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Nonmonetary Forms of Remuneration Under the Federal Securities Laws

Robert A. Profusek*

In response to increasing public attention to the granting and receipt of corporate perquisites, the Securities and Exchange Commission has published various pronouncements and requirements apparently designed to elucidate the disclosure expected of reporting companies with respect to nonmonetary forms of management remuneration. The author, noting the ambiguous nature of the SEC's published views, analyzes these requirements and identifies principles which can serve as guidelines for disclosure. He then examines a number of standard corporate benefits in light of these principles and suggests treatments for each. He concludes by discussing the nature of the disclosure required and the registrant's duty to investigate in this context under the federal securities laws.

INTRODUCTION

CORPORATE "PERQUISITES," the nonmonetary benefits frequently received by corporate officers and directors in addition to their salaries, have recently received considerable attention in newspapers, on television, and at "three-martini lunches." While recurring efforts to alter the tax treatment of certain business expenses undoubtedly instigated some of this concern, the

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3. For example, in 1978 the Internal Revenue Service (IRS) amended its audit handbook to deal with perquisites. E.g., N.Y. Times, Mar. 24, 1978, at A-1, col. 4, and D-1, cols. 5-6. The present Administration has publicly stated its intention to revise the rules in this context. Id. Efforts by the IRS to change applicable rules have been frustrated by congressional action. E.g., Wall St. J., May 24, 1978, at 10, col. 1. See generally FORBES, July 24, 1978, at 20.
activities of the Securities and Exchange Commission (SEC) have thus far garnered the most attention in this context.

In August, 1977, the SEC issued a purportedly interpretive release (First Release) expressing its view that "the existing reporting provisions under the securities acts require registrants to include within the remuneration reported all forms of remuneration which are received by management from the corporation, including personal benefits sometimes referred to as 'perquisites.'" To be sure, companies subject to SEC regulation have historically been required to report the amount of "remuneration" paid to directors and particular officers whose aggregate direct remuneration exceeds a specified amount, as well as that paid to all officers and directors as a group. Indeed, the SEC has instituted several enforcement and administrative actions based on alleged corporate failures to include within reported remuneration the value of various nonmonetary benefits received by officers and directors. However, in connection with the publication of the First Release, the SEC conceded that "the cases instituted by the Commission have suggested misappropriation of the company's assets in addition to noncompliance with the disclosure provisions." Thus, while the First Release purported to be merely an interpretation of existing disclosure requirements, it nonetheless seems clear that through the First Release and subsequent actions the SEC intended to direct the federal disclosure system into virgin areas.


5. The most significant of these disclosure requirements were previously contained in Item 17 of Form S–I, 17 C.F.R. § 239.11 (1977) (registration statements); Item 16 of Form 10–K, id. § 249.310 (annual reports); and Item 7 of Schedule 14A, id. § 240.14a–101 (proxy and information statements); they now appear in Item 4 of Regulation S-K, 5 FED. SEC. L. REP. (CCH) ¶ 70,962 (1979) [hereinafter cited as Regulation S–K].


8. First Release, supra note 4, at 17,059–3 n.1.

9. The SEC's implicit assumption that certain forms of personal benefits may bear upon the "integrity of management" and the emphasis placed upon the accuracy with which such benefits are reflected in corporate books and records suggest that the SEC's activities in this context are but a natural extension of its campaign against so-called "questionable payments." Compare First Release, supra note 4, at 17,059–4 to –7 with Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments
On February 6, 1978, the SEC fired its second salvo in this area "to provide further guidance to registrants."\textsuperscript{10} In its Second Release the SEC articulated a few general principles which partially resolved some of the ambiguities of the First Release and set forth the SEC's position with respect to a number of specific types of nonmonetary benefits.

The SEC invited comments on both of these releases,\textsuperscript{11} and it is likely that the views so solicited formed the basis for the SEC's inclusion of specific disclosure requirements pertaining to personal benefits in the amendments to the disclosure requirements relating to management remuneration and transactions in Regulation S-K, the consolidated disclosure regulation.\textsuperscript{12} While the amended disclosure rules provide specific guidance with respect to a few particular disclosure issues, like the First and Second Releases they fail to establish any overall principles for determining whether a particular nonmonetary benefit constitutes reportable remuneration. The primary purpose of this Article is the establishment of such principles.

At the outset, the amended disclosure rules will be analyzed. As will become apparent, these rules raise more questions than they answer, necessitating further reference to the interpretive re-


\textsuperscript{11} Id at 17,059–16.

leases. The interpretive releases will therefore be discussed with a view toward extracting therefrom general principles to guide analysis of whether particular nonmonetary benefits constitute reportable remuneration. Several benefits which are commonly provided to corporate executives will then be tested against such principles. Finally, the nature of the disclosure required and the duty to investigate possible failures to disclose such benefits in prior periods will be briefly considered.

I. A FRAMEWORK FOR ANALYSIS

A. Amendments to Regulation S-K

The values of "personal benefits" furnished to certain management personnel are now required to be reported as cash-equivalent forms of remuneration in the table prescribed by Item 4(a) of Regulation S-K. Except for benefits which "[do] not discriminate in favor of officers and directors," for which no disclosure is required, the personal benefits which now must be reported are those which "are not directly related to job performance."17

13. In the Third Release, the Division of Corporation Finance stated that "except in a limited number of specific instances the perquisite disclosure requirements of [Regulation S-K] have not superseded the Commission's two earlier releases relating to the disclosure of personal benefits in the remuneration table." Third Release, supra note 12, at 61,779. That the SEC found it necessary to include specific provisions regarding nonmonetary benefits in the amended remuneration disclosure requirements of Regulation S-K which add little to the prior interpretive releases rather clearly suggests, however, that the interpretive releases were really more than just that. But see SEC v. Montauk Corp., [Current] Fed. Sec. L. Rep. (CCH) 97,114 (D.D.C. 1979).

14. Certain forms of nonmonetary benefits and indirect remuneration, such as stock options, loans, and transactions with the issuer or registrant, have long been subject to specific disclosure requirements. E.g., Item 4(d) of Regulation S-K, supra note 5, at ¶ 61,766. They will not be further discussed herein.

15. It should be noted that the appropriate treatment of nonmonetary benefits for federal income tax purposes and the role of state law in this area are outside the scope of this Article, except to the extent that they may bear upon federal securities disclosure questions. E.g., text accompanying notes 86-87 infra. For a discussion of the former issue, see, e.g., Note, Federal Income Taxation of Employee Fringe Benefits, 89 Harv. L. Rev. 1141 (1976). The SEC has correctly taken the position that "the determination of reportable forms of remuneration is not necessarily based upon what has been included by an officer or director in gross income computed for tax purposes." First Release, supra note 4, at 17,059-5 n.20. These issues are, of course, independently significant, and there is some evidence that the IRS has been intensifying its scrutiny in this area. See, e.g., Wall St. J., Feb. 17, 1978, at 4, col. 2.

