CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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April 9, 2015

The Honorable Mary Jo White
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Request for Guidance on Confidentiality Agreements Related to Whistleblower Rules

Dear Chair White:

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of over three million companies of every size, sector and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in the 21st century economy. To achieve this objective, it is an important priority of the CCMC to advance a strong and transparent corporate governance structure.

We are writing to express our significant concern regarding an enforcement action on April 1, 2015 that the Securities and Exchange Commission ("SEC" or the "Commission") took under Rule 21F-17 regarding confidentiality and other agreements at KBR, Inc.[1] We believe this action is the result of a highly subjective interpretation and application of the SEC's recently adopted whistleblower rules, sanctioning KBR for having restrictive language in confidentiality and other agreements with employees who may be whistleblowers under SEC rules. Such enforcement action essentially sets policy that was simply not included in the final whistleblower rules promulgated in 2011. Effectively, the SEC is undertaking rulemaking through enforcement rather than the regular notice and comment process.

[1] *See* Press Release, Securities and Exchange Commission, "SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements" (April 1, 2015) available at: http://www.sec.gov/news/pressrelease/2015-54.html.

Rule 21F-17 prohibits a company from threatening to enforce or using a confidentiality agreement to prevent an employee from communicating with SEC staff without company consent. However, the rule does not bar companies from having confidentiality agreements with employees or other third parties; nor does the rule specify language that can or cannot be used in confidentiality or other types of agreements with employees or other counterparties. Agreements requiring confidentiality or non-disclosure of certain types of information are a routine part of doing business in the United States and throughout the world. Ordinarily these agreements have, at most, a tenuous connection to the federal securities laws and the SEC's whistleblower rules. The SEC's enforcement action against KBR, however, has created significant uncertainty as to the enforceability of agreements of all kinds insofar as they make mere mention of the confidentiality of information. This lack of clarity subjects companies—the vast majority of whom have robust ethics and compliance programs—to the prospect of enforcement action by the SEC's enforcement division where there is no clear guidance from the Commission.

Moreover, recent press reports indicate that the SEC's enforcement division has launched an investigative sweep by sending a number of letters to companies asking for copies of non-disclosure agreements, employment contracts, codes of conduct, and other documents.[2] These requests for voluntary document production provide no basis for why the company has been chosen for such an action, while the company is expected to expend considerable time and resources complying with the request. As a practical matter, a company's management and board of directors must be afforded the opportunity to appropriately respond to SEC inquiries and work to remedy any deficiencies upon which the SEC is targeting the company. Without an explanation of why the company is being targeted or whether allegations of securities violations have been made, the company is once again left in an untenable position at the SEC's mercy, waiting to see how the Division of Enforcement further shapes the whistleblower rules through future on-off enforcement actions.

The current ambiguities in the SEC's whistleblower program can be rectified and the SEC's investigative resources can be preserved if the Commission provides additional clarity on what language it considers allowable in non-disclosure agreements, confidentiality agreements, employment contracts, codes of conduct, and

[2] Rachel Louise Ensign, T*reatment of Tipsters is Focus of SEC,* Wall Street Journal, February 26, 2015.

other similar documents. Rather than using the enforcement process to gather data, set policy, and thereby define the parameters of acceptable behavior, we request that the SEC undertake an initiative to provide more formal guidance that would assist companies, employees, and other contractual counterparties to better understand the specific categories of agreements or provisions that may violate the SEC's whistleblower rules. Doing so will not only benefit companies and their employees, but the SEC as well.

We ask the Commission to give its full attention to this important topic, and the CCMC stands ready to assist you in that effort.

Sincerely,

David Hirschmann

cc: The Honorable Luis A. Aguilar
The Honorable Daniel M. Gallagher
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar
Mr. Andrew Ceresney, Director, Division of Enforcement
Mr. Sean McKessy, Chief, Office of the Whistleblower