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SEC I: SEC Issues Guidance Regarding Prohibited Conduct in Connection with IPO Allocations

U.S. Securities and Exchange Commission, [Interpretation and Solicitation of Comment: Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations](#) (Apr. 7, 2005).

U.S. Securities and Exchange Commission, [SEC Issues Guidance Regarding Prohibited Conduct in Connection with IPO Allocations](#), News Release 2005-49 (Apr. 7, 2005).

The Commission issued for public comment an interpretive release on April 7 to

provide guidance regarding prohibited conduct by underwriters in connection with initial public offering allocations.

Reg M prohibits underwriters and others from bidding for, purchasing or attempting to induce any person from bidding for or purchasing an offered security during the restricted period as defined in that regulation. Generally, the restricted period commences 1 or 5 days before determination of an offering price and ends upon a person's completion of participation in the distribution.

According to the Commission's announcement of the new interpretive guidance:

"The guidance serves as a reminder that attempts to induce aftermarket purchases during a restricted period are prohibited by Regulation M. Attempts to induce aftermarket bids or purchases undermine the integrity of the market as an independent pricing mechanism and give prospective IPO purchasers the impression that there is a scarcity of the offered securities and the balance of their buying interest can only be satisfied in the aftermarket. Moreover, other investors who purchase shares in the aftermarket would not know that aftermarket demand had been stimulated by the underwriter's unlawful conduct. The guidance includes references to recent Commission enforcement cases alleging inducements in the offering process in violation of Regulation M."

The SEC's summary of topics dealt with in the interpretive guidance includes:

Inducements to purchase in the form of tie-in agreements or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.

Communicating to customers that expressing an interest in buying shares in the immediate aftermarket or immediate aftermarket buying would help them obtain allocations of hot IPOs.

Soliciting customers prior to the completion of the distribution regarding

whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.

Proposing aftermarket prices to customers or encouraging customers who provide aftermarket interest to increase the prices that they are willing to place orders in the immediate aftermarket.

Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.

Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.

Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.

SEC II: SEC Releases Agenda for April 13 Roundtable on Implementation of Internal Control Reporting Provisions

U.S. Securities and Exchange Commission, [Briefing Paper: Roundtable on Implementation of Internal Control Reporting Provisions](#) (Apr. 5, 2005).

U.S. Securities and Exchange Commission, [Spotlight On: Roundtable on Implementation of Internal Control Reporting Provisions](#) (Apr. 5, 2005).

U.S. Securities and Exchange Commission, [Commission Announces Roundtable on Internal Control Reporting Requirements](#) (Feb. 7, 2005).

U.S. Securities and Exchange Commission, [Commission Seeks Feedback and Announces Date of Roundtable on Implementation of Sarbanes-Oxley Internal Control Provisions](#) (Feb. 22, 2005).

The Commission will hold a "Roundtable on Implementation of Internal Control Reporting Provisions" on Wednesday, April 13, 2005, in the William Douglas Room at Commission headquarters, 450 Fifth Street, N.W., Washington, D.C., beginning at 9 a.m. The Roundtable is open to the public on a first come, first served basis. The Commission also will make the Roundtable available by audio/video Webcast.

On April 5 the Commission released the final agenda for the Roundtable. The Roundtable will involve six panels dealing with six broad issues involving the following topics:

The First Year - Now that a significant group of companies has completed the first Section 404 process, the Commission seeks input to permit it to assess the impact of the Commission's rules and AS No. 2 on companies and on their internal controls and financial reporting. The Commission also seeks input on the impact of implementation of the internal control assessment, reporting and auditing requirements.

Reporting to the Public - The Commission is seeking input on whether management's and the auditor's reports have generally been useful to the various users of a company's financial statements. The Commission is also seeking input regarding what improvements in reporting or disclosure could be made in this area.

Planning and Design - The Commission would like input on the process of planning and design to determine the scope of companies' controls as well as the scope of the review of those controls, including the extent to which registrants and auditors have used professional judgment in designing the scope of internal control and the review required under the Commission's rules and AS No. 2.

Documentation and Testing - The Commission hopes for input about the level of documentation and testing that was performed by management and the outside auditor in completing their respective assessments of internal control over financial reporting.

