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SEC Focus On Perks Offers Insights On Cooperation

By **Frederick Block, Emily Renshaw and Michael Fakhoury** (August 8, 2023, 4:11 PM EDT)


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Over the past several years, executive compensation, and specifically perquisites, has been a focus of the Division of Enforcement of the U.S. Securities and Exchange Commission and resulted in a growing number of notable settlements.[1]

A recent perquisite enforcement action, In re: Stanley Black & Decker Inc.,[2] is the latest example of the SEC's continued focus on executive perquisites, or "perks," and whether public companies are properly identifying and disclosing them.

Notably, while the SEC alleged that Stanley failed to disclose $1.3 million worth of perquisites it provided to certain executives, it settled the matter without requiring Stanley to pay a monetary penalty, remarking that Stanley self-reported the conduct, implemented remedial measures, and cooperated with the SEC's investigation.

This case and other recently filed matters demonstrate that the commission has placed a heightened level of importance on cooperation and provide further insight into what type of cooperation may be required to avoid a civil money penalty.

Disclosure Obligations for Perquisites

What is a perquisite or personal benefit?

Item 402 of Regulation S-K requires companies to disclose the total value of all perquisites and other personal benefits provided to named executive officers who receive at least $10,000 worth of such items in a given year.

It further requires the identification of all perquisites and personal benefits by type and quantification of any perquisite or personal benefit that exceeds the greater of $25,000 or 10% of total perquisites.

The SEC explains in Release 33-8732A that to determine whether something is a perquisite or personal benefit, companies must evaluate whether the benefit to the executive is "integrally and directly related to the performance of the executive's duties" or "generally available on a non-discriminatory basis to all employees."[3]

If the benefit is "integrally and directly related to the performance of the executive's duties," then it is

not a perquisite or personal benefit and need not be reported.[4]

However, whether a benefit is integrally and directly related to job performance "is a narrow [concept]," which "draws a critical distinction between an item that a company provides because the executive needs it to do the job … and an item provided for some other reason, even where that other reason can involve both company benefit and personal benefit."[5]

Indeed, a benefit that is provided for a business reason or for "the convenience of the company" may be considered a perquisite if it confers a "direct or indirect benefit that has a personal aspect."[6]

Recent Action Focuses on Use of Corporate Aircraft and Charge Card

The SEC recently settled charges with Stanley, including violations of Exchange Act Sections 14(a) and 13(a) and Rules 13a-1 and 12b-20, alleging that the company failed to disclose at least $1.3 million worth of perquisites and personal benefits paid to, or on behalf of, four of its executive officers and one of its directors from 2017 through 2020.[7]

As with other recent cases involving perquisites, the perks and benefits predominantly related to the officers' and director's use of Stanley's corporate aircraft.

Notably, the SEC settled the case against Stanley without requiring a civil money penalty against the entity. The lack of a civil penalty was attributed to Stanley's cooperation in the SEC's investigation.

The SEC also settled charges with Jeffery D. Ansell, a former Stanley senior officer and executive, including violations of Exchange Act Sections 14(a) and 13(b), alleging that he used Stanley's corporate charge card to pay for more than $647,000 in personal expenses from 2017 through 2020.[8]

The charges against Ansell related to personal expenses — that were charged to Stanley — for chauffer services, travel items, meals, apparel and car repair services.

When Stanley's accounting personnel provided Ansell with a questionnaire for executive officers and discussed Stanley's proxy statements, Ansell allegedly never raised any issues with his personal charges being coded as legitimate business expenses.

Notably, Ansell later reimbursed Stanley for personal expenses incurred on his behalf in connection with a Feb. 4, 2022, separation agreement. To resolve the case, Ansell agreed to pay a civil penalty of $75,000.

