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OUR REF

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

ISS consultation paper dated 27 October 2016 entitled "US Policy - General Share Issuance Mandates for Cross-Market Companies (US-listed, non-US-incorporated companies)" (the "Consultation Paper")

Dear Sirs

We refer to the Consultation Paper which we have discussed with a number of Irish companies whose shares are listed on stock exchanges in the United States of America ("**U.S. Listed Irish PLCs**"), as well as with law firms and other intermediaries based in the United States. This letter reflects the consistent feedback received from those discussions.

For the reasons set out below, we believe that U.S. Listed Irish PLCs should not be expected to comply with UK corporate governance standards or standards based on, or derived from, those standards. Instead, those companies should be expected to comply with the same standards as their peers listed on NYSE and NASDAQ (whether incorporated in the United States or elsewhere), subject of course to any applicable Irish laws or regulations.

1. Irish corporate governance regime generally

1.1 Ireland is a small open economy with a limited domestic market for equity capital markets. Accordingly, there is a long history of Irish companies raising money from international investors. For historical and other reasons, those investors were often based in London. However, Irish companies have also listed their shares in France, Germany and of course the United States (with the United States being the principal destination of choice for indigenous technology and pharmaceutical companies).

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- 1.2 Given the global importance of London's capital markets, the similarities between Irish and English company law and the large number of Irish companies listed in London, it is not surprising that UK corporate governance standards have been influential in Ireland. However, it is important to recognise that Irish company law does not mandate any specific corporate governance regime for listed Irish PLCs and the regime applied by those individual PLCs is therefore generally determined by the requirements of the relevant stock exchanges on which their shares are listed, as well as the expectations of shareholders.
- 1.3 Irish PLCs with shares listed outside Ireland and the UK have often applied very different corporate governance standards to those applicable in the UK. This trend has increased markedly in recent years as the number of U.S. Listed Irish PLCs has increased (in fact, such companies now represent about one third of all Irish listed companies). In addition, it should be noted that no U.S. Listed Irish PLC currently has shares listed in Ireland or the UK.
- 1.4 Accordingly, we believe that it is simply not correct to assume as a starting point that all listed Irish PLCs ought to apply UK corporate governance standards. Instead, for those companies listed outside Ireland and the UK, a more nuanced approach is required, taking account of the nature of the investor bases of those companies and their expectations, as well as applicable laws and regulations (including stock exchange regulations).
2. **Requirements of Irish law, and expectations of Irish, UK and U.S. investors, regarding share allotment authorities**
 - 2.1 Under Irish law, shareholders of an Irish PLC are required to approve, at least once every five years, a general share allotment authority (by way of ordinary resolution) and a disapplication of statutory pre-emption rights (by way of special resolution), in each case for an amount that cannot exceed the PLC's then authorised but unissued share capital (and such authorities may be subsequently revoked or varied). There are very similar provisions under English law.
 - 2.2 Institutional investors in companies whose shares are listed on the main market of the London Stock Exchange have long required that companies significantly limit the above allotment authorities in amount and duration. Most Irish companies who list their shares in the UK also list on the equivalent exchange in Ireland and accordingly follow the same practice.
 - 2.3 The importance of pre-emption rights in the context of UK corporate governance regime is undeniable - the UK Pre-Emption Group guidelines describe them as "*a cornerstone of UK company law*". The requirements of the UK Pre-Emption Group guidelines regarding share allotment authorities are long-standing and widely supported in the UK market. Nonetheless, it is important to recognise that the guidelines are expressly stated to apply to companies with UK premium listings only (with a recommendation that companies with UK standard or AIM listing also comply). No policy is set out with respect to UK (or Irish) companies whose shares are listed outside the United Kingdom.
 - 2.4 It should also be noted that the UK (and Irish) main market listing rules also include detailed provisions governing pre-emption rights, including a number of detailed restrictions regarding the basis on which shares can be used on a non-pre-emptive basis.

- 2.5 The position in the UK regarding pre-emption rights contrasts very significantly to the position in the United States, where investors, academic commentators and other interested parties generally, we understand, do not expect, or seek, UK style pre-emption rights. Instead, those parties appear to accept that companies often need to access capital markets quickly and potential concerns associated with affording management flexibility in this respect are either not significant or are adequately protected against by other factors. This fact is reflected by the very different approach to non-pre-emptive shares issuances taken by the NYSE and NASDAQ listing rules.
- 2.6 In recent years, ISS's annual voting guidelines have recommended that all listed Irish and UK PLCs (including U.S. Listed Irish PLCs) follow, in effect, the recommendations of the UK Pre-Emption Group regarding share allotment authorities. The revised proposal set out in the Consultation Paper proposes a relaxation of the UK Pre-Emption Group guidelines, but nonetheless is driven by UK corporate governance concerns.
- 2.7 However, the fundamental divergence of views between, and expectations of, UK and U.S. investors regarding pre-emption rights cannot be ignored or qualified. Given ISS's stated mission, we believe that, in formulating a policy regarding pre-emption rights for shareholders in U.S. Listed Irish PLCs, the key consideration for ISS must be the expectations and legitimate interests of shareholders in those companies.