Using Judgment in Communications and Conclusions - The Commission is seeking input about the level of professional judgment used in these areas by management, the audit committee and the auditor in their communications as well as in reaching conclusions about internal control over financial reporting.

Next Steps - The Commission is interested in learning what lessons have been learned so far, whether subsequent years likely will require a different level of effort by management and/or the auditor than the first year, what steps may be taken by the Commission and/or the PCAOB to improve the process, and what advice should be given to smaller companies and foreign issuers as they plan for their first year of implementation.

SEC III: SEC Releases Staff Accounting Bulletin 107 Dealing with Accounting for Stock Options and Other Share-Based Payments

U.S. Securities and Exchange Commission, [Staff Accounting Bulletin No. 107](#) (Mar. 29, 2005).

U.S. Securities and Exchange Commission, [Office of Economic Analysis Memorandum: Economic Perspective on Employee Option Expensing - Valuation and Implementation of FAS 123\(R\)](#) (Mar. 18, 2005).

U.S. Securities and Exchange Commission, [SEC's Office of the Chief Accountant and Division of Corporation Finance Release Staff Accounting Bulletin 107](#), News Release No. 2005-43 (Mar. 29, 2005).

On March 29, the SEC's Office of the Chief Accountant and its Division of

Corporation Finance announced the release of Staff Accounting Bulletin No. 107 entitled "Share-Based Payment". It deals with the Financial Accounting Standard Board's accounting standard for stock options and other share-based payments (FASB Statement No. 123 (revised 2004) entitled "Share-Based Payment (Statement 123R)").

SAB No. 107 provides guidance related to share-based payment transactions with non-employees, the transition from nonpublic to public entity status, valuation methods (including assumptions such as expected volatility and expected term), the accounting for certain redeemable financial instruments issued under share-based payment arrangements, the classification of compensation expense, non-GAAP financial measures, first-time adoption of FASB Statement 123R in an interim period, capitalization of compensation cost related to share-based payment arrangements, the accounting for income tax effects of share-based payment arrangements upon adoption of Statement 123R, the modification of employee share options prior to adoption of Statement 123R and disclosures in Management's Discussion and Analysis subsequent to adoption of Statement 123R.

SEC IV: SEC Files Settled Reg FD Charges Against Flowserve Corporation, Its CEO and its Director of Business Relations

U.S. Securities and Exchange Commission, [In the Matter of Flowserve Corp., C. Scott Greer and Michael Conley, Order Instituting Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934](#) (Mar. 24, 2005).

U.S. Securities and Exchange Commission, [SEC Files Settled Regulation FD Charges Against Flowserve Corporation, Its CEO, and Director of Investor Relations; Flowserve Agrees to Pay \\$350,000 Penalty; CEO Agrees to Pay \\$50,000 Penalty](#), Litig. Rel. No. 19154 (Mar. 24, 2005).

U.S. Securities and Exchange Commission, [SEC Files Settled Regulation FD Charges Against Flowserve Corporation, Its Chief Executive Officer, and Director of Investor Relations](#), News Release 2005-41 (Mar. 24, 2005).

On March 24, the Commission filed settled Reg FD charges against Flowserve Corporation, its CEO (C. Scott Greer) and its Director of Investor Relations (Michael Conley). The Commission described the case as "the first Regulation FD case filed by the Commission involving a reaffirmation of earnings by an issuer and the first settled enforcement action against a Director of Investor Relations for violating this rule."

In its order, the Commission found that Flowserve began 2002 forecasting annual earnings per share in the range of \$1.90 to \$2.30. In July of that year, the company revised that estimate to \$1.70 to \$1.90 per share. On September 27, according to the SEC, the company lowered its earnings estimate to \$1.45 to \$1.55 per share, which the Company reaffirmed in its Form 10-Q filed on October 22, 2002. According to the Commission:

"On Nov. 19, 2002, forty-two days before the end of Flowserve's fiscal year, Greer, along with Conley, met privately in Irving, Texas with analysts. At that meeting, one of the analysts asked about the Company's earnings guidance for the year. Neither Conley nor Greer gave the response required by the Company's policy, i.e., that earnings guidance was effective at the date given and would not be updated until the Company publicly announced updated guidance. Conley did not caution Greer before Greer answered the analyst's questions. In fact, Conley remained altogether silent. Instead, in response to the question, Greer reaffirmed the previous public guidance, which had been issued on Oct. 22, 2002, and thus provided additional material nonpublic information.

