UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10977 / September 3, 2021

SECURITIES EXCHANGE ACT OF 1934
Release No. 92874 / September 3, 2021

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4248 / September 3, 2021

ADMINISTRATIVE PROCEEDING
File No. 3-20523

In the Matter of **THE KRAFT HEINZ CO.,** **and** **EDUARDO PELLEISSONE,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND 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 against The Kraft Heinz Co. ("KHC") and against Eduardo Pelleissone ("Pelleissone"), pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act.

II.

In anticipation of the institution of these proceedings, KHC and Pelleissone (collectively "Respondents") have submitted Offers of Settlement (the "Offers") 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 them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Making Findings and Imposing a Cease-And-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

Summary

1. This matter concerns a multi-year expense management scheme by KHC's procurement division to improperly reduce KHC's cost of goods sold and achieve cost savings that were externally touted to the market and internally tied to performance-based targets. The misconduct resulted in KHC reporting inflated earnings before interest, taxes, depreciation and amortization ("EBITDA"), a key performance metric for investors. From the fourth quarter of 2015 through the end of 2018 (the "Relevant Period"), procurement employees negotiated agreements with numerous suppliers to obtain upfront cash payments and discounts, in exchange for future commitments to be undertaken by KHC, while improperly documenting the agreements in ways that caused the company to prematurely and improperly recognize the expense savings.

2. In accordance with accounting principles generally accepted in the United States ("Generally Accepted Accounting Principles" or "U.S. GAAP"), if the upfront cash and discounts are tied to future commitments, then the expense savings must be recognized over the period the future obligations are satisfied. Procurement division employees, however, negotiated and maintained false and misleading supplier contracts that made it appear as if expense savings were provided in exchange for past or same-year events performed by KHC, when, in reality, they were upfront payments in exchange for a future benefit from KHC, in order to improperly recognize costs savings prematurely.

3. Over the Relevant Period, KHC entered into approximately 59 transactions which were improperly recognized as a result of the false and misleading documentation negotiated and generated by procurement division employees. Had these transactions been properly documented and accounted for, KHC's cost of goods sold during that period would have been approximately $50 million higher than reported.

4. These misleading transactions, along with numerous other misstated accounting entries, led KHC, in June 2019, to restate its financial statements on Form 10-K. The restatement included financial data reported for fiscal year ("FY") 2015, as well as the financial statements contained in Forms 10-Q and 10-K for FYs 2016 and 2017 and the first three quarters of FY 2018 that were filed with the Commission. KHC corrected a total of $208 million in cost savings arising from 295 transactions, and also corrected its Adjusted EBITDA during the relevant period, as reflected in the restatement.

5. Pelleissone, KHC's then Chief Operating Officer and Global Head of Operations, was presented with several warning signs indicating that expenses were being managed through manipulating supplier agreements, imposed pressures on the procurement division to deliver unrealistic savings targets, and, as a member of the company's disclosure committee,

[1] 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.

unreasonably approved KHC financial statements that he should have known were materially false and misleading.

6. A procurement executive who reported to Pelleissone ("Procurement Executive"), managed the procurement division, approved certain of KHC contracts with suppliers, and had sub-certification responsibilities in 2018. Despite numerous warning signs that should have alerted him that procurement division employees were circumventing KHC's internal controls in order to achieve cost savings targets, the Procurement Executive approved and failed to prevent several supplier contracts that masked the true nature of the underlying transactions. The Procurement Executive also should have known that this false and misleading contract documentation was provided to KHC's finance and controller groups, thus causing KHC to prematurely recognize cost savings in contravention of U.S. GAAP.

RESPONDENTS

7. KHC is a food and beverage manufacturing company co-headquartered in Chicago, Illinois, and Pittsburgh, Pennsylvania. The company has a class of shares registered with the Commission pursuant to Exchange Act Section 12(b), which trades on NASDAQ under the symbol "KHC." KHC was created in July 2015 through the merger of public company Kraft Foods Group Inc. ("Kraft") with and into private company H.J. Heinz Co. ("Heinz").

