

# THE SHAREHOLDER FORUM, INC.

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May 30, 2014

By email

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: May 13, 2014, Pershing Square Capital Management, L.P.,  
Form PREN14A: Preliminary Proxy Statement Pursuant to  
Section 14(a) for Registrant Allergan, Inc.

Dear Secretary Murphy:

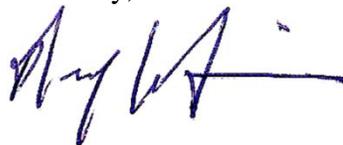
In a published May 27, 2014 letter to the SEC's Chair, Representative Edward Royce of the House Financial Services Committee has requested the SEC's "thorough review" of plans presented in the referenced Schedule 14A filing by Pershing Square for that shareholder's conduct of a "meeting of the shareholders" of the registrant Allergan, Inc., to "vote" on a "Proposed Resolution." The Shareholder Forum had recently addressed similar concerns about issues raised by this new concept in a May 21, 2014 report that accompanies this letter.

It should be noted that most Forum participants welcome innovations that improve investor access to decision-making information, including open exchanges of views. Their interest is therefore focused on assuring both fair practices and clear rules.

As indicated in the accompanying Forum report, we know from our own experience that shareholder meetings and surveys can be fairly conducted to benefit participating investors. While the Forum conducts these processes as an independent moderator rather than as an owner of a subject issuer's securities, it should be also possible for an issuer's shareholder to arrange functional responsibilities that work effectively with existing SEC regulations. For example, rather than conduct a non-issuer "vote" by direct agreements between shareholders as proposed by Pershing Square, arrangements can be made to use the same type of independent response collection services that the Forum has used for shareholder surveys. Similarly, the service provider that manages most regulated proxy distributions can perform the independent verifications of shareholder identity that are essential to the integrity of anonymous polling.

Please let me know if you have any questions about the issues summarized in the Forum's report, or want any information about the Forum's experience. I can be reached by telephone at 212-605-0335 or by email at [g1@shareholderforum.com](mailto:g1@shareholderforum.com).

Sincerely,



Gary Lutin, Chairman

## Questions About Shareholder-Hosted Meetings of Shareholders

### [Questions for lawyers](#)

### [Investor interest in shareholder-hosted meetings](#)

Last week's report of Pershing Square's plan to conduct a "meeting of the shareholders" of Allergan<sup>1</sup> has stimulated fresh thinking about processes for investor exchanges of views.

Shareholder meetings conducted by one of the shareholders – as distinguished from meetings conducted by the corporate issuer or by what the SEC defines as an independent "moderator" such as the Shareholder Forum – had been common a decade ago, used most notably by the activist Herbert Denton of Providence Capital to attract investor support and media attention to his proposals.<sup>2</sup> The revived version, though, has some important differences:

- Pershing Square is calling its meeting for what is presented as a formal voting process conducted according to SEC rules,<sup>3</sup> even though Pershing Square does not have the authority to act on behalf of the issuer and the vote is not for any real corporate action. Past examples of shareholder-hosted meetings were generally presented as opportunities to hear and offer views, without any references to voting-like processes.
- Pershing Square has reported owning 9.7% of Allergan's stock, making the meeting host subject to SEC 13D requirements and suggesting careful attention to Allergan's 10% poison pill threshold. Past shareholder hosts held relatively small positions in the subject company, allowing most other investors to comfortably communicate with the host.

Some of the issues that have been raised by this new variation are summarized below, and your additional observations or questions will be welcomed.

### Questions for lawyers

While the Forum does not address legal issues, it is important to note that lawyers may be debating a couple of questions about the Pershing Square version of a shareholder meeting:

1. ***Will a participant trigger the poison pill?*** According to some observers, the Pershing Square "Proxy Statement" has been very carefully crafted to satisfy an exception to Allergan's poison pill definition of "an agreement, arrangement or understanding to act

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<sup>1</sup> See [May 15, 2014 Reuters Hedgeworld: "No downside in Allergan 'meeting.'"](#)

<sup>2</sup> See [September 12, 2002 Los Angeles Times: "Disney Investor Calls for Meeting | Media: Providence Capital wants institutional shareholders to discuss the company's corporate governance issues, including the board's makeup"](#) and [October 21, 2003 Wall Street Journal: "Investors Seek to Rewind Kodak | Providence Capital-Led Group Wants Company to Roll Back Big Plans for Digital Technology."](#)

<sup>3</sup> Pershing Square states that it is furnishing a "Proxy Statement and the enclosed WHITE Proxy Card" to Allergan shareholders "in connection with the solicitation of revocable proxies from shareholders of the Company to vote at a meeting of the shareholders of the Company (the 'Meeting')," and that it is calling the Meeting for shareholders "to consider and vote on the following non-binding resolution (the 'Proposed Resolution');" see [May 13, 2014, Pershing Square Capital Management, L.P., SEC Form PREN14A: Preliminary Proxy Statement of the Requesting Shareholder in Connection with a Meeting of the Shareholders of Allergan, Inc.](#)

together.” The exception is defined in a provision for “a revocable proxy or consent given to such Person in response to a public proxy or consent solicitation made pursuant to, and in accordance with, Section 14(a) of the Exchange Act by means of a solicitation statement filed on Schedule 14A).”<sup>4</sup> Others may argue, though, that this provision does not apply since the consent agreement between shareholders is not really “pursuant to” SEC regulations for a proxy solicitation if there is no real issuer meeting to be regulated.

