

April 2004

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Published by RR Donnelley

Editorial Content by Glasser LegalWorks

Blake Bell, Editor in Chief

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SEC I: SEC Releases Final Rule on Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date

U.S. Securities and Exchange Commission, [Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date](#), Release Nos. 33-8400, 34-49424 (Mar. 16, 2004).

U.S. Securities and Exchange Commission, [SEC Votes to Adopt Additional 8-K Requirements and to Propose Amendments to Form 20-F and Fund Manager Disclosure Requirements](#) (Mar. 11, 2004).

On March 11, the Securities and Exchange Commission approved final rules in a

release entitled "Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date". The text of the final rules was released on March 16. The SEC has expanded the number of events that must be reported on Form 8-K under the Exchange Act. According to the SEC:

These amendments add eight new items to the form, transfer two items from the periodic reports and expand disclosures under two existing Form 8-K items. Due to the increase in reportable events under the form, we are reorganizing the Form 8-K items into topical categories. The amendments also shorten the Form 8-K filing deadline for most items to four business days after the occurrence of an event triggering the disclosure requirements of the form. Finally, we are adopting a limited safe harbor from liability for failure to file certain of the required Form 8-K reports. These amendments are responsive to the "real time issuer disclosure" mandate in Section 409 of the Sarbanes-Oxley Act of 2002. They are intended to provide investors with better and faster disclosure of important corporate events.

In addition to events previously required to be disclosed, the amended rules now require 8-K disclosure of: (1) the execution, amendment or termination other than in accordance with its express terms) of a material "definitive" agreement (i.e., an agreement that is not considered a "non-binding" one) not made in the ordinary course of business; (2) the development of a material direct financial obligation or some material obligation under an off-balance sheet arrangement or the occurrence of any triggering events that accelerate or increase the likelihood of such development; (3) notices from exchanges or NASDAQ that securities do not satisfy listing standards or that the securities have been delisted; (4) determination by the board (or by officers of company in certain circumstances) committing company to an exit plan or a disposal plan that will require material charges under GAAP to be incurred; (5) determination by the board (or by

officers of company in certain circumstances) to take a material impairment charge under GAAP; (6) determination by the board (or by officers of company in the certain circumstances) that investors should not rely on previously-issued financial statements, related audit reports or completed interim reviews by outside accountants; (7) unregistered sales of equity securities as well as material modifications to rights of equity holders; and (8) certain miscellaneous items including departures and elections of directors or principal officers and changes to the company's certificate of incorporation or bylaws not disclosed in a proxy.

The effective date for the new rules is August 23, 2004.

RealCorporateLawyer.com is pleased to make available to its readers a number of excellent memoranda prepared by leading law firms providing analyses of the final SEC rules regarding Form 8-K disclosure requirements:

White & Case LLP, [Final SEC Rules Regarding Form 8-K Disclosure Requirements and Deadlines](#) (Mar. 23, 2004).

Sullivan & Worcester, [Client Advisory: SEC Approves Rules Requiring New and Faster Disclosure](#) (Mar. 29, 2004).

Buchanan Ingersoll PC, [Securities / SEC Alert: New Form 8-K Amendments Adopted](#) (Mar. 2004).

Pillsbury Winthrop LLP, [Client Alert: Revised Form 8-K: New Disclosure Items and Shorter Filing Deadlines](#) (Mar. 24, 2004).

Troutman Sanders LLP, [Form 8-K Disclosure Requirements and Accelerated Filing Deadline](#) (Mar. 24, 2004).

Bryan Cave, [Corporate Finance Bulletin: SEC Adopts Amendments to Form 8-K](#) (Mar. 18, 2004).

Wachtell, Lipton, Rosen & Katz, [SEC Adopts New Form 8-K](#)

[Disclosure and Accelerated Filing Deadline](#) (Mar. 17, 2004).

Nixon Peabody LLP, [Securities Law Alert: SEC Adopts New Form 8-K Requirements](#) (Mar. 11, 2004).

SEC II: SEC Proposes Amendments to Form 20-F To Allow Foreign Private Issuers to Change to International Accounting Standards

U.S. Securities and Exchange Commission, [Proposed Rule: First-Time Application of International Financial Reporting Standards](#) (Mar. 11, 2004).

