

## Inadequate Perk Disclosure Remains in SEC's Sights

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### A \$900,000 fine is a reminder for companies to use care in tracking and disclosing all elements of executive compensation.

Between 2015 and 2019, Argo Group International Holding, Ltd. reported some \$1.2 million in perks and similar personal benefits paid to its former CEO, including retirement contributions, insurance, housing and home leave allowances, medical premiums, and financial planning services. But according to the SEC's [June 4 settled order](#), Argo failed to disclose four times that amount of other perks—more than \$5.3 million—including “personal use of corporate aircraft, rent and other housing costs, personal use of corporate automobiles, helicopter trips, other personal travel costs, use of a car service by family members, club and concierge service memberships, tickets and transportation to sporting, fashion and other entertainment events, personal services provided by Argo employees, and watercraft-related costs.”<sup>1</sup> The SEC also concluded that Argo failed to maintain internal controls to ensure that transactions were properly recorded as compensation rather than as business expenses. The company's weaknesses included:

- providing expense reimbursement to the CEO without requiring an adequate explanation of a business purpose;
- allowing the CEO to approve his own expense reimbursements; and
- failing to implement any mechanism to ensure the CEO paid for his personal use of corporate aircraft.

The CEO's use of corporate perks—including undisclosed use of Argo's corporate aircraft—was also the subject of a widely-reported proxy contest in the spring of 2019 involving an activist shareholder who criticized what it deemed to be lavish spending of corporate assets.

The order recognizes that Argo undertook significant remedial efforts prior to settling the SEC's enforcement action, including launching an internal investigation, revising its executive compensation policies and implementing enhanced internal controls. The SEC also noted that the company replaced the CEO, entered in an agreement to obtain reimbursement from him, changed the composition of its board, and shared the results of its internal investigation with the SEC staff.

The case against Argo is the latest in a series of SEC enforcement actions involving executive perks.

- As we discussed in an [earlier client alert](#), in July 2018 the SEC resolved similar claims with The Dow 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.
- Later the same month, [the SEC brought a case](#) against the former CEO of Energy XXI, Ltd., alleging that in addition to hiding personal loans obtained from company vendors and a board candidate, he habitually submitted business expenses for payment that he should have known were personal in nature. These expenses included lavish social events, travel, donations to charities, and an office bar stocked with liquor and cigars. The former CEO consented to a \$180,000 fine and a five-year ban on serving as a director or officer of a public company.
- In September 2019, the [SEC resolved claims](#) relating to Nissan's failures to disclose more than \$90 million of compensation to be paid to its former CEO in retirement. According to the SEC, the

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<sup>1</sup> A detailed list of perks can be found in Argo's 2020 proxy statement. See [2019 Summary Compensation Table, pp. 54-55](#).

former CEO and a former director concealed this compensation by entering into secret contracts, backdating letters, and changing the calculation of the pension allowance. The company agreed to pay a \$15 million fine, the former CEO agreed to a \$1 million fine and a 10-year officer and director bar, and the former director agreed to a \$100,000 fine, a five-year officer and director bar, and a five-year suspension from practicing as an attorney before the SEC.

As the SEC reiterated in The Dow Chemical Company [order](#), its standard for determining whether an item is a perk is as follows:

- “An item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive’s duties.”
- “Otherwise an item is a perquisite or personal benefit 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.”

As we said in our [prior client alert](#), this standard is not easy for companies to operationalize, and it is a matter about which reasonable people can sometimes disagree. An alternative approach is the so-called “Wall Street Journal” standard—that is, whether it would be embarrassing to read on the front page of a major newspaper that the company had provided an item or reimbursed an executive for an item. If so, the item is likely a perk and should be treated as such for disclosure purposes.

The SEC remains focused on undisclosed perks, including claims against individual executives. These cases are a reminder that the SEC will enforce its rules in sensitive areas such as perks even when the relevant information is unlikely to be material to the company’s results or financial condition, or even to a reasonable investor. A critical aspect of SEC compliance is carefully tracking, reviewing and disclosing all components of executive compensation, including reimbursements of personal expenses. Taking these steps can reduce the risk of incomplete disclosures regarding executive compensation and perks, and avoid the significant expense, distraction, and potential reputational impact of an enforcement investigation.

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