On Nov. 20, 2002, an analyst who attended the meeting issued a report stating that Flowserve had reaffirmed its earnings guidance. The next day, on Nov. 21, Flowserve's closing stock price was approximately 6% higher than the closing price the day before. In addition, the trading volume of Flowserve's stock increased by 75%, from 379,500 shares traded on Nov. 20 to 658,300 shares traded on Nov. 21. After the market closed on Nov. 21, Flowserve furnished a Form 8-K to the Commission acknowledging that it had "reaffirmed its full year 2002 estimated earnings per share."

In an added twist, the Commission noted in its News Release regarding the action that "[i]n addition to the underlying conduct, the Commission considered the Respondents' lack of cooperation afforded the Commission staff. Specifically and inconsistent with the Form 8-K furnished by the Company, both Greer and Conley denied that a reaffirmation occurred at the private meeting with the analysts."

SEC V: SEC Issues Final Rule and Requests Additional Comment Regarding Mutual Fund Redemption Fees

U.S. Securities and Exchange Commission, [Final Rule and Request for Additional Comment: Mutual Fund Redemption Fees](#), Release No. IC-26782 (Mar. 11, 2005).

On March 11, the Commission issued a final rule release and request for additional comment regarding "Mutual Fund Redemption Fees." The new rule, effective May 23, 2005, allows open-end investment companies to impose a redemption fee (that cannot exceed two percent of the amount redeemed) to be retained by the fund. According to the Commission's release, the "redemption fee is intended to allow funds to recoup some of the direct and indirect costs incurred as a result of short-term trading strategies, such as market timing." The rule also requires most funds to enter into written agreements with

intermediaries including broker-dealers and retirement plan administrators that hold shares on behalf of other investors under which the intermediaries must agree to provide funds with certain shareholder identity and transaction information at the request of the fund and carry out certain instructions from the fund.

The Commission's release further provides that the Commission is also "requesting additional comment to obtain further views on whether it should establish uniform standards for redemption fees charged under the rule."

SRO I: NASD Recommends SEC Improve Point of Sale Disclosure by Requiring Online Disclosure of "Profile Plus"

NASD, [NASD Endorses Concise, Web-Based Point of Sale Mutual Fund Disclosure - "Profile Plus" Major Recommendation of NASD Mutual Fund Task Force to SEC](#) (Apr. 4, 2005).

On April 4, the NASD announced that it is recommending that the SEC "improve point of sale disclosure to mutual fund investors by mandating Internet disclosure of a new 'Profile Plus' - a two-page document providing basic information about a mutual fund, including its investment objectives, risks, performance, fees and expenses, and information about potential conflicts of interest."

The NASD made available via its Web site an example of a [hypothetical two-page "Profile Plus"](#) and has recommended to the Commission that every broker-dealer be required to post such a Profile Plus for each mutual fund it sells on the broker-dealer's Web site with hyperlinks to the fund's prospectus and to a dealer disclosure statement with more information about the broker-dealer's "potential conflicts of interest". According to the NASD, it has recommended that investors also be given the option of requesting paper delivery of the document.

The NASD's recommendation arises from the recent release of the ["Report of the Mutual Fund Task Force: Mutual Fund Distribution"](#). The Task Force's recommendations recently were endorsed in a [letter to the SEC from Robert R. Glauber, Chairman and CEO of the NASD dated March 31, 2005](#).

PCAOB I: PCAOB Votes To Propose Auditing Standard on Reporting on the Elimination of a Material Weakness

Public Company Accounting Oversight Board, [Proposed Auditing Standard - Reporting on the Elimination of a Material Weakness](#), PCAOB Release No. 2005-002 (Mar. 31, 2005).

Public Company Accounting Oversight Board, [Briefing Paper: Proposed Auditing Standard on Reporting on the Elimination of a Material Weakness](#) (Mar. 31, 2005).