8. Pelleissone, age 47, resides in Chicago, Illinois. Pelleissone was KHC's Global Head of Operations and Chief Operating Officer between July 2015 and November 2018, and its Head of Strategic Projects from November 2018 until June 2019, when he left the company. During the period of 2016 through 2018, Pelleissone served as a member of KHC's disclosure committee, which was tasked with reviewing and affirming the accuracy and completeness of the company's quarterly and annual filings. Before the merger with Kraft, Pelleissone was the Global Head of Operations for Heinz. Pelleissone is currently the president of operations in a regional subsidiary of a different publicly traded company.

FACTS

Background

9. Following the Kraft-Heinz merger in July 2015, newly-formed KHC made concerted efforts to eliminate redundancies and reduce operational costs. As part of its merger strategy, KHC disclosed to investors that the company would deliver on certain cost savings results throughout the company, including in the procurement division, a large cost center for KHC. The cost savings strategy, including its impact on costs of goods sold, was widely covered by analysts at the time. Although the company achieved the promised cost savings, individual procurement employees had key performance targets tied to additional cost savings from the procurement division.

10. To implement this cost savings strategy, the company set performance targets for procurement division employees tied to savings realized through negotiations with suppliers. For a period immediately following the merger between Kraft and Heinz, these targets were

generally achieved, due to, among other things, synergies from renegotiating supplier contracts in light of the newly-combined company's increased purchasing power.

11. By 2017, however, the procurement division had largely exhausted its ability to extract synergies from the merger. In addition, the cost of many ingredient and packaging supplies increased significantly due to adverse inflation and unfavorable foreign exchange rates.

12. The combined impact of the increased raw material costs and savings already realized in prior years made it more difficult for procurement division employees to achieve additional, incremental savings in 2017 and 2018. The procurement division, under the Procurement Executive's direction and with Pelleissone's oversight, implemented overly ambitious annual budget and division-level savings targets, based on corporate KHC targets. They, in turn, pushed procurement division employees to come up with ideas to generate additional immediate, same-year, savings, and did not adjust the internal targets.

Expense Management Misconduct

13. The expense management misconduct was carried out by KHC's procurement division employees, across multiple geographic zones, and involved several strategies employed to misrepresent the true nature of transactions, resulting in accounting errors and misstatements. Out of the 295 transactions that KHC ultimately corrected in connection with the restatement, approximately 59 were part of the procurement division's expense management misconduct, including the following types of transactions:

- "Prebate Transactions" – KHC procurement division employees agreed to future-year commitments, like contract extensions and future-year volume purchases, in exchange for savings discounts and credits by suppliers ("Prebates"), but mischaracterized the savings in contract documentation, which stated that they were for *past or same-year* purchases made by KHC ("Rebates");

- "Clawback Transactions" – KHC procurement division employees agreed to take upfront payments subject to repayment through future price increases or volume commitments, but documented the transaction in ways which obscured the repayment obligation; and

- "Price Phasing Transactions" – Suppliers agreed to reduce their prices during a certain period in exchange for an offsetting price increase in a future period, but the full nature of the arrangement was not communicated by KHC procurement division employees to KHC controller group employees.

14. In accordance with U.S. GAAP,[2] KHC should have recognized the savings

[2] GAAP requires that a "rebate or refund of a specified amount of cash consideration that is payable pursuant to a binding arrangement only if the entity completes a specified cumulative level of purchases or remains a customer for a specified time period shall be recognized as a reduction of the cost of sales based on a systematic and rational

provided in exchange for future commitments over the period of time that KHC performed the commitments. Accordingly, when a prebate was provided in exchange for a contract extension or future-year volume commitment, the savings should have been recognized over the life of the extension, or the future period in which KHC purchased the goods from the supplier. Conversely, rebate savings from past or same-year commitments should have been recognized ratably over the period in which they were earned. Finally, clawback transactions should have been recognized ratably over the clawback period—when it was reasonably estimable that KHC would satisfy its repayment obligation.

