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November 10, 2016

Re: **U.S. Policy – General Share Issuance Mandates for Cross-Market Companies (U.S.-listed, non-U.S.-incorporated companies) (the "Consultation Paper")**

Institutional Shareholder Services, Inc.
702 King Farm Boulevard, Suite 400
Rockville, MD 20850

Ladies and Gentlemen:

As legal counsel to several public companies incorporated in Ireland but listed on a U.S. stock exchange ("**U.S.-Listed Irish Companies**"), we are deeply concerned about ISS's proposed policy, issued on October 27, 2016, under which ISS "would recommend in favor of general share issuance authorities (ie. those without a specified purpose) up to a maximum of 20 percent of currently issued capital, as long as the duration of the authority is clearly disclosed and reasonable."

For reasons described in further detail below, it is our view that ISS should not apply share issuance policies to U.S.-Listed Irish Companies. This practice has directly and adversely affected our U.S.-Listed Irish Company clients, potentially putting them at a significant competitive disadvantage as compared with their peers that are both listed and incorporated in the U.S., without any apparent link to increasing shareholder value. We believe that a proposal to further reduce the permissible threshold for general share issuances by U.S.-Listed Irish Companies will only exacerbate this result. In addition, given the existing protections in place by the U.S. stock exchange listing rules with respect to the issuance of stock – protections equally applicable to U.S.-Listed Irish Companies – as well as the broad shareholder support typically accorded to general share issuance proposals, an ISS policy regarding general share issuance proposals at U.S.-Listed Irish Companies is unnecessary and unjustified. These conclusions are firmly supported by our clients.

I. Relevant Background and Current ISS Position

Under Irish law, directors of an Irish public limited company must have authority from the company's shareholders to issue any shares, including shares which are part of the company's authorized but unissued share capital. Irish law provides that this general allotment authority can be granted for a period of up to five years and up to the amount equal to 100% of the company's authorized but unissued share capital. Although not required by Irish law, however, it has become market practice for companies with shares listed on the Irish Stock Exchange ("**ISE**") to generally limit the share allotment and issuance authority to an amount equal to 33% of issued share capital for the period between their annual general meetings and for such authority to be limited to a period of 12 to 18 months.

As a separate matter, unless otherwise authorized, when an Irish public limited company issues shares for cash to new shareholders, Irish law requires the company to first offer those shares on the same or more favorable terms to existing shareholders of the company on a pro–rata basis. This is commonly referred to as the statutory pre-emption right. Pursuant to Irish law, companies may opt-out of the statutory pre-emption rights provision for up to five years and up to the amount equal to 100% of the company's authorized but unissued share capital. Similar to the practice regarding share allotment proposals, however, it has become market practice for companies with shares listed on the ISE to generally limit the pre-emption authority to 5% of issued share capital for the period between their annual general meetings and for such authority to be limited to a period of 12 to 18 months.

While the customary limitations on share issuance authorities described above are part of the corporate governance framework applicable to companies whose shares are listed on the main market of the ISE (regardless of whether such companies are incorporated in Ireland or elsewhere), U.S.-listed companies that are not (and never have been) listed on the ISE fall outside the scope of the ISE listing rules and are not governed by the corporate governance standards applicable to companies whose share capital is listed on the ISE. In recent years, ISS has sought to apply the limitations derived from ISE market practice as mentioned above to U.S.-Listed Irish Companies, first by applying the policies of the NAPF Corporate Governance and Voting Guidelines and the Pre-Emption Group Pre-Emption Principles, and subsequently through its own policy guidelines for United Kingdom and Irish stock exchange-listed companies.

The current version of ISS's policy guidelines is titled "United Kingdom and Ireland Proxy Voting Guidelines, 2016 Benchmark Policy Recommendations." Under these guidelines, ISS will generally recommend that shareholders vote for resolutions to authorize the

issuance of equity unless "[t]he general issuance authority exceeds one-third (33%) of the issued share capital." Additionally, under the current guidelines, "[a]ssuming it is no more than one-third, a further one-third of the issued share capital may also be applied to a fully pre-emptive rights issue taking the acceptable aggregate authority to" 66%. With regard to the Irish law proposal to authorize the company to opt-out of the statutory pre-emptive rights provision, ISS will generally recommend a vote in favor of resolutions to authorize the issuance of equity unless "[t]he routine authority to disapply preemption rights exceeds 10 percent of the issued share capital, provided that any amount above 5 percent is to be used for the purposes of an acquisition or a specified capital investment."

