

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 101934 / December 17, 2024

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4548 / December 17, 2024

ADMINISTRATIVE PROCEEDING
File No. 3-22362

In the Matter of

EXPRESS, INC.,

Respondent.

**ORDER INSTITUTING CEASE-AND-DESIST
PROCEEDINGS PURSUANT TO SECTION
21C OF THE SECURITIES EXCHANGE ACT
OF 1934, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Express, Inc. (“Express” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-And-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. This matter arises from Express, Inc.'s failure to disclose in its definitive proxy statements \$979,269 worth of certain perquisites and personal benefits it paid on behalf of its Chief Executive Officer (the "CEO"), and member of its board of directors, for its fiscal years 2019, 2020, and 2021. Most of the undisclosed perquisites and personal benefits were costs associated with the CEO's authorized use of chartered private aircraft. Express did not have adequate controls, policies, or procedures in place to effectively identify and analyze potential compensation for disclosure. In connection with this conduct, Express violated Sections 13(a) and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-15(a), 14a-3, and 14a-9 thereunder.

Respondent

2. Express, Inc. is a Delaware corporation headquartered in Columbus, Ohio. The company is a multi-brand American fashion retailer that operates online stores as well as physical stores. Express's common stock traded on the New York Stock Exchange ("NYSE") until March 25, 2024, when it was delisted. It was then quoted on the OTC Pink Open Market under the ticker symbol "EXPR." On April 22, 2024, Express and its affiliated subsidiaries filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Action"). On April 24, 2024, Express filed a Form 15 to terminate its registration of its common stock under Section 12(g) of the Exchange Act and to immediately suspend its duty to file periodic reports with the Commission. On June 25, 2024, a group of investors acquired the majority of Express's retail operating assets in the Bankruptcy Action.

Background

3. Section 14(a) of the Exchange Act makes it unlawful to solicit any proxy in respect of any security (other than an exempted security) registered pursuant to Section 12 of the Exchange Act in contravention of such rules and regulations as the Commission may prescribe. Rule 14a-3 prohibits issuers with securities registered pursuant to Section 12 of the Exchange Act from soliciting proxies without furnishing proxy statements containing the information specified in Schedule 14A, including executive compensation disclosures pursuant to Item 402 of Regulation S-K. Item 402 of Regulation S-K requires disclosure of the total value of all perquisites and other personal benefits provided to named executive officers who receive at least \$10,000 worth of such items in a given year. *See* Item 402(c)(2)(ix)(A). Item 402 of Regulation S-K also requires identification of all perquisites and personal benefits by type, and quantification of any perquisite or personal benefit that exceeds the greater of \$25,000 or 10% of total perquisites. *See* Instruction 4 for Item 402(c)(2)(ix).

4. In 2006, the Commission adopted amendments to executive compensation disclosure rules, including Item 402 of Regulation S-K. *See* Commission's Executive Compensation and Related Person Disclosure Final Rule adopting release, Release Nos. 33-8732A; 34-54302A; IC-27444A; File No. S7-03-06 (August 29, 2006) (the "Adopting Release"). According to the Adopting Release, "an item is not a perquisite or personal benefit," and does not

need to be reported, “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 on a non-discriminatory basis to all employees.” The Adopting Release also states that “the concept of a benefit that is ‘integrally and directly related’ to job performance is a narrow one,” which “draws a critical distinction between an item that a company provides because the executive needs it to do the job, making it integrally and directly related to the performance of duties, and an item provided for some other reason, even where that other reason can involve both company benefit and personal benefit.”

5. According to the Adopting Release, even where the company “has determined that an expense is an ‘ordinary’ or ‘necessary’ business expense for tax or other purposes or that an expense is for the benefit or convenience of the company,” that determination “is not responsive to the inquiry as to whether the expense provides a perquisite or other personal benefit for disclosure purposes.” Indeed, “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 his or her job.”

Facts

6. Contrary to Item 402 of Regulation S-K and the Commission’s guidance in the Adopting Release, Express’s system for identifying, tracking, and calculating perquisites incorrectly applied a standard whereby a business purpose would be sufficient to determine that certain items were not perquisites or personal benefits that required disclosure.

7. In definitive proxy statements disclosing executive compensation paid for fiscal years 2019, 2020, and 2021, which were filed in 2020 through 2022, Express disclosed “All Other Compensation” for the CEO in the amounts of: \$33,068 for fiscal year 2019, excluding \$147,704 for relocation benefits; \$4,942 for fiscal year 2020; and \$16,360 for fiscal year 2021, excluding \$277,358 for vesting of a one-time restricted cash award. The disclosed “All Other Compensation” consisted of retirement contributions and insurance premiums for each year, \$32,000 for one private flight for the CEO’s relocation for fiscal year 2019, and \$2,895 worth of private aircraft usage by the CEO’s family members for fiscal year 2021.

