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## Desire, Conservatism, Underfunding, Congressional Meddling, and Study Fatigue: Ingredients for Ongoing Reform at the Securities and Exchange Commission?

Joan M. Heminway

*University of Tennessee, Knoxville*, [jheminwa@tennessee.edu](mailto:jheminwa@tennessee.edu)

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DESIRE, CONSERVATISM, UNDERFUNDING, CONGRESSIONAL  
MEDDLING, AND STUDY FATIGUE: INGREDIENTS FOR  
ONGOING REFORM AT THE SECURITIES AND EXCHANGE  
COMMISSION?

*Joan MacLeod Heminway\**

In the spring of 2010, after two years of significant reform efforts undertaken to address perceived weaknesses in its rulemaking and enforcement activities (alleged failings that have been blamed for the financial crisis and Bernie Madoff debacle), the U.S. Securities and Exchange Commission (SEC) was rewarded for its efforts with a congressional provision in the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act)<sup>1</sup> that compels ongoing reform efforts based on the results of a third-party examination.

Not later than the end of the 90-day period beginning on the date of the enactment of this subtitle, the Securities and Exchange Commission (hereinafter in this section referred to as the “SEC”) shall hire an independent consultant of high caliber and with expertise in organizational restructuring and the operations of capital markets to examine the internal operations, structure, funding, and the need for comprehensive reform of the SEC, as well as the SEC’s relationship with and the reliance on self-regulatory organizations and other entities relevant to the regulation of securities and the protection of securities investors that are under the SEC’s oversight.<sup>2</sup>

This is the text that introduces the general mandate of Section 967 of the Dodd–Frank Act (Section 967). The section goes on to prescribe general areas of study and require that the independent consultant render a report to the SEC and the U.S. Congress “[n]ot later than the end of the 150-day period after being retained.”<sup>3</sup> That report—256 pages, not including the cover page, table of contents, and glossary (BCG Report)—was issued on March 10, 2011, over three years before work

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\* W.P. Toms Distinguished Professor of Law, The University of Tennessee College of Law; J.D., New York University School of Law; A.B., Brown University. Work on this Article was supported by thoughtful comments from Arthur Laby and members of the faculty at Suffolk University Law School and by research funding from The University of Tennessee College of Law.

1. Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), *available at* [http://www.dodd-frank-act.us/Dodd\\_Frank\\_Act\\_Text\\_Section\\_967.html](http://www.dodd-frank-act.us/Dodd_Frank_Act_Text_Section_967.html).

2. *Id.* § 967(a)(1).

3. *Id.* §§ 967(a)(2), 967(b).

on this Article was completed.<sup>4</sup>

Having earlier written about SEC reform efforts in recent years and having been interested—in fact, amazed—by the number and type of studies included in the Dodd–Frank Act,<sup>5</sup> I began to wonder whether Section 967 and the resulting BCG Report were, are, and will be useful and efficient. Did Congress make the right decision in the Dodd–Frank Act about how to approach the need for ongoing, targeted reforms at the SEC to make it a more functional, effectual regulatory agency? I initially had to admit that I was unclear on the best way to answer that question, but I knew I wanted to try. I started my inquiry with what I already knew. My existing knowledge led me to a number of observations at the intersection of the SEC’s then existing reform efforts and Section 967.

In prior works on the topic of SEC reform, I used change leadership literature (a branch of business management scholarship) to assess the potential success of the SEC’s ongoing efforts to restructure itself and its operations.<sup>6</sup> In these articles, I contended that the SEC’s pre-Dodd–Frank and early post-Dodd–Frank reform efforts bear earmarks of potential success based on various factors catalogued in change leadership literature.<sup>7</sup> I noted, in the more recent of the two articles, that former SEC Chairman Mary Schapiro’s public communications about the BCG Report just prior to its release were evidence of her possible status as a wartime leader, a type of leader that may be successful in making lasting institutional reforms.<sup>8</sup> I further observed that the institutional study that resulted in the BCG Report appeared to help develop or restore interconnections among personnel in the SEC that may be important to successful organizational change:

The recent examination of SEC operations conducted by the Boston Consulting Group (BCG), required under the Dodd–Frank Act, re-engaged the SEC’s staff in the ongoing reform dialogue (by incorporating

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4. BOSTON CONSULTING GRP., U.S. SECURITIES AND EXCHANGE COMMISSION: ORGANIZATIONAL STUDY AND REFORM (2011) [hereinafter BCG Report], available at <http://www.sec.gov/news/studies/2011/967study.pdf>.

5. Joan Heminway, *Dodd–Frank Forum—And Now for Something Completely Different*, CONGLOMERATE (July 21, 2010), <http://www.theconglomerate.org/2010/07/doddfrank-forum-and-now-for-something-completely-different.html>.

6. Joan MacLeod Heminway, *Reframing and Reforming the Securities and Exchange Commission: Lessons from Literature on Change Leadership*, 55 VILLANOVA L. REV. 627, 630 (2010) [hereinafter Heminway, *Reframing*], available at <http://ssrn.com/abstract=1688147>; Joan MacLeod Heminway, *Sustaining Reform Efforts at the SEC: A Progress Report*, 30 BANKING & FIN. SERVICES POL’Y REP. 1, 1 (2011) [hereinafter Heminway, *Sustaining*], available at <http://ssrn.com/abstract=1859045>.

7. See Heminway, *Reframing*, *supra* note 6, at 659; Heminway, *Sustaining*, *supra* note 6, at 1–9.

8. Heminway, *Sustaining*, *supra* note 6, at 2.

staff input) and, in the process, accorded credit to diverse viewpoints, encouraged transparency and feedback relating to ongoing reforms, and reconnected members of the SEC staff to the agency and its efforts to transform itself. Although the study was conducted by a third party engaged by the SEC rather than directly by the SEC leadership, the work done by BCG re-enforced and extended earlier work done by SEC leaders in their self-assessments of aspects of SEC operations. The common element of these efforts is staff engagement in the organizational change process, as opposed to top-down imposition of reforms—the treatment of the SEC as a living system, not a machine.<sup>9</sup>

Finally, I noted that the BCG Report and the related congressional mandates of periodic reporting in the Dodd–Frank Act (which call for reports to Congress at six-month intervals over a period of two years)<sup>10</sup> should help to sustain the SEC’s focus on aligning and clarifying its organizational structure, another established element of successful organizational change.<sup>11</sup> These observations lend some analysis to the question of whether Section 967 is efficacious and tend to support the view that that Section 967 and the BCG Report may be effectual. But they are preliminary and incomplete observations.

I also observed that, despite the SEC’s honest and open desire to improve itself, the nature of the SEC itself—sometimes portrayed as an inflexible, officious government unit—might complicate the effective and efficient implementation of Section 967 and the overall prospects for success in the SEC’s reform efforts. There may be two opposing forces at work in the area of SEC institutional reform in the post-financial-crisis era, with the outcome of that opposition being uncertain:

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9. *Id.* at 6 (footnotes omitted).

10. Dodd–Frank Act, Pub. L. No. 111-203, § 967(c), 124 Stat. 1376 (2010). Specifically, these congressional reporting requirements last for two years after the issuance of the BCG Report (i.e., through March 2013).

Not later than the end of the 6-month period beginning on the date the consultant issues the report under subsection (b), and every 6-months thereafter during the 2-year period following the date on which the consultant issues such report, the SEC shall issue a report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate describing the SEC’s implementation of the regulatory and administrative recommendations contained in the consultant’s report.

*Id.* Three reports have been issued to date. See SEC. & EXCH. COMM’N, REPORT ON IMPLEMENTATION OF SEC ORGANIZATIONAL REFORM RECOMMENDATIONS (Mar. 30, 2012) [hereinafter March 2012 SEC Report], available at <http://www.sec.gov/news/studies/2012/secorgreformreport-2012-df967.pdf>; SEC. & EXCH. COMM’N, REPORT ON IMPLEMENTATION OF SEC ORGANIZATIONAL REFORM RECOMMENDATIONS (Sept. 9, 2011) [hereinafter September 2011 SEC Report], available at <http://www.sec.gov/news/studies/2011/secorgreformreport-df967.pdf>; SEC. & EXCH. COMM’N, REPORT ON IMPLEMENTATION OF SEC ORGANIZATIONAL REFORM RECOMMENDATIONS (Oct. 17, 2012) [hereinafter October 2012 SEC Report], available at <http://www.sec.gov/news/studies/2012/sec-organizational-reform-recommendations-101712.pdf>.

11. Heminway, *Sustaining*, *supra* note 6, at 7.

First is the sincere desire, especially among senior policymakers, to effect meaningful, thoughtful, and progressive regulatory change. The crisis caused many within the agencies to rethink the priorities and processes of regulation, and has strengthened the hand of those most inclined to ask difficult questions, challenge the status quo, and try new ideas.

Set against this progressive force is the deep conservatism of the agencies themselves. The federal agencies that supervise banks and oversee capital markets are highly regimented and bureaucratic. Information, insight, and warning signs are often not acted on or shared without first being reviewed and approved at each level of the organizational hierarchy. Among different agencies, competing agendas can sometimes win out over close cooperation. New rules will of course be developed as required, but new attitudes and new ways of working will be harder to come by.<sup>12</sup>

This complex, dissonant characterization of the SEC—as open-minded and reformist, yet also conservative, hierarchical, and slow-moving—rings true to me. One legal commentator once noted that “[w]e can compare U.S. government policy changes to the navigation of a supertanker. One does not see the results of any effort to back water or change course for a considerable time.”<sup>13</sup>

Another apparent counterweight to the SEC’s desire for reform has been a lack of sufficient resources. Financial capital and human capital at the SEC are in relatively short supply (and have been deficient during the entire reform period). The underfunding of the SEC has been a matter of public debate at a number of junctures during the recent SEC reform process and, as I have noted elsewhere, threatens to impede the implementation of reform initiatives.<sup>14</sup> Specifically, the scarcity of funding to support follow-through on study findings under the Dodd–Frank Act may mean that the prescribed studies will merely constitute legislative relics.

The timing of Congress’s enactment of Section 967 is an additional possible area of concern. Why interrupt an existing reform campaign to evaluate it or start a new one? To the extent that Section 967 can be seen as an extension (rather than an interruption) of the reform work begun by former Chairman Schapiro and other SEC leaders,<sup>15</sup> why impose new processes on the organization and its change leaders—

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12. JOHN LESTER & JOHN BOVENZI, THE DODD–FRANK ACT: WHAT IT DOES, WHAT IT MEANS, AND WHAT HAPPENS NEXT 7 (2010), available at [http://www.oliverwyman.com/ow/pdf\\_files/OW\\_EN\\_FS\\_Publ\\_2010\\_The\\_Dodd\\_Frank\\_Act.pdf](http://www.oliverwyman.com/ow/pdf_files/OW_EN_FS_Publ_2010_The_Dodd_Frank_Act.pdf).

13. William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980–89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 647 (1994).

14. Heminway, *Sustaining*, *supra* note 6, at 9–12.

15. See Heminway, *Sustaining*, *supra* note 6, at 6.

adding cost to the reform process by requiring the retention of an outside expert for an initial assessment and diverting the time of the SEC's leadership and staff to engage in programmatic self-assessment by participating in a study and ongoing reporting? "Might the SEC have done just as well in continuing on the road to reform it had been on pre-Dodd-Frank? . . . ."<sup>16</sup>

Finally, I noted that Section 967 is only one among many legislative provisions in the Dodd-Frank Act that call for the completion of studies and related action by or at the SEC in addition to the substantive rulemaking provided for under the Dodd-Frank Act.<sup>17</sup> Layer onto that the studies required under §§ 106, 402, and 504 of the recently enacted Jumpstart Our Business Startups (JOBS) Act<sup>18</sup> and the report required under Section 7 of the Stop Trading On Congressional Knowledge (STOCK) Act<sup>19</sup>. . . . "Study fatigue" (if there is such a thing), in addition to general regulatory overload (including in connection with other provisions of the Dodd-Frank Act, the JOBS Act, and the STOCK Act), seemed probable.

In sum, I determined that the SEC has exhibited a desire to engage in honest reform, despite its overall conservatism. Yet, underfunding, congressional meddling, and study fatigue present real barriers to success. Beyond these observations on the SEC's reform efforts, however, I remained somewhat at a loss as to how to approach the question of Section 967's utility as an agency reform tool in the short term and long term, especially given recent changes in the leadership of the SEC occasioned by former Chairman Schapiro's resignation effective in December 2012 (resulting in Elisse Walter assuming the position of Chairman)<sup>20</sup> and President Obama's subsequent nomination

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16. Heminway, *supra* note 5.

