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REPORT

Shareholder Proposals

Gyrodyne May Omit Proposal on Right Of Shareholders to Call Special Meetings

Gyrodyne Co. of America Inc. may exclude from proxy materials for its upcoming annual meeting a shareholder proposal that the bylaws be amended to provide, in part, that special meetings may be called at the request of the holders of not less than 15 percent of all the shares entitled to vote at such meetings, the staff of the Division of Corporation Finance said Oct. 31 (*Gyrodyne Co. of America Inc.*, SEC No-Action Letter, avail. 10/31/05).

Specifically, the staff said that it would not recommend enforcement action if the proposal is excluded in reliance on 1934 Securities Exchange Act Rule 14a-8(i)(9). That provision allows exclusion of proposals that directly conflict with one of the company's own proposals to be submitted to shareholders at the same meeting.

Gyrodyne's counsel advised the staff that the proposal, submitted by Everest Special Situations L.P., resolves that '' 'the Gyrodyne By-Laws relating to Meeting[s] of Stockholders be amended to provide that special meetings of the stockholders of Gyrodyne may be called at any time by the President, Chairman of the Board, the Board of Directors or at the request of the holders of not less than fifteen percent (15%) of all the shares entitled to vote at any such meeting.' ''

Company's Proposal. Counsel urged the staff that the proposal may be excluded from Gyrodyne's 2005 proxy materials under Rule 14a-8(i)(9) ''because it directly conflicts with one of the Company's proposals to be submitted to the shareholders at its 2005 annual meeting.'' In this regard, counsel noted that the company intends to submit a proposal to amend the bylaws to allow shareholders holding not less than 30 percent of shares entitled to vote at a shareholders meeting to call a special meeting.

Counsel asserted that the staff has interpreted Rule 14a-8(i)(9) as allowing a company to omit a shareholder proposal if there is ''some basis'' for concluding that an affirmative vote on both the shareholder's proposal and the company's proposal would lead to an inconsistent or inconclusive mandate from the shareholders. In fact, counsel said, the staff ''has permitted exclusion even if the proposal could be characterized as an 'alternative' to, rather than the 'opposite' of, the registrant's proposal,'' (See, *Chevron Corp.*, SEC No-Action Letter, avail. 2/27/91).

''The Company believes that the Proposal is at best an alternative to, and at worst inconsistent with, a proposal that the Company intends to present at the annual meeting and, therefore, conflicts with the Company's proposal.''

Further, according to counsel, ''the Proposal cannot be salvaged by inclusion of both proposals in the Proxy Materials and instructing the shareholders to vote for one or the other, but not both.'' The staff has recognized that ''the possibility of shareholders inadvertently voting for both proposals, leading to an inconsistent or inconclusive mandate'' is not cured by structuring the proxy form to allow shareholders to vote ''either/or,'' counsel wrote.

In response, the staff said that it ''will not recommend enforcement action . . . if Gyrodyne omits the proposal from its proxy materials in reliance on rule 14a-8(i)(9).''

Special Counsel Heather Maples signed the staff's response. The request for a no-action position was submitted by Alon Kapen, Farrell Fritz, Uniondale, N.Y.

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