Affidavits

Photographs and Video Cameras

- Cameras are one of the most contentious issues with inspectors
- Concerns with cameras:
  1. Cameras will capture proprietary aspects of the manufacturing operation and the information could be disclosed unintentionally
  2. Information obtained during an inspection is evidence that will be admissible in court
  3. A picture is much more difficult to challenge than oral testimony

Photographs and Video Cameras, continued

- Inspector will insist he/she has the right to use cameras
- There is no definitive legal authority on this issue
  - The FFDCA does not address it
  - Nor have the U.S. courts
- You should establish a policy and stick to it
  - Many companies do not allow cameras
  - Some companies do not object

Photographs and Video Cameras, continued

- In 95% of cases, if you hold firm, the inspector ultimately will conduct the inspection without the camera
- It can be difficult, it will be contentious, but if you want to keep the camera out of the facility, you typically will prevail
- If you decide to allow photographs, take duplicate photos for your records

Affidavits

- Inspectors typically will ask companies to sign affidavits (FDA 463a) during or after inspections
- You are never required to sign an affidavit
- Affidavits should not be signed until they are first reviewed by your corporate or outside counsel
- We advise our clients that they should not sign affidavits
- FDA may insist the company official is required to sign— hold firm and "blame it on your lawyers"

Part 2:

Managing an FDA Inspection

FSMA Implementation and Inspections

- The first major FSMA compliance deadlines have come and gone
  - Both Preventive Controls and FSVP already in effect for large and small companies
  - Compliance dates for very small companies approaching
- Preventive Controls and modernized GMP inspections began in earnest in January 2017
- FDA's mantra is "educate before and while we regulate"
- FDA has said its initial goal will be to work with industry to create a culture of food safety and this goal will apply not just in the initial months of compliance, but going forward

PC Inspections – What to Expect

- Based on the initial Preventive Controls inspections, expect a very regulatory approach
- “If it isn’t documented, it didn’t happen!”
- FDA will expect the plant manager to be able to explain their scientific justifications underlying Food Safety Plan and provide supporting scientific documentation
- Inspectors will conduct their own hazard analysis and compare that to the facility’s hazard analysis

How to Prepare

- Make sure your food safety plan meets FDA's regulatory requirements
  - Is it well organized?
  - Accessible?
- Are you documenting what you said you would do?
- Do you have a culture of food safety?
- Conduct a mock FSMA inspection
- Update your inspection manual

State v. FDA Inspections

- States conduct inspections under the Pasteurized Milk Ordinance (PMO), while FDA conducts inspections under FSMA
- Important to know in advance which products fall under which category
- Will dictate what is within/outside scope of inspection
- FDA looking at Pilot for Federal/state cooperation and minimizing inspections

Inspector Arrival

- Employees should be instructed to direct inspectors to a pre-determined company representative
- The statute authorizes an inspection to occur at reasonable times and in a reasonable manner
- If the inspector arrives when the appropriate senior personnel are not on-site, it is appropriate for plant personnel to ask the inspector to wait while they contact these individuals
- Politely inform the inspector that the responsible individual is at another location and ask if the inspection can be held off for a short time until they arrive at the facility

Pre-Inspection Interview

- Take inspector to a conference room or office where you can discuss the inspection prior to entering the manufacturing facility
  - Ensure that there is no sensitive information in this room
- Take notice of the inspector(s)' credentials
- Verify with the inspector that he/she is conducting a "routine" inspection
- The pre-inspection interview provides an opportunity to discuss the company policies (discussed further below)
- The inspector also should be advised to direct all questions to the designated individual(s) when in the manufacturing environment

The Inspection

- Accompany the inspector during the inspection of the facility
- If the inspector identifies an issue of concern and it can be readily fixed or addressed, implement the corrective action as soon as possible – and ask the inspector to note correction on any 483
- A designated individual should take detailed notes of the inspection

The Inspection, continued

- When accompanying the inspector, be cordial and responsive to questions, but don't volunteer more information than is asked
- The inspector is on a fact finding mission and will take note of any information that is volunteered or disclosed as part of the inspection
- FDA is entitled to:
  - Open access to the manufacturing environment
  - Take samples (product and environmental)
  - Examine product labels
  - Review food safety records

FSMA/Preventive Controls

- FDA may ask about your familiarity and compliance with the Preventive Controls for Human Food regulation, which was issued as part of FSMA
- If you are not familiar with this regulation, you need to spend some time learning about it in advance of the inspection

Samples

- Inspectors are authorized to take samples (finished product, raw materials, or environmental swabs) and will provide you with a receipt (FDA 484)
- The company can seek reimbursement for samples taken but typically will not do so (unless the sample is particularly expensive)
- When the inspector takes samples, you should:
  - Obtain duplicate samples
  - Ask the inspector to identify the analyses that will be performed
  - Let the inspector know that you would like to receive a copy of the analyses when completed

Samples, continued

- Inspectors can sample finished product, raw materials, and the environment (e.g., drains and floors)
- It is difficult to predict the significance of an environmental sample taken on non-food contact surfaces such as a drain – it will depend on how many positives, and where they were found
- The detection of a pathogen on a food contact surface will present significant issues

