

# Memorandum

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## Issuer Faces Shareholder Lawsuit For Alleged Omissions in Proposal to Amend Incentive Plan

May 10, 2017

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Last month, a shareholder of Intel Corporation filed a complaint in the United States District Court for the Southern District of New York, seeking to enjoin the company from submitting to a shareholder vote a management-sponsored proposal in its proxy statement that asks shareholders to approve the amendment and restatement of its 2006 Equity Incentive Plan (the “2006 Plan”).<sup>1</sup> The plaintiff’s complaint, which was brought under Section 14(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), is premised on the allegation that Intel failed to “comply with the SEC’s disclosure requirements for proxy statements” with respect to its proposal to amend and restate the 2006 Plan.

Specifically, the complaint asserts that, under Exchange Act Rule 14a-3(a), no solicitation of shareholder votes may be made without furnishing a publicly-filed proxy statement “containing the information specified in Schedule 14A.” Item 10(a)(1) of Schedule 14A, in turn, requires that “[i]f action is to be taken with respect to any plan pursuant to which cash or noncash compensation may be paid or distributed,” the proxy statement must “[d]escribe briefly the material features of the plan being acted upon, identify each class of persons who will be eligible to participate therein, indicate the approximate number of persons in each such class, and state the basis of such participation.” According to the complaint, however, Intel’s proposal, which seeks to allow the company to add 33 million new shares for awards under the 2006 Plan and to extend its term to June 30, 2020, does not specify “the classes of eligible participants, their approximate number, and the basis of their participation in the amended and restated 2006 Plan.” Instead, the plaintiff alleges, the proposal only informs shareholders: “Intel has a long-standing practice of granting equity awards not only to its executives and directors but also broadly among its employees. In 2016, approximately 84% of Intel’s employees received an equity award.” The proposal also includes a table that indicates: “Eligible

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<sup>1</sup> See [Freedman v. Intel Corp.](#), Case 1:17-cv-02884-GHW (Complaint) (S.D.N.Y. Apr. 21, 2017).

participants: All of our full-time and part-time employees, where legally eligible to participate, and our non-employee directors.” According to the complaint, these disclosures are deficient, as they do not disclose “the number of full-time and part-time employees and those legally eligible to participate” in the 2006 Plan.

The plaintiff claims that Intel made similar omissions in 2015, when it also presented for shareholder approval an amendment of the 2006 Plan. The plaintiff alleges that, both in 2015 and this year, “[t]hese were willful omissions,” given that Intel allegedly “knows better.” To buttress this claim, the plaintiff highlights the fact that, in its 2013 proxy statement, Intel not only described the eligible participants of the 2006 Plan as all of its “full-time and part-time employees, where legally eligible to participate,” as well as non-employee directors, but further specified how many full-time employees, part-time employees and non-employee directors were eligible to participate in the plan.

In light of Intel’s alleged omissions, the plaintiff requests that the court enjoin the shareholder vote on the proposal until the company provides its shareholders with a supplemental proxy statement containing the disclosures required by Item 10(a)(1). The plaintiff contends that an injunction is warranted because Intel shareholders would otherwise be required to vote on a proposal that allegedly “fails to provide sufficient – and federally required – information” for shareholders to “understand how many participants there are in the plan and why they are eligible for such awards.” Moreover, the plaintiff argues, the proposed amended and restated 2006 Plan would allow for 33 million stock awards to be granted to an unknown number of employees and then immediately vest, and “[u]nwind[ing] these awards will be impossible.”<sup>2</sup>

### Implications of the Action

Private causes of action alleging a violation of Exchange Act Rule 14a-3 are rare, though this is not the first time plaintiffs have filed lawsuits against issuers with respect to their proxy statement disclosures. In this regard, the *Intel* lawsuit is somewhat reminiscent of the string of lawsuits filed against issuers in 2012 and 2013 with regard to their say-on-pay proposals, which had similarly cited insufficient proxy disclosure and sought injunctive relief.

At this point, it is too early to discern whether the filing of the *Intel* complaint is indicative of any emerging trend. Regardless, and while the outcome of the *Intel* suit is not yet known, the shareholder complaint in this case should serve as a reminder to issuers of the importance of conducting comprehensive form checks of their proxy statements.

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<sup>2</sup> While the complaint sought both a preliminary and permanent injunction, the plaintiff later withdrew his request for a preliminary injunction.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or [yafit.cohn@stblaw.com](mailto:yafit.cohn@stblaw.com), or any other member of the Firm's Public Company Advisory Practice.

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