

Haynes, Lanea

From: Shaffer, Kristin
Sent: Monday, October 30, 2017 12:23 PM
To: [REDACTED]
Cc: HSRHelp
Subject: RE: HSR Non-Voting Securities Question

[REDACTED],

We agree that these are not voting securities.

FYI – we are rolling out a new email address for HSR questions for the shop. When you email [REDACTED], every PNO attorney will receive your question at the same time. In the future, unless you are inquiring about a particular filing, please use this email address rather than our individual addresses. We expect that this will make it easier for us to efficiently address questions and get responses out as soon as we can.

Best regards,
Kristin

From: [REDACTED]
Sent: Monday, October 30, 2017 10:19 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Gillis, Diana L.; Shaffer, Kristin; Sheinberg, Samuel I.; Whitehead, Nora; Carson, Timothy
Cc: [REDACTED]
Subject: HSR Non-Voting Securities Question

Hi PNO team,

We write today seeking confirmation that certain securities do not constitute “voting securities” as defined in 801.1(f)(1)(i). We currently represent an investor (“Investor”) that intends to acquire approximately \$200 million in a newly-issued series of preferred shares (“Series Z Preferred”) of a non-public corporation (“Target”). Investor already has an equity interest in Target, owning both common (“Ordinary”) voting shares and shares from an earlier issuance of non-voting preferred shares (“Series X Preferred”). Additionally, Investor currently has the right, under the terms of a voting agreement (the “Voting Agreement”), to designate one director to the board of directors.

Between Investor and Target, the HSR size-of-person tests are met. Target is domiciled in the Cayman Islands but operates in the United States. Target has both Ordinary and Preferred shares. Target’s Articles of Association provide that the holders of Target’s Ordinary Shares “shall be exclusively entitled to designate, appoint, remove, replace and reappoint at any time or from time to time” all seven (7) directors on Target’s Board of Directors. The Articles further provide that “in no event shall the holders of Preferred Shares have any right to designate, appoint, remove, replace or reappoint any directors on the Board by virtue of holding such Preferred Shares.”

Under the terms of the shareholders’ Voting Agreement, Investor can designate one person (the “Designee”) to the seven member board for so long as it beneficially owns at least half of the Series X Preferred non-voting shares it initially acquired. The Voting Agreement indicates that, should Investor beneficially own less than that number, then the Designee “will be designated by the holders of a majority of the Ordinary Shares and Preferred Shares, voting together as a single class and on an as-converted basis.” “Preferred Shares” are defined in the proposed revised Voting Agreement to be Series X Preferred and Series Z Preferred shares. Investor will not receive any further Board representation as a result of the proposed acquisition of Series Z Preferred shares.

We believe the Series Z Preferred shares Investor will acquire constitute “non-voting” securities, and thus are not subject to notification under the HSR Act. Under the terms of the Articles, Target’s Preferred shares have no right to elect any board director. Additionally, under the terms of the Voting Agreement the Preferred shares have no present right to vote for a member of the Board of Directors.

Please let us know if this interpretation is consistent with the PNO’s position. Thank you.

Best regards,

[Redacted]

[Redacted]

[Redacted]