

Small Business Securities Bulletin - SEC Enforcement Case for Failure to Disclose Perks

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A periodic bulletin keeping small businesses informed about current developments in securities law and related matters

Formal Securities and Exchange Commission (SEC) enforcement action for a failure to comply with the line-item disclosure requirements of Regulation S-K is rare. A recent case, however, proves that it can happen. Last month the SEC brought an enforcement action against NIC, Inc., a company that manages government websites, and four of its executives for failing to disclose more than \$1.18 million in perquisites paid to former CEO Jeffrey Fraser over a six-year period. The complaint alleges that NIC's proxy statements, annual reports and registration statements failed to disclose Mr. Fraser's perquisites during 2002 through 2005 and materially understated them during 2006 and 2007. Such perquisites included, among others, \$4,000 per month to live in a Wyoming ski lodge, "rent" payments for a house owned by an entity owned and controlled by Mr. Fraser, vacations for Mr. Fraser and his girlfriend and family, spa, skiing, health club and other expenses, a leased Lexus SUV and day-to-day living expenses such as groceries and clothing. The complaint also alleges that NIC's related party transactions were misleading for failing to disclose its payment of \$1 million with respect to the operation of planes for Mr. Fraser, as well as numerous control failures at NIC that allowed Mr. Fraser to be inappropriately reimbursed for personal expenditures and that resulted in the disclosure failures alleged in the complaint.

The SEC's action with all but one of the defendants was settled, resulting in disgorgement of \$1.18 million by Mr. Fraser, civil penalties aggregating \$2.8 million and an injunction against the defendants. NIC also agreed to retain an independent consultant to recommend appropriate improvements to its policies, procedures, controls and training related to payment of expenses, related party transactions and other matters.

While an admittedly egregious case of non-disclosure, assuming the SEC's allegations are true, this action should still serve as a reminder that the SEC takes compliance with its disclosure

regulations seriously and will take appropriate action in the right circumstances, although in most cases this will be an SEC comment requiring better disclosure or the fixing of current disclosure via an amended filing or Form 8-K. This case emphasizes that SEC reporting companies need to take their disclosure obligations seriously as well and ensure they are complying with them in full. This is especially true with respect to compensation disclosure, which is of particular interest both investors and, in light of the continuing economic downturn and the [recently enacted say-on-pay rules \(see our January 2011 Bulletin\)](#), is likely to be a focus for the foreseeable future.

About Me. I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at www.ober.com/attorneys/penny-somer-greif.

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