By email

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
United States of America

18 February 2011

Dear Ms Murphy

GC100 response to the request for public comment in connection with the Commission's study on extraterritorial private rights of action—File No. 4-617

I am writing on behalf of the GC100 in response to the request by the Commission for public comment in connection with its study to determine the extent to which private rights of action under the anti-fraud provisions of the U.S. Securities Exchange Act of 1934 should be extended to cover trans-national securities fraud.

The GC100 is the Association of General Counsel and Company Secretaries of the UK FTSE 100, the index which includes the 100 largest companies listed on the London Stock Exchange measured by market capitalisation. There are currently over 120 members of the group, representing some 90 companies headquartered outside the United States, many of which maintain listings on U.S. national securities exchanges as well as in their home countries.

We are naturally concerned about the Study and its potential outcome, given the obvious impact of any extraterritorial expansion of Section 10(b)'s private right of action on our member companies. But this is not simply a predictable knee-jerk reaction. We firmly believe that such an expansion would be unsound as a matter of policy because it would:

- render the U.S. capital markets less attractive to non-U.S. companies, and therefore diminish the competitiveness of the U.S. capital markets;
- ignore investor protections instituted by other countries and infringe on their regulatory prerogatives; and
- infringe on established principles of international comity by extending the jurisdiction of the U.S. courts to cases which lack a meaningful nexus to the United States.

We therefore strongly urge the Commission to conclude in its Study that the private right of action under Section 10(b) should not extend beyond its current application to purchases or sales of securities outside the United States.

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The Association of General Counsel and Company Secretaries of the FTSE 100
The GC100 Group is an unincorporated members' association administered by the Practical Law Company Limited

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Attractiveness and competitiveness of U.S. capital markets

Any expansion of the scope of Section 10(b) would render the U.S. capital markets less attractive to non-U.S. companies such as those which comprise the GC100. Non-U.S. companies frequently rank the threat of securities law claims, including in particular class-action lawsuits, as one of the primary reasons for avoiding the U.S. capital markets. For example, a 2008 survey by Harvard Law School students found that a “top concern” among foreign issuers with respect to their entry into the U.S. capital markets was U.S. antifraud laws.[1]

The aspect of an extraterritorial private right of action which is most troubling is not the incremental exposure to securities law claims under Section 10(b) from U.S. holders (which would be a natural and expected concomitant of marketing securities to U.S. investors), but the concern that creating any nexus at all to the U.S. capital markets may suddenly expose a company to U.S. securities lawsuits from all of its investors globally, regardless of where they are located. This daunting all-or-nothing proposition could well cause many companies to avoid U.S. capital markets altogether.

It is not just the fear of protracted litigation or the prospect of paying significant greenmail sums to settle a securities lawsuit which worries non-U.S. companies, but also the perceived uncertainty of the United States’ litigious environment. No company, not even one with an exemplary compliance record, is immune from “strike” suits should the price of its securities suddenly and unexpectedly fall, even if for reasons outside its control. Certain aspects of the U.S. legal system, including contingency fee arrangements and “opt out” class action mechanisms, are in particular perceived as encouraging baseless, vexatious litigation. Moreover, decisions outside the Federal courts system by judges and juries can be inconsistent and unpredictable. Opening the U.S. courts to an additional class of plaintiffs would increase the instances of abuse and create further uncertainty, which, in turn, would discourage non-U.S. companies from raising capital in U.S. markets. Non-U.S. companies would decide that accessing U.S. capital is not worth the additional, unpredictable risk of litigation and liability.

Not only would the prospect of expensive litigation deter non-U.S. companies from accessing the U.S. capital markets in the first place, but it would also fuel the continuing exodus of non-U.S. companies from U.S. trading markets. Since the Commission amended its rules in 2007 to facilitate de-registrations by foreign private issuers, more than 40% of the European companies which were reporting companies at that time have chosen to terminate their U.S. registration.[2] The prospect of U.S. private anti-fraud litigation is credited with helping to drive this trend. More foreign private issuers would be likely to follow suit if Section 10(b) is expanded.