17. The National Economic Research Associates, Inc. has produced a chart showing sixteen SEC studies provided for in Dodd-Frank and their relevant deadlines. NAT'L ECON. RESEARCH ASS'N, ECON. CONSULTING, STUDIES—SECURITIES AND EXCHANGE COMMISSION, (2012), *available at* [http://www.nera.com/nera-files/Securities\\_and\\_Exchange\\_Commission.pdf](http://www.nera.com/nera-files/Securities_and_Exchange_Commission.pdf). A summary provided by the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness lists twenty-four SEC studies. CTR. FOR CAPITAL MKTS. COMPETITIVENESS, DODD-FRANK ACT OF 2010: SUMMARY OF RULEMAKING, STUDIES, AND CONGRESSIONAL REPORTS BY TITLE, *available at* <http://chamberpost.typepad.com/files/dodd-frank-summary-sheet.pdf>. A leading law firm catalogues eighteen SEC studies. DAVIS POLK, DODD-FRANK PROGRESS REPORT (2011), *available at* [http://www.davispolk.com/files/uploads/FIG//July2011\\_Dodd.Frank.Progress.Report.pdf](http://www.davispolk.com/files/uploads/FIG//July2011_Dodd.Frank.Progress.Report.pdf).

18. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 102, 402, 504, 126 Stat. 306 (2012).

19. Stop Trading On Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 112-105, § 7, 126 Stat. 291 (2012).

20. See Paul Davidson & Tim Mullaney, *Elisse Walter Tapped to Lead SEC; Mary Schapiro Leaving*, U.S.A. TODAY (Nov. 27, 2012), <http://www.usatoday.com/story/money/markets/2012/11/26/mary-schapiro-sec-leaving/1726837/>; Ben Protess & Susanne Craig, *Rebuilding Wall Street's Watchdog*, N.Y. TIMES DEALBOOK (Nov. 26, 2012,

and the U.S. Senate's confirmation of Mary Jo White as Chairman.<sup>21</sup> I knew that what I was searching for was in the nature of an assessment tool. What I needed was a rubric for the evaluation of Section 967 and the SEC's related program of reform. My prior work incorporating the literature of change leadership and change management was not up to this task. That literature identifies attributes of people and processes that predict a likelihood of success in reform efforts; it does not measure the efficacy of reform efforts.

By (as I have done before) reaching outside the law, I have been able to acquire some additional insight (even if not the simple rubric I sought). Social scientists have developed and contribute to a field of study—program evaluation—that holds promise in resolving questions about the propriety and potential success of institutional reforms at the SEC, including those under Section 967. This field encourages the thorough, systematized assessment of the programs, agendas, and plans of various types of organizations. Program evaluation in the governmental agency realm interfaces with public administration, including agency reform efforts.<sup>22</sup> The mandates of Section 967 may exemplify good program evaluation in federal government. If they do, there is reason to believe that Section 967 may be worth the paper on which it is written and worthy of the SEC's continued attention as it continues down a reform-oriented path.

In Part I of this Article, I describe what I have learned about the general contours of program evaluation and its application in the context of administrative reform efforts, in each case based on existing program evaluation and public administration literature. I then briefly link this overview back to my earlier work on change leadership at the SEC. In Part II, I provide an assessment of the content and implementation of Section 967 through the lens of program evaluation. This assessment provides a general framework for making limited observations about the efficacy of Section 967 and the overall nature of evaluating reform efforts at the SEC. The conclusion in Part III summarizes the key observations made in Part II and comments generally on the prospects for continued SEC reform and the need for consistent SEC program evaluation and, therefore, enhanced congressional consideration of and

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10:15 AM), <http://dealbook.nytimes.com/2012/11/26/schapiro-head-of-s-e-c-to-announce-departure/>.

21. See Dina ElBoghdady, *Mary Jo White confirmed as SEC Chief*, WASH. POST, Apr. 8, 2013, [http://articles.washingtonpost.com/2013-04-08/business/38373590\\_1\\_mary-jo-white-al-franken-crediting-agency-industry](http://articles.washingtonpost.com/2013-04-08/business/38373590_1_mary-jo-white-al-franken-crediting-agency-industry).

22. See Mari Millery, *Planning for a Service Program Evaluation*, in A PRACTICAL GUIDE TO PROGRAM EVALUATION PLANNING 63, 71 (Debra J. Holden & Marc A. Zimmerman eds., 2009) [hereinafter PRACTICAL GUIDE] ("Many service programs have instituted quality assurance or continuous quality improvement programs that intersect, and sometimes overlap, with program evaluation efforts in general and process evaluation efforts in particular.").

responsibility for the program evaluations it sponsors.

## I. PROGRAM EVALUATION IN THE CONTEXT OF NEW PUBLIC MANAGEMENT AND CHANGE MANAGEMENT

Program evaluation is a type of assessment process that has become standard in organizational management. “Program evaluation is essential to demonstrate effective practice, advance an organization’s mission, and powerfully respond to one’s internal and external stakeholders.”<sup>23</sup> Although the literature on program evaluation is most commonly applied to the assessment of social programs (especially human service programs), it also has been applied to the review of business plans and strategies, educational programs, and government administrative activities. This Part briefly describes program evaluation both generally and in the administrative reform context.

### *A. Defining Program Evaluation*

Program evaluation is a rigorous, planned, approach to assessing the efficacy of an organization or organizational activity. More formalistically, one might describe program evaluation as “a social science activity directed at collecting, analyzing, interpreting, and communicating information about the workings and effectiveness of . . . programs.”<sup>24</sup> As such, it represents an important, practical analytical tool in organizational and managerial studies.

Program evaluation is applied research used as part of the managerial process. Evaluations are conducted to aid those who must make administrative decisions about . . . programs. Unlike theoretical research, where scientists engage in science for its own sake, program evaluation systematically examines . . . programs for pragmatic reasons. Decision makers may need to know if a program accomplished its objectives, if it is worth funding again next year, or if a less expensive program can accomplish the same results.<sup>25</sup>

Program evaluation may occur at the behest of an internal constituent of the organization that conducts or operates the program or as required or suggested by someone from outside the organization. The person who

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23. STEPHEN A. KAPP & GARY R. ANDERSON, *AGENCY-BASED PROGRAM EVALUATION: LESSONS FROM PRACTICE 1* (2010).

24. PETER H. ROSSI ET AL., *EVALUATION: A SYSTEMATIC APPROACH 2* (7th ed. 2003). The authors of this text also offer a slightly different, but consonant definition that is useful. “Program evaluation is the use of social research methods to systematically investigate the effectiveness of . . . programs in ways that are adapted to their political and organizational environments and are designed to inform . . . action . . . .” *Id.* at 16.

25. DAVID ROYSE ET AL., *PROGRAM EVALUATION: AN INTRODUCTION 11* (4th ed. 2006).



requests the assessment is known as the “evaluation sponsor.”<sup>26</sup> The process of program evaluation is founded on a series of questions developed by the evaluation sponsor and others with interest in the program being evaluated, in consultation with the evaluator.<sup>27</sup> The process of developing and refining these evaluation questions may involve both clarifying the various objectives of the constituent stakeholders and negotiating among those constituents to reach common ground.<sup>28</sup> This development and refinement process typically involves inquiries into the motivation for raising the evaluation questions.<sup>29</sup>

Although the evaluation questions are the impetus and foundation for the program evaluation, the overall process of program evaluation, like that of traditional academic research methodologies, involves planning, data collection, analysis, and reporting.<sup>30</sup> As a result, the program evaluation process is characterized by a series of general, sequential steps. One text summarizes these steps in an eight-part framework that comprises:

- Identifying the evaluation question;
- Conceptualizing the evaluation question;
- Operationalizing the evaluation question;
- Selecting and defining the evaluation method;
- Selecting the sample for evaluation;
- Collecting data;
- Managing and analyze data; and
- Employing the resulting information operationally.<sup>31</sup>

Even though it is not apparent from this list of sequenced steps, the program evaluation process involves ongoing consultation among the

26. *Id.* at 18 (“The evaluation plan is generally organized around the questions posed about the program by those who commission the evaluation, called the evaluation sponsor, and other pertinent stakeholders—individuals, groups, or organizations that have a significant interest in how well a program functions.”).

27. *Id.*

28. *Id.*

[O]ften, . . . the evaluator must negotiate with the evaluation sponsors and stakeholders to develop and refine the questions. Although these parties presumably know their own interests and purposes, they will not necessarily formulate their concerns in ways that the evaluator can use to structure an evaluation plan. For instance, the initial questions may be vague, overly general, or phrased in program jargon that must be translated for more general consumption . . . . In such cases, the evaluator must probe thoroughly to determine what the question means to the evaluation sponsor and program stakeholders and why they are concerned about it.

*Id.* (emphasis omitted).

29. *Id.* (“Equally important are the reasons the questions about the program are being asked, especially the uses that will be made of the answers.”).

30. *Id.* at 16 (“[E]valuators will typically employ social research procedures for gathering, analyzing, and interpreting evidence about the performance of a program.”).

31. KAPP & ANDERSON, *supra* note 23, at 27.

evaluators and, more often than not, between the evaluators and various stakeholders. Another program evaluation text makes this part of the process explicit by expressly incorporating stakeholder engagement in its distinctive articulation of the first five (pre-investigative) steps in the program evaluation process.<sup>32</sup> Various frameworks for evaluation planning exist, and formal, specialized program evaluation methods and rubrics have been constructed for the review of specific types of programs (e.g., educational, public health, and human service).<sup>33</sup>

These tailored methods and rubrics reflect an important reality of program evaluation: the purpose and nature of the evaluation process is different from program to program and context to context.<sup>34</sup> “One of the most challenging aspects of program evaluation is that there is no ‘one size fits all’ approach.”<sup>35</sup>

As a practical matter, an evaluation must . . . be tailored to the organizational makeup of the program. In designing the evaluation, the evaluator must take into account any number of organizational factors, such as the availability of administrative cooperation and support; the ways in which program files and data are kept and access permitted to them; the character of the services provided; and the nature, frequency, duration, and location of the contact between the program and its clients.<sup>36</sup>

Moreover, program evaluation plans are not static. Typically, they are highly contextual and require revision and refinement as the evaluation proceeds.<sup>37</sup> The context in which a program evaluation

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32. PRACTICAL GUIDE, *supra* note 22, at 1–2 (setting forth the five steps in the Evaluation Planning Incorporating Context (EPIC) model: “(1) assess context, (2) gather reconnaissance, (3) engage stakeholders, (4) describe the program, and (5) focus the evaluation.”); *see also* Debra J. Holden & Marc A. Zimmerman, *Program Evaluation Planning: Overview and Analysis*, in PRACTICAL GUIDE, *supra* note 22, 143, 145–51 [hereinafter Holden & Zimmerman, *Overview & Analysis*] (summarizing and commenting on the five steps in the EPIC model).

33. *See, e.g.*, CTRS. FOR DISEASE CONTROL AND PREVENTION, A FRAMEWORK FOR PROGRAM EVALUATION (2011), available at <http://www.cdc.gov/eval/framework/index.htm>; Julie A. Marshall, *Planning for an Education Evaluation*, in PRACTICAL GUIDE, *supra* note 22, at 33–61; Millery, *supra* note 22, at 63–85; Fatma Mizikaci, *A Systems Approach to Program Evaluation Model for Quality in Higher Education*, 14 QUALITY ASSURANCE IN EDUC. 37 (2006), available at [http://www.ftsm.ukm.my/aishah/paper%20pdf\\_2nd%20education/Fatma\\_A%20systems%20approach%20to%20program%20evaluation%20model%20for%20quality%20in%20higher%20education.pdf](http://www.ftsm.ukm.my/aishah/paper%20pdf_2nd%20education/Fatma_A%20systems%20approach%20to%20program%20evaluation%20model%20for%20quality%20in%20higher%20education.pdf).

34. *See* ROSSI ET AL., *supra* note 24, at 2 (“Evaluations are conducted for a variety of practical reasons: to aid in decisions concerning whether programs should be continued, improved, expanded, or curtailed; to assess the utility of new programs and initiatives; to increase the effectiveness of program management and administration; and to satisfy the accountability requirements of program sponsors.”); *see also* ROYSE ET AL., *supra* note 25, at 12–13 (summarizing four reasons for program evaluation).

35. ROSSI ET AL., *supra* note 24, at 32.

36. *Id.* at 20.

