

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 51625 / April 28, 2005

ADMINISTRATIVE PROCEEDING
File No.
3-11917

In the Matter of)	
)	ORDER INSTITUTING CEASE-AND-DESIST
)	PROCEEDINGS, MAKING FINDINGS, AND
TYSON FOODS, INC. and)	IMPOSING A CEASE-AND-DESIST ORDER
DONALD TYSON,)	PURSUANT TO SECTION 21C OF THE
)	SECURITIES EXCHANGE ACT OF 1934
Respondents.)	
)	

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted against Tyson Foods, Inc. (“Tyson Foods”) and Donald Tyson (“Mr. Tyson” or “Don Tyson”) (collectively “Respondents”) pursuant to Section 21C of the Securities Exchange Act of 1934 (the “Exchange Act”).

II.

In anticipation of the institution of these proceedings, each of the Respondents has submitted an Offer of Settlement (“Offer”) that the Commission has determined to accept. Solely for the purposes of these proceedings and any other proceeding 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (“Order”), as set forth below.¹

¹ In a separate civil action filed simultaneously with this proceeding, Tyson Foods and Don Tyson each separately consented to the entry of a judgment by the U.S. District Court for the District of Columbia pursuant to Section 21(d) of the Exchange Act ordering Tyson Foods and Don Tyson to pay civil penalties of \$1.5 million and \$200,000, respectively. *SEC v. Tyson Foods, Inc. and Donald Tyson*, Civ. Action No. (05 0841 D.D.C.) (JDB).

III.

On the basis of this Order and Respondents' Offers, the Commission finds² that:

A. RESPONDENTS

1. **Tyson Foods** is a Delaware corporation with its principal offices in Springdale, Arkansas. Founded in 1935, Tyson Foods is a processor and marketer of chicken, beef, and pork. The company's revenue for the fiscal year ended October 2, 2004, exceeded \$26 billion. Tyson Foods' Class A common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange under the symbol "TSN."

2. **Donald Tyson**, age 74, became the company's president in 1966, and served as CEO and chairman from 1967 to 1991. He served as chairman from 1991 to 1995 and as senior chairman from 1995 to 2001. He retired as senior chairman in October 2001. He is currently a director of the company, a position he has held since 1952, and also serves on the executive committee of the company's board of directors.

B. SUMMARY

3. In proxy statements filed with the Commission from 1997 to 2003, Tyson Foods made misleading disclosures of perquisites and personal benefits provided to Don Tyson. The company also failed to maintain adequate internal controls over his personal use of company assets and the disclosure of those perquisites in its proxy statements.

4. For the five years prior to his retirement as senior chairman (1997-2001), the company failed to disclose over \$1 million³ of perquisites provided to Mr. Tyson, used the expression "travel and entertainment" to describe perquisites that could not properly be so characterized, and failed to disclose separately or quantify properly certain other benefits. From 2002 to 2003, the company used the same misleading terms "travel and entertainment" to describe the continuation of his perquisites pursuant to a retirement agreement and failed to disclose fully the nature and scope of those benefits. Finally, due to internal control failures throughout most of 1997 to 2003, the company provided or paid for various personal benefits totaling approximately \$1.5 million that were neither raised with nor authorized by either the compensation committee or the board of directors.

5. Don Tyson, who signed the annual reports that incorporated the proxy statements for each fiscal year from 1997 to 2003, was a cause of the company's disclosure failures.

² The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

³ Of this amount, \$424,121 was not disclosed because of internal controls failures at the company, and \$596,656 was disclosed as "performance-based bonuses" instead of as perquisites.

Among other things, in each year from 1997 to 2003, he signed questionnaires used to prepare the company's proxy statements that failed to identify or quantify various perquisites. Before signing them, he failed to read the questionnaires or take action to ensure the accuracy of the company's disclosure of his perquisites, and he failed to review the proxy statements before he signed the annual reports into which they were incorporated.