U.S. Securities and Exchange Commission, [SEC Votes to Adopt Additional 8-K Requirements and to Propose Amendments to Form 20-F and Fund Manager Disclosure Requirements](#) (Mar. 11, 2004).

Also on March 11, the U.S. Securities and Exchange Commission voted to propose amendments to Form 20-F to provide a "one-time accommodation" to allow foreign private issuers registered with the SEC to change their financial statement preparation to preparation pursuant to International Financial Reporting Standards (IFRS). The proposed accommodation "would apply to foreign private issuers that have not previously published financial statements under IFRS, formerly known as International Accounting Standards ('IAS'), and that publish IFRS financial statements for the first time for any financial year beginning no later than January 1, 2007." According to the Commission's proposing release:

The accommodation would permit eligible foreign private issuers for their first year of reporting under IFRS to file two years rather than three years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS, with

appropriate related disclosure. The accommodation would retain current requirements regarding the reconciliation of financial statement items to generally accepted accounting principles ("GAAP") as used in the United States ("U.S. GAAP"), but modify the form in which the reconciliations are presented in the first filing that includes IFRS financial statements.

RealCorporateLawyer.com is pleased to make available to its readers the following analysis of the proposed SEC amendments to Form 20-F:

White & Case LLP, [Guide for Foreign Private Issuers: Preparing Your Upcoming Annual Report on Form 20-F](#) (Mar. 2004).

SEC III: SEC Proposes Amendments To Require Electronic Filing of Form ID

U.S. Securities and Exchange Commission, [Proposed Rule: Mandated Electronic Filing for Form ID](#), Release Nos. 33-8399, 34-49416, 35-27815, 39-2416, IC-26385 (Mar. 15, 2004).

[Comments on Proposed Rule: Mandated Electronic Filing for Form ID](#)

On March 15, the U.S. Securities and Exchange Commission proposed rule and form amendments to mandate electronic filing of Form ID. (Form ID is the application for access codes to file on EDGAR.) According to the Commission, the intended effect of the proposals is "to facilitate the more efficient transmission and processing of the information Form ID requires in a manner that will benefit investors, filers and the Commission."

Rule 10 of Regulation S-T currently requires Forms ID to be filed on paper. The proposals would not only mandate electronic filing, but would also make hardship exemptions unavailable to Forms ID. Interestingly, the Commission says that

because only new filers will file the electronic Form ID, it proposes that the form "should be supplemented with additional verification to help ensure the security of the system." Thus, the proposal also provides for amendment of Regulation S-T to require such applicants to "file in paper by fax within two business days before or after electronically filing Form ID a notarized document, manually signed by the applicant over its typed signature, that includes the information contained in the Form ID filed or to be filed and confirms the authenticity of the Form ID." In its proposed release the Commission states that it eventually "will replace this procedure with a requirement that applicants used a certificate from a certification authority to authenticate their Form ID filings."

SEC IV: SEC Proposes Amendments to Require SROs to File Proposed Rule Changes Electronically

U.S. Securities and Exchange Commission, [Proposed Rule: Proposed Rule Changes of Self-Regulatory Organizations](#), Release No. 34-49505 (Mar. 30, 2004).

On March 30 the U.S. Securities and Exchanged Commission released the text of yet another proposed rule that would require electronic filings with the Commission, this time by SROs seeking to propose rule changes. The Commission proposes to amend certain requirements applicable to Self-Regulatory Organizations that seek to propose rule changes. Under the proposal, such SRO rule change proposals would have to be filed with the SEC electronically. Additionally, the Commission proposes to require SROs to post all such proposed rule changes, as well as current and complete sets of their rules, on their Web sites. In its proposing release, the Commission states that "the proposed amendments are designed to modernize the SRO rule filing process by making it more efficient and cost effective. The proposed amendments also should improve the transparency of the rule filing process and assure [sic] that all SRO members and other interested persons have ready access to an accurate,

up-to-date version of SRO rules."

Comments on the proposal must be submitted on or before June 4, 2004.

SEC V: SEC Proposes to Expand Information That Certain Investment Company Filers Must Submit Via EDGAR

U.S. Securities and Exchange Commission, [Proposed Rule: Rulemaking for EDGAR System](#), Release Nos. 33-8401, 34-49426, 35-27816, 39-2417, IC-26388 (Mar. 16, 2004).

