

October 2004

[Click Here for Printer Friendly Format](#)

Published by RR Donnelley

Editorial Content by Glasser LegalWorks

Blake Bell, Editor in Chief

In This Issue:

[SEC I: SEC Proposes Rule To Establish Voluntary Program for Reporting Financial Information on EDGAR Using XBRL](#)

[SEC II: SEC Fee Rate Advisory #2 and Fee Rate Advisory #3 for Fiscal Year 2005](#)

[SEC III: SEC Settles Enforcement Action Against General Electric for Alleged Compensation Disclosure "Failures"](#)

[SEC IV: SEC Issues Fifth Supplement to Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations](#)

[SEC V: Division of Corporation Finance Issues Staff Legal Bulletin No. 14B \(CF\) Regarding Shareholder Proposals](#)

[SRO I: NASD Bond Panel Issues Widely-Anticipated Report on Corporate Debt Market](#)

[SRO II: SEC Approves NASD's CEO Compliance Certification Rule; Expected Effective Date Dec. 1, 2004](#)

[PRACTICAL GUIDANCE: Courtesy of RealCorporateLawyer.com](#)

[COMINGS AND GOINGS: Who's Doing and Saying What and Where?](#)

SEC I: SEC Proposes Rule To Establish Voluntary Program for Reporting Financial Information on EDGAR Using XBRL

U.S. Securities and Exchange Commission, [XBRL Voluntary Financial Reporting Program on the EDGAR System](#), Release No. 33-8496 (Sept. 27, 2004).

U.S. Securities and Exchange Commission, [Enhancing Commission Filings Through the Use of Tagged Data](#), Concept Release No. 33-8497 (Sept. 27, 2004).

U.S. Securities and Exchange Commission, [SEC Proposes Rule to Establish Voluntary Program for Reporting Financial Information on](#)

[EDGAR Using XBRL](#), Release No. 2004-138 (Sept. 27, 2004).

U.S. Securities and Exchange Commission, [SEC Announces Initiative to Assess Benefits of Tagged Data in Commission Filings](#), Release No. 2004-97 (July 22, 2004).

U.S. Securities and Exchange Commission, [Spotlight on Tagged Data and XBRL Initiatives](#) (Sept. 28, 2004).

On September 27, the SEC proposed rule amendments and issued a concept release as part of its ongoing initiative to consider the benefits of tagged data and its potential for improving the timeliness, accuracy and analysis of financial disclosure in Commission filings. The Commission is proposing to establish a "voluntary program" to allow registrants to file supplemental financial information using so-called eXtensible Business Reporting Language (XBRL). According to its announcement:

"Registrants would be able to voluntarily furnish XBRL data in an exhibit to specific EDGAR filings under the Securities Exchange Act of 1934 and the Investment Company Act of 1940. The program would begin with the 2004 calendar year-end reporting season."

In its related concept release, the Commission solicited public comment on the benefits of tagging data; the implications of tagging data not only for filers but also for investors, the SEC and "other market participants"; and the adequacy and efficacy of XBRL as a format for reporting financial information.

To learn more about XBRL, *see* RealCorporatLawyer.com's FAQ's entitled "[XBRL](#)".

SEC II: SEC Fee Rate Advisory #2 and Fee Rate Advisory #3 for Fiscal Year 2005

U.S. Securities and Exchange Commission, [Fee Rate Advisory #2](#)

[for Fiscal Year 2005](#), Release No. 2004-137 (Sept. 27, 2004).

U.S. Securities and Exchange Commission, [Fee Rate Advisory #3 for Fiscal Year 2005](#), Release No. 2004-139 (Sept. 30, 2004).

On September 27, the SEC issued Fee Rate Advisory #2 for Fiscal Year 2005 noting that to the extent that it must operate under a continuing resolution as of the start of Fiscal Year October 1 (as was the case), then fees paid under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g) and 31 of the Securities Exchange Act of 1934 "will remain at their current rates". The advisory further noted that five days after enactment of the Commission's regular fiscal year 2005 appropriation, the first three aforementioned rates will decrease from the current rate of \$126.70 per million to \$117.70 per million as previously announced. The fourth rate, the Section 31 fee rate applicable to securities transactions on the exchanges and Nasdaq will – effective 30 days after the enactment of the Commission's regular appropriation – increase from the current rate of \$23.40 per million to \$32.90 per million, as previously announced. The Commission confirmed its advisory in Fee Rate Advisory #3 for Fiscal Year 2005, noting that the Commission would, in fact, begin operating under a continuing resolution beginning October 1 that will extend through November 20, 2004.