C. FACTS

6. Tyson Foods started out as a small independent chicken business in rural Arkansas. During Don Tyson's tenure at Tyson Foods, the company's revenue increased from \$51 million to more than \$10 billion. Tyson Foods' board of directors greatly valued Don Tyson's leadership and continued service to the company. The company had a long history of paying a substantial portion of Don Tyson's annual compensation in the form of perquisites and personal benefits. When the company was smaller than it is today, it would pay for certain personal expenses and send a company employee to his home to mow his lawn or fill his car with gas. As the company grew, it gradually provided more perquisites to Mr. Tyson and began providing certain perquisites and personal benefits to Don Tyson's wife, his daughters and three individuals with whom he had close personal relationships (collectively referred to herein as "family" and/or "friends").

1. Perquisites Provided and Attributed to Don Tyson from 1997-2001

7. While Don Tyson was employed as senior chairman from 1997 to 2001, Tyson Foods provided him with the following, which totaled approximately \$3 million:

- \$689,016 in personal expenses for him and two of his friends. These personal expenses were paid through cash advances from the company's accounts, directly billed to the company or charged to three company credit cards that had been issued in the mid 1990s to Mr. Tyson and two of his friends. The credit card bills were sent directly to a Tyson Foods subsidiary and were paid in full by the company.⁴ The cards were canceled during the course of the Commission's investigation in this matter. Among other things, these personal expenses included a \$20,000 purchase for oriental rugs, an \$18,000 purchase for antiques, a \$15,000 vacation in London, an \$8,000 horse, and other substantial purchases of clothing, jewelry, artwork, vacations and theater tickets;
- \$464,132 in personal use by him and his family and friends of company-owned homes in the English countryside and in Cabo San Lucas, Mexico. But for a 120-night annual limit on his usage of the English home, the only limitation imposed on how Mr. Tyson and his family and friends used the homes was that business use would take priority over personal use. Company records reflect occasions when Don Tyson's friends hosted their

⁴ These credit cards remained active despite the institution in 1998 of a company-wide policy requiring that company-billed credit cards either be cancelled or that the company be given access to a personal account from which it could draw funds to pay the credit card bills. Don Tyson was aware of the company's policy. Mr. Tyson provided the company with access to his checking account to pay these bills, however, as a result of internal control failures at the company, it continued to pay the expenses incurred on the company credit cards by Mr. Tyson and two of his friends.

friends and family for vacations in the English home and used the company-paid chauffeur, cook and housekeeper at that home. His friends also vacationed at the company's home and used the company's crewed boat in Cabo San Lucas, Mexico;

- \$426,086⁵ of personal use of company-owned aircraft by him and his family and friends. Don Tyson had virtually unlimited access to Tyson Foods' aircraft. The only limitation on Don Tyson's access to Tyson Foods' aircraft was that business use would take priority over personal use. Mr. Tyson's family and friends regularly used the company's aircraft for personal travel with and without him on board;
- \$203,675 in housekeeping provided by company employees or persons paid by the company at five different homes where Don Tyson and his family and friends lived and/or vacationed;
- \$84,000 in lawn maintenance at five different homes where he and his family and friends lived;
- \$46,110 to maintain nine automobiles owned and used by him and his family and friends;
- \$36,554 in telephone services for him and his family and friends;
- \$15,000 in Christmas gift certificates that were provided to Don Tyson's family and friends; and
- \$1,072,699 to cover Don Tyson's personal income tax liability associated with his receipt of these benefits.

In addition, Tyson Foods provided various perquisites to Mr. Tyson and his family and friends that had *de minimus* incremental cost to the company. These included personal use of the company's stadium skyboxes, personal use of a compound of lake homes and monitoring of security systems at homes where Mr. Tyson and his family and friends lived.

