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Via Email policy@issgovernance.com

November 10, 2016

Institutional Shareholder Services Inc.

RE: 2017 Benchmark Policy Consultation—General Share Issuance Mandates for Cross-Market Companies (US-listed, non-US-incorporated companies)

Dear Madam or Sir:

We are pleased to submit this letter in response to the request of Institutional Shareholder Services Inc. ("**ISS**") for comments regarding the proposed 2017 US policy update with respect to General Share Issuance Mandates for US-listed cross-market companies (the "**Proposed Policy Update**").

While we support the stated objective of better reflecting US listing rules and the expectations of investors in the US market, for the reasons stated below, we believe that the Proposed Policy Update does not adequately achieve that objective. Our comments on the Proposed Policy Update are informed principally by our experience as legal counsel to companies listed exclusively in the US and incorporated in the UK and Ireland.

Background on the Two Types of Share Issuance Proposals for Companies Incorporated in the UK and Ireland and Associated Market Practices

As we understand it, companies incorporated in the UK and Ireland are legally required to obtain specific authority from shareholders for the following two types of share issuances:

1. The authority to allot and issue <u>any</u> of the company's ordinary shares (other than pursuant to employee equity plans) (the "**General Allotment and Issuance Authority**"); and
2. Authority to dis-apply the statutory preemption rights that otherwise require a company issuing shares for cash to first offer those shares on the same or more favorable terms to existing shareholders of the company on a pro-rata basis (the "**Pre-Emption Opt-Out Authority**" and, together with the General Allotment and Issuance Authority, the "**Share Issuance Authorities**").

We think it is important to recognize that UK and Irish company law, as we understand it, allows shareholders to approve the Share Issuance Authorities for an authorization period of up to five years and an amount of up to 100% of the company's authorized but unissued shares. Accordingly, as we understand it, any further limits on the Share Issuance Authorities are driven entirely by domestic corporate governance policies and local stock exchange and listing rules.

The limits related to the Share Issuance Authorities set forth in the existing ISS United Kingdom and Ireland Proxy Voting Guidelines (the "**ISS UK/Ireland Policy**") are derived from the recommendations of the UK Investment Association's Share Capital Guidelines and the UK Pre-Emption Group's Statement of Principles, which recommendations are themselves driven by UK market practice. We refer you to other commentators for more background on the UK/Ireland market practices that have developed with respect to the Share Issuance Authorities, but we nonetheless wish to reiterate that US market practices are fundamentally different from UK/Ireland market practices.

Investor Expectations and Recent Results

We believe that investors in companies listed in the US and incorporated elsewhere expect these companies to follow customary US capital markets practices, US corporate governance standards, the rules and regulations of the SEC and the applicable listing standards and rules. Indeed, the following voting results with respect to "full" Share Issuance Authorities (*i.e.*, proposals seeking authority to issue up to 100% of authorized capital for a duration of five years) sought by non-controlled US-listed foreign companies that were opposed by ISS because they exceeded the limits set forth in the existing ISS UK/Ireland Policy suggest that a majority of shareholders of US-listed companies understand this issue and do not expect companies to apply market limitations derived from a company's country of incorporation:

Company	Annual General Meeting Date	General Allotment and Issuance Authority Proposal Support	Pre-Emption Opt-Out Authority Proposal Support
Jazz Pharmaceuticals plc	August 4, 2016	84.7%	80.7%
Horizon Pharma plc	November 13, 2015	71.1%	70.5%
XL Group Ltd	April 25, 2014	79.0%	71.4%
Willis Towers Watson plc	July 23, 2014	79.2%	74.9%
Covidien plc	March 19, 2014	63.9%	63.6%

Clarification on ISS Changes under Consideration

Prior to specifically responding to ISS' request for comment, we would like to point out that although the two Share Issuance Authorities are separately addressed in the existing ISS UK/Ireland Policy, the Proposed Policy Update does not distinguish between the two types of Share Issuance Authorities. As a result, on its face, the Proposed Policy Update would subject US-listed companies to a less restrictive Pre-Emption Opt-Out Authority policy but a <u>more</u> restrictive General Allotment and Issuance Authority policy as compared to the existing ISS

UK/Ireland Policy.[1] Specifically, the limit set forth in the Proposed Policy Update would effectively decrease the 33%/66% limit under the existing ISS UK/Ireland Policy with respect to the General Allotment and Issuance Authority to 20%, thereby exposing US-listed companies to even more restrictive limits than the limits set forth under the existing ISS UK/Ireland Policy.

