

PUBLIC

ACT Sec. Act of 1933, ICA
SECTION 34(b)
RULE 482, 346-1
PUBLIC
AVAILABILITY 2/7/97

Our Ref. No. 97-77-CC
RESPONSE OF THE OFFICE OF CHIEF COUNSEL GE Funds
DIVISION OF INVESTMENT MANAGEMENT File No. 811-7142

Your letter of February 5, 1997 requests assurance that the staff would not recommend enforcement action to the Commission if series of the GE Funds include in advertisements or supplemental sales literature the performance information of other registered investment companies and institutional private accounts that are managed by GE Investment Management Incorporated ("GEIM"), the GE Funds' investment adviser, or GEIM's affiliate, General Electric Investment Corporation ("GEIC").

Facts

GE Funds (the "Trust") is a registered open-end investment company that currently offers ten series (the "Funds"), eight of which are offered to the public. GEIM and GEIC (together, "GE Investments") are wholly-owned subsidiaries of General Electric Company that have in common virtually all of their investment professionals. 1/ GE Investments provides investment management services to a variety of institutional accounts, including registered investment companies and private accounts (collectively, the "Institutional Accounts").

In accordance with the staff's position in Nicholas-Applegate Mutual Funds ("Nicholas-Applegate I") (pub. avail. Aug. 6, 1996), GEIM intends to include in the Trust's prospectus information regarding the performance of Institutional Accounts that are advised by GEIM or GEIC and have investment objectives and policies that are substantially similar to those of a corresponding Fund. 2/ You state that the Institutional

1/ You represent that GEIC serves as adviser exclusively to GE-affiliated accounts on an at-cost basis, while GEIM serves as adviser to external accounts on a fee-paying basis. You represent that, solely for administrative and accounting purposes related to these differences, GEIM and GEIC are structured as separate entities.

2/ You represent that, consistent with the requirements of Form N-1A, the performance information of Institutional Accounts that are registered investment companies will be calculated on the basis of standardized total return, and will be presented in comparison to appropriate broad-based market indices. See Form N-1A, Items 5A and 22(b)(i). You also represent that the composite performance of Institutional Accounts that are private

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Accounts' performance information will be provided to illustrate the performance of GE Investments in managing accounts that have investment objectives and policies that are substantially similar to those of the Funds. You represent that, with respect to a new Fund, the prospectus will specifically and prominently disclose that the Fund does not yet have its own performance record, and that the performance information of the Institutional Accounts should not be considered a substitute for the Fund's own performance information. With respect to a Fund that has a performance history of its own, you represent that the Institutional Accounts' performance information will be given no greater prominence than the Fund's own performance information.

You represent that the prospectus will disclose that the Institutional Accounts consist of portfolios separate and distinct from the Funds, and that the performance of the Institutional Accounts is not indicative of the past or future performance of the Funds. You further represent that the prospectus will disclose all material differences between the Institutional Accounts and the Funds and will include any other disclosure that may be necessary to ensure that Institutional Account performance information is not presented in a misleading manner. Specifically, you represent that the prospectus will disclose differences between the fee structures of the Institutional Accounts and those of the Funds and, where applicable, will disclose that the performance of the Institutional Accounts would have been lower if they had been subject to the fees and expenses of the relevant Fund. In addition, the prospectus will disclose that the private accounts' composite performance might have been lower if the private accounts had been regulated as investment companies under the federal securities and tax laws.

You request relief so that the Funds may include performance information of the Institutional Accounts in advertisements complying with the provisions of Rule 482 under the Securities Act of 1933 (the "Securities Act") and supplemental sales literature complying with the provisions of Rule 34b-1 under the Investment Company Act of 1940 (the "Investment Company Act"). You represent that the Institutional Accounts' performance information and accompanying disclosure would be presented in

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accounts will be presented net of management fees. You state that, with respect to those private accounts that do not pay a management fee, a hypothetical management fee will be deducted equal to the highest rate that would have been charged by GE Investments to a comparable fee-paying account. See J.P. Morgan Investment Management, Inc. (pub. avail. May 7, 1996); Association for Investment Management and Research (pub. avail. Dec. 18, 1996).

advertisements or supplemental sales literature exactly as the information appears in the Trust's prospectus. 3/ You further represent that advertisements or supplemental sales literature will clearly explain the nature and purpose of the Institutional Account performance information.