2. Disclosures of Don Tyson's Perquisites from 1997-2001

8. Disclosures about Don Tyson's perquisites and personal benefits for each of the fiscal years from 1997 to 2001 were made in footnotes to the "other annual compensation" column of the summary compensation tables of Tyson Foods' proxy statements for those years. Those footnotes described his perquisites as "travel and entertainment costs and amounts reimbursed for estimated income tax liability related thereto," and identified aggregate figures for the "travel and entertainment costs" and the related income tax liability, respectively. These

⁵ The company calculated the value of personal aircraft usage using the method required for imputation of income for tax purposes, known as Standard Industry Fare Level, or SIFL, rather than the aggregate incremental cost method required by Instruction 2 to Item 402(b)(2)(iii)(C) of Regulation S-K of the Exchange Act for disclosure of perquisites.

proxy statements were incorporated by reference in the company's annual reports filed on Forms 10-K for those fiscal years, which were signed by Mr. Tyson and others.

9. Tyson Foods omitted over \$1 million of Don Tyson's perquisites from disclosure in these proxy statements filed with the Commission due to internal control failures and a strategy devised by the company's tax accountant to preserve the company's tax deduction for Mr. Tyson's compensation that resulted in mischaracterizing portions of his perquisites as a "performance-based bonus."

10. Specifically, \$424,121 in perquisites (representing mostly the value of the above-described housekeeping, lawn maintenance, automobile maintenance and telephone services) was omitted from disclosure because in-house counsel responsible for preparing proxy statements was unaware that Don Tyson was receiving those services. Mr. Tyson signed annual director and officer ("D&O") questionnaires that disclosed only that he received "travel and entertainment" and provided a total value of his annual perquisites as calculated by the company's outside tax accountant. He delegated responsibility for the accuracy of those questionnaires. He did not read them before signing them and took no other action to determine whether his responses were complete and accurate.

11. An additional \$596,656 of perquisites and the tax gross-up thereon, were omitted from the proxy statements' disclosure of perquisites in 1998, 1999 and 2000 due to a tax strategy devised to permit the company to deduct Don Tyson's entire compensation. Section 162(m) of the Internal Revenue Code limits the deductibility of executive compensation to \$1 million unless the compensation is "performance based," which means the compensation is payable "on account of the attainment of one or more performance goals." The company had adopted (effective fiscal 1995) a shareholder approved senior executive performance bonus plan to comply with Section 162(m). For each of the years 1998, 1999 and 2000, the amount of Mr. Tyson's salary plus perquisites exceeded \$1 million. For those years, the company's tax accountant advised the compensation committee to award Don Tyson a bonus under the senior executive performance bonus plan in the amount by which his salary plus perquisites exceeded \$1 million. Mr. Tyson signed D&O questionnaires for the years 1998, 1999 and 2000 that incorrectly stated that he had received bonuses of \$86,656 (1998), \$310,000 (1999) and \$200,000 (2000) rather than disclosing that he had received perquisites valued at such amounts. Those perquisite amounts were then improperly disclosed in the proxy statements as performance-based bonuses by moving amounts from the "other compensation" column (used to disclose perquisites) to the "bonus" column of the summary compensation table. This resulted in underreporting Mr. Tyson's perquisites in each of those years by \$86,656, \$310,000 and \$200,000 in 1998, 1999 and 2000, respectively.

12. Of the perquisites the company did disclose, the company disclosed them as "travel and entertainment" costs, as noted above. That description was inaccurate because Don Tyson and his family and friends received over \$372,539 in personal expenses that could not be characterized as "travel" or "entertainment." Also, in many years, the cost of these personal expenses, use of company homes, personal use of company aircraft and/or residential services exceeded 25% of the total perquisites. However, these perquisites were not separately disclosed

“by type and amount” in the footnotes to the summary compensation tables as required by the Commission’s rules. See Regulation S-K, Item 402(b)(2)(iii)(C) and Instruction 1 thereto.