2014-2015: Early Expense Management Misconduct

15. In the months leading up to the merger with Kraft, the procurement division of Heinz was faced with a $10 million year-end cost savings gap. This gap created pressure for the division to come up with ideas to generate additional same-year savings. As a result, the Procurement Executive, who worked at Heinz at the time, took steps with regard to a previously-negotiated transaction with a packaging supplier to improperly recognize additional cost savings in 2015. Pelleissone received monthly performance reports of these negotiations.

16. The original agreement, which the Procurement Executive signed the year earlier on behalf of Heinz, provided that the supplier would make a $3.5 million upfront payment (commonly referred to as a "prebate") to Heinz in exchange for the parties' signing a new three-year contract in 2015. The letter of intent further stated that the supplier was *not* obligated to provide the $3.5 million prebate payment if the parties failed to execute the new contract. Consistent with this contract language, the Procurement Executive delivered a presentation to Pelleissone which communicated that the cost savings from the $3.5 million prebate transaction was linked to the three-year period covered by the new contract.

17. In late 2015, following the merger, KHC renegotiated the language describing the $3.5 million prebate, entered into a new contract which stated the payment was "a non-refundable 2015 payment . . . for purchases made in 2015," and prematurely recognized the cost savings in 2015.

18. This accounting treatment was improper because the final contract, which the Procurement Executive approved and signed, mischaracterized the true nature of the supplier payment by concealing the fact that the $3.5 million prebate payment remained linked to a three-year contract.

19. Planning documents that the Procurement Executive presented to Pelleissone acknowledged that Heinz was in the process of negotiating a new supplier contract for the purpose of generating "improved, backdated impact for CY15" in the form of a "rebate." The

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allocation of the cash consideration offered to each of the underlying transactions that results in progress by the entity toward earning the rebate or refund provided the amounts are probable and can be reasonably estimated. If the rebate or refund is not probable and cannot be reasonably estimated, it shall be recognized as the milestones are achieved." Accounting Standards Codification ("ASC") 705-20 *Accounting for Certain Consideration Received from a Vendor*.

document stated that the parties needed to "align on wording," without which, the company could "book only 1/3 of benefit" in 2015. The Procurement Executive also met with the CEO of the supplier in order to determine if the supplier would be "open to reword" the description of the payment to "allow [Heinz] to book" the full "3,5 Mi[llio]n USD into 2015", and discussed internally that wording of the $3.5 million payment would enable Heinz to book the amount in 2015. Finally, Pelleissone and the Procurement Executive understood that a final board presentation regarding procurement, unlike prior drafts, did not contain the details surrounding the $3.5 million prebate payment from the supplier.

20. In a separate transaction involving the same supplier, the Procurement Executive and Pelleissone discussed the restructuring of a $2 million retention bonus that the supplier had awarded to legacy Kraft before the merger, in order for newly merged KHC to recognize the full amount in 2015, resulting in a credit to the savings targets of Heinz procurement personnel. The Procurement Executive and Pelleissone had access to information that was not communicated to the controller group that would have caused the controller group to question whether immediate recognition of the $2 million was appropriate. In this transaction, procurement division employees negotiated two new contracts with the supplier—one in which legacy Kraft returned the bonus back to the supplier, and another, in which the supplier re-conveyed the $2 million rebate, but this time, to legacy Heinz, and purportedly in exchange for purchase volumes in 2015. Recharacterizing the $2 million retention bonus as a supposed purchase volume rebate enabled KHC to improperly recognize the full $2 million in 2015. The Procurement Executive and Pelleissone were provided a global operations presentation that discussed the transaction as part of a plan to recognize cost savings in 2015, but did not take steps to address whether the rebate was accurately reflected in the new contract with legacy Heinz.

