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**Our Reference:** GM/MAMCL/M2C/G2B

10 November 2016

**DELIVERED VIA E-MAIL TO:** policy@issgovernance.com

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

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

Ladies and Gentlemen,

We refer to the Consultation Paper issued by ISS on 27 October 2016 as part of the ISS draft 2017 policy updates. As Irish legal counsel to the majority of the Irish incorporated public companies solely listed on a U.S. stock exchange ("**U.S. Listed Irish Companies**"), we welcome the request for feedback on the proposed change to share issuance policies as set out in the Consultation Paper. For reasons set out below, it is our view that the application by ISS of the share issuance policies that are customary for non-U.S. listed companies to U.S. Listed Irish Companies is not appropriate. This view is firmly supported by our clients that are U.S. Listed Irish Companies.

This practice has directly affected a significant number of our U.S. Listed Irish Company clients who have been required to adhere to ISS policies that apply to non-U.S. listed companies. Several of our clients are firmly in support of the conclusions reached in this letter. Indeed, we are not aware of any of our U.S. Listed Irish Company clients that are not in favour of the letter.

**Irish Law Overview and Current ISS Position**

Irish law requires Irish public limited companies to obtain shareholder approval to generally issue shares (which we refer to in this letter as the "**General Allotment Authority**"). Moreover, 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 favourable terms to existing shareholders of the company on a pro-rata basis unless this has been otherwise dis-applied by the constitution of the

company/or by shareholders (which we refer to in this letter as the "**Pre-emption Dis-application Authority**"). As a matter of Irish law, the General Allotment Authority and the Pre-emption Dis-application Authority may be granted in each case for a period of up to **five years** and up to the amount equal to **100% of the company's authorised but unissued share capital** (i.e. its "**headroom**").

Although not legally required, it has become market practice for companies with shares listed on the Irish Stock Exchange ("**ISE**"), to limit (i) the General Allotment Authority to an amount equal to 33% of issued share capital for the period between their annual general meetings and (ii) the Pre-emption Dis-application Authority to 5% of issued share capital for the period between their annual general meetings. While the market practice in respect of the General Allotment Authority and the Pre-emption Dis-application Authority is 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, by first applying the policies of the NAPF Corporate Governance and Voting Guidelines and the Pre-Emption Group Pre-Emption Principles (neither of which is applicable to U.S. Listed Irish Companies), and subsequently through its own policy guidelines for United Kingdom and Irish stock exchange listed companies, which became effective as of 1 February 2015 and which have since been amended. The current version is the "United Kingdom and Ireland Proxy Voting Guidelines, 2016 Benchmark Policy Recommendations".

**Consultation Paper Proposal**

The Consultation Paper recognises that the application of the policies of the country of incorporation to U.S. Listed Irish Companies causes those issuers to become subject to local listing rules and best practices, which do not generally apply to companies without a listing in that market.

It is proposed that ISS would recommend in favour 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**").

The stated intention of the new measure is to better reflect U.S. listing rules and the expectations of investors in the U.S. market. The Consultation Paper requests comments on the following specific points:

- As proposed, the new policy would effectively extend the New York Stock Exchange ("**NYSE**") or National Association of Securities Dealers Automated Quotations ("**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. ISS has queried whether participants believe that 20% is an appropriate threshold for such cross-market companies, or would it be more appropriate to grant a mandate for issuances up to a lower or higher level?

- Should such companies seek annual approval for share issuance mandates, or would a longer mandate (e.g. 2 years or 3 years) be acceptable?

- Should the same policy also apply to companies treated by the U.S. Securities and Exchange Commission ("**SEC**") as Foreign Private Issuers?

**Arthur Cox Comments**

The Proposal is helpful in so far as it acknowledges the difficulties currently faced by U.S. Listed Irish Companies that are subject to regulation by the relevant U.S. stock exchange on which they are listed (i.e. NYSE/NASDAQ) as well as the policies applied by ISS to companies whose shares are listed in the country of their incorporation. However, we are firmly of the view that any ISS policy guidelines should not seek to impose any restrictions whatsoever on these companies over and above the company law requirements for share issuances already applicable in a company's country of incorporation, the requirements of the stock exchange on which that company is listed, and the requirements of the securities regulatory authority to which the company is subject.

Our rationale is as follows:

- **The Proposal would put U.S. Listed Irish Companies at a Competitive Disadvantage**

  We understand that ISS does not apply share issuance restrictions on companies incorporated and listed in the U.S. on the basis that they are already subject to restrictions prescribed by the relevant stock exchange rules. However, it should be considered that U.S. Listed Irish Companies are of course also subject to the same stock exchange rules, so there is no need or benefit for ISS to impose additional restrictions.

  By recommending that the share issuance authorities that foreign incorporated companies can seek from shareholders should be limited, ISS policy guidance places U.S. Listed Irish Companies at a competitive disadvantage to their U.S. incorporated counterparts. For example, companies listed and incorporated in the U.S. generally do not grant existing shareholders pre-emptive rights on a new issuance of shares.