II. The Consultation Paper Proposal

The Consultation Paper recognizes an inherent issue with applying to a U.S.-listed company incorporated outside the U.S. ISS's proxy voting policies for the company's country of incorporation – namely, that applying ISS's policies for this foreign jurisdiction causes the issuer to become subject not only to the listing requirements of the stock exchange on which the issuer is listed but also to local listing rules and best practices, which do not generally apply to companies without a listing in that market. With the stated intention of "better reflect[ing] U.S. listing rules and the expectations of investors in the U.S. market," the Consultation Paper proposes that ISS would recommend in favor of general share issuance authorities (i.e., those without a specified purpose) up to a maximum of 20% of currently issued share capital, as long as the duration of the authority is clearly disclosed and reasonable (the "**Proposal**").

III. Concerns Regarding the Proposal

As an initial matter, in light of the fact that Irish law requires public limited companies incorporated in Ireland to submit for shareholder approval two separate and distinct resolutions regarding share issuances – one requesting the general authority to issue shares and one requesting the authority to opt-out of the statutory pre-emptive rights provision – it is not clear from the Proposal to which resolution ISS's proposed policy would apply. At a minimum, the Proposal requires clarification for this reason.

More importantly, from a substantive perspective, the Proposal suffers from a number of fundamental problems, as discussed in further detail below. The Proposal is helpful insofar as it acknowledges the difficulties currently faced by U.S.-Listed Irish Companies that are subject to regulation by the U.S. stock exchange in which they are listed (i.e., The New York Stock Exchange ("NYSE") or The NASDAQ Stock Market ("NASDAQ")) as well as the policies applied by ISS to companies whose shares are listed in the country of their

incorporation. We believe, however, that any ISS policy guidelines applicable to U.S.-Listed Irish Companies related to share issuances and/or statutory pre-emption rights should not seek to impose any restrictions on these companies beyond the Irish corporate law requirements.

A. The Proposal Would Put U.S.-Listed Irish Companies at a Competitive Disadvantage

By recommending that the share issuance authorities that U.S.-listed foreign-incorporated companies can seek from shareholders be capped at 20% of currently issued capital, the Proposal could place U.S.-Listed Irish Companies at a significant competitive disadvantage to their U.S.-incorporated counterparts, without any apparent link to increasing shareholder value.

A share allotment proposal submitted to shareholders of a U.S.-Listed Irish Company, in the ordinary course, does not request that shareholders approve an increase in such companies' authorized share capitals or that shareholders approve a specific issuance of shares. Rather, shareholder approval of such a proposal merely grants the board of directors of such company the authority to issue shares that are already authorized under such company's governing documents. This authorization is required as a matter of Irish law for U.S.-Listed Irish Companies and is not otherwise required for other companies listed on the U.S. exchanges that are not foreign corporations. Accordingly, U.S.-Listed Irish Companies are already at a significant disadvantage to their U.S.-incorporated peers with respect to their ordinary course operations; to impose a cap on the general share allotment authority above and beyond what Irish law requires further exacerbates this disadvantage.

Similarly, companies listed and incorporated in the U.S. generally do not grant existing shareholders pre-emptive rights on a new issuance of shares. Accordingly, the fact that U.S.-Listed Irish Companies are required by Irish law to receive shareholder approval to disapply statutory pre-emptive rights in and of itself places such companies at a competitive disadvantage to their U.S. incorporated peers. A cap imposed by ISS on the authority to disapply pre-emption rights beyond what is required by Irish law further aggravates the competitive disadvantage of U.S.-Listed Irish Companies as compared to issuers incorporated in the U.S.

On its face, the Proposal suggests that ISS is contemplating to reduce the recommended cap applicable to the general allotment authority (as opposed to one-off share issuances) from 33% of issued share capital to 20% of issued share capital. This approach would

further restrict U.S.-Listed Irish Companies, potentially making it considerably more difficult for U.S.-Listed Irish Companies to compete with companies both listed and incorporated in the U.S., particularly in the case of material transactions. This lower threshold would further reduce the speed at which capital-raising activities can be completed, which would, in turn, further increase companies' costs, and cause significant logistical difficulties to complete such transactions. We believe that the current ISS approach is already unduly restrictive and strongly recommend that, in any event, it not be further restricted.