16. Instruction 2(d) to Item 4(a) of Regulation S-K, supra note 5, at 61,764.

17. Id. Pursuant to express statutory authority, remuneration paid by the issuer or registrant to its officers and directors must be disclosed. E.g., Item 14 of Schedule A, 15 U.S.C. § 77aa (1976). Given this statutory directive, the logic behind the exclusion of personal benefits provided to broad categories of employees might seem difficult to divine. If
The instructions to the amended disclosure rules, however, fail to provide any general principles by which the issuer or registrant can determine whether a particular benefit meets this test. Moreover, the basic assertion that personal benefits—those not directly related to job performance—must be disclosed adds virtually nothing to the SEC’s prior interpretive pronouncements in this area.\textsuperscript{18} Hence, reference to the prior releases remains necessary for an understanding of the amended disclosure rules.

B. The Interpretive Releases

The SEC has stated that “management is usually in the best position to determine whether a certain benefit should be viewed as a form of remuneration based on the facts and circumstances involved in each situation.”\textsuperscript{19} Nonetheless, in the two releases the SEC identified a number of personal benefits which do, or may, constitute reportable remuneration and, in the First Release, provided two general exceptions for categories of personal benefits which do not constitute reportable remuneration.

According to the SEC, six types of personal benefits make up the category of benefits which should be reported under all circumstances: (1) home repairs and improvements; (2) housing and other living expenses (including domestic service) provided at principal or vacation residences of management personnel; (3) the personal use of company property (such as automobiles, airplanes, yachts, or apartments); (4) personal travel expenses; (5) personal entertainment and related expenses; and (6) legal, accounting, and other professional fees for matters unrelated to the business of the registrant.\textsuperscript{20}

A second category of personal benefits which may in some cases constitute forms of remuneration includes certain third-

\textsuperscript{18} For example, in the Second Release the SEC stated, “The value of those benefits received by management which are directly related to the performance of their job is not required to be included in aggregate remuneration.” Second Release, supra note 10, at 17,059–10. See also note 13 supra.

\textsuperscript{19} First Release, supra note 4, at 17,059–5.

\textsuperscript{20} Id. at 17,059–5. The only types of nonmonetary benefits covered in the Second Release which are not within the direct scope of the First Release are club memberships, particular insurance and reimbursement plans, physicals, and security devices. See Second Release, supra note 10, at 17,059–12 to –14. For a discussion of these benefits, see note 69 and text accompanying notes 89–104 infra.
party benefits "such as favorable bank loans and benefits from suppliers [in situations in which] the corporation compensates, directly or indirectly, the bank or supplier for providing the loan or services to management; and the use of corporate staff for personal purposes."\(^{21}\)

These two categories of benefits are "personal" under the terms of the interpretive releases and the amended disclosure rules in the sense that they may relieve the recipient of expenditures generally considered to be of a personal nature. The difference between the SEC's treatment of the two categories of personal benefits apparently arises from the fact that in the former the corporation will in most instances incur an expense to provide the benefit, whereas in the latter it will incur either no expense at all (for example, a bank may make a "favorable" home loan to an officer merely for goodwill purposes) or no incremental expense (for example, corporate staff must be paid in any event).\(^{22}\)

In the First Release, the SEC identified two general categories of admittedly personal benefits for which no disclosure is required: (1) incidental personal benefits and (2) benefits which are ordinary and necessary to the conduct of the corporation's business.\(^{23}\) Incidental personal benefits were described as those benefits which are "directly related to job performance,"\(^{24}\) the same overriding concept utilized in the amended disclosure rules.\(^{25}\) Parking places, meals at company facilities, and office space and furnishings were cited as examples of such benefits.\(^{26}\) However, even this limited exception was qualified by the additional requirement that incidental benefits be "authorized and properly accounted for by the company."\(^{27}\)

22. See text accompanying notes 38-40 infra.
23. First Release, supra note 4, at 17,059-5 to -6. Some authorities seemingly have treated the two categories of exceptions as but a single exception with an aggregate test requiring that a benefit be both "incidental" and "ordinary and necessary" to be excluded from reported remuneration. E.g., McCoy & Griffin, What's the Value of What's Included in New Corporate Perquisite Rules?, N.Y.L.J., Dec. 19, 1977, at 38, col. 1. It nevertheless seems clear that an alternative approach was intended. Eppler & Yaeger, Management Perquisites, 10 REV. OF SEC. REG. 841, 843-44 (1977).
24. First Release, supra note 4, at 17,059-6.
25. See Instruction 2(d) to Item 4(a) of Regulation S-K, supra note 5, at 61,764.
26. First Release, supra note 4, at 17,059-6.
27. Id. See also Second Release, supra note 10, at 17,059-8 ("Of course, accurate and sufficiently detailed books and records are prerequisites to the appropriate disclosure of remuneration information."). While it has been suggested that "falsified accounts and unreported funds are generally reportable in themselves," Garrett, Disclosure of "Emoluments" of Corporate Officers, 9 ANN. INST. ON SEC. REG. 35, 42 (1978), it is difficult to
The second category of nonreportable remuneration under the First Release consists of personal benefits which are "ordinary and necessary to the conduct of company business." For benefits to fall within this exclusion, three requirements must be met. Ordinary and necessary benefits are those which:

1. Are available to management employees generally;
2. Do not relieve the individual of expenditures normally considered to be of a personal nature; and
3. Are extended to management solely for the purpose of:
   a. Attracting and maintaining qualified personnel;
   b. Facilitating their conduct of company business; or
   c. Improving their efficiency in job performance.

The example provided by the SEC under this exception is an itemized expense account.

The absence of logic in the SEC's articulation of the ordinary and necessary exception is readily apparent. The requirement that the benefit be available to management employees generally is not related to the question whether the benefit is provided for business purposes. A salesperson may utilize certain club memberships completely for business purposes, thereby receiving no remuneration, whereas such a benefit may not be necessary to the business purposes of a particular company's controller; but if such a membership were provided generally to management employees, under the SEC's rationale the value of the controller's

understand how this issue is related to the requirement that remuneration be disclosed. The same is true with respect to the question whether the benefit is properly authorized under state law. Perhaps these two qualifications merely reflect the disquieting trend, manifest in the SEC's activities in the questionable payments context, toward using the federal disclosure system to achieve substantive ends. See generally Freeman, The Legality of the SEC's Management Fraud Program, 31 BUS. LAW. 1295 (1976); Note, Foreign Bribes and the Securities Acts' Disclosure Requirements, 74 MICH. L. REV. 1222 (1976).

29. Id. (emphasis added).
30. Id. However, the SEC suggested that expense accounts may be forms of remuneration "if they are excessive in amount [sic] conferred to [sic] frequently." Id. This limitation is illogical since it does not relate to the essential inquiry—whether the expenditure constitutes a personal benefit in the first instance.

The SEC has taken the firm position that "an unitemized expense account would be a form of remuneration... except to the extent [that] specific amounts spent by an executive using such an expense account can be identified as relating to valid business related expenses." Second Release, supra note 10, at 17,059–15 to –16. See also First Release, supra note 4, at 17,059–6. Thus, the burden is on both the company and the executive to justify the business use of an unitemized expense account. In some instances that burden may not be easily met. E.g., Wall St. J., Nov. 12, 1979, at 12, col. 2.

31. McCoy & Griffin, supra note 23, at 38, col. 4.
membership would be nonreportable along with the value of the salesperson's membership.

