

## Sheinberg, Samuel I.

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**From:** [REDACTED]  
**Sent:** Thursday, September 05, 2019 9:14 AM  
**To:** Walsh, Kathryn E.; Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne  
**Subject:** FW: Foreign entity - corporation or non-corporate entity

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**From:** Whitehead, Nora  
**Sent:** Thursday, September 5, 2019 9:13:40 AM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: Foreign entity - corporation or non-corporate entity

A foreign party itself (with its counsel) is often in the best position to determine whether it is appropriately categorized as a corporate or non-corporate entity, based on the guidance in our 2016 blog as well as the totality of the circumstances in the relevant foreign country.

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**From:** [REDACTED]  
**Sent:** Wednesday, September 4, 2019 2:32:21 PM (UTC-05:00) Eastern Time (US & Canada)  
**To:** [REDACTED]  
**Subject:** Foreign entity - corporation or non-corporate entity

Dear HSR Help: For a potential transaction, I am seeking advice as to whether a "limited company" being established under the laws of a foreign jurisdiction should be considered a corporation or non-corporate entity. The Company's "Board of Directors" is responsible for the management of the Company's business. The Articles of Association of the Company provides for two classes of directors, "Directors" and "Investor Directors," and the method of appointing "Directors" changes after an initial five year period. All of the following facts are included in the Company's Articles of Association and not per a shareholder's agreement.

Appointment of "Directors":

- During an initial five year period, the Nominations Committee of the Board of Directors (as established by the Chairman of the Board or, if not established by the Chairman of the Board, by the holders of Ordinary shares) shall have a right to appoint "Directors." For so long as Founder LP holds any shares in the Company, during the initial five year period, Founder LP shall have a right to object to such proposed appointment where Founder LP, acting reasonably, believes the Person proposed is not a suitable candidate to be a Director.
- After the initial five year period, the holders of Ordinary shares shall have a right to appoint Directors (with or without a recommendation of the Nominations Committee).

Appointment of "Investor Directors":

- Investor Directors are appointed by a vote of the holders of Convertible A Shares, Convertible B Shares and Ordinary shares.
- Each investor shareholder whose aggregate amount of capital contributions made to the Company exceeds a certain dollar value and who has not already appointed one (1) or more Investor Directors shall be entitled to appoint one (1) Investor Director.
- At any one time there shall not be more than two (2) Investor Directors appointed who have been nominated for appointment by the same Shareholder.

For this inquiry, please assume that the majority of directors are, at all times, appointed as “Directors” (that is, not as “Investor Directors”).

Applying the “Corporate or Non-Corporate?” test: The Company does have a supervisory board of directors. And the Company does issue securities that all the holders to vote for *certain* directors. However, a majority of the directors are appointed, at least for the initial five year period.

Does the fact that certain directors are appointed as described above and others are elected mean that the Company is a non-corporate entity? Does the determination depend on whether a majority of the directors are appointed or are elected?

I would expect that under the facts described above, the Company would be considered non-corporate, at least during the initial five year period, because a majority of the board is not elected by shareholders, but appointed a board committee.

After the initial five year period, the appointment of a majority of the board, and at least theoretically, all of the board, is by shareholder vote. Does the fact that there is an allowance for the potential appointment of certain Investor Directors as a matter of right by qualifying shareholders mean that the Company remains non-corporate? Or, upon expiration of the initial five year period, does the fact that a majority of the board is elected by shareholders mean that the company would “flip” to be considered a corporation?

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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