

Memorandum

SEC Files Sarbanes-Oxley Clawback Action Against Two Former CFOs

March 3, 2015

On February 10, 2015, the Securities and Exchange Commission (“SEC”) filed settled administrative cease-and-desist proceedings against two former chief financial officers (“CFOs”) of Saba Software, Inc. for their failure to reimburse the company for the stock-sale profits and bonuses they received in the 12 months following the filing of periodic reports necessitating restatement, as required under Section 304(a) of the Sarbanes-Oxley Act.¹ The two respondents consented to the entry of the cease-and-desist order without admitting or denying the findings therein.

The clawback action stems from the falsification of Saba’s time records over a period of more than four years, which had led the company to determine and announce in 2012 that it must restate its financial statements for the years 2008 through 2011, as well as the first two quarters of 2012, “due to its material non-compliance with GAAP.” While Saba has not yet filed its required restatement, the SEC estimated that the company overstated reported pre-tax income by “approximately \$70 million over the period from 2008 through the second fiscal quarter of 2012.” According to the SEC, “[t]hese misstatements are material,” since:

1. “based on the Company’s own estimates, the restated financials will reflect overstatements of gross revenue and profit of more than 5% in each year for the period 2008 through 2011,” and
2. “the effect of the inflated revenue was that Saba met analyst expectations for [earnings per share] in certain quarters and caused at least one year (2010) to reflect net income when, but for the inflated revenue, the Company should have reported a net loss.”

Section 304 of the Sarbanes-Oxley Act provides that “[i]f an issuer is required to prepare an accounting

¹ See [In the Matter of William Slater, CPA, et al.](#), Release No. 34-74240; File No. 3-16381 (Feb. 10, 2015).

restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws,” the issuer’s chief executive officer (“CEO”) and CFO must reimburse the issuer for:

1. “any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period” following the false filing; and
2. “any profits realized from the sale of securities of the issuer during that 12-month period.”²

The SEC found that Saba’s former CFOs, who served the company from 2008 through 2012, “both realized Saba stock-sale profits and received bonuses during the 12-month periods following the filings containing financial results that Saba is required to restate,” but did not reimburse Saba for those amounts. Accordingly, while the former CFOs did not participate in the misconduct resulting in the misstatement, the SEC concluded that the former CFOs violated Section 304 of the Sarbanes-Oxley Act, which, the SEC explained, “does not require that a chief financial officer engage in misconduct to trigger the reimbursement requirement.” In addition to ordering the former CFOs to cease and desist from committing future violations of Section 304, the SEC directed them to return to Saba the nearly half-a-million dollars they owe the company pursuant to Section 304.

As noted by the director of the SEC’s San Francisco office, the SEC’s enforcement action serves as a reminder that “[d]uring any period when a company materially misrepresents its financial results, even executives who were not complicit in the fraud have an obligation to return their bonuses and stock sale profits to the company for the benefit of the shareholders who were misled.”³

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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² Sarbanes-Oxley § 304, 15 U.S.C. § 7243.

³ Securities and Exchange Commission, “[SEC Announces Half-Million Dollar Clawback from CFOs of Silicon Valley Company That Committed Accounting Fraud](#)” (Feb. 10, 2015).



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