Public Company Accounting Oversight Board,
http://www.pcaobus.org/News_and_Events/News/2005/03-31.asp
(Mar. 31, 2005).

On March 31, the PCAOB voted unanimously to propose for public comment a standard that would apply when auditors report on the elimination of material weakness in a company's internal control over financial reporting. The PCAOB's proposal reportedly was prompted by companies that suggested that where investor confidence had been adversely impacted due to a company's disclosure of a material weakness, once that weakness was removed companies wanted the "ability to bolster confidence in management's assertions about those internal control improvements with the added assurance of the company's independent auditor." Consequently, the PCAOB proposed a standard for auditors to provide such an assurance when, in the company's judgment, such assurance would be appropriate.

According to the PCAOB's announcement:

"The proposed standard would establish a stand-alone engagement that is entirely voluntary, performed only at the request of the company. Providing a specific standard governing such auditor

reporting will facilitate implementation of the requirements of Section 404 of the Act and provide for additional assurance regarding the reliability of public company financial reporting."

The comment period on the proposed auditing standard will close on May 16.

PRACTICAL GUIDANCE: Including XBRL and Announcement of Spring Series of SEC 'Hot Topics' Seminars

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:

Corporate Law Bulletin: SEC Enforcement Action against Flowserve Corporation from Morrison & Foerster. (04/05/05)	Majority Vote to Elect Directors from Wachtell, Lipton, Rosen & Katz. (03/14/05)
Ninth Circuit Revisits Sarbanes-Oxley Act Provision for Escrow of Extraordinary Payments in Connection with Investigation of Possible Securities Fraud from Wachtell, Lipton, Rosen & Katz. (04/04/05)	Securities Law Update: NI 51-102 New Continuous Disclosure Filing Obligations - March 2005 from Stikeman Elliott LLP. (03/10/05)
Securities Law Advisory: Recent SEC Enforcement Action Renews Emphasis on Regulation FD from Alston & Bird LLP. (03/29/05)	SecMail: Net Capital Deduction for Stock Borrow Transactions from Fried, Frank, Harris, Shriver & Jacobson LLP. (03/09/05)
Securities Litigation: Ninth Circuit Defines SEC Power to Obtain Pre-Litigation Freeze of "Extraordinary Payments" to Executives from Morrison and Foerster LLP. (03/29/05)	Securities Law Update: Canadian Securities Administrators Proposes New Rules for Internal Control Reporting from Stikeman Elliott LLP. (03/09/05)
SEC Issues Final Rule Regarding Voluntary Redemption Fees from Alston & Bird LLP. (03/24/05)	SEC Issues Section 21(a) Report Challenging Merger Proxy Disclosure of "Naked" Merger Agreement Representations from Wachtell, Lipton, Rosen & Katz. (03/07/05)
No Substitute for Good Judgment from Wachtell, Lipton, Rosen & Katz. (03/24/05)	Securities and Exchange Commission Adopts Voluntary Redemption Fee Rule from Alston & Bird LLP. (03/04/05)
Corporate and Securities Bulletin: Underwriters' Due Diligence Obligations In The Wake Of In Re WorldCom from	Recent Developments on Disclosure of Executive Compensation and Perquisites from Morrison and Foerster LLP. (03/04/05)

Thacher Proffitt & Wood LLP. (03/16/05)	
Legislative Update: The Class Action Fairness Act of 2005 from Mayer, Brown, Rowe & Maw LLP. (03/14/05)	Acquisition Agreements as SEC Disclosure Documents from Dechert LLP. (03/03/05)

On April 4, the SEC began accepting XBRL submissions. For the reasons, I'm please to tell you:

Revised and updated FAQs regarding XBRL are available on our [FAQ page](#) if you click on the XBRL link.

RR Donnelley, who makes RealCorporateLawyer possible, furnished financials to the SEC in the XBRL moments after the start of the new SEC program, demonstrating the company's continued leadership in the XBRL initiative (http://www.rrd.com/wwwrrd/news/2005/2005_04_04.asp).

