BioCardia, Inc.
Form PRE 14C
March 09, 2017

INFORMATION STATEMENT PURSUANT TO SECTION 14 (C)

OF THE SECURITIES EXCHANGE ACT OF 1934

Check the appropriate box:

Preliminary Information Statement
Confidential, for Use of the Commission Only (as permitted by Rule 14c-5 (d)(2))
Definitive Information Statement

BIOCARDIA, INC.

(Name of Registrant As Specified In Charter)

Payment of Filing Fee (Check the appropriate box):

No fee required.

Fee computed on table below per Exchange Act Rules 14c-5(g) and 0-11.

1) Title of each class of securities to which transaction applies:

2) Aggregate number of securities to which transaction applies:

3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (Set forth the amount on which the filing fee is calculated and state how it was determined):

4) Proposed maximum aggregate value of transaction:

5) Total fee paid:

Fee paid previously with preliminary materials.

Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

1) Amount Previously Paid:

2) Form, Schedule or Registration Statement No:

3) Filing Party:

4) Date Filed:

BIOCARDIA, INC.

125 Shoreway Road, Suite B

San Carlos, CA 94070

NOTICE OF STOCKHOLDER ACTION BY WRITTEN CONSENT

Dear Stockholders:

We are writing to advise you that we have received approval to:

(1) ratify the form of the indemnification agreement (the "Indemnification Agreement") and authorize the Company to enter into the same with each of its current and future directors; and

(2) amend and restate our certificate of incorporation (the "Certificate") to, among other things,

a. provide for a classified board of directors;

b. limit the ability of stockholders to call special meetings;

c. limit the ability of stockholders to act by written consent; and

d. establish a super-majority voting threshold for certain amendments to the Certificate or the Company's Bylaws.

(3) amend and restate the Company's Bylaws.

These actions were unanimously approved by our Board of Directors (the "Board"), and by stockholders who hold a majority of our issued and outstanding voting securities. We anticipate an effective date of April , 2017, or as soon thereafter as practicable in accordance applicable law, including the Delaware General Corporation Law ("DGCL").

WE ARE NOT ASKING YOU FOR A PROXY, AND YOU ARE REQUESTED NOT TO SEND US A PROXY.

No action is required by you. The accompanying information statement is furnished only to inform our stockholders of the actions described above before they take place in accordance with DGCL and Rule 14C of the Securities Exchange Act of 1934, as amended. This Information Statement is first mailed on or about March , 2017.

At the direction of the Board of Directors of

BIOCARDIA, INC.

By: /s/ Peter Altman
Peter Altman
President and Chief Executive Officer

THIS INFORMATION STATEMENT IS BEING PROVIDED TO

YOU BY THE BOARD OF DIRECTORS OF THE COMPANY

WE ARE NOT ASKING YOU FOR A PROXY AND YOU ARE

REQUESTED NOT TO SEND US A PROXY

BIOCARDIA, INC.

125 Shoreway Road, Suite B

San Carlos, CA 94070

INFORMATION STATEMENT

March 9, 2017

GENERAL INFORMATION

This Information Statement has been filed with the Securities and Exchange Commission and is being furnished, pursuant to Section 14C of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to the holders (the "Stockholders") of the common stock, par value $0.001 per share (the "Common Stock"), of BioCardia, Inc., a Delaware Corporation (the "Company"), to notify such Stockholders that on or about March 1, 2017, the Company received written consents in lieu of a meeting of Stockholders from holders of voting shares representing at least 58.4% of the shares of the total issued and outstanding shares of voting stock of the Company (the "Majority Stockholders") to (1) approve and ratify the form of Indemnification Agreement and authorize the Company to enter into the same with each of its current and future directors; (2) amend and restate the Certificate to, among other things: (a) limit the ability of stockholders to act by written consent; (b) provide for a classified board of directors; (c) limit the ability of stockholders to call special meetings; and (d) establish a super-majority voting threshold for certain amendments to the Certificate or the Company's Bylaws; and (3) amend and restate the Company's Bylaws. The Board has also unanimously approved the Actions subject to Stockholder approval. Accordingly, we have received all necessary approvals and your consent is not required and is not being solicited in connection with the approvals. The above-named actions are hereinafter referred to collectively as the "Actions".

