

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 83581 / July 2, 2018**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3947 / July 2, 2018**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-18570**

<p><b>In the Matter of</b></p> <p style="text-align:center"><b>The Dow Chemical Company,</b></p> <p><b>Respondent.</b></p>
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**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 The Dow Chemical Company (“Dow” 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 finds that:

**Summary**

1. From 2011 through 2015, and in proxy statements reporting on those years, Dow did not ensure that approximately \$3 million in executive perquisites were adequately evaluated and disclosed as “other compensation” in the Compensation Discussion & Analysis (“CD&A”) section of the annual proxy statements. These authorized but undisclosed perquisites included personal use of the Dow aircraft and other expenses. Although Dow applied procedures regarding the evaluation and disclosure of its executives’ perquisites, Dow did not follow the Commission’s standard regarding disclosure of perquisites, which provides that:

- An item is not a perquisite or personal benefit 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.

Instead, Dow incorrectly applied a standard whereby a business purpose related to the executive’s job was sufficient to determine that a benefit would not be a perquisite that required disclosure. The Commission considered, but ultimately decided not to adopt, a business purpose standard to determine whether a benefit provided to an executive should be disclosed as a perquisite. *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”).

### **Respondent**

2. Dow, a Delaware corporation based in Midland, Michigan, manufactures and supplies chemical products for use as raw materials in the manufacture of customer products and services worldwide. Dow’s stock was registered under Section 12(b) of the Exchange Act. Dow’s common stock traded on the New York Stock Exchange until August 31, 2017.

### **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. 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.

4. 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."

6. Contrary to Item 402 of Regulation S-K and the Commission's guidance in the Adopting Release, Dow applied a standard whereby a business purpose would be sufficient to determine that a benefit was not a perquisite that required disclosure. As a result, Dow did not satisfy the Commission's regulations and guidance.

7. Additionally, Dow did not adequately train employees in key roles, including those tasked with drafting the CD&A section of the proxy statement and compiling the executive compensation tables, to ensure that the proper standard was applied for perquisites disclosure.

8. Dow also had inadequate processes and procedures to ensure proper reporting of perquisites. Dow personnel compiled the executive compensation table from a variety of sources without ensuring that the amounts reported were consistent with the Commission's perquisite disclosure rules. Additionally, Dow did not fully comply with its own policies that called for conducting an annual review of changes from the prior year to Commission rules and regulations, market response, audit feedback, analysis of other companies' disclosures, and changes in Dow's compensation benefit programs.

9. As a result of applying an improper standard for perquisite disclosure from 2011 through 2015 for its named executive officers, Dow understated its disclosed perquisites in its 2013 to 2016 proxy statements. Specifically, Dow understated its Chief Executive Officer's disclosed perquisites by approximately \$3 million of additional Company authorized compensation, or 59%, in the following years: (1) 2011 by approximately \$414,000 or 61%; (2) 2012 by approximately \$849,000 or 70%; (3) 2013 by approximately \$867,000 or 69%; (4) 2014 by approximately \$523,000 or 56%; and (5) 2015 by approximately \$318,000 or 34%.

10. Thus, the amount of "other compensation" required to be disclosed pursuant to Regulation S-K was misstated in Dow's 2013 to 2016 proxy statements, which are incorporated by reference into Dow's annual reports on Form 10-K for that same time period. Such undisclosed other compensation included, among other things: travel to outside board meetings, sporting

events, and personal activities; club memberships; limited use of personal assistant office time; and membership fees to sit on the board of a charitable organization.

11. Rule 14a-9 prohibits the use of proxy statements containing materially false or misleading statements or materially misleading omissions. As a result of the conduct described above, Dow violated Section 14(a) of the Exchange Act and Rule 14a-9 thereunder.

12. Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder, require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and annual reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading. As a result of the conduct described above, Dow violated Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder.

#### **IV.**

#### **Undertakings**

Respondent has undertaken to:

Retain at its own expense an independent consultant (the “Independent Consultant”), not unacceptable to the staff of the Commission, for a period of one year, to conduct a review of Dow’s policies, procedures, controls, and training relating to the evaluation of whether payments and other expense reimbursements should be disclosed as perquisites under the securities laws, including the Commission’s rules and standards. Within 180 days of being retained, the Independent Consultant shall recommend in a written report (“Report”) to be provided to Respondent and the staff of the Commission, if and where appropriate, policies, procedures, controls, and training reasonably designed to ensure:

(a) Dow’s compliance with Item 402 of Regulation S-K relating to the disclosure of perquisites as executive compensation; and

(b) that Dow has processes and internal controls in place to reasonably ensure payments and other expenses are properly evaluated for perquisite disclosure under the securities laws, including the Commission’s rules and standards.

Respondent shall adopt and implement all recommendations contained in the Report within 180 days of receiving the Report, provided, however, that within 30 days after the Independent Consultant serves the Report, Respondent shall in writing advise the Independent Consultant and the Commission of any recommendations that it considers to be unnecessary, unduly burdensome, impractical, or costly. With respect to any recommendation that Respondent considers unnecessary, unduly burdensome, impractical or costly, Respondent need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which Respondent and the Independent Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 30 days after Respondent advises the Independent Consultant of its

objection. In the event Respondent and the Independent Consultant are unable to agree on an alternative proposal, Respondent will abide by the determinations of the Independent Consultant.

The Independent Consultant will enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Dow, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Denver Regional Office of the Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Dow, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

After the final certification from the Independent Consultant, Respondent shall certify, in writing, compliance with the undertaking(s) set forth above. The certification shall identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Mary S. Brady, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than 60 days from the date of the completion of the undertakings.

## V.

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 13a-1, 12b-20, and 14a-9 thereunder.
- B. Respondent shall comply with the undertakings enumerated in Section IV above.
- C. Respondents shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1,750,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.
- D. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Respondent's name as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Kurt L. Gottschall, Division of Enforcement, Securities and Exchange Commission, Byron Rogers Federal Office Building, 1961 Stout Street, Ste. 1700, Denver, CO 80294-1961.

E. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty

imposed in this proceeding. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields  
Secretary