

September 13, 2018 Publication

Topics

Transportation
Aviation

Related People

William W. Lin
linw@lanepowell.com

Related Practices & Industries

Transportation

Recent SEC Enforcement Actions Serve as Reminder for Public Companies: Carefully Monitor Executives' Use of Business Aircraft

Transportation Legal Update

Recent Securities and Exchange Commission (SEC) enforcement actions relating to personal use of business aircraft should serve as a reminder to public companies to review their executives' perquisite disclosure policies and procedures. Over the past few months, the SEC has brought a number of enforcement actions relating to a public company's failure to properly disclose their executives' personal use of company aircraft in the company's proxy statement.

In July, the SEC charged the former CEO of Energy XXI Ltd. for failure to disclose perquisites and other undisclosed personal loans and related-party transactions. According to the SEC, the executive failed to disclose expenses that were "unreasonable, personal in nature, and/or not supported by sufficient documentation," including the use of the company's aircraft to attend a football game at the CEO's alma mater with other industry executives.

In another case, the SEC brought an enforcement action against a company for failure to identify and disclose perquisites (which included

the executive's use of the company's corporate aircraft) provided to the company's executive officer. The SEC concluded that the company had inadequate processes and procedures in place to ensure proper reporting of perquisites and that the company had failed to adequately train its employees to prepare the Compensation Discussion and Analysis portion of its proxy statements filed with the SEC.

Perks Are Required to Be Disclosed in a Public Company's Proxy Statement

These recent SEC enforcement actions highlight the SEC's continuing focus on executive perquisites and underscore the importance for in-house flight and legal departments to identify, document and report the use of the company's aircraft by executives. Publicly traded companies are required to disclose all compensation paid to their named executive officers (NEOs) (i.e., a company's CEO, CFO and the three most highly compensated executive officers other than the CEO and CFO) in the company's proxy statement filed annually with the SEC. The SEC's rules generally require all perquisites and personal benefits provided to an NEO that exceed \$10,000 in the aggregate in a fiscal year to be disclosed in the Summary Compensation Table of the company's proxy statement.

Further, in preparing the Summary Compensation Table, companies should apply the SEC's more stringent standard for determining whether an item is a "perquisite." The SEC's more stringent standard provides that:

- An item is not a perquisite if it is *integrally and directly related* to the performance of the executive's duties.
- If the payment or benefit is not integral and directly related to the performance of the executive's duties, the 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*.

Accordingly, the use of a public company's aircraft by an NEO, their family members or guests for *any* personal purpose triggers disclosure with the SEC and the aggregate incremental cost (AIC) associated with the personal flight must be reported. AIC means the cost to the company of the personal flight, not the value of the benefit received by the executive or the tax value (e.g., SIFL rates) of the benefit. Generally, the incremental

costs will include the variable and direct costs associated with operating the flight, such as fuel, airport fees and catering, and a proportionate share of the aircraft's operating costs such as airframe, engines and maintenance.

Key Takeaways

- First, publicly traded companies should provide training to the appropriate personnel within the company to ensure the correct standard is applied to determine whether the item must be disclosed as a perquisite in filings with the SEC.
- Second, companies must keep detailed records of all flights involving the business aircraft (including any flights that may be for an executive's personal use) and include information such as expenditures for fuel, crew, landing fees, catering, maintenance and repair.
- Third, companies should have procedures in place to ensure expenses are properly documented, evaluated and disclosed for SEC reporting purposes. Review procedures and policies and work with the company's flight department, internal and external audit team, and legal counsel on the proper calculation of the aggregate incremental cost to the company associated with each flight taken by the executive.

William Lin is a Shareholder in the Seattle Office of Lane Powell PC.