21. These rebate transactions at legacy Heinz and KHC following the merger should have placed Pelleissone and the Procurement Executive on notice of the appropriate accounting treatment for these types of transactions, that procurement division employees misrepresented the true economic nature of rebate transactions, and the importance placed on not linking payments from suppliers to future contract obligations in order to achieve premature costs savings. For instance, in a pre-merger transaction involving a potato supplier, Heinz's procurement division tried to improperly recognize $10 million in cost savings in 2014 by drafting side credit notes which improperly stated that a total of $10 million was being provided in exchange for 2014 purchases of potatoes and other vegetables, rather than for the new multi-year contract (the real reason for the $10 million payment). Although this payment was ultimately recorded correctly—and spread over the life of the contract— the Procurement Executive and Pelleissone should have understood through this transaction that pre-merger Heinz's controllers were being presented agreements with suppliers that mischaracterized the true nature of the transactions. In an email communication, for example, the Procurement Executive informed Pelleissone of the need to align on a "story" for the Heinz global controller regarding the purpose of the supplier payments and the importance of not linking payments from suppliers to future obligations.

2017-2018 Expense Management Misconduct

22. Beginning in 2017 and continuing into 2018, KHC encountered significant headwinds in its effort to meet annual budget and savings targets, principally due to inflation and unfavorable foreign exchange rates, the exhaustion of merger-related savings, and the incremental, year-over-year nature of the procurement division savings targets. The expense management misconduct was more limited in 2016 because the procurement division exceeded its gross savings targets that year.

23. However, from 2017 on, as market conditions deteriorated, Pelleissone should have known that continued incremental savings were unrealistic, but he failed to adjust expense reduction expectations for the procurement division, creating a high-pressure environment focused on obtaining same-year cost savings. Procurement division employees discussed internally that Pelleissone "push[ed] like crazy" for them to meet cost savings goals, and increased cost savings targets to unreasonable levels. At least in part due to this pressure, in 2017 and 2018, members of the procurement division—across multiple geographic zones—manipulated 54 supplier transactions (out of approximately 59 during the Relevant Period) to improperly obtain premature recognition of cost savings.

24. Pelleissone and the Procurement Executive had access to information, including from their involvement in the earlier transactions described above, that should have alerted them to the fact that certain contracts with suppliers submitted by procurement division employees to KHC's controllers did not reflect the true nature of the underlying agreements and would result in improper accounting treatment. Similarly, the Procurement Executive and Pelleissone also should have known that certain agreements with suppliers did not generate any new costs savings, despite purported cost savings being reflected in the company's accounting books and records and public disclosures.

25. In 2017, for example, procurement division employees negotiated a $2 million prebate to KHC from a sugar supplier in exchange for a three-year contract extension and future sugar purchases. In addition, the agreement called for KHC to return the $2 million back to the supplier, in the form of paying higher prices for sugar over the three-year period. Thus, the agreement did not produce any actual cost savings. The Procurement Executive and Pelleissone should have known the true structure of the transaction, including through their participation in monthly performance reviews, during which it was disclosed that the $2 million was tied to a contract extension and future volume purchases, but that KHC planned to recognize the full cost savings in August 2017.

26. The Procurement Executive also provided Pelleissone with a "risk mitigation plan," which listed $2 million in 2017 savings from the transaction and identified three other transactions that were part of the expense management misconduct. The Procurement Executive highlighted in the email attaching the plan that he would "need to find a way to make them count in 2017 by getting them signed off by the controllers." Nonetheless, Pelleissone, as a member of KHC's disclosure committee, raised no questions or concerns, and affirmed the accuracy and completeness of KHC's quarterly filings spanning the recognition of this transaction.

27. During the Relevant Period, as a member of the disclosure committee, Pelleissone failed to review the quarterly and annual SEC filings provided to him as part of his disclosure committee responsibilities, yet he still certified that he was unaware of inaccuracies or omissions in those filings. Pelleissone, thus, failed to implement the internal accounting control of disclosure committee review of SEC filings.