In addition, because the proposed cap of 20% to be applied to general share issuance proposals of U.S.-Listed Irish Companies deviates meaningfully from the threshold applicable to Irish companies not listed on U.S. stock exchanges, the Proposal would also disadvantage U.S.-Listed Companies as compared to their Irish peers. Thus, ironically, the Proposal would put U.S.-Listed Irish Companies at a competitive disadvantage not only to other U.S. issuers but also to other Irish issuers.

B. U.S. Stock Exchange Rules Already Provide Appropriate Safeguards

ISS does not apply share issuance restrictions to companies incorporated and listed in the U.S., presumably because these companies are not required to obtain shareholder approval for share issuances and because such companies are already subject to restrictions prescribed by the relevant stock exchange rules. U.S.-listed companies incorporated outside the U.S. are, of course, also subject to the same U.S. stock exchange rules. Accordingly, as with companies incorporated and listed in the U.S., there is no need for or benefit derived from the imposition by ISS of additional restrictions on U.S.-Listed Irish Companies.

The rules of the U.S. stock exchanges provide sufficient safeguards with regard to the issuance of stock. Under the rules of the NYSE, for example, shareholder approval is required for listed companies prior to the issuance of common stock in any transaction or series of related transactions, other than in limited circumstances, if (1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20% of the voting power outstanding before the issuance of such stock or (2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the common stock.[1] The NASDAQ listing requirements contain a similar provision.[2] In

[1] *See* NYSE Listed Company Manual § 312.03, attached as Exhibit A.

addition, the NYSE and NASDAQ require shareholder approval for equity compensation plans and certain issuances to related parties. These requirements currently apply to, and would continue to apply to, U.S.-Listed Irish Companies regardless of whether ISS determined to impose a separate policy applicable to such companies. Given that U.S.-Listed Irish Companies are subject to the requirements of the NYSE or NASDAQ to the same extent as any other issuer listed on that exchange, further limitations on share issuances by U.S.-Listed Irish Companies are unwarranted.

Moreover, because the U.S. capital markets are the sole equity capital markets for U.S.-Listed Irish Companies that are not dual listed, we believe that shareholders reasonably expect those companies to follow customary U.S. capital market practices, U.S. corporate governance standards, the rules and regulations of the Securities and Exchange Commission ("SEC") and the rules and listing standards of the NYSE or NASDAQ, as applicable. In all our years representing U.S.-Listed Irish Companies, we are not aware of a single instance in which a shareholder reached out to any of our clients requesting protections beyond those provided by Irish law, the SEC or the applicable exchanges. Applying market practices of a market where our clients' shares are not listed solves for a problem that does not exist and exacerbates a problem that does. It would simply not be in the best interests of either our clients or their shareholders to impose standards that go above and beyond what is required, since our clients are already committed to complying with the governance rules and practices of the relevant capital market for their equity, whether the NYSE or NASDAQ, which provides its own restrictions on share issuances for the protection of shareholders.

C. A 20% Cap on General Share Issuance Authorities Would Not Reflect U.S. Stock Exchange Listing Rules

The Proposal purports "to better reflect U.S. listing rules and the expectations of investors in the U.S. market." As noted above, those who invest in U.S.-Listed Irish Companies rightfully expect that these companies will adhere to the listing standards of the U.S. stock exchanges; a 20% cap on general share issuance authorities, however, in no way reflects U.S. listing rules. To the contrary, such a cap is entirely arbitrary.

The Proposal's 20% cap appears to have been derived from the listing standards of the NYSE and NASDAQ, which, as indicated above, require shareholder approval prior to issuing securities in specified situations, including in certain transactions or series of

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[2] *See* NASDAQ Stock Market Rule 5635, attached at Exhibit B.

related transactions, and incorporate a 20% threshold. The reference to these listing standards, however, is misguided, as the share issuance resolutions required by Irish law are not associated with any transaction(s). Under Irish law, shareholders must authorize the company's board to issue any shares, including shares that are part of the company's authorized but unissued share capital. The general share issuance proposal required under Irish law, therefore, does not ask shareholders to approve a specific issuance of shares; rather, such proposal simply seeks to grant the company's board the authority to issue shares that are already authorized under the company's memorandum of association. This authorization is not required for companies incorporated in the U.S. and listed on a U.S. stock exchange. Indeed, with very tailored exceptions outlined in the listing standards of the NYSE and NASDAQ, domestic corporations are generally permitted to issue shares at any time, without shareholder approval, up to the limit specified in the corporation's certificate of incorporation. By dictating that general share issuance authorities are appropriate only up to a maximum of 20% of currently issued capital, the Proposal in fact deviates from U.S. listing rules and imposes a random cap in connection with share issuances by U.S.-Listed Irish Companies that is not similarly applicable to other companies listed on a U.S. stock exchange.

