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November 9, 2016

Via email to policy@issgovernance.com

Institutional Shareholder Services Inc. ("ISS")
702 King Farm Boulevard, Suite 400
Rockville, MD 20850

Re: U.S. Policy – General Share Issuance Mandates for Cross-Market Companies

Ladies and Gentlemen:

As counsel to Prothena Corporation plc, an Irish public limited company ("Prothena"), Latham & Watkins LLP is pleased to submit comments to ISS on behalf of Prothena in response to the policy changes proposed in "General Share Issuance Mandates for Cross-Market Companies (U.S.-listed, non-U.S.-incorporated companies)" (the "Policy Proposal"). Thank you for the opportunity to comment.

As an Irish-incorporated company whose securities are listed only on the Nasdaq Global Select Market, Prothena would be subject to the proposed policy change, if adopted. As we understand, the proposed policy is intended to replace ISS's current approach for evaluating proposed shareholder resolutions granting general share issuance authority to issuers organized in jurisdictions outside the United States, the laws of which require them to obtain shareholder approval prior to issuing shares of their capital stock. While current policy provides that ISS shall evaluate such resolutions under the ISS policy guidelines applicable to an issuer's country of organization (which guidelines are often driven by the listing rules and best practices of local securities exchanges), the proposed policy would recommend voting in favor of general share issuance authorities of up to 20% of an issuer's currently issued share capital, provided the duration of the authority is clearly disclosed and reasonable.[1]

As proposed, the new policy is intended to apply only for those companies (a) that are treated as U.S. domestic issuers under the rules of the Securities and Exchange

[1] While the Policy Proposal does not directly address whether the proposed policy would include recommending in favor of a corresponding preemption rights waiver with respect to the same number of shares in jurisdictions where such a waiver is required for non-preemptive issuances, we have assumed that it would.

Commission (the "SEC"), and (b) whose shares are listed only on a U.S. securities exchange (such companies, the "Relevant Issuers").

As discussed in further detail below, we believe the proposed policy may limit the capital-raising activities of Prothena and other Relevant Issuers to a greater extent than the legal and regulatory requirements to which these issuers are subject. Accordingly, we respectfully propose that ISS adopt an alternate policy that would recommend in favor of general share issuance authorities (with a corresponding preemption rights waiver, where applicable in the jurisdiction of organization) of up to (a) 100% of an issuer's authorized but unissued share capital at the time the relevant proposal is voted upon, or (b) such lesser amount as would be consistent with ISS's Common Stock Authorization policy applicable to U.S.-incorporated issuers and would comply with any applicable limitations on advance authority imposed by legal or regulatory requirements to which the issuer is subject, provided that, in each case, the duration thereof also complies with any such limitations. We believe such a policy would minimize any disadvantage of Relevant Issuers relative to their U.S.-incorporated counterparts, thereby furthering shareholders' economic interests, while also conforming to the expectations of the relevant investor base.

The current policy for evaluating general share issuance and preemption rights waiver proposals by Relevant Issuers restricts their ability to raise capital and should be revised.

Under current ISS policy, proposals by non-U.S. companies that are not foreign private issuers under SEC rules are generally evaluated under ISS's U.S. proxy voting guidelines. However, proposals made by such companies solely due to the requirements of another market or jurisdiction—including proposals to grant general share issuance authorities and preemption rights waivers required by the laws of an issuer's jurisdiction of organization—are instead evaluated under the ISS policy applicable to that market or jurisdiction, as the case may be. However, as the Policy Proposal notes, the ISS policies used to evaluate proposals to grant general share issuance authorities and preemption rights waivers are often driven by the listing rules and best practices of local securities exchanges, which are typically more restrictive than local laws.

While the current policy may be appropriate for issuers that have securities listed on these local securities exchanges, as applied to Relevant Issuers, it introduces a new set of requirements, forcing them to conform their share issuance proposals to the more restrictive local exchange rules embodied in the ISS guidelines or risk a negative recommendation from ISS and a corresponding negative vote by shareholders.