No Civil Penalty Against the Company Due to Its Cooperation

In announcing these charges, Division of Enforcement Director Gurbir S. Grewal remarked, in part, that the matter "not only reaffirms the Commission's commitment to enforcing executive compensation disclosure rules, but also to incentivizing self-reporting and cooperation when entities and individuals discover violations of the federal securities laws."[9]

Indeed, Grewal has repeatedly sought to incentivize companies to self-report violations of the securities laws.[10]

Although he has continued to highlight cooperation in his speeches, Grewal has not precisely articulated

what benefits self-reporters could receive from the commission other than vague notions of "something less" than a respondent that did not self-report or meaningfully cooperate.[11]

The Stanley case is unique in that it is one of only a few instances in which the commission publicly stated that no civil money penalty was levied due to the respondent's extensive cooperation.[12]

The Stanley case was quickly followed by a settlement — unrelated to executive compensation — with View Inc., where the commission also did not impose a penalty because the respondent entity cooperated with the commission's investigation.[13]

Thus, these cases give some insight into what level and type of cooperation is currently necessary to receive credit that translates into no civil penalties.

According to the Stanley order, Stanley cooperated in the following ways:

- "After learning of potential misconduct ... [acting] to ensure that outside counsel conducted an internal investigation under the direction and oversight of a Special Committee of independent directors";
- Before finishing the internal investigation, self-reporting its failure to disclose perquisites to the SEC;
- Providing the SEC with its findings from its internal investigation and other relevant documents; and
- Implementing "remedial measures designed to ensure compliance with Item 402 of Regulation S-K and Commission guidance" and making disclosures about the previously undisclosed perquisites.[14]

The steps taken by View to receive cooperation credit were similar and included the following:

- "Providing [SEC] staff with detailed explanations and summaries of specific factual issues at all stages of the staff's investigation";
- "Providing staff with detailed financial analyses from an outside consulting firm" about the accounting at issue in the matter;
- "Identifying key documents and witnesses that staff had not yet identified";
- "Making witnesses available quickly ... for both informal interviews and subpoenaed testimony"; and
- "Promptly following up on several requests from staff without requiring subpoenas."

These orders suggest that, at a minimum, cooperation credit of this level requires an entity to self-report conduct to the SEC.

The other steps taken, and factors considered, remain subject to varying degrees of ambiguity. This seems to indicate that whether an entity will receive cooperation credit remains subject to considerable

discretion of each investigative team.

After all, they are the ones likely to influence the commission in making a determination of whether the entity cooperated with the investigation and provided relevant documents in a timely fashion.

Observations Going Forward

The SEC continues to investigate a broad swath of issues facing public companies. The Stanley case suggests that executive perquisites will remain in the SEC's crosshairs.

Considering the SEC's current position, companies should assess their exposure to perquisite-related disclosures in proxy fillings and the possible effects of any SEC scrutiny to their businesses.

Further, these cases should serve as a reminder to public companies to review and reassess their policies, procedures and controls surrounding traditional business risks, such as those related to executive perquisites and benefits, and particularly those concerning the use of company aircraft.

While it is encouraging to see the SEC rewarding cooperation by forgoing civil money penalties, it remains to be seen whether this becomes a more frequent occurrence for the commission and whether orders like these encourage more frequent self-reporting.

In the meantime, companies seeking to receive cooperation credit from the SEC should consider:

- Promptly retaining outside counsel to conduct internal investigations;
- Maintaining the independence of any investigation by having a board committee or other designated committee oversee the investigation;
- Self-reporting the underlying issues and presenting the results of the internal investigation to the SEC;
- Cooperating fully with the SEC's investigation and affirmatively indicating a desire to cooperate;
- Furnishing the SEC staff with analyses and/or findings of any outside consultants retained to assist with the company's investigation;
- Providing the SEC staff with summaries of specific factual issues during the staff's investigation, while also taking steps to preserve any applicable privileges;
- Proactively identifying key documents and witnesses for the SEC staff and making those witnesses available for interviews/testimony;
- Promptly following up on the SEC's requests and keeping the staff informed of the company's progress in responding to those requests; and
- Periodically asking the SEC staff whether they believe the company is being cooperative.