SEC III: SEC Settles Enforcement Action Against General Electric for Alleged Compensation Disclosure "Failures"

U.S. Securities and Exchange Commission, [General Electric Settles SEC Action for Disclosure Failures in Connection with Its Former CEO's Benefits Under His Employment and Retirement Agreement](#), News Release 2004-135 (Sept. 23, 2004).

In the Matter of General Electric Company, [Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities](#)

[Exchange Act of 1934](#) (Sept. 23, 2004; Exchange Act Release No. 50426).

On September 23, the SEC announced that it had instituted settled enforcement against General Electric Company. The Commission charged that GE "failed to fully describe the substantial benefits it had agreed to provide its former chairman and CEO John F. 'Jack' Welch, Jr., under an 'employment and post-retirement consulting agreement.'" According to the Commission's announcement, GE consented to entry of a cease-and-desist order prohibiting it from violating the proxy solicitation and periodic reporting provisions of the federal securities laws. According to the Commission, the pertinent proxy statements filed by GE "only referred to Welch's entitlement to ' . . . continued lifetime access to Company facilities and services comparable to those that are currently made available to him by the Company," in connection with a December 1996 "employment and post-retirement consulting agreement" between Welch and the Company. In its announcement of the settled enforcement action, the Commission suggested that the disclosures referencing "facilities and services" were inadequate in view of the nature and extent of the post-retirement compensation provided:

"The agreement itself, which was appended as an exhibit to GE's 1996 annual report, stated that Welch was entitled to receive in retirement 'continued access to Company facilities and services comparable to those provided to him prior to his retirement, including access to Company aircraft, cars, office, apartments, and financial planning services,' but did not provide further meaningful and complete disclosure of those 'facilities and services.' Moreover, GE made no other disclosures in its SEC filings that allowed investors to understand the nature and scope of Welch's retirement benefits-specifically, investors could not learn from GE's previously filed proxy statements many of the most significant 'facilities and services' Welch had been provided prior to his

retirement, including personal use of GE-owned aircraft, personal use of chauffeured limousines and home security systems."

SEC IV: SEC Issues Fifth Supplement to Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations

U.S. Securities and Exchange Commission, [Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations - Fifth Supplement](#) (Sept. 2004).

On September 20, the Commission made available the fifth supplement to the Division of Corporation Finance's telephone interpretation manual. The supplement provides interpretive guidance regarding proxy rules and Schedule 14A.

The issues treated revolve around application of the so-called "unbundling rule" (Rule 14a-4(a)(3)) in the context of mergers, acquisitions and similar contexts. The guidance provides information to help companies determine when charter, bylaw or similar provisions must be set out separately on the form of proxy in the context of mergers, acquisitions and similar transactions and – according to the Commission – to establish a uniform approach by companies that apply Rule 14a-4(a)(3).

The telephone interpretation provides guidance regarding:

- Application of the unbundling rule to merger and acquisition transactions;
- Application of the unbundling rule when a new acquisition vehicle is used;
- and
- Specification of examples of situations when unbundling may not be required.

SEC V: Division of Corporation Finance Issues Staff Legal Bulletin No. 14B (CF) Regarding Shareholder Proposals

U.S. Securities and Exchange Commission, [Division of Corporation Finance Staff Legal Bulletin No. 14B \(CF\) - Shareholder Proposals](#) (Sept. 15, 2004).

See also:

U.S. Securities and Exchange Commission, [Division of Corporation Finance: Staff Legal Bulletin No. 14 - Shareholder Proposals](#) (Jul. 13, 2001).

U.S. Securities and Exchange Commission, [Division of Corporation Finance: Staff Legal Bulletin No. 14A - Shareholder Proposals](#) (Jul. 12, 2002).

On September 15, the Commission's Division of Corporation Finance issued Staff Legal Bulletin No. 14B (CF) regarding shareholder proposals. According to the Commission, the bulletin clarifies and updates some of the guidance contained in Staff Legal Bulletin No. 14 and to provide additional guidance on issues that commonly arise under Rule 14a-8.

