

ITEM 4(c) / 4(d)

**Verne, B. Michael**

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**From:** [REDACTED]  
**Sent:** Monday, May 26, 2014 1:39 PM  
**To:** Verne, B. Michael  
**Subject:** HSR - Officer/Director Definitions

Hello Mike,

I hope you had a great holiday weekend. I have a few clarification questions regarding the application of the definitions of "officer" and "director" for Item 4c/Item 4d purposes.

As I understand it, an officer is one whose position (i) is appointed by the board of directors, (ii) identified in the company's articles of incorporation and/or (iii) identified in the company's by-laws.

The results from my search of the informal opinions online did not indicate whether this definition has been amended or enhanced in any way.

One question relates to the situation where a board of directors appoints a person for purposes of fulfilling a different regulatory requirement but the person is not deemed to be an officer within the company and that person is not in any way treated as an officer, for HSR purposes, is the person still regarded as an officer nonetheless because of the board appointment?

Similarly, if a vice president position is technically listed in the company's by-laws/articles of incorporation, but the position is not deemed to be an officer within the company, meaning that person does not have the "officer" level responsibilities, privileges, compensation, title, etc., for HSR purposes, is that person still regarded as an officer nonetheless because of the position is listed in the relevant documents?

Finally, please advise whether board observers are deemed directors for HSR search purposes? Here the "observer" is not appointed by the board and has no voting, management or decision-making authority. The observer does not contribute to the decision-making process in any way and the observer does not create documents for officers/directors of the company. (The observer also is not an officer). I take it that under these circumstances, the observer is not an officer/director that needs to be searched for potentially responsive documents—is this correct? Are there circumstances in which a board observer is treated as a director that should be searched?

When applying the definitions, is there any consideration of "intent" of the board/company? Where the board or company did not intend to elevate a particular position to the "officer" or executive level when making the appointment or listing the position in the by-laws, should that intention be part of the determination for HSR purposes? Same for the board observer position.

Thanks very much.

Regards,  
[REDACTED]

1. If the board appoints a person to a non-officer position, he doesn't become an officer for HSR purposes just because of the board appointment.
2. If a vice president is listed in the by-laws/articles of incorporation as an officer, I think the VP would be an officer for HSR purposes, even if the company does not consider him an officer
3. Board observers are not directors for HSR purposes
4. I don't think that intent matters. If the board appoints an officer, or the officer is listed in the by-laws or articles of incorporation, then he is an officer for HSR purposes, regardless of the intent of the company.

**Based on this, is it correct that if the charter documents make a distinction in the appointment of executive officers and non-executive officers, the HSR definition tracks the executive officers since they are the ones with the decision-making authority/responsibility to operate the company?**

Based on #2 above, we think both would be considered officers for HSR purposes.

B  
5/28/14

kw concurs