28. In 2018, the agreement with the sugar supplier was extended to provide KHC with more time to repay the supplier for the 2017 prebate, through inflated sugar prices. To accomplish this, KHC was given an immediate sugar price reduction, but later in the year, the inflated prices resumed, and thereafter, continued over a longer future period in order to effectuate full repayment. However, KHC recognized an immediate price reduction of $500,000 as purported new cost savings. In an email message from a procurement division employee to colleagues (though not Pelleissone), the employee stated that Pelleissone proposed procurement "re-open [the sugar supplier] deal and extend contract in exchange for longer amortization of pre-payment." Thereafter, the Procurement Executive was informed of the deal's structure, and both Pelleissone and the Procurement Executive received presentations communicating the anticipated and improper 2018 savings recognition.

29. In 2017 and 2018, KHC's procurement division entered into additional agreements with suppliers which provided KHC with upfront payments that were recognized prematurely, even though they were tied to future commitments and allowed the suppliers to "clawback" an agreed-upon percentage of the upfront prebate. In one such transaction, the Procurement Executive was sent a presentation reflecting that KHC obtained a $4 million price reduction and $7.5 million in other efficiencies in exchange for committing to a new contract with a "5 year term" for the purchase of new cardboard grades from the supplier, and the supplier could "claw back a portion if any of the implementation is delayed after 2018." According to the presentation provided to the Procurement Executive, the supplier could recoup the prebate through increased pricing on 2019 KHC purchases.

30. The Procurement Executive acknowledged that the cost savings from the agreement would be "booked in July [2018]" in his self-evaluation that he provided to Pelleissone in connection with his performance review. He also was informed by one of his subordinates that there was potential "upside in the year [] if we get the wording correct[]." Thereafter, the Procurement Executive had a call with the CEO of the supplier, during which they discussed contract wording for the two supplier payments which did not link either of the prebates to a contract extension or a clawback obligation. The Procurement Executive approved the final contract, which did not reflect the true nature of the transaction, while understanding that KHC's controllers would rely on the contract to make an accounting determination.

31. Thereafter, the Procurement Executive signed, and along with Pelleissone, submitted, a sub-certification of the accuracy and completeness of the financial statements generated by global procurement over the first three quarters of 2018, during which the majority of the savings from this transaction were improperly recognized. KHC then relied on this sub-certification in making representations to its auditor regarding the completeness and accuracy of its financial statements.

32. The Procurement Executive also approved “price phasing” transactions, which created the illusion of immediate cost savings through price decreases from suppliers, but, in reality, were structured to include an offsetting price increase later in time. These “price phasing” transactions violated GAAP because they purported to generate cost savings that did not exist.

33. In 2017, for example, KHC improperly reduced its costs by $600,000 in earlier quarters through a price phasing deal with a sugar supplier. The transaction produced no real savings, however, because it required KHC to remit the same amount back to the supplier in the form of higher pricing in later quarters within the same year. In connection with this deal, the Procurement Executive was aware that his team was contemplating sugar pricing strategies to address pressures from Pelleissone to narrow the gap between forecasted and actual expenses to date, and approved the transaction. The Procurement Executive and Pelleissone reviewed presentations highlighting that the $600,000 in positive impact to KHC’s P&L was tied to “sugar price phasing.” Similarly a draft presentation that the Procurement Executive reviewed in advance of a trip he and Pelleissone took to visit the supplier highlighted that the deal would “[m]ove some negative impact from Q1 CY17 through price phasing.”

KHC’s Internal Control~~s~~ Deficiencies

34. Throughout the Relevant Period, the company did not design or maintain effective controls for the procurement division, including those implemented by the finance and controller groups, in connection with the accounting for supplier contracts and related arrangements. The company reported this material weakness in its annual report on Form 10-K filed on June 7, 2019. For example, on the Friday after the close of the August 2017 books, the controller group allowed KHC to recognize fully in 2017 a rebate that it had previously determined correctly to spread over a future-year period. The changed decision by that Monday to allow immediate recognition was not adequately documented nor explained to internal stakeholders, and it was made after procurement employees were instructed by a superior in operations to “find a way . . . to get back” the payments into the August books.