The bulletin lays out the staff's views on: the application of rule 14a-8(i)(3); common issues regarding a company's notice of defects to a shareholder proponent under Rule 14a-8(j); opinions of counsel under Rule 14a-8(j)(2)(iii); and processing matters relating to the availability of submitted materials the mailing and public availability of SEC staff responses.

The supplement outlines examples of instances where the Commission staff believes that exclusion or modification of a proposal and its supporting statement language in reliance on Rule 14a-8(i) would not be appropriate:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors

or its officers; and/or

the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

The supplement also outlines instances in which the staff deems it appropriate under Rule 14a-8(i)(3) to exclude either all or part of a proposal or supporting statement based on materially false or misleading statements including the following:

statements that directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation;

factual statements that the company demonstrates objectively to be materially false or misleading;

resolutions contained in the proposal that are so inherently vague or indefinite that neither the stockholders voting on the proposal nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires (this objection also may be appropriate where the proposal and the supporting, when read together, have the same result); and

proposals where a substantial portion of the supporting statement is irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which the shareholder is being asked to vote.

The bulletin indicates that the Commission will not address substantive matters in this context over the phone requiring, instead, that the company's arguments be submitted in writing.

SRO I: NASD Bond Panel Issues Widely-Anticipated Report on Corporate Debt Market

NASD, [NASD Bond Panel Urges Fuller Information, Access to Corporate Bond Market for Retail Investors](#), News Release 04-062 (Sept. 30, 2004).

NASD, [Report of the Corporate Debt Market Panel](#) (Sept. 2004).

Noting that retail investors are now responsible for nearly two-thirds of all corporate bond transactions, on September 30, NASD announced that a special

NASD panel is "recommending better information for investors before and at the time of every trade and increased disclosures on post-trade confirmations." In addition, according to the same announcement, NASD will "dramatically increase" investor access to bond pricing information once the third and final phase of TRACE has begun.

In addition to specific recommendations, the Panel provided overall guidance regarding the corporate bond market. The report concludes in its report that individual investors need more information to allow them to determine if bonds are appropriate for their investment objectives, what execution quality they receive and the bond's overall risk / return. Additionally, the panel states in its report that it believes that "trade confirmations should include straightforward and complete information regarding the nature of the service / transaction performed by brokerage firms on behalf of investors." Finally, the Panel in its report urges NASD and the brokerage community "to intensify their efforts to achieve wider distribution of bond information through various media channels" and that NASD "continue its effort to increase the distribution and availability of TRACE information as a cornerstone of a broader effort to better educate individual investors about the bond market." Interestingly, the Panel further states in its report:

"The Panel believed that it would be very helpful for individual investors to be able to compare the price, yield, and return they receive from a bond against industry benchmarks. NASD should work to ensure that benchmarks are widely available to individual investors. NASD should encourage existing providers of benchmark (or index) data to increase their distribution. NASD should also work to determine if a set of standard 'benchmarks' could be developed that are specifically geared towards individual investors."

SRO II: SEC Approves NASD's CEO Compliance Certification Rule; Expected Effective Date Dec. 1, 2004

NASD, [SEC Approves NASD's CEO Compliance Certification Rule](#) (NASD Member Alert) (Sept. 24, 2004).

U.S. Securities and Exchange Commission, [Order Approving Proposed Rule Change and Amendments Nos. 1 and 2 Thereto by NASD Relating to Chief Executive Officer Certification and Designation of Chief Compliance Officer](#), Release No. 34-50347 (Sept. 10, 2004).

NASD, [NASD Rule 3013 and Interpretive Material](#) (Sept. 24, 2004).

On September 10, the SEC issued an order approving new NASD Rule 3013 and associated interpretive material that will require members to: (i) designate a Chief Compliance Officer; and (ii) require the Chief Executive Officer (or equivalent officer) to certify annually that the member has in place "processes to establish, maintain, review, test, and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable NASD rules, MSRB rules, and federal securities laws and regulations." In its announcement of the SEC's order approving the new rule, NASD stated that the rule will become effective 30 days following publication of a Notice to Members announcing the rule approval. According to the announcement, NASD expects to publish the Notice to Members "around November 1, 2004".

