

## Corporate

# SEC Issues Guidance on Perquisite and Personal Benefits Disclosure in Response to COVID-19



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On September 21, 2020, the SEC's Division of Corporation Finance issued updated guidance on whether certain perquisites, or perks, provided to executive officers as a result of the ongoing pandemic are required to be considered "all other compensation" and potentially disclosed in the company's proxy statement.<sup>[1]</sup> As companies have shifted to remote working arrangements due to COVID-19, public companies considered whether the provision of certain perks to their executives required for working from home would be considered "all other compensation" under Item 402(c)(2)(ix) (A) of Regulation S-K.

C&DI Question 219.05 confirms that companies should use the traditional two-step analysis set out in Release 33-8732A<sup>[2]</sup> for determining whether a perk is considered as "all other compensation". Under this analysis, a public company must consider whether the benefit is "integrally and directly related to the performance of the executive's duties" or "generally available on a nondiscriminatory basis to all employees."

**Most importantly, the SEC noted in C&DI Question 219.05 that what is "integrally and directly related" to an executive officer's duties may be different during the COVID-19 pandemic as compared to past years.**

For example, "enhanced technology needed to make the executive's home his or her primary workplace upon imposition of local stay-at-home orders would generally not be a perquisite or personal benefit because of the integral and direct relationship to the performance of the executive's duties." But likewise, "items such as new health-related or personal transportation benefits provided to address new risks arising because of COVID-19, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits even if the company would not have provided the benefit but for the COVID-19 pandemic, unless they are generally available to all employees."<sup>[3]</sup>

The good news is that this guidance does not upend the traditional and well-known perk analysis and will not impute additional income to executives for simply doing their jobs from home with some technology enhancements due to the pandemic. However, the guidance still leaves a bit of a blurry line with respect to what is "integrally and directly related" to an executive's duties under such perk analysis and companies will still be required to make determinations within this framework.

While not specifically noted by the SEC in Question 219.05, the authors would suggest that the same analysis would likely apply to the analysis of director perks in Item 402(k)(2)(vii)(A) of Regulation S-K as well.

### **3 Action Items for Consideration**

**Continue to Record All Benefits Provided to Executive Officers:** Companies should continue to record and document each benefit provided to executive officers, regardless of whether the company determines such benefit must be publicly disclosed.

**Document Each Internal Determination Made With Respect to Perks:** If your internal legal staff or Disclosure Committee determines a benefit provided in response to COVID-19 does not require public disclosure, make sure that determination is clearly documented. The SEC continues to bring enforcement actions related to perks and personal benefits, which can result in fines and implicate a public company's internal controls.

**Discuss Remote Working Environment With Human Resources and the Applicable Executive:** As remote work environments are likely to continue into 2021, consider what items are "integrally and directly related" to such executive's duties on a daily basis to better capture and monitor perks.

*Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.*

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)

[1] This C&DI is the latest public company guidance issued by the Division of Corporation finance in response to COVID-19. For summaries of other guidance issued this year, see "[SEC's Division of Corporation Finance Issues Guidance on Financial Reporting as a Result of the Ongoing Outbreak of COVID-19](#)," (Mar. 25, 2020); and "[Guidance from SEC's Division of Corporation Finance on COVID-19 Financial Reporting](#)," (July 1, 2020).

[2] Securities and Exchange Commission, Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006), available at <https://www.sec.gov/rules/final/2006/33-8732a.pdf>.

[3] Securities and Exchange Commission Division of Corporation Finance, Compliance & Disclosure Interpretations Question 219.05, available at <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.



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