Expanding the scope of Section 10(b) in the name of investor protection would, ironically, impact U.S. investors adversely in at least two ways. First, companies would have a strong incentive to keep themselves and the investment opportunities they represent outside the United States and away from U.S. investors. This outcome would be particularly unfortunate in light of current investment trends. Many U.S. investors are being urged, in order to achieve better returns, to diversify their portfolios and gain greater exposure to certain growth economies. Investors naturally would seek to achieve this by purchasing the securities of non-U.S. companies. Making such purchases would become increasingly difficult, however, if an expansion of Section 10(b)’s scope increases non-U.S. companies’ reluctance to deal with U.S. investors. U.S. investors therefore may be forced to invest in secondary markets, but even then issuers may be eager to restrict investments by U.S. investors to escape the long reach of U.S. law. Secondly, an expansive application of Section 10(b) would encourage companies to minimise all contact with the United States to avoid establishing any connection which would support a global class action lawsuit brought under Section 10(b). Non-U.S. companies would have a strong incentive to curtail

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1 Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Laws*, *in* Global Capital Markets and the U.S. Securities Laws 2009: Strategies for the Changing Regulatory Environment, 1243, 1253 (2009).

2 *See* Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission: December 31, 2009, U.S. Securities and Exchange Commission, http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2009.pdf (last visited Feb. 17, 2011); Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission: December 31, 2006, U.S. Securities and Exchange Commission, http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2006.pdf (last visited Feb. 17, 2011).

communications to U.S. investors and redeploy capital and investment outside the United States, to the detriment of the U.S. economy.

This concern is not based on a selfless or charitable concern for the U.S. economy. Many of our member companies have substantial businesses and thousands of employees in the United States, and anything which negatively impacts the U.S. economy is bad for business and bad for our member companies.

Investor protections in non-U.S. jurisdictions

Arguments in favour of the extraterritorial application of Section 10(b) seem to be based on a premise that failing to extend the protections of Section 10(b) to transactions outside the United States would leave U.S. investors exposed to fraudsters in foreign countries or would provide non-U.S. companies a haven in the U.S. to further fraudulent acts in transactions abroad. This is simply not the case.

The markets most likely to draw U.S. capital are subject to extensive and sophisticated regulatory regimes, which provide ample safeguards against fraudulent acts.[3] The United Kingdom, for example, has established the Financial Services Authority (the "FSA") which has power to impose fines and penalties for rule violations and market abuse, institute criminal proceedings for certain offences and take other specific measures to stop fraud. The FSA aggressively prosecutes fraud using these tools. U.K. law also features a statutory cause of action for mis-statements or omissions in offering documents and other disclosures.[4] Many other countries have similar mechanisms for tracking down and punishing securities fraud.[5]

It is true that the regulatory frameworks in place around the world differ from the U.S. framework, and differ in ways which tend to temper litigious behaviour. Few other jurisdictions feature, for example, "opt-out" class-actions, choosing instead "opt-in" procedures if choosing a collective-action system at all. "Loser pays" rules are prevalent.[6] Many jurisdictions limit the use of contingency fees or prohibit them altogether. Many also limit pre-trial discovery. This should not be mistaken as a sign that these countries lack a commitment to eradicating securities fraud; nor should the United States' system be considered the one and only legitimate way to do so. Rather, the existence of distinct regulatory systems around the world should stand as testament to the unremarkable proposition that different peoples devise different, yet nonetheless effective, ways to solve similar problems.

Principles of international comity

Were the United States to widen the scope of Section 10(b)'s private right of action to capture purchases and sales in other jurisdictions, the United States in effect would be overriding the policy choices of other sovereign nations. A country which limits the use of class actions because of the detrimental impact strike suits are thought to have on domestic industry would have its policy undermined if its citizens (who purchased securities on the country's principal securities exchange) join a class action lawsuit in the United States filed against the country's leading manufacturer. Likewise, a jurisdiction which has set up an "opt-in" class action system to ensure that all class members must affirmatively choose to have their rights adjudicated in such a forum would have its policy frustrated were an "opt-out" class action to form in the United States and include investors from such jurisdiction whose rights would be determined, in all likelihood without their full knowledge, in proceedings which may be given preclusive effect in these investors' home jurisdiction.

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3 The regulatory systems in place in foreign markets benefit from other, inherent advantages, such as proximity to evidence and witnesses, lack of language or other cultural barriers, greater ability to seize forfeitable assets and the use of local law enforcement personnel.

4 See Brief of Amicus Curiae United Kingdom of Great Britain and Northern Ireland, at 5-14, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191).

5 We understand that other commentators will describe in greater detail the securities regulations in place and remedies available in other jurisdictions.

6 "Losers pay" rules require the losing party in litigation to pay the other party's costs and lawyers' fees, in contrast to the U.S. practice whereby each party bears its own costs and fees.

To usurp sovereign authority in this way violates the fundamental principle of comity between nations and risks straining the United States' relationship with its partners overseas, which is hardly a desirable outcome, particularly when the robustness of the protections afforded by foreign regulatory regimes means there is no need to do so.

