

Pershing Square's Unusual Precatory Proxy Resolution in Its Fight for Allergen

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As noted in several [press reports](#), Pershing Square's recent SEC filing of a preliminary proxy statement related to Allergen is an unusual maneuver in its efforts to cause a merger of the company with Valeant Pharmaceutical.

The preliminary [proxy statement](#) shows up on Allergen's SEC Edgar page and contains a brief description by the registrant, Pershing Square, soliciting Allergen shareholders to vote at a yet-to-be-called meeting for a single non-binding resolution, to request that the Allergen board "promptly engage in good faith discussions with Valeant regarding Valeant's offer to merge with the Company, without in any way precluding discussions the Board may choose to engage in with other parties potentially offering higher value."

The purpose of the resolution, according to the filing, is a means for Allergen shareholders "to demonstrate, in a coordinated and powerful manner" support for the company to engage with Valeant as part of the board's effort to assess the company's alternatives. No special meeting is being sought, even though Allergen gives shareholders holding at least 25% ownership that right and also provides the ability to act by written consent. According to the proxy statement, Pershing Square has decided against that approach as an initial matter because of the requirements (which it deems "onerous," "unusual" and "burdensome") and timelines for any special meeting, including the need for any shareholders that request a meeting to first conduct a public proxy solicitation and the possibility that the board will seek to delay a special meeting or call its own meeting, as permitted in the bylaws. However, they may decide later to take that route.

In all caps, the proxy statement makes clear that even if the resolution receives majority support, it has no legal effect and the Allergen board has no obligation to take any action with respect to the request in the proposal. The proposal's intent is to "send a clear message to the board." As we indicated recently in our [client memo](#) on early proxy season trends, hedge fund activist investors are learning the value of the pressure that stems from the symbolic precatory proposal.

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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