On March 16, the Commission released the text of proposed rules intended to expand the information that it requires certain investment company filers submit electronically via EDGAR and to make certain technical changes the EDGAR system. The Commission is proposing that certain open-end management investment companies and insurance company separate accounts "identify in their EDGAR submissions information relating to their series and classes (or contracts, in the case of separate accounts)."

In addition, the Commission proposes to add several investment company filings to the list of those that must be filed electronically. Currently, investment companies must submit in paper filings fidelity bonds under Section 17(g), sales literature filed with the Commission under Section 24(b), and litigation material filed under Section 33 of the Investment Company Act. The Commission's proposals would amend Rule 101 to make these submissions mandatory electronic submissions.

SEC VI: SEC Issues Staff Accounting Bulletin No. 105 Dealing with Application of Accounting Principles to Loan Commitments

U.S. Securities and Exchange Commission, [SEC Staff Accounting Bulletin: No. 105 - Application of Accounting Principles to Loan Commitments](#), Release No. SAB 105 (Mar. 9, 2004).

On March 9, the Commission released Staff Accounting Bulletin No. 105 entitled "Application of Accounting Principles to Loan Commitments." The bulletin sets forth the Staff's views regarding the application of GAAP to loan commitments accounted for as derivative instruments.

The bulletin hypothesizes the following set of facts: Bank A enters into a loan commitment with a customer to extend a mortgage loan at a specified rate. Bank A intends to sell the mortgage loan after it is funded. Under Statement No. 133, such a loan commitment should be accounted for as a derivative instrument and measured at fair value. Bank A expects to receive future cash flows related to servicing rights from servicing fees (included in the loan's interest rate or otherwise), late charges, and other ancillary sources, or from selling the servicing rights into the market. The bulletin then provides two areas of guidance:

Bank A may not consider the expected future cash flows related to the associated servicing of the loan. According to the bulletin, "The staff believes that incorporating expected future cash flows related to the associated servicing of the loan essentially results in the immediate recognition of a servicing asset. However, servicing assets are to be recognized only once the servicing asset has been contractually separated from the underlying loan by sale or securitization of the loan with servicing retained." Additionally, according to the Commission, "no other internally-developed intangible assets (such as customer relationship intangible assets) should be recorded as part of the loan commitment derivative. Recognition of such assets would only be appropriate in a third-party transaction (for example, the purchase of a loan commitment either individually, in a portfolio, or in a business combination)."

The bulletin also provides that Bank A should "disclose its accounting policy for loan commitments pursuant to APB Opinion No. 22, *Disclosure of Accounting Policies*. Bank A should provide disclosures related to loan commitments accounted for as derivatives, including methods and assumptions used to estimate fair value and any associated hedging strategies, as required

by Statement No. 107, Statement No. 133 and Item 305 of Regulation S-K. Additionally, Bank A should provide disclosures required by Item 303 of Regulation S-K and any related interpretive guidance."

The bulletin makes clear that "[t]he staff will not object if registrants that have not been applying the accounting described in this bulletin continue to use their existing accounting policies for loan commitments accounted for as derivatives entered into on or before March 31, 2004. For loan commitments accounted for as derivatives and entered into subsequent to that date, the staff expects all registrants to apply the accounting described in this bulletin."

SEC VII: SEC Sues Two Company Officers for Violating Certification Requirements of Sarbanes-Oxley

U.S. Securities and Exchange Commission, [Chairman and Principal Financial and Accounting Officer Charged with Filing False Certifications Required by the Sarbanes-Oxley Act of 2002](#), Litigation Release No. 18638 (Mar. 25, 2004).

Securities and Exchange Commission v. Cedric Kushner Promotions, Inc., Cedric Kushner, James DiLorenzo, and Steven Angel, Civ. Action No. 04 CV 2324, [Complaint](#) (S.D.N.Y., complaint filed Mar. 22, 2004).

