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December 17, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934—File No. S7-33-10

Dear Ms. Murphy:

Our letter responds to the request by the Securities and Exchange Commission (the "Commission") for comments on its proposed rules to implement the Securities Whistleblower Incentives and Protection Program (the "bounty program") authorized by Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which were published in the Federal Register on November 17, 2010. We are submitting this letter on behalf of the GC100, which is the Association of General Counsel and Company Secretaries of the FTSE 100. There are currently about 120 members of the group representing some 90 companies headquartered outside the United States, many of which maintain a listing on a U.S. national securities exchange and are therefore foreign private issuers subject to the U.S. federal securities laws. Our comments and recommendations in this letter address the implications of the proposed rules for foreign private issuers and companies, wherever organized, that have overseas employees.

Like U.S. companies, foreign private issuers have a strong interest in developing effective compliance programs and in detecting and preventing conduct that does not comport with applicable law. Since the enactment of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), foreign private issuers have created procedures designed to encourage prompt

internal reporting of misconduct and appropriate remediation and disciplinary action. This evolution in practice has not been without challenges, as certain procedures required by the Sarbanes-Oxley Act and related regulations have conflicted with non-U.S. law and regulations. We believe that the bounty program raises similar concerns, both with respect to foreign private issuers and U.S. companies with operations overseas. The GC100 therefore urges the Commission to consider further, in consultation with the securities regulators of other relevant jurisdictions, the interplay of the proposed rules with non-U.S. law and regulations and to incorporate appropriate provisions that may mitigate the risk of regulatory conflict and promote cooperation among U.S. and overseas regulatory authorities. Furthermore, as both U.S. and non-U.S. companies have expended significant resources to create, implement and build employee confidence in corporate compliance programs, the GC100 respectfully suggests that the proposed rules do more to bolster them, including as recommended below.

The Proposed Rules Should Do More to Reinforce Existing Compliance Programs

New Section 21F of the Securities Exchange Act of 1934 directs the Commission to pay an award to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to a successful enforcement action. These awards are payable only if the Commission recovers a monetary sanction exceeding $1,000,000 and can range from 10 to 30% of the penalties collected in a Commission enforcement or related action. Under the proposed rules, employees both inside and outside the United States would be eligible for whistleblower awards.

Commentators have correctly noted that this incentive may encourage whistleblowers to go directly to the Commission in order to preserve their eligibility for an award, bypassing altogether, and therefore undermining, internal compliance mechanisms. The Commission has responded to this concern by limiting the universe of would-be whistleblowers in ways intended to promote the use of internal processes and by pledging to give companies the opportunity in appropriate cases to conduct the initial investigation into alleged misconduct and report back to the Commission. While we commend the Commission for acknowledging the importance of this concern, we do not believe that the proposed rules go far enough. Accordingly, we believe that the proposed rules should be amended as follows prior to their adoption.

First, internal reporting of a possible compliance failure should in all cases be a prerequisite to recovery by an employee-whistleblower under the bounty program. This requirement is the only way that the Commission can prevent the bounty program from inducing whistleblowers to sidestep and thereby undermine existing internal compliance programs. Without this protection, the bounty program will also drive companies to view all compliance matters equally – as matters of potentially severe consequence, given the increased risk of regulatory intervention – when, in reality, compliance matters vary widely in complexity and significance. An effective compliance program often (and wisely) takes this reality into account and focuses the company's resources on those areas where the company and its shareholders face the most serious risk. It also bears mention that affording a company an opportunity to examine, in the first instance, alleged misconduct reported to the Commission by a whistleblower, as the

Commission has indicated it intends to do, would have the same result as conditioning a whistleblower recovery on internal reporting – *i.e.*, an initial company investigation – but would do so in a more circuitous, inefficient fashion. Requiring that a whistleblower first raise a potential securities law violation directly through a company's internal channels would avoid straining the Commission's limited resources unnecessarily with a flood of inchoate allegations of misconduct.

