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Our Ref
TS

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10 November 2016

Dear Sirs

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

We act as Irish legal counsel for a significant number of US listed Irish incorporated public companies ("**US Listed Irish incorporated Companies**"). We welcome the opportunity to make a submission on the proposed changes to the ISS share issuance policy set out in the Consultation Paper.

Background

The current ISS policy on share issuances applicable to US Listed Irish incorporated Companies was introduced in recent years and reflects the market practice for companies that are Irish incorporated and listed on the Irish Stock Exchange ("**ISE**").

This policy was not applicable when the majority of US Listed Irish incorporated Companies were originally established. When the relevant groups were originally restructured so as to introduce an Irish incorporated company as the new holding company, the overriding objective was typically to preserve so far as possible the pre-existing governance regime ie, the applicable US governance regime. The goal typically was to establish the new Irish incorporated holding company in such a way as to reassure investors that there would be no material alteration to that pre-existing governance regime.

With respect to share issuance under Irish law there are two key requirements. Firstly, directors must be authorised to issue shares in the relevant company. This authority can be conferred up to an amount equal to the authorised but unissued share capital of the relevant company and for a maximum period of five years. Secondly, where shares in an Irish company are to be issued for cash such shares must be offered on a pre-emptive basis to existing shareholders unless the relevant

requirements have been disapplied. Such disapplication can apply for any issuance of shares and be for a maximum period of up to five years.

Given that the overriding goal was typically to maintain the existing governance regime for these companies and as the Irish requirements with respect to share issuance are not mirrored under the US governance regime, the approach taken (without exception to our knowledge) was to authorise directors to issue shares up to the authorised but unissued share capital of the relevant company for a five year period (ie, the maximum authority possible under Irish corporate law) and also to disapply statutory pre-emption rights in respect of any share issuance for a five year period (again, the maximum disapplication possible). In our experience, there was no adverse investor comment on this approach.

As the relevant authorities were to expire at the end of the five year period referred to above, the relevant companies were typically minded to renew the relevant authorities for a further five year period (ie, to continue the governance regime that had been originally put in place when Irish incorporated companies were introduced as the new holding companies of the relevant groups). More recently established US Listed Irish incorporated Companies would also, in our experience, have taken the same approach on establishing in Ireland, given the choice. The introduction of the current ISS policy on share issuance has obviously run counter to that.

In our experience it was never anticipated, prior to the introduction of the current ISS policy, that the governance requirements applicable to an Irish incorporated company listed on the ISE would become relevant to any of these companies. To our knowledge, over the five year period during which the position adopted originally pertained, there was no adverse investor comment with respect to the approach taken. This is also reflected in recent shareholder votes such as in Jazz Pharmaceuticals plc where the general five year allotment authorisation and the five year pre-emption disapplication were approved notwithstanding a negative ISS recommendation. This is unsurprising in our view as we assume that investors in US Listed Irish incorporated Companies expect the US governance regime to apply to those companies and do not expect the governance regimes applicable in the case of other listing regimes to be relevant.

The application of the governance regime applicable to Irish companies listed on the ISE places US Listed Irish incorporated Companies in a somewhat unique position. From an Irish perspective they are treated differently to other Irish public companies that are not listed on the ISE as those companies are free to avail of the maximum degree of flexibility permissible under Irish law in respect of the share issuance requirements referred to above. From a US perspective, they are being required to adhere to share issuance policies that are not applicable to their US incorporated counterparts. We do not see any reason why they should be treated differently in this manner.

The Matheson position

Our position is that, as the US Listed Irish incorporated Companies are not listed on the ISE, the only Irish governance regime that they ought to be required to comply with is that provided for under Irish corporate law. Accordingly, they should be free, like any other Irish public company that is not listed on the ISE, to:

- authorise their directors to issue shares up to the maximum amount of their authorised but unissued share capital for a period of five years;
- disapply statutory pre-emption rights in respect of any share issuance for a period of five years.

As explained above, this was the position that pertained in the case of the majority of them prior to the recent introduction of the current ISS policy with respect to share issuance. Accordingly, our view is that the ISS policy on share issuance should recommend in favour of such authorities.

In response to the specific questions put by ISS in the Consultation Paper:

As proposed, the new policy would 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. 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?

In our view, the primary governance regime for US Listed Irish incorporated Companies should be the regime applicable under US capital market practices, US corporate governance standards and the rules and regulations of the SEC, the NYSE and NASDAQ. The only governance regime that should be applicable to US Listed Irish incorporated Companies from an Irish perspective should be the requirements provided for under Irish corporate law. Consequently, US Listed Irish incorporated Companies should be allowed a mandate to grant authority to their directors to issue shares up to the maximum level permitted under Irish law (ie, the authorised but unissued share capital of the relevant company). That authority should be capable of being conferred for the maximum five year period permissible under Irish law. For the same reasons, US Listed Irish incorporated Companies should be allowed a mandate to disapply Irish statutory pre-emption rights in respect of any share issuance for the maximum permissible period of five years. In essence, these companies should be treated in the same way as any other Irish public company that is not listed on the ISE and, to the extent possible under Irish law, should not be subject to additional restrictions beyond what is required under the US governance regime.

Should such companies seek annual approval for share issuance mandates or would a longer mandate (eg, two years or three years) be acceptable?

As indicated above, in our view a mandate of up to five years, as is permitted under Irish corporate law, should be acceptable.

Should the same policy also apply to companies treated by the US SEC as Foreign Private Issuers?

In our view there should be no differentiation as between US Listed Irish incorporated Companies that are designated as US Domestic Issuers or US Foreign Private Issuers.

We welcome the opportunity to make this submission and would be happy to engage further with ISS on these questions.

Yours faithfully

MATHESON