3. **Approaches taken by U.S. Listed Irish PLCs to pre-emption rights**

- 3.1 As of the date of this letter, there are 27 U.S. Listed Irish PLCs, many of which have very different corporate histories and investor bases. However, we would make the following general observations regarding that cohort of companies:
- (a) The vast majority of U.S. Listed Irish PLCs do not qualify as foreign private issuers for the purposes of SEC rules and regulations. We understand that this is generally on the basis that 50% or more of the outstanding voting securities of those companies are held by U.S. residents. As set out in paragraph 2 above, U.S. investors generally view pre-emption rights in a fundamentally different way to UK investors.
 - (b) The vast majority of U.S. Listed Irish PLCs do not currently comply with UK Pre-Emption Group guidelines or any derivation thereof (including the current ISS guidelines). Of course, it is accepted that many of the share allotment authorities for those companies were granted on incorporation under the relevant constitutional documents (providing maximum flexibility as permitted by Irish law). However, we are not aware of any material negative feedback from shareholders or advisory bodies regarding this approach generally.
 - (c) A very small number of U.S. Listed Irish PLCs have complied with the UK Pre-Emption Group guidelines for a number of years. However, this approach is explained by the fact those companies previously maintained a listing on the main market of the Irish Stock Exchange.
 - (d) In recent years, a small number of U.S. Listed Irish PLCs have (often reluctantly) chosen to comply with ISS voting guidelines in formulating proposals to be put to shareholders. We believe the key factors driving many of those choices are (i) the high voting threshold required to approve a disapplication of pre-emption rights

(i.e. 75% vote) and (ii) the very serious consequences of a failure to have the resolution passed, when judged against the fact of the voting guidelines and their influence. However, notwithstanding these issues, a number of other U.S. Listed Irish PLCs have chosen to propose resolutions contrary to ISS policy and generally received strong shareholder support for such proposals, most recently in the case of the 2016 AGM of Jazz Pharmaceuticals (with over 80% of shareholders voting in favour).

3.2 We believe that the above points strongly support the conclusion that, in the vast majority cases, investors in U.S. Listed Irish PLCs do not expect those companies to comply with UK Pre-Emption Group guidelines or any derivation thereof (including the current ISS guidelines or the proposals set out in the Consultation Paper).

4. **Additional reasons why ISS does not need to impose additional restrictions on the ability of U.S. Listed Irish PLCs to issue shares without shareholder approval**

4.1 Having established that investor sentiment (driven by a U.S., rather than a UK, approach to corporate governance) does not support the general application of the UK Pre-Emption Group guidelines (or derivations thereof) to U.S. Listed Irish PLCs, the question then arises as to whether ISS should seek to impose some less onerous form of restrictions on U.S. Listed Irish PLCs. For the following additional reasons, we believe that there is no justification for ISS to do so:

(a) *Existing rights under NYSE/ NASDAQ rules on dilutive share issuances should be sufficient*

The listing rules of the NYSE and NASDAQ set out protections for shareholders with respect to dilutive share issuances. In its Consultation Paper, ISS appears to propose that, for foreign companies treated by SEC as domestic issuers, its voting guidelines would effectively replicate, and even extend, those requirements. ISS does not give any reason for this, nor does it explain why such foreign companies would be treated differently to US public companies (who would not be subject to the new voting guidelines).

(b) *Imposing additional restrictions on U.S. Listed Irish PLCs would unfairly prejudice those companies vis-à-vis other U.S. listed companies*

Obtaining shareholder approval for share issuances is a time-consuming and expensive process. In circumstances where such issuance is being undertaken for the purposes of an acquisition or other transaction, a requirement for shareholder approval is a key execution risk that necessarily impacts on the attractiveness of the relevant issuer as a transaction counterparty.

Many of the competitors of the U.S. Listed Irish PLCs are also listed in the United States and therefore subject to the NYSE/ NASDAQ shareholder approval requirements. Imposing any additional requirement for shareholder approval on U.S. Listed Irish PLCs could of course impact the ability of those Irish PLCs to compete with those U.S. listed competitors on acquisitions.

(c) *In approving any share issuances, directors of an Irish company must comply with their fiduciary duties*

In undertaking any share issuance, the directors of an Irish company are required to act in good faith in what the directors consider to be the interests of the company and to exercise such powers for proper purposes only. As in the case of a U.S. company, this is a key protection for shareholders in an Irish company.

5. Response to ISS request for comment

5.1 With respect to the specific matters on which ISS has sought comment in its Consultation Paper, and for the reasons set out above, we submit as follows:

- (a) Irish PLCs whose shares are listed on NYSE/ NASDAQ only should not be subject to any additional requirements to obtain shareholder approval for share issuances beyond those set out in Irish law and NYSE/ NASDAQ rules. Accordingly, we do not support the proposed policy of ISS to support share allotment authorities for non-US issuers only where they are limited to 20% of existing issued share capital.
- (b) With respect to new share allotment authorities proposed by U.S. Listed Irish PLCs, ISS should support proposals that give the maximum flexibility afforded by Irish law (i.e. for a period of five years and with respect to the entire amount of the issuer's authorised but unissued share capital).
- (c) There should not be a different policy for Irish PLCs that are treated as foreign private issuers for the purposes of SEC rules and regulations. Some of those companies may, either for historical reasons or reasons related to the composition of their investor base, choose to propose UK style pre-emptive pre-emption rights. However, this determination should be made by those companies, not ISS.

5.2 In conclusion, we recognise that bodies such as ISS play a key role in upholding good corporate governance standards by public companies, particularly through the annual promulgation of voting guidelines. Issuers also recognise this important role and generally strive to comply with such guidelines, particularly where the subject matter of the guidelines is of fundamental importance to those issuers. In those circumstances, we believe it is incumbent on ISS to propose policies that reflect the commercial realities of the situations in which the relevant public companies operate and also that reflect, and do not contradict, the underlying concerns and interests of the investors in those companies.

Yours faithfully

McCann FitzGerald