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[1] See, e.g., In re ProPetro Holding Corp., Exchange Act Release No. 93645, AP File No. 3-20661 (Nov. 22, 2021) (company failed to properly disclose CEO perks and related party transactions); In re National Beverage Corp., Exchange Act Release No. 92560, AP File No. 3-20451 (August 4, 2021); Gulfport Energy Corporation, Exchange Act Release No. 91196, AP File No. 3-20232 (February 24, 2021) (same); Hilton World Wide Holdings Inc., Exchange Act Release No. 90052, AP File No. 3-20109 (September 30, 2020) (company failed to disclose travel-related executive perks; identified through data analytics); RCI Hospitality Holdings Inc., Exchange Act Release No. 89935, AP File No. 3-20035 (September 21, 2020) (company failed to properly disclose CEO & CFO perks and related party transactions); Argo Group International Holdings Ltd., Exchange Act Release No. 89009, AP File No. 3-19822 (June 4, 2020) (company failed to properly disclose former CEO perks).

[2] See In re Stanley Black & Decker Inc., Exchange Act Release No. 97761, AP File No. 3-21497 (June 20, 2023).

[3] See Securities and Exchange Commission, Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 Fed. Reg. 53,158 (Sept. 8, 2006)].

[4] Id. at 53,177.

[5] Id.

[6] Id.

[7] See In re Stanley Black & Decker Inc., Exchange Act Release No. 97761, AP File No. 3-21497 (June 20, 2023).

[8] See In re Jeffery D. Ansell, Exchange Act Release No. 97760, AP File No. 3-21498 (June 20, 2023).

[9] See Press Release, Securities and Exchange Commission, SEC Charges Stanley Black & Decker and Former Executive for Failures in Executive Perks Disclosure (June 20, 2023).

[10] See e.g., Gurbir S. Grewal, Director, Division of Enforcement, Remarks at Financial Times Cyber Resilience Summit (June 22, 2023) ("As I've said in many of my public remarks, firms that meaningfully cooperate with an SEC investigation, including by coming in to speak with us or self-reporting, receive real benefits, such as reduced penalties or even no penalties at all."); Gurbir S. Grewal, Director, Division of Enforcement, Remarks at Securities Enforcement Forum (Nov. 15, 2022) ("While meaningful cooperation starts with self-policing and self-reporting, it does not end there. It also means proactively

cooperating with our investigations and remediating violations" and citing examples); Gurbir S. Grewal, Director, Division of Enforcement, Remarks at Securities Enforcement Forum West 2022 (May 12, 2022) ("As we've seen in a number of recent cases, when clients take steps to self-report potential violations, or to proactively cooperate with our investigations and remediate violations, the Commission is often willing to credit that cooperation, including through reduced penalties, or even no penalties at all."); Gurbir S. Grewal, Director, Division of Enforcement, PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021) ("Cooperation also means more than 'self-reporting' to the SEC only when your violation is about to be publicly announced through charges by another regulator or an article in the news media.").

[11] See, e.g., Press Release, Securities and Exchange Commission, SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures (May 11, 2023) (in orders unrelated to executive compensation issues, noting that civil penalties were "reduced" because both "HSBC and Scotia Capital self-reported and self-remediated their recordkeeping violations" and the reduced penalties "reflect their efforts and cooperation"). The press release announcing these reduced penalties, however, is silent on how much these entities would have paid in penalties if they had not cooperated with the SEC's investigation.

[12] See, e.g., SEC Press Release, SEC Charges Canadian Cannabis Company and Former Senior Executive with Accounting Fraud ("In agreeing to settle with Cronos, the Commission determined that the company should not incur a financial penalty, given its timely self-reporting, significant cooperation, and remediation.").

[13] See Press Release, Securities and Exchange Commission, SEC Charges "Smart" Window Manufacturer, View Inc., with Failing to Disclose $28 Million Liability (July 3, 2023).

[14] See supra note 6.