Second, we note that proposed Rule 21F-4(b)(4) excludes several types of information from qualifying as "original information," including (i) information received by a person with legal, compliance, audit, supervisory or governance responsibilities, where the information was communicated to the person with the reasonable expectation that he or she would take responsive action, and (ii) information obtained from or through an entity's legal, compliance, audit or other functions for identifying, reporting and addressing potential non-compliance. Both of these exclusions are subject to an important exception: whistleblowers who receive information in this manner may still be eligible for an award if the company does not disclose the reported information to the Commission "within a reasonable time" or if the company proceeds "in bad faith."

There is a considerable risk that this feature of the proposed rules will be detrimental to the effective management of internal compliance programs. It would seem to require compliance programs to contemplate not only remediation, but also self-disclosure, in all cases, whatever the nature of the allegations or the outcome of the investigation into their credibility. Such a result would be a significant change to current law and practice. By effectively compelling universal self-reporting to avoid the risk of compliance-related personnel engaging in "whistleblowing," the proposed rules would cause companies – and particularly larger companies that face more complex compliance challenges by virtue of their scope – to involve regularly the Commission staff in their internal compliance function. That result serves neither companies nor their shareholders, since it exposes companies to possible penalties and other adverse consequences in cases of alleged misconduct that may be immaterial, even if they are proven, and that are in any case remediated. At a minimum, it may oblige companies to expend resources responding to Commission inquiries about such matters, even when those inquiries are unlikely to lead to any penalty. Promulgating rules that pressure companies to self-report also may further overburden Commission staff and distract it from resolving the most important compliance failures, which are the proper focus of Commission enforcement resources.

In light of the likely negative implications of proposed Rule 21F-4(b)(4)'s self-reporting element, we believe it should be eliminated. Given the special role compliance-related personnel play in promoting a compliance-oriented culture, we believe that the final rules should provide unambiguous incentives to execute their responsibilities in the interests of shareholders, and not their own personal financial interests. We therefore recommend that an employee who received information of possible misconduct through compliance channels as contemplated by proposed Rule 21F-4(b)(4) be ineligible for an award under the bounty program, unless he or she has a reasonable and appropriately substantiated basis for believing that the company has failed

to remediate the alleged problem or has acted in bad faith. The final rules should clarify that effective remediation need not entail self-reporting.

Indeed, we believe that this principle should apply more generally to all employee-whistleblowers (*i.e.*, not only those with compliance-related positions). That is, an employee should not be eligible for a whistleblower award unless he or she has a reasonable belief that the company has failed to remediate the problem effectively following his or her internal reporting, such that the misconduct persists, or the company has proceeded in bad faith. This approach could also include a "report-back" requirement to the whistleblower (or to the attorney representing an anonymous whistleblower) comparable to the procedure called for by the rules implementing Section 307 of the Sarbanes-Oxley Act with respect to lawyers practicing before the Commission. In this way, companies would have the opportunity to address and correct any compliance failure and to make responsible decisions about self-reporting.

We recognize that this approach presents a question about the proper outcome when the company concludes that there has been no material violation of law but the reporting employee disagrees. As stated above, employees receiving information about alleged misconduct through a company's internal compliance function should be eligible for a whistleblower award only if they have a reasonable and appropriately substantiated basis for believing that the company has failed to remediate the alleged problem or has acted in bad faith (and the other requirements of the proposed rules are met). A different approach should be taken, however, in the case of employees who receive information about a securities law violation through other channels. We believe that the policy goals underpinning the bounty program militate in favor of an award to such a whistleblower who has a reasonable belief that the company has failed to remediate the problem (and the other requirements of the proposed rules are met) in any case in which a company has failed to self-report. If, by contrast, the company has reported the issue to the Commission, we believe that no bounty should be awarded, regardless of any resulting enforcement action. We submit that this approach creates the proper incentives for the company to investigate compliance issues promptly and fully, to report to the Commission when appropriate and, in all cases, to take appropriate remedial action and be responsive to employees who properly raise concerns through internal procedures.