The Actions will be effective on the twenty first day after the Company has mailed this Information Statement under Regulation 14C to the Stockholders entitled to receive the same, or as soon thereafter as is practicable.

WE ARE NOT ASKING YOU FOR A PROXY AND YOU ARE REQUESTED NOT TO SEND A PROXY.

RECOMMENDATION OF THE BOARD OF DIRECTORS

On October 24, 2016, we completed a business combination pursuant to which BioCardia Lifesciences, Inc. became our wholly-owned subsidiary. In connection with the transaction, Steven Rubin, Stephen Liu and Subbarao Uppaluri, our directors before the business combination, resigned from their positions as directors and Peter Altman Ph.D., Jay Moyes, Thomas Quertermous, Simon Stertzer, Allan Tessler, Fernando L. Fernandez, Richard Krasno and Richard C. Pfenniger Jr., were appointed as their replacements. The new directors believe that the Actions are in the best interest of the Company and the Stockholders as (1) the Indemnification Agreement will induce current and future directors and officers to serve or continue to serve as a director and/or officer of the Company; (2) the amending and restating of the Company's Certificate and Bylaws are deemed to be reasonable, advisable, fair, and beneficial to the achievement of the Company's purposes. No assurance can be given that any of the foregoing will ultimately be proven to be correct.

The Board unanimously approved the Actions, and Stockholders who hold a majority of our issued and outstanding voting securities have also approved the Actions.

This Information Statement contains a brief summary of the material aspects of the actions approved by the Board and the Majority Stockholders.

ACTION 1:

APPROVAL OF INDEMNIFICATION AGREEMENT

The Board has unanimously approved a form of indemnification agreement to be entered into by the Company with its directors and executive officers (the "Indemnification Agreement"), which is incorporated herein by reference to Exhibit A of this Information Statement.

The terms of the Indemnification Agreement provide that the Company will indemnify the directors and officers to the full extent authorized or permitted by the provisions of the DGCL, as such may be amended from time to time. Each director and officer of the Company will enter into an Indemnification Agreement with the Company.

Section 144 of the DGCL provides that a transaction between a corporation and one or more of its directors or a corporation and another entity in which one or more of its directors has a financial interest or is an officer or director shall not be void or voidable provided that: (i) the material facts of that transaction are disclosed or known to the board of directors and the board of directors authorizes the transaction by a majority of the disinterested directors of the board; (ii) the material facts of that transaction are disclosed or known to the stockholders and the stockholders authorize the transaction by a vote of the stockholders; or (iii) the transaction is fair to the corporation as of the time it is authorized, approved or ratified by the board of directors, a committee or the stockholders. Each director of the Company will enter into an Indemnification Agreement and have a financial interest therein.

The purpose of the Indemnification Agreement is to induce current and future directors and officers to serve or continue to serve as a director and/or officer of the Company. This Agreement is a supplement to and in furtherance of the Bylaws and the Certificate and any resolutions adopted pursuant thereto by the Company's board of directors or Stockholders, and shall not be deemed a substitute therefor, nor to diminish or abrogate any rights of parties.

ACTION 2:

APPROVAL OF AMENDMENT AND RESTATEMENT OF CERTIFICATE OF INCORPORATION

The Board unanimously approved an amendment and restatement of our Certificate in the form attached as Exhibit B (the "Amended Certificate").

The Amended Certificate includes several defensive provisions. These defensive measures could have the effect of rendering more difficult or discouraging a merger, tender offer or other takeover attempt that some, or a majority, of the Company's Stockholders might believe to be in their best interests or in which Stockholders might receive a premium for their stock over the then current market price of such stock. The Company's management is not aware of any current effort to accumulate shares of the Company's common stock or to otherwise obtain control of the Company. Rather, the defensive provisions included in the Amended Certificate are being proposed at this time in order to protect our and our Stockholders' interests and preserve the long-term value of the Company.