PRACTICAL GUIDANCE: Courtesy of RealCorporateLawyer.com

RealCorporateLawyer.com provides 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. Recent

additions include:

Securities Update: What Constitutes a Material Contract? from Mayer, Brown, Rowe & Maw (10/04/2004)	SEC Proposes Rule Requiring Hedge Fund Adviser Registration from Sadis & Goldberg LLC (09/17/2004)
Staff Legal Bulletin on Shareholder Proposals from Jenner & Block (09/28/2004)	Sentencing Guideline Revisions: New Focus on Corporate Compliance and Ethics Programs from Bryan Cave LLP (09/10/2004)
Effective Compliance and Ethics Programs Under the Amended Sentencing Guidelines from Mayer, Brown, Rowe & Maw (09/28/2004)	Court of Appeals Limits Safe Harbor Protection from Gibson, Dunn & Crutcher LLP (08/30/2004)
How Safe Is the Safe Harbor for Forward-Looking Statements? A Recent Case Raises the Bar from Dechert LLP (09/23/2004)	

Don't forget the upcoming SEC "Hot Topics" Seminar (Fall 2004), a FREE full day briefing presented by RR Donnelly and Glasser LegalWorks. The briefing will be held in Atlanta on October 26, Cleveland on November 16, Boston on November 18 and London on October 7. Participants will hear from SEC officials, corporate counsel, law firm partners and accounting experts in briefing sessions for which MCLE credit is available. To learn more about the seminar, [click here](#). To read the transcript of the July 20 SEC "Hot Topics"

Teleconference that addressed the SEC's and PCAOB's new regulations regarding internal controls over financial reporting, [click here](#).

Also, be sure to visit the [RealFundCompliance.com](#) Web site. The free site includes not only the [monthly E.zine](#) on fund compliance but also [breaking news](#) on fund compliance issues. There are [daily regulatory developments listings](#) on the home page as well as hot topic sections on such topics as [compliance](#), [disclosure](#), [fund governance](#), [soft dollars](#), [revenue sharing](#), [frequent trading](#) and [legislative initiatives](#). The site includes a new [FAQ section](#) as well as special features on topics including the following: [anti-money laundering](#), [bank/trust companies](#), [broker-dealers](#), [CFTC](#), [ERISA / fiduciary](#), [inspection / enforcement](#), [insurance products](#), [investment advisers](#), [litigation](#), [private funds / hedge funds](#), [registered funds](#), [retirement / 529 plans](#), and [Sarbanes-Oxley](#).

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

James Meyers, former Assistant Chief Litigation Counsel in the SEC's Division of Enforcement, reportedly has joined Orrick Herrington & Sutcliffe as a securities litigation partner. See [Orrick Gains SEC Recruit for Securities Litigation Push](#), TheLawyer.com (Oct. 4, 2004).

On September 14, the New York Stock Exchange named **Peter W. Jenkins** as Senior Vice President, Institutional Client Group. Formerly he served as a managing director and head of North Americas Active Equity Trading for Deutsche Bank Asset Management. See [NYSE Names Peter W. Jenkins Senior Vice President, Institutional Client Group](#), Press Release (Sept. 14, 2004).

On September 8, the SEC's Office of Economic Analysis announced that **Mahendrarajah Nimalendran** and **C.S. Agnes Cheng** have been named as Visiting Academic Scholars. They will each serve for a one-year term. Nimalendran is currently the Bank of America Professor of Finance in The Warrington College of Business at the University of Florida. Dr. Cheng is currently a Professor of Accounting in the C.T. Bauer College of Business at the University of Houston. See U.S. Securities and Exchange Commission, [Visiting Academic Scholars Appointed to the Office of Economic Analysis](#), News Release 2004-126 (Sept. 8, 2004).

On September 7, the New York Stock Exchange appointed **Regina C. Mysliwiec** Special Advisor to the Chief Regulatory Officer. See [NYSE Appoints Regina C. Mysliwiec Special Advisor to Chief Regulatory Officer](#), Press Release (Sept. 7, 2004).

Also on September 7, the New York Stock Exchange named S.V.P. **Robert A. Marchman** as head of Market Surveillance, NYSE Regulation. See [NYSE Names Robert A. Marchman Head of Market Surveillance](#), Press Release (Sept. 7, 2004).