37. *Id.* (“[O]nce an evaluation is launched, it is common for changes and ‘in-flight’ corrections to be required. Modifications, perhaps even compromises, may be necessary in the types, quantity, or quality of the data collected as a result of unanticipated practical or political obstacles, changes in the

occurs may involve, for example, the overall ethical, political, economic, cultural, or social environment surrounding the program evaluation, the program's activities, or the markets in which the program operates or the program's activities are conducted, as well as resource or funding and operating concerns relating to the program.<sup>38</sup> Program resource and funding issues may have particular salience in evaluation planning in difficult financial times because program evaluation may help decision makers identify where to focus or reallocate limited resources or when to cut ineffectual programs.<sup>39</sup> "The ability to articulate the value of one's interventions and programs and satisfy constituents becomes heightened when facing times of economic stress, difficult funding decisions, and an increased demand for services."<sup>40</sup>

### *B. Evaluation of Governmental Reform Programs*

Human service programs have been the focal point of program evaluation, but program evaluation has applications that extend far and wide—across for-profit, not-for-profit, and governmental organizations. To be sure, program evaluation processes "are useful in virtually all spheres of activity in which issues are raised about the effectiveness of organized social action . . . . Administrators in both the public and private sectors often assess the managerial, fiscal, and personnel practices of their organizations."<sup>41</sup> In fact, it can safely be said that, in certain governmental administrative settings, program evaluation has become a regular part of the ordinary course business of government.

Evaluation has now become a political and managerial activity that makes

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operation of the program, or shifts in the interest of the stakeholders." In sum:

Program evaluation is not a cut-and-dried activity like putting up a prefabricated house or checking a document with a word processor's spelling program. Rather, evaluators must tailor the initial evaluation plan to the particular program and its circumstances and then typically revise and modify their plan as needed. The specific form and scope of an evaluation depend primarily on its purposes and audience, the nature of the program being evaluated, and, not least, the political and organizational context within which the evaluation is conducted.

*Id.* at 18.

38. See KAPP & ANDERSON, *supra* note 23, at 1; see also ROSSI ET AL., *supra* note 24, at 41–44 (identifying "administrative and political context" as a factor to be taken into account in conducting a program evaluation).

39. See ROSSI ET AL., *supra* note 24, at 15. Specifically, one group of scholar-commentators contends:

Regardless of political trends, two points seem clear about the current environment for evaluation. First, restraints on resources will continue to require funders to choose the . . . problem areas on which to concentrate.

*Id.*

40. KAPP & ANDERSON, *supra* note 23, at 1.

41. ROSSI ET AL., *supra* note 24, at 6.

significant input into the complex mosaic from which emerge policy decisions and resources for starting, enlarging, changing, or sustaining programs to better the human condition. In this regard, evaluation research must be seen as an integral part of the social policy and public administration movements.<sup>42</sup>

The use of program evaluation in assessing federal government programs is not new. “Since at least the 1960s, program evaluation and its close companion, policy analysis, have become institutionalized aspects of congressional oversight and agency management of federal programs.”<sup>43</sup> Examples exist in many contexts, from the general to the very specific.

The broad scope of program evaluation can be seen in the evaluations of the U.S. General Accounting Office (GAO), which have covered the procurement and testing of military hardware, quality control for drinking water, the maintenance of major highways, the use of hormones to stimulate growth in beef cattle, and other organized activities far afield from human services.<sup>44</sup>

Research undertaken in connection with this Article revealed an unsuccessful congressional attempt to legislate a federal government program evaluation commission.<sup>45</sup>

Notwithstanding this history, questions remain about the relevance and appropriateness of applying program evaluation to governmental administrative reform projects in the federal agency setting. For example, can financial regulatory initiatives like those pursued at the SEC be successful subjects of program evaluation? They are not

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42. *Id.* at 10–11.

43. ROSALIE RUEGG & IRWIN FELLER, A TOOLKIT FOR EVALUATING PUBLIC R&D INVESTMENT: MODELS, METHODS, AND FINDINGS FROM ATP’S FIRST DECADE 1 (2003), available at <http://www.atp.nist.gov/eao/gcr03-857/contents.htm>; see also ROSSI ET AL., *supra* note 24, at 12–14 (“Evaluation activities increased rapidly during the Kennedy and Johnson presidencies of the 1960s, when social programs undertaken under the banners of the War on Poverty and the Great Society provided extensive resources”); see also ROSSI ET AL., *supra* note 24, at 11–15 (describing program evaluation at the intersection of social policy and public administration).

44. ROSSI ET AL., *supra* note 24, at 6. The GAO (referenced in the text accompanying this note 44) is guided in its evaluation efforts by Generally Accepted Government Auditing Standards (GAGAS), set forth in the so-called “Yellow Book,” that govern both financial and performance audits. See U.S. GENERAL ACCOUNTING OFFICE, GOVERNMENT AUDITING STANDARDS: 2011 INTERNET VERSION 13 (Aug. 2011) [hereinafter YELLOW BOOK], <http://www.gao.gov/govaud/iv2011gagas.pdf>; Arthur B. Laby, *Implementing Regulatory Harmonization at the SEC*, 30 REV. BANKING & FIN. L. 189, 200 (2010–11). “Performance audits provide objective analysis to assist management and those charged with governance and oversight in using the information to improve program performance and operations, reduce costs, facilitate decision making by parties with responsibility to oversee or initiate corrective action, and contribute to public accountability.” YELLOW BOOK, *supra*, at 13. The GAO’s performance audit standards may provide helpful guidance to external program evaluators.

45. H.R. 5588, 106th Congress (2000), available at <http://www.govtrack.us/congress/bills/106/hr5588/text>.

apparently “social programs,” which have historically been the focus of program evaluation,<sup>46</sup> but they are seemingly “programs” in the context of GAO performance audits.<sup>47</sup>

Even if we assume that substantive financial regulatory initiatives can be assessed productively through program evaluation, institutional transformation programs may not be appropriate candidates for program evaluation. Are the reform efforts of administrative agencies properly classified as “programs” for program evaluation purposes? “[P]rograms can be vague and hard to distinguish and define.”<sup>48</sup> In the program evaluation context, a program is defined to include “an organized collection of activities designed to reach certain objectives.”<sup>49</sup> Although a program typically requires its own staffing, has its own budget, and has its own identity within a given organizational structure, a program may be best defined as a collection of activities that has an identifiable, ongoing existence and a quantifiable, recognized influence or outcome.<sup>50</sup> By these measures, a sufficiently defined plan of administrative reform with specific measurable objectives may be classified as a “program” suitable for program evaluation.<sup>51</sup>

Program evaluation in the agency reform context can be properly construed as an adjunct to a managerial approach to public sector administrative reform. Sometimes characterized as “New Public Management” (NPM), managerialist administrative reform is top-driven reform that incorporates structural and process modifications with the objective of achieving change in public sector units.<sup>52</sup>

New Public Management—more generally known as “managerialism”—has been defined so often by so many observers that it has become conceptually incoherent. Properly understood, NPM’s focal emphasis is on reducing or eliminating structural distinctions between the public and private sectors so that the behavior of public managers resembles that of managers in entrepreneurial, profit-driven, investor-owned firms.<sup>53</sup>

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46. See ROSSI ET AL., *supra* note 24, at 29 (defining “social program; social intervention” as “[a]n organized, planned, and usually ongoing effort designed to ameliorate a social problem or improve social conditions.”).

47. See YELLOW BOOK, *supra* note 44, at 13 (“The term ‘program’ is used in GAGAS to include government entities, organizations, programs, activities, and functions.”).

48. ROYSE ET AL., *supra* note 25, at 6.

49. *Id.* at 5.

50. *Id.* at 5–7.

51. For example, the SEC has established a Web page collecting and identifying its “Post-Madoff Reforms.” See *The Securities and Exchange Commission Post-Madoff Reforms*, U.S. SEC. AND EXCHANGE COMMISSION, <http://www.sec.gov/spotlight/secpostmadoffreforms.htm> (last visited Apr. 7, 2013). It is unclear that this listing, taken alone, is sufficient to evidence a program.

52. See Brendan C. Nolan, PUBLIC SECTOR REFORM: AN INTERNATIONAL PERSPECTIVE xix, xx–xxi (Brendan C. Nolan ed. 2001).

53. Laurence E. Lynn, Jr. & Sydney Stein, Jr., *New Public Management Comes to America* 1

Thus, although its definition in the abstract may be unclear, in practice, NPM describes an approach to public administration founded on a series of core, outcome-driven principles co-opted from private enterprise. “NPM, like most administrative labels, is a loose term. Its usefulness lies in its convenience as a shorthand name for the set of broadly similar administrative doctrines which dominated the bureaucratic reform agenda in many of the OECD group of countries from the late 1970s.”<sup>54</sup> Specifically, Professor Christopher Hood asserts that New Public Management comprises seven doctrines:

- “‘Hands-on professional management’ in the public sector”;<sup>55</sup>
- “Explicit standards and measures of performance”;<sup>56</sup>
- “Greater emphasis on output controls”;<sup>57</sup>
- “Shift to disaggregation of units in the public sector”;<sup>58</sup>
- “Shift to greater competition in the public sector”;<sup>59</sup>
- “Stress on private-sector styles of management practice”;<sup>60</sup> and
- “Stress on greater discipline and parsimony in resource use.”<sup>61</sup>

These seven doctrines are rooted in a perceived need for accountability and are driven by a desire for the attainment of measurable results and operating efficiencies.<sup>62</sup>

Given that NPM derives its strength from confidence in private enterprise management, one might expect that management failures in the private sector would deter the use of NPM. Certainly, the Enron debacle, Martha Stewart’s legal troubles, the Bernie Madoff affair, and (most recently) the subprime mortgage market collapse could have been enough to discourage the use of private enterprise as a model for just about anything. Although faith in business managers and free markets has suffered in the wake of the 2008 financial crisis, it seems that many

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(Harris School Series, Working Paper No. 08.04, 2006), available at [http://harrisschool.uchicago.edu/sites/default/files/working-papers/wp\\_08\\_04.pdf](http://harrisschool.uchicago.edu/sites/default/files/working-papers/wp_08_04.pdf).

54. Christopher Hood, *A Public Management for All Seasons*, 69 PUB. ADMIN. 3, 3–4 (1991).

55. *Id.* at 4 (“Active, visible, discretionary control of organizations from named persons at the top, ‘free to manage’”).

56. *Id.* (“Definition of goals, targets, indicators of success, preferably expressed in quantitative terms, especially for professional services”).

57. *Id.* (“Resource allocation and rewards linked to measured performance; breakup of centralized bureaucracy-wide personnel management”).

58. *Id.* at 5 (“Break up of formerly ‘monolithic’ units, unbundling of U-form management systems into corporatized units around products, operating on decentralized ‘one-line’ budgets and dealing with one another on an ‘arms-length’ basis”).

59. *Id.* (“Move to term contracts and public tendering procedures”).

60. *Id.* (“Move away from military-style ‘public service ethic’, greater flexibility in hiring and rewards; greater use of PR techniques”).

61. *Id.* (“Cutting direct costs, raising labour discipline, resisting union demands, limiting ‘compliance costs’ to business”).

62. *Id.* at 4–5.

of the doctrines have survived intact, and government reform efforts continue to rely on the values underlying NPM—albeit in a refocused form.<sup>63</sup> To paraphrase Mark Twain, reports of the death of NPM<sup>64</sup> are greatly exaggerated.<sup>65</sup>

The reform efforts with which the SEC has been engaged since early 2009 are consistent with NPM. A number of Professor Hood's seven doctrines are evidenced in those efforts. For example, based on public reports, the actions of the SEC's former Chairman, Mary Schapiro, and the SEC's former Director of the Division of Enforcement, Robert Khuzami, in leading change at the SEC exemplify engaged, "hands-on professional management," the first doctrine.<sup>66</sup> Also, the reorganization of the Division of Enforcement under the leadership of former Chairman Schapiro and former Director Khuzami was designed to focus on the operations of the division and eliminate bureaucratic waste, emphasizing "output controls" and disaggregating operating units consistent with the third and fourth doctrines.<sup>67</sup> And finally, the overall employment of change leadership strategies and processes derived from studies of private business transitions is evidence of a focus on "private sector styles of management practice," the sixth doctrine.<sup>68</sup>

Based on these collected observations, program evaluation, as a

63. See Roger Levy, *New Public Management: End of an Era?*, 25 PUB. POLICY & ADMIN. 234 (2010).

64. See Patrick Dunleavy et al., *New Public Management Is Dead—Long Live Digital-Era Governance*, 16 J. PUB. ADMIN. RES. & THEORY 467, 468 (2006) ("The intellectually and practically dominant set of managerial and governance ideas of the last two decades, new public management (NPM), has essentially died in the water.").

65. See W. JOSEPH CAMPBELL, *THE YEAR THAT DEFINED AMERICAN JOURNALISM: 1897 AND THE CLASH OF PARADIGMS* 79 (2006). The actual quote is: "The report of my death was an exaggeration." See *id.*; W. Joseph Campbell, *Noting the Anniversary of Twain's 'Report of My Death' Comment*, MEDIA MYTH ALERT (June 1, 2011, 7:02 AM), <http://mediamythalert.wordpress.com/2011/06/01/noting-the-anniversary-of-twains-report-of-my-death-comment/>. Although Mark Twain is known to have commented along these lines more than once, the earliest example is in a note reportedly written by him in May 1897 relating to an extrapolation of his illness and death from the illness of his cousin. Barbara Schmidt, *Directory of Mark Twain's maxims, quotations, and various opinions: DEATH*, TWAIN QUOTES, <http://www.twainquotes.com/Death.html> (last visited Apr. 7, 2013).