Based on the rationale for the policy change under consideration, we assume that it is not the intent of ISS to apply more restrictive policies than exist under the existing ISS UK/Ireland Policy. Doing so is contrary to the rationale for the Proposed Policy Update and moreover, would produce an anomalous result where companies listed both in the US and in the UK or Ireland would continue to be subject to the existing ISS UK/Ireland Policy (which is less restrictive as it relates to the General Allotment and Issuance Authority). We do not see any objective rationale for subjecting foreign-incorporated companies to stricter standards than their US-incorporated peers. As described below, we generally do not believe that it is appropriate to apply the standards and market practices of a market where a company's shares are not listed.

Responses to Specific Requests for Comments

Request for Comment: "As proposed, the new policy would effectively extend the NYSE/NASDAQ requirement for shareholder approval of issuances above 20 percent to scenarios in which the listing rules do not currently apply, such as public share issuances for cash. Do you believe that 20 percent 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?"

To further the objective of the Proposed Policy Update, we believe that ISS should rely on the NYSE/NASDAQ listing rules that are in place to protect shareholders from dilutive share issuances, just like ISS does for US-incorporated companies, and should generally support a mandate for share issuances up to a company's authorized but unissued shares. We do not support imposing greater restrictions on US-listed companies simply because they are incorporated in a foreign jurisdiction, and we believe that imposing a new hybrid limit is facially contrary to the objective underlying the Proposed Policy Update. Our position is based in part on the following points:

- While the laws of certain foreign jurisdictions are the reason that certain US-listed companies are required to obtain Share Issuance Authorities, we believe the relevant characteristic for analyzing these proposals is the listing jurisdiction, not the jurisdiction of incorporation, because it is the listing jurisdiction, not the jurisdiction of incorporation, that generally imposes (or does not impose) restrictions to protect shareholders from dilutive share issuances. Our position is consistent with the position of the Investment Association and the Pre-Emption Group whose guidelines and principles are intended to

[1] For General Allotment and Issuance Authorities, the limit under the existing ISS UK/Ireland Policy is 33% of issued share capital (or 66% if the additional 33% is used only for fully pre-emptive rights issuances) and for Pre-Emption Opt-Out Authorities, the limit under the existing ISS UK/Ireland Policy is 10% of issued share capital, provided that any amount above 5% is to be used for the purposes of an acquisition or a specified capital investment. We again note that none of these limits are imposed by law.

apply to UK-listed companies. Part 1 of the Pre-Emption Group Statement of Principles provides that the principles are intended to apply to "all companies ***(wherever incorporated)*** [emphasis added] with shares admitted to the Premium Listing segment of the Official List of the UK Listing Authority and to trading on the Main Market for listed securities of the London Stock Exchange."[2]

- Companies listed solely in the US are subject to the governance rules of the US capital markets, which provide their own separate restrictions on share issuances for the protection of shareholders. ISS does not mandate additional restrictions on how or when companies incorporated in the US may use their shares and we do not believe that ISS should do so simply because a US-listed company is incorporated in a foreign jurisdiction. In fact, we see no rationale for mandating additional limits on share issuances.

- Generally speaking, we do not believe that it is appropriate to apply the standards and market practices of a market where a company's shares are not listed. ISS appears to be supportive of that general sentiment as reflected in the Proposed Policy Update. However, because the 20% limit set forth in the Proposed Policy Update is, in effect, a substitute limit for the limits set forth in the existing ISS UK/Ireland Policy, it appears that ISS would nonetheless be mandating such a limit because applicable foreign market standards and practices suggest such limits are appropriate for companies listed in those markets, not because investors expect US-listed companies to self-impose greater limits.

- Companies that are listed and incorporated in the US are not generally required to—and do not—seek shareholder approval to renew their authority to allot and issue shares, and these companies generally do not grant existing shareholders pre-emptive rights on new issuances of shares. ISS does not subject US-listed companies that are incorporated in the US to greater restrictions on share issuances than those already imposed by local listing rules, but rather holds a company accountable for its past use of authorized shares when determining whether to support an increase to the company's authorized capital. We believe that ISS should apply the same standard to US-listed companies that are incorporated in the UK or Ireland and it should not seek to impose greater restrictions than those imposed by NYSE/NASDAQ to which these companies are already subject.

In considering whether the proposed 20% limit is appropriate, we also considered the following:

- As noted above under the caption "*Clarification on ISS Changes Under Consideration*", if the 20% limit is intended to apply to the General Allotment and Issuance Authority, then the Proposed Policy Update would effectively decrease the 33%/66% limit under the existing ISS UK/Ireland Policy to 20%. This contradicts the rationale for the Proposed Policy Update and would disadvantage companies listed solely in the US more than they are currently disadvantaged under the existing ISS UK/Ireland Policy.