D. Shareholders Have Historically Been Overwhelmingly Supportive of Share Issuance Authorities

Historically, shareholders have been overwhelmingly supportive of general share issuance proposals. For example, as confirmed by Irish counsel, proposals seeking shareholder approval to authorize the company to issue up to a maximum of 33% of its issued ordinary share capital typically receive support of over 90% of votes cast, if not higher. Furthermore, there have been recent instances in which U.S.-Listed Irish Companies have sought shareholder authorization for share issuances to the maximum extent permitted by Irish law and contrary to ISS policy recommendations. Despite ISS's recommendations against such proposals, the majority of shareholders of those companies have in fact voted in favor of renewing the general right to issue shares in accordance with market practice and upholding the dis-application of statutory pre-emption rights (albeit, the required 75% threshold for pre-emption may not have been met on all occasions). In the most recent Irish example involving Jazz Pharmaceuticals plc, the general allotment and pre-emption disapplication proposals were approved by over 80% of shareholders notwithstanding a negative ISS recommendation. In our view, these statistics suggest that investors are not overly concerned with respect to this topic and that they are undoubtedly comfortable with a 33% threshold, rendering a reduction of this threshold unnecessary.

In addition, it is standard practice for U.S.-Listed Irish Companies to provide for share issuance authorities to the maximum extent permitted by Irish law in their constitutions on incorporation. As confirmed by Irish counsel, at the time of contemplation of the transactions resulting in the incorporation of the new Irish parent companies, there was little or no push-back from shareholders. Indeed, the fact that Ireland permitted a five-year "blanket" authority was in many cases a significant deciding factor for many companies and their large shareholders when choosing a suitable jurisdiction.

IV. Recommendations

For the reasons set forth above, we provide the following recommendations:

- ***ISS should apply a uniform approach to all U.S.-listed companies.*** Specifically, ISS should adopt a single policy supporting the regulation of share issuances by all U.S.-listed companies in accordance with customary U.S. capital market practices, U.S. corporate governance standards, SEC rules and regulations and the rules and listing standards of the NYSE or NASDAQ, as applicable. Accordingly, we strongly recommend that ISS:

    - reconsider its intention to extend the NYSE/NASDAQ requirement for shareholder approval of issuances above 20% to scenarios in which the listing rules do not currently apply, such as public share issuances for cash, and

    - cease to evaluate the share issuance proposals submitted by U.S.-Listed Irish Companies under ISS's Irish policy.

- ***ISS should support U.S.-Listed Irish Companies that propose to renew their required share issuance authorizations under Irish law to the maximum extent permitted by Irish law.*** In other words, ISS should support any U.S.-Listed Irish Company that, in accordance with the governing law in its country of incorporation, seeks approval from shareholders every five years to allow the company to issue up to all of its authorized but unissued share capital and disapply statutory pre-emption rights without being required to seek further shareholder approval, subject to any limitations set out in the rules and regulations of the SEC and the NYSE or NASDAQ rules and listing standards. ISS should not impose higher standards than those required under local law or U.S. rules, regulations and stock exchange listing standards. The benefits, if any, certainly do not support the meaningfully higher costs associated with an annual vote.

- ***The position stated above should apply to all U.S.-Listed Irish Companies, regardless of whether they are designated by the SEC as U.S. Domestic Issuers or Foreign Private Issuers.***

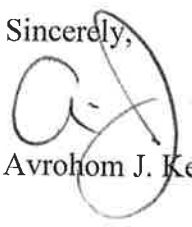
To the extent ISS does not agree with our conclusions and recommendations as set forth above, ISS should, at the very least, retain its current policy on general share issuance proposals as it applies to U.S.-Listed Irish Companies. In other words, if ISS believes, despite the arguments set forth above, that there is a sound justification for implementing a proxy voting policy with regard to general share issuance proposals at U.S.-Listed Irish Companies, it should at least continue to favor resolutions at such companies that would authorize the general issuance of equity up to 33% of the issued share capital, with an additional 33% of issued share capital permitted to be applied to a fully pre-emptive rights issue. Additionally, in light of the overwhelming support of shareholders for these proposals – and given the significant expense involved in requesting annual approval for share issuances – U.S.-Listed Irish Companies should only be required to seek approval for general share issuance mandates every five years, as required under Irish law.

