

# Executive Perks Disclosure: Latest SEC Enforcement Action Rewards Company's Cooperation with No Penalty

Posted in: Disclosure Requirements, Executive Compensation, SEC, SEC Enforcement

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***SEC continues to closely scrutinize identification, analysis and disclosure of executive perquisites (especially executives' personal use of corporate jets)***

"Public companies have a duty to comply with their disclosure obligations regarding executive compensation, including perks and personal benefits, so that investors can make educated investment decisions. Here, although [the company] fell short in carrying out its obligation, the Commission declined to impose a civil penalty based, in part, on the company's self-report, cooperation with the staff's investigation and remedial efforts."

—Sanjay Wadhwa, Acting Director of the SEC's Enforcement Division

On December 17, 2024, the SEC **announced** settled charges against a formerly NYSE-listed (now-bankrupt) fashion retailer for allegedly failing to disclose in its definitive proxy statements for fiscal years 2019, 2020 and 2021 nearly \$1 million worth of perquisites and other personal benefits provided to its CEO. Most of the undisclosed items were costs associated with the CEO's authorized use of chartered aircraft for personal purposes. As a result, the company understated the "All Other Compensation" portion of the CEO's compensation by an average of 94% over the three fiscal years. The SEC also alleged that the company failed to maintain

adequate controls, policies or procedures to effectively identify and analyze potential compensation for disclosure.

Specifically, the SEC claimed that **the company's system for identifying, tracking and calculating perquisites incorrectly applied a standard whereby a business purpose would be sufficient to determine that certain items were not perquisites or personal benefits that required disclosure.** As a result, the company erroneously viewed the CEO's business expenses to include expenses associated with his personal flights, including transportation, meals and hotel. The company paid these expenses but did not disclose them as perquisites.

Corporate jet usage for personal travel has also been a target of heightened IRS scrutiny. In February 2024, the IRS **announced** plans to begin audits focused on business aircraft involving personal use and whether for tax purposes the use of jets is being properly allocated between business and personal reasons.

The **SEC's order** cites the **adopting release** for the 2006 amendments to the SEC's executive compensation disclosure rules (including Item 402 of Regulation S-K), which states (emphasis added):

**“An item is not a perquisite or personal benefit,” and does not need to be reported, “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.... The concept of a benefit that is ‘integrally and directly related’ to job performance is a narrow one,”** which “draws a critical distinction between an item that a company provides because the executive needs it to do the job, making it integrally and directly related to the performance of duties, and an item provided for some other reason, even where that other reason can involve both company benefit and personal benefit.”

Further, even where the company “has determined that an expense is an ‘ordinary’ or ‘necessary’ business expense for tax or other purposes or that an expense is for the benefit or convenience of the company,” that determination “is not responsive to the inquiry as to whether the expense provides a perquisite or other personal benefit for disclosure purposes.” Indeed, **“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 the performance by the executive of his or her job.”**

**Notably, the SEC declined to impose a civil monetary penalty due to the company's self-reporting, cooperation and remedial efforts**, which included:

- After learning of potential misconduct, the company acted promptly to ensure that outside counsel **conducted an internal investigation**. Before completing its internal investigation, the company **self-reported to the SEC** staff the failure to disclose perquisites and other conduct potentially implicating the federal securities laws.
- The company **cooperated with the SEC's investigation** by providing to SEC staff facts developed through the internal investigation, compilations of relevant documents, information and data.
- After it self-reported, the company **implemented remedial measures** designed to ensure compliance with Item 402 of Regulation S-K and related SEC guidance. In addition, in 2023, the company filed its fiscal year 2022 proxy statement, which **provided revised disclosures regarding perquisites and personal benefits provided to the CEO** for fiscal years 2020 and 2021. The company also disclosed that the CEO voluntarily reimbursed the company approximately \$454,000 for private air travel and expenses that were determined to be perquisites or personal expenses, and made additional disclosures thereafter.

## **ISS Executive Perquisites Report**

On December 17, 2024, **ISS published an analysis** of Russell 3000 companies' usage and magnitude of executive perks in fiscal 2023, including travel-related and security perks. Among the findings:

- The number of Russell 3000 companies (excluding the S&P 500) that provide at least one perk to their CEO increased 2.4% from 2022 to 2023, to 37.6%.
- Perks accounted for 5.3% of total median CEO pay for Russell 3000 companies in 2023.
- Overall, the median value of perks has increased faster than CEO pay over the past five years.
- Personal use of corporate aircrafts by executives remained one of the most prevalent perks in 2023. The Russell 3000 saw a slight uptick to a new peak of 7.9%.
- Security perks, while relatively rare, are rapidly increasing in prevalence for the S&P 500 and Russell 3000. In 2023, 16.2% of S&P 500 and 2.1% of Russell 3000

companies provided this perk, up from 11.9% and 0.8% in 2019, respectively. Given recent security incidents involving high-profile CEOs, both the prevalence and value of these benefits are expected to increase moving forward.

- While perks may not play a major role in investors' decisions to support Say-on-Pay proposals, companies that provide larger aggregate perks tend to have lower Say-on-Pay vote support.

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