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[2] http://www.pre-emptiongroup.org.uk/getmedia/655a6ec5-fecc-47e4-80a0-7aea04433421/Revised-PEG-Statement-of-Principles-2015.pdf.aspx

- The 20% limit set forth in the Proposed Policy Update is only marginally less restrictive than the existing ISS UK/Ireland Policy as it relates to Pre-Emption Opt-Out Authority. The existing ISS UK/Ireland Policy already supports the issuance of up to 10% of issued share capital and we do not believe that increasing a 10% limit to 20% adequately achieves the stated objective of the Proposed Policy Update.
- The Proposed Policy Update appears to limit companies to issuing 20% of currently issued capital during the entire authorization period and appears to be more restrictive than the NYSE/NASDAQ 20% rules—that the Proposed Policy Update is intended to better reflect—which generally do not aggregate separate, unrelated issuances. If, as we read the Proposed Policy Update, the 20% limit is a flat limit that applies during the entire authorization period, not only would the Proposed Policy Update effectively 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, the additional practical effect is to create an entirely new 20% limit that applies to multiple, unrelated share issuances that would not otherwise be aggregated under NYSE/NASDAQ rules for purposes of determining whether shareholder approval is required. As an example, under NYSE/NASDAQ rules, a US-listed company could undertake two or more separate and unrelated discounted private placements for up to 19.99% of its then-issued share capital in each private placement without triggering a shareholder approval requirement. Viewed in that light, the 20% limit set forth in the Proposed Policy Update represents a <u>substantially more restrictive limit</u> than exists under the NYSE/NASDAQ 20% rules.

Further, and as stressed above, we believe that applying foreign market limitations—derived from a company's country of incorporation as opposed to where its shares are listed—would leave these companies disadvantaged as compared with their US incorporated/US-listed peers in a manner that is not in the best interest of shareholders. Many strategic opportunities such as potential acquisitions are highly competitive, with multiple parties often offering comparable or even the same economics, and restricting the ability of US-listed foreign companies to issue shares and mandating a shareholder vote when none would be required under NYSE/NASDAQ rules would greatly disadvantage those companies, particularly as it relates to the uncertainty of whether a company could obtain shareholder approval for a specific issuance in the context of any transaction, as well as the delays it would experience in seeking and obtaining such approval, thereby making any transaction bid that it were to submit automatically less attractive. Likewise, the requirement to first offer shares that a company proposes to issue for cash to all of its existing shareholders in time-consuming pro-rata rights offerings (even assuming UK/Ireland-style rights offerings could effectively be structured in the US) would considerably reduce the speed at which a company could complete capital-raising activities, would increase its costs and otherwise might make it difficult for a company to complete such transactions.

Moreover, we believe that the Proposed Policy Update would unduly disadvantage foreign companies that rely on rapid capital deployment to achieve their growth objectives. Stated another way, imposing new limits above and beyond those required by NYSE/NASDAQ rules would continue to disproportionately affect these types of companies vis-à-vis both their US-incorporated peers and other US-listed, foreign-incorporated companies that have business and growth strategies not dependent on capital-intensive investments.

For the reasons stated above, we recommend that ISS reconsider its intention to mandate a 20% limit (or any limit) on share issuances by foreign-incorporated companies that are listed solely in the US. We believe that ISS should treat all companies that are listed solely in the US equally and, in this regard, we believe that ISS should generally support a mandate for share issuances up to a company's authorized but unissued shares.

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

We believe that ISS should generally support approving the Share Issuance Authorities for the maximum period provided for under applicable law (which, in the case of companies incorporated in Ireland or England and Wales, is a period of up to five years). When analyzing requests to approve the Share Issuance Authorities, we believe that, instead of focusing on how frequently a company seeks Share Issuance Authorities, it would be appropriate for ISS to take into account some of the same qualitative company-specific factors that it considers when analyzing a US proposal to increase authorized capital, particularly since ISS does not impose any such frequency requirements on US-incorporated companies seeking an increase in authorized capital. As is the case with the 20% limit on share issuances, we believe that imposing a requirement on foreign-incorporated companies listed exclusively in the US to seek Share Issuance Authorities more frequently than is required by applicable law is contrary to the objective of the Proposed Policy Update and would continue to result in foreign-incorporated companies being treated less favorably than their US-incorporated peers.

Request for Comment: "Should the same policy also apply to companies treated by the US SEC as Foreign Private Issuers?"

We believe that the same rationale that supports a mandate for share issuances up to a company's authorized but unissued shares applies to foreign private issuers that are listed exclusively in the US.

We appreciate the opportunity to comment on the Proposed Policy Update and would be pleased to discuss any questions that ISS or its staff may have with respect to this letter.

Very truly yours,

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