8. However, these same definitive proxy statements failed to disclose \$979,269 worth of perquisites and personal benefits provided to the CEO, thereby understating the “All Other Compensation” portion of its Named Executive Officers’ compensation by an average of 94% over the three fiscal years 2019, 2020 and 2021. Express incorrectly viewed the CEO’s business expenses to include expenses associated with the CEO’s personal flights, including transportation, meals, and hotel. Express paid these expenses but did not disclose these expenses as perquisites.

9. Express incorporated its definitive proxy statements disclosing executive compensation paid for fiscal years 2019, 2020, and 2021 into its Forms 10-K annual reports by reference.

10. On April 28, 2023, Express filed its fiscal year 2022 proxy statement, which, among other things, provided revised disclosures regarding perquisites and personal benefits provided to the CEO for fiscal years 2020 and 2021. Express also disclosed that the CEO voluntarily reimbursed the company approximately \$454,000 for private air travel and expenses that were determined to be perquisites or personal expenses.

Violations

11. Section 14(a) of the Exchange Act makes it unlawful to solicit any proxy with respect to any security (other than an exempted security) registered pursuant to Section 12 of the Exchange Act in contravention of such rules and regulations as the Commission may prescribe. Rule 14a-3 prohibits issuers from soliciting proxies without furnishing proxy statements containing the information specified by Schedule 14A, including executive compensation disclosures pursuant to Item 402 of Regulation S-K. Item 402 of Regulation S-K requires disclosure of the total value of all perquisites and other personal benefits provided to named executive officers who receive at least \$10,000 worth of such items in a given year. Item 402 of Regulation S-K also requires disclosure of all perquisites and personal benefits by type, and specific identification of any perquisite or personal benefit that exceeds the greater of \$25,000 or 10% of the total perquisites. Rule 14a-9 prohibits the use of proxy statements containing materially false or misleading statements or materially misleading omissions. Misstatements and omissions are material under Rule 14a-9 if they would alter the “total mix of information” considered by a shareholder in making a voting decision. *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976). Proxy violations do not require a showing of scienter; negligence is sufficient. *See, e.g., Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300-01 (2d Cir. 1973); *Sirota v. Econo-Car Intern., Inc.*, 61 F.R.D. 604, 607 (S.D.N.Y. Jan 15, 1974). As a result of the conduct described above, Express violated Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 thereunder.

12. Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission, among other things, annual reports as the Commission may require. The Commission need not prove scienter to establish a violation of Section 13(a) of the Exchange Act (or Exchange Act Rules 12b-20 and 13a-1). *See, e.g., SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998). As a result of its incorporation of deficient proxy statements by reference in its annual reports, Express violated Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

13. As a result of the conduct described above, Express violated Rule 12b-20 under the Exchange Act, which requires that, in addition to the information expressly required to be included in a statement or report filed with the Commission, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

14. Rule 13a-15(a) of the Exchange Act requires issuers to maintain disclosure controls and procedures. Rule 13a-15(e) defines “disclosure controls and procedures” to mean “controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Act (15 U.S.C. 78a et seq.) is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms.” Rule 13a-15(e) explains that “[d]isclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.” By failing to maintain policies, procedures, or controls designed to ensure that all potential perquisites and personal benefits are identified and analyzed for complete and accurate disclosure in its proxy statements, Express violated Rule 13a-15(a).

Express’s Self-Reporting, Cooperation and Remedial Efforts

15. In determining to accept the Offer, the Commission considered the following:

a. After learning of potential misconduct, Express acted promptly to ensure that outside counsel conducted an internal investigation. Before completing its internal investigation, Express self-reported to the Commission staff the failure to disclose perquisites referred to herein and other conduct potentially implicating the federal securities laws.

b. Express cooperated with the Commission’s investigation, when it provided to Commission staff facts developed through the internal investigation, compilations of relevant documents, information, and data.

c. After it self-reported, Express implemented remedial measures designed to ensure compliance with Item 402 of Regulation S-K and Commission guidance. Express also made disclosures in its fiscal year 2022 proxy statement concerning expenses it had identified that constituted undisclosed perquisites, and made additional disclosures thereafter.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(a) and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-15(a), 14a-3 and 14a-9 thereunder.

B. Respondent acknowledges that the Commission is not imposing a civil penalty based in part upon its cooperation in a Commission investigation. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission, or in a related proceeding, the Division may, at its sole discretion and with prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay a civil money penalty. Respondent may contest by way of defense in any resulting administrative proceeding whether it knowingly provided materially false or misleading information, but may not: (1) contest the findings in the Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Vanessa A. Countryman
Secretary