66. See *supra* text accompanying note 55 (labeling and describing the first doctrine); Heminway, *Reframing*, *supra* note 6, at 637–41 (identifying various aspects of hands-on professional management in assessing then Chairman Schapiro and then Director Khuzami as wartime leaders and problem finders).

67. See *supra* text accompanying notes 57 & 58 (labeling and describing the third and fourth doctrines); Robert S. Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010), available at <http://www.sec.gov/news/speech/2010/spch011310rsk.htm> (describing the reorganization of the SEC's Division of Enforcement).

68. See *supra* text accompanying note 60 (labeling and describing the sixth doctrine); Heminway, *Reframing*, *supra* note 6 (analyzing SEC reform efforts through the lens of change leadership literature); Heminway, *Sustaining*, *supra* note 6 (same).

process, has the potential to make government operations and change management more accountable and responsive. As such, it has the capacity to be an integral part of NPM efforts and to be used to assess the efficacy of agency programs, including reform projects built on NPM doctrines and change management efforts more generally. Misgivings about a managerialist approach to public administration arising out of perceived and actual corporate mismanagement and agency failures preceding and contributing to the recent financial crisis can be displaced or resolved through effective program evaluation. Congressional passage of Section 967 may have had this purpose or may have this effect. In addition, congressional qualms about the nature and effects of the SEC's internal reform efforts may be reinforced or laid to rest by an external assessment built on tested social science principles and methodologies. Section 967, as an example of program evaluation, may evidence a positive contribution to public administration and change management. Query whether this potential has been achieved in implementation . . . . Part II offers preliminary observations on the success of the program evaluation actually undertaken under Section 967 with the thought that these observations may instruct Congress in its future program evaluation efforts.

## II. EVALUATING SEC OPERATIONS AND REFORM UNDER SECTION 967

The information in Part I indicates that program evaluation may be useful in assessing SEC operations, including potentially the SEC's current reform program. Section 967 calls for an assessment process that looks like program evaluation.<sup>69</sup> But is the study required under Section 967 efficacious? Does the congressional mandate in Section 967 set into motion a useful, constructive process of program evaluation? Was the process carried out in a manner that appears consistent with quality program evaluation practices? And does the outcome and implementation of the process appear to be appropriate and positive? Even without expertise in social science research methodologies or public administration, a reader of the literature on program evaluation can make a number of relevant observations in response to these questions.

### *A. The Overall Congressional Approach Under Section 967*

As the evaluation sponsor, Congress motivates the program

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69. See Dodd-Frank Act, Pub. L. No. 111-203, §§ 967(a)(1)–(2), 967(b), 124 Stat. 1376 (2010); *supra* text accompanying notes 2 & 3.



evaluation required by Section 967. Accordingly, Congress must establish the scope of the evaluation, framing its focus and contents and isolating, or helping to isolate, the question or questions to be answered through the evaluation process. These decisions are made in the context of Congress's control over the SEC's existence and authority (given that it and the regulatory system it monitors are congressionally created),<sup>70</sup> as well as its control over funding.<sup>71</sup> And they are made in light of perceived or potential failures at the SEC—problems in the execution of its congressional mandate.

[P]rogram evaluation often begins by identifying a problem. Decision makers want to distinguish programs that work from those that do not and to know if their money is well spent. They may have developed questions about a program because of some incident or problems brought to their attention . . . . A problem is any undesirable situation or condition. Sometimes program evaluations are undertaken in order to determine the extent or magnitude of a problem or to confirm a suspected problem . . . .<sup>72</sup>

How well did Congress do in its role as evaluation sponsor? Did it adequately establish a framework for the program evaluation it requested in Section 967?

Congress framed the matters it wanted studied in some detail in the statute. Section 967 first references generally an examination of “the internal operations, structure, funding, and the need for comprehensive reform of the SEC, as well as the SEC's relationship with and reliance on self-regulatory organizations and other entities relevant to the regulation of securities and the protection of securities investors that are under the SEC's oversight.”<sup>73</sup> If I understand this general aspect of Congress's program evaluation directive correctly, it translates into several possible evaluation questions<sup>74</sup> with overlapping areas of focus. One possible phrasing of these questions follows.

- Are the internal operations, structure, and funding of the SEC

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70. See 15 U.S.C. §78d (2006) (establishing the SEC); see also Heminway, *Sustaining*, *supra* note 6, at 9–11 (describing congressional funding authority over the SEC and its effects on SEC operations); James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. TIMES, July 15, 2011, available at <http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html?pagewanted=all>.

71. ROSSI ET AL., *supra* note 24, at 20 (“[A]n evaluation may be conducted because it is mandated by program funders and then used only to demonstrate compliance with that requirement.”).

72. ROYSE ET AL., *supra* note 25, at 15.

73. Dodd–Frank Act, § 967(a)(1).

74. See *supra* text accompanying note 31 (noting that the first step of the program evaluation process is to identify the evaluation question); KAPP & ANDERSON, *supra* note 23, at 26 (“Identify the evaluation question is the part of the process where the general focus of the project is stated in the form of a research question.”) (emphasis added).

appropriate, effective, efficient, and sufficient based on the SEC's current mandate?

- Is there a need for comprehensive reform of the SEC in order for it to successfully execute its mission and fulfill its responsibilities?
- Are the SEC's relationship with and reliance on self-regulatory organizations and other securities regulation and investor protection entities under SEC oversight properly suited to its functions?

The first of these possible research questions is broad enough to encompass the other two. The second of these possible questions hones in directly on the SEC's ongoing and prospective future reform efforts and, by focusing on the word "comprehensive," seems to indicate that Congress is seeking information about whether those reforms ought to be more foundational or all-encompassing than they currently are. The third of these possible questions identifies a specific aspect of the SEC's current operations, stemming from the overall structure of federal securities regulation—the interactions between the SEC and other regulatory organizations in the federal regulatory system over which the SEC has monitoring, rule-making, enforcement, and other responsibilities. This broadly worded question indicates a macro-level concern about the position and authority of the SEC in the federal system of securities regulation. It seems reasonable, in a program evaluation context, to view the second and third possible research questions as additional information about the nature of the desired inquiry that helps the evaluator conceptualize the principal evaluation question.<sup>75</sup>

Section 967 also sets forth more specifically the minimum required focuses of the mandated study. Congress required that the study address:

- (A) the possible elimination of unnecessary or redundant units at the SEC;
- (B) improving communications between SEC offices and divisions;
- (C) the need to put in place a clear chain-of-command structure, particularly for enforcement examinations and compliance inspections;
- (D) the effect of high-frequency trading and other technological advances on the market and what the SEC requires to monitor the effect of such trading and advances on the market;

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<sup>75</sup> See *supra* text accompanying note 31 (noting that the second step of the program evaluation process is to conceptualize the question); KAPP & ANDERSON, *supra* note 23, at 26 ("Conceptualize the question puts greater detail around the question. This step clarifies the key concepts in the evaluation question.") (emphasis added).

(E) the SEC's hiring authorities, workplace policies, and personal practices, including—

(i) whether there is a need to further streamline hiring authorities for those who are not lawyers, accountants, compliance examiners, or economists;

(ii) whether there is a need for further pay reforms;

(iii) the diversity of skill sets of SEC employees and whether the present skill set diversity efficiently and effectively fosters the SEC's mission of investor protection; and

(iv) the application of civil service laws by the SEC;

(F) whether the SEC's oversight and reliance on self-regulatory organizations promotes efficient and effective governance for the securities markets; and

(G) whether adjusting the SEC's reliance on self-regulatory organizations is necessary to promote more efficient and effective governance for the securities markets.<sup>76</sup>

This list identifies more specific congressional concerns about the SEC and its existing regulatory and reform activities and, as a result, offers the evaluator additional information on the objectives of the required study, enabling a further conceptualization of the evaluation question or questions. However, some of the specified areas of concern are vaguer than others. A number of the listed items identify a potential problem but fail to put that problem in a sufficiently detailed context. For example, Congress is concerned about “communications between SEC offices and divisions.”<sup>77</sup> In what respect? For what reasons? Similarly, Congress expresses a concern in Section 967 with the clarity of the SEC's “chain-of-command structure, particularly for enforcement examinations and compliance inspections.”<sup>78</sup> But Congress does not identify what is unclear about the current chain-of-command structure or why it is concerned about this lack of clarity. Congress also fails to indicate the apparently unique issues relating to the chain of command in the Division of Enforcement that caused it to call that division out for special treatment in Section 967. Without this additional contextual information, it will be difficult for a program evaluator to operationalize the evaluation question or questions and design the evaluation process—selecting and delineating the methodology and choosing the sample to be studied.<sup>79</sup>

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76. Dodd–Frank Act, § 967(a)(2).

77. *Id.* § 967(a)(2)(B).

78. *Id.* § 967(a)(2)(C).

79. *See supra* text accompanying note 31 (noting that the third, fourth, and fifth steps of the program evaluation process involve operationalizing the evaluation question, selecting and defining the evaluation method, and selecting the sample for evaluation); KAPP & ANDERSON, *supra* note 23, at 26–27 (“Operationalize the question adds further detail to the question . . . . This step defines specific

In operationalizing the evaluation questions and designing the evaluation process, one key concern is determining the type of evaluation to be conducted. The literature on program evaluation generally defines two principal types of program evaluation. An evaluation may be summative (effectiveness-oriented or impact-oriented) or formative (process-oriented).<sup>80</sup> A summative evaluation is designed to assess a program's effectiveness.<sup>81</sup> A formative evaluation focuses on assessing program implementation and improving the program.<sup>82</sup>

The guidance given by the U.S. Congress in Section 967 may lend itself to both types of evaluation. For example, Congress's inquiries about "whether the SEC's oversight and reliance on self regulatory organizations promotes efficient and effective governance for the securities markets"<sup>83</sup> and "whether adjusting the SEC's reliance on self-regulatory organizations is necessary to promote more efficient and effective governance for the securities markets,"<sup>84</sup> appear to require summative evaluations and outcomes. In contrast, the congressional directives to study "the possible elimination of unnecessary or redundant units at the SEC,"<sup>85</sup> "improving communications between SEC offices

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concepts of the evaluation question . . . . These initial steps [the first three steps in the evaluation process] set up the choice of the actual design by putting some detail around the intended question.").

80. See KAPP & ANDERSON, *supra* note 23, at 28–29; BLAINE R. WORTHEN ET AL., PROGRAM EVALUATION: ALTERNATIVE APPROACHES AND PRACTICAL GUIDELINES 14–18 (2nd ed. 1997). The summative versus formative distinction can be conceptualized as a characterization of the measurement of evaluation outcomes. See Debra J. Holden & Marc A. Zimmerman, *Evaluation Planning Here and Now*, in PRACTICAL GUIDE, *supra* note 22, at 24 [hereinafter Holden & Zimmerman, *Evaluation Planning*] (characterizing summative outcomes as intermediate-term/effectiveness/impact outcomes and formative outcomes as short-term or process-oriented outcomes).

81. *Id.* at 29 ("[A] summative evaluation . . . is focused on assessing the effectiveness of the program."); see also Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 24 (noting that summative outcomes "are typically related to behavior or policy change, with a focus on the direct or indirect effects of the program on participants, as well as larger systems and possibly the community."); ROYSE ET AL., *supra* note 25, at 175 ("Summative program evaluation studies are those that provide an empirically based appraisal of the results, or final outcomes, of an innovative program."); WORTHEN ET AL., *supra* note 80, at 14 ("Summative evaluation is conducted and made public to provide program decision makers and potential consumers with judgments about that program's worth or merit in relation to important criteria.") (emphasis omitted).

82. *Id.* at 28 (noting that a process evaluation is "designed to improve the program"); ROYSE ET AL., *supra* note 25, at 116 ("Formative evaluations are employed to adjust and enhance interventions. They are not used to prove whether a program is worth the funding it receives but serve more to guide and direct programs . . ."); WORTHEN ET AL., *supra* note 80, at 14 ("Formative evaluation is conducted to provide program staff evaluative information useful in improving the program.") (emphasis omitted); Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 24 (describing formative measures as focused "on the process of program implementation.").

83. Dodd–Frank Act, § 967(a)(2)(F).

84. *Id.* § 967(a)(2)(G).

85. *Id.* § 967(a)(2)(A).

and divisions,”<sup>86</sup> and “the need to put in place a clear chain-of-command structure, particularly for enforcement examinations and compliance inspections”<sup>87</sup> seem to be directed toward process-oriented formative evaluation. Congressional clarification on these judgments would be helpful to the program evaluator. Presumably, this is an area in which ongoing consultation should be undertaken between the evaluation sponsor and the evaluator,<sup>88</sup> but this is a difficult task when Congress, a large and diverse legislative body (comprising two houses), is the evaluation sponsor.

