SEC Continues Focus on Lack of Whistleblower Carve Outs in Company Confidentiality Agreements

June 30, 2022

On June 22, 2022, the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") announced a settled enforcement action against The Brink's Company ("Brinks"), a cash transit and money processing service company, for violations of Rule 21F-17 of the Securities Exchange Act of 1934 (the "Exchange Act").[1] The action primarily involved Brinks' use of a confidentiality and non-compete agreement (the "Agreement") that prohibited employees from providing confidential information to third parties without Brinks' prior written authorization. The SEC found that the Agreement violated Rule 21F-17(a) because it failed to provide specific carve outs for potential SEC whistleblowers. To settle the action, Brinks agreed to pay a $400,000 penalty and to comply with certain undertakings, including amending its employment agreements to comport with Rule 21F-17. The action, which drew a public statement from SEC Commissioner Hester Peirce, underscores the SEC's expectation that companies have long since revised their confidentiality agreements and other related documents to comply with Rule 21F-17.

Rule 21F-17(a). Rule 21F-17(a), which was adopted in 2011 as part of the SEC's Whistleblower Program, prohibits "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

The Commission's Findings. The Commission found that, beginning in at least 2015 and continuing through April 2019 (the "Relevant Period"), Brinks required its U.S. employees to execute the relevant agreement as part of the onboarding process. As noted above, the Agreement prohibited employees from divulging "Confidential Information" without Brinks' prior written authorization. The Agreement defined "Confidential Information" broadly to include, among other categories of information, "financial information including financial information set forth in internal records, files and ledgers or incorporated in profit and loss statements, financial reports and business plans. . . ." The Commission noted that this type of information is commonly the

[1] *In the Matter of The Brink's Company*, Exchange Act Rel. No. 95138 (Jun. 22, 2022).

subject of whistleblower complaints. During part of the Relevant Period, Brinks also required employees to sign agreements with similar confidentiality provisions upon leaving the company and when the company settled litigated employment matters.

Brinks maintained two legal offices—in Richmond, Virginia and Dallas, Texas—that dealt with employment matters. The Richmond office handled matters involving executives, while the Dallas office dealt with issues related to all other employees. According to the SEC order, while technically separate, these offices routinely shared legal guidance and other information applicable to the other group. The Commission emphasized that broadly worded agreements similar to the Agreement at issue had been the focus of enforcement proceedings pursuant to Rule 21F-17 since April 2015. According to the SEC, Brinks' in-house attorneys in both offices had received legal guidance from outside counsel regarding Rule 21F-17 enforcement proceedings, yet Brinks failed to revise its documents accordingly.

For instance, the SEC said in-house lawyers in both the Richmond and Dallas Brinks offices received an April 3, 2015 "Client Memo" from outside counsel that summarized the SEC's first enforcement action under Rule 21F-17(a) brought against KBR, Inc.[2] The Client Memo predicted that the SEC would bring more actions under Rule 21F-17 and recommended that companies adopt the language changes contained in the KBR order verbatim. Brinks personnel in the company's Dallas office revised the Agreement template approximately one week later, but rather than adding protections for potential SEC whistleblowers, they added a more restrictive liquidated damages provision against employees found to be in violation of the Agreement. Both offices continued to receive outside updates regarding the Commission's enforcement of Rule 21F-17(a), but failed to make any whistleblower-related changes until years later: the Richmond office in January 2017 and the Dallas office in April 2019, a year after Brinks' had been made aware of the Commission's investigation into its Agreement and other related documents.

To settle the action, Brinks agreed to pay a $400,000 penalty. It also agreed to add a "Protected Rights" section to its employment-related agreements, emphasizing that the agreements do not limit an employee's "ability to file a charge or complaint with the Securities and Exchange Commission, or any other federal, state, or local governmental regulatory or law enforcement agency." Brinks also agreed to contact former and current employees who signed the Agreement during the Relevant Period and provide them with a copy of the SEC's order and a statement confirming that they are permitted to submit whistleblower reports with the SEC.

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[2] *See In the Matter of KBR, Inc.*, Exchange Act Rel. No. 74619 (Apr. 1, 2015).

Commissioner Peirce's Statement. SEC Commissioner Peirce released a statement[3] accompanying the Brinks order stating that while she agreed that Brinks violated Rule 21F-17(a), she did not support the undertaking that required Brinks to inform employees that they are able to file a charge or complaint with "any other federal, state, or local governmental regulatory or law enforcement agency." She stated that Rule 21F-17 finds its lawful authority under Exchange Act Section 21F, which ensures the free flow of information to the SEC, not other governmental entities. She emphasized that Brinks' agreement to add the broad language "should not be misconstrued as an indication that other companies are under any obligation to use the same or similar language to avoid running afoul of Rule 21F-17."

Takeaways. The Brinks order continues a pattern of enforcement of Rule 21F-17(a) against companies that do not contain appropriate carve outs in their confidentiality agreements, separation agreements and other similar documents.[4] This continuous enforcement since 2016 demonstrates the SEC's commitment to Rule 21F-17(a) actions, putting companies at risk for failure to update relevant documents.

The SEC's Division of Examinations published a risk alert in 2016 notifying companies that the exam staff would be examining several categories of documents to identify potential violations of Rule 21F-17, including compliance manuals, codes of ethics, employment agreements and separation agreements.[5] Companies should continue to review their current templates for such documents to ensure they do not contain broad language that could be read as prohibiting, discouraging or interfering with any protected SEC whistleblowing activities, and also ensure that all prior versions of the documents that do contain such broad language are no longer in use. Companies should keep in mind other applicable state and federal whistleblower statutes and regulations when proactively crafting their internal policies.

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[3] Hester M. Peirce, Commissioner, SEC, *A Caution on the Limits of Authority: Statement Regarding In the Matter of The Brink's Company* (Jun. 22, 2022), *available at* https://www.sec.gov/news/statement/peirce-statement-brinks-company-062222.

[4] *In the Matter of KBR, Inc.*, Exchange Act Rel. No. 74619 (Apr. 1, 2015); *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp.*, Exchange Act Rel. No. 78141 (Jun. 23, 2016); *In the Matter of BlueLinx Holdings, Inc.*, Exchange Act Rel. No. 78528 (Aug. 10, 2016); *In the Matter of Health Net, Inc.*, Exchange Act Rel. No. 78590 (Aug. 16, 2016); *In the Matter of NeuStar, Inc.*, Exchange Act Rel. No. 79593 (Dec. 19, 2016); *In the Matter of SandRidge Energy, Inc.*, Exchange Act Rel. No. 79607 (Dec. 20, 2016); *In the Matter of BlackRock, Inc.*, Exchange Act Rel. No. 79804 (Jan. 17, 2017); *In the Matter of Homestreet, Inc. and Darrell Van Amen*, Exchange Act Rel. No. 79844 (Jan. 19, 2017); *In the Matter of Guggenheim Securities, LLC*, Exchange Act Rel. No. 92237 (June 23, 2021).

[5] Risk Alert: Examining Whistleblower Rule Compliance (Oct. 24, 2016), *available at* http://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examiningwhistleblower-rule-compliance.pdf.

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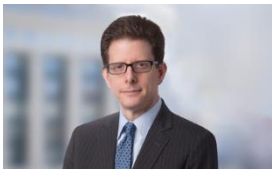

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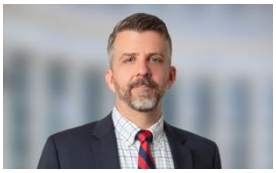

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