

PERK REDUX – YET ANOTHER COMPANY STUMBLES OVER SEC EXECUTIVE COMPENSATION RULES

Dec 18, 2024

WHAT HAPPENED

On December 17, 2024, the SEC [announced settled charges](#) against Express, Inc. for failing to disclose perks paid to its then CEO, including personal use of airplanes.

Without admitting or denying the SEC's findings, Express agreed to a cease-and-desist order.

TAKEAWAYS

The case represents the latest in a series of recent enforcement actions targeting omissions to disclose perquisites. See, for example, our [October 17, 2024 post](#).

The SEC declined to impose a civil fine because the company self-reported, cooperated with the SEC investigation and took remedial efforts. Additionally, although not specifically cited as a basis, the company had earlier filed for bankruptcy, with the court approving the Chapter 11 liquidation plan the same day as the SEC announcement. By contrast, several recent cases resulted in significant financial penalties and, in some instances, the imposition of independent consultants to review policies, procedures, controls and training relating to reporting and disclosure.

The case provides a reminder that the SEC has shown heightened focus on perquisites and related person transactions. Accordingly, companies should regularly review their internal and disclosure controls and policies and procedures to identify and analyze compensation for disclosure. As discussed in our [July 7, 2023 post](#), examples include:

- 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:

- 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.

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Background

According to the [SEC Order](#):

The company 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, its proxy statements for fiscal 2019, 2020 and 2021 failed to disclose \$979,269 of CEO perquisites, thereby understating “All Other Compensation” by an average of 94%.

In particular, the company incorrectly viewed the CEO’s business expenses to include expenses associated with his personal flights, including transportation, meals, and hotel. Although paying those expenses, it did not disclose them as perquisites.

Self-Reporting, Cooperation and Remedial Efforts

The SEC order cited the following in support of the settlement:

- After learning of potential misconduct, the company engaged outside counsel to conduct an internal investigation. Before completing the investigation, it self-reported to the SEC staff the disclosure failure.
- The company cooperated with the SEC investigation, providing facts developed through the internal investigation, compilations of relevant documents, information and data.
- The company implemented remedial measures designed to ensure compliance with SEC rules and guidance.
- In its proxy statement for fiscal 2022, the company included revised disclosures of CEO perquisites and personal benefits for fiscal 2020 and 2021. In addition, it 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.

Finding and Settlement

The SEC's order found that the company violated Sections 13(a) and 14(a) of the Securities Exchange Act of 1934 and Rules 12b-20, 13a-1, 13a-15(a), 14a-3 and 14a-9. Without admitting or denying the SEC's findings, the company agreed to a cease-and-desist order.

RELATED PRACTICE AREAS

- Securities & Corporate Governance
- Securities Litigation and Enforcement

MEET THE TEAM



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