The second requirement—that qualifying benefits not relieve the recipient of expenditures normally thought to be personal in nature—is similarly perplexing. If a benefit meets this requirement and is thus excepted because it is deemed not to be of a personal nature, it is illogical to have included it as a "personal benefit" in the first instance. Conversely, if a benefit is deemed "personal" within the general rule requiring disclosure, it is difficult to see how it can meet the requirement of the ordinary and necessary exception that it not be personal in nature.32

Finally, the three purposes set forth in the third requirement for the ordinary and necessary limitation are not particularly illuminating. The first purpose—that of attracting and maintaining qualified personnel—is broad enough to encompass virtually any personal benefit. Benefits that satisfy the other two purposes—that of facilitating the performance of company business and that of improving efficiency in job performance—are not "personal" in the first instance.

The ultimate justification for issuing the interpretive releases is the Commission's view that they would "help registrants assure that the aggregate remuneration reported in registration statements, reports, and proxy and information statements contains all forms of remuneration, including salary, fees, bonuses and other personal benefits received by management."33 However, the numerous inadequacies of the two releases practically ensure that issuers and registrants will react differently from each other and inconsistently with the underlying concerns that gave rise to the issuance of the releases in the first place, except possibly with respect to the few specific items addressed in the Second Release. In sum, the SEC has failed to provide general principles against which those benefits not specifically covered by the Second Release can be measured, and the Commission's effort to identify general principles which can be utilized to exclude certain personal benefits has produced ambiguous and logically inconsistent results. It therefore seems appropriate that an effort be undertaken to identify the general principles which should control in this context.

32. See Eppler & Yaeger, supra note 23, at 844.
33. First Release, supra note 4, at 17,059-7.
C. Suggested Principles

1. Distinguishing Perquisites from Remuneration

At present, the relevant statutory provisions require only that "remuneration" paid by the issuer or registrant be disclosed. In 1976, the SEC proposed various amendments to the disclosure requirements applicable to management background and specifically invited comment on the suggestion that registrants be required to disclose "the numerous emerging forms of indirect compensation or 'perquisites' now given to management personnel." It should be noted, however, that the focus of the existing disclosure rules is not on the availability of perquisites in a general sense; that a particular executive may be provided with more than is absolutely necessary to perform his or her assigned tasks (for example, first-class travel, expensive office furnishings, or the availability of executive dining facilities) is irrelevant to the disclosure system. Rather, inquiry must focus only upon the "remuneration" paid to officers and directors. The problem, then, is one of isolating principles which should control the latter determination.

2. Governing Principles

a. Expenditure by the Corporation. It should be axiomatic that to constitute remuneration paid by the issuer or registrant within the meaning of the federal securities laws "something of positive value must pass from the corporation to the insider." If the company incurs no expense, no remuneration is paid by it. It was most likely this perception which led the SEC to the apparently absolute conclusion that personal benefits such as home repairs or personal travel expenses must be disclosed as remuneration, whereas third-party benefits such as favorable bank loans constitute remuneration only when "the corporation compensates, directly or indirectly, the bank . . . for providing the loan."
b. **Corporate Expenditure as Substitute for Personal Expense Which Would Otherwise be Incurred by the Recipient.** Under the terms of the First Release, the question whether an otherwise personal benefit "relieves the individual of expenditures normally considered to be of a personal nature" is but one of the tests for determining whether it is an ordinary and necessary expenditure and, therefore, excludable from reported remuneration.41 This test, however, should be a *sine qua non* for the conclusion that a particular nonmonetary benefit constitutes remuneration42 because it focuses precisely upon the relevant question whether the purpose and application of a particular benefit relates to business (nonremunerative) or personal (remunerative) matters. In addition, it has the virtue of injecting some predictability into the analysis in this area. It is significant that each of the six types of nonmonetary benefits identified in the First Release as presumptively constituting remuneration meets this test in most circumstances.43

Moreover, it may be that some benefits should not be thought of as relieving the recipient of what would otherwise constitute a personal expense in the absence of some reasonable ground to believe that the recipient would have personally incurred the expense regardless of his or her position in the corporation or the availability of the corporate benefit. For example, an executive would obviously not be expected to pay for his or her own furnishings at company facilities. It could further be argued that no reportable remuneration accrues if, for example, the spouse of an executive hitchs a ride on a corporate airplane for personal travel purposes when the plane was already destined to fly to a particular location for business purposes. In this circumstance it seems unlikely that the spouse would have incurred the personal expense had the airplane not been available. Although it could be argued that these items fall within the exception for "incidental" personal benefits,44 it seems clear that the SEC would not concur.45

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42. E.g., Eppler & Yaeger, *supra* note 23, at 844 ("[A] benefit that does not relieve an individual of personal expenditures should not be remuneration."). *See also* McCoy & Griffin, *supra* note 23, at 39, col. 3.


44. Id.

This is not to say that all personal benefits which (1) involve expenditures by the corporation and (2) relieve the recipients of expenses personal in nature which they would otherwise personally incur necessarily constitute reportable remuneration. It is here that the exceptions articulated in the First Release come into play for expenses which are ordinary and necessary to the conduct of the company's business or merely provide incidental personal benefits.

c. Exceptions. (i) Ordinary and Necessary Business Expenditures. The SEC stated in the First Release that certain ordinary and necessary personal benefits need not be reported as remuneration provided they (1) are available to management personnel generally, (2) do not relieve the recipient of expenditures normally considered to be of a personal nature, and (3) are extended solely for the purposes of attracting and maintaining qualified personnel, facilitating the conduct of company business, or improving job performance.46

As discussed above, the second requirement that the benefit not relieve the recipient of expenditures personal in nature should not be allowed to stand since it virtually eliminates the exception.47 Given the illogic of this second prong of the ordinary and necessary test, and the ease with which most personal benefits will qualify under one of the three purposes in the test's third prong (especially that of attracting and maintaining qualified personnel), the principal inquiry in this context should be whether the personal benefit is available to management personnel generally. It was probably this rationale which led the SEC, in the amended disclosure rules, to exempt flatly any personal benefit which is "provided to broad categories of employees" and does not "discriminate in favor of officers or directors."48 This change in the amended disclosure requirements would bring the rule in line with the SEC's stated rationale for requiring disclosure of personal benefits—enabling investors to determine the value of the issuer or registrant's shares, to assess the value of management, and to uncover any management exercise of undue influence in

46. See First Release, supra note 4, at 17,059–6. See text accompanying note 29 supra. This concept, as such, did not appear in the Second Release except for the specific discussion of group life and health plans. See Second Release, supra note 10, at 17,059–13.
47. See text accompanying note 32 supra.
48. Instruction 2(d) to Item 4(a) of Regulation S–K, supra note 5, at 61,764.
securing special benefits.\textsuperscript{49}

(ii) \textit{Incidental Personal Benefits}. The SEC's exception for "incidental" personal benefits is narrowly phrased in the First Release. Incidental benefits are those which, like furnishings at company-maintained offices, are "directly related to job performance."\textsuperscript{50} However, the SEC's interpretation of this language has been somewhat broader in scope; company expenditures less intimately related to job performance, such as parking places and meals at company facilities, have also been excluded thereunder.\textsuperscript{51}

