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Executive Use of Corporate Aircraft: Navigating Tax, SEC Disclosure and Other Key Considerations

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Companies are increasingly allowing their chief executive officers and, in certain circumstances, other executives to use corporate jets (which may be chartered flights or fractionally or fully owned aircraft) for personal use due to various reasons. Although this benefit may be a relatively small percentage of an executive's overall compensation package, it is still likely significant to the executive and may assist companies in attracting and retaining top talent. Further, commercial travel can pose security risks for high-profile executives; some companies permit these executives to use corporate jets due to safety and privacy concerns. Lastly, flying private may allow executives to save time and work more productively while traveling. For example, while traveling for personal reasons, executives may be able to conduct meetings and attend to any pressing business matters that arise mid-flight.

Despite these benefits, executive use of corporate jets may have complex implications, including tax consequences, SEC disclosure (publicly traded companies only) and other key considerations. As discussed in a separate Proskauer blog post, the IRS also recently announced a new audit campaign targeting the use of corporate jets, although it is unclear whether this will remain a focus of the new administration.

Tax Considerations for Private and Public Companies

Private and public companies, including private equity sponsors and other investment managers, and their employees must consider the tax consequences of allowing an executive or investment professional to use corporate jets for personal use. Specifically, under IRS rules, the value of an executive's personal use of a corporate aircraft is treated as imputed income to the executive and is taxable compensation, subject to tax reporting and withholding. The most common method for calculating the value of the imputed income is by using the Standard Industry Fare Level (SIFL) method, which is based, among other things, on the distance flown, aircraft weight and number of passengers on a private jet. The value calculated under the SIFL method is reported as W-2 income to the executive and is subject to payroll taxes, although this amount is often significantly less than the fair market value of the benefits provided to the executive or the actual cost to the company of operating the jet. Additionally, although an employer's cost of operating a non-commercial aircraft is generally deductible as an ordinary business expense, employers may not be able to deduct any entertainment expenses associated with personal travel under the Tax Cuts and Jobs Act (TCJA).

In order to determine the potential tax consequences of allowing an executive to use a corporate jet for personal use, companies must separately evaluate whether each passenger on a corporate jet is flying for a valid business purpose (*e.g.*, while an executive may have a valid business purpose for flying on a corporate jet, the executive's spouse may be traveling for entertainment in certain circumstances). If certain passengers (but not others) are traveling for entertainment, the portion of flight expenses allocated to those guests traveling for entertainment may be considered a taxable fringe benefit to the executive hosting the guests and, as an entertainment-related expense, may not be deductible to the employer under the TCJA. Importantly, these tax implications would apply even if a corporate jet has empty seats available for use at no additional cost.

SEC Disclosure Obligations for Public Companies

In addition to the foregoing tax implications, with respect to public companies only, personal use of company aircraft by the company's named executive officers (NEOs) must also be disclosed in the company's proxy statement under SEC rules. In particular, Item 402 of Regulation S-K requires disclosure of perquisites and other personal benefits if the total value exceeds $10,000 in a fiscal year. Importantly, the incremental cost to the company of providing this benefit, and not the value imputed to the executive, is used for purposes of this disclosure. As a result, this disclosure typically includes the cost of fuel, maintenance of the aircraft, crew costs, landing fees and in-flight catering and services, although fixed costs like the depreciation of the aircraft or any base salaries paid to staff generally are not required to be disclosed unless these costs are increased due to the executive's personal use. In addition, if any single perk exceeds the greater of $25,000 or 10% of total perks, its specific value must be itemized, which may result in increased scrutiny from investors and regulators.

Other Key Considerations

In addition to the tax and SEC disclosure considerations, other key considerations should be analyzed. For example, internal policies and recordkeeping procedures should be established and monitored and, from a corporate governance perspective, appropriate approvals from the board or its committees (*e.g.*, audit or compensation) should be obtained. Once approved, periodic reporting and monitoring may be advisable. Further, other regulatory considerations should be reviewed, particularly, where corporate-owned aircraft is used (*e.g.*, FAA rules).

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Given these considerations, companies that permit executives to use their private aircraft should carefully track and retain information relating to their use. It is also best practice for companies to establish clear policies and guidelines regarding using aircraft for personal travel, including the process for obtaining pre-approval for any personal use. A company's finance, tax, legal and human resources functions should also coordinate to ensure an executive's imputed income is correctly tracked and reported and any personal use by an executive is properly disclosed in accordance with the SEC disclosure rules. Companies may also consider requiring executives to reimburse them for the costs associated with any personal use, which may mitigate some of the issues discussed in this blog post.

Although allowing executives to use a company's private aircraft can be an attractive benefit for executives, businesses should proactively manage any associated tax, governance and operational issues and, for public companies, SEC disclosure obligations as well. By addressing these issues in a thoughtful and comprehensive manner, companies can support their management team by avoiding unnecessary surprise tax consequences and also reinforce investor confidence through consistent governance practices that contribute to long-term corporate stability and trust.

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