On September 1, 2004, the U.S. Securities and Exchange Commission announced the reorganization of the Commission's human resources office. The reorganization will divide the current office into two organizations: (i) the Office of Human Resources; and (ii) the Office of Administrative Services. A search has

begun for two senior officers, one to head each office. See U.S. Securities and Exchange Commission, [SEC Reorganizes Human Resources Functions](#), News Release 2004-124 (Sept. 1, 2004).

What Are the Commissioners Saying? On September 28, SEC Commissioner **Cynthia A. Glassman** delivered "[Remarks Before the Council of Institutional Investors](#)" Regarding Proposed Regulation NMS. SEC Chairman **William H. Donaldson** delivered "[Remarks Before Financial Services Leadership Forum](#)" on September 27 concerning Commission's recent work considered against five goals.

What Are the Commission Staffers Saying? On September 28, SEC Chief Accountant **Donald T. Nicolaisen** delivered "[Remarks Before the IASB Meeting With World Standard-Setters](#)" regarding the reconciliation requirements for IFRS to U.S. GAAP by non-U.S. registrants filing with the SEC and the IASB-FASB convergence efforts. The same day, **Susan Nash** (Associate Director of the SEC's Division of Investment Management) delivered "[Remarks at the FSA Asset Management: Risk, Opportunity and Regulation Conference](#)" regarding late trading and abusive market timing in the mutual fund industry. On September 23, **Annette L. Nazareth** (Director of the SEC's Division of Market Regulation) delivered "[Remarks Before the ICI Equity Markets Conference](#)" regarding proposed Regulation NMS. On September 20, **Stephen M. Cutler** (the SEC's Director of the Division of Enforcement) spoke at UCLA School of Law Regarding "[The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program](#)". On September 15, **Mary Ann Gadziala** (the SEC's Associate Director of OCIE), spoke in Toronto, Canada before the 6th Annual Financial Institutions Regulatory Compliance Summit regarding "[The Enhanced Focus on Risk and Controls](#)". On September 14, **Cynthia M. Fornelli** (Deputy Director of the SEC's Division of Investment Management) spoke at a Hedge Fund Best Practices Seminar regarding "[Succeeding in the New Regulatory Environment](#)". Also on September 14, the SEC's Chief Accountant, **Donald T. Nicolaisen**, spoke before the Foundation for Accounting Education concerning

["Current Developments in the Office of the Chief Accountant"](#). On September 13, **Cynthia M. Fornelli** spoke at IA Week's 4th Annual Fall Compliance Conference Regarding "[Regulation of Investment Advisers - The View from Washington](#)".

Input, Please

Please let us know what you like - and don't like - so we can tailor the site to be a hands-on resource for you and your colleagues. In addition, if you would like to contribute content to our site, let us know. E-mail comments, suggestions and other input to RealCorporateLawyer@rrd.com.

To Subscribe

Subscribe to this news service for free by visiting <http://www.realcorporatelawyer.com> and filling out the online form or send an email to RealCorporateLawyer@rrd.com.

To unsubscribe, send an email to RealCorporateLawyer@rrd.com.

© 2004 RR Donnelley

This free E.zine is provided for informational purposes only and does not constitute legal advice. RR Donnelley & Sons Company is not engaged in rendering legal or other professional services. Publication on this E.zine is not intended to create, and the information contained hereon does not constitute, an attorney-client relationship. Do not act or rely upon the information and advice given in this publication without seeking the services of competent professional counsel.

RR Donnelley's capital markets business is integral to the capital raising and regulatory processes worldwide. We help corporations, securities law firms and investment banks create, manage, produce and deliver transaction and compliance documents. We add value through highly personalized and around-

the-clock service, single-source deal solutions, deal management, worldwide regulatory expertise, a global reach, client education and insight that comes from a history of experience and achievement. We partner with our clients to make it easier for them to get the deal done? so they can focus on where they add value. We provide our clients a world-class experience, augmented by our flexibility, ability to listen and anticipate changing needs.

For more information, visit us at capitalmarkets.rdonnelley.com or www.RealCorporateLawyer.com, a reference resource site for corporate and securities lawyers.