2. *Does participation require SEC 13D reporting?* Considering the reported 9.7% beneficial ownership of the host, legal advisors to investors must decide whether participating in the “Meeting” could be viewed as “acting in concert.” There are of course different types of participation to be considered, ranging from simply attending and listening to the more active granting of authority for “voting.” Even the simplest acceptance of an invitation to the meeting, though, is complicated by Pershing Square’s statement that it is asking shareholders for their agreement to support a “coordinated and powerful” process intended to influence Allergan management.<sup>5</sup> And since this process is not in fact a real issuer vote, securities law experts will have to determine whether an investor can rely upon SEC regulations applicable to voting.

The Forum will of course report any determinations of these legal issues that may interest Forum participants.

### Investor interest in shareholder-hosted meetings

Most Forum participants naturally support the expanded use of forum-type processes. Whether the legal issues of the Pershing Square variation can be resolved to allow practical investor participation or not, it has stimulated the following constructive observations:

- **Opinion polling** – Many investors as well as corporate managers are enthusiastic about using a quasi-voting process to survey investor views,<sup>6</sup> since the recent proliferation of online survey tools has made it impractical to get meaningful responses to conventional questionnaires. The Pershing Square presentation of a simple vote for or against its advocate-defined proposal, however, will not produce as much information about investor views as a questionnaire designed for that purpose.<sup>7</sup> Opinion research professionals have also expressed concerns about distortions resulting from higher

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<sup>4</sup> See [May 12, 2014 Bloomberg View: “Bill Ackman Will Hold a Pretend Allergan Shareholder Meeting”](#) and the referenced [April 23, 2014, Allergan, Inc., SEC Form 8-K, Exhibit 4.1: Rights Agreement, dated as of April 22, 2014, between Allergan, Inc. and Wells Fargo Bank, N.A.](#)

<sup>5</sup> See the previously referenced [May 13, 2014, Pershing Square Capital Management, L.P., SEC Form PREN14A.](#)

<sup>6</sup> See [May 15, 2014, Michael R. Levin posting in The Activist Investor Blog: “A Shareholder ‘Get Together.’”](#)

<sup>7</sup> For an example of the type of survey that had been feasible until recently, using the same distribution channels to a company’s shareholders that is used for proxy voting but with a questionnaire designed for more detailed views than allowed by a simple vote, see the [April 2, 2010 Forum Report: Survey of Johnson & Johnson Shareholders | Voting Criteria and Information Requirements for 2010 Annual Meeting.](#)

participation rates by supporters of the “Proposed Resolution” than by opposed or indifferent shareholders, and by the absence of independent polling management to assure the integrity of both participant privacy and reporting.

*In summary, Pershing Square’s use of a quasi-voting process may be a very effective means of attracting attention to encourage meaningful levels of shareholder response. Further refinements should be considered to eliminate regulatory concerns and improve the quality of results.*

- ▶ **Exchange of investor views** – Although the preliminary “Proxy Statement” does not present details beyond bracketed spaces for future identification of a time and place, it is assumed that the physical convening of the “Meeting” will present opportunities for attendees to exchange views. The general design of the Pershing Square process, however, appears to be focused almost exclusively on the solicitation of support for its “Proposed Resolution,” and in that context it may not be constructive to invite debates and digressions.

*It may be assumed that the Pershing Square plan was not developed for the purpose of providing an open exchange of investor views, but the legal as well as access issues raised by this innovation should stimulate thinking to improve both the old Denton model of shareholder-hosted “town hall” meetings and the Forum model of independently moderated meetings.*

- ▶ **Supporting a petition** – Though presented in language to fit SEC regulations for proxy voting, Pershing Square has actually presented a very innovative means for shareholders to petition a company’s management. There are of course many legal and administrative issues to be resolved, but some refinement of this petitioning process could provide an effective alternative to current practices relying upon shareholder submissions of precatory proposals at annual meetings.

*Pershing Square’s invention should be considered very broadly as a possible foundation for “petitioning” in situations that justify higher levels of attention.*



It should be noted that the Forum has had no involvement in the Pershing Square plan for an Allergan “Meeting.” As an observer, I thank those of you who have offered views and invite continuing discussion of this innovation’s potential applications to investor interests.

*GL – May 21, 2014*

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