Please don't forget the upcoming, free Spring 2005 SEC "Hot Topics" Seminar where you will hear from SEC officials, corporate counsel, law firm partners, finance professionals and accounting experts on the hottest SEC topics of the day. The complimentary seminar, for which CLE/CPE credit is available, will be held in Houston (May 17), Washington, D.C. (May 19), Seattle (June 7), San Diego (June 9) and Philadelphia (June 16). For more information, please visit the [seminar home page](#) and review the [registration page](#), the [program overview page](#), the [program agenda](#), and the [faculty list](#).

Remember as well that RealCorporateLawyer.com makes searchable collections of the presentation materials used at its complimentary programs available online. For example, the transcript for the recent [SEC "Hot Topics" Seminar \(Fall 2004\)](#) is available. The conference was a FREE full day briefing presented by RR Donnelley and Glasser LegalWorks. Other recent transcripts are available on the "[Programs](#)" page. For example, 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](#).

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

On April 1, the SEC announced that **Meyer Eisenberg** has been named Acting Director of the Commission's Division of Investment Management. Since 1998,

Mr. Eisenberg has served as Deputy General Counsel responsible for issues arising under the Investment Company Act and Investment Advisers Act. *See* U.S. Securities and Exchange Commission, [SEC Names Meyer Eisenberg Acting Director of Division of Investment Management](#) (Apr. 1, 2005).

On March 30, the SEC named **Scott W. Friestad** Associate Director of the Commission's Division of Enforcement. Since July 2000, he had served as an Assistant Director in the same Division. *See* U.S. Securities and Exchange Commission, [Scott Friestad Named Associate Director of SEC's Division of Enforcement](#) (Mar. 30, 2005).

The Commission's Office of the Chief Accountant announced on March 29 that **Cheryl Linthicum**, **Mark Taylor** and **Teri Yohn** have been named Academic Accounting Fellows for one-year terms that being in August 2005. Cheryl Linthicum is an Associate Professor of Accounting at the University of Texas at San Antonio. Mark Taylor is the holder of the John P. Begley Endowed Chair in Accounting at Creighton University in Omaha, Nebraska. Teri Yohn is an Associate Professor at Georgetown University where she has taught since receiving her PhD from Indiana University in 1991. *See* U.S. Securities and Exchange Commission, [Cheryl Linthicum, Mark Taylor and Teri Yohn Named Academic Accounting Fellows in SEC Office of the Chief Accountant](#) (Mar. 29, 2005).

On March 16, the SEC announced that U. S. District Court Judge **I. Leo Glasser** has issued an order appointing attorney **Lee S. Richards** to act as Independent Examiner for Computer Associates International Inc. in compliance with the Final Judgment entered in the Commission's civil action against the company. Mr. Richards will serve as Independent Examiner for at least eighteen months. *See* U.S. Securities and Exchange Commission, [Court Appoints Attorney Lee S. Richards Independent Examiner for Computer Associates International, Inc.](#) (Mar. 16, 2005).

What Are the Commissioners Saying? SEC Chairman **William Donaldson** delivered an opening [statement regarding Regulation NMS](#) during the SEC's

April 6 open meeting and also delivered a [statement regarding the Broker-Dealer Rule](#) during the same meeting. Commissioner **Paul S. Atkins** delivered the [Charles Hamilton Houston Lecture](#) at Harvard Law School on April 4. SEC Chairman Donaldson delivered "[Remarks Before the Financial Services Roundtable](#)" on April 1, 2005. Commissioner **Cynthia A. Glassman** delivered "[Remarks Before the Redefining Investment Strategy Education \('RISE'\) Symposium Corporate Governance Panel](#)" on March 30. Commissioner Glassman also delivered remarks regarding "[EU-US Dialogue on Financial Market Regulation - A US Perspective](#)" at the Annual Washington Conference of the Institute of International Bankers on March 14. SEC Chairman Donaldson gave "[Remarks Before the Directors Education Institute](#)" on March 16 and, on March 14, gave a [speech before the Mutual Fund and Investment Management Conference](#). Commissioner Atkins delivered "[Remarks Before the Boston Securities Traders Association](#)" on March 9.

What Are the Commission Staffers Saying? It was a quiet month for SEC Staffers. The SEC's Director of the Division of Enforcement, **Stephen M. Cutler**, delivered "[Remarks Before the Directors' Education Institute at Duke University: Staying the Course](#)" on March 18.

Input, Please

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