The exclusion of incidental benefits should have both qualitative and quantitative components. The qualitative component centers analysis on the essential purpose of the benefit. For example, that an executive may be flown on corporate aircraft to a business meeting when a commercial flight was available should not mean that he or she received reportable remuneration. Similarly, if executives are permitted or encouraged to play golf at company expense in the course of week-long staff meetings, no reportable remuneration should thereby accrue.\textsuperscript{52}

The quantitative aspect focuses on the relative value of the benefit to the recipient. While traditional standards of materiality are not determinative,\textsuperscript{53} some commentators have urged that at
least a *de minimis* rule should exist in this context. The SEC adopted an analogouse concept in the amended disclosure rules, although it is clear that the SEC staff refuses expressly to recognize a *de minimis* principle, as such, in this context. If the issuer cannot ascertain the specific amount of benefits or the extent to which the benefits are personal rather than business-related "without unreasonable effort or expense," the amount may be excluded if it does not exceed $10,000 with respect to any individual as to whom disclosure is required.

d. Summary. Although the SEC has thus far failed so to do, it is possible to identify principles which can generally be used to guide analysis of whether a particular corporate benefit constitutes reportable remuneration under the federal securities laws. As a threshold matter, a benefit should not be deemed to constitute remuneration unless it involves (1) an expenditure by a registrant or issuer which (2) relieves the recipient of an expense personal in nature that he or she would otherwise be likely to incur. Even if these conditions are met, it may be that a particular benefit, which would then be deemed a "personal benefit," will not constitute reportable remuneration if it is a benefit which meets the test of being either ordinary and necessary (*i.e.*, available to management personnel generally) or merely incidental to an essentially job-related function. It seems appropriate to test a number of benefits commonly provided to executives by United States corporations against these general principles.

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54. *E.g.*, Garrett, supra note 27, at 42. Analysis of this quantitative aspect has led some to the conclusion, in other contexts, that even if certain facts might be deemed material, it is not necessarily a foregone conclusion that they must be disclosed; the costs involved must be balanced against the benefits to be obtained. *See, e.g.*, Ash v. Baker, 392 F. Supp. 368, 372 (E.D. Pa. 1975) (*dictum* that expense of resolicitation of proxies outweighed potential benefits), aff'd, 530 F.2d 963 (3d Cir.), cert. denied, 426 U.S. 921 (1976); SEC Securities Act Release No. 34-11733 (Oct. 14, 1975), reprinted in [1975-76 Transfer Binder] *FED. SEC. L. REP. (CCH)* f 80,310.

55. Instruction 2(d)(ii) of Item 4(a) of Regulation S-K, supra note 5, at 61,764. In the Third Release, the Division of Corporation Finance stated flatly that the conditional exclusion in Instruction 2(d)(ii) "is not a *de minimis* perquisite exclusion . . . . The specific amounts of any personal benefits, no matter how small, are to be included if they can be determined with reasonable effort or expense." Third Release, supra note 12, at 61,779.

56. In addition, a number of valuation problems will be addressed herein as they become relevant. In its interpretive releases, the SEC indicated an intent to allow issuers and registrants great flexibility in valuing reportable personal benefits. *E.g.*, First Release, supra note 4, at 17,059–6 to –7 (*"Non-monetary forms of valuation must be valued as
II. ANALYSIS OF PARTICULAR BENEFITS

A. Corporate Facilities and Other Properties

1. Automobiles

The practice of providing company-owned or -leased automobiles to officers is relatively common among large corporations. While the nature of corporate automobile programs varies greatly, in many instances companies pay the total rental or purchase price, maintenance expenses, and insurance premiums. Reimbursement for personal use of the automobiles may be, but often is not, required.

The personal use of company-owned or -leased automobiles is specifically identified in the SEC releases as constituting reportable remuneration. Of course, when a company automobile is used solely in connection with job-related matters, the user does not receive remuneration because he or she is not relieved of any personal expenditure. It may be rather unusual, however, for a company-owned or -leased car over which an executive has complete discretion to be used exclusively for business purposes. In most situations where company automobiles are used for personal purposes, some remuneration should be said to have accrued and the SEC and some commentators seem to contemplate a rather precise allocation between business and personal use in this con-accurately as possible. The appropriate valuation may depend upon appraisals, the value of the benefit to the recipient, the value assigned for tax purposes, or some other appropriate standard.

However, this flexibility was eschewed in the promulgation of the amended disclosure rules under which personal benefits are to be valued at actual incremental cost to the issuer. Instruction 2(d)(i) of Item 4(a) of Regulation S-K, supra note 5, at 61,764. But “if such aggregate costs are significantly less than the aggregate amounts the recipient would have had to pay to obtain the benefits, appropriate disclosure, including the aggregate value to the recipient, should be made in a footnote to the table.” Id. It is curious that no parallel provision exists for instances in which the recipient's alternative cost significantly exceeds the registrant's aggregate incremental cost.


58. First Release, supra note 4, at 17,059-5 to -6; Second Release, supra note 10, at 17,059-11.

59. Others have come to this conclusion on the ground that “the time saving element and the extra productivity by the executive which such time saving generates provide a basis for not treating the benefit as compensation.” McCoy & Griffin, supra note 23, at 38, col. 5. While this analysis reaches the proper conclusion, it fails to recognize the distinction between “perquisites” and “remuneration.” See text accompanying notes 34-36 supra.
text. Yet it is possible to envisage circumstances in which some personal use of a company automobile might not constitute reportable remuneration. For example, the occasional personal use of automobiles in a pool maintained at a particular location might not constitute remuneration where the automobiles are provided and used predominantly for business purposes. The personal use in such circumstances might be considered incidental or in some situations may come within the exclusion of *de minimis* benefits as to which the valuation of personal use cannot be calculated without unreasonable effort.

Where it cannot be said that the extent of personal use is merely incidental or *de minimis*, some companies adopt, for the sake of convenience, standard valuation practices based upon percentage or mileage formulas, without otherwise investigating the actual use patterns of particular executives. Such approaches may not be sanctioned by the Second Release and may also raise income tax issues if there are variances between the amounts reported to the IRS and those reported to the SEC. These considerations have caused a number of companies to adopt reimbursement practices based upon the particular executive's personal use (on a percentage or mileage basis) of company-owned or -leased automobiles. A few companies have adopted formulas under which the executive receives reimbursement for business use at the current IRS allowance rate of seventeen cents per mile. This approach is thought to be particularly appropriate when the predominant use is personal, as otherwise practically the entire cost incurred by the company would be included as remuneration. While it is arguable that the executive receives additional remuneration to the extent that his or her actual costs are less than such allowances, the terms of the Second Release sug-

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60. See, e.g., Second Release, supra note 10, at 17,059–11; Eppler & Yaeger, supra note 23, at 845.

61. The SEC stated that the Division of Corporate Finance would express no objection if the value of this benefit were a percentage of the cost to the company of leasing or owning the car based upon the amount of time an executive used the car for personal purposes or the number of miles the car was used for personal purposes. Second Release, supra note 10, at 17,059–11.


63. In such circumstances the registrant's cost probably constitutes the most reliable, and easy to administer, standard for valuation. The fact that the company may receive a discount on cars purchased or leased should be of no consequence. *See* note 67 *infra*.

gest that formulas premised upon appropriate IRS standards will be recognized for disclosure purposes,\(^{65}\) and the SEC staff in the past has informally advised companies that such approaches are acceptable.

