

Groupon Shareholders Allege Improper Bundling of Incentive Plan Proposal

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Seeking injunctive relief, shareholders of Groupon complained that the company improperly aggregated separate and distinct amendments to Groupon's 2011 incentive plan to be voted on at its annual meeting on June 13, 2013. In the initial proxy statement, a proposal on the company's ballot asks shareholders to approve amending the plan to increase the total number of shares currently authorized as well as the amount that could be granted to any individual.

After plaintiffs filed a demand letter seeking supplemental disclosures, the company amended its proxy statement to inform shareholders that the board has already granted its chief operating officer an amount of shares in excess of the individual limit back in January. The plaintiffs' letter asked the company to rescind the award, but the company instead asked shareholders under the same proposal to ratify the previous board action by making the effective date of the plan amendment, if approved, January 2013.

The plaintiffs argue that the company improperly bundled distinct actions, and in fact is asking for three separate approvals in one proposal. The proposal intends to amend the total amount allowed under the plan, a general increase of the limits permitted for each plan participant, and also seeks approval of the ratification of an existing award already made to an executive. The plaintiffs allege that shareholders must accept all amendments even if they favor the general increases but do not want to ratify the prior award.

It is unclear whether the unique circumstances related to the previous executive grant motivated the plaintiffs' actions, as the complaint indicates that the plaintiffs agree with the overall increase to the total amount of shares, but not with any of the increases being sought for individuals, either generally or for the specific award being ratified. Some have been concerned that the Apple action early in the proxy season will inspire a wave of unbundling lawsuits for annual meetings.

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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