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Chamber of Commerce Seeks SEC Guidance on Confidentiality Agreements after the KBR Action

April 13, 2015 | Client Update | 2-minute read

In a **letter** to SEC Chair White, the U.S. Chamber of Commerce, through the Center for Capital Markets Competitiveness (CCMC), has expressed “significant concern” regarding the enforcement action that the SEC took against KBR regarding whistleblowers and the company’s confidentiality agreements. Our memo on the KBR action is **here**.

CCMC indicates that they believe that the KBR enforcement action is the “result of a highly subjective” application of the whistleblower rules and sets policy that is not part of the rules, so that effectively the SEC is undertaking rulemaking through enforcement instead of a notice and comment process. The letter argues that while 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, the rule does not prevent companies from having confidentiality agreements, which are a routine part of doing business.

CCMC believes that the SEC’s enforcement action against KBR has created “significant uncertainty” as to the existing agreements that mention keeping information confidential, and the lack of guidance from the SEC subjects companies to the possibility of enforcement action. Recent press reports suggest there is an SEC investigative sweep of companies asking for copies of non-disclosure agreements, employment contracts, codes of conduct and other documents. These requests for voluntary document production apparently do not given any reasons for why a company is chosen. CCMC claims that without being told why a company is being targeted, 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.”

Instead, CCMC urges the SEC to provide more formal guidance and provide additional clarity on what language it considers allowable, instead of “using the enforcement process to gather data, set policy, and thereby define the parameters of acceptable behavior.”

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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