

SEC Maintains Its Focus on Perk Disclosures

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The SEC has shown its willingness to continue to take companies to task for not disclosing perquisites and personal benefits to executive officers in a manner that is consistent with the SEC's expectations. Unfortunately, the SEC's standard is often challenging to put into practice.

Companies should be cautious when analyzing potential perks related to the COVID-19 pandemic.

On September 21, 2020, the SEC staff released [Compliance & Disclosure Interpretation Section 219.05](#), which acknowledges that “an item considered a perquisite or personal benefit when provided in the past may not be considered as such when provided as a result of COVID-19.” According to this Staff interpretation, “enhanced technology” to improve an executive’s home workspace when stay-at-home orders were implemented would generally not be a perk. “New health-related or personal transportation benefits” provided during the pandemic, however, may be perks if they do not meet the SEC’s standard described below. This guidance addresses specific types of items that may be provided more often to executives during the pandemic, but does not change the overall analysis for what is a perquisite or personal benefit.

The SEC continues to scrutinize disclosures relating to perks.

Given this continued scrutiny, U.S. public companies should be mindful of their practices for tracking, reviewing and disclosing all elements of executive compensation. Because SEC enforcement activity often looks to the company’s internal controls and procedures, taking these steps can help reduce the risk of potential SEC investigation.

As an example of the SEC’s focus on this matter, the SEC recently instituted proceedings against one hospitality company for allegedly failing to disclose perquisites and personal benefits provided to executive officers. Although the company disclosed perks as “All Other Compensation” in its Summary Compensation Tables for the relevant years, according to the [SEC’s order](#), there were additional travel-related perks with a value of approximately \$1.7 million, including expenses associated with the personal use of corporate aircraft and hotel stays and related taxes.

The action was generated by the SEC’s use of “risk-based data analytics” to uncover potential violations relating to perks, and the SEC has indicated that it will continue to use these analytics to identify companies that do not comply with the executive compensation disclosure rules. The SEC has focused on using data analytics to identify statistical outliers and anomalies to generate investigative leads that are potentially stronger than the normal mix of complaints and referrals that it receives.

This action is the latest in a series of SEC enforcement activity involving executive perks. Before this order:¹

- In June 2020, the SEC settled with an insurance underwriter for alleged failure to disclose more than \$5.3 million in perks. The settlement and perks, which we describe in our [memorandum](#), included personal use of corporate aircraft and automobiles, housing costs, helicopter trips, personal travel, family member car service use, club and concierge services, sporting and other entertainment event fees and watercraft-related costs.
- In July 2018, the [SEC brought a case](#) against the former CEO of an oil and gas company for allegedly hiding personal loans obtained from company vendors and a board candidate and frequently submitting expenses for personal items, including social events, travel, donations to charities and a well-stocked office bar.
- Our [client memorandum](#) earlier in July 2018 describes an SEC settlement with a chemical company, which agreed to pay a \$1.75 million fine and retain an independent consultant to review its policies covering the characterization and disclosure of expense reimbursements and other payments. The perks involved included the use of company aircraft for personal purposes, club memberships and use of personal assistant time.

In its most recent order, the SEC restated its standard for analyzing potential perks — a standard that can be difficult to operationalize in practice.

The SEC's order reiterates the standard for determining a perquisite or personal benefit as set forth in the [adopting release](#) to the SEC's 2006 amendments to Item 402 of Regulation S-K regarding executive compensation disclosure.

- An item is not a perquisite or personal benefit and does not need to be reported "if it is integrally and directly related to the performance of the executive's duties."
- An item is a perquisite or personal benefit and does need to be reported "if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees."²

Notwithstanding the SEC's clear-cut view, this standard can be challenging to put into practice. Companies might consider applying the so-called "Wall Street Journal standard". Would it be embarrassing to read on the front page of a major newspaper that the company had provided the item or reimbursed an executive for the item? If so, the company might consider the item a perk and disclose it as such.

¹ In addition to the SEC's scrutiny of executive perks, the SEC has also recently shown an emphasis on executive compensation disclosure more broadly. In September 2019, the [SEC resolved its claims](#) with an automobile manufacturer relating to the manufacturer's alleged failure to disclose more than \$90 million of compensation paid to its former CEO.

² The SEC's order goes on to quote additional guidance set forth in the SEC's adopting release:

"The concept of a benefit that is 'integrally and directly related' to job performance is a narrow one," which "draws a critical distinction between an item that a company provides because the executive needs it to do the job, making it integrally and directly related to the performance of duties, and an item provided for some other reason, even where that other reason can involve both company benefit and personal benefit."

Even where the company "has determined that an expense is an 'ordinary' or 'necessary' business expense for tax or other purposes or that an expense is for the benefit or convenience of the company," that determination "is not responsive to the inquiry as to whether the expense provides a perquisite or other personal benefit for disclosure purposes."

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