A&L Goodbody Solicitors International Financial Services Centre North Wall Quay Dublin 1
Tel: +353 1 649 2000 Fax: +353 1 649 2649 email: info@algoodbody.com website: www.algoodbody.com dx: 29 Dublin

A&L Goodbody

Our ref | AFC / RML **Your ref** | **Date** | 9 November 2016

By Email: policy@issgovernance.com

Institutional Shareholder Services Inc. (**ISS**)
1177 Avenue of Americas
2nd Floor
New York, NY 10036

Dear Sirs

ISS Consultation Paper - General Share Issuance Mandates for Cross-Market Companies

We are writing in response to your recently published consultation paper titled "***General Share Issuance Mandates for Cross-Market Companies (U.S.-listed, non-U.S.-incorporated companies)***" (the **Consultation Paper**). Thank you for the opportunity to comment.

By way of background, A&L Goodbody is a leading Irish corporate law firm and advises a large number of Irish-incorporated, but solely U.S.-listed, companies (**Relevant Companies**). Accordingly, the Consultation Paper is of significant interest to us and to our clients. From recent discussions with them, we understand that our below comments also broadly represent the sentiments of a large number of Relevant Companies. Specifically, our client Endo International plc wishes to note that this submission reflects their views.

Background

Companies incorporated in Ireland are required by law to seek separate authorities from shareholders to (i) issue shares and (ii) disapply pre-emption rights in relation to certain such issuances. However, provided that these authorities are renewed at least once every 5 years, and that they do not exceed the company's authorised but unissued share capital, there are no Irish law restrictions imposed on the quantum, or term, of these authorities. They may be for any quantum and term the shareholders in the particular company deem appropriate.

The local UK & Irish stock exchange listing rules requirements and best practice guidance noted in passing in the Consultation Paper, and from which ISS's UK & Irish Proxy Voting Guideline are derived, have no basis in Irish law. They simply reflect the expectations of the UK & Irish markets. As the Consultation Paper notes, ISS's UK/Ireland policy is "*often driven by local listing rules and best practices, which do not generally apply to companies without a listing in that market*".

Given that the Relevant Companies only have U.S. listings, we believe that these local investor expectations (not being derived from any underlying Irish law), and the rules of local exchanges on which these companies are not listed are logically irrelevant to them. We therefore welcomed and felt that it was entirely appropriate that ISS's stated intent with its proposed amendments was to "*better reflect U.S. listing rules and the expectations of investors in the U.S. market*". However, as described in more detail below we do not see any basis or logic to ISS failing to fully reflect U.S. listing rules and the expectations of U.S. investors by simply applying its existing U.S. policies to these companies.

Current Policy

Given the complexity of the issues, we believe that it may be useful to firstly summarise the current policy which ISS applies to all Irish incorporated public companies (regardless of where they are listed). In line with its UK & Irish Proxy Voting Guidelines, ISS currently recommends voting against resolutions proposed by such companies that grant authority:

- to issue shares exceeding 33% of issued share capital (or 66% of issued share capital for a fully pre-emptive rights issue);

- to issue more than 5% of issued share capital for cash without pre-emption annually, subject to a 7.5% limit in any three year period (provided that companies can seek shareholder approval for an authority up to 10% of issued share capital if any amount in excess of 5% is used only for an acquisition or a specified capital investment); and/or

- lasting for longer than 18 months.

As referred to above, this policy accords with the local listing rules and the expectations of the investment community in the UK and Ireland. For the avoidance of doubt, as regards companies which have a listing (either sole or dual) on those local Irish or UK exchanges we believe that it is entirely appropriate that these policies should continue to apply. However, as appears to be recognised by ISS in the Consultation Paper, they are not appropriate for companies who have no such listing.

ISS Proposal

Although the Consultation Paper does not specifically refer to pre-emption rights, our understanding is that ISS's new proposal is to recommend voting in favour of *non-pre-emptive share issuances for cash of only up to 20% of issued share capital* (as opposed to the current 5%), and to allow such authority to run for between two and three years (as opposed to 18 months). We assume that ISS would continue to recommend voting in favour of authorities permitting the *pre-emptive issue of shares of only up to 33% of issued share capital* in line with existing practice, as it would not seem to make any sense for ISS to impose even more restrictive limits than currently apply under UK/Irish guidelines when its stated intention is to bring its guidance more in line with U.S. practice which is unrestrictive in this regard[1].

We do not believe that this proposal goes far enough and we do not understand the rationale for ISS imposing on non-U.S.-incorporated companies a 20% limitation on non-pre-emptive issuances for cash, without imposing it on their U.S.-incorporated peers. ISS appears to accept that the shareholders of U.S.-incorporated peer companies are adequately protected by existing legal frameworks including in particular the NYSE/NASDAQ rules relating to certain share issuances. If that is the case, then it is worth pointing out that the shareholders of their Irish-incorporated peers have at least an equivalent (and perhaps greater) level of protection as their U.S. counterparts, which we describe in further detail below.

