

SEC Continues to Scrutinize Disclosure of Perks and Personal Benefits

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Over the past few months, the Securities and Exchange Commission (the “SEC”) has imposed civil penalties in the hundreds of thousands of dollars against multiple publicly traded corporations in connection with their failure to disclose certain perquisites and personal benefits provided to senior executive officers, including travel, lodging and entertainment fringes and expenses.

These enforcement actions are the latest indication that the SEC is closely reviewing disclosure of perks and personal benefits, with a focus on companies identified as noncompliant through the SEC’s use of risk-based analytics. Under SEC proxy disclosure regulations for executive compensation under Item 402 of Regulation S-K under the 1933 Securities Act (“Item 402”), any item that provides a direct or indirect benefit that has a personal aspect is considered to be a perk, unless that benefit is “integrally and directly related to the performance of the [individual’s] duties,” or the benefit is provided to all employees on a non-discriminatory basis. Item 402 requires disclosure of perks in excess of \$10,000 in the aggregate. Any individual perk exceeding the greater of \$25,000 or 10% of the total amount of perks must be quantified and disclosed in a footnote to the summary compensation table.

In addition to increased regulatory scrutiny, the Tax Cuts and Jobs Act (the “TCJA”) limited the ability of employers to deduct the costs associated with providing certain fringe benefits related to transportation, moving expenses, employer-provided meals and entertainment, and employee achievement awards through year-end 2025.

In order to simplify their reporting obligations, avoid the heightened perquisite disclosure required by Item 402 and maximize deductibility of executive pay, employers may choose to eliminate company-provided perquisites and increase regular cash compensation, such as salary or wages. For tax purposes, cash generally will be taxable to the employee as ordinary income and would be deductible by the employer as an ordinary and necessary business expense, as long as that compensation is reasonable. Nonetheless, corporations may be required to discuss any shift from perquisites to cash in its narrative disclosures, including its Compensation Discussion and Analysis, or “CD&A.” In addition, employers should make sure to consider the effect any proposed salary increase may have on other compensation components – for example, annual bonuses, incentive awards and severance that are based on a multiple or percentage of salary – as well as for purposes of employer contributions to and discrimination testing with respect to 401(k) plans.

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