

Recent SEC Enforcement of Environmental Financial Disclosure

by E. Lynn Grayson

Introduction

In the past few months, the SEC has resolved a number of pending actions against corporate executives accused of engaging in improper environmental financial reporting. Three such examples include: entry of a guilty plea by Safety-Kleen's former CFO, Paul Humphreys, who was accused of improperly reducing environmental remediation reserve account estimates to overstate earnings; the settlement of civil charges against ConAgra executives that alleged the improper reduction of environmental reserve estimates in order to offset losses; and the imposition of a cease-and-desist order on Ashland, Inc. and its former Environmental Remediation Director for improperly reducing the company's estimated remediation reserves. These actions suggest that the SEC is increasingly willing to police corporations' environmental financial disclosures. In the already dynamic area of environmental law, this new trend deserves special attention due to its potentially serious consequences – including costly penalties for corporations and fines or jail time for executives.

Safety-Kleen Guilty Plea

Securities and Exchange Commission v. Safety-Kleen Corp., Kenneth W. Winger, Paul R. Humphreys, William D. Ridings, and Thomas W. Ritter, Jr., Civil Action No. 02-CV-9791 (CSH) (S.D.N.Y.) (December 12, 2002); Litigation Release No. 17891.

The former CFO of Safety-Kleen, Paul Humphreys, pled guilty to criminal securities and bank fraud charges on June 22, 2007. Humphreys was indicted in December 2002 for improperly reducing the company's environmental remediation reserve accounts in order to create fictitious income for Safety-Kleen, a hazardous waste disposal company. The complaint against Humphreys alleged that he made the false reports so that Safety-Kleen would meet target earnings. Due to his admitted participation in the scheme to overstate earnings from 1998 through 2000, Humphreys now faces up to 45 years in prison and \$2.25 million in fines. One of Humphreys' alleged co-conspirators, William Ridings, pled guilty to related fraud charges in 2002. Ridings was Safety-Kleen's

vice president and controller during the period the misconduct occurred.

ConAgra Settlements

Securities and Exchange Commission v. James P. O'Donnell et al., United States District Court for the District of Colorado, Civil Action, No. 07-CV-01373; Litigation Release No. 20176, Accounting and Auditing Release No. 2629 (June 29, 2007).

On June 29, 2007, the SEC settled pending civil actions against several ConAgra executives related to environmental financial reporting. The complaints alleged that ConAgra's officials improperly reduced the company's legal and environmental reserves to account for unplanned losses in the fiscal years 2000 and 2001. As a result, ConAgra allegedly filed materially inaccurate financial statements misreporting its earnings and reserves. The executives settled the civil charges by agreeing to restrain from future misconduct and paying monetary penalties. ConAgra's former CFO, James O'Donnell, agreed to pay the largest sum to settle the complaint against him: \$425,531 in disgorgement plus \$174,151 in

pre-judgment interest on that amount, divestiture of 17,648 unexercised stock options, and a civil penalty of \$100,000. O'Donnell and the other executives also are suspended from appearing or practicing before the Commission as accountants for at least one year.

**Cease and Desist Order
Against Ashland and
Executives**

In re Ashland Inc. and William C. Olatin, Exchange Act Release No. 54830, Accounting and Auditing Release No. 2518, Administrative Proceeding File No. 3-12487 (Nov. 29, 2006).

On November 29, 2006, the SEC issued a cease-and-desist order against Ashland, Inc., and William Olatin, its former Director of Environmental Remediation. The Commission found that Ashland violated the Exchange Act by

materially understating its environmental reserves from 1999 through 2001. The Commission also found that Ashland used Olatin's environmental remediation cost estimates to determine its reserves, which remediation cost estimates Olatin had improperly reduced. Specifically, Olatin instructed his accountant to decrease the actual cost calculations by as much as 25% (\$12 million) each year without any documented reason for doing so. Olatin's reductions in turn decreased Ashland's total reserve estimates by almost 7% (approximately \$160 million) in both 1999 and 2000. The Commission concluded that Ashland's internal controls, which Olatin helped design, were inadequate, and ordered Ashland to address these deficiencies by undertaking a number of potentially costly revisions to its financial reporting policies and procedures.

The Commission also prohibited Olatin from future participation in Ashland's financial reporting.

Conclusion

In the wake of earlier public financial scandals, the SEC increased its focus on accounting practices in order to better regulate corporate disclosures. Now, the SEC seems to have turned its attention on environmental financial disclosures and corporations and corporate executives should take special note of the heightened attention that the SEC is now giving to these disclosures. Although the SEC has not announced any new guidelines or initiatives, corporations and corporate executives should certainly be cognizant of the increased number of civil and criminal actions being brought by the SEC against corporations and officials who fail to observe existing environmental reporting requirements.

For more information, please contact the following Jenner & Block attorney:

E. Lynn Grayson, Partner
Tel: 312 923-2756
Email: lgrayson@jenner.com