With regard to the Irish law proposal to authorize the board to opt-out of the statutory pre-emptive rights provision in the event of the issuance of shares for cash, if ISS disagrees with our conclusion that it should not apply a policy to U.S.-Listed Irish Companies that is more restrictive than the rules and regulations of the SEC or the rules and listing standards of the relevant U.S. stock exchange, we believe that an increase in the threshold applied to U.S.-Listed Irish Companies (from 5% to 20%) is appropriate.

* * *

We appreciate the opportunity to comment on ISS's proposed policy change. To that end, we would be pleased to discuss our comments with you or provide any additional information you would find useful. If you have any questions regarding this letter, please do not hesitate to contact the undersigned at (212) 455-2711 or akess@stblaw.com, Karen Hsu Kelley at (212) 455-2408 or kkelley@stblaw.com, or Yafit Cohn at (212) 455-3815 or yafit.cohn@stblaw.com.

Sincerely,



Avrohom J. Kess

Exhibit A

NYSE Listed Company Manual § 312.03

View this document in context in the NYSE Listed Company Manual:
click here

312.00 Shareholder Approval Policy

312.01 Shareholders' Interest

Shareholders' interest and participation in corporate affairs has greatly increased. Management has responded by providing more extensive and frequent reports on matters of interest to investors. In addition, an increasing number of important corporate decisions are being referred to shareholders for their approval. This is especially true of transactions involving the issuance of additional securities.

Good business practice is frequently the controlling factor in the determination of management to submit a matter to shareholders for approval even though neither the law nor the company's charter makes such approvals necessary. The Exchange encourages this growth in corporate democracy. For example, due to the recent growth of officer and director equity - based compensation arrangements and the increased interest of shareholders in this area, companies may determine to submit stock option and similar plans to shareholders for approval, whether or not the Exchange requires such approval.

312.02 Companies Are Urged

Companies are urged to discuss questions relating to this subject with their Exchange representative sufficiently in advance of the time for the calling of a shareholders' meeting and the solicitation of proxies where shareholder approval may be involved. All relevant factors will be taken into consideration in applying the policy expressed in this Para. 312.00 and the Exchange will advise whether or not shareholder approval will be required in a particular case.

312.03 Shareholder Approval

Shareholder approval is a prerequisite to issuing securities in the following situations:

(a) Shareholder approval is required for equity compensation plans. See Section 303A.08.

(b) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to:

(1) a director, officer or substantial security holder of the company (each a "Related Party");

(2) a subsidiary, affiliate or other closely-related person of a Related Party; or

(3) any company or entity in which a Related Party has a substantial direct or indirect interest;

if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance.

However, if the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder, and if the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market value of the issuer's common stock, then shareholder approval will not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

In addition, the provisions of this Section 312.03(b) will not apply to the sale of stock for cash by an Early Stage Company to (i) a Related Party, (ii) a subsidiary, affiliate or other closely-related person of a Related Party; or (iii) any company or entity in which a Related Party has a substantial direct or indirect interest, provided that the Early Stage Company's audit committee or a comparable committee comprised solely of independent directors reviews and approves of all such transactions prior to their completion.

The exemption in the preceding paragraph will not be applicable to a sale of securities by the listed company to any person subject to the provisions of this Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

The sale of stock to a Related Party that is an employee, director or service provider is subject to the equity compensation rules in Section 303A.08 of the Manual. For example, a sale of stock by an Early Stage Company to any of such parties at a discount to the then market price would be treated as equity compensation under Section 303A.08 notwithstanding the exemption from shareholder approval provided under Section 312.03(b). Consequently, the company would be required to either: (i) obtain shareholder approval of such sale, or (ii) issue such shares under an equity compensation plan that had previously been approved by shareholders and for which shareholder approval under Section 303A.08 is not otherwise required. Moreover, shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under this subparagraph or one or more of the other subparagraphs. (See Section 312.04(a).)

(c) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or

(2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

However, shareholder approval will not be required for any such issuance involving:

•any public offering for cash;

•any bona fide private financing, if such financing involves a sale of:

•common stock, for cash, at a price at least as great as each of the book and market value of the issuer's common stock; or

•securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least as great as each of the book and market value of the issuer's common stock.

