

## Sheinberg, Samuel I.

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**From:** [REDACTED]  
**Sent:** Thursday, August 20, 2020 12:55 PM  
**To:** Berg, Karen E.; Carson, Timothy; Sheinberg, Samuel I.; Six, Anne; Whitehead, Nora; Musick, Vesselina  
**Subject:** FW: Question on 802.9

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From: Walsh, Kathryn E.  
Sent: Thursday, August 20, 2020 12:55:01 PM (UTC-05:00) Eastern Time (US & Canada)  
To: [REDACTED]  
Cc: [REDACTED]  
Subject: FW: Question on 802.9

No, the fund cannot rely on 802.9.

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From: [REDACTED]  
Sent: Wednesday, August 19, 2020 10:08:58 PM (UTC-05:00) Eastern Time (US & Canada)  
To: [REDACTED]  
Subject: Question on 802.9

I have a question on 802.9:

### FACTS:

An investment fund owns 9% of the voting securities worth \$100 million of an issuer and has a purely passive intent - it trusts the issuer's management to run the business, and has no plans to change that approach. It does not own any competitor to the issuer. Assume it would qualify for the 802.9 exemption based on these facts.

Now add this additional fact: the shares the investment fund acquired came with the contractual right to appoint a director to the board of the issuer. The fund wants to remain subject to the 802.9 exemption. The fund would like to keep the board right with the shares, because when it goes to sell the shares in the future after holding them passively, the securities would presumably be more valuable if they can be sold with the right to appoint a director.

### QUESTION:

Can the fund simply not appoint a director and rely on the 802.9 exemption (meeting all other 802.9 requirements)? This would appear to be allowed, as the fund will not "nominate" a director, and no employee or related person would "serve" on the board of the issuer.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]