Analysis

In Nicholas-Applegate I, the staff confirmed that neither Section 34(b) of the Investment Company Act nor Section 206 of the Investment Advisers Act of 1940 would prohibit a fund from including in its prospectus performance information regarding private accounts managed by the fund's adviser that had substantially similar investment objectives, policies, and strategies, provided that the information was not presented in a misleading manner and did not obscure or impede understanding of information that is required to be included in the fund's prospectus (including the fund's own performance information). In Bramwell Growth Fund (pub. avail. Aug. 7, 1996), the staff took the same position with respect to the inclusion in a fund's prospectus of standardized total return information of another registered investment company previously managed by the fund's portfolio manager that had substantially similar investment objectives and policies. 4/ In each of these letters,

3/ An advertisement or supplemental sales literature pertaining only to one Fund will include all of the performance information and accompanying disclosure appearing in the Trust's then current prospectus as it relates to that particular Fund. In advertisements or supplemental sales literature pertaining to all of the Funds, all of the performance information and accompanying disclosure will be included. You represent, however, that performance information in advertisements or supplemental sales literature may differ from performance information included in the Trust's current prospectus to the extent that the performance information in advertisements or supplemental sales literature is updated to reflect average annual total return for one, five, and ten year periods measured as of the most recent calendar quarter, as required by Rule 482.

4/ We note that the facts presented here, and in Nicholas-Applegate I and Bramwell, differ from those in MassMutual Institutional Funds ("MassMutual") (pub. avail. Sept. 28, 1995). MassMutual addressed the case in which an unregistered account is converted into a registered fund with substantially similar investment objectives, policies, and strategies. In MassMutual, the staff granted no-action relief to a registered fund that sought to include, as part of the fund's own performance information, the performance information of the unregistered account for the period prior to the effectiveness of the fund's

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however, the staff declined to express any view regarding the inclusion in a fund's Rule 482 advertisements or supplemental sales literature of performance information of other accounts managed by the fund's adviser.

Rule 482 under the Securities Act requires, among other things, that if an open-end management investment company (other than a money market fund) includes fund performance information in an advertisement, it must include standardized total return information in accordance with paragraph (e)(3) of the rule. Rule 34b-1 under the Investment Company Act provides that sales literature containing fund performance information will be deemed misleading unless it includes, among other things, the total return calculations required by paragraph (e)(3) of Rule 482. Rule 482 and Rule 34b-1 are intended to standardize the calculation and presentation of fund performance information in advertisements or supplemental sales literature to prevent the use of misleading information, and to facilitate the comparison of funds by investors. 5/

Neither Rule 482 nor Rule 34b-1 by its terms prohibits a fund from including in its advertisements or sales literature performance information relating to other accounts managed by the fund's adviser, so long as the information is not presented in a misleading manner. The Commission has expressed the view that Rule 482 should be read as precluding "performance information about any related entity to the fund such as its adviser . . . where the use of such performance is intended as a substitute for the performance of the fund." 6/

You maintain that, because a Fund may, in accordance with Nicholas-Applegate I and Bramwell, present the performance information of the Institutional Accounts in the Trust's prospectus in a manner that is not misleading, the identical information would be no more likely to mislead investors when presented in the Fund's advertisements or sales literature. You also maintain that, with respect to a Fund that has its own performance history, the proposal is consistent with Rule 482 because the Institutional Accounts' performance information would

4/(...continued)
registration statement. Here, the Institutional Accounts are not the predecessors of the Funds, so the performance information of the Institutional Accounts can be presented only in addition to, and not as part of, the Funds' own performance information.

5/ See Investment Company Act Release No. 16245 (Feb. 2, 1988) (release adopting amendments to Rule 482 and adopting Rule 34b-1) (the "Adopting Release").

