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SEC's SolarWinds Suit May Chill Disclosures, Ex-Officials Say

By **Sarah Jarvis**

Law360 (February 5, 2024, 10:24 PM EST) -- A group of 21 former government officials from both Democratic and Republican administrations has urged a New York federal court to consider the possible chilling effects of public-private information sharing on cyber incidents in the U.S. Securities and Exchange Commission's case against SolarWinds.

Former officials including an ex-U.S. attorney, former senior White House staffers and directors, and ex-senior attorneys for the U.S. Department of Justice and U.S. Department of Homeland Security on Friday signed an **amicus brief** in the SEC's lawsuit against software provider SolarWinds Corp., warning that the enforcement action "could disincentivize public-private information-sharing that is critically important to our nation's security."

The group says chief information security officers may become more cautious in weighing how their communications on cybersecurity threats might increase their potential liability.

"Cybersecurity risks are far easier to evaluate after a risk has already materialized and been eliminated," the group says. "A CISO or company concerned that the preliminary information about a cybersecurity incident or vulnerability it shares with law enforcement or industry may be treated in hindsight as something that should have been disclosed publicly may think twice before sharing that information in the first place."

Those who signed onto the amicus brief include former federal law enforcement and national security officials with expertise in cybersecurity, and the group has collectively worked for multiple administrations of both parties.

Among the amicus group is John P. Carlin, a former acting deputy attorney general and assistant attorney general for national security with the DOJ, and current co-chair of Paul Weiss Rifkind Wharton & Garrison LLP's cybersecurity and data protection practice.

The group also includes J. Michael Daniel, formerly a special assistant to the president and a cybersecurity coordinator in the Executive Office of the President from 2012 to 2017; Melinda Haag, former U.S. attorney for the Northern District of California; Chris Inglis, formerly a White House national cyber director and deputy director of the National Security Agency; and John Reed Stark, former chief of the SEC's Office of Internet Enforcement.

Among others, the group additionally includes ex-officials from the FBI and CIA.

The group underscored the strength of cyberthreats facing U.S. companies and government entities, saying "not even the most sophisticated cybersecurity defenses, public or private, can reliably protect an information system from a dedicated, sophisticated threat actor." They add that it's important for victims of cyberattacks to notify government agencies swiftly, even if all the facts aren't yet known.

"Even the shortest delay in sharing information can hamper the government's ability to effectively respond because threat actors can quickly delete evidence and move infrastructure before the government has an opportunity to seize or preserve the relevant evidence," the group says.

Carlin of Paul Weiss, who is also counsel for the former officials, said in a statement: "We believe that public disclosure is not a substitute for, and must not come at the expense of, voluntary confidential sharing of more detailed information with the agencies tasked with combatting cyber threats, who have the right set of technical tools and legal authority to take effective action."

The SEC **sued** SolarWinds in October 2023, accusing the company of failing to tell investors about cybersecurity weaknesses prior to a Russian-linked data breach in 2020. **Experts say** the suit is the first SEC proceeding to litigate cybersecurity disclosure issues, and it marks the first time a chief information security officer — SolarWinds cyber lead Timothy Brown — has been named a defendant in this type of regulatory action.

SolarWinds **has alleged** the SEC is trying to "revictimize the victim" with the suit, arguing the company did what it was supposed to do in handling an "extraordinarily sophisticated" breach and had risk factors that were comparable to other companies.

Other groups filed amicus briefs in the case last week, including the U.S. Chamber of Commerce, which **accuses** the SEC of using a provision of the Foreign Corrupt Practices Act as a power grab for broader corporate policing authority. The software provider has garnered support from other parties, including a software industry group, and a coalition of cybersecurity organizations and chief information security officers.

Serrin Turner of Latham & Watkins LLP, counsel for SolarWinds, said in a statement on Friday that the amicus briefs "highlight that the SEC's positions in this case are not only unsupported by the law but raise serious security concerns for companies, CISOs, and the public at large."

"We remain confident that SolarWinds' disclosures at all times were appropriate, and the SEC's assertions otherwise are fundamentally flawed," Turner said.

An SEC representative didn't immediately respond to requests for comment Monday.

The former government officials are represented by John P. Carlin and Jeannie S. Rhee of Paul Weiss Rifkind Wharton & Garrison LLP.

The SEC is represented in-house by Christopher M. Bruckmann, Kristen M. Warden, W. Bradley Ney, Benjamin Brutlag, Lory Stone and John J. Todor.

SolarWinds and Brown are represented by Serrin A. Turner, Michael Clemente, Sean M.

Berkowitz and Kirsten C. Lee of Latham & Watkins LLP.

Brown is additionally represented by Alec Koch, Michael J. Biles and Mateo de la Torre of King & Spalding LLP.

The case is Securities and Exchange Commission v. SolarWinds Corp. et al., case number 1:23-cv-09518, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.