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Should SEC Revisit Executive Security Perquisite Disclosure?

December 23, 2024

The recent homicide of UnitedHealthcare CEO Brian Thompson has put a spotlight on executive security and has prompted many companies to reassess how they are protecting their top executives. We also believe that in the wake of this tragic event it is time for the Securities and Exchange Commission (SEC) to revisit the treatment of personal security as a perquisite requiring disclosure in a company's SEC reports. The current SEC guidance forces companies into a catch-22, where a decision to provide personal security protection will require disclosure and draw additional scrutiny, and potentially the ire of proxy advisory firms, while a decision to limit or not provide such protection to avoid disclosure or reduce the amount disclosed will potentially put executives' safety at risk.

The seminal SEC release from 2006 addressing perquisite disclosure remains the relevant guidance in determining whether disclosure of security arrangements as a perquisite is required. Under the 2006 release, an item is not a perquisite if it is integrally and directly related to the performance of an executive's duties, and it is a perquisite 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, unless it is generally available on a nondiscriminatory basis to all employees. The 2006 release expressly cautions that the concept of a benefit that is integrally and directly related to job performance is a narrow one and provides that business purpose or convenience does not affect the characterization of an item as a perquisite or personal benefit where it is not integrally and directly related to the performance by the executive of their job.

According to the 2006 release, security provided at a personal residence or during personal travel is considered a perquisite and not integrally and directly related to the performance of an executive's duties. In addition, under current SEC guidance, a company policy that identifies an ongoing security threat to an executive, and therefore requires that an executive (or an executive and their family) have security provided at a personal residence and during all personal travel does not affect the conclusion that the item provided is a perquisite or personal benefit.

However, in the 2006 release, the SEC also acknowledges that the integrally and directly related standard is satisfied by "an item that a company provides because the executive **needs it to do the job**" (emphasis added), and that companies themselves are in the best position to determine whether particular arrangements are perquisites or necessary for the executive to do their job. Additionally, long before the 2006 release, in a 1978 interpretive release, the SEC acknowledged this circumstance, stating that "[t]he taking of various security measures for the protection of executives may not result in any remuneration to such executive if the individual's life has been threatened because of his position in the company or if the company reasonably believes that the individual's safety is in jeopardy." Accordingly, we believe that when a company has identified and documented an ongoing security threat for a particular executive, it is hard to dispute that anything is more critical to the ability to fulfill duties than to be safe and alive. Described differently, an executive's ability to perform the job, even when manifestly "on the clock," is dependent on the executive's protection from work-related threats outside of those hours.

Reexamining personal security-related perquisites is further supported in an environment where the line between personal and business activities has been so significantly blurred since the 2006 release. Technological advancements have all but eliminated the nine-to-five workday for senior executives and ushered in a world where public company executives are expected to be working and available at all times. The days of commuting back and forth to company headquarters where the majority of an executive's time was spent in a corner office have been replaced by significant periods of remote work from an executive's personal residence or while ostensibly on vacation. Furthermore, post-COVID, fully remote or hybrid work is commonplace, and many executives now spend a significant amount of time working from home.

We of course understand that the implications of the foregoing analysis are potentially far reaching. For instance, it may compel the conclusion that personal travel on corporate aircraft or with a company-provided car and driver that is mandated pursuant to a company's security protocols should not be treated as a perquisite for

compensation disclosure purposes. However, we don't shy away from the conclusion that such a result may be appropriate in at least some circumstances. Indeed, revisiting the appropriateness of that conventional analysis may ease the tension resulting at the many companies requiring executives to travel on corporate aircraft and use a company car and driver for all personal travel, while simultaneously requiring those executives to reimburse the company for the incremental cost of that travel – a result that could be viewed as even more onerous in an environment where the requirement is rightly viewed as a precondition to the executive's proper discharge of their duties.

In summary, the issues presented here do not lend themselves to bright-line conclusions, but as we head into the coming proxy season, we believe many companies will have good reason to revisit their treatment of personal security-related perks, and we would encourage the SEC to defer to a company's principled conclusions and not take a hidebound stance that inflexibly adheres to the conventions of an earlier time.[1]

Note

1. Notably, in the SEC's most recent perquisite enforcement action, In the Matter of Express, Inc. (see this Cooley PubCo blog post), the SEC's order did not cite the company's failure to disclose expenses for personal security services for its CEO, despite the company's own corrective disclosure identifying personal security services provided to the CEO that were subsequently determined not to have been "integrally and directly related" to the performance of his duties. It is not clear, however, whether the omission of personal security from the SEC's order is the beginning of a deliberate shift away from the way the SEC has historically viewed personal security.

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