The desirability of utilizing any particular valuation or reimbursement approach necessarily depends upon the facts at issue. In general, a reimbursement policy based upon personal use would be preferable to a policy based on business use in situations in which the company wishes to avoid repeated future disclosures.\(^{66}\)

2. Corporate Aircraft

a. General. When an executive has discretionary use of an airplane, analysis of the extent to which he or she should be deemed to have received reportable remuneration will generally parallel that set forth with respect to automobiles—the use of the airplane to relieve the executive of expenses which he or she would otherwise incur for personal purposes should result in reportable remuneration.

However, there are a few issues which are peculiar to this context. For example, an officer may use a corporate airplane to attend a meeting of the board of directors of an unaffiliated company. The executive will probably not have been relieved of a personal expense which he or she would otherwise have borne since his or her travel expenses would most likely have been paid by the other company. Furthermore, an officer's membership on other boards of directors frequently serves his or her employer's overall business interests; hence, expenses incurred in that capacity might not be personal in the first instance.

The most difficult issue concerning corporate aircraft is valuation. Although the SEC's opinion on this issue is unclear in the Second Release, apparently the SEC believes that either the cost to the executive of alternative means of travel or the allocated actual cost to the issuer or registrant is appropriate.\(^{67}\) However, if corporate aircraft is generally used for business purposes, it seems unreasonable to value the benefit received for a specific personal use by allocating the actual cost to the issuer or registrant or by

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\(^{65}\) Second Release, supra note 10, at 17,059-11.

\(^{66}\) A reasonable reimbursement policy would obviate the need for disclosure since, on a net basis, the company would not have expended any funds for the executive's personal benefit by its provision of the automobile.

\(^{67}\) The SEC stated that:
using the prevailing market rate of a charter flight. Thus, the use of the incremental cost to the company is appropriate under the amended disclosure rules so long as such cost is not "significantly less" than the aggregate amount which the recipient would otherwise pay. While such approaches (the utilization of incremental cost in particular) parallel the principle that an executive receives remuneration only to the extent that the issuer or registrant incurs an expense, it is unlikely in most situations that the executive would have taken a charter airplane had a corporate aircraft not been available. The use of the probable alternative cost to the executive—fare on a comparable commercial flight—is preferable on the ground that the company's cost is disproportionate to the amount which the executive would have otherwise paid.

b. Spouses and Hitchhikers. The SEC flatly concluded in the Second Release that if "the company plane is flown somewhere for a business reason and an executive who does not have company business to transact at such place hitches a ride or tags along on the plane, [such] executive receives a form of remuneration." Given the provision in the amended disclosure rules that benefits furnished to other persons which indirectly benefit management must be included as reportable remuneration, the SEC's position with regard to executive hitchhikers would seem to apply equally to spouses and other hitchhikers who are dependents of the executive. While it is arguable under the terms of the Second Release that the value to be ascribed to this benefit is merely the modest additional expenses incurred by the company

The Division [of Corporation Finance] would express no objection if the personal use of company assets were valued using one of the following methods:

a) determining the recipient's cost if he had obtained the use of equivalent assets independently of the corporation; or
b) allocating a portion of the cost to the corporation of owning and maintaining the facility during a particular year on the basis of the time the asset was used for personal purposes or the mileage of such usage unless this amount is disproportionate to the amount which the recipient would have paid if he had obtained the use of equivalent assets himself.

Second Release, supra note 10, at 17,059–12 (emphasis added). The term "equivalent assets" suggests that the cost of a charter, rather than a commercial, flight is intended.

68. Instruction 2(d)(i) of Item 4(a) of Regulation S–K, supra note 5, at 61,764.
69. Some companies have formally adopted security programs which require top executives to use corporate aircraft on personal trips; the executives then reimburse the company in an amount equivalent to a comparable commercial fare. Where reasonable grounds exist for such a program, the requirement for additional reimbursement to the extent of the cost of a charter trip is arguably unnecessary.
70. Second Release, supra note 10, at 17,059–11.
71. Instruction 2(d) to Item 4(a) of Regulation S–K, supra note 5, at 61,764.
as a result of the hitchhiker's presence on the airplane, the SEC staff asserted in an open session held to review the Second Release that the value to be reported should be the cost of a comparable commercial flight.

It seemingly would be more reasonable to conclude that very little, if any, remuneration should be said to accrue to an executive when he or she, a spouse, or a dependent hitches a ride on a company airplane otherwise flying to a particular location for business purposes, so long as no one is displaced. In this circumstance, the registrant incurs only a modest additional expense at most, even though the executive may have received a substantial personal benefit under the terms of the amended disclosure rules and the releases. Moreover, a personal travel expense would probably not otherwise have been incurred if a corporate airplane had not been available.

It is difficult to reconcile the SEC's position on hitchhiking with the approach it takes toward third-party benefits such as loans or supplier discounts, which constitute reportable remuneration only if the company directly or indirectly reimburses the third party for supplying them. While it is true that, unlike hitchhiking on corporate aircraft, the benefit is not provided by the company in the third-party situations, this fact should be of no import. The relevant inquiry in the hitchhiking area should be whether the company has incurred any additional expense due to the benefit it has provided.

Somewhat different considerations may exist as a practical matter when spouses or hitchhikers accompany executives on per-

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72. The SEC stated, "Although the corporation may have incurred little cost as a result of providing air transportation to the extra person(s), the value of this personal benefit should be included in aggregate remuneration or otherwise reported." Second Release, supra note 10, at 17,059-11 (emphasis added). If the phrase "this personal benefit" were read as referring to the corporation's additional "little cost," only the corporation's actual incremental cost would be includable as remuneration.


74. In some cases there may be a direct business purpose for a spouse accompanying an executive on a business trip. Moreover, many companies have formal or informal policies encouraging spouses to accompany executives on relatively extended trips. Such a policy is frequently rationalized on the ground that the company has a legitimate business interest in easing the personal stress on the executive which may be caused by extended travel.

75. See text accompanying notes 16-33 supra.

76. First Release, supra note 4, at 17,056-6. See text accompanying note 21 supra.
sonal trips. If the issuer or registrant treats the actual, incremental, or charter cost of the executive's trip as his or her reportable remuneration, there is no basis for the inclusion of any additional amount for the spouse's or hitchhiker's trip, as the cost to the company is not increased by the presence of the additional person—the plane was flying to that destination anyway. However, if a comparable first-class fare were to be utilized it would appear, at least with respect to spouses and family members who are dependents of the executive, that a similar per capita charge ought to be made for the additional persons. It seems reasonable to assume that no additional remuneration should be attributed to the executive for hitchhikers who are not dependents, on the ground that the benefit accruing to the executive is practically impossible to value and would rarely relieve the executive of what otherwise would be a personal expense. The Second Release, however, appears to be at variance with this reasoning.  

3. **Apartments, Yachts, Lodges, and Other Corporate Properties**

The ownership or lease of corporate yachts, apartments, lodges, and other facilities does not necessarily give rise to reportable remuneration. As was the case with corporate automobiles and aircraft, the issue turns on the purpose for the ownership or lease of such facilities and their ultimate use.  

For example, when a corporation permits its executives to use a hunting lodge as a vacation place, those executives receive remuneration when they use it for that purpose, even if the lodge is used at other times for business purposes. In this situation, each executive would be relieved of an otherwise personal expense, at least to the extent that the corporation thereby incurred additional expenses.

Under the terms of the Second Release, allocation would seem to be required where some of the use is for business and some for

77. Second Release, supra note 10, at 17,059–10 ("Registrants should [include as remuneration] those benefits conferred directly to officers, directors and those that may benefit such persons indirectly because they are provided to relatives and friends who do not perform services for the corporation.").

78. *See McCoy & Griffin, supra* note 23, at 39, col. 1. This is so even if the facility is only available to an extremely limited group of executives. For example, if a corporation maintains an apartment at a branch location for the exclusive business use of an executive who normally works out of the company’s headquarters in another city, it would seem that no reportable remuneration should be said to accrue under the federal securities laws for use of the apartment.
personal purposes. However, the exception for incidental personal benefits will occasionally find application. For example, if an officer or director decides to stay an extra night at a company apartment after the conclusion of out-of-town business meetings to visit friends or attend the theater, it is arguable that such a benefit is merely incidental to the essential business purpose for the apartment's use. While the incremental costs to the registrant, such as additional maid service, might be deemed to constitute remuneration, it may be that such benefits could be disregarded as de minimis. Similarly, when the facility is used for a business purpose, and an executive brings his or her spouse along, no remuneration should accrue to the executive so long as no additional expense is incurred by the company.

4. Improvements at Personal Residences

Company provision of home repairs or improvements at executives' personal residences is presumed by the SEC to be a personal benefit which constitutes reportable remuneration. Several of the enforcement actions brought by the SEC in this area have involved such matters. In general, when the company either directly or indirectly incurs an expense in providing such repairs or improvements, the recipient is relieved of expenses normally considered to be personal in nature, and the cost should constitute reportable remuneration. The actual cost of the repair or improvement, unless significantly less than the expense that the recipient would otherwise have borne, should be utilized as the reported value of the benefit.

There may be circumstances, however, in which repairs or improvements made to an executive's home may not constitute remuneration. For example, security systems may constitute only incidental personal benefits if a reasonable corporate need for the particular type of system can be established.

80. In the section of the Second Release devoted to "living expenses," the SEC approaches this conclusion. "[T]he occasional use of a company maintained apartment, house or other dwelling [is not] a form of remuneration . . . provided the dwelling is used by an officer or director for the purpose of facilitating his conduct of company businesses." Id. at 17,059–13.
81. First Release, supra note 4, at 17,059–5 to –6. See text accompanying note 20 supra.
83. See Second Release, supra note 10, at 17,059–13 ("The taking of various security
B. Services and Related Benefits

1. Legal, Tax, and Accounting Services

Services provided to officers or directors by outside legal, tax, or accounting advisors constitute reportable remuneration if they are paid for by the company and relate to purely personal matters of the executive.⁸⁴ If the bill for outside services is not directly or indirectly paid by the company, no reportable remuneration accrues.⁸⁵

In many circumstances, however, it may be difficult to distinguish personal from company-related matters, for example, advice in connection with transactions in securities or compensation, or legal representation in the context of governmental investigations. An appropriate standard in these grey areas, at least with respect to legal services, may be whether the company could indemnify the officer or director for such expenses under applicable state corporate law. Nevertheless, the SEC staff has taken the informal position that indemnification payments do not constitute remuneration "if they are related to expenses that are ordinary and necessary to the conduct of company business."⁸⁶ In applying this test to direct payments, including those for tax and accounting services, the SEC staff has taken the position that the payments will be nonreportable only if they constitute ordinary and necessary business expenses for federal income tax purposes.⁸⁷

With respect to executive use of corporate staff, the SEC has

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⁸⁵. The Second Release stated:

**Question:** When does a company compensate a client or an outside professional for providing personal services to an officer or director?

**Interpretive response:** A company may compensate its client or an outside professional directly or indirectly for providing its executive with a service in various ways including:

a) paying or agreeing to pay a higher than market rate for its purchases or services obtained from the client or professional as a result of the executive's relationship with the client; and

b) increasing or undertaking to increase its business dealings with the client as a result of the executive's relationship with the client.

*Id.* at 17,059–15.


taken the position that the nature of the service provided controls: "If the services are rendered with respect to a purely personal matter, such as the preparation of a will or United States tax return, such usage of the corporate staff would result in a form of remuneration to the officer or director." It is arguable, however, that the occasional use of corporate staff for personal services should not result in remuneration. This would be so to the extent that the staff personnel are not thereby diverted from performing their normal job responsibilities, or are not assigned regular duties which relieve the executive beneficiaries of otherwise personal expenses. In this situation, the company would not have incurred any incremental expense. If some remuneration must be reported, the cost to the company would be the most appropriate standard for valuation, although the amount which the executive would have paid had he or she hired an unrelated person might also be used.

2. Moving Expenses and Physicals

In most situations, reimbursement for moving expenses and periodic physicals will not constitute reportable remuneration. While such benefits involve expenditures by the company which relieve the recipient of what otherwise may be personal expenses, they are usually excludable on two independent grounds. First, if the executive is viewed as an asset to the corporation, his or her availability and health could be said to be directly related to his or her value to the company. Therefore, such benefits arguably constitute incidental benefits within the meaning of the First Release. Second, if such benefits are generally available to management personnel, they would be ordinary and necessary to the conduct of company business under the alternative exclusion of the First Release, since they are provided "for the purpose of at-

89. Moving expenses normally are reimbursable only where the move was made at the company's request. If the move merely reflected the executive's desire to change houses or to relocate in another side of town (unless, perhaps, the company headquarters had been relocated), reimbursement by the company would constitute reportable remuneration since it could not be justified on either of the grounds set forth in the text accompanying notes 91-93 infra.
90. See Second Release, supra note 10, at 17,059-12 ("Payments for physical examinations for executives generally do not result in a form of remuneration to the executives.").
91. McCoy & Griffin, supra note 23, at 39, col. 1.
92. See text accompanying notes 24-27, 50-55 supra.
tracting and maintaining qualified personnel."  

Even if a physical examination is provided at a resort, it should not constitute remuneration so long as it is conducted over a reasonable period of time and the amount involved is not excessive, regardless of whether the cost incurred by the company exceeds that which would have been incurred locally. However, if the physical results in a paid vacation for the executive (and in some cases his or her spouse) and "if the cost of the physical examination is disproportionate to the cost of a physical examination at a clinic in a non-resort area," then a portion of the cost should be treated as remuneration.

C. Club Memberships

It is curious that club memberships, which are common non-monetary corporate benefits, are not specifically mentioned in the First Release. Notwithstanding the SEC's apparent willingness in the Second Release to treat all club memberships alike, some distinctions should be drawn among them.

The initiation fee and monthly or annual dues for business clubs should not constitute reportable remuneration if legitimate business reasons exist for the membership in and ultimate use of the club. Personal use of such memberships should be deemed "incidental" to this principal business usage, thereby placing it within the exception created by the SEC in the First Release. However, additional expenses incurred for personal use of business clubs would constitute reportable remuneration if such expenses are paid by the company.

Country clubs present a different set of problems. The SEC has taken the position that "if the clubs are used solely for busi-

93. See text accompanying notes 28–32, 46–49 supra.
94. McCoy & Griffin, supra note 23, at 39, col. 1.
95. Second Release, supra note 10, at 17,059–12.
96. See generally First Release, supra note 4, at 17,059–3.
97. The SEC has recognized that the "payment of fees of professional organizations is not a form of remuneration to the officers or directors if membership in the organization is necessary to such person's performance of his duties for the company." Second Release, supra note 10, at 17,059–12. If one assumes that the word "necessary" is not intended to mean "indispensable," an analogy can readily be drawn between professional organizations and business clubs such that both would be exempted in the circumstances described above.
100. If a particular executive is also a member of a family country club at his or her own expense, the business purpose for other club memberships seems easier to justify.
ness related matters, the usage does not result in remuneration to
the executive. If, however, the club is used for personal activities,
this usage results in a form of remuneration."\textsuperscript{101} The SEC also
takes the position that all expenses attributable to personal use of
any club membership by an officer or director must be reported as
remuneration.\textsuperscript{102} Here, the SEC would probably require disclo-
sure of an allocated portion of the initiation fees and annual dues
as well as disclosure of any personal expenses.

Initiation fees, however, are usually one-time expenditures
which in many situations cannot reasonably be apportioned be-
tween the probable ultimate business and personal uses. Where
an executive's membership in a particular club would be in the
company's business interest, it could be argued that any personal
benefit which accrues from this membership does not involve any
additional expense by the company\textsuperscript{103} and should not be consid-
ered reportable remuneration. When the personal use of the club
membership is not so great as to cast doubt upon whether the
membership is maintained for business purposes, similar reason-
ing should apply to the payment of periodic dues. Without such
expenditures, the business purpose could not be fulfilled. There-
fore, it may be said that no reportable remuneration accrues be-
cause no additional expense is incurred by the company.\textsuperscript{104} In
any event, reimbursement by the company for expenses incurred
for personal use of club facilities would constitute reportable re-
muneration.

\textbf{D. Loans and Discounts}

Under the terms of the First Release, "the ability of manage-
ment to obtain benefits from third parties, such as favorable bank
loans and benefits from suppliers," may constitute reportable re-
muneration.\textsuperscript{105} However, only the actual receipt of a third-party
benefit, and not the mere ability to obtain it, should be required to
be disclosed.\textsuperscript{106} Moreover, under the SEC releases a third-party
benefit must be included as remuneration only in situations in
which "the corporation compensates, directly or indirectly, the

\begin{footnotes}
\item[101.] Second Release, supra note 10, at 17,059-12.
\item[102.] Id.
\item[103.] Other writers have reached this result by analogy to rules governing the federal
income tax status of dual-benefit expenses. McCoy & Griffin, supra note 23, at 38, col. 6.
\item[104.] Others have disagreed with this conclusion. See id. ("[I]t would seem that annual
dues should be pro-rated based upon the relative amounts of business and personal use.").
\item[105.] First Release, supra note 4, at 17,059-6.
\item[106.] Eppler & Yaeger, supra note 23, at 843.
\end{footnotes}
bank or supplier for providing the loan or services to management."

Only in these circumstances does the issuer or registrant incur an expense in connection with the provision of the benefit. As a result, favorable loans or discounts provided by banks or suppliers merely for the purpose of generating or maintaining goodwill will not constitute reportable remuneration.

On the other hand, should the company indirectly reward the third party for providing the benefit, for example, by maintaining compensating balances at a bank or agreeing to absorb the discounts in future purchases from a supplier, the benefit would constitute reportable remuneration. Valuation may be difficult in this context. If the company agrees to absorb discounts in future purchases, the amount of the discount would represent the amount of the remuneration. However, if the company agrees only to make future purchases of otherwise needed products at the then-prevailing rates, it could be argued that there is no third-party benefit since no additional cost is incurred by the company. With third-party loans, the value could be said to represent either the net cost to the company, if any, of the indirect payment to the bank, or the difference between prevailing terms for similar loans and those obtained by the executive. The difficulty of affixing a reliable value under the latter standard suggests that the former will be applied.

E. Insurance and Medical Reimbursement Plans

Health and life insurance plans which name the executive or his or her designee as the beneficiary and medical reimbursement

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107. First Release, supra note 4, at 17,059–6. The Second Release has similar language. "Where the corporation compensates the bank either directly or indirectly for extending the loan to the executive, the officer or director receives remuneration to the extent of the benefit derived from such compensation." Second Release, supra note 10, at 17,059–12.


109. A similar result should obtain with discounts provided by the company so long as the particular item is not acquired at less than its cost. However, in the SEC's view: [t]he purchase by officers or directors of the corporation's products at a discount need not be valued for the purpose of reporting remuneration received by an executive provided:
   a) all or substantially all of the corporation's employees may make purchases at the same discount or at a discount based upon eligibility criteria which precludes [sic] individual selection; and
   b) the price of the product as a result of the discount is not less than the cost to the corporation of producing it.

Second Release, supra note 10, at 17,059–15. The additional requirement that "substantially all of the company's employees" receive discounts is illogical. If the company incurs no expense, no remuneration should be deemed to have been received.
plans involve expenditures by the company which relieve the recipient of expenses normally thought to be personal in nature. Therefore, such benefits may be excluded from reported remuneration only if the plans or arrangements fall within the exception for group plans which do not discriminate in favor of officers and directors. Executives’ liability insurance requires different treatment. If such insurance is “intended to relieve officers and directors of liability relating to their job performance,” premiums and benefits paid do not constitute remuneration.

III. NATURE OF DISCLOSURE

A separate description of each form of remuneration is not required by the present disclosure provisions so long as disclosure of the benefit is not otherwise mandated. The amended disclosure provisions relating to management remuneration clearly contemplate that, after an appropriate value is assigned to nonmonetary forms of remuneration, such amount will be added to the amounts reported for the named individuals and the group appearing in the remuneration tables. Footnote disclosure is required where the aggregate amount of reported personal benefits exceeds the lesser of $25,000 or ten percent of an individual executive’s aggregate remuneration. Such disclosure must include the dollar amount or percentage of remuneration constituting personal benefits and a brief description of such benefits.

Regardless of the amended disclosure rules, textual disclosure may be necessary if the transactions at issue are material to shareholders or investors. In the questionable payments context, the SEC has frequently articulated the view that the extent to which directors and executive officers were involved in such matters was required to be disclosed as bearing on the integrity of management. This was true whether or not such payments were financially material. While its propriety is far from clear ana-

110. Instruction 2(d)(iii) of Item 4(a) of Regulation S-K, supra note 5, at 61,764.
112. Instruction 2(d)(iii) of Item 4(a) of Regulation S-K, supra note 5, at 61,764.
113. Id.
114. Id.
115. SEC Report, supra note 9, at 18-19.
116. Id. The SEC stated: Implicit in such disclosure requirements [evidenced by the items enumerated in Schedule A] is the assumption that corporations conduct their business and sell their products on the basis of quality and price rather than bribes and kickbacks. Such practices not only bear upon the quality of the registrant’s business and the attendant risks, but also on the quality of a registrant’s earnings . . . . The disclo-
lytically,117 this view has been adopted by some courts118 and may indicate that full disclosure of a situation approaching misappropriation of corporate assets will be required.

