

KEEP TRACK OF PERQUISITES AND RELATED PERSON TRANSACTIONS: RECENT SEC ENFORCEMENT ACTIONS

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Over the past few years, the SEC has renewed its focus on public company failures to disclose perquisites and related person transactions. As discussed under “Deeper Dive” below, most of the cases involve companies that failed to adopt appropriate controls or policies to identify or track such matters – providing cautionary tales of inattention for public companies. Many of the enforcement actions resulted in significant financial penalties and, in some cases, the retention of independent consultants to review policies, procedures, controls and training relating to reporting and disclosure.

According to the SEC, an item is not a perk or personal benefit if it is integrally and directly related to the performance of an 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.

TAKEAWAYS

Companies should review their internal and disclosure controls and policies and procedures to make sure they address:

- The use of corporate-owned or charter aircraft, including proper accounting for any personal use
- The identification, valuation, documentation and tracking of other perquisites
- The identification, documentation and tracking of related person transactions, including procedures to identify relevant covered persons, such as relatives of directors and executive officers and their respective businesses
- Training of staff in the scope, definition and valuation of perquisites and related person transactions

Other recommended practices companies may consider include:

- Adding or expanding perquisite questions in annual D&O Questionnaires
- Coordinating with the Compensation Committee and HR department to establish and enforce policies and procedures for approving perquisites
- Coordinating with the HR or Executive Compensation departments to document and track perquisites

DEEPER DIVE

Some of the notable cases include:

- **Stanley Black & Decker** (June 2023) – in filings for 2017 through 2020, the company failed to disclose at least \$1.3 million in perquisites for four NEOs and one director, largely related to personal use of corporate aircraft. The proxy statements listed zero dollars attributable to the officers' and director's use of corporate aircraft, understating "All Other Compensation" by an average of \$325,000 per individual, or a total of \$647,000 in the case of **Jeffrey D. Ansell**, former EVP (including \$280,000 in improper reimbursements for personal expenses) . After learning of the issue, a Special Committee conducted an internal investigation and self-reported to and shared information and results with the SEC staff. The company implemented remedial measures and described the undisclosed perquisites in its next 10-K. As a result, although the company and Mr. Ansell both agreed to cease and desist orders, only the EVP paid a civil penalty (\$75,000).
- **The Greenbrier Companies, Inc.** (March 2023) – in filings for 2017 through 2020, the company failed to disclose approximately \$320,000 in perquisites to the founder and former CEO, **William A. Furman**, consisting of use of a company car, financial advisors, and club dues, and certain other Greenbrier NEOs for travel-related expenses for Furman's and such other NEOs' spouses (to attend customer and industry receptions and other functions), and for personal security. And in filings for 2017 through 2021, although it disclosed that it had chartered private aircraft owned by Furman and managed by a third party, the company failed to disclose that Furman received approximately \$1.6 million of the approximately \$3 million paid. The company lacked adequate accounting controls and policies regarding approval and use of private aircraft and other perquisites.

In response to the SEC investigation, the company developed new internal controls over perquisite and other proxy disclosures, expense reporting, and travel and trained NEOs and employees on expense report completion and the D&O Questionnaire. The company and former CEO agreed to cease and desist orders and paid civil penalties of \$1 million and

\$100,000, respectively.

- **ProPetro Holding Corp. and Dale Redman, CEO** (November 2021) – in filings for 2018 and 2019, the company and its co-founder and former CEO failed to disclose certain perquisites and stock pledges, including (1) approximately \$250,000 in charges relating to personal travel on his aircraft; (2) use of company credit cards to charge \$125,000 in personal expenses in violation of company policy; (3) approximately \$50,000 in other undisclosed perquisites (charitable donations and event tickets) and (4) pledges of his company stock in two real estate transactions in violation of the company's shareholder agreement and insider trading policy. The company did not have policies regarding approval and use of or reimbursement for private aircraft.

In May 2019, the Audit Committee conducted an internal investigation on unrelated matters which revealed the improper expense reimbursements and undisclosed stock pledges. The company filed an 8-K disclosing such matters and took remedial actions, including replacing the management team, appointing new directors, creating a disclosure committee with its own counsel, developing new internal controls regarding internal auditing matters, credit card and expense reimbursement, and travel, establishing a training program for employees, among other things. As a result, although the company and the former CEO both agreed to cease and desist orders, only the CEO paid a civil penalty (\$195,000).