On March 25, the SEC announced that it had filed a complaint in the United States District Court for the Southern District of New York against Cedric Kushner Productions, Inc., its Chairman of the Board, Chief Executive Officer, President and Founder Cedric Kushner, its Principal Financial and Accounting Officer, James DiLorenzo, and its former Executive Vice President and Secretary, and a current Director, Steven Angel allegedly for "violating the antifraud, record-keeping, and reporting provisions of the federal securities laws." Interestingly, as part of the complaint, the Commission alleges that

Kushner and DiLorenzo violated the certification requirements of the Sarbanes-Oxley Act of 2002, and Rule 13a-14 of the Exchange Act. Among the allegations of the complaint are allegations contained in paragraphs 28 and 29 providing, in part, as follows:

28. . . . [I]n violation of the duties imposed by Sarbanes-Oxley, he [Kushner] signed the May 20 Filing and the Sarbanes-Oxley certification without having read either document and without having taken any steps to determine their accuracy or truthfulness, relying instead on nothing more than [another's] representation to that effect. . . .

29. . . . He [DiLorenzo] also knew, or was reckless in not knowing, that the financial statements contained material inaccuracies that the auditors had previously brought to his attention. DiLorenzo, nevertheless, signed the May 20 Form 10-KSB and the Sarbanes-Oxley certification included therewith.

PCAOB I: PCAOB Adopts Final Internal Control Standards

Public Company Accounting Oversight Board, [An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements](#), PCAOB Release No. 2004-001 (Mar. 9, 2004).

Public Company Accounting Oversight Board, [Briefing Paper: Board Considers Adopting Standard for Audits of Internal Control Over Financial Reporting](#) (Mar. 9, 2004).

Public Company Accounting Oversight Board, [Board Approves \[Standard\] for Audits of Internal Control, July 19 Registration](#)

[Deadline for Non-U.S. Firms](#) (Mar. 9, 2004).

On March 9, the Public Company Accounting Oversight Board adopted an auditing standard for internal control over financial reporting. The auditing standard, "An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements" addresses the work that is required to audit internal control over financial reporting as well as the relationship of such an audit to the audit of the financial statements.

The final standard is essentially consistent with the version of the standard first proposed by the PCAOB last year. For further information about the new standard (which still must be approved by the SEC), RealCorporateLawyer.com is pleased to make available to its readers an important memorandum from Covington & Burling providing a detailed analysis of the final standard:

Covington & Burling, [Securities: A New Standard for Auditing Internal Control Over Financial Reporting](#) (Mar. 26, 2004).

M&A DEVELOPMENTS: 2nd Circuit Reverses Lower Court Decision Decision in MONY Group v. Highfields Capital Management

The MONY Group Inc., [U.S. Court of Appeals Blocks Dissidents from Mailing Proxy Cards to MONY Stockholders Without Complying With Federal Proxy Rules](#), PRNewswire-FirstCall (Apr. 1, 2004).

On April 1, The MONY Group Inc. announced that the United States Court of Appeals for the Second Circuit unanimously ruled in favor of MONY and directed entry of a preliminary injunction to prevent Highfields Capital Management LP, Longleaf Partners Small-Cap Fund and Southeastern Asset Management Inc. from violating the federal proxy rules by mailing proxy material that included reproductions of MONY's proxy card, to MONY stockholders in connection with

MONY's proposed merger with AXA Financial without complying with the disclosure requirements of the federal proxy rules. The Court reportedly held that "MONY will suffer irreparable harm if [the dissidents] are allowed to enclose duplicates of management's proxy cards in their solicitations to MONY shareholders without complying with the disclosure requirements" of the federal proxy rules.

The decision reversed a lower court decision entered on February 11 considered to be a matter of first impression. The lower court ruled that a dissident shareholder could mail to other shareholders a duplicate copy of the company's proxy card, together with instructions describing how to use the card to vote against a proposed merger without complying with the proxy rules promulgated under the Exchange Act. *See MONY Group, Inc. v. Highfields Capital Management, et al.*, 2004 WL 253330, slip op. (S.D.N.Y., Feb. 11, 2004).

To read more about the lower court's decision and a critique of that decision, see Kirkland & Ellis, [M&A Notes from Kirkland & Ellis \(MONY v. Highfields Capital\)](#) (Mar. 15, 2004).