(d) Shareholder approval is required prior to an issuance that will result in a change of control of the issuer.

(e) Sections 312.03 (b), (c) and (d) shall not apply to issuances by limited partnerships.

Amended: December 31, 2015 (NYSE-2015-02).

312.04 For the Purpose of Section 312.03

For the purpose of Section 312.03:

(a) Shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs.

(b) Pursuant to Sections 312.03 (b) and (c), shareholder approval is required for the issuance of securities convertible into or exercisable for common stock if the stock that can be issued upon conversion or exercise exceeds the applicable percentages. This is the case even if such convertible or exchangeable securities are not to be listed on the Exchange.

(c) The Exchange's policy regarding the need to apply to list common stock reserved for issuance on the conversion or the exercise of other securities is described in Section 703.07.

(d) Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used in making any calculation provided for in Sections 312.03 (b) and (c). Shares reserved for issuance upon conversion of securities or upon exercise of options or warrants will not be regarded as outstanding.

(e) An interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

(f) "Voting power outstanding" refers to the aggregate number of votes that may be cast by holders of those securities outstanding that entitle the holders thereof to vote generally on all matters submitted to the company's security holders for a vote.

(g) "Bona fide private financing" refers to a sale in which either:

• a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or

• the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more

Exhibit B

NASDAQ Stock Market Rule 5635

Each Company that is not a limited partnership shall solicit proxies and provide proxy statements for all meetings of Shareholders and shall provide copies of such proxy solicitation to Nasdaq. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(F).

(c) Quorum

Each Company that is not a limited partnership shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 % of the outstanding shares of the Company's common voting stock. Limited partnerships that are required to hold an annual meeting of partners are subject to the requirements of Rule 5615(a)(4)(E).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

5625. Notification of Noncompliance

A Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 14, 2010 (SR-NASDAQ-2010-060), operative June 13, 2010.

5630. Review of Related Party Transactions

(a) Each Company that is not a limited partnership shall conduct an appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the Company's audit committee or another independent body of the board of directors. For purposes of this rule, the term "related party transaction" shall refer to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Act. However, in the case of non-U.S. issuers, the term "related party transactions" shall refer to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.

(b) Limited partnerships shall comply with the requirements of Rule 5615(a)(4)(G).

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended May 20, 2009 (SR-NASDAQ-2009-049); amended June 16, 2009 (SR-NASDAQ-2009-052).

5635. Shareholder Approval

This Rule sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) a change of control; and (iv) private placements. General provisions relating to shareholder approval are set forth in Rule 5635(e), and the financial viability exception to the shareholder approval requirement is set forth in Rule 5635(f). Nasdaq-listed Companies and their representatives are encouraged to use the interpretative letter process described in Rule 5602.

(a) Acquisition of Stock or Assets of Another Company

Shareholder approval is required prior to the issuance of securities in connection with the acquisition of the stock or assets of another company if:

(1) where, due to the present or potential issuance of common stock, including shares issued pursuant to an earn-out provision or similar type of provision, or securities convertible into or exercisable for common stock, other than a public offering for cash:

(A) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or

(B) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities; or

(2) any director, officer or Substantial Shareholder (as defined by Rule 5635(e)(3)) of the Company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the Company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

(b) Change of Control

Shareholder approval is required prior to the issuance of securities when the issuance or potential issuance will result in a change of control of the Company.

(c) Equity Compensation

Shareholder approval is required prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants, except for:

(1) warrants or rights issued generally to all security holders of the Company or stock purchase plans available on equal terms to all security holders of the Company (such as a typical dividend reinvestment plan);

(2) tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the Company's independent compensation committee or a majority of the Company's Independent Directors; or plans that merely provide a convenient way to purchase shares on the open market or from the Company at Market Value;

(3) plans or arrangements relating to an acquisition or merger as permitted under IM-5635-1; or

(4) issuances to a person not previously an employee or director of the Company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the Company, provided such issuances are approved by either the Company's independent compensation committee or a majority of the Company's Independent Directors.

Promptly following an issuance of any employment inducement grant in reliance on this exception, a Company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

Amended June 16, 2009 (SR-NASDAQ-2009-052).