A program evaluation also may assess outputs or effects on one or more levels depending on the perspectives of the constituencies to be served by the program and the evaluation process.

*Level* refers to the focus of the evaluation in terms of whether the findings of greatest interest are at the individual level (i.e., the people served by the program), community or local level, state or regional level, or national level. Each level of evaluation will have different contexts that the evaluator needs to understand thoroughly to effectively plan the evaluation. The differing levels, for example, will influence the selection of stakeholders to engage in the evaluation planning process and the questions that will be of the greatest importance to the sponsor.<sup>89</sup>

Because the level or levels of a particular program evaluation are based on the desired outcomes of the evaluation process,<sup>90</sup> they necessarily reflect the nature of the evaluation questions and the type of program evaluation (summative or formative) being conducted. The program evaluator determines the level or levels of the evaluation in planning the evaluation. “The purpose of the evaluation and the outcomes of interest to the sponsor drive the level or focus of the evaluation.”<sup>91</sup>

The program evaluation required by Section 967 manifests as a multi-leveled process, and the BCG Report indicates it was conducted at several levels.<sup>92</sup> The study areas that appear to require summative evaluation<sup>93</sup> may involve analyses conducted at the level of the

86. *Id.* § 967(a)(2)(B).

87. *Id.* § 967(a)(2)(C).

88. *See supra* note 28.

89. Holden & Zimmerman, *Overview & Analysis*, *supra* note 32, at 2–3; *see also* Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 15 (“‘Level’ of evaluation is a fairly complex concept that refers to the perspective of greatest importance to be measured through the evaluation.”).

90. *See* Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 15.

91. *Id.*; *see also* Millery, *supra* note 22, at 70 (“Determining the level of evaluation is parallel to clarifying the purpose of the evaluation.”).

92. *See* BCG Report, *supra* note 4, at 5 (“BCG . . . conducted more than 425 discussions with the SEC, former SEC officials, regulated entities, peer regulators, SROs, and industry groups.”).

93. *See, e.g.*, Dodd–Frank Act, § 967(a)(2)(F)–(G); *supra* text accompanying notes 83 & 84.

regulatory subjects—participants in the securities markets (e.g., buyers, sellers, and intermediaries)—as well as at the level of co-regulators on a national level and Congress as the funding institution. The evaluation levels of other study areas, including those that may involve more formative evaluation,<sup>94</sup> are significantly harder to gauge without more contextual information. In some cases, it is hard to gauge from the statutory provision alone what the purpose of the evaluation is and what outcomes may be of the most interest to Congress.<sup>95</sup> As with the types of evaluation, the statute alone does not unambiguously provide sufficient information to permit the evaluator to definitively designate the levels of evaluation required or desirable. Consultation between the evaluator and Congress would help clarify the evaluation levels,<sup>96</sup> but it is, as earlier noted, impractical.

The evaluation question or questions, in the context of information about the program itself, assist the evaluator in at least preliminarily assessing the type and level of evaluation to be made.<sup>97</sup> As a result, a lack of clarity in evaluation questions may result in suboptimal decisions concerning the design and implementation of the evaluation process. In Section 967, the U.S. Congress has provided the SEC and the evaluator important baseline information about the matters to be included in the study. However, in some cases, uncertainties about the context in which these matters should be studied and the objectives or outcomes desired by Congress in requesting the study of those matters may, without more congressional guidance, present challenges in the evaluation process. Although it is common in a program evaluation process for an evaluator and sponsor to consult on an ongoing basis about these kinds of uncertainties, Congress is a large, decentralized, deliberative institution, making consultation difficult (if not impossible), and no consultative process is expressly included in Section 967. If Congress desires to mandate program evaluations through the legislative process, it should develop or otherwise acquire enough expertise in program evaluation to be able to frame precise evaluation questions that best ensure an efficient, effective evaluation process and consider establishing a process for consultation in the event that questions arise.

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94. See, e.g., *id.* § 937 (a)(2)(A)–(C); *supra* text accompanying notes 85–87.

95. See *supra* text accompanying note 91.

96. See *supra* note 28.

97. *But cf.* Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 10 (“The evaluator needs to plan and conduct the study in the context of the program’s people, politics, history, resources, constraints, values, needs, and interests.”). Adjustments in the evaluation questions and the type and level of evaluation may be made over the course of the program evaluation. See KAPP & ANDERSON, *supra* note 23, at 28–29.

### *B. The Engagement and Involvement of BCG*

Under Section 967, the SEC was required to “hire an independent consultant of high caliber and with expertise in organizational restructuring and the operations of capital markets . . . .”<sup>98</sup> In response to this congressional directive, the SEC retained The Boston Consulting Group (BCG) to perform the required study. The BCG Report summarizes the findings of the study conducted by BCG in accordance with that engagement. This part of the Article offers observations on the retention of BCG, the assessment activities of BCG, and the BCG Report from the perspective of program evaluation literature. The purpose of this assessment is to identify and evaluate issues associated with the retention, monitoring, and requested outputs of external evaluators as a case study. Thus case study may offer information useful to future program evaluations initiated by congressional action.

#### 1. BCG as an External Evaluator Hired by the SEC

Program evaluations may be conducted with an evaluator internal to the program or with an external evaluator.<sup>99</sup> External evaluations may be conducted by (among others) university researchers or private consultants.<sup>100</sup> The choice of internal or external evaluation may have advantages and disadvantages based on context.<sup>101</sup>

The use of an external evaluator—an independent expert consultant, as mandated by Section 967—has several identifiable potential advantages in this context. These possible advantages include (as the term “independent expert consultant” suggests) offering a more objective evaluation and taking advantage of relevant, and possibly broad-based, program evaluation expertise. However, using an external evaluator also may result in a more efficient and effective evaluation process (helping to avert undue mission-distraction for the agency) and may better ensure timeliness in meeting sponsor-dictated deadlines for completion of the review process. An interesting aspect of the study required under Section 967 that may counterbalance some of these advantages is the separation of program evaluation sponsorship (which rests in Congress) from program evaluation funding (which was supplied under Section 967 by the SEC). Each of these aspects of program evaluation in the context of Section 967 is addressed in turn in

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98. Dodd–Frank Act, § 967(a)(1).

99. See WORTHEN ET AL., *supra* note 80, at 18 (“The adjectives *internal* and *external* distinguish between evaluations conducted by program employees and those conducted by outsiders.”).

100. See KAPP & ANDERSON, *supra* note 23, at 89–100.

101. See *id.*; WORTHEN ET AL., *supra* note 80, at 18–19.

the succeeding Subparts.

### *a. Independence*

“A private consulting organization provides an external review and reasonably objective viewpoint that can support the credibility of the process and findings.”<sup>102</sup> Dispassionate analysis is, as a general matter, the external evaluator’s stock in trade.<sup>103</sup> The independent nature of an external evaluator’s review also may provide fresh ideas based on the evaluator’s own experiences in other contexts (rather than relying on the ideas of internal constituents), which can have both benefits and drawbacks.<sup>104</sup>

Congressional concern about the efficacy and cost-effectiveness of SEC regulation and the actual and possible future effects of the SEC’s reform efforts make an independent review of both the SEC’s operations and its reform program desirable (if not necessary). Although Congress did not define what it meant in its requirement that the SEC hire an “independent” consultant, as an external evaluator, BCG has at least facial independence from the SEC. The BCG Report does note, however, that its knowledge and experience derives from work with other regulators and with entities overseen by the SEC.<sup>105</sup>

### *b. Expertise*

An agency may not have or be able to afford to retain staff with program evaluation expertise.<sup>106</sup> The SEC hires significant numbers of professionals versed in varied research areas. However, it is unclear whether any SEC personnel (with the one notable exception of the Office of the Inspector General, which serves as a somewhat

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102. *Id.* at 96; *see also* Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 14 (“If an evaluator is independent of the program, then stakeholders may be more likely to accept the findings as objective and valid. Therefore, this independence can enhance the credibility of both the evaluator and the ultimate evaluation results.”); Holden & Zimmerman, *Overview & Analysis*, *supra* note 32, at 145 (“External evaluators are assumed to be more impartial than internal evaluators; because they have no stake in the evaluation results, their findings are more likely to be accepted as objective and valid.”); Millery, *supra* note 22, at 69 (“[E]xternal evaluators can lend objectivity and credibility to the evaluation study”).

103. *See* WORTHEN ET AL., *supra* note 80, at 18 (“Seldom is there . . . much reason to question the objectivity of the external evaluator . . . and this dispassionate perspective is perhaps her greatest asset.”).

104. *But cf.* Holden & Zimmerman, *Overview & Analysis*, *supra* note 32, at 146 (noting that an external evaluator may, for example, need to put more effort into building relationships with stakeholders “in order to assure them that their input will be incorporated into the planning process.”).

105. *See* BCG Report, *supra* note 4, at 11.

106. *See* KAPP & ANDERSON, *supra* note 23, at 87–88.



independent, expert internal evaluator<sup>107</sup>) have relevant program evaluation expertise, even if it were otherwise advantageous for the SEC to conduct its own internal evaluation of its operations and reform program.<sup>108</sup> However, an agency can “gain the expertise needed to conduct a thorough evaluation . . . [by engaging] a consulting firm or private company that specializes in research.”<sup>109</sup> The text of Section 967 specifies the expertise that Congress required the external evaluator to have.

Specifically, under Section 967, the SEC was required to hire a firm with “expertise in organizational restructuring and the operations of capital markets,” not an expertise in program evaluation. According to the BCG Report, BCG was retained by the SEC based on BCG’s “knowledge and experience in securities markets, organizational design, people management, and technology—for both public and private sector clients.”<sup>110</sup> A review of BCG’s Web site indicates self-assessed competencies in those (and other relevant) areas, with the notable exception of securities markets.<sup>111</sup> BCG is a leading global business consulting group, and BCG was retained in 2003 to conduct a comparative study of the Russian securities market<sup>112</sup> (and more recently

107. See U.S. SEC. & EXCH. COMM’N, 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 95–97 (2011), available at <http://www.sec.gov/about/secpar/secpar2011.pdf> [hereinafter SEC 2011 ANNUAL REPORT] (describing the function and evaluation activities of the SEC Office of the Inspector General); see also WORTHEN ET AL., *supra* note 80, at 21 (noting the relatively independent internal evaluation function of the federal Offices of the Inspectors General); SEC 2011 Annual Report, *supra*, at 47 (noting that in 2011, the SEC Office of the Inspector General “conducted 14 audits and reviews . . . [covering] 17 of the 35 assessable units (49 percent).”).

108. The SEC has engaged in internal evaluations of its programs in the past, at least on a limited basis. See, e.g., SEC 2011 Annual Report, *supra* note 107, at 88, 99 (describing a pilot performance management system in the Division of Enforcement and general internal assessment efforts).

109. KAPP & ANDERSON, *supra* note 23, at 96.

110. BCG Report, *supra* note 4, at 11.

111. See, e.g., *Information Technology*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/capabilities/information\\_technology/default.aspx](http://www.bcg.com/expertise_impact/capabilities/information_technology/default.aspx) (last visited Apr. 7, 2013); *Program Management*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/capabilities/operations/program\\_management/default.aspx](http://www.bcg.com/expertise_impact/capabilities/operations/program_management/default.aspx) (last visited Apr. 7, 2013); *Public Sector*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/industries/public\\_sector/default.aspx](http://www.bcg.com/expertise_impact/industries/public_sector/default.aspx) (last visited Apr. 7, 2013). Although there is no indication on the Web site of expertise in “securities markets,” there is evidence of self-reported related knowledge and experience in corporate finance, financial institutions, and the private equity industry. See *Corporate Finance*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/capabilities/corporate\\_finance/default.aspx](http://www.bcg.com/expertise_impact/capabilities/corporate_finance/default.aspx) (last visited Apr. 7, 2013); *Financial Institutions*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/industries/financial\\_institutions/default.aspx](http://www.bcg.com/expertise_impact/industries/financial_institutions/default.aspx) (last visited Apr. 7, 2013); *Private Equity*, BOSTON CONSULTING GROUP, [http://www.bcg.com/expertise\\_impact/industries/private\\_equity/default.aspx](http://www.bcg.com/expertise_impact/industries/private_equity/default.aspx) (last visited Apr. 7, 2013); [http://www.bcg.com/expertise\\_impact/capabilities/corporate\\_finance/default.aspx](http://www.bcg.com/expertise_impact/capabilities/corporate_finance/default.aspx) (last visited Apr. 7, 2013).

112. *Boston Consulting Group to Study Russian Securities Market*, MONDOVISIONE (Sept. 16, 2003), <http://www.mondovisione.com/media-and-resources/news/boston-consulting-group-to-study->

by the Depository Trust & Clearing Corporation “to conduct a business case study for reducing the current T+3 settlement cycle for equities and certain debt securities in the United States”).<sup>113</sup> However, direct evidence of BCG’s expertise in capital markets or securities markets is not readily available.

