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ALERT

A Client Alert About Client Alerts – SEC Cites Alerts In Issuing $400,000 Fine Related to Whistleblower Protections

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What: On June 22, 2022, the Securities and Exchange Commission (SEC) settled charges against The Brink's Company (Brinks) for requiring employees to sign confidentiality agreements that prohibited disclosure of any financial or business information to third parties without prior notification to Brinks, threatened liquidated damages and legal fees for noncompliance, and did not contain any exemption for whistleblowing activity. Combined with a much larger resolution a few days later, the SEC has made clear that, in assessing penalties, it will be focusing on the role of gatekeepers, including in-house counsel, in advising their clients.

Settlement Summary: Last week, the SEC announced that it settled charges against Brinks for interfering with potential whistleblowers through restrictive confidentiality agreements in violation of Exchange Act Rule 21F-17(a). Enacted in 2011, Rule 21F-17(a) prohibits any person from taking any action to impede an individual from communicating directly with the SEC, including by "enforcing, or threatening to enforce, a confidentiality agreement." The Brinks settlement is especially significant because it reveals the Commission's belief that the ubiquitous client alert is sufficient to put companies on notice of problematic conduct.

The SEC Order asserts that between April 2015 and April 2019, Brinks required almost all of its new hires (2,000 – 3,000 individuals annually) to sign a Confidentiality and Non-Competition Agreement (Confidentiality Agreement) as part of their onboarding process. The Confidentiality Agreement broadly prohibited employees from revealing "Confidential Information"—defined to include financial and

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business information—without prior written consent from a Brinks executive. It did not contain any carve-outs for disclosure to government entities. And, significantly, Brinks added a $75,000 liquidated damages clause for any breach in April 2015, *after* the SEC had started publicly enforcing new whistleblower protections.

Remarkably, the SEC Order relies on Brinks's receipt of widely distributed law firm client alerts to demonstrate that Brinks had knowledge that its Confidentiality Agreements were improperly restrictive. The SEC Order specifies that between 2015 and 2016, Brinks's legal department received multiple legal updates from outside counsel highlighting new SEC enforcement actions for violations of Rule 21F-17(a). As we described in our own client alert in 2016,[1] at this time, the SEC had launched its campaign to enforce the whistleblower rules enacted in 2011. The emerging enforcement actions indicated that the SEC was targeting restrictive clauses—even those in legacy confidentiality agreements and other employment documents which pre-dated the enactment of the SEC's 2011 whistleblower rules.

The SEC Order further states that despite receiving "general circulation client alerts from multiple law firms" "and specific legal advice" on the SEC's enforcement actions regarding Rule 21F-17(a), Brinks failed to adequately revise the Confidentiality Agreements. Specifically, it notes that beginning in 2015, "Brinks in-house attorneys . . . received general client bulletins, legal alerts, and case summaries from various private law firms discussing the Commission's enforcement actions charging violations of Rule 21F-17(a)." In particular, the Order points out that a Brinks employment group attorney forwarded himself a Wall Street Journal Article discussing one of the SEC's Rule 21F-17(a) actions.

While Brinks added a whistleblower exemption to its corporate-level severance agreement template in January 2017, it failed to make changes to the main Confidentiality Agreements until April 2019—one year after the SEC began investigating Brinks. And, a month later, in May 2019, Brinks publicly stated that employees were permitted to provide confidential information to government agencies and accept monetary awards for doing so.

The SEC found that "[b]y requiring current and former employees to notify the company prior to disclosing any financial or business information to any third parties and threatening them with liquidated damages and legal fees if they did not do so, Brinks took action to impede potential whistleblowers by forcing those employees to choose between identifying themselves to the company as whistleblowers or potentially having to pay $75,000 and the company's legal fees." Accordingly, the SEC determined that Brinks violated Exchange Act Rule 21F-17 (a).

In the settlement, Brinks did not admit or deny any of the SEC's findings but consented to pay a $400,000 civil penalty, to cease and desist its conduct, and to comply with certain undertakings. Notably, Brinks agreed to add a provision to its employment agreements clarifying that employees may engage in whistleblowing activities.

Takeaways and Industry Impacts: First and foremost, the Brinks resolution should be a reminder that the SEC whistleblower protections are alive and well, and that the SEC is intent on protecting whistleblowers, one of the most important sources for SEC enforcement cases. Compliance with Rule 21F-17(a) continues to be

policed, and private and public companies alike should assure themselves that employment agreements and practices comply with the SEC's rules.

Second, company boards and legal departments need to recognize that SEC regulations affect more than just insider trading and a company's annual and quarterly filings. As the SEC's recent push into Environmental, Social and Governance (ESG) issues demonstrates, the current Commission holds an expansive view of its own regulatory authority. Legal departments large and small need to consider the SEC's priorities and continually conduct their risk assessments with those priorities in mind. As the Brinks Order makes clear, one way to do that is to incorporate information such as law firm client alerts into that process. While they may fill up your in-box, we now know that the SEC assumes companies read and consider them.

Finally, in-house counsel should be aware that the SEC has made clear, in speeches by Enforcement Director Grewal and others, that it intends to examine the advice gatekeepers, including in-house lawyers, are providing their corporate clients in certain circumstances. The Brinks Order, intentionally we think, demonstrates the breadth of the SEC's investigation into what Brinks's lawyers knew about Rule 21F-17(a) and when they knew Brinks was out of compliance. Similarly, on June 28, 2022, in conjunction with a $100 million dollar resolution against a major audit firm, the SEC required the firm to hire an independent consultant to conduct an investigation of its own lawyers and managers and how their behavior affected the SEC's investigation into the underlying conduct. Both of these cases demonstrate a previously unheard of appetite by the SEC to get behind corporate legal advice.

[1] https://www.wiley.law/alert-SEC-Fines-Company-Gouging-Whistleblower-Protections-Severance-Agreements.