13. Due to the internal control failures, many of the perquisites described above were neither raised with nor authorized by Tyson Foods’ compensation committee or its board of directors.⁶ While the members of the compensation committee knew generally that Don Tyson received “travel and entertainment” in the form of his own personal use of company aircraft and homes and the dollar amount of Mr. Tyson’s annual perquisites, no one in company management, including Don Tyson, brought to the compensation committee’s or the full board’s attention any additional information about his other perquisites. As a result, for example, the board members were unaware until the Commission’s investigation that the company was paying for substantial personal expenses incurred by Don Tyson and two of his friends. They were also unaware of the regular use of company aircraft by Don Tyson’s family and friends while he was not on board. They were also unaware until a review of executive perquisites by the company’s general counsel’s office in November 2002 (discussed in greater detail below) of the housekeeping, lawn maintenance, telephone services, and automobile maintenance provided to Don Tyson and his family and friends.

3. Disclosure of Perquisites Provided Under Don Tyson’s Retirement Agreement and Perquisites Provided Following His Retirement

14. Don Tyson retired as senior chairman in 2001. He and Tyson Foods entered into a “Senior Executive Employment Agreement,” dated October 19, 2001 (the “Retirement Agreement”), which provided that he would receive certain consideration in return for his agreement to furnish “advisory services” to the company following his retirement as senior chairman. The Retirement Agreement provided that Don Tyson would receive one million shares of restricted Class A common stock, \$800,000 per year for ten years and “travel and entertainment costs, as well as his estimated income tax liability with respect thereto, consistent with past practices.” The Retirement Agreement itself was filed as an exhibit to the company’s 2001 Form 10-K.

15. In its proxy statements filed in 2002 and 2003, Tyson Foods, in describing the Retirement Agreement, stated that Mr. Tyson would receive “travel and entertainment costs . . . consistent with past practices,” but made no other disclosures describing the full nature and scope of the perquisites that Don Tyson would receive in retirement. Thus, for example, no disclosure was made that he and his family and friends would continue to receive many of the perquisites described above. As with the company’s prior proxy statements, the terms “travel and entertainment” did not properly disclose some of the perquisites that he received, which could not be characterized as either “travel” or “entertainment.” In addition, although the company disclosed that he would receive travel and entertainment costs and tax gross-ups thereon “consistent with past practices,” investors could not learn from the company’s previously-filed proxy statements the total costs of the benefits Mr. Tyson would receive in

⁶ The value of these perquisites was approximately \$1.5 million. During the course of the Commission’s investigation, Don Tyson voluntarily reimbursed the company more than \$1.5 million. In view of Don Tyson’s reimbursement, the Commission is not ordering him to pay disgorgement in this matter.

retirement due to the omission of perquisites from the prior proxy statements. In his first two years of retirement, he received \$1.1 million in “travel and entertainment costs” and associated tax gross-ups, which was almost double what Tyson Foods reported for his last two years of employment as senior chairman (\$585,281).

16. In November 2002, the general counsel’s office at Tyson Foods conducted a review of executive perquisites. In connection with that review, Don Tyson signed a list of perquisites that failed to describe adequately his use of certain company assets and omitted certain other perquisites that Tyson Foods was providing him and his friends and family. While that list did state that he obtained personal use of the company’s aircraft and homes, it failed to indicate that Mr. Tyson made these corporate assets available to his family and friends for their personal use and that the company had paid for personal expenses for him and two of his friends.

D. VIOLATIONS

1. Tyson Foods Violated the Proxy Solicitation, Reporting Provisions and the Internal Control Provisions of the Exchange Act

17. Tyson Foods violated the proxy solicitation and reporting provisions of the Exchange Act by filing with the Commission annual reports and proxy statements that failed to fully and accurately disclose the perquisites that Don Tyson received during his last five years as senior chairman and the perquisites to which he was entitled pursuant to his Retirement Agreement.

18. Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require all issuers with securities registered under Section 12 of the Exchange Act to file annual reports with the Commission on Form 10-K. These reports must be complete and accurate in all material respects. See, e.g., SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979). No showing of scienter is necessary to establish a violation of Section 13(a). Id. at 1167.

19. Section 14(a) of the Exchange Act requires registrants that solicit any proxy or consent or authorization in connection with any security registered pursuant to Section 12 of the Exchange Act (other than an exempted security), to comply with such rules as the Commission may promulgate. Rule 14a-3 provides that no solicitation of a proxy may occur unless each person solicited is concurrently furnished or has previously been furnished with a proxy statement containing the information specified in Schedule 14A. Rule 14a-9 prohibits, among other things, the use of proxy statements which omit to state any material fact necessary in order to make the statements therein not false or misleading. Like Section 13(a) of the Exchange Act, no showing of scienter is required to establish a violation of Section 14(a) of the Exchange Act and Rules 14a-3 and 14a-9 thereunder. See, e.g., Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1299-1300 (2d Cir. 1973).

20. Tyson Foods was required to fully and accurately disclose Don Tyson’s perquisites while he was employed as senior chairman from 1997 to 2001 and those to which he was entitled thereafter pursuant to his Retirement Agreement. Item 11 of Form 10-K requires

that registrants furnish the information required by Item 402 of Regulation S-K. Similarly, Item 8 of Schedule 14A, captioned “Compensation of Directors and Executive Officers,” requires that registrants set forth in the proxy statement the information required by Item 402 of Regulation S-K if action is to be taken with respect to, among other things, election of directors. Item 402 of Regulation S-K sets forth the required disclosures with respect to executive compensation. The underlying purpose of the Item 402 disclosures is “to improve shareholders’ understanding of all forms of compensation paid to senior executives and directors.” Securities Act Release No. 6962, Executive Compensation Disclosure (Oct. 16, 1992). Proxy disclosures with respect to executive compensation “enhance shareholders’ ability to assess how well directors are representing their interests.” Id.

21. Item 402(b) of Regulation S-K requires disclosure of perquisites. Disclosure is required for named executive officers when the value of “perquisites and other personal benefits, securities or property” exceeds the lesser of \$50,000 or 10% of the total annual salary and bonus reported for the executive. Two types of disclosures are required for each executive: (1) the total dollar amount of the perquisites must be included in the summary compensation table; and (2) an additional footnote disclosure is required to specifically identify “by type and amount” each perquisite that exceeds 25% of the total perquisites reported for the executive.

22. In proxy statements filed for fiscal years 1997 to 2001, Tyson Foods made misleading disclosures of the provision of personal benefits and perquisites to Don Tyson and otherwise failed to comply with Item 402(b). The footnote description of Don Tyson’s perquisites as “travel and entertainment costs” was misleading because, among other things, Don Tyson and his family and friends received numerous perquisites that could not be considered travel or entertainment. In addition, the total perquisites disclosed for Don Tyson during this period omitted more than \$1 million in perquisites due to internal control failures and the company’s disclosure of portions of Don Tyson’s perquisites as performance-based bonuses in 1998, 1999 and 2000. Tyson Foods also failed to specifically identify by type and amount each of Mr. Tyson’s perquisites that exceeded 25% of his total perquisites, and it incorrectly valued Mr. Tyson’s personal aircraft usage using the tax or SIFL method instead of using the aggregate incremental cost method required by Instruction 2 to Item 402(b)(2)(iii)(C).

23. Item 402(h)(2) of Regulation S-K requires registrants to describe the “terms and conditions” of any compensatory plan or arrangement that results from the executive officer’s retirement if the amount involved exceeds \$100,000. The purpose of Item 402(h) is to provide “shareholders ... a clear interest in knowing what contractual commitments the board has made on behalf of the registrant, both with respect to present inducements to join the registrant’s top management and future promises.” Tyson Foods’ proxy statements for fiscal years 2002 and 2003 did not fully and accurately describe the substantial perquisites that Don Tyson would receive as part of his retirement arrangement. In addition, the company’s disclosure of his entitlement in retirement to “travel and entertainment” costs “consistent with past practice” was misleading because, as previously discussed, many of those benefits could not be characterized as travel or entertainment and because, as previously discussed, the prior disclosures understated what he actually received in perquisites while he was employed.

24. Section 13(b)(2)(B) of the Exchange Act requires registrants to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (1) transactions are executed in accordance with management's general or specific authorization; (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets; (3) access to assets is permitted only in accordance with management's general or specific authorization; and (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. Like Section 13(a), there is no scienter requirement to establish a violation of the internal controls provisions in Section 13(b).

25. Tyson Foods failed to devise and maintain a system of internal accounting controls over personal use of assets sufficient to detect, prevent, or account properly for Don Tyson's and his family's and friends' use of company assets. Don Tyson received \$424,121 in perquisites that went undisclosed because Tyson Foods' proxy reporting process failed to identify them. Moreover, Mr. Tyson received approximately \$1.5 million in personal benefits and perquisites (including gross-up payments for tax purposes) both while he was employed and during his retirement that had not been raised with or authorized by the compensation committee or the board of directors. As a result of its failure to maintain a system of internal accounting controls that captured all perquisites provided to Mr. Tyson and that informed the compensation committee of such perquisites, Tyson Foods failed to fully and accurately disclose Don Tyson's personal benefits and perquisites in the company's proxy statements during his tenure as senior chairman and in connection with his retirement, as required by Items 402(b) and 402(h) of Regulation S-K.

26. Based on the foregoing, Tyson Foods violated Sections 13(a), 13(b)(2)(B) and 14(a) of the Exchange Act and Rules 13a-1, 14a-3 and 14a-9 thereunder.

2. Don Tyson Was a Cause of Tyson Foods' Proxy Solicitation and Reporting Violations

27. Don Tyson was a cause of Tyson Foods' violations of Sections 13(a) and 14(a) of the Exchange Act and Rules 13a-1, 14a-3 and 14a-9 thereunder.

28. During his tenure as senior chairman from 1997 through 2001, Don Tyson's actions and omissions were a cause of Tyson Foods' misleading disclosures of his perquisites and personal benefits. Although he signed annual questionnaires that purported to list all company-provided perquisites that he received, his responses disclosed only that he received "travel and entertainment" from the company. Mr. Tyson also signed the company's Forms 10-K, which incorporated by reference the company's proxy statements. Don Tyson did not read those questionnaires or the proxy statements incorporated into the company's Forms 10-K before signing them, and he failed to take action to ensure the accuracy of the company's disclosures of his perquisites. Instead, he assigned to others the responsibility for compiling the information to be included in the responses to the questionnaires. However, Don Tyson was the only individual who possessed certain information necessary to accurately complete the questionnaires.

29. Don Tyson was also a cause of the company's misleading disclosures of his retirement perquisites in its 2002 and 2003 proxy statements. In those years, he provided the same incomplete list of his perquisites in questionnaires and, in addition, separately provided in connection with the company's review of executive perquisites by its general counsel's office an incomplete list of perquisites that he had received for 2002. That list omitted the fact that the company had paid for personal expenses for him and two of his friends and had provided housekeeping, lawn maintenance, automobile maintenance and telephone services to him and his family and friends.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED that:

Respondent Tyson Foods cease and desist from committing any violations and any future violations of Sections 13(a), 13(b)(2)(B) and 14(a) of the Exchange Act and Rules 13a-1, 14a-3 and 14a-9 thereunder.

Respondent Don Tyson cease and desist from causing any violations and any future violations of Sections 13(a) and 14(a) of the Exchange Act and Rules 13a-1, 14a-3 and 14a-9 thereunder.

By the Commission.

Jonathan G. Katz
Secretary