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BEHIND THE NEWS

Smulyan bid puts **Emmis** board member **Bayh** in hot seat

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Susan **Bayh** is at ease in the corporate world. The wife of U.S. Sen. Evan **Bayh** is a former Eli Lilly and Co. attorney who now serves on six public company boards, collecting more than \$400,000 in fees a year. Among those companies are Indianapolis' WellPoint Inc. and **Emmis** Communications Corp., where she serves as lead director of the eight-person board.

But even the 46-year-old boardroom veteran must be feeling a little banged up these days. That's because at **Emmis**, she finds herself in the awkward position of evaluating the \$471 million buyout offer from Chairman Jeff Smulyan—who just happens to be an unabashed political supporter of her husband, a Democrat who's eyeing the 2008 presidential nomination.

"The kind of ... affiliations that are involved here might potentially make it very difficult for her to make an independent decision and one that is in the best interests of the wider shareholders," said Paul Hodgson of The Corporate Library, a Maine-based governance research firm.

"It is possible for someone to act independently in that situation, but it is very difficult for them to be able to convince stockholders of that fact, I would think."

Indeed, these aren't easy days for any of the six **Emmis** directors who are considered independent under NASDAQ rules. In early May, Smulyan, the company's founder and CEO, put them in an awkward spot by offering \$15.25 a share to buy the 83 percent of the company he doesn't already own.

Here's the rub: Shareholders have panned the offer as woefully low. But because Smulyan holds special shares that give him extra votes, his voting power is 67 percent, allowing him to single-handedly vote down any competing offer that might emerge. He's already notified the board that he "will not agree to any other transaction involving **Emmis** or his shares of **Emmis**."

Smulyan can wield his extra voting power on any vote—except on his own bid to take the company private. That means rank-and-file shareholders have the power to shoot down Smulyan's offer but not to approve a better one from an outside suitor.

Bevy of questions

The bizarre dynamics already have spawned two lawsuits by shareholders seeking an injunction and damages. They've also raised a bevy of questions. Among them: Should board members approve a sale to Smulyan even if they know putting the company's radio stations up for auction would yield a richer price?

"Smulyan may have pushed his board into a corner from which they cannot easily extricate themselves without acute embarrassment, or worse," said Frank Martin, whose Elkhart-based Martin Capital Management owns 7.2 percent of **Emmis** shares. The firm says it would oppose Smulyan's offer if it comes to a vote.

Political ties

For Susan **Bayh**, who did not respond to a request for comment, the issues are even trickier.

Smulyan, 59, is an active Democrat who served as co-chairman of the Democratic Leadership Council's 2001 National Conversation, a forum for elected and political leaders in the "New Democrat" wing of the party. He's also staged fund-raisers for **Bayh** at his Indianapolis home.

"I hope he one day will seek the presidency," Smulyan said at a 2001 Democratic Leadership Council event in Indianapolis.

If the board blesses Smulyan's offer, shareholders will howl he's buying it for a steal-not the kind of dust-up a presidential wannabe with a squeaky clean record would welcome. Even if the board extracts a bigger buyout price from Smulyan, some shareholders are going to say they should have gotten more.

Susan **Bayh** could have it worse. At least she's not on the three-person committee of independent directors now evaluating Smulyan's offer. **Emmis** spokeswoman Jodi Wright confirmed **Bayh**'s not on it, but the company has not yet said who is.

Even so, as lead director, **Bayh** will be in the middle of the fray. After the committee makes its recommendation, it will go to the full board. According to Securities and Exchange Commission filings, Smulyan and the other insider on the board, General Counsel Gary Kaseff, "will not participate in the evaluation of the proposal."

Throughout the process, **Bayh** may well put shareholders' interests first, Hodgson said, but she nonetheless faces a perception problem, one she may have been wise to avoid by declining to serve on the board in the first place.

After all, the questions surfacing now aren't exactly out of the blue. **Bayh** also drew scrutiny in the late 1990s when **Emmis** hired her for \$50,000 a year to develop the company's charitable giving plans-a post she accepted even though she already was on the board as an independent director. From 1998 until stepping down from the charitable giving post in 2002, she collected \$250,000 for that work.

"What a tangled web this is," Hodgson said.

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