

Director Independence Determinations Must Take All Facts and Circumstances into Account

The recently completed merger of the Black & Decker Corporation and Stanley Works has brought attention to the manner in which the Board of Directors of a publicly traded company should determine whether a director is “independent” for the purposes of NYSE Section 303A.¹ Nolan Archibald was the Chairman, President, and CEO of Black & Decker, and M. Anthony Burns was a member of its Board of Directors. Black & Decker sought shareholder approval for a proposed merger of the company with Stanley Works. During the merger negotiations, Mr. Burns served on the Transaction Committee of the Black & Decker Board of Directors. That committee was involved in putting together and reviewing the initial proposal for the combination with Stanley Works, including determining Mr. Archibald’s role and compensation in the new combined company.²

Just prior to completion of the transaction, a corporate governance issue was raised by the New York Stock Exchange (“NYSE”) as a result of recent revelations that Messrs. Archibald and Burns have a “private business relationship involv[ing] a real estate development project known as Red Ledges” in Heber City, Utah. This business relationship between the senior officer and board member was reportedly disclosed to Black & Decker’s counsel, who “confirmed that the relationship did not impede Mr. Burns’ independence under the [NYSE’s] standards as applied by Black & Decker.” The Black & Decker Board of Directors, however, did not take the relationship into account when making its “independence” determination for Mr. Burns, and it is unclear whether the company’s general counsel notified the Board’s Corporate Governance Committee. The company believed that “[p]ersonal business relationships between individuals (as opposed to relationships with the company) generally are not relevant to the independence tests [for directors] under [NYSE] rules because they do not create a material relationship between a director and the company.”³

The NYSE disagreed. The NYSE advised Black & Decker “that, in interpreting its rules, the NYSE believes relationships between a director and a member of senior management that are material to either party should be considered by a board of directors in its evaluation of director independence.”⁴

The NYSE response to Black & Decker serves as an important reminder to Boards making independence determination to take all facts and circumstances into account as stated in the Commentary to Section 303A.02(a) of the NYSE Listed Company Manual which reads in relevant part:

¹ Because Black & Decker is listed on the NYSE, its corporate governance rule applies. The parallel NASDAQ requirements for director independence are in NASDAQ Rules 4200 and 4350. For a comprehensive review of these rules, see <http://www.sec.gov/rules/sro/34-48745.htm>.

² Press Release, The Black & Decker Corporation, *Black & Decker Provides Additional Information in Connection With the Special Meeting of Stockholders to Consider the Stanley Transaction* (Mar. 9, 2010), available at <http://www.your-story.org/black-decker-provides-additional-information-in-connection-with-the-special-meetings-of-stockholders-to-consider-the-stanley-transaction-136268/>.

³ *Id.*

⁴ Press Release, The Black & Decker Corporation, *Black & Decker Issues Further Statement in Connection With the Special Meeting of Stockholders to Consider the Stanley Transaction* (Mar. 10, 2010), available at <http://www.your-story.org/black-decker-issues-further-statement-in-connection-with-the-special-meetings-of-stockholders-to-consider-the-stanley-transaction-138010/>.

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“*Commentary:* It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company.... **Accordingly, it is best that boards making ‘independence’ determinations broadly consider all relevant facts and circumstances.** In particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others....” [emphasis added].

Companies should also keep in mind Item 407 of Regulation S-K, that for proxy statements which solicit shareholders in connection with the election of directors, companies must disclose whether each nominee for director is independent under the rules for determining director independence which are applicable as required by Item 407(a)(1). In addition, Item 407 requires disclosure of each transaction, relationship or arrangement not otherwise disclosed in a proxy statement as related party transactions that were considered by the board under in determining that the director is independent.⁵

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

⁵ See Regulation S-K Item 407.