Question 103.11

Question: The Hart-Scott-Rodino ("HSR") Act provides an exemption from the HSR Act's notification and waiting period provisions if, among other things, the acquisition of securities was made "solely for the purpose of investment," with the acquiror having "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 15 U.S.C. 18a(c)(9); 16 C.F.R. 801.1(i)(1). Does the fact that a shareholder is disqualified from relying on this HSR Act exemption due to its efforts to influence management of the issuer on a particular topic, by itself, disqualify the shareholder from initially reporting, or continuing to report, beneficial ownership on Schedule 13G?

Answer: No. The inability to rely on the HSR Act exemption alone would not preclude a shareholder from filing on Schedule 13G in lieu of the Schedule 13D otherwise required. Instead, eligibility to ~~use~~report on Schedule 13G ~~under Exchange Act~~in reliance on Rule 13d-1(b) or Rule 13d-1(c) will depend, among other things, on whether the shareholder acquired or is holding ~~equity~~the subject securities with the purpose or effect of changing or influencing control of the issuer. This determination is based upon all the relevant facts and circumstances~~.~~ and will be informed by the meaning of "control" as defined in Exchange Act Rule 12b-2. [Feb. 11, 2025]

~~The subject matter of the shareholder's discussions with the issuer's management may be dispositive in making this determination, although the context in which the discussions occur is also highly relevant. For example:~~

- ~~Generally, engagement with an issuer's management on executive compensation and social or public interest issues (such as environmental policies), without more, would not preclude a shareholder from filing on Schedule 13G so long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G. *See* Release No. 34-39538 (Jan. 12, 1998)(stating that a shareholder's proposal or soliciting activity relating to such topics generally would not cause a loss of Schedule 13G eligibility).~~

- ~~Engagement on corporate governance topics, such as removal of staggered boards, majority voting standards in director elections, and elimination of poison pill plans, without more, generally would not disqualify an otherwise eligible shareholder from filing on Schedule 13G if the discussion is being undertaken by the shareholder as part of a broad effort to promote its view of good corporate governance practices for all of its portfolio companies, rather than to facilitate a specific change in control in a particular company.~~

- ~~By contrast, Schedule 13G would be unavailable if a shareholder engages with the issuer's management on matters that specifically call for the sale of the issuer to another company, the sale of a significant amount of the issuer's assets, the restructuring of the issuer, or a contested election of directors. [July 14, 2016]~~