IM-5635-1. Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements

Employee ownership of Company stock can be an effective tool to align employee interests with those of other Shareholders. Stock option plans or other equity compensation arrangements can also assist in the recruitment and retention of employees, which is especially critical to young, growing Companies, or Companies with insufficient cash resources to attract and retain highly qualified employees. However, these plans can potentially dilute shareholder interests. Rule 5635(c) ensures that Shareholders have a voice in these situations, given this potential for dilution.

Rule 5635(c) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

(1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);

(2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;

(3) any material expansion of the class of participants eligible to participate in the plan; and

(4) any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an "evergreen formula"), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, Companies should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Rule 5635(c) provides an exception to the requirement for shareholder approval for warrants or rights offered generally to all Shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. An equity

compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the Company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from shareholder approval under this section.

Further, the rule provides an exception for inducement grants to new employees because in these cases a Company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. The rule requires that such issuances be approved by the Company's independent compensation committee or a majority of the Company's Independent Directors. The rule further requires that promptly following an issuance of any employment inducement grant in reliance on this exception, a Company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 5635(c). These shares may be used for post-transaction grants of options and other equity awards by the listed Company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. Nasdaq would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in connection with a merger or acquisition would be counted by Nasdaq in determining whether the transaction involved the issuance of 20% or more of the Company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 5635(a).

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the Company's independent compensation committee or a majority of the Company's Independent Directors. It should also be noted that a Company would not be permitted to use repurchased shares to fund option plans or grants without prior shareholder approval.

For purposes of Rule 5635(c) and IM-5635-1, the term "parallel nonqualified plan" means a plan that is a "pension plan" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be

considered a parallel nonqualified plan unless: (i) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and, (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

(d) Private Placements

Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving:

(1) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or

(2) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

IM-5635-2. Interpretative Material Regarding the Use of Share Caps to Comply with Rule 5635

Rule 5635 limits the number of shares or voting power that can be issued or granted without shareholder approval prior to the issuance of certain securities. (An exception to this rule is available to Companies when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise as set forth in Rule 5635(f). However, a share cap is not permissible in conjunction with the financial viability exception provided in Rule 5635(f), because the application to Nasdaq and the notice to Shareholders required in the rule must occur prior to the issuance of any common stock or securities convertible into or exercisable for common stock.) Generally, this limitation applies to issuances of 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. (While Nasdaq's experience is that this issue is generally implicated with respect to these situations, it may also arise with respect to the 5% threshold set forth in Rule 5635(a)(2).) Companies sometimes comply with the 20% limitation in this rule by placing a "cap" on the number of shares that can be issued in the transaction, such that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If a Company determines to defer a shareholder vote in this manner, shares that are issuable under the cap (in the first part of the transaction) must not be entitled to vote to approve the remainder of the transaction. In addition, a cap must apply for the life of the transaction, unless shareholder approval is obtained. For example, caps that no longer apply if a Company is not listed on Nasdaq are not permissible under the Rule. Of course, if shareholder approval is not obtained, then the investor will not be able to acquire 20% or more of the common stock or voting power outstanding before the transaction and would continue to hold the balance of the original security in its unconverted form.

Nasdaq has observed situations where Companies have attempted to cap the issuance of shares at below 20% but have also provided an alternative outcome based upon whether shareholder approval is obtained, including, but not limited to a "penalty" or a "sweetener." Instead, if the terms of a transaction can change based upon the outcome of the shareholder vote, no common shares may be issued prior to the approval of the Shareholders. Companies that engage in transactions with defective caps may be subject to delisting. For example, a Company issues a convertible preferred stock or debt instrument that provides for conversions of up to 20% of the total shares outstanding with any further conversions subject to shareholder approval. However, the terms of the instrument provide that if Shareholders reject the transaction, the coupon or conversion ratio will increase or the Company will be penalized by a specified monetary payment, including a rescission of the transaction. Likewise, a transaction may provide for improved terms if shareholder approval is obtained. Nasdaq believes that in such situations the cap is defective because the presence of the alternative outcome has a coercive effect on the shareholder vote, and thus may deprive Shareholders of their ability to freely exercise their vote. Accordingly, Nasdaq will not accept a cap that defers the need for shareholder approval in such situations.

Companies having questions regarding this policy are encouraged to contact the Nasdaq Listing Qualifications Department at (301) 978-8008, which will provide a written interpretation of the application of Nasdaq Rules to a specific transaction, upon prior written request of the Company.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

IM-5635-3. Definition of a Public Offering

Rule 5635(d) provides that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under this rule, however, shareholder approval is not required for a "public offering."

