

SEC Enforces SOX Clawback in Shadow of Dodd-Frank

September 1, 2011 | Client Update | 3-minute read

Earlier this week, the SEC announced a settlement with the former CFO of Beazer Homes USA to clawback incentive compensation and profits from the sale of Beazer stock of more than \$1.4 million pursuant to the Sarbanes-Oxley Act. Neither the CFO nor Beazer's CEO, who reached a similar settlement with the SEC earlier this year for almost \$6.5 million, was charged with personal misconduct. Notably, the SEC blames Beazer's chief accounting officer as the main perpetrator of the fraudulent actions that led to accounting restatements, but in accordance with the Sarbanes-Oxley Act, the SEC could not seek recoupment from any officers other than the CEO and CFO. The SEC complaint against the chief accounting officer only included traditional cease-and-desist and disgorgement relief.

Section 304 of the Sarbanes-Oxley Act authorizes the SEC to seek recoupment of certain incentive compensation if an issuer must prepare an accounting restatement due to material noncompliance of the issuer with financial reporting requirements "as a result of misconduct." The SEC actions against Beazer's CEO and CFO were criticized for taking an expansive reading of "misconduct" under the statute. In contrast, the new rules the SEC is expected to promulgate in the coming months to implement the clawback requirements under Dodd-Frank will subject current and former officers to clawbacks, without reference to misconduct by anyone. Under Dodd-Frank, companies must develop and implement policies with respect to (1) disclosure of incentive-based compensation that is based on publicly reported financial information and (2) clawback of incentive-based compensation from current or former executive officers following a restatement triggered by material noncompliance with any financial reporting requirements under securities laws. The amount subject to the clawback is the amount in excess of what would have been paid under the restated results during the 3-year period preceding the date on which a company is required to prepare the restatement.

In a number of respects as noted below, the requirements of Dodd-Frank are broader than those of SOX. Due to its expansive nature, in particular the absence of any misconduct as a trigger, there will likely be more clawback actions under Dodd-Frank than we have seen so far under SOX. The Dodd-Frank provisions raise a number of interpretative questions, including whether SEC actions against officers will make it difficult for companies not to seek compensation reimbursements under Dodd-Frank if available.

Dodd-Frank	SOX
- Requires clawbacks without regard to whether any misconduct has occurred	Requires misconduct, but according to the Beazer action, the misconduct does not need to be by the individual charged with clawback
- 3-year look-back	12-month look-back
- Applies to current and former executive officers	Applies only to CEO and CFO

- Enforceable by the issuer, as well as the SEC	Enforceable only by the SEC
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For more information on open issues regarding the clawback under Dodd-Frank and its impact on foreign private issuers, see [Compensation Clawback under Dodd Frank: Impact on Foreign Issuers](#) from our Tokyo Office Blog.

The SEC news release regarding the clawback of compensation from Beazer Homes' former CFO, as well as the related SEC complaint, can be found [here](#).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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