

SEC Issues \$1.75 Million Penalty Over Perks Disclosures

July 10, 2018 – Governance & Compliance Insider
by Cam C. Hoang

A recent SEC consent order against The Dow Chemical Company reminds companies that when evaluating whether or not to disclose a payment or benefit to an executive as a perk in a proxy statement, the fact that the item has a tangential business purpose, or is convenient for the company, is insufficient grounds to exclude the item as a perk. In order to be excluded as a perk, the item must be "integrally and directly" related to the performance of the executive's duties. Examples of items that typically should be classified as perks include country club memberships for mixed business and personal use, commuting expenses, and personal guests who join a business flight on the corporate jet.

While companies may perceive individual perks as insignificant or as justifiable business expenses, these items can be significant in the aggregate, in hindsight and through a regulatory lens. The consistent failure to disclose perks over a period of years may result in Commission sanctions and negative publicity, particularly for larger public companies and for companies who for a variety of reasons are the subject of closer Commission scrutiny.

As background, on July 2, 2018, the SEC entered into a consent order against Dow, settling claims that from 2011 through 2015, the company did not adequately evaluate and disclose approximately \$3 million in executive perks as "other compensation" in its proxy statements. These authorized but undisclosed perks included personal use of the Dow aircraft and other expenses. The consent order notes that though Dow applied procedures regarding the evaluation and disclosure of its executives' perks, it did not follow the Commission's standard regarding disclosure of perks, which provides that:

- An item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties.
- Otherwise an 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

Related People

- Cam C. Hoang

Related Capabilities

- Corporate Governance & Compliance
- Mergers & Acquisitions
- Government Enforcement & Corporate Investigations

on a non-discriminatory basis to all employees.

Instead, the consent order finds, Dow incorrectly applied a standard whereby a business purpose related to the executive's job was sufficient to determine that a benefit would not be a perquisite that required disclosure.

Notably, the consent order also sanctions Dow for its disclosure controls. According to the order, Dow did not adequately train employees in key roles, including those tasked with drafting the CD&A section of the proxy statement and compiling the executive compensation tables, to ensure that the proper standard was applied for perks disclosure. Dow also had inadequate processes and procedures to ensure proper reporting of perks. In addition to a \$1.75 million penalty, the consent order requires Dow to hire an independent consultant for one year to review and make recommendations on Dow's policies, procedures, controls and training related to the evaluation of whether payments and other expense reimbursements should be disclosed as perks under securities laws.