  As we read it, the effect of the Proposal would be to impose a requirement on U.S. Listed Irish Companies to convene an extraordinary general meeting of shareholders to approve each specific share issuance (or series of share issuances during the period to which the general 20% authority relates) that exceeds 20% of its share capital in circumstances where the relevant SEC and NYSE/NASDAQ rules would not impose that requirement. This would place U.S. Listed Irish Companies at a significant disadvantage to their U.S. incorporated peers (in terms of cost, timelines of execution and transaction continuity) when competing for acquisitions and similar transactions.

  If the Proposal intends to apply the 20% threshold to the General Allotment Authority (as opposed to one-off share issuances), this will further restrict the approach currently applied by ISS (by reducing the existing threshold of 33% to 20%). We believe that the current ISS approach is already unduly restrictive and would strongly recommend that, in any event, it is not further restricted.

Similarly, the requirement to first offer shares that our clients propose to issue for cash to all of their existing shareholders in time-consuming pro-rata rights offerings where the shares to be issued represent more than 20% of the existing issued share capital makes it considerably more difficult for U.S. Listed Irish Companies to compete with U.S. listed and incorporated companies. This requirement reduces the speed at which capital-raising activities can be completed which also increases their costs and causes significant logistical difficulties to complete such transactions.

- **Investor Expectations**

The U.S. capital markets are the sole equity capital markets for U.S. Listed Irish Companies, and as such, 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 SEC and the NYSE or NASDAQ rules and listing standards.

Applying market practices of a market where our clients' shares are not listed is not only inappropriate but is simply not in the best interests of our clients or their shareholders. This is especially true in circumstances where our clients are already committed to complying with the governance rules and practices of the relevant capital market for issuers' equity, whether NYSE or NASDAQ, which provides its own separate restrictions on share issuances for the protection of shareholders.

- **U.S. Stock Exchange Rules already provide Appropriate Safeguards**

It is important to consider that, should ISS choose not to adopt the position advocated in the Consultation Paper or any other policy with respect to U.S. Listed Irish Companies, it would not mean that more companies would have no restrictions on future share issuances. The opposite is in fact true based on our understanding that U.S. Listed Irish Companies are typically considered to be U.S. domestic reporting companies under SEC rules and are subject to the same governance and share issuance requirements as all other U.S. incorporated companies listed on NYSE or NASDAQ.

The rules of the U.S. stock exchanges provide sufficient safeguards with regard to the issuance of shares/ 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.

In addition, the NYSE requires shareholder approval for equity compensation plans and certain issuances to related parties, and the NASDAQ rules contain similar requirements. 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 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.

- **Historic Shareholder Sentiment**

  There have been recent examples where U.S. Listed Irish Companies have sought shareholder approval in respect of the General Allotment Authority and the Pre-emption Dis-application Authority to the maximum extent permitted by Irish law and contrary to ISS policy recommendations (i.e. for a five year period and for an amount equal to 100% of the Company's authorised but unissued share capital).

  Despite ISS recommending against such proposals, the majority of shareholders of those companies have in fact voted in favour of renewing the General Allotment Authority and the Pre-emption Dis-application Authority to the maximum extent permitted by Irish law (albeit, the required 75% threshold for the latter authority may not have been met on all occasions). In the most recent Irish example involving Jazz Pharmaceuticals plc, each of the General Allotment Authority and Pre-emption Dis-application Authority proposals were approved by over 80% of shareholders notwithstanding negative ISS recommendations. Considering that the shareholders of many U.S. Listed Irish Companies are obliged by internal governance policies to follow ISS voting recommendations, this divergence from recommendations by ISS is a clear statement that such shareholders do not expect non-U.S. market practices to apply.

  In addition, it is standard practice for U.S. Listed Irish Companies to provide for the General Allotment Authority and the Pre-emption Dis-application Authority to the maximum extent permitted by Irish law in their constitutions on incorporation. As far as we are aware, 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.

**Recommendation**

In response to the specific points raised by ISS in the Consultation Paper, for the reasons set out above, our recommendations are set out below.

- That ISS apply its approach to all U.S. listed companies consistently by adopting a uniform policy supporting the regulation of share issuances by those companies in accordance with customary U.S. capital market practices, U.S. corporate governance standards, the SEC rules and regulations and the NYSE or NASDAQ rules and listing standards, as applicable. Accordingly, we strongly recommend that ISS reconsiders 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.

- That ISS should support U.S. Listed Irish Companies renewing their required share issuance authorisations under Irish law to the maximum extent permitted by Irish law, such that those companies seek approval from shareholders every five years in respect of the General Allotment Authority and the Pre-emption Dis-application Authority 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.

- That the position as 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.

We hope that this submission is helpful and we would welcome the opportunity to engage with ISS further on this issue.

Yours faithfully,

Brian O'Gorman, Managing Partner

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