

Busy Year for Proxy Contests

September 2, 2015 | Client Update | 2-minute read

ISS counts Tempur Sealy as among the 28 proxy contests during the first six months of 2015, the busiest period for contests since 2009, even though the dissidents waged a “vote no” campaign instead of nominating alternative director candidates. The overall dissident “win rate” calculated by ISS decreased from 67% for all of 2014 to 46% for the first six months of 2015, particularly where the targeted company had a market cap above \$1 billion. The firm believes that these results were affected by the absence of notable “heavyweights” in contests owing in part to settlements.

At Tempur Sealy, according to news reports, H Partners missed the company's advance notice deadline to nominate its own slate and chose instead to urge investors to withhold votes for three of the company's nominees, including the CEO, the chairman of the board and the chairman of the nominating and corporate governance committee. Both outside directors were affiliated with private equity firms that had previously exited their positions.

In its contested solicitation materials with a separate proxy card, H Partners noted that it owns nearly 10% of the company's stock and is a “long-term stockholder,” since it had held shares since 2012. H Partners pointed out that the company has majority voting and a resignation policy that requires directors who receive less “for” votes than “against” votes to tender their resignations. Since there was no proxy contest with more candidates than seats available, the company's majority voting standard continued to apply.

The background in the solicitation materials outlined a series of meetings that had begun in 2013 with requests for a board seat that H Partners claimed were never seriously put forth before the company's nominating and corporate governance committee, suggestions for executive compensation changes and books and records demands. All three of the targeted nominees ultimately did not receive majority support at the meeting and left the board. The CEO also resigned his position. One of the outcomes was the adoption of a board shareholder liaison committee, which states in its charter that the committee's responsibility is to “promote and develop better and richer communications between stockholders and the board” but notes that the committee's efforts are “intended to complement management's efforts with stockholders” and “will be coordinated.”

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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