Two concerns emerge from these observations about the congressional mandate under Section 967 that the SEC retain a consultant with specified required areas of expertise. First, in drafting Section 967, Congress did not address the need for a consultant with program evaluation expertise. Instead, Congress focused exclusively on substantive areas of expertise relating to the SEC’s operational mission. More well-considered legislative drafting (reflecting, among other things, the need for a consultant with expertise in program evaluation) would remedy this type of error in the future. Second, it is unclear whether the SEC complied in full with the congressional mandate to hire a consultant with expertise in capital markets, based on a review of BCG’s Web site and other publicly available information. The congressional requirements for substantive expertise in Section 967 are somewhat vague in this regard (as to what constitutes expertise in the operations of capital markets), and Section 967 includes no express institutionalized manner of vetting the qualifications of the consultant (although an informal system for checking qualifications may have been established, and Congress retained oversight ex post by requiring that it receive a copy of the report).

### *c. Efficacious Use of Agency Resources*

Congress, in drafting Section 967 to require the retention of an external evaluator, may also have wanted to keep SEC staff members engaged with the operation of the agency, given that the Dodd–Frank Act requires the SEC’s engagement with significant rule making and other regulatory pursuits. Although all program evaluations are distracting to agency operations (in that staff members must participate in the process, taking them away from their regular operating activities), an internal evaluator typically would be required to devote substantial time to designing and implementing a program evaluation and may have—or be perceived to have—a stake in certain evaluation outcomes

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russian-securities-market/.

113. Christopher Gohlke, *DTCC and Boston Consulting Group Explore US Settlement Switch*, THE TRADE (May 23, 2012), [http://www.thetradenews.com/News/Operations\\_\\_\\_Technology/Clearing\\_\\_\\_settlement/DTCC\\_and\\_Boston\\_Consulting\\_Group\\_explore\\_US\\_settlement\\_switch.aspx](http://www.thetradenews.com/News/Operations___Technology/Clearing___settlement/DTCC_and_Boston_Consulting_Group_explore_US_settlement_switch.aspx).

that impacts program operations.<sup>114</sup> Specifically, actual or perceived interest in the outcomes of the program evaluation may both compromise the evaluator's ability to conduct an independent review and create certain expectations for the evaluator and other stakeholders (including agency staff) that have the potential to disrupt the operations of the project under study and the agency more broadly.<sup>115</sup>

As a general matter, program evaluations can be highly political and threatening, and the context can make them more so.<sup>116</sup> Staff may not trust the results of an internal evaluator's assessment and may resist implementing reforms consistent with the study findings of an internal evaluator.<sup>117</sup> On the other hand, agency staff members are more knowledgeable about the program at the outset (or at least may be more knowledgeable) and often already have connections with the stakeholders whose participation is needed for an effective evaluation.<sup>118</sup> No doubt, given the significant regulatory burdens of the SEC in the wake of the Madoff affair, the financial crisis, and the additional regulatory burdens of the Dodd–Frank Act, Congress reasoned that an efficient process that disrupts agency activities as little as possible and results in effectual implementation was attractive.

#### *d. Compliance with Reporting Deadlines*

The retention of an external evaluator also “may gain the agency an evaluator with the ability to respond to a request in a timely manner and to meet the time frames and requirements associated with funding and agency decision making.”<sup>119</sup> Because Section 967 calls for the evaluation report to be issued within 150 days after retention of the evaluator, timing was an issue. Staff time was in short supply because of the SEC's significant engagement with rulemaking and enforcement activities, together with its participation in numerous congressionally mandated studies.<sup>120</sup>

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114. See KAPP & ANDERSON, *supra* note 23, at 88; see also ROYSE ET AL., *supra* note 25, at 381 (noting that one researcher warns internal evaluators “against confusing the interests of the organization with those of individual administrators with whom they identify personally”).

115. KAPP & ANDERSON, *supra* note 23, at 88; see also ROYSE ET AL., *supra* note 25, at 381.

116. See ROYSE ET AL., *supra* note 25, at 378–85; see also Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 12–13.

117. See Holden & Zimmerman, *Overview & Analysis*, *supra* note 32, at 145–46 (noting that program staff may “distrust the evaluation and become less than cooperative in planning and implementing it” when it is conducted by an internal evaluator).

118. See KAPP & ANDERSON, *supra* note 23, at 86–87; see also Millery, *supra* note 22, at 69.

119. KAPP & ANDERSON, *supra* note 23, at 96.

120. See *supra* text accompanying notes 17–19.

*e. Serving Two Masters?*

Finally, it is significant to note that the program evaluation sponsor is requesting, but not directly paying for, the study. The U.S. Congress has defined the basic contents of the SEC's program evaluation,<sup>121</sup> but Section 967 calls for the SEC to hire the evaluator.<sup>122</sup> So, while Congress is the sponsor of the evaluation, the SEC is the funder. Both staffing and funding arrangements can impact the nature and conduct of a program evaluation process.<sup>123</sup>

Program evaluators, like other service professionals, exist to provide valuable services to clients.<sup>124</sup> They owe ethical responsibilities to these clients.<sup>125</sup> Accordingly, the program evaluator must determine who the client is.<sup>126</sup>

As an evaluation sponsor, Congress requested the study, scripted out its basic contents, and, along with the SEC, designated itself as a recipient of the resulting report.<sup>127</sup> Congress holds the SEC accountable through ongoing reporting.<sup>128</sup> BCG serves the needs of Congress as the sponsor of the evaluation; Congress appears to be the client in this engagement. Yet, the SEC is in some senses also a client to whom some ethical responsibilities are owed—not merely because it funds the study, but also because the study serves the agency's needs.<sup>129</sup>

The manner in which Section 967 is drafted and the nature of the evaluation sponsor, agency, and evaluation process create potential challenges for BCG as the external evaluator. The SEC and BCG were required to work together to carry out the study required by Section 967, independent of Congress, despite Congress's role as the evaluation sponsor.<sup>130</sup> Congress and the SEC may have different agendas, and they may play out in a political way in the evaluation process. “[P]rogram evaluation is almost always conducted in a political arena. A finding

121. See *supra* Part II(A).

122. See *supra* text accompanying note 98.

123. See WORTHEN ET AL., *supra* note 80, at 19; see also Millery, *supra* note 22, at 68–69.

124. See generally KAPP & ANDERSON, *supra* note 23, at 41 (“The primary responsibility of professionals is to conduct their work in such a manner as to promote the well-being of clients.”).

125. See *id.* (“There is an ethical imperative to provide interventions/programs/services that promote the well-being of clients; thus, determining if and to what extent such help is taking place is an ethical imperative . . .”).

126. See *id.* at 42 (identifying this question).

127. Dodd–Frank Act, § 967(a)–(b).

128. *Id.* § 967(c).

129. See KAPP & ANDERSON, *supra* note 23, at 57 (“Evaluators have the ethical responsibility to conduct themselves in a manner that is directed by the best interests of the project.”).

130. See Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 13–14 (discussing different types of relationships between evaluators and sponsors and describing the roles played by each).

that pleases one group may make another group unhappy . . . . [P]olitical pressures will vary in strength, depending on what is at stake.”<sup>131</sup> With a distant sponsor and a close working relationship between the evaluator and the agency, communications regarding the evaluation questions, process design and implementation, methodologies, and results may not adequately take into account the congressional viewpoint—to the extent that a bicameral legislature can identify and articulate a single viewpoint. This makes for awkward and potentially inefficient communications as the study is designed and implemented. Also, biases may be introduced through sponsorships and funding arrangements that may compromise independence and impartiality.<sup>132</sup> “The wise evaluator will be sensitive to any factors (political or otherwise) that can affect his or her judgment.”<sup>133</sup> Accordingly, in its work for the SEC initiated at Congress’s behest, BCG was put in a tough position—one in which it likely had to guard against being predisposed to adopt or favor SEC attitudes or viewpoints because of its role, and the roles of Congress and the SEC, in the program evaluation process under Section 967.<sup>134</sup>

## 2. The Design and Implementation of the Program Evaluation

There is no single way to conduct a program evaluation in a particular context. It would be presumptive to offer a substantive critique of BCG’s process in conducting the program evaluation required under Section 967 without the benefit of an in-depth expert analysis. However, it is possible for a non-expert to use norms reflected in program evaluation literature to identify areas of potential concern relating to the program evaluation process designed and implemented by BCG to comply with the requirements of Section 967. A separate critique of the BCG Report is important (if not essential) in an assessment of the program evaluation mandated under Section 967. The report is an integral part of the process and observations about it, like observations about other parts of the program evaluation process under

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131. ROYSE ET AL., *supra* note 25, at 382.

132. See Millery, *supra* note 22, at 69 (“The evaluator should be aware of the potential biases introduced by the various evaluator-sponsors, and evaluation funding arrangements and should clarify roles and relationships early in the planning process.”).

133. ROYSE ET AL., *supra* note 25, at 382.

134. Congressional and SEC attitudes or viewpoints may be transparent and public. See, e.g., *supra* text accompanying note 12 (observing the SEC’s desire for reform and overall conservatism); Jessica Holzer & Andrew Ackerman, *SEC Addressing Gaps in Analysis*, WALL ST. J. (Apr. 17, 2012), available at <http://online.wsj.com/article/SB10001424052702304818404577348101006567024.html> (noting congressional frustration with the SEC’s incomplete economic analyses of rulemaking and missed regulatory deadlines). However, some attitudes and viewpoints may be harder to identify and guard against.

Section 967, may identify both weaknesses in the Section 967 program evaluation and a better way forward in future assessments of agency reform efforts.

In Section 967, Congress delineates five principal areas of study: “the internal operations” of the SEC;<sup>135</sup> the “structure” of the SEC;<sup>136</sup> the “funding” of the SEC;<sup>137</sup> “the need for comprehensive reform of the SEC;”<sup>138</sup> and “the SEC’s relationship with and the reliance on self-regulatory organizations and other entities relevant to the regulation of securities and the protection of securities investors that are under the SEC’s oversight.”<sup>139</sup> Congress then sets forth seven items that must be included in the study.<sup>140</sup> The BCG Report summarizes these mandates (indicating its awareness of them), notes that the SEC specifies four broad areas for study “consistent with Dodd–Frank,” and cites to the SEC’s “Statement of Work Form” as support for conducting its study in these four broad areas.<sup>141</sup> The four areas for study include “Organization structure,”<sup>142</sup> “Personnel and resources,”<sup>143</sup> “Technology and resources,”<sup>144</sup> and “Relationship with SROs.”<sup>145</sup> The BCG Report identifies BCG’s focus in each area of study.<sup>146</sup> The four areas of study appear to be appropriately cast to meet the congressional mandates in Section 967. However, because Section 967 includes more detail than these summaries, there is a possibility that the changes made by the SEC and BCG misinterpret Congress’s intent and inadvertently exclude certain matters from study.

BCG also notes certain limitations to the scope of its study:

To carry out its mission, the SEC requires both a regulatory framework with clear authorizations, as well as a robust set of internal capabilities to fulfill this mandate. This study focuses on the latter. An analysis of the legal framework, regulatory philosophy, or performance of the SEC against its mission is beyond the scope of this study.<sup>147</sup>

These limitations seem appropriate under the circumstances (avoiding the need for an analysis of the SEC’s legal mandate and authority) and,

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135. Dodd–Frank Act, § 967(a)(1).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* text accompanying note 76.

141. *See* BCG Report, *supra* note 4, at 11.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 12.

147. *Id.*

as a result, neatly dodge some of the more significant political issues that led to the enactment of Section 967.

After establishing these preliminary matters, the BCG Report then offers details on its program evaluation design and implementation. BCG's study of the SEC had four sequenced steps (modules). First, BCG assessed the "implications of external forces,"<sup>148</sup> reviewing information about market-based changes and challenges impacting the SEC. Next, BCG engaged each of the established four areas of study by learning about the current state and perceived future needs of the SEC, conducting a gap analysis between the SEC's current state and three separate metrics ("best practices," "external benchmarks," and "new requirements"), and developing related recommendations.<sup>149</sup> Then, after combining and assimilating the recommendations from the four areas of study, BCG finalized its written report.<sup>150</sup>

Reflecting back on the general steps in the prototypical program evaluation process described in Part I,<sup>151</sup> BCG appears to be engaging in practices that are closely aligned with standard program evaluation methods. By assessing the implications of external forces and undertaking to understand the current state and perceived future needs of the SEC, BCG conceptualized and operationalized the four areas of study and the evaluation questions within them.<sup>152</sup> Its activities in this regard closely follow the basic steps of a standard program evaluation process—assessing context, gathering reconnaissance, engaging stakeholders, describing the program, and focusing the evaluation.<sup>153</sup> BCG's reported activities also supported its choices of methodologies, sample selection, and data collection, management, and analysis, all of which are consonant with recognized stages in a program evaluation process.<sup>154</sup>

The "methodologies and tools" used by BCG reflect attentiveness to program evaluation processes described in the literature. Methods and instruments used in program evaluation are chosen to address information needs that correspond and respond to the evaluation

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148. *Id.* at 13.