The following description of certain aspects of the Amended Certificate is intended to be a summary only and is qualified in its entirety by the terms of the Amended Certificate.

Amendments by Written Consent of Stockholders

The DGCL provides that, unless a company's certificate of incorporation provides otherwise, stockholders may take action without a meeting if the holders of stock having the minimum number of votes necessary to authorize such action sign a written consent. The Amended Certificates provides that, except (i) with respect to the approval of stock splits or reverse stock splits, or (ii) as otherwise expressly provided by the terms of any series of Preferred Stock permitting the holders of such series of Preferred Stock to act by written consent, any action permitted to be taken by stockholders may only be taken at an Annual Meeting or Special Meeting of stockholders.

There are advantages of limiting stockholder action by written consent and these advantages include:

- requiring stockholder action only at a stockholder meeting increases the likelihood that the Company and all of its stockholders will be given an opportunity to consider carefully and respond prudently to important stockholder proposals; and

- requiring stockholder action only at a stockholder meeting avoids untimely action in a context that might not permit stockholders to have the full benefit of the knowledge, advice and participation of the Company's management and Board.

There are disadvantages to limiting stockholder action by written consent, and these disadvantages may include:

- the view that provisions limiting action by written consent of the stockholders are inconsistent with principles of good corporate governance because they can, either in appearance or practice, limit stockholders' ability to participate effectively in corporate governance; and

- the expense of holding a meeting of stockholders can be considerable, and it is inefficient to hold a stockholders meeting if the holders of a significant number of voting stock have already determined how a matter will be decided.

In making its decision, the Board balanced the various interests of those who view the right to act by written consent as good corporate governance and the attendant advantages of acting by written consent, and the protections afforded stockholders by precluding action by written consent. The Board concluded that the best interests of the Company and Stockholders would be served by limiting the ability of Stockholders to act by written consent.

Special Meetings of Stockholders

Elimination of the Stockholders' power to call a special meeting provides anti-takeover protection for the Company. The Board is committed to ensuring effective corporate governance policies and practices, which ensure that the Company is governed with high standards of ethics, integrity and accountability and in the best interest of the Stockholders. The Board, in its continuing review of corporate governance matters, has determined that eliminating the Stockholders' power to call special meetings of the Stockholders will best serve the purposes of the Company and the interests of the Stockholders.

In deciding to approve the elimination of the Stockholders' power to call a special meeting, the Board considered the arguments against elimination of this power, in particular that elimination of the Stockholders' power to call a special meeting may hinder the Stockholders' ability to affect company matters. After giving careful consideration to Stockholder views concerning this matter, the Board determined that the benefits of eliminating Stockholders' power to call special meetings outweighed any detriment of such provisions.

Classification of Directors

A classified (or "staggered") board of directors provides effective protection against hostile takeover tactics and proxy contests, because it makes it difficult to gain control of the board of directors without the cooperation or approval of the incumbent directors. A classified board also supports continuity and stability on the board and in the overall business of the Company, as a majority of directors will always have prior experience as directors of the Company. The Board believes that these benefits outweigh any concern that classified boards make it more difficult for stockholders to replace a majority of the board even where a majority of the stockholders are unsatisfied with the directors' performance, and any argument that annually elected boards increase the accountability of directors by providing stockholders with the opportunity to express their opinions on the performance of the entire board of directors each year.

The initial Class I directors will consist of Peter Altman and Fernando L. Fernandez, who will hold office initially for a term expiring at the 2017 annual meeting of Stockholders. The initial Class II directors will consist of Thomas Quertermous, Richard Pfenniger and Allan R. Tessler, who will hold office initially for a term expiring at the 2018 annual meeting of Stockholders. The initial Class III directors will consist of Richard Krasno, Jay M. Moyes and Simon H. Stertzer, who will hold office initially for a term expiring at the 2019 annual meeting of Stockholders. At each annual meeting following this initial classification and allocation, the successors to the class of directors whose terms expire at that meeting would be elected for a term of three years.

