

## SEC CHARGES NIC INC. AND FOUR EXECUTIVES FOR FAILING TO DISCLOSE CEO PERQUISITES

February 3, 2011

A recent Securities and Exchange Commission (“SEC”) enforcement action should serve as a reminder to public companies that they may face SEC action for failing to disclose or inadequately disclosing the perquisites or personal benefits received by named executive officers and directors. As a result, public companies in the midst of proxy season should re-examine their controls and procedures to ensure proper disclosure of perquisites and personal benefits.

### Recent Action Involving NIC Inc.

Last month, the SEC filed civil charges<sup>1</sup> against NIC Inc. (“NIC”), a Kansas technology services company, its former CEO, current CEO, former CFO and current CFO for failing to disclose in SEC filings from at least 2002 to 2007 over \$1.18 million in perquisites and personal benefits to Jeffery Fraser, NIC’s founder and former CEO and chairman. According to the SEC, while NIC claimed in its SEC filings that Fraser’s salary was nominal (as low as \$1 a year), the defendants instead failed to disclose perquisites received by Fraser, including over \$4,000 per month for a Wyoming ski lodge, vacations for Fraser, his girlfriend and his family, flight training, hunting, spa, skiing and health club expenses, computers and electronics for both Fraser and his family, Lexus SUV lease payments, costs to commute by private aircraft from Fraser’s home in Wyoming to his office at NIC’s Kansas headquarters and other day-to-day living expenses.<sup>2</sup> In addition, the SEC alleged that Fraser routinely charged living expenses on company credit cards and requested reimbursement for expenses he did not incur.

The SEC further alleged that the other charged executives authorized the payment of the personal expenses, circumvented the company’s internal controls, procedures and policies, made false representations to NIC’s auditors and reviewed and/or signed the proxy statements, annual reports and registration statements at issue despite knowledge of the SEC’s disclosure rules and other requirements. In addition, the SEC alleged that NIC continued to prepare misleading public filings and failed to correct its actions, despite a whistleblower complaint and a 2007 SEC investigation.

The SEC has settled the charges against NIC, its former CEO, former CFO and current CEO for a combined \$2.8 million and additional non-monetary penalties. The SEC’s action against the current CFO is ongoing.

### Required Disclosures

Item 402 of Regulation S-K requires that a public company disclose perquisites and other personal benefits of named executive officers and directors in the “All Other Compensation” column of its Summary

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<sup>1</sup> SEC Charges NIC Inc. and Four Current or Former Executives for Failing to Disclose CEO Perquisites, Litigation Release No. 21809 (January 12, 2011), available at <http://www.sec.gov/litigation/litreleases/2011/lr21809.htm>.

<sup>2</sup> SEC Complaint vs. NIC Inc., Jeffery S. Fraser, Harry H. Herington and Eric J. Bur, available at <http://www.sec.gov/litigation/complaints/2011/comp21809-nic.pdf>, and SEC Complaint vs. Stephen M. Kovzan, available at <http://www.sec.gov/litigation/complaints/2011/comp21809-kovzan.pdf> (January 12, 2011).

Compensation Tables unless the aggregate amount of the perquisites for the named executive officer or director is less than \$10,000. If the total value of all perquisites and personal benefits for the last fiscal year is \$10,000 or greater for any named executive officer or director, each perquisite or personal benefit, regardless of the amount, must be identified by type and each perquisite or personal benefit that exceeds the greater of \$25,000 or 10% of the total amount must be quantified and disclosed in a footnote.

Although the SEC has declined to expressly define perquisites due to concerns that a bright-line rule would encourage characterizing amounts in a manner designed to circumvent disclosure, the SEC has, however, indicated that an item is not a perquisite if it is integrally and directly related to the performance of the executive's or director's duties. Otherwise, an item will be treated as a perquisite if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless the item is generally available to all employees on a non-discriminatory basis, in which case it will not be considered a perquisite or personal benefit.

In applying its interpretative guidance, items that would require disclosure as perquisites include, but are not limited to: club memberships not used exclusively for business entertainment purposes, personal financial or tax advice, personal travel using vehicles owned or leased by the company, personal travel otherwise financed by the company, personal use of other property owned or leased by the company, housing and other living expenses (including relocation assistance), security provided at a personal residence or during personal travel, commuting expenses and discounts on the company's products or services not generally available to all employees.

If you have any questions regarding the SEC's recent action, please contact Mindy C. Calisti, <http://www.wcsr.com/lawyers/mindy-c-calisti>, the principal drafter of this alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/profSearch?team=corporateandsecurities>.

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