Companies are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

(i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the Company);

(ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);

(iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the Company and those investors);

(iv) the offering price (including the extent of any discount to the market price of the securities offered); and

(v) the extent to which the Company controls the offering and its distribution.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018).

(e) Definitions and Computations Relating to the Shareholder Approval Requirements

(1) For purposes of making any computation in this paragraph, when determining the number of shares issuable in a transaction, all shares that could be issued are included, regardless of whether they are currently treasury shares. When determining the number of shares outstanding, only shares issued and outstanding are considered. Treasury shares, shares held by a subsidiary, and unissued shares reserved for issuance upon conversion of securities or upon exercise of options or warrants are not considered outstanding.

(2) Voting power outstanding as used in this Rule refers to the aggregate number of votes which may be cast by holders of those securities outstanding which entitle the holders thereof to vote generally on all matters submitted to the Company's security holders for a vote.

(3) An interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of a Company or party shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a "Substantial Shareholder."

(4) Where shareholder approval is required, the minimum vote that will constitute shareholder approval shall be a majority of the total votes cast on the proposal. These votes may be cast in person, by proxy at a meeting of Shareholders or by written consent in lieu of a special meeting to the extent permitted by applicable state and federal law and rules (including interpretations thereof), including, without limitation, Regulations 14A and 14C under the Act. Nothing contained in this Rule 5635(e)(4) shall affect a Company's obligation to hold an annual meeting of Shareholders as required by Rule 5620(a).

(5) Shareholder approval shall not be required for any share issuance if such issuance is part of a court-approved reorganization under the federal bankruptcy laws or comparable foreign laws.

(f) Financial Viability Exception

An exception applicable to a specified issuance of securities may be made upon prior written application to Nasdaq's Listing Qualifications Department when:

(1) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and

(2) reliance by the Company on this exception is expressly approved by the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors. The Listing Qualifications Department shall respond to each application for such an exception in writing.

A Company that receives such an exception must mail to all Shareholders not later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required. Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the Company is relying on a financial viability exception to the stockholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The Company shall also make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.

Adopted Mar. 12, 2009 (SR-NASDAQ-2009-018); amended Apr. 27, 2009 (SR-NASDAQ-2009-040); amended Mar. 15, 2010 (SR-NASDAQ-2010-006); amended Sep. 10, 2013 (SR-NASDAQ-2013-118).

IM-5635-4. Interpretive Material Regarding Future Priced Securities and Other Securities with Variable Conversion Terms

Summary

Provisions of this IM-5635-4 would apply to any security with variable conversion terms. For example, Future Priced Securities are private financing instruments which were created as an alternative means of quickly raising capital for Companies. The security is generally structured in the form of a convertible security and is often issued via a private placement. Companies will typically receive all capital proceeds at the closing. The conversion price of the Future Priced Security is generally linked to a percentage discount to the market price of the underlying common stock at the time of conversion and accordingly the conversion rate for Future Priced Securities floats with the market price of the common stock. As such, the lower the price of the Company's common stock at the time of conversion, the more shares into which the Future Priced Security is convertible. The delay in setting the conversion price is appealing to Companies who believe that their stock will achieve greater value after the financing is received. However, the issuance of Future Priced Securities may be followed by a decline in the common stock price, creating additional dilution to the existing holders of the common stock. Such a price decline allows holders to convert the Future Priced Security into large amounts of the Company's common stock. As these shares are issued upon conversion of the Future Priced Security, the common stock price may tend to decline further.

For example, a Company may issue $10 million of convertible preferred stock (the Future Priced Security), which is convertible by the holder or holders into $10 million of common stock based on a conversion price of 80% of the closing price of the common stock on the date of conversion. If the closing price is $5 on the date of conversion, the Future Priced Security holders would receive 2,500,000 shares of common stock. If, on the other hand, the closing price is $1 on the date of conversion, the Future Priced Security holders would receive 12,500,000 shares of common stock.

Unless the Company carefully considers the terms of the securities in connection with several Nasdaq Rules, the issuance of Future Priced Securities could result in a failure to comply with Nasdaq listing standards and the concomitant delisting of the Company's securities from Nasdaq. Nasdaq's experience has been that Companies do not always appreciate this potential consequence. Nasdaq Rules that bear upon the continued listing qualification of a Company and that must be considered when issuing Future Priced Securities include: