

## Sheinberg, Samuel I.

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**From:** HSRHelp  
**Sent:** Friday, January 31, 2025 9:05 AM  
**To:** HSR Auto Forward List  
**Subject:** FW: Share Acquisition's Impact on Voting Percentage

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**From:** Walsh, Kathryn E.  
**Sent:** Friday, January 31, 2025 9:05:04 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** HSRHelp  
**Subject:** FW: Share Acquisition's Impact on Voting Percentage

We disagree with the 801.12 analysis – the preferred shareholders vote the shares at issue, and the review and approval steps don't obviate that right. Shareholder's acquisition is not exempt under 7A(c)(10).

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**From:** [REDACTED]  
**Sent:** Monday, January 27, 2025 8:25:35 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** HSRHelp  
**Subject:** Share Acquisition's Impact on Voting Percentage

PNO team,

We are writing to confirm that acquiring a certain class of shares in a publicly traded company (the "Company") will not increase an investor's voting percentage as calculated under 16 C.F.R. § 801.12. Please assume the HSR Act size of transaction and size of person thresholds are met.

The Company is publicly traded and has two share classes: Common shares (publicly traded) and Preferred shares (not publicly traded). Common shareholders elect up to seven directors, while Preferred shareholders may elect a specific number of directors depending on the percentage of the Company's outstanding capital stock beneficially owned by the Preferred shareholders as a whole. However, Preferred shareholders do not participate in the election of Common directors or have voting rights at the Company's annual shareholder meeting. Nonetheless, all securities issued are "voting securities" as defined in 16 C.F.R. 801.1(f)(1)(i), because they are securities that "at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer."

Our client ("Shareholder") holds all outstanding Preferred shares but no Common shares. Under the applicable agreements and the Company's Preferred shares Certificates of Designation, the Preferred shareholders' rights to elect directors are as follows:

- when the Preferred shareholders beneficially own 10% of the Company's outstanding capital stock, the Preferred shareholders have the exclusive right, voting together as a separate class, "to appoint and elect one (1) director" of the Company;
- when the Preferred shareholders beneficially own 15% of the Company's outstanding capital stock, the Preferred shareholders have the exclusive right, voting together as a separate class, "to appoint and elect two (2) directors" of the Company; and
- when the Preferred shareholders beneficially own 30% of the Company's outstanding capital stock, the Preferred shareholders have the exclusive right, voting together as a separate class, "to appoint and elect three (3) directors" of the Company.

Since the Shareholder holds all of the outstanding Preferred shares, but no Common shares, its HSR voting percentage (as calculated under 16 C.F.R. § 801.12) does not increase for certain acquisitions of Preferred shares. For instance, if the

Shareholder beneficially owns at least 15% but less than 30% of the total capital stock, the Shareholder has the right to elect two of the Company's nine directors, giving it a voting percentage of 22%. Acquiring additional Preferred shares would not change this percentage unless the Preferred shares were newly-issued and resulted in the Shareholder beneficially owning 30% or more of the Company's capital stock. Accordingly, such an acquisition would be exempt under Section 7A(c)(10) of the HSR Act because "the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of the outstanding voting securities of the issuer."

Preferred shareholders may also obtain a fourth director, but not as the result of having "the exclusive right...to appoint and elect" such director. Instead, if the Preferred shareholders beneficially own at least 40% of the Company's outstanding capital stock, Preferred shareholders may "nominate and designate" a fourth director. However, this designation right is not absolute. Pursuant to the Certificates of Designation, when the Preferred shareholders beneficially own at least 40% of the outstanding capital stock of the Company, the Preferred shareholders:

shall have the exclusive right, voting together as a separate class, to nominate and designate a fourth director of [the Company], provided, however, that any fourth director ... would be subject to the reasonable, good faith review and determination of the nominating and corporate governance committee of the Board (the "Nominating Committee") that the election of such director not result in either [the Company violating any stock exchange rules or other applicable law, or a determination that the appointment constitutes a change of control under the Company's governing documents or applicable law] and any such director shall be designated by the Nominating Committee (or Board) to a class of common directors for approval by the stockholders of the Company at the applicable annual meeting of stockholders.

Accordingly, after the Preferred shareholders vote to determine who to "nominate and designate" as the fourth director, the Nominating Committee reviews the appointment to ensure compliance with stock exchange rules and that the appointment does not trigger a change of control under applicable law. Once approved by the Nominating Committee, the director is designated by the Nominating Committee (or Board) as a Common director for election by Common shareholders at the next annual meeting. If Common shareholders do not elect the nominee, the process effectively repeats, with the Preferred shareholders having the right to "appoint and elect a replacement for such director," who again will be subject to review and approval by the Nominating Committee and election by the Common shareholders at the next annual meeting.

While the Preferred shares "at present ... entitle the owner or holder thereof to vote for the election of directors of the issuer," this right only pertains to the ability to elect three directors of the Company; the Preferred shareholders are not entitled to vote for the election of the fourth director – only the right to nominate and designate as a director, subject to the approval of the Nominating Committee and ultimately the vote of the Common shareholders. While they clearly have the contractual right to nominate and designate the fourth director, the actual election of such nominee to the Board is not absolute.

If the ability to vote on who to designate as a director does not constitute the right to "vote for the election of directors of the issuer," the Shareholder's acquisition of the newly-issued Preferred shares will not result in an increase in its voting percentage under 16 C.F.R. § 801.12. Currently the Shareholder can elect three directors, because it beneficially owns more than 30% (but less than 40%) of the Company's outstanding capital stock. While the Shareholder's acquisition of newly-issued Preferred shares will result in the Shareholder's ability to "nominate and designate" a fourth director to the board, the director so nominated is designated as a Common director and must be elected by the Common shareholders at the Company's next annual stockholder meeting. Because of this, and because the Shareholder holds all of the outstanding Preferred shares, the Shareholder's voting percentage under § 801.12, which is currently 30% (electing three of ten directors), will not increase as a result of the acquisition of the additional Preferred shares. After such acquisition, Shareholder's voting percentage may decrease to 27.3% under § 801.12, because the Preferred shareholders can elect only three of eleven directors, assuming the fourth director is elected by the Common shareholders. As a result, the acquisition would be exemption under Section 7A(c)(10) of the HSR Act.

Can you confirm that this analysis is correct? If you need any additional information, please let us know.

Best regards,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]