IV. DUTY TO INVESTIGATE

The SEC’s decision to amend Regulation S–K to provide specifically for disclosure of personal benefits indicates that the thrust

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Id. (emphasis in original). The integrity-of-management rationale for requiring disclosure is not unique to the questionable payments context. See, e.g., Rafal v. Geneen, [1972-73 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,505, at 92,441 (E.D. Pa. 1972) (fact that a nominee for election to a board of directors was a defendant in an action alleging improper use of inside information deemed material under rule 14a-9(a)). For example, in Matter of Franchard Corp., 42 S.E.C. 163, 170-71 (1964) (footnotes omitted), the SEC stated:

Evaluation of the quality of management—to whatever extent it is possible—is an essential ingredient of informed investment decision. A need so important it cannot be ignored, and in a variety of ways the disclosure requirements of the Securities Act furnish factual information to fill this need. Appraisals of competency begin with information concerning management’s past business experience, which is elicited by requirements that a prospectus state the offices and positions held with the issuer by each executive officer within the last 5 years. . . . To permit judgments whether the corporation’s affairs are likely to be conducted in the interest of public shareholders, the registration requirements elicit information as to the interests of insiders which may conflict with their duty of loyalty to the corporation. Disclosures are also required with respect to the remuneration and other benefits paid or proposed to be paid to management as well as material transactions between the corporation and its officers, directors, holders of more than 10 percent of its stock and their associates.

The concerns articulated in cases such as Franchard bear directly upon the relationship of management’s integrity and abilities to the financial interests of investors. In contrast, the SEC staff has more recently stated that the disclosure system “does not speak exclusively of financial relationships and data.” Instead, emphasis has been placed on “the quality of a Registrant’s earnings.” SEC Report, supra note 9, at 18.

117. This approach seems patently inconsistent with that taken by the Commission with respect to civil rights and other matters of significant social and political concern. See SEC Securities Act Release, No. 34-11733 (October 14, 1975), [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,310. More importantly, to the extent that the SEC begins to depart from the economic model of disclosure which guides its efforts in other contexts, “we can begin to wonder what sexual, what ethical, what other things may get involved.” Kripke, Opening Remarks on the Corporation in Crisis, 31 BUS. LAW 1277 (1976). Reliance upon the federal securities laws to control improper corporate conduct is “inferior to the direct sanctions normally used by society to prevent antisocial behavior and may, in fact, undermine the traditional purposes” of such laws. Note, supra note 27, at 1223. It has been persuasively argued that much of the SEC’s activity in this area, in particular that centered around the integrity-of-management rationale, has exceeded the jurisdiction granted the Commission by applicable legislation. E.g., Freeman, supra note 27, at 1298-1303. Thus, it is unclear, except perhaps in the most egregious cases, whether this factor, as articulated by the SEC, should be of significance in this context.

of its efforts in this area is essentially forward looking. However, the SEC observed that one of the reasons for issuing the First Release was that "recent cases brought by the Commission have revealed that some registrants have not disclosed personal benefits as remuneration."119 By issuing what purport to be interpretive releases rather than by proposing new rules, the Commission has ostensibly preserved its authority to bring enforcement actions for alleged inadequacies of prior filings.120 As a result, it has been suggested that investigations of disclosure in prior years modeled after questionable payments investigations will be required in this context.121

However, the enforcement actions cited in the First Release involved (1) instances in which substantial payments were made to officers and directors that were concealed on the corporate books and records; (2) situations amounting to misappropriation of corporate assets raising the "integrity-of-management" issue; and (3) in some cases, other traditional securities laws violations such as alleged schemes to inflate reported earnings or the concealment of transactions which were clearly within the scope of existing securities laws requirements.122 Since the first two concerns will rarely be present with respect to nonmonetary forms of remuneration, where the third concern is absent it would appear that investigations of prior periods should not normally be undertaken unless the company has knowledge of such matters.

Nevertheless, companies are on notice that the SEC now expects proxy statements and other filings to contain appropriate disclosures of nonmonetary forms of remuneration. It is clear that the SEC also expects issuers and registrants to implement procedures to ensure that such remuneration is identified and disclosed:

The Commission notes with approval, that, as a step toward improving the data upon which such disclosures are based, some corporations have established procedures by which independent auditors review management remuneration and report to the audit committee of the board of directors; in other

120. Eppler & Yaeger, supra note 23, at 846.
corporations, the board of directors may even be responsible for approving or disapproving the aggregate remuneration of all or certain members of management. In view of the all-inclusive nature of the required disclosure, the Commission urges all registrants to analyze thoroughly the internal controls and procedures by which management remuneration is identified and disclosed in order to assure that all required disclosures are made.\textsuperscript{123}

It has been suggested that questions relating to nonmonetary forms of remuneration be included in the conflict of interest questionnaires which many companies distribute to officers or directors in the course of preparing proxy statements or, if no such questionnaire is regularly distributed, in a special questionnaire designed specifically for remuneration disclosure purposes.\textsuperscript{124} However, several considerations militate against such an approach. As a practical matter, it will be difficult for a given officer or director to identify reportable remuneration given the ambiguities of the SEC's pronouncements and the few other authorities in this area. Responses to any such questionnaire are likely to be inconsistent and, perhaps, unnecessarily detrimental to other corporate interests. (For example, legitimate positions accepted by the IRS may be undercut.) Moreover, unlike the situations involving investigations of questionable payments, the number of relevant individuals will be relatively limited and the company is likely to have the necessary information required to meet its disclosure obligations in the first instance.

It may be appropriate for particular company personnel (for example, an internal auditor and/or a staff attorney) to collect the necessary information in this area on an annual basis, employing a general analysis of the available benefits, record checks, and personal interviews to the extent appropriate.\textsuperscript{125} In addition, the suggestion in the First Release that the procedures designed to ensure adequate disclosure be reviewed by an independent committee of

\textsuperscript{123} First Release, \textit{supra} note 4, at 17,059-7.

\textsuperscript{124} McCoy & Griffin, \textit{supra} note 23, at 39, col. 3.

\textsuperscript{125} Several companies have already conducted what appear to be entirely adequate investigations without recourse to questionnaires. It might be argued that relying principally upon corporate records supplemented by the company's system of internal audit controls is inadequate since it may fail to detect the most egregious cases—instances in which records have been falsified to conceal particular benefits. Nevertheless, internal auditing controls do exist, and it seems unlikely that one who is compelled to falsify records (now proscribed by Title I of the Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78q, 78dd-1, 78dd-2, 78ff (Supp. 1979)) would respond affirmatively to a questionnaire on this topic in any event.
V. CONCLUSION

The debate over whether so-called corporate perquisites must be disclosed in ordinary statements and reports under the federal securities laws has been mooted by the amendments to Schedule S–K which generally require such disclosure. However, the SEC has yet to articulate overriding principles in this context to guide issuers in determining whether the value of particular benefits must be disclosed and to elucidate what reporting companies should do to fulfill their disclosure obligations. This Article, in focusing upon the principles which can be gleaned from the SEC's publications in this context, is intended to fill this void.

126. See text accompanying note 123 supra.