35. During the Relevant Period, finance personnel in gatekeeping roles also overlooked indications that some expenses were potentially being improperly managed and accounted for in the procurement division. In one internal communication, for example, a member of KHC’s controller group acknowledged a procurement buyer’s effort to “jam [a] rebate in to help [KHC’s] results in 2017.” That member of the controller group took no steps to report this conduct to legal or compliance, nor to determine whether it was part of a larger practice within procurement.

36. During the Relevant Period, KHC also tied internal performance metrics and compensation of the procurement legal group staff to assisting the procurement division’s efforts to reduce costs. Additionally, prior to 2018, KHC failed to provide the legal group with adequate staffing and resources for reviewing numerous global supply contracts, many of which were under negotiation at the same time. Under these conditions, the part of the legal group in charge of reviewing procurement contracts overlooked facts indicating that contract documentation was inconsistent with the underlying negotiated transaction, and the group failed to have reasonably

sufficient controls over the procurement contracting process.

37. Pelleissone should have known that, in not properly addressing several indicia that supplier contracts were being used to manage expenses, he caused KHC's internal accounting controls failures, including those relating to: (i) its accounting-related policies and procedures, (ii) the preparation and signing of contract approval forms which were to communicate the key commercial terms of procurement transactions to the controllers, (iii) the review of contract documentation and contract approval forms by KHC's controllers, (iv) the completion and approval of management representation letters affirming the accuracy and completeness of the financial records of KHC's Zones, business units, and procurement division, and (v) a disclosure committee whose function was to review and confirm the accuracy and completeness of KHC's draft periodic filings.

* * * * * *

38. KHC issued debt in securities offerings during the relevant period, the offerings for which incorporated by reference the inaccurate financial reports that were later restated, and offered the Procurement Executive and Pelleissone, among other employees, stock options and other stock-based compensation during the Relevant Period, and bonus compensation that was tied to their success at generating supply chain and operational cost savings. Specifically, the bonus criteria given the largest weight for the Procurement Executive was reaching a metric referred to as a purchase price variance target that was based on the amount of year-over-year savings the procurement division obtained from its supplier contracts. Similarly, Pelleissone was assigned responsibility for operational costs, which not only were a key factor in determining the company's annual budget, but were also directly impacted by the year-over-year savings achieved by the procurement division.

39. Additionally, during the period of the misconduct, Pelleissone exercised options in August 2018 on 35,000 shares of KHC common stock and then sold the shares at a profit.

VIOLATIONS

40. Section 17(a)(2) of the Securities Act proscribes the receipt of "money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(3) of the Securities Act proscribes engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." A violation of these provisions does not require scienter and may rest on a finding of negligence. *See Aaron v. SEC*, 446 U.S. 680, 685, 701-02 (1980).

41. Section 13(a) of the Exchange Act requires issuers to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rules 13a-1, 13a-11, and 13a-13 require the filing of annual, current, and quarterly reports, respectively. The obligation to file such reports embodies the requirement that they be true and correct. *See, e.g., SEC v. Savoy Indus., Inc.*, 587 F.2d 1149,

1165 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979). In addition to the information expressly required to be included in such reports, Rule 12b-20 of the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading. A violation of these reporting provisions does not require scienter and may rest on a finding of negligence. *See SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978).

42. Section 13(b)(2)(A) of the Exchange Act requires Section 12 registrants to make and keep books, records, and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Section 13(b)(2)(B) of the Exchange Act requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles. Scienter is not an element of the books and records and internal control provisions. *See Ponce v. SEC*, 345 F.3d 722, 737 n.10 (9th Cir. 2003) (noting that a "plain reading of Section 13(b) reveals that it also does not impose a scienter requirement").