Given that Irish law allows for a general disapplication of pre-emption rights, that U.S. investors do not expect, nor do U.S. listing rules require, them to have pre-emption rights, and that local UK & Irish norms or exchange rules are logically irrelevant, there does not seem to be any basis for treating U.S-incorporated companies differently to their Irish-incorporated peers. However, under ISS's current proposal Relevant Companies, for no objective reason, would remain at a competitive disadvantage to their U.S.-incorporated peers, adverse to the interests of their shareholders.

Examples of Imbalances / Disadvantages

There are many potential examples of the imbalance that would persist between U.S.-incorporated and Irish-incorporated peer companies by this unwarranted extension of the current NYSE/NASDAQ listing rules requirements to only the non-U.S.-incorporated companies including that:

(A) we understand that while a U.S.-incorporated peer, with solely a U.S.-listing, would in certain circumstances require a shareholder approval in order to issue new shares representing more

[1] Alternatively, ISS may be suggesting that it would vote in favour of an uncapped authority in respect of pre-emptive issuances. It would helpful for ISS to confirm its approach.

than 20% of its issued share capital, the rules of the NYSE/NASDAQ (as applicable) would not require any such approval for the issuance of shares in a non-pre-emptive "public offering". Under the current ISS proposal, an Irish-incorporated peer would be subject to such shareholder approval regardless of the fact that the rules of the exchange did not require it.

This is particularly relevant as, given practical differences in how the capital markets in the U.S. operate versus the capital markets in the UK and Ireland, it is extremely difficult, to a point where it is effectively impossible, to structure a public offering in the U.S. market as a fully pre-emptive offering. Therefore, an Irish/UK style rights issue is not we believe possible and every capital raising by an affected company would likely be non-pre-emptive.

(B) similarly, we understand that the rules of the NYSE/NASDAQ would generally not aggregate individual share issuances which occur more than 6 months apart in the absence of other linking factors. A U.S.-incorporated peer could therefore in theory undertake a number of non-pre-emptive capital raises over a period of two to three years without the need for any shareholder approval. Those capital raises could be for an aggregate amount well in excess of the 20% cap proposed by ISS for Irish-incorporated companies. In practice, this would only enable an Irish-incorporated company to do annual non-pre-emptive share issuances for cash of 10% of issued share capital over a two year period, or 6.66% over a three year period – only a marginal improvement on the existing ISS UK/Irish policy of 5% of issued share capital annually.

The cumulative effect of these practical issues is that under the current ISS proposal the Relevant Companies would have less flexibility to raise cash to take advantage of potential opportunities such as acquisitions or other capital-intensive transactions, and suffer from greater timing and execution risk in pursuing such opportunities. All of these outcomes are bad for the affected companies and bad for their shareholders whose interests ISS is seeking to protect.

Alternative proposal

We believe that ISS should instead, in line with Irish legal requirements, recommend voting in favour of resolutions of Irish-incorporated, solely U.S. listed companies allowing for the *issue of shares for cash non-pre-emptively up to a maximum of up to 100% of current authorised but unissued share capital and for a duration of up to five years*. We believe that such a proposal is justified for the following reasons:

(1) The Rules of the Relevant Exchange and Applicable Law Adequately Protect Investors

The vast majority of shareholders in Irish Relevant Companies are based in the U.S., the U.S. capital markets are the only markets for the ordinary shares of such companies and the ordinary shares of such companies are listed solely on the NYSE or NASDAQ. These companies believe that their shareholders expect them to follow customary U.S. capital markets practices and U.S. corporate governance standards. Such companies are also legally required to comply with:

- the NYSE/NASDAQ rules (as applicable);
- the SEC rules; and
- Irish domestic law which:
    - limits authorities to issue shares non-pre-emptively to the amount of the relevant company's authorised but unissued share capital;

- requires renewal of such authorities at least every five years; and
- imposes extensive fiduciary duties on directors including as regards non-pre-emptive share issuances.

It is important to note that our proposal is entirely consistent with the Irish legal restrictions on share issuances and that shareholders would remain fully protected by such restrictions. We strongly believe that the laws of a country that have full application to the Relevant Companies are the correct and only objective reference point for formulating ISS policy, rather than a set of local listing rules and practices that have no application to such companies.

We believe that the multiple requirements outlined above provide shareholders of Irish Relevant Companies with at least equivalent (and perhaps greater) protection than shareholders of U.S.-listed, U.S.-incorporated companies and that it is unnecessary to seek to impose additional shareholder approval requirements on Irish Relevant Companies by essentially extending the NYSE/NASDAQ rules (and, in effect, Irish legal requirements) in the manner suggested in the Consultation Paper.