In the event that a vacancy occurs during the year, the board of directors may appoint a director to fill the vacancy. Any director elected in this manner shall hold office for the remainder of the full term of the director for which the vacancy was created or occurred and until such director's successor shall have been elected and qualified.

Supermajority Vote for Certain Amendments to the Certificate and for Amendments to Bylaws

The use of supermajority voting requirements provides anti-takeover protection for the Company. The Board is committed to ensuring effective corporate governance policies and practices, which ensure that the Company is governed with high standards of ethics, integrity and accountability and in the best interests of the Stockholders. The Board, in its continuing review of corporate governance matters, has determined that providing for supermajority voting requirements for certain amendments to the Certificate will best serve the purposes of the Company and the interests of the Stockholders. In deciding to approve the supermajority requirements, the Board considered the arguments against this action, in particular that use of supermajority voting requirements to amend certain provisions of the Certificate may hinder Stockholders' ability to affect Company matters. After giving careful consideration to stockholder views concerning this matter, the Board determined that the benefits of providing for the supermajority voting requirements outweighed any detriment of such provisions.

The Board also believes that the supermajority provisions contained in the Amended Certificate regarding amendments to the Bylaws are appropriate. Following careful consideration of the implications of the amendment, the Board determined that it is appropriate to approve the Amended Certificate requiring the supermajority stockholder voting provisions for stockholders to adopt, amend, or repeal any provision of the Bylaws of the Company.

ACTION 3:

APPROVAL OF AMENDMENT AND RESTATEMENT OF BYLAWS

The Board unanimously approved an amendment and restatement of our Bylaws in the form attached as Exhibit C (the "Amended Bylaws"). The Amended Bylaws also give effect to the limitations on the Stockholders' ability to act by written consent and to call special meetings of the Stockholders, as well as supermajority voting requirement for further amendments to the Amended Bylaws by the Stockholders. The Amended Bylaws also advance notice procedures for Stockholders to bring business before the annual meeting.

While the Amended Bylaws are not required to be submitted to a vote of the Stockholders, in light of the Bylaws being amended and restated in their entirety, the Board felt it was appropriate for the amended and restatement to be

conditioned on the approval of the Stockholders.

ADDITIONAL INFORMATION

The Company is subject to the informational requirements of the Exchange Act and in accordance therewith files reports, proxy statements and other information including annual and quarterly reports on Form 10-K and 10-Q (the "1934 Act Filings") with the Securities and Exchange Commission (the "Commission"). Reports and other information filed by the Company can be inspected and copied at the public reference facilities maintained at the Commission 100 F Street, Washington, DC 20549 at prescribed rates. The Commission maintains a web site on the Internet (http://www.sec.gov) that contains reports, proxy and information statements and other information regarding issuers that file electronically with the Commission through the Electronic Data Gathering, Analysis and Retrieval System ("EDGAR").

OUTSTANDING VOTING SECURITIES

As of March 2, 2017, there were 457,575,631 shares of Common Stock outstanding. Each share of outstanding Common Stock is entitled to one vote on matters submitted for Stockholder approval.

On or about March 1, 2017, the Company received written consents in lieu of a meeting of stockholders from holders of voting shares representing at least 58.4% of the voting shares then outstanding approving the Actions. As the Actions were approved by the Majority Stockholders, no proxies are being solicited with this Information Statement.

The DGCL provides in substance that unless the Company's Certificate provides otherwise, stockholders may take action without a meeting of stockholders and without prior notice if a consent or consents in writing, setting forth the action so taken, is signed by the stockholders having not less than the minimum number of votes that would be necessary to take such action at a meeting at which all shares entitled to vote thereon were present. The consent of the holders of a majority of the outstanding shares of voting stock is necessary to take the Actions.

