

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92560 / August 4, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20451

In the Matter of

National Beverage Corp.,

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 National Beverage Corp. (“NBC” 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 fiscal years 2016 through 2020, NBC did not adequately evaluate and disclose certain executive perquisites in its annual proxy statements related to the authorized but undisclosed use of an aircraft (the “Aircraft”) by the Chief Executive Officer (“CEO”) that was not integrally and directly related to his job duties. The Aircraft is jointly owned by NBC and NBC’s management company (the “Management Company”), which is wholly owned by NBC’s CEO. In connection with this conduct, NBC 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. NBC, a Delaware corporation based in Fort Lauderdale, Florida, manufactures and distributes beverage products. NBC’s stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act. NBC’s common stock trades on the NASDAQ Global Select Market. During the relevant period, NBC reported executive compensation in its annual proxy statements, incorporating that information by reference into its annual reports on Forms 10-K.

Background on Perquisite Disclosure Requirements

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.

4. Item 402 of Regulation S-K requires disclosure in Forms 10-K 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. 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.” 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”). 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.” The Adopting Release lists “commuting expenses (whether or not for the company’s convenience or benefit),” “personal travel using vehicles owned or leased by the company,” and “personal travel otherwise financed by the company” as examples requiring disclosure as perquisites or personal benefits under Item 402.

NBC Failed to Disclose Certain Perquisite Compensation

6. In its proxy statements filed with the Commission in 2016 through 2020, NBC stated that: “[t]he Company does not provide any additional perquisites to Executive Officers, other than a car allowance . . . The total of all perquisites to any Executive Officer did not equal or exceed \$10,000 for [the] Fiscal [year].” However, for the relevant period, NBC’s CEO took trips on the Aircraft and charters that were financed by NBC, but not integrally and directly related to the CEO’s job duties within the meaning of the Adopting Release and were not generally available on a non-discriminatory basis to all employees. These trips to domestic and foreign destinations included five trips in fiscal year 2016, eight in fiscal year 2017, seven in fiscal year 2018, six in fiscal year 2019, and seven in fiscal year 2020.

7. NBC understated its disclosed perquisites in its proxy statements, and by incorporation in its Forms 10-K, for fiscal years 2016 through 2020 because it did not disclose NBC’s expenses for the CEO’s trips on the Aircraft and charter flights that were not integrally and directly related to the CEO’s job duties as part of the CEO’s compensation. Specifically, NBC understated its CEO’s other compensation by a total of approximately \$732,647 during the relevant period, including approximately: (1) \$148,902 in fiscal year 2016; (2) \$126,623 in fiscal year 2017; (3) \$137,850 in fiscal year 2018; (4) \$158,207 in fiscal year 2019, and (5) \$161,065 in fiscal year 2020.

NBC Did Not Have Adequate Perquisite Disclosure Controls

8. NBC did not have controls or procedures in place to identify and analyze potential perquisites for disclosure in its proxy statements and Forms 10-K for fiscal years 2016 through 2020. NBC did not track or analyze whether flights taken by the CEO were integrally and directly related to the CEO’s job duties, and failed to disclose as compensation the costs of certain flights that should have been disclosed pursuant to Item 402 of Regulation S-K. Additionally, NBC did not train employees in key roles, including those tasked with drafting the

Compensation Discussion & Analysis section of the proxy statement and compiling the executive compensation tables, so that perquisites were adequately identified for analysis and, where appropriate, disclosed.

Violations

9. As a result of the conduct described above, NBC violated Section 13(a) of the Exchange Act and Rule 13a-15(a) thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to maintain disclosure controls and procedures designed to ensure that information required to be disclosed by the issuer is included in the reports that it files.¹

10. As a result of the conduct described above, NBC violated Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder, which 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.

11. As a result of the conduct described above, NBC violated Section 14(a) of the Exchange Act and Rule 14a-3 thereunder, which prohibit the use of proxy statements omitting information required to be included by Schedule 14A, including executive compensation disclosures pursuant to Item 402 of Regulation S-K, and Rule 14a-9, which prohibits the use of proxy statements containing materially false or misleading statements or omissions.

IV.

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

Accordingly, it is hereby ORDERED that:

A. pursuant to Section 21C of the Exchange Act, Respondent NBC 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.

¹ Rule 13a-15(e) defines "disclosure controls and procedures" as "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 [Exchange] Act ... is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. Disclosure 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 [Exchange] 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 disclosures."

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$481,920 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.

C. 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 NBC'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 Jason Burt, Division of Enforcement, Securities and Exchange Commission, 1961 Stout Street, Ste. 1700, Denver CO 80294-1961.

D. 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.

Vanessa A. Countryman
Secretary