This approach largely reflects the position articulated by ISS in its 2015 European Proxy Voting Manual which states, at page 40, that "*Generally speaking, companies listed on NASDAQ and the NYSE must seek shareholder approval for any issuance of shares or of securities convertible into shares in excess of 20 percent of the company's outstanding shares at the time of issuance. If stock exchange listing requirements include adequate safeguards with respect to share issuances, ISS will approve the request unless there are specific concerns with the company*."

In our view, NYSE/NASDAQ rules, the SEC rules and Irish law provide such adequate safeguards, particularly as there are no other relevant listing rules on which to judge companies that are solely U.S.-listed.

(2) Relevant Investors' Expectations

Given the vast majority of shareholders are U.S. based, we understand that they do not expect that pre-emption rights would ordinarily apply to companies who are solely listed on a U.S. exchange. In this regard it is worth noting that analysis of a representative sample of Irish Relevant Companies that sought to renew non-pre-emptive share issuance authorities in line with our alternative proposal, shows that despite negative voting recommendations from ISS such proposals were approved in each case by a significant majority of shareholders and, where such proposals failed to achieve the 75% of shareholders voting approval threshold required under Irish law to legally pass the relevant resolution, the margin of such failure was small.

When one takes into consideration anecdotal accounts of certain investors being bound to follow ISS voting recommendations by their own internal governance rules, even where they are not personally concerned with a proposal, such large majorities in favour suggest that investors neither require, nor expect, non-U.S. standards or norms to apply. In the most recent Irish example, resolutions in line with our alternative proposal were passed by over 80% of shareholders notwithstanding a negative ISS recommendation. A table outlining this analysis is included at the Appendix.

(3) Any Non-U.S. Rules and Policies are Irrelevant

It is possible that ISS's proposal of a 20% of issued share capital authority for two to three years is an attempt to strike a balance between the U.S. position and the position applicable to companies listed in certain markets covered by ISS's UK/Irish and Continental European policies. For example, we note that the 2016 Europe Proxy Voting Guidelines provide that ISS would generally support proposals granting authorities up to a 20% of issued share capital for non-pre-emptive share issuances and 100% of issued share capital for pre-emptive issuances for Continental European companies. Perhaps this formed part of the reasoning behind the new proposal. However, for the reasons set out above, we believe that the listing rules and best practices of markets where Relevant Companies are not listed should have no bearing on ISS policy as it relates to companies which are solely U.S.-listed. Where such companies are listed in the U.S. but incorporated elsewhere, a "half-way house" approach does not appear to be in the interests of such companies or their shareholders.

Conclusion

We are grateful for the opportunity to comment on the Consultation Paper and ISS's apparent acceptance that the UK & Irish Proxy Voting Guidelines are not appropriate for Relevant Companies is a welcome development.

However, we firmly believe that the current proposal does not achieve its stated objectives and that there are strong legal and commercial justifications for instead adopting our alternative proposal.

These companies should be entitled to avail of the maximum share issuance authorities allowable under Irish law, subject to complying with the Rules of the NYSE/NASDAQ, ISS's related US Voting Policy and the SEC Rules. There does not appear to be any justification for ISS to seek to either (a) extend the NYSE/NASDAQ rules beyond their normal scope solely because a company is incorporated outside of the U.S. or (b) impose irrelevant local rules and market norms when the companies' sole listing is in the U.S..

If for some reason ISS is unwilling to allow the issue of shares for cash non-pre-emptively up to a maximum of up to 100% of current authorised but unissued share capital and for a duration of up to five years, we would advocate that, at a minimum, the allowable percentage should be increased from 20% to 100% of issued share capital and for as long a duration as possible in order to help mitigate the commercial prejudice that it exposes these companies to.

Thank you once again for allowing us the opportunity to comment. We would be very happy to discuss with you the issues outlined in this letter in person or by telephone given their complexity and importance to a wide range of interested parties. Our contact details are set out below.

Yours faithfully

Alan Casey

Partner, New York
t: +1 646 545 3395
e: acasey@algoodbody.com

Ronan Lyons

Partner, Dublin
t: +353 1 649 2342
e: rlyons@algoodbody.com

Appendix

Representative sample of shareholder votes of Irish Relevant Companies that sought approval from shareholders enabling non-pre-emptive share issuances for cash up to 100% of authorised but unissued share capital for a duration of five years

Company	Resolution to grant five-year authority to issue shares up to the amount of authorised but unissued share capital (50%+ approval required)	Resolution to disapply pre-emption rights in respect of such share issuance (75% approval required)	Year
Covidien plc	64.3%	63.9%	2014
Willis Towers Watson plc	79.2%	74.9%	2014
XL Group plc	78.9%	71.4%	2014
Horizon Pharma plc	71.1%	70.5%	2015
Jazz Pharmaceuticals plc	84.8 %	80.7%	2016

M-33840141-1