PRACTICAL GUIDANCE: Courtesy of RealCorporateLawyer.com

Every day RealCorporateLawyer.com works hard to provide its readers with free access to a very large collection of law firm memoranda providing practical guidance on current hot topics. Readers are encouraged to visit the frequently-updated "Special Features" area of the home page for such current memoranda, as well as the [SEC Reform Portal](#) containing hundreds of other such memoranda. In just the last two weeks, RealCorporateLawyer -- a free service -- has provided its readers with easy access to the following memoranda:

White & Case LLP, [Final SEC Rules Regarding Form 8-K Disclosure Requirements and Deadlines](#) (Mar. 23, 2004).

White & Case LLP, [Guide for Foreign Private Issuers: Preparing Your Upcoming Annual Report on Form 20-F](#) (Mar. 2004).

Gibson Dunn & Crutcher LLP, [Proposed New Hart-Scott-Rodino Act Rules Requiring Notification for Formations of "Non-Corporate Entities" and Acquisitions of "Non-Corporate Interests"](#) (Apr. 1,

Pillsbury Winthrop LLP, [Client Alert: Revised Form 8-K: New Disclosure Items and Shorter Filing Deadlines](#) (Mar. 24, 2004).

Troutman Sanders LLP, [Form 8-K Disclosure Requirements and Accelerated Filing Deadline](#) (Mar. 24, 2004).

Bryan Cave, [Corporate Finance Bulletin: SEC Adopts Amendments to Form 8-K](#) (Mar. 18, 2004).

2004)

Sullivan & Worcester, [Client Advisory: SEC Approves Rules Requiring New and Faster Disclosure](#) (Mar. 29, 2004).

Covington & Burling, [Securities: A New Standard for Auditing Internal Control Over Financial Reporting](#) (Mar. 26, 2004).

Wachtell, Lipton, Rosen & Katz, [Key Issues for Directors](#) (Mar. 26, 2004).

Buchanan Ingersoll PC, [Securities / SEC Alert: New Form 8-K Amendments Adopted](#) (Mar. 2004).

Wachtell, Lipton, Rosen & Katz, [SEC Adopts New Form 8-K Disclosure and Accelerated Filing Deadline](#) (Mar. 17, 2004).

Nixon Peabody LLP, [Securities Law Alert: SEC Adopts New Form 8-K Requirements](#) (Mar. 11, 2004).

Kirkland & Ellis, [M&A Notes \(MONY v. Highfields Capital\)](#) (Mar. 16, 2004).

Dechert LLP, [Mergers & Acquisitions Special Alert: 2004 Proxy Season Update](#) (Mar. 15, 2004).

In addition to all of this, RealCorporateLawyer.com has unveiled a new [MD&A Center](#).

COMINGS AND GOINGS: Who's Doing and Saying What and Where?

Matthew Wells, most recently the Director of Public Affairs for the American Tort Reform Association, has joined the SEC as Director of the Office of Public Affairs. He will serve as the agency's principal spokesperson, responsible for the agency's day-to-day media relations and public relations about Commission activities. He will report to the Managing Executive for External Affairs, **Laura L. Cox**, who is responsible for strategic oversight and management of public affairs, legislative and intergovernmental affairs, and investor education for the Commission. *See* U.S. Securities and Exchange Commission, [Matthew Well Named Public Affairs Director](#), News Release 2004-47 (Apr. 5, 2004).

On March 31, the U.S. Securities and Exchange Commission announced the selection of **Chester Spatt, Ph.D.**, as Chief Economist and Director of the Commission's Office of Economic Analysis. Mr. Spatt joins the Commission from Carnegie Mellon University where he is the Mellon Bank Professor of Finance and Director of the Center for Financial Markets at the Tepper School of Business. He will succeed **Lawrence E. Harris**, who is returning to his research and teaching at the USC Marshall School of Business where he holds the Fred V. Keenan Chair in Finance. *See* U.S. Securities and Exchange Commission, [Chester Spatt Named Chief Economist](#), News Release 2004-45 (Mar. 31, 2004).

On March 25, the Commission announced that the **Honorable William H. Pauley III**, United States District Judge for the Southern District of New York, has

approved the Commission's investor education plan in connection with the \$1.4 billion global settlement of the SEC enforcement actions against ten of the nation's top investment firms and two individuals alleging undue influence of investment banking interests on securities research at brokerage firms. The plan provides for creation of a non-profit organization designed to equip Americans with the knowledge and skills to make informed investment decisions. In separate orders issued earlier the same week, the Court appointed **Charles D. Ellis** as Chairman of the Board of the new organization and **George G. Daly** as the Executive Director of the new organization. Mr. Ellis is a Senior Advisor and Director of Greenwich Associates. Mr. Daly is the Albert Fingerhut Professor of Business Administration at the Stern School of Business of New York University and was the Dean of the Stern School from 1993 to 2002. *See* U.S. Securities and Exchange Commission, [Commission Investor Education Plan Approved; Investor Education Organization Leaders Named](#), News Release 2004-40 (Mar. 25, 2004).

On March 19, the SEC announced that its Office of the Chief Accountant has selected six professional accounting fellows for two-year terms beginning in June 2004: (1) **Shan L. Benedict**, a senior manager in BDO Seidman LLP's National SEC Department; (2) **Jennifer M. Burns**, a senior manager in Deloitte & Touche LLP's National Office Risk, Regulatory, Professional Matters Group; (3) **Mark A. Northan**, a senior manager in KPMG LLP's Department of Professional Practice; (4) **Brian K. Roberson**, a senior manager in KPMG LLP's Department of Professional Practice; (5) **Nancy L. Salisbury**, a senior manager in Ernst & Young LLP's Baltimore, Maryland practice office and formerly in the firm's Mid-Atlantic Area Professional Practice Group; and (6) **Pamela R. Schlosser**, a senior manager in PricewaterhouseCoopers LLP's Professional, Technical, Risk and Quality Group. *See* U.S. Securities and Exchange Commission, [Office of the Chief Accountant Selects Six Professional Accounting Fellows](#), News Release 2004-39 (Mar. 19, 2004).

On March 2, the New York Stock Exchange announced that, effective March 8,

Richard G. Ketchum would begin his duties as Chief Regulatory Officer of the NYSE. Originally Mr. Ketchum was scheduled to begin with the NYSE in June due to a non-compete clause in his contract with NASDAQ, a previous employer, but NASDAQ agreed to waive the clause. *See* [New York Stock Exchange, Richard G. Ketchum to Assume Role as NYSE Chief Regulator Effective March 8](#) (Mar. 2, 2004).

What Are the Commissioners Saying? SEC Chairman **William H. Donaldson** delivered "[Remarks to the Council of Institutional Investors](#)" on March 25, addressing recent SEC activities and major issues facing the Commission. He also delivered "[Opening Remarks at the Security Holder Director Nominations Roundtable](#)" on March 10 as well as "[Remarks to the Practising Law Institute](#)" on March 5 regarding his first twelve months at the agency. SEC Commissioner **Cynthia A. Glassman** delivered "[Remarks at the SIA Compliance & Legal Division's 35th Annual Seminar](#)" on March 23rd regarding the Commission's "serious ramping up" of rulemaking and enforcement actions in response to corporate scandals. Commissioner **Glassman** also spoke before the American Enterprise Institute on March 8 regarding "[Issues Surrounding the SEC's Shareholder Access Proposal](#)". She also spoke at the Practising Law Institute on March 5 regarding "[My Top 10 Observations as an SEC Commissioner](#)". On March 4, Commissioner **Glassman** spoke before the Women's Syndicate Association regarding "[What Were They Thinking? Observations of an SEC Commissioner](#)" and before the Annual Conference of the Institute of International Bankers on March 1 regarding the [SEC's implementation of Gramm-Leach-Bliley](#). On March 2, Commissioner **Paul S. Atkins** spoke before the ABA Section of Business Law's 5th Annual Conference on [Private Investment Funds](#) regarding current developments in the regulation of mutual funds and mandatory registration of hedge fund advisers in the U.S.

What Are the Commission Staffers Saying? On March 22, **Paul F. Roye** (Director of the Division of Investment Management) spoke regarding "[Integrity and Accountability: The New Imperatives for the Mutual Fund Industry](#)". On

March 15, Lori A. Richards of the Office of Compliance Inspections and Examinations gave a speech entitled "[Put the Compliance Rule to Work: IA Compliance Best Practices Summit](#)".

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