We acknowledge that Congress may be reluctant to rely completely on foreign regulators to curb fraud related to securities purchased outside the United States. However, to the extent that a fraud perpetrated offshore is left unchecked by the relevant foreign regulator, investors would not lack protection: the Commission and the U.S. Department of Justice, as a result of Section 929P(b) of the Dodd-Frank Act, would retain the ability to bring enforcement actions under Section 10(b) "*involving … conduct within the United States that constitutes significant steps in furtherance of the violation … or … conduct occurring outside the United States that has a foreseeable substantial effect within the United States*."[7] Several other provisions of the Dodd-Frank Act also enhance the enforcement powers of the Commission and the Department of Justice and their ability to compensate victims for their loss.[8] The Commission and the Department of Justice are well equipped as a result of these provisions to address any trans-national securities fraud which has a meaningful connection to the United States and which has not been adequately addressed by foreign regulators.

Indeed, the Commission and the Department of Justice are inherently better able to police trans-national securities frauds than private plaintiffs. The Commission and the Department of Justice are charged with acting in the public interest, an interest which embodies international comity, and unlike private plaintiffs (or their class action lawyers) are not motivated by individual pecuniary gain. In addition, the Commission and the Department of Justice have arrangements in place with other regulators which enable them to coordinate an effective international response to trans-national fraud. In particular, the Commission has signed, in addition to 70 other non-US regulatory authorities, the International Organization of Securities Commissions' Multilateral Memorandum of Understanding,[9] forged bilateral enforcement cooperation memoranda with the regulatory commissions in 20 other countries[10] and entered into Mutual Legal Assistance Treaties facilitating cooperation in criminal securities matters with over 50 countries.[11]

Finally, we believe that limiting the scope of Section 10(b)'s private right of action to those demarcated in Morrison[12] (that is to say, to fraud in relation to securities purchased or sold on U.S. exchanges or otherwise in the United States) meets with reasonable investor expectations. To the extent that a U.S. investor purchases a security on a non-U.S. exchange, the investor should expect that the transaction would be governed by local, and not U.S., law and be subject to the local, not U.S., regulatory framework. The expectations of a non-U.S. investor are even more obvious. There is no basis whatsoever for a non-U.S. investor purchasing a security on a non-U.S. exchange to have any legitimate expectation of being able to sue the issuer under U.S. law. When making the investment decision to purchase securities on a non-U.S. exchange, an investor should factor in the risks and benefits of the local regulatory regime. If the Commission has any concern that U.S. investors may not fully appreciate the risks and benefits of a foreign regulatory regime, the more appropriate solution would be to require non-U.S. companies to provide additional disclosure about local securities regulation, not to expand Section 10(b).

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7 Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(b), [15 U.S.C.A. § 77v(a) (West [2010])].

8 For example, the Dodd-Frank Act enhanced the Commission's subpoena power, authority to impose civil penalties in administrative proceedings and "Fair Funds" mechanism for compensating victims of fraud. Dodd-Frank Act §§ 929E, 929P(a), 929B, 15 U.S.C.A. §§ 77v(a), 77h–1, 7246(a) (West 2010)

9 List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, IOSCO, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Feb. 17, 2011).

10 Cooperative Arrangements with Foreign Regulators, U.S. Securities and Exchange Commission, Office of International Affairs, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited Feb. 17, 2011).

11 The U.S. Library of Congress, Search Treaties (search "Word/Phrase" for "mutual legal assistance"), http://thomas.loc.gov/home/treaties/treaties.html (last visited Feb. 17, 2011).

12 *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

The Commission's mandate is to protect investors, to maintain fair, orderly and efficient markets, and to facilitate capital formation. As discussed above, an extension of Section 10(b)'s private right of action would fail on each of those scores:

- far from protecting U.S. investors, an extraterritorial private right of action would do precisely the opposite by discouraging non-U.S. companies from engaging U.S. investors;
- infringing on the regulatory prerogatives of other jurisdictions would erode the cooperation among U.S. and foreign regulators, disrupting market order and causing inefficiencies; and
- impeding non-U.S. companies from accessing the U.S. capital markets hardly promotes capital formation.

Given the concerns which we have identified, it is our submission that sound judgment clearly favours limiting the scope of Section 10(b)'s private right of action to that set out in Morrison. We therefore urge the Commission to reach this conclusion in its Study.

Should you have any questions about this submission, please contact me, or Mary Mullally, Secretary to the GC100.

Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies

Yours sincerely

John Davidson
General Counsel and Group Company Secretary, SABMiller plc
Chair of the GC100

cc:

Securities and Exchange Commission

Hon. Mary L. Schapiro, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner