

Client Alert

A report
for clients
and friends
of the firm

February 2006

SEC Rule Proposals Include Interpretive Guidance Regarding Perquisites and Other Personal Benefits Effective for this Proxy Season

The Securities and Exchange Commission has provided interpretive guidance, applicable for this proxy season, about what company-provided items should be disclosed as perquisites or other personal benefits.

On January 27, 2006, the SEC issued proposals to amend the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors under the Securities Act of 1933 and the Securities Exchange Act of 1934 (Rel. 33-8655). The proposing release includes SEC interpretive guidance with respect to disclosure of perquisites and other personal benefits under Item 402 of Regulation S-K of the '33 Act.

Interpretive Guidance

How to determine which company-provided items are perquisites or personal benefits. A company-provided item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties. In contrast, a company-provided item is a perquisite or personal benefit if it confers a direct or indirect benefit that has a personal aspect to the executive, unless it is generally available on a non-discriminatory basis to all employees.

Business purpose is not determinative. Business purpose or convenience does not affect the characterization of an item as a perquisite or personal benefit where it is not integrally and directly related to job performance. For example, a company's decision to provide an item of personal benefit for security purposes does not affect whether an item constitutes a perquisite or personal benefit. As such, a company policy that, for security purposes, an executive must use company aircraft for personal travel or company-provided property for vacations does not affect whether the item is a perquisite or personal benefit.

The following chart provides a summary of some examples from the proposing release of company-provided items that:

- are not perquisites or personal benefits as long as they are integrally and directly related to job performance; and
- are perquisites or personal benefits if they are not integrally and directly related to job performance

Type of company-provided item	Not perquisites or personal benefits	Perquisites or personal benefits
Transportation	Travel to and from business meetings and other business travel	Personal travel using vehicles owned or leased by the company or otherwise financed by the company
		Commuter transportation services or commuting expenses
		Aircraft, yachts or other watercraft
Security	Security provided during business travel	Security provided during personal travel or at a personal residence
Entertainment	Business entertainment and itemized expense accounts limited to business purposes	Club memberships not used exclusively for business entertainment purposes
Services	Additional clerical or secretarial services devoted to company matters	Additional clerical or secretarial services devoted to personal matters
		Personal financial or tax advice
		Investment management services
Facilities	Office space at a company business location, even if it is larger than that of other employees	Housing and other living expenses ¹
	Reserved parking space that is closer to business facilities but not otherwise preferential	Personal use of other property owned or leased by the company
Other		Discounts on the company's products or services ²

Related Proposals not Currently in Effect

Best practices. As set forth above, the SEC's interpretive guidance on what items should be disclosed as perquisites and personal benefits is applicable to this proxy season. Related proposals, not currently in effect, regarding perquisites and other personal benefits represent best practices for this proxy season. Under the proposals, perquisites and other personal benefits would be disclosed for both named executive officers and directors.

Thresholds. Under the proposals not currently in effect, perquisites and other personal benefits would be included in the "All Other Compensation" column of a revised Summary Compensation Table.³ The proposals would eliminate the current minimum reporting threshold of \$50,000 or 10% of the total of annual salary and bonus.⁴ Unless the aggregate value of perquisites and personal benefits was less than \$10,000, the particular nature⁵ of any perquisite or other personal benefit would be identified in footnote disclosure. If the value of the perquisite or personal benefit was valued at the greater of \$25,000 or 10% of total perquisites and other personal benefits, that value would be quantified in footnote disclosure.

Valuation. The proposals would retain the current standard for valuing perquisites or personal benefits based on the aggregate incremental cost to the company and its subsidiaries. The proposing release clarifies that the amount attributed for federal income tax purposes is not the current or proposed proper valuation, unless such amount equals the incremental cost.

Request for Comment

The SEC requests comment on several questions about the proposals regarding disclosure of perquisites or personal benefits, including among others:

- Whether \$10,000 is the proper minimum reporting threshold;
- Whether, as proposed, all perquisites should be separately identified when the \$10,000 aggregate threshold is exceeded;
- Whether the standard for valuing perquisites and other personal benefits should be changed from aggregate incremental cost to the company to the retail value of what is received;
- Whether Item 402 of Regulation S-K should include a definition of perquisites or other personal benefits;

- Whether there are any areas regarding perquisites and other personal benefits where the SEC should consider providing further interpretive advice; and
- Whether the SEC should codify its interpretive advice.

Conclusion

The comment period on the proposals will continue until April 10, 2006. The SEC staff has indicated that it hopes to adopt final rules in time for next year's proxy season. While we expect the proposals regarding perquisites and other personal benefits to be adopted substantially as proposed, their final form cannot be predicted. In that context, this client alert is a brief summary of the currently applicable interpretive guidance for this proxy season on what company-provided items constitute perquisites or other personal benefits, and the related proposals.

-
- ¹ Including but not limited to relocation assistance and payments for the executive or director to stay at his or her personal residence.
 - ² If they are not generally available to employees on a non-discriminatory basis.
 - ³ Director compensation of perquisites and personal benefits would appear in the "All Other Compensation" column of a proposed Director Compensation Table. Proposed Item 402(l) of Regulation S-K. See Proposing Release at page 88.
 - ⁴ Current Item 402(b)(2)(iii)(C)(1) of Regulation S-K. Note that there is no current minimum reporting threshold for perquisite or personal benefits compensation to directors under current Item 402(g) of Regulation S-K.
 - ⁵ For example, it would be insufficient to identify perquisites of clothing, jewelry, artwork, theater tickets and housekeeping services as "travel and entertainment." Proposing Release at page 45.

NEW YORK • LOS ANGELES • WASHINGTON
BOSTON • BOCA RATON • NEWARK
NEW ORLEANS • PARIS

Proskauer Rose LLP's Capital Markets Practice Group has extensive experience in all types of capital markets transactions, including both registered and exempt transactions. We represent domestic and foreign private issuers and underwriters in registered transactions and exempt Rule 144A, Regulation S and Regulation D transactions. We provide the full range of services required by our domestic and international clients to facilitate initial public offerings, follow-on offerings, investment-grade, convertible and high-yield debt offerings, and real estate securities transactions.

Proskauer Rose LLP's Executive Compensation Practice forms a significant part of the Firm's Employee Benefits and Executive Compensation Law Practice Group. The practice addresses the full spectrum of compensation issues.

For more information contact:

Julie M. Allen

212.969.3155 – jallen@proskauer.com

Ira G. Bogner

212.969.3947 – ibogner@proskauer.com

Robyn Manos

202.416.6816 – rmanos@proskauer.com

Andrea S. Rattner

212.969.3812 – arattner@proskauer.com

Richard H. Rowe

202.416.6820 – rrowe@proskauer.com

Michael S. Sirkin

212.969.3840 – msirkin@proskauer.com

Allan R. Williams

212.969.3220 – awilliams@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2006 PROSKAUER ROSE LLP. All rights reserved.

You can also visit our Website at www.proskauer.com