149. *Id.*

150. *See id.* at 14.

151. *See supra* text accompanying notes 30–32.

152. *See* ROSSI ET AL., *supra* note 24, at 16 ("[E]valuators will typically employ social research procedures for gathering, analyzing, and interpreting evidence about the performance of a program.").

153. *See* PRACTICAL GUIDE, *supra* note 22, at 2 (setting forth the five steps in the Evaluation Planning Incorporating Context (EPIC) model: "(1) assess context, (2) gather reconnaissance, (3) engage stakeholders, (4) describe the program, and (5) focus the evaluation."); *see also* Holden & Zimmerman, *Overview and Analysis*, *supra* note 32, at 145–51 (summarizing and commenting on the five steps in the EPIC model). *See supra* note 32.

154. *See supra* text accompanying note 30.

questions and the type and level of evaluation in the context of the program being evaluated. “[A]gency factors influence the choice and implementation of various methodologies.”<sup>155</sup> The evaluator must determine the basic information needed to effectively answer each evaluation question and must identify whether and, if so, how that information may be obtained.<sup>156</sup>

Evaluators must often innovate and improvise as they attempt to find ways to gather credible, defensible evidence . . . . The circumstances surrounding specific programs, and the particular issues the evaluator is called on to address, frequently compel evaluators to compromise and adapt textbook methodological standards. The challenges to the evaluator are to match the research procedures to the evaluation questions and circumstances as well as possible and, whatever procedures are used, to apply them at the highest possible standard feasible to those questions and circumstances.<sup>157</sup>

To make this connection between evaluation questions and evaluation methodologies, an evaluator may begin by interviewing important stakeholders to assemble a composite picture of each program being studied.<sup>158</sup> “These interviews are typically informal and unstructured and usually include a series of basic questions that encourage stakeholders to tell the evaluator about the more significant aspects of the program from their point of view.”<sup>159</sup>

After meeting with key stakeholders, the evaluator thoroughly reviews program documentation and other literature related to the program and its proposed outcomes. At the same time, the evaluator may interview key staff and program stakeholders to understand the history and evolution of the program, develop logic models or conceptual frameworks to visually depict how the program is thought to function, and create tools that begin to specify the potential issues of interest for the evaluation.<sup>160</sup>

This picture of the program enables the evaluation by setting baseline descriptions of the operation of the program (sometimes collected in the form of a program logic model summarizing the program’s resources, activities, processes, and outcomes<sup>161</sup>), connecting (as and if applicable)

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155. KAPP & ANDERSON, *supra* note 23, at 34.

156. See Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 27 (“The evaluator needs to assess each question to determine if data sources for answering it are available or if the available resources allow for collection of those data sources.”).

157. ROSSI ET AL., *supra* note 24, at 17.

158. KAPP & ANDERSON, *supra* note 23, at 133–34 (“At the beginning of an evaluation project, it is fairly standard to ask a variety of stakeholders, people with an interest in the program . . . about the program.”).

159. *Id.* at 134.

160. Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 20–21.

161. See KAPP & ANDERSON, *supra* note 23, at 136–50 (describing and illustrating how differing



the program to its greater public context,<sup>162</sup> and helping the agency and evaluator identify the information that is needed to answer the evaluation questions and potential sources of that information.<sup>163</sup> This program description creates a foundation for the study.

The process that BCG undertook to learn about the operations and requirements of the SEC and the related gap analyses<sup>164</sup> both launched and comprised part of BCG's assessment of the SEC. This process consisted of document review and analysis and interviews and discussions with various stakeholders.<sup>165</sup> Based on the information BCG obtained from these activities, BCG employed various methodologies and assessment tools to conduct necessary and desirable analyses of the acquired data.<sup>166</sup>

BCG's design and implementation of the SEC study under Section 967 appear to be both identifiable as program evaluation and consistent with the rigor expected of good program evaluation. The design of the study is directed at the matters called out by Congress for analysis, and the planning and conduct of the study follow recognizable program evaluation patterns. However, a more substantive analysis of BCG's study design and implementation is advisable given the required diversion of resources by the SEC as the subject and object of the process. A valid program evaluation process should generate valid results that can be used to improve the structure and operations of the SEC.<sup>167</sup> A faulty program evaluation process may be manifested through a suboptimal evaluation design and report and may result in an inefficient use of agency resources.

### 3. The BCG Report

Program evaluation processes culminate with the issuance of reports. "Once the evaluation has been completed, the information needs to be shared in a manner that will most likely complement its eventual use."<sup>168</sup>

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viewpoints about a program can be fashioned into a program logic model and used to assess the program).

162. See Holden & Zimmerman, *Evaluation Planning*, *supra* note 80, at 21–22 (describing how the information in a program logic model may be "collated, collected and integrated to form a conceptual model of the intended processes of the program.").

163. See KAPP & ANDERSON, *supra* note 23, at 150–54 (describing and illustrating how a program logic model can help identify information needs and potential and actual information sources).

164. See *supra* text accompanying note 149.

165. See BCG Report, *supra* note 4, at 14.

166. See *id.* at 14–18. The analyses are described in detail in the Appendix included as chapter 7 of the BCG Report. See *id.* at 155–260.

167. See generally KAPP & ANDERSON, *supra* note 23, at 29 ("[T]he purpose of a program evaluation is the generation of quality information for the improvement of services.").

168. *Id.* at 325.

These reports have somewhat standardized components: an introduction (which may include or consist of an executive summary of the report); a literature review; a description of the study methodologies, findings, and recommendations; and relevant appendices.<sup>169</sup> The structure of the BCG Report conforms to this normative description. It comprises seven chapters: an executive summary; chapters on the scope of and approach to the study, the context of the study, BCG's assessment of each area of study, the strategic direction of the SEC, and recommended initiatives; and an appendix including details and a glossary.<sup>170</sup>

To be most effective, the process of producing the evaluation report should engage key stakeholders:

End users of information can be great resources in the overall report production process. Reports are often produced in stages, a format that provides an opportunity for feedback and discussion of findings before a final report is disseminated. Evaluators develop and give users a draft of the evaluation report for feedback. The reviews of the draft report usually generate valuable discussion about the findings and possible use, as well as the actual written product.<sup>171</sup>

The BCG Report indicates that a draft version of the report was produced during the third module of the study and finalized in the fourth module.<sup>172</sup> Although the BCG Report does not indicate that feedback was solicited from key personnel at the SEC (or Congress) before the report was finalized, BCG's work may also have conformed to this standard practice. Congress can evaluate this aspect of the study process, if it desires to do so, through the mandated system of post-evaluation reporting it established in Section 967.

### *C. Post-Evaluation Implementation and Periodic Reports*

Section 967 institutes a post-evaluation reporting system designed to allow Congress to remain informed about the SEC's implementation of BCG's recommendations.<sup>173</sup> Section 967 calls for the SEC to report to Congress every six months during the two-year period after the release of the BCG Report.<sup>174</sup> This reporting schedule presumably is designed to ensure that the evaluation process and report are appropriately utilized, a common concern in program evaluation processes.<sup>175</sup>

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169. *Id.* at 333–34; ROYSE ET AL., *supra* note 25, at 395–404.

170. *See* BCG Report, *supra* note 4, at 3–4 (the table of contents of the report).

171. KAPP & ANDERSON, *supra* note 23, at 332.

172. BCG REPORT, *supra* note 4, at 14.

173. Dodd–Frank Act, § 967(c).

174. *Id.*

175. *See* ROYSE ET AL., *supra* note 25, at 410 (“One of the most disappointing things that can

Imagine that the evaluators have brought a full bucket of water to the project leader on a scorching hot day. Someone has to reflect on how the water will be used and then take action to pour it into glasses, drink it, use it to water the plants, or bathe with it, otherwise it will just sit there and evaporate until it is no longer useful to anyone.<sup>176</sup>

The post-evaluation process described in Section 967 is part of a “feedback loop” that ties the agency’s “internal learning” to “external sharing” with stakeholders.<sup>177</sup> By inserting this feedback loop in Section 967, Congress (whether unwittingly or purposefully) broadly invoked the spirit, even if not the letter, of utilization-focused evaluation by explicitly investing the SEC in the evaluation process.<sup>178</sup>

In any evaluation there are many potential stakeholders and an array of possible uses. Utilization-focused evaluation requires moving from the general and abstract, i.e., possible audiences and potential uses, to the real and specific, i.e., actual primary intended users and their explicit commitments to concrete, specific uses. The evaluator facilitates judgment and decision making by intended users rather than acting as a distant, independent judge. Since no evaluation can be value-free, utilization-focused evaluation answers the question of whose values will frame the evaluation by working with clearly identified, primary intended users who have responsibility to apply evaluation findings and implement recommendations.<sup>179</sup>

The inclusion of this aspect of program evaluation in Section 967 has apparent benefits in, among other things, fostering transparency in a way that better assures the accountability of the SEC and Congress to the public and better ensures the ongoing use of BCG’s findings and recommendations, enhancing prospects for SEC reform in accordance with those findings and recommendations.<sup>180</sup> Although it may be that BCG in fact employed a utilization-focused evaluation process, more conscious and explicit focus by Congress in Section 967 on the utilization of the SEC study would have better ensured that a utilization-

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happen to an evaluator is that the evaluation report . . . is placed on a bookshelf or filed away to be seldom noticed or referred to again.”); see also Michael Quinn Patton, *Utilization-Focused Evaluation*, in EVALUATION MODELS: VIEWPOINTS ON EDUCATIONAL AND HUMAN SERVICES EVALUATION 425 (D.L. Stufflebeam et al. eds., 2d ed. 2000).

176. CHEYANNE CHURCH & MARK M. ROGERS, DESIGNING FOR RESULTS: INTEGRATING MONITORING AND EVALUATION IN CONFLICT TRANSFORMATION PROGRAMS 179 (2006), available at [http://www.sfcg.org/programmes/ilt/ilt\\_manualpage.html](http://www.sfcg.org/programmes/ilt/ilt_manualpage.html).

177. *Id.*

178. See Patton, *supra* note 175, at 427–29 (describing the “personal factor” in utilization-focused evaluations).

179. *Id.* at 425–26.

180. See generally CHURCH & ROGERS, *supra* note 176, at 179 (“Sharing the evaluation results and the subsequent reflections and adaptations to the project externally increases transparency between the organization and its stakeholders and donors.”).

focused process was employed and the attendant potential benefits were most fully realized.

Even absent a utilization-focused evaluation, however, there are acknowledged steps that can be taken in the context of Section 967 to make optimal use of BCG's observations and employ BCG's recommendations. One program evaluation resource, for example, suggests the use of a four-step process, emanating from learning theory, to utilize the output of a program evaluation—a process that commences during the evaluation process and extends through the issuance of the evaluation report and into the implementation phase.

First, the project team goes through the experience of the evaluation—preparation, evaluation plan, process, debrief and review of the final report. The team then reflects on the conclusions and recommendations, and generalizes the information beyond the immediate project. From there the focus shifts to how this newly acquired knowledge should be applied to the project or beyond. Finally, the team considers what needs to be shared with other teams, with the broader organization, and with the field as a whole.<sup>181</sup>

A process like this could work well with the ongoing reporting responsibilities of the SEC under Section 967. In fact, as the SEC stated in its first Section 967 report to Congress, the SEC did reflect on the observations and suggestions made by BCG in the BCG Report, generalize that information, and design an implementation plan that engages multiple stakeholders.<sup>182</sup> “Efforts have focused on putting the right people, infrastructure and processes into place to support an effort that has the potential to re-shape how the SEC executes its mission through redefined processes, roles and responsibilities, and enhanced engagement with internal and external stakeholders.”<sup>183</sup> As part of this planning process, the resulting SEC reform project was institutionalized and named—the Mission Advancement Program, or MAP.<sup>184</sup>

In order for the agency to adopt and “own” the implementation of agreed-upon BCG recommendations, a program name (moving away from “BCG Study” or “BCG Recommendations”) was developed to give an identity to the initiative as well as set the stage for the multi-year program. With the adoption of an identity and vision, the program was formally designated the “Mission Advancement Program” (MAP). MAP acknowledges where the agency is today and how it will continue to move forward in support of its mission. The vision of MAP is “to

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181. *Id.* at 180.

182. *See* September 2011 SEC Report, *supra* note 10, at 3–4, 8–25 (summarizing and detailing the establishment of infrastructure, processes, and workflows to implement the BCG Report).

183. *Id.* at 8.