Finally, we note that proposed Rule 21F-4(b)(7) provides that a report to the Commission will, for purposes of determining whether the information therein constitutes "original information," relate back to the internal report to a corporate legal, compliance, audit or similar function, provided that the whistleblower contacts the Commission within 90 days of having reported internally. This 90-day period places undue pressure on self-reporting decisions (or, if our suggestion in the preceding paragraphs is accepted, expeditiously remediating compliance issues that have been raised internally). A company's internal compliance mechanism often requires a significant amount of time to address reports of misconduct in a comprehensive and thoughtful way. This is particularly true when an internal investigation entails the collection and review of substantial documentation in paper and electronic form from multiple sources.

We therefore believe that the 90-day period provided by the proposed rules should be lengthened to ensure that companies have a meaningful period of time in which to investigate and reach well-supported conclusions. At a minimum, this period should be extended to 180 days. Likewise, in the event that the Commission retains, contrary to our suggestion, the self-report feature in proposed Rule 21F-4(b)(4), the rules should stipulate that the "reasonable time" within which a company may self-report should not be less than 180 days. Should the Commission decline to lengthen the period beyond 90 days as we suggest, the rules should at least clarify that it is not necessary for a company to have concluded its investigation before submitting a report and that any report submitted to the Commission need not meet any content or other requirements; a brief description of the allegation and a statement that an internal inquiry is pending should suffice.

We believe that the language of the Dodd-Frank Act plus its delegation of rulemaking authority to the Commission permits the Commission to adopt the recommendations suggested above.

The Proposed Rules Should Appropriately Account for Potential Conflicts with Non-U.S. Law

We observe that employees of both U.S. companies and foreign private issuers who are located outside the United States would be eligible to collect a whistleblower award, which has the effect of conferring on the Commission extra-territorial jurisdiction over conduct that may also be regulated by non-U.S. laws. The bounty program may very well conflict with those laws. This is more than a theoretical concern – similar conflicts arose in connection with the whistleblower provisions of the Sarbanes-Oxley Act and ultimately led an EU Data Protection Working Party and several EU member states to publish guidelines on how companies could, in developing their whistleblower programs, reconcile European data protection principles with the requirements of the Act and related rules.[1]

For example, the CNIL, France's data protection agency, concluded in two separate cases that anonymous whistleblower hotlines created in response to Section 301 of the Sarbanes-Oxley Act violated French and European privacy and data protection laws.[2] The CNIL contended that the anonymous nature of these hotlines, among other factors, would result in an

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[1] *See* Ad-hoc Working Group on Employee Data Protection of the Düsseldorfer Kreis, *Whistleblowing – Hotlines: Internal Warning Systems and Employee Data Protection* (2007), available at http://www.eapdlaw.com/newsstand/detail.aspx?news=911; CNIL, *Guideline document adopted by the "Commission nationale de l'informatique et des libertés" (CNIL) on 10 November 2005 for the implementation of whistleblowing systems in compliance with the French Data Protection Act of 6 January 1978, as amended in August 2004, relating to information technology, data filing systems and liberties* (2005), available at http://www.cnil.fr/fileadmin/documents/en/CNIL-recommandations-whistleblowing-VA.pdf; *see also* EU Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31.

[2] *See* McDonald's France, CNIL Délibération No. 2005-110 (May, 26 2005), available at http://www.droit-tic.com/juris/aff.php?id_juris=32; CEAC/Exide Technologies, CNIL Délibération No. 2005-111 (May 26, 2005), available at http://www.cnil.fr/en-savoir-plus/deliberations/deliberation/delib/74.

organized system of erroneous or slanderous workplace denunciations. In its guidelines for the implementation of whistleblowing systems in compliance with the French Data Protection Act, the CNIL required companies' reporting systems to, among other things, "be designed in such a way that the employees using the system are requested to identify themselves each time they make an alert."[3] Several other European countries, including Finland, Portugal and Spain, have also published whistleblower hotline guidelines that prohibit or curtail the kind of anonymous reporting required by Section 301 of the Sarbanes-Oxley Act.[4]

The current proposed rules would result in a similar conflict in that they provide a mechanism for reports to be made on an anonymous basis (so long as the whistleblower is represented by an attorney and provides the attorney's contact details in his or her initial submission). Not only would the bounty program undermine EU privacy and data protection rules, it would also obviate internal compliance programs developed in response to the Sarbanes-Oxley Act and adapted, after much consideration, to comply with EU regulations.