6/ Id. at n.31 (emphasis added).

be presented in addition to, rather than as a substitute for, the Funds' own performance information, and would be accompanied by prominent disclosure stating that the performance is not the Funds' own performance. 7/

We believe that neither Rule 482, Section 34(b), nor Rule 34b-1 prohibits a Fund from including in its advertisements or supplemental sales literature the performance information of Institutional Accounts that have substantially similar investment objectives, policies, and strategies, provided that the performance is not presented in a misleading manner and is not presented as a substitute for the Fund's own performance. Accordingly, we would not recommend enforcement action to the Commission if the Funds include the performance information of the Institutional Accounts in advertisements or supplemental sales literature in accordance with the representations in your letter. Our conclusion is based particularly on the following facts and representations, each of which is designed to ensure that the Institutional Account performance information would not be presented as a substitute for the Fund's performance information:

(i) advertisements or supplemental sales literature will prominently disclose that the Institutional Account performance is not the Fund's own performance, and should not be considered indicative of the past or future performance of the Fund;

(ii) advertisements or supplemental sales literature will prominently disclose that Institutional Account performance should not be considered a substitute for the Fund's performance;

(iii) with respect to a Fund that has its own performance history, the Institutional Account performance information will be provided in addition to the performance information of the Fund, and will be presented no more prominently than the Fund's performance;

7/ As stated above, you represent that when a Fund has no performance history of its own, in order to prevent the performance of the Institutional Accounts from being mistaken for the Fund's own performance, the Institutional Accounts' performance information will be accompanied by prominent disclosure stating that the Fund does not yet have its own performance history and that the Institutional Account performance is not intended to be a substitute for the Fund's own performance.

(iv) advertisements or supplemental sales literature will clearly explain the nature and purpose of the Institutional Account performance information; and

(v) advertisements or supplemental sales literature will disclose all material differences between the Institutional Accounts and the Fund and will include any other disclosure that may be necessary to ensure that Institutional Account performance information is not presented in a misleading manner.

You should note that any different facts or representations might require a different conclusion. 8/

This response supersedes positions taken by the Division of Investment Management in 1993 that presenting performance information regarding an adviser's other accounts is inconsistent with the requirements of Rule 482, and that other account performance information may be used in supplemental sales literature only when the fund itself does not have any performance history. 9/ Upon reconsideration, we believe that this earlier position is inconsistent with both the Commission's statement in the 1988 release adopting amendments to Rule 482 10/ and the Commission's long-standing position that whether information in a fund's advertisements or sales literature is misleading, for purposes of the federal securities

8/ This response should not be construed as providing no-action assurance with respect to any particular presentation of the performance of Institutional Accounts.

In addition, we note that the National Association of Securities Dealers, Inc. (the "NASD") has taken the position that the use of advertisements and sales literature that include performance information regarding an adviser's other accounts may be a violation of its Conduct Rules. NASD Regulatory and Compliance Alert at 7-8 (June 1992). Our response does not address the status of your proposal under the NASD Conduct Rules.

9/ See Letter from Carolyn B. Lewis, Assistant Director, Securities and Exchange Commission, Division of Investment Management, to Registrants (Feb. 22, 1993) (citing footnote 31 of the Adopting Release).

10/ See supra notes 5-6 and accompanying text.

laws, depends on the totality of the circumstances, including the manner in which it is presented. 11/

Sarah Wagman
Sarah A. Wagman
Attorney

11/ See, e.g., Investment Company Act Release No. 10621 (Mar. 8, 1979) (withdrawing the Commission's Statement of Policy on investment company sales literature) ("[w]hat is or is not misleading in sales literature may depend greatly on the totality of the circumstances, including the context in which it is used and the sophistication of the investor.").

WILLKIE FARR & GALLAGHER

New York
Washington, DC
London
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February 5, 1997

1933 Act Rule 482
1940 Act Rule 34b-1

BY HAND

Jack W. Murphy, Esq.
Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Judiciary Plaza
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: GE Funds

Dear Mr. Murphy:

We are writing on behalf of GE Funds, a Massachusetts business trust (the "Trust"), to request the assurance of the staff of the Division of Investment Management (the "Staff") that it would not recommend that the Securities and Exchange Commission (the "Commission") take any enforcement action under the Securities Act of 1933, as amended (the "1933 Act"), or the Investment Company Act of 1940, as amended (the "1940 Act"), if the Trust includes in advertisements in accordance with Rule 482 under the 1933 Act ("Rule 482") and in supplemental sales literature in accordance with Rule 34b-1 under the 1940 Act, historical performance information of other institutional accounts managed by the Trust's investment adviser or its affiliate under the circumstances described below.

Background

The Trust is an open-end management investment company registered under the 1940 Act, the shares of which are registered under the 1933 Act (SEC File Nos. 811-7142 and 33-51308, respectively). The Trust consists of shares of eleven series, nine of which are currently being offered to the public (each series, and any future series, is herein referred to as a "Fund", and collectively, the "Funds"). GE Investment Management Incorporated ("GEIM") is the Trust's investment adviser. GEIM and its affiliate, General Electric Investment Corporation ("GEIC" and, together with GEIM, "GE Investments") provide investment management services to a variety of institutional accounts, including a number of registered investment companies and private accounts. Each of GEIM and GEIC is a wholly-owned subsidiary of General Electric Company ("GE"). GEIM and GEIC are sister companies that have been structured as separate entities for administrative and accounting purposes as a result of GEIC serving exclusively as adviser to certain GE-affiliated accounts

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on an at cost basis only and GEIM serving as adviser to externally-oriented accounts on a fee paying basis. The investment professionals responsible for the investment operations of each entity are virtually identical.

Prospectus Disclosure

In accordance with a recent no-action position taken by the Staff,¹ GEIM intends to include in the Trust's prospectus historical performance of all institutional private accounts² and all registered investment companies, with certain exceptions, having investment objectives and policies substantially similar to those of the Funds, for which either GEIM or GEIC currently acts as investment adviser, compared to the historical performance of broad market indexes. For a Fund with any history of investment operations as of the effective date of its prospectus, this related historical performance will appear together with, and be given no greater prominence than, the Fund's own historical performance information. For a new Fund, the Trust's prospectus will specifically and prominently state that the Fund has no performance record of its own and that the related performance information should not be viewed as a substitute for the Fund's own performance.

The related performance data, calculated on an average annual total return basis, is provided to illustrate the past performance of GE Investments in managing accounts substantially similar to the Funds. The prospectus will disclose that (1) these accounts consist of portfolios separate and distinct from the Funds, (2) their performance is not indicative of the past or future performance of the Funds, and (3) investors should not consider the performance data in any way indicative of future performance. In addition, differences in the fee structures of the various accounts are noted and, where applicable, a statement will be included to the effect that the performance figures would

¹ Nicholas-Applegate Mutual Funds, SEC No-Action Letter (pub. avail. Aug. 7, 1996).

² The Funds have determined to exclude certain registered investment companies from the performance presentation in the Trust's prospectus because the current performance data of the excluded funds is either (a) higher than, or in GE Investments' determination not materially lower than, the included funds' performance data, (b) the excluded funds have a shorter history of investment operations than the Funds being promoted or (c) the excluded funds' holdings vary owing to the relatively recent adoption of the relevant investment strategy or merger into the excluded fund of funds with different investment strategies. See Association for Investment Management and Research, SEC No-Action Letter (pub. avail. Dec. 18, 1996), at footnote 2; and Nicholas-Applegate, at footnote 3.

have been lower to the extent they were subject to the higher fees and expenses incurred by the relevant Fund.

Related performance data of registered investment companies is calculated and presented in accordance with the uniform standards prescribed by Form N-1A. All composite performance data is calculated in accordance with recommended standards of the Association for Investment Management and Research. Consistent with the Staff's prior positions on related composite performance data, the data reflects management fees actually incurred by fee paying accounts, although custodial fees and expenses are not deducted from the results.³ With respect to non-fee paying GE-affiliated accounts, a hypothetical management fee is applied equal in amount to the highest rate that would have been charged to a comparable fee paying account based on GE Investments' stated fee schedules.⁴ In addition, the prospectus will disclose that the composite performance could have been adversely affected by the imposition of certain regulatory requirements, restrictions and limitations if the accounts within each composite had been regulated as investment companies under the federal securities and tax laws.

Proposal

The Trust proposes to include in Rule 482 advertisements and in supplemental sales literature relating to the Funds' historical performance information of other institutional accounts managed by GE Investments that have substantially similar investment objectives and policies to the Funds exactly as the information appears in the Trust's prospectus.⁵ An advertisement or supplemental sales literature for only one Fund would include all of the performance data and accompanying disclosure appearing in the Trust's then current prospectus as it relates to that particular Fund. In advertisements or supplemental sales materials that pertain to all the Funds, all of the performance information and accompanying disclosure will be included. In each case, the advertisement or supplemental sales literature

³ See Investment Company Institute, SEC No-Action Letter (pub. avail. Aug. 24, 1987).

