

SEC Charges CEO with Failing to Disclose Perks to Shareholders

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Companies frequently wrestle with perks in their proxy executive compensation disclosure. Whether an item constitutes a perk often requires judgment based on the facts and circumstances,¹ and disclosure may elicit intense, public scrutiny over what amounts to a relatively small percentage of an executive's total compensation package.²

From time to time, the SEC issues a cautionary tale that perks need to be accounted for and reported with care. The SEC recently announced that Miles Nadal, the former CEO of marketing company MDC Partners, has agreed to pay \$5.5 million to settle charges that his perks were not properly disclosed to shareholders.

While MDC Partners disclosed certain perks received by Mr. Nadal, including an annual allowance of \$500,000, it failed to disclose payments for personal use of private airplanes, charitable donations in Mr. Nadal's name, yacht and sports car expenses, cosmetic surgery, and a wide range of other perks totaling an additional \$11.285 million from 2009 through 2014.

The SEC order notes that MDC Partners, which agreed to a \$1.5 million settlement of the matter earlier this year, understated Mr. Nadal's perks by an average of almost 300% each year.

While MDC Partners' example is an egregious one, companies should verify that they have implemented internal controls that are capturing the full range of perks and potential perks, particularly where there is temptation to omit or mischaracterize these items, and that they have implemented disclosure controls that ensure the accurate reporting of these items.

¹ In its adopting release for the "Executive Compensation and Related Person Disclosure," Release Nos. 33-8732A, 34-54302A, File No. S7-03-06 (Aug. 29, 2006), the SEC established a two-step analysis for whether an item constitutes a perk:

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1. An item is not a perquisite if it is “integrally and directly related” to the performance of the executive’s duties, even if there is an element of personal benefit, so no disclosure would be required.
2. If an item is not integrally and directly related to the performance of the executive’s duties, and it confers a direct or indirect benefit that has a personal aspect, then the item is a perquisite, unless it is generally available on a non-discriminatory basis to all employees. It does not matter whether the item may be provided for some business reason or for the convenience of the company.

2 Under Item 402(c)(2)(ix) of Regulation S-K, perquisites or other personal benefits paid to the named executive officers in the proxy statement must be disclosed in the summary compensation table, unless their total value is less than \$10,000. Each perquisite or personal benefit must be identified by type, and each one that exceeds the greater of \$25,000 or 10% of the total amount of perquisites and personal benefits must be quantified and disclosed in a footnote. Perquisites and other personal benefits are to be valued based on their aggregate incremental cost to the company.