The proposed whistleblower rules may also be incompatible with legislation and regulation adopted in other jurisdictions, such as the U.K. Public Interest Disclosure Act 1998. The interplay between the proposed rules and other relevant non-U.S. legislation and regulation should therefore be examined for additional conflicts.

In light of these conflicts and the potential for further conflicts, and consistent with fundamental principles of comity, we urge the Commission to consult non-U.S. regulators before adopting rules that would permit non-U.S. employees to make reports to the Commission under the bounty program. Such consultation will help avoid rewarding those employees for non-compliance with home country requirements or otherwise undermining local regulatory initiatives.

We further submit that cooperation with non-U.S. securities regulators is warranted not only in connection with the initial formulation of the whistleblower rules, but also in connection with their administration. Specifically, if alleged misconduct violates the securities laws of the United States and another country, the rules should encourage reporting the alleged misconduct to the non-U.S. regulator at the same time as to the Commission (and, as stressed above, only after the whistleblower has reported internally and the company has failed

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[3] CNIL, *Guideline document adopted by the "Commission nationale de l'informatique et des libertés" (CNIL) on 10 November 2005 for the implementation of whistleblowing systems in compliance with the French Data Protection Act of 6 January 1978, as amended in August 2004, relating to information technology, data filing systems and liberties* (2005), available at http://www.cnil.fr/fileadmin/documents/en/CNIL-recommandations-whistleblowing-VA.pdf.

[4] *See* Tietosuojavaltuutetun toimisto, *Työelämän tietosuoja ns. whistleblowing ilmiantojärjestelmissä* (July 27, 2010), available at http://www.tietosuoja.fi/uploads/8k2gfu6geytbc3d.pdf; Comissão Nacional de Protecção de Dados, *Princípios Aplicáveis aos Tratamentos de Dados Pessoais com a finalidade de Comunicação Interna de Actos de Gestão Financeira Irregular (Linhas de Ética)*, Deliberação No. 765/2009 (Sept. 21, 2009), available at http://www.cnpd.pt/bin/orientacoes/DEL765-2009_LINHAS_ETICA.pdf; Agencia Española de Proteccíon de Datos, *Creación de sistemas de denuncias internas en las empresas (mecanismos de "whistleblowing")*, available at http://ec.europa.eu/justice/policies/privacy/policy_papers/docs/informe_whistleblowing_es.pdf.

to take appropriate remedial action). The objective of this system of dual reporting would be to facilitate cooperation among regulators to resolve the matter, with the non-U.S. regulator taking the lead in reviewing the case and taking action where appropriate. If a fine is imposed by the Commission, then the whistleblower would be eligible for a bounty; if only the non-U.S. regulator imposes a fine, then no bounty would be awarded to the whistleblower under the bounty program.

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We believe the bounty program has the potential to improve the integrity of securities markets and support ethical corporate governance and compliance globally. However, the proposed rules can and should do more to promote the reporting of alleged misconduct through companies' existing internal compliance programs. We also believe the bounty program as currently proposed would have significant, adverse consequences on companies with overseas operations, notably, the risk of unfair additional burdens on non-U.S. companies, the potential for conflicts with non-U.S. law and the risk of inefficient regulatory action where the Commission and other regulators have a shared enforcement interest with respect to overseas conduct. Further consideration of the interplay of the bounty program with non-U.S. law and regulatory frameworks should be undertaken by the Commission prior to adopting final rules.

Should you have any questions or need additional information, please do not hesitate to contact Edward F. Greene at (212) 225-2030, Giovanni P. Prezioso at (202) 974-1650, Janet L. Fisher at (212) 225-2472 or Shawn J. Chen at (202) 974-1552.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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
Mr. Robert S. Khuzami, Director, Division of Enforcement