⁴ See J.P. Morgan Investment Management, Inc., SEC No-Action Letter (pub. avail. May 7, 1996).

⁵ Advertisements and supplemental sales materials will include the identical disclosure accompanying a Fund's performance information, however, consistent with Rule 482, the performance data itself will be updated to reflect average annual total return for one, five and ten year periods, as applicable, and will be current to the most recent calendar quarter. To this limited extent, the performance data may vary from the data included in the Trust's current prospectus.

will clearly explain the nature and purpose of the related performance information. The Trust's prospectus will disclose all material differences between private institutional accounts and registered investment companies and will include any other disclosure that may be necessary to ensure that an institutional account's performance is not presented in a misleading manner.

Discussion

In *Nicholas-Applegate Mutual Funds*,⁶ the Staff permitted certain mutual funds to include in their prospectus information concerning the performance of certain private accounts managed by the funds' investment adviser. However, the Staff specifically noted that it was not expressing any view regarding the inclusion of related historical performance data in Rule 482 advertisements or supplemental sales literature.⁷ A footnote in the Commission's release adopting certain amendments to Rule 482 stated that the amendments precluded "performance information about any related entity to the fund such as its adviser, i.e., other funds or private accounts controlled by the adviser, where the use of such performance is intended as a substitute for the performance of the fund".⁸ In light of the Staff's recent no-action positions and the proposed presentation of performance information as described in this letter, we are writing to seek the Staff's views on the scope of this footnote.

The quoted footnote expressed the position that the information should not be used as a "substitute" for a fund's performance. The Trust does not intend to use this related performance data as a substitute for a Fund's own historical performance information. For a new Fund, the prospectus will specifically and prominently disclose that the Fund has no performance record of its own and that the related performance information should not be viewed as a substitute for the Fund's own performance. For a Fund with any history of investment operations as of the effective date of its prospectus, the Fund's historical performance data will accompany the related performance data and will be presented with at least equal prominence. As mentioned above, the disclosure will clearly state that the adviser's performance relates to portfolios separate and distinct from the Fund and should not be construed as indicative of the Fund's performance. Therefore, we submit that the prohibition addressed in the footnote is not applicable to the Trust's proposed performance presentation.

⁶ See *supra* note 1.

⁷ *Nicholas-Applegate*, at footnote 2.

⁸ Investment Company Act Release No. 16245 at footnote 31 (May 1, 1988) (emphasis supplied).

Jack W. Murphy, Esq.
February 5, 1997
Page 5

We note that the Trust does not intend to extract excerpts of the adviser's historical performance information from the prospectus for use in Rule 482 advertisements and supplemental sales literature. Rather, the historical performance data and accompanying disclosure presented in a Fund's sales materials will be identical to the prospectus disclosure relating to that Fund, which is subject to review by the Staff. We recognize the concern that, in selecting disclosure to be included in Rule 482 advertisements, an adviser could choose to omit certain disclosure included in the prospectus that would cause the related performance information to be misleading. However, no part of the prospectus performance disclosure relating to the particular Fund being advertised will be omitted from the sales materials. We submit that the sales material therefore would be no more misleading than the identical disclosure included in the Fund's prospectus, which is subject to review by the Staff and the anti-fraud provisions of the federal securities laws. Thus, if the Trust proceeds as described above, we believe that the concerns expressed in the quoted footnote will be ameliorated.

Conclusion

In view of the foregoing, on behalf of the Trust, we respectfully request the assurance of the Staff that it would not recommend that the Commission take any enforcement action under the 1933 Act or the 1940 Act if the Trust advertises historical performance information of other institutional accounts managed by GE Investments as described above.

Should the Staff have any questions or comments concerning this request, they should be directed to the undersigned, Burton M. Leibert or Maryann Canfield of this office at 212-821-8000.

Very truly yours,


Jon S. Rand

cc: Matthew J. Simpson, Esq.
Burton M. Leibert, Esq.
Maryann Canfield, Esq.