By limiting the scope of authority that Relevant Issuers can obtain to issue shares without preemption rights, the current policy makes it more difficult for Relevant Issuers to raise the capital they may need to take advantage of strategic opportunities and otherwise grow their respective businesses. While Relevant Issuers are already at a disadvantage in this respect compared to U.S. corporations, which are generally permitted to issue shares without preemption rights at any time, the current policy furthers this

disadvantage. Thus, to the extent the current policy limits the ability of Relevant Issuers to raise capital to a greater degree than applicable legal and regulatory requirements, it is ultimately to the detriment of their shareholders' economic interests.[2]

Accordingly, we agree that the current policy as it applies to Relevant Issuers should be revised and are grateful that ISS has proposed an alternate approach; however, as discussed below, we do not believe the Policy Proposal should be adopted as proposed.

The proposed policy for evaluating general share issuance and preemption rights waiver proposals by Relevant Issuers restricts their ability to raise capital and should be revised.

The proposed policy provides that ISS would recommend in favor of general share issuance authorities and preemption rights waivers of up to 20% of an issuer's currently issued share capital, as long as the duration thereof is clearly disclosed and reasonable. Though the Policy Proposal does not define "reasonable," the comment request suggests it may be somewhere between one and three years.

While we are encouraged that the proposed policy is an improvement over the current policy, we believe it can be further improved. First, similar to the current policy, the proposed policy would impose size and duration limitations that are more restrictive than the legal and regulatory requirements to which Relevant Issuers may actually be subject. For example, while the laws of Ireland permit Prothena and other Relevant Issuers organized there to obtain general non-preemptive share issuance authority with a duration of up to five years, the Policy Proposal suggests that ISS may not support any such authority having a duration of longer than three years. In this case, and in any other cases in which the proposed size or duration limitations are more restrictive than applicable law, the interests of shareholders may suffer.

In addition, while the proposed policy resembles current Nasdaq Stock Market ("Nasdaq") and New York Stock Exchange ("NYSE") rules, it effectively extends the scope of these rules for Relevant Issuers in many respects. Under Nasdaq and NYSE rules, listed issuers are generally required to obtain shareholder approval prior to issuing 20% or more of their outstanding shares or voting power in a single transaction or series

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[2] We note that the SEC has deferred to local law and practices applicable to non-U.S. companies that are not foreign private issuers. On several recent occasions, the Staff of the Division of Corporation Finance has granted no-action relief from the requirement to file a preliminary proxy statement under Rule 14a-6(a) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to certain non-U.S. issuers for routine matters requiring shareholder approval under the laws of their respective jurisdictions. These include matters for which U.S. issuers would generally not need shareholder approval and that would otherwise require the filing of a preliminary proxy statement under Rule 14a-6(a). (*See* Ingersoll-Rand plc (*avail.* Mar. 13, 2015) (the "Ingersoll Letter"); Avago Technologies (*avail.* Nov. 7, 2014); Garmin Ltd. (*avail.* Sept. 30, 2014); Aon plc (*avail.* Mar. 31, 2014); Schlumberger Ltd. (*avail.* Jan. 31, 2014)). In the Ingersoll Letter, such matters included share issuance authorities and waivers of statutory preemption rights under the laws of Ireland. Each such request for no-action relief noted the burden on the non-U.S. issuer requesting relief relative to U.S. issuers if such relief were not granted.

of transactions (the "20% Rules").[3] However, there are certain transactions to which the 20% Rules do not apply, including (a) issuances in connection with public offerings (under NYSE rules, such issuances must be for cash), and (b) issuances at a price at or above the greater of the book value or the market value of the issuer's securities (under NYSE rules, such issuances must be for cash and part of a "bona fide private financing"). The proposed policy contains no such exceptions, and would subject Relevant Issuers to a 20% maximum for all general share issuance authorities regardless of the circumstances under which the shares are ultimately issued. We do not believe that this aspect of the proposed policy is consistent with U.S. market expectations, since U.S. investors do not expect the 20% Rules to apply in these additional circumstances.

Accordingly, while we believe the proposed policy is an improvement over the current approach, we respectfully request that ISS reconsider the application of the 20% maximum and duration limitations included in the Policy Proposal and consider adopting the suggested alternate approach described below.