PRINCIPAL STOCKHOLDERS

Beneficial ownership is determined in accordance with the rules of the Securities and Exchange Commission and generally includes voting or investment power with respect to securities. In accordance with Securities and Exchange Commission rules, shares of our Common Stock which may be acquired upon exercise of stock options which are currently exercisable or which become exercisable within 60 days of the date of the applicable table below are deemed beneficially owned by the holders of such options and are deemed outstanding for the purpose of computing the percentage of ownership of such person, but are not treated as outstanding for the purpose of computing the percentage of ownership of any other person.

As of March 2, 2017, there were 457,575,631 shares of Common Stock outstanding. The following table sets forth information with respect to the beneficial ownership of our Common Stock as of March 2, 2017 by (i) each stockholder known by us to be the beneficial owner of more than 5% of our Common Stock (our only class of voting securities), (ii) each of our directors and named executive officers, and (iii) all of our directors and executive officers as a group. To the best of our knowledge, except as otherwise indicated, each of the persons named in the table has sole voting and investment power with respect to the shares of our Common Stock beneficially owned by such person, except to the extent such power may be shared with a spouse. To our knowledge, none of the shares listed below are held under a voting trust or similar agreement, except as noted. Other than the Merger, to our knowledge, there is no arrangement, including any pledge by any person of our securities or any of our parents, the operation of which may at a subsequent date result in a change in control of the Company.

Unless otherwise noted below, the address of each person listed on the table is c/o BioCardia, Inc., 125 Shoreway Road, Suite B, San Carlos, CA 94070.

Name and Address of Beneficial Owner	**Number of Shares Beneficially Owned**	**Percentage of Beneficial Ownership**
5% Stockholders:		
Entities affiliated with Stertzer Family Trust [(1)]	43,469,101	9.48%
Sabiah Ltd. [(2)]	27,065,159	5.91%
Frost Gamma Investments Trust [(3)]	130,503,835	28.52%

OPKO Health, Inc.	24,252,769	5.30%
Entities affiliated with Gerald P. Peters [4]	28,131,315	6.15%
Named Executive Officers and Directors:		
Peter Altman, Ph.D. [5]	13,876,195	3.00%
David McClung [6]	513,437	*
Eric Duckers [7]	142,660	*
Fernando L. Fernandez	-	*
Richard Krasno	-	*
Jay M. Moyes [8]	376,257	*
Richard C. Pfenniger, Jr.	600,000	*
Thomas Quertermous, M.D.	1,305,466	*
Simon H. Stertzer, M.D. [9]	43,469,101	9.48%
Allan R. Tessler [10]	9,938,197	2.17%
All directors and executive officers as a group (12 people)	70,993,923	15.46%

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* Less than 1.0%.

(1) Consists of (i) 31,039,310 shares of Common Stock held by the Stertzer Family Trust, (ii) 4,916,171 shares of our Common Stock held by Windrock Enterprises L.L.C., (iii) 1,258,925 shares of our Common Stock held by the Stertzer Gamma Trust, (iv) 5,386,743 shares our Common Stock held by Stertzer Holdings LLC, and (v) 867,952 shares subject to options, held by Dr. Stertzer. Dr. Stertzer and his spouse are co-trustees of the Stertzer Family Trust, and sole members and managers of Windrock Enterprises L.L.C., and share voting and dispositive control over the shares held by the Stertzer Family Trust and Windrock Enterprises L.L.C. Dr. Stertzer is the grantor of the Stertzer Gamma Trust and may be deemed to have voting and dispositive control over the shares held by the Stertzer Gamma Trust. Dr. Stertzer may be deemed to have voting and dispositive control over the shares held by Stertzer Holdings LLC.

(2) Luis M de la Fuente, his wife and child are the stockholders of Sabiah Ltd. and share voting and dispositive control over the shares held by Sabiah Ltd. The address for this entity is P.O. Box 438, Road Town, Tortola, British Virgin Islands.

(3) Dr. Phillip Frost is the trustee and Frost Gamma Limited Partnership is the sole and exclusive beneficiary of Frost Gamma Investments Trust. Dr. Frost is one of two limited partners of Frost Gamma Limited Partnership. The general partner of Frost Gamma Limited Partnership is Frost Gamma, Inc. and the sole shareholder of Frost Gamma, Inc. is Frost-Nevada Corporation. Dr. Frost is also the sole shareholder of Frost-Nevada Corporation. The address for these entities is 4400 Biscayne Boulevard, Suite 1500, Miami, Florida 33137.

(4) Consists of (i) 9,296 shares of our Common Stock held by Gerald P. Peters, (ii) 9,664,629 shares of our Common Stock held by The Peters Corporation, (iii) 3,613,351 shares of our Common Stock held by the Peters Family Art Foundation, (iv) 5,778,011 shares of our Common Stock held in the Kathleen K. Peters & Gerald P. Peters III Revocable Trust UTA dtd. Sept. 29, 2008, (v) 8,290,038 shares of our Common Stock held in an account for the benefit of Mr. Peters, and (vi) 775,990 shares of our Common Stock held in an account for the benefit of his spouse. Gerald P. Peters, President, Chief Executive Officer and Financial & Fiscal Officer of the Peters Family Art Foundation may be deemed to have voting and dispositive control over the shares held by the Peters Family Art Foundation. The address for the Peters Family Art Foundation is P.O. Box 2437, Santa Fe, NM 87504. Mr. Peters may be deemed to have voting and dispositive control over the shares held by The Peters Corporation.

(5) Consists of 8,338,109 shares of our Common Stock held by Dr. Altman and 5,538,086 shares subject to options.

(6) Consists of 513,437 shares subject to options.

(7) Consists of 142,660 shares subject to options.

(8) Consists of 159,006 shares of our Common Stock held by Drayton Investments LLC and 217,248 shares subject to options held by Mr. Moyes. Mr. Moyes and Dr. Gregory Critchfield are the managing members of Drayton Investments, LLC and share voting and dispositive control over the shares held by Drayton Investments LLC.

(9) Consists of (i) 31,039,310 shares of Common Stock held by the Stertzer Family Trust, (ii) 4,916,171 shares of our Common Stock held by Windrock Enterprises L.L.C., (iii) 1,258,925 shares of our Common Stock held by the Stertzer Gamma Trust, (iv) 5,386,743 shares our Common Stock held by Stertzer Holdings LLC, and (v) 867,952 shares subject to options, held by Dr. Stertzer. Dr. Stertzer and his spouse are co-trustees of the Stertzer Family Trust, and sole members and managers of Windrock Enterprises L.L.C., and share voting and dispositive control over the shares held by the Stertzer Family Trust and Windrock Enterprises L.L.C. Dr. Stertzer is the grantor of the Stertzer Gamma Trust and may be deemed to have voting and dispositive control over the shares held by the Stertzer Gamma Trust. Dr. Stertzer may be deemed to have voting and dispositive control over the shares held by Stertzer Holdings LLC.

(10) Consists of (i) 162,941 shares subject to options held by Mr. Tessler and (ii) 6,965,106 shares of our Common Stock held by ART/FGT Family Limited Partnership, (iii) 1,405,075 shares of our Common Stock held by International Financial Group, and (iv) 1,405,075 shares of our Common Stock held by The Tessler Family Limited Partnership. Mr. Tessler and his spouse are limited partners of the ART/FGT Family Limited Partnership and share voting and dispositive control over the shares held by the ART/FGT Family Limited Partnership. The address for the ART/FGT Family Limited Partnership is 2500 Moose Wilson Road, Wilson, Wyoming 83014. Mr. Tessler may be deemed to have voting and dispositive control over the shares held by the

Tessler Family Limited Partnership and International Financial Group.

DISSENTER'S RIGHTS OF APPRAISAL