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. 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.

Rule 21F-17 prohibits a company from threatening to enforce or using a
customary 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. 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

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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