We respectfully request that ISS consider adopting a policy that supports general non-preemptive share issuance authorities of up to 100% of authorized but unissued share capital, subject to ISS's Common Stock Authorization policy and compliance with applicable law.

We respectfully request that ISS consider the adoption of a policy that recommends in favor of general share issuance authorities (with a corresponding preemption rights waiver, where applicable, including in the case of Prothena) of up to (a) 100% of an issuer's authorized but unissued share capital at the time the relevant proposal is voted upon, or (b) such lesser amount as would be consistent with ISS's Common Stock Authorization policy applicable to U.S.-incorporated issuers and would comply with any applicable limitations on advance authority imposed by legal or regulatory requirements to which the issuer is subject. We further request that ISS consider not placing any independent limitations on the duration of such authorities and instead, issue a favorable recommendation as long as the proposed duration is permitted under applicable law. We believe this approach is appropriate for the reasons set out below.

A. *Minimize disadvantage and enhance shareholder value*

We believe that general share issuance authority proposals should be evaluated based on the legal and regulatory standards to which Relevant Issuers are subject. We believe the alternative approach described above would help to ensure that ISS policy does not make it more difficult for Relevant Issuers to raise capital relative to their U.S.-incorporated counterparts, by permitting them to obtain non-preemptive share issuance authorities that more closely align them to the position of U.S.-incorporated companies to the extent permitted by applicable laws and regulations. Under this approach, Relevant

[3] *See* Nasdaq Rule 5635(d) and Section 312.03(c) of the NYSE Listed Company Manual.

Issuers would be similarly positioned to U.S.-incorporated companies in their ability to take advantage of strategic opportunities and utilize the capital markets to grow their businesses, thereby enhancing the economic interests of their shareholders.

B. *Conform to shareholder expectations*

As stated in the Policy Proposal, the new policy is intended to apply only to companies that are not foreign private issuers under SEC rules. Among other requirements under SEC rules, an issuer will not be considered a foreign private issuer if more than 50% of its outstanding voting securities are held by U.S.-based shareholders.[4] In addition, the proposed policy would apply only to companies whose securities are listed solely on a U.S. securities exchange. As such, it should be primarily U.S.-based investors who are affected by the policy change. By enabling Relevant Issuers to obtain non-preemptive share issuance authority that approximates legal and regulatory restrictions applicable to their U.S.-incorporated counterparts, we believe the alternative approach described above would align more closely to the expectations of the relevant shareholder base.

C. *Existing safeguards provide meaningful protection*

As discussed above, Relevant Issuers are generally subject to Nasdaq or NYSE rules that require a shareholder vote in connection with certain share issuances that pose a significant threat of dilution or disenfranchisement. In addition, while our suggested approach would permit these companies to issue shares up to their authorized but unissued share capital, local laws requiring shareholder approval to effect any increase in the number of shares authorized for issuance would still apply.[5] Relevant Issuers would also continue to be subject to limitations under applicable law regarding the permissible size and/or duration of share issuance authorities.

Accordingly, for the reasons set forth above, we request that ISS revise its current approach for evaluating proposed shareholder resolutions granting general non-preemptive share issuance authorities, and adopt a policy that supports such authorities up to (a) 100% of an issuer's authorized but unissued share capital, or (b) such lesser amount as would be consistent with ISS's Common Stock Authorization policy applicable to U.S.-incorporated issuers and would comply with any applicable legal or regulatory requirements, provided that, in each case, the duration thereof also complies with such requirements.

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[4] *See* Rule 3b-4(c) under the Exchange Act.

[5] Even if corporate laws in some jurisdictions would not necessarily require a shareholder vote, please note that we have phrased our suggested alternative approach for ISS's consideration with reference to authorized but unissued share capital *at the time the relevant proposal is voted upon.*

Thank you again for the opportunity to comment on this proposed policy change. I would be pleased to discuss these comments with you or to provide any additional information you may find useful. If you have any questions regarding this letter, please do not hesitate to contact me by phone at +1.650.463.4693, or by email at Alan.Mendelson@lw.com.

Very truly yours,

Alan C. Mendelson
of LATHAM & WATKINS LLP

cc: Bill Homan, Prothena Corporation plc