43. Section 13(b)(5) of the Exchange Act provides: "No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2) [of the statute]."

44. Rule 13b2-1 also prohibits any person from directly or indirectly, falsifying or causing to be falsified, any book, record, or account subject to Section 13(b)(2)(A). Rule 13b2-2(a) prohibits an officer or director of an issuer from, among other things, making or causing to be made a materially false or misleading statement to an accountant in connection with any required audit of the issuer's financial statements or the preparation of a report required to be filed with the Commission. Scienter is not required to establish a violation of either of these rules. *See World-Wide Coin Investments*, 567 F. Supp. 724, 749 (N.D. Ga. 1983) (addressing Rule 13b2-1); *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d. Cir. 1997) (addressing Rule 13b2-2).

FINDINGS

45. Based on the foregoing, the Commission finds that Respondent KHC violated Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 12b-20, 13a-1, 13a-11, and 13a-13 promulgated thereunder.

46. Based on the foregoing, the Commission finds that Respondent Pelleissone (a) violated Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Section 13b-5, and Exchange Act Rules 13b2-1 and 13b2-2(a); and (b) caused KHC's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act, and Rules 12b-20, 13a-1, 13a-11, and 13a-13 promulgated thereunder.

KHC'S COOPERATION AND REMEDIAL EFFORTS

47. In determining to accept Respondent KHC's Offer, the Commission considered the cooperation and remedial acts promptly undertaken by KHC. Among other efforts, KHC proactively expanded the scope of its internal investigation, provided timely updates to the Commission staff regarding KHC's investigation findings, and provided courtesy translations of foreign language documents. KHC has taken disciplinary action, enhanced review of its finance, controllership, and legal functions, and instituted enhanced training, policies and procedures to prevent and detect future misconduct of the type described in the Order.

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, effective immediately, that:

A. KHC shall cease and desist from committing or causing any violations and any future violations of Securities Act Sections 17(a)(2) and 17(a)(3) and Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 12b-20, 13a-1, 13a-11, and 13a-13 promulgated thereunder.

B. KHC shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $62,000,000 to the Securities and Exchange Commission. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

C. Pelleissone shall cease and desist from committing or causing any violations and any future violations of Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13b-5, 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 13b2-1, 13b2-2(a), 12b-20, 13a-1, 13a-11, and 13a-13 promulgated thereunder.

D. Pelleissone shall, within ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $300,000, disgorgement of $12,500, and prejudgment interest of $1,711.31 to the Securities and Exchange Commission. If timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. The Commission may distribute civil money penalties collected in this proceeding if, in its discretion, the Commission orders the establishment of a Fair Fund pursuant to 15 U.S.C. § 7246, Section 308(a) of the Sarbanes-Oxley Act of 2002. The Commission will hold funds paid pursuant to this paragraph in an account at the United States Treasury pending a decision whether the

Commission, in its discretion, will seek to distribute funds or, subject to Exchange Act Section 21F(g)(3), transfer them to the general fund of the United States Treasury.

Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents 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) Respondents 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 the Respondents 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 Anita B. Bandy, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

E. Regardless of whether the Commission in its discretion orders the creation of a Fair Fund for the penalties ordered in this proceeding, 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, Respondents agree that in any Related Investor Action, Respondents shall not argue that Respondents are entitled to, nor shall Respondents benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payments of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that Respondents 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 Respondents 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.

F. Respondent KHC acknowledges that the Commission is not imposing a civil penalty in excess of $62,000,000 based upon its cooperation in a Commission investigation and related enforcement action. If at any time following the entry of the Order, the Division of Enforcement ("Division") obtains information indicating that KHC 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 KHC, petition the

Commission to reopen this matter and seek an order directing that KHC pay an additional civil penalty. KHC 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent Pelleissone, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Pelleissone under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Pelleissone of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary