



The Environmental Practice of Sidley Austin LLP

Our **Environmental Practice** consists of approximately 40 attorneys who concentrate on environmental and natural resources law. Established over 25 years ago, our group is now one of the largest environmental practices in the United States, with extensive experience in all aspects of environmental and natural resources law. The depth and range of our practice and the frequency with which we address cutting-edge issues enable us to advise clients quickly and cost-effectively.

For further information on our Environmental Practice, please contact either:

David T. Buente
202.736.8111
dbuente@sidley.com

Robert M. Olian
312.853.7208
rolian@sidley.com

To receive future copies of the **Environmental Update** via email, please send your name, company or firm name and email address to rduncan@sidley.com

This **Sidley Update** has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000. Prior results do not guarantee a similar outcome.

Recent SEC Enforcement Proceedings — Environmental Reserves

Within the last nine months, the Securities and Exchange Commission (SEC) has resolved three enforcement proceedings that included claims of alleged improper conduct in setting and adjusting environmental reserves. The proceedings underscore the importance of appropriate procedures and controls for establishing and adjusting such reserves.

In the Matter of Ashland Inc. and William C. Olin

On November 29, 2006, the SEC settled with Ashland Inc. and Ashland's former Director of Environmental Remediation, William Olin. SEC Administrative Proceeding No. 3-12487. Regulated entities should take note of the following points.

Improper Reduction of Estimates: The SEC found that Olin improperly reduced estimates for environmental remediation at sites for which Ashland was liable. The estimates had been prepared by Ashland engineers and an outside consultant using a "decision tree" computer program to estimate remedial costs. Ashland allowed Olin to correct mistakes or otherwise adjust the estimates if he had a reasonable basis for doing so, but the SEC found Olin had no such basis and reduced estimates for various sites by the same large percentage. Ashland used the adjusted estimates to set its environmental reserve. Relying on the adjusted estimates, the SEC found Ashland had materially understated its environmental reserve and overstated its net income from 1999 to 2001.

Inadequate Internal Controls: According to the SEC, Ashland's internal controls included written procedures for developing "detailed, documented support for the engineers' estimates, as well as [a] peer critique session led by the independent consultant." *Id.* at 6. Nonetheless, the SEC found that "Ashland's internal controls were inadequate because they did not establish guidelines for, or require documentation or review of, adjustments to the engineers' cost estimates. Olin helped design these controls." *Id.*

Complaint Filed Under Whistleblower Protection Provisions: In 2002, three Ashland engineers questioned Olin's adjustments to cost estimates in their confidential responses to an internal code of conduct questionnaire and certification statement. After Olin learned the identity of one of the engineers, he told the engineer that there were problems with his performance, and asked him to consider whether he wanted to stay with company. The engineer left Ashland claiming he was the subject

of retaliation. The engineer filed a complaint with the Department of Labor under the whistleblower provisions of the Sarbanes-Oxley Act of 2002, and later settled with Ashland.

Violation of the Securities and Exchange Act of 1934 (Exchange Act):

The SEC found that Ashland had violated various provisions of the Exchange Act by understating its environmental reserves and failing to have adequate internal controls. The SEC also found that Olasin both caused those violations and personally violated the Exchange Act.

Remedial Measures: In its settlement with the SEC, Ashland agreed to:

- (1) Document adjustments to environmental remediation reserve estimates and the reasons for them.
- (2) Maintain for seven years all records concerning environmental remediation reserve estimates.
- (3) Require the manager of its Environmental Remediation Group to confer with the individual preparing the estimate for a site before adjusting the estimate.
- (4) Include in Ashland's Business Responsibility Questionnaire and Certification, which is sent to the Environmental Remediation Group and Accounting Department, questions to employees about whether they know of any failure to follow procedures for setting reserves or any misstatement in the company's books and records concerning an environmental remediation reserve.
- (5) With its outside auditor, conduct an annual review of policies and procedures for establishing its environmental reserve, including a comparison of estimates to budgets and actual expenditures.
- (6) Submit an annual report to the board of directors regarding compliance with these new measures.
- (7) Retain PricewaterhouseCoopers LLP to review Ashland's practices for establishing the company's environ-

mental reserve, soliciting and investigating employee complaints, and taking measures to prevent retaliation against those filing complaints.

Securities and Exchange Commission v. Safety-Kleen Corp., et al.

On June 22, 2007, a former CFO of Safety-Kleen Corp. pled guilty to a variety of securities and bank fraud charges. The SEC asserted that the CFO and others had created fictitious income by reducing several environmental remediation reserve accounts. The reductions did not comply with GAAP because they were made arbitrarily, without any analysis to support them.

SEC Actions Against Former Executives of ConAgra Foods, Inc.

On June 29, 2007, former financial executives of ConAgra Foods, Inc. settled numerous civil charges with the SEC. SEC Litigation Release No. 20176. The charges included:

- (1) alleged improper reductions by a former Corporate Controller of excess legal and environmental reserves to offset more than \$5.4 million of unrelated losses for which no reserve had been established; and
- (2) alleged improper actions by three former executives concerning the reversal of millions of dollars of excess legal and environmental reserves to income.

★ ★ ★

For additional information about the issues discussed in this Environmental Update, please contact:

Chicago

Laura L. Leonard
312.853.7620
lleonard@sidley.com

Los Angeles

Judith Praitis
213.896.6637
jpraitis@sidley.com

New York

Maureen M. Crough
212.839.7323
mcrough@sidley.com

Washington, D.C.

Christopher L. Bell
202.736.8118
cbell@sidley.com

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.

www.sidley.com

Sidley Austin LLP, a Delaware limited liability partnership, operates in affiliation with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership, Sidley Austin (UK) LLP, a Delaware limited liability partnership (through which the London office operates), and Sidley Austin, a New York general partnership (through which the Hong Kong office operates). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley or the firm.

SIDLEY AUSTIN LLP
SIDLEY