Environmental Sampling

- FDA has learned that it is easier to find a pathogen in the environment than in food
- FDA now will often descend on a company with a team of investigators that will take environmental samples
- FDA will collect samples from food contact surfaces (Zone 1)
- FDA will also collects samples from other zones (Zones 2, 3, and 4)

Duplicate Samples

- If product or food contact surfaces are sampled, all inventory from the sampled lot should be placed on hold until the FDA results are obtained
- The company should do a full cleaning after the inspection so that the next lot is not affected if the sample tests positive
- Label your duplicate the samples after they have been taken and establish a chain of custody that tracks where the samples are taken after the inspection
- FDA will provide results of its analysis for samples of food products on Form FDA 1551 (typically within a few weeks)

Records Access

- FSMA significantly expanded FDA's access to records during a routine facility inspection
- This expanded records access takes effect as of your compliance date for the Preventive Controls regulation

Records Available to FDA

- The following records are available to FDA:
  - Good Manufacturing Practices (GMPs)
  - Food Safety Plan
    - Hazard analysis
    - Preventive controls (§ 117.135)
    - Monitoring procedures and implementation records
    - Corrective action procedures and implementation records
    - Verification procedures and implementation records, including:
      - Environmental and product testing procedures and records
      - Equipment calibration procedures and records
      - Records reviews, including justification for the timeframe for reviewing monitoring and corrective action records

Records Available to FDA, continued

- Food Safety Plan, continued
  - Plan reanalysis
  - Validation records
  - Recall plan (§ 117.139)
  - Supply chain program, procedures, and implementation records
- Training for:
  - Employees (i.e., Qualified Individuals)
  - Preventive Controls Qualified Individual(s)
  - Qualified Auditor(s)

Records Access for Routine Inspections

FDA also is entitled to review and copy:

1. List of products shipped and to where
2. Shipping records of ingredients received by company

Records Access for Routine Inspections, continued

FDA will ask for, but is not legally entitled to receive:

1. Recipes
2. Financial data
3. Pricing data
4. Personnel data (e.g., organizational charts and human resources files, other than training documents)
5. Research data
6. Sales data (other than shipping data related to sales)

Records Requests

- If FDA requests records within the scope of what they have legal access to review, you should provide the records and:
  - Mark the record as “CONFIDENTIAL” (ideally using a red stamp on every page)
  - Make a copy of all records you provide FDA to keep as part of your inspection file
- If you have any questions about whether records FDA requests must be provided within the scope of FDA’s authority, contact legal counsel during the inspection

Part 3:

Inspection Follow-up

Post-Inspection Meeting

- There should be a post-inspection meeting to discuss observations made during the inspection
- If the inspector took samples, he/she should be asked to confirm the analyses that will be performed and the company should repeat its request to obtain the results as soon as they are available
- Listen carefully and be sure you understand what the inspector means by each observation
- Keep detailed notes of comments made during the post-inspection meeting
- Do not argue with the inspector(s)

Post Inspection Procedures

- At the conclusion of the inspection, FDA will present a Form FDA 483 ("Inspectional Observations") if the agency has observed conditions of potential concern
- Upon receipt, you should review the FDA 483 carefully
- In the event it contains an observation of a condition that the company corrected during the inspection, the inspector should be asked to note the corrective action on the form
- The mere existence of an observation in a FDA 483 does not itself mean the company has produced adulterated or misbranded products, but does mean it is a condition the inspector believes needs to be corrected

Post Inspection Procedures, continued

- If you receive a 483, you should contact legal counsel immediately for assistance in preparing your response
- FDA must receive a written response regarding the 483 within 15 business days
  - The response should identify corrective actions that have been made, or a timetable for when they will be made, documentation, and provide company position on whether any of the observations are not legitimate
  - Response is highly advisable if the company wants to mitigate potential for a Warning Letter
  - Response should be reviewed by legal counsel

Post Inspection Reports

- After the inspection, the individual that accompanied the inspector should prepare a post inspection report
- Include the post inspection report in the company's Inspection file
- The post inspection report should include all relevant information from the inspection
- This report is just for internal purposes and is not provided to FDA

Post Inspection Procedures

- The FDA inspector will prepare an Establishment Inspection Report (EIR) that will contain his/her observations from the inspection and frequently will contain proprietary information
- FDA should provide the EIR to the company several months after the inspection
- EIRs are subject to public release under the Freedom of Information Act (FOIA) but the proprietary information in them is not
- A FOIA request can be submitted requesting a copy of the EIR (but not on company letter head) to make certain FDA has deleted confidential information
- FDA will classify inspection and post classification online

Post Inspection Procedures, continued

- Depending on whether inspection results in positive environmental test results, a response separate from the 483 may be needed
- Potential need to meet with FDA following inspection and corrective actions to address environmental positives

Conclusions

- Know the rules of the game and prepare accordingly
- Actively manage any FDA inspection
- Inspection follow-up is essential

Questions?

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