184. *Id.* at 10.

effectively align [the agency's] resources against the SEC's most critical responsibilities and enable the SEC to continue to evolve as a premier regulator that is agile and equipped to evolve in pace with the securities market."<sup>185</sup>

The SEC's second Section 967 report to Congress describes overall progress made in executing the four agendas represented in the MAP,<sup>186</sup> noting improvements to SEC operations in three areas: infrastructure reorganization, efficiency and effectiveness process review, and the identification of cost-saving opportunities.<sup>187</sup>

However, the second Section 967 report also cautions that "[h]aving completed the initial stages of review and analysis, it is anticipated that the level of activity related to MAP projects will be reduced in FY 2012."<sup>188</sup> The report identifies the reasons for this abatement.<sup>189</sup>

Staff and management time to devote to this initiative will continue to be in short supply, and future phases of implementation are likely to require levels of funding that must be directed at other agency priorities at this time. For this reason, future activity will be focused on a limited number of projects from among those initiatives described below based on an assessment of their relative potential for operational impact or cost savings. In the coming months, the working groups will continue to assess the changes suggested by BCG to refine and identify those that would provide the most benefit to the SEC and the public.<sup>190</sup>

Later in the report, the SEC explains these challenges in greater detail and notes a third, related challenge: limits on the SEC's ability to effectively absorb and manage change.<sup>191</sup> The report concludes:

The last six months have seen notable progress as agency staff have worked to solve problems and initiate tangible improvements in people, process and technology domains. However, the agency faces an extraordinary workload and resource demands in the coming months and will necessarily be selective in pursuing further only those initiatives that will result in measureable efficiency and effectiveness gains or cost savings.<sup>192</sup>

This conclusion and the challenges it reflects represent a somewhat sobering reality in the program evaluation process required and fostered

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185. *Id.*

186. *See* March 2012 SEC Report, *supra* note 10, at 7–59.

187. *Id.* at 4–5.

188. *Id.* at 5.

189. *Id.*

190. *Id.*

191. *Id.* at 60–62 (describing challenges involving financial and human resources and change absorption).

192. *Id.* at 62.

under Section 967. The SEC has a larger and more complex mission to fulfill as it continues the process of reforming itself. The second Section 967 report indicates that, failing the introduction of new resources, the SEC may be forced to make difficult decisions between meeting its regulatory mandate and pursuing its reform efforts.

The third SEC report under Section 967 was issued in October 2012. It indicates a continued concern about balancing the SEC's regulatory and reform tasks, although it paints a rosier picture of these concerns and boasts significant progress in implementing the BCG Report recommendations.<sup>193</sup> Specifically, the report notes (among other things) that, "in order to balance the MAP activities with additional work dictated by the Dodd-Frank Act, and the agency's many other ongoing obligations, the SEC has prioritized its efforts toward implementing those initiatives yielding the greatest potential for more immediate operational impact activities."<sup>194</sup> According to the report, "the activities are now being executed primarily by SEC staff, with program management support as required, resulting in a reduction in related agency expenditures by more than 90%."

But a different possible story is told by Representative Darrell Issa, Chairman of the Committee on Oversight and Government Reform of the U.S. House of Representatives, in a January 3, 2013 letter to Chairman Walter.<sup>195</sup> The letter questions the level of spending on outside consultants in connection with the MAP and the necessity of retaining those consultants.<sup>196</sup> Although hearings had not been held or scheduled to sort through the details on this matter at the time work on this Article was completed (mid-April 2013), the combined information in the third SEC report under Section 967 and the January letter from Representative Issa may suggest that former Chairman Schapiro, finding insufficient human resources within the SEC to execute on both agency rulemaking projects under Dodd-Frank and agency reform initiatives occasioned by the SEC Report, made the decision to retain extra human resources in the form of outside project management consultants. Even

193. October 2012 SEC Report, *supra* note 10, at 44–45.

194. *Id.* at 45.

195. Letter from Darrell E. Issa, Chairman, Comm. on Oversight & Gov't Reform, U.S. House of Representatives, to Elisse Walter, Chairman, U.S. Sec & Exch. Comm'n (Jan. 3, 2013), at 2–3, <http://www.davispolk.com/files/uploads/FIG/Rep.Issa.Letter.to.SEC.010313.pdf> (raising concerns about the cost of the "program management" services provided by outside consultants at Booz Allen Hamilton, Inc. in connection with the MAP); *see also Sarah N. Lynch, U.S. House Panel Probes SEC Spending on Consultants*, REUTERS (Jan 4, 2013), <http://www.reuters.com/article/2013/01/04/us-sec-consultants-idUSBRE9030V320130104>.

196. Sarah N. Lynch, *As Booz Allen Consults SEC Critics Question Cost*, REUTERS (March 1, 2012), [http://www.huffingtonpost.com/2012/02/29/booz-allen-sec\\_n\\_1311905.html](http://www.huffingtonpost.com/2012/02/29/booz-allen-sec_n_1311905.html) (stating that the retention of the consultants "was essential because the SEC simply did not have the manpower or experts on hand to conduct the follow-up work").

in the face of an ostensibly well-grounded rationale of this kind, however, the ongoing management and oversight of the consultants' activities and cost would be at issue. Of course, a thinly staffed SEC also might make this type of management and oversight impossible . . . .

At the time work on this Article was completed, the final report of the SEC under Section 967 had not yet been issued. Perhaps this final report will shed further light on the question of resource allocations made in connection with Section 967 compliance. Perhaps it will not. In any event, the financial and human resources expended in implementing a reform plan through a mandated reporting system may be significant.

### III. CONCLUSION

I started my research on this Article wondering whether Section 967 represented a positive development in the SEC's ongoing efforts at reform. I knew from my prior work that the SEC had a desire for reform and had made progress in instituting its own program of reform in the absence of a congressional pronouncement.<sup>197</sup> In the early days after the adoption of the Dodd–Frank Act, I identified certain potential positive effects of Section 967 on the SEC's reform efforts based on elements of change leadership literature.<sup>198</sup> I questioned, however, whether the SEC's conservatism,<sup>199</sup>—together with (potentially) the under-resourced environment in which the SEC currently operates,<sup>200</sup> the nature and extent of Congress's engagement with the reform effort through Section 967,<sup>201</sup> and the sheer weight of the number of studies and reports that involve the SEC as provided under the Dodd–Frank Act, the JOBS Act, and the STOCK Act (not to mention the weight of rule-making and enforcement obligations under these laws and otherwise)<sup>202</sup>—might negatively impact the SEC's change momentum. After fumbling for an assessment rubric that might help me to assess the efficacy of Section 967, I turned to the literature on program evaluation, which seemed to most closely describe the context in which Section 967 was intended to operate. To ensure that I was headed down the right path, I consulted public administration literature to confirm that program evaluation operated in that context as well as in the private sector.

Perhaps unsurprisingly, when viewed through the lens of program

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197. See *supra* text accompanying notes 6–9.

198. See *supra* text accompanying notes 10–11.

199. See *supra* text accompanying note 12.

200. See *supra* text accompanying note 14.

201. See *supra* text accompanying notes 15–16.

202. See *supra* text accompanying notes 17–19.

evaluation, Section 967 gets mixed reviews. On the one hand, Section 967 successfully engages the basic elements of program evaluation, and BCG executed on those basic elements in a manner that comports with descriptions of valid program evaluation in the relevant literature. On the other hand, BCG's work may or may not be of high quality (there is no plan for or apparent expertise in a substantive evaluation of BCG's work), and the specifics of Section 967 raise some interesting, and potentially important, issues from a program evaluation standpoint. Part II of this Article covers these points in detail.

For instance, Congress could have been more precise in framing its evaluation questions—the matters to be studied—to clarify the purpose of the evaluation mandated under Section 967 and the outcomes of interest to it. This is especially important given the relatively distant nature of Congress as a program evaluation sponsor and the SEC's multiple roles as funder, subject, and object of the program evaluation. Additional specificity and related congressional guidance on the evaluation questions would have established a more robust foundation for the type and level of evaluation to be conducted and the information needs to be met by the evaluation process. Further, more precise evaluation questions may have bolstered BCG's independence in conducting the evaluation.

Also, while the specification of an external evaluator has salient advantages in the context of the program evaluation required under Section 967, the directive on the retention of an appropriate consultant in Section 967 could have specified the need to hire a consultant with program evaluation expertise and could have better described what constitutes “expertise . . . in the operation of capital markets.”<sup>203</sup> Although there may have been no detriment suffered in this case as a result of these deficiencies, they may contribute to the retention of the wrong type of evaluator.

Finally, the program evaluation process mandated under Section 967 could have been expressly designed to more comprehensively bring into play a utilization-focused program evaluation process, working in more explicit, pervasive feedback loops between BCG and the SEC to better ensure short-term and long-term use of BCG's observations and recommendations. Although the post-evaluation reporting system ensures that the SEC will address with Congress its use of these outputs for a period of two years, the reform process is likely to extend beyond that period. The tone of the second Section 967 report is decidedly cautious and evidences a conservative approach to implementing

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203. Dodd–Frank Act, § 967(a)(1).



reforms on an ongoing basis.<sup>204</sup> Having said that, however, the SEC's first three Section 967 reports indicate that it is committed to continue the process of reform subject to its ability to do so given the SEC's capacity to absorb and manage change and competing needs for the SEC's human and money capital. These efforts, however, come at a cost, and that cost includes the allocation of internal or external human capital to ongoing reporting and implementation mandates. Whether the SEC's desire for positive change survives and its reform program thrives to bring the SEC to new regulatory heights—in light of its conservatism, underfunding, need to continue to comply with the reporting mandates of Section 967, and accumulated study fatigue—remains to be seen. Moreover, the overall costs and benefits of the reform efforts mandated under Section 967 have not yet been assessed, and it is unclear whether plans for that type of comprehensive assessment exist.

In sum, while program evaluation literature provides a touchstone for making observations about whether Section 967 is an effectual piece of legislation, the non-expert observations that can be made on the basis of that literature are necessarily limited. This Article does not permit a conclusion, for example, as to whether the reform efforts undertaken in response to the BCG Report result in short-term or long-term benefits to investors, issuers, or others served by the SEC's programmatic mission or as to whether the aggregate benefits of Section 967 exceed its total costs.

Yet, the literature on program evaluation underscores its potential importance as a tool of responsible, effective administration and oversight of government programs.

[T]he role of evaluation is to provide answers to questions about a program that will be useful and will actually be used. This point is fundamental to evaluation—its purpose is to inform action. An evaluation, therefore, primarily addresses the audience (or, more accurately, audiences) with the potential to make decisions and take action on the basis of the evaluation results. The evaluation findings may assist such persons to make go/no-go decisions about specific program modifications or, perhaps, about initiation or continuation of entire programs. They may bear on political, practical, and resource considerations or make an impression on the views of individuals with influence. They may have direct effects on judgments of a program's value as part of an oversight process that holds the program accountable for results. Or they may have indirect effects in shaping the way program issues are framed and the nature of the debate about them.<sup>205</sup>

Accordingly, program evaluation should be used more consciously and

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204. *See, e.g.*, text accompanying note 180.

205. ROSSI ET AL., *supra* note 24, at 20.

on an informed, consistent basis—not just for the purpose of gauging SEC reform, but also for the overall assessment of government programs, including federal agency operations and reform efforts.

The conscious, informed, and consistent use of program evaluation will require, however, a sharpened focus on important unresolved questions underlying federal agencies and their activities—questions about the nature of efficient and efficacious agency operations and regulation. These questions have economic, political, and social roots and implications too complex to digest here. But without attention to these important questions, congressionally sponsored program evaluation is an unanchored ship adrift in the vast sea of our federal government.<sup>206</sup>

In an imaginary, idealized world free of transaction costs, agency costs, political biases, and cognitive biases, a thoughtful, engaged program evaluation process would support and strengthen agency initiatives like the SEC's pre-existing reform program to the betterment of the overall regulatory scheme and for the benefit of its protected individuals and groups. Because our world is not free from these costs and biases, however, Congress should ensure, before it mandates expenditures for an agency program evaluation, that it participates in the sponsorship of that program evaluation in an aware, advised manner, sensitive to the potential intricacies, benefits, and perils of that evaluation process. Congress can develop (through internal talent or by retaining outside experts) structures and protocols for the conduct of federal agency program evaluations and appropriate rubrics and tools (including detailed, context-driven checklists of the components of a quality program evaluation) to assess the efficacy of those program evaluations in different contexts.<sup>207</sup> This Article expresses support for the thoughtful development of those structures, protocols, rubrics, and tools as a means of better ensuring the optimal use of program evaluations in public administration at the federal level.

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206. Cf. RUEGG & FELLER, *supra* note 43, at 1 (noting that the institutionalization of program evaluation in the U.S federal government “is not synonymous with acceptance, quality, credibility, or impact.”).

207. The GAO's GAGAS for use in performance audits may provide some guidance in this regard. See *supra* note 44.