- **National Beverage Corp.** (August 2021) – in filings for 2016 through 2020, the company failed to disclose executive perquisites related to the use by the CEO of charter flights and an aircraft jointly owned by the company and the CEO. The company had disclosed that it did not provide any perquisites to NEOs other than a car allowance. However, the CEO took a number of foreign and domestic trips resulting in an understatement of his other compensation by approximately \$730,000. The company failed to track or analyse flights or train employees in key roles and otherwise lacked controls or procedures in place to identify and analyze potential perquisites for disclosure and did not train employees responsible for disclosure.

The company agreed to a cease and desist order and paid a civil penalty of approximately \$480,000.

- **Gulfport Energy Corp.** (February 2021) – in filings for 2014 through the CEO's resignation in 2018, the company and he failed to disclose certain perquisites, including \$650,000 in aircraft charter expenses and significant interest-free credit card advances involving balances of hundreds of thousands dollars. The company also failed to disclose related person transactions involving \$152,000 in landscaping services provided by his son's company, of

which the CEO paid \$32,000 personally in order to reduce the total below the \$120,000 threshold, as well as the credit card advances. As the company did not have any internal policies relating to chartered aircraft, the company did not review the CEO's usage to determine if it involved perquisites or personal expenses, and no one reviewed individual flights to determine the flight purpose. Similarly, the CEO did not identify the flights in his D&O questionnaire relating to perquisites.

Following an internal investigation by the Audit Committee, the company took remedial actions: the CEO resigned and the board replaced the CFO, controller, GC, internal audit director and external disclosure counsel, and adopted a number of aircraft, travel and expense policies and implemented new proxy and related person tracking procedures, among other things. As a result, although the company and the former CEO, Michael G. Moore, both agreed to cease and desist orders, only the former CEO paid a civil penalty (\$88,000).

- RCI Hospitality Holdings, Inc., Eric S. Langan (CEO) and Phillip K. Marshall (CFO) (September 2020) – in filings for 2014 through 2019, the company failed to disclose \$615,000 in perquisites, including the personal use of company aircraft and vehicles, reimbursement for personal commercial airline flights, the company's charitable contributions to a school attended by two of the CEO's children, the cost of providing housing and a meals allowance to the CFO, and compensation paid to the CEO's girlfriend for incidental "personal services". The company failed to maintain any policies or procedures concerning use of company aircraft or other perquisites and disclosed that it did not provide "significant perquisites" to NEOs except for company-provided cars.

In addition, the company failed to disclose a number of related party transactions, including contracting with businesses owned by the CEO's father (\$175,000) and brother (\$320,000), convertible loans made by a director's brother (\$750,000; 75,000 shares), and employment compensation paid to the brother. It failed to maintain accounting controls to track such transactions.

The company took remedial actions: engaging outside counsel to conduct an independent investigation (which was shared with the SEC); engaging a consultant to assist in reviewing and revising its executive compensation process, policies and controls; and implementing new internal controls and policies and procedures for perquisites, aircraft usage, expense reimbursement, travel, and charitable contributions, related party transactions, and family employment. The company, the CEO and the CFO agreed to cease and desist orders and paid civil penalties of \$400,000, \$200,000 and \$35,000, respectively.

- [Argo Group International Holdings, Ltd.](#) (June 2020) – in filings for 2014 through 2018, the company failed to disclose over \$5.3 million to its then CEO in the form of a wide range of perquisites, including expenses associated with 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 or other entertainment events, personal services provided by Argo employees, and watercraft-related costs.

Following receipt of an SEC subpoena in mid-2019, the company conducted an internal investigation and in late 2019, the CEO resigned and agreed to reimburse Argo for certain perquisites and personal expenses. In addition, the company took remedial actions including: sharing the results of the investigation with the SEC; engaging a consultant to assist in reviewing and revising its executive compensation process, policies and controls; replacing its CEO; entering into an agreement to obtain repayments from the former CEO; implementing new internal controls and compliance policies and procedures concerning perquisites, airplane usage, expense reimbursement, travel, and charitable contributions; and changing the composition of its board of directors. The company agreed to a cease and desist order and paid a civil penalty of \$900,000.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



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