



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

April 4, 2019

Bradley J. Bondi
Cahill Gordon & Reindel LLP
Eighty Pine Street
New York, NY 10005-1702

Re: ***SEC v. Salix Pharmaceuticals, Ltd.*, Civil Action No. 1:18-cv-08886 (S.D.N.Y., Sept. 28, 2018)**
Bausch Health Companies, Inc., previously known as Valeant Pharmaceuticals International, Inc. – Waiver Request of Ineligible Issuer Status under Rule 405 of the Securities Act of 1933

Dear Mr. Bondi:

This is in response to your letter dated September 27, 2018, written on behalf of Valeant Pharmaceuticals International, Inc., now known as Bausch Health Companies, Inc. (“Bausch”) and constituting an application for relief from Bausch being considered an “ineligible issuer” under clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act of 1933 (“Securities Act”). Bausch requests relief from being considered an ineligible issuer under Rule 405, as a result of the entry of a judgment (“Final Judgment”) on April 4, 2019 in the United States District Court for the Southern District of New York relating to the complaint filed by the Commission on September 28, 2018 against Salix Pharmaceuticals, Ltd. (“Salix”), a subsidiary of Bausch, in *SEC v. Salix Pharmaceuticals, Ltd.*, (Civil Action No. 1:18-cv-08886).

Based on the facts and representations in your letter, and assuming Salix complies with the Final Judgment, we have determined that Bausch has made a showing of good cause under clause (2) of the definition of ineligible issuer in Rule 405 and that Bausch will not be considered an ineligible issuer by reason of the entry of the Final Judgment. Accordingly, the relief described above from Bausch being an ineligible issuer under Rule 405 of the Securities Act is hereby granted. Any different facts from those represented or failure to comply with the terms of the Final Judgment would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Tim Henseler
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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*ADMITTED IN DC ONLY

September 27, 2018

VIA EMAIL

Timothy B. Henseler, Esq.
Chief, Office of Enforcement Liaison
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of Salix Pharmaceuticals, Ltd.

Dear Mr. Henseler:

On behalf of Valeant Pharmaceuticals International, Inc. ("Valeant" or "Applicant"), we hereby seek a determination by the Securities and Exchange Commission (the "Commission") that Valeant will not be an ineligible issuer under Rule 405 under the Securities Act of 1933 (the "Securities Act") for any purpose, including the definition of "well-known seasoned issuer" in Rule 405, as a result of the entry of a settlement and final judgment (the "Judgment") against Salix Pharmaceuticals, Ltd. ("Salix"), a subsidiary of Valeant. We respectfully submit that relief from the ineligible issuer provisions is appropriate in the circumstances of this case for the reasons given below. We further request that the requested determination be effective upon the entry of the Judgment.

BACKGROUND

The staff of the Division of Enforcement (the "Staff") has engaged in settlement discussions with Salix in connection with the Staff's investigation of Salix. As a result of these discussions, Salix submitted a Consent of Defendant Salix Pharmaceuticals, Ltd. (the "Consent"), which the Staff presented to the United States District Court for the Southern District of New York in connection with a complaint (the "Complaint") against Salix related to the Staff's investigation.

In the Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Salix consents to the entry of a final judgment permanently restraining and enjoining it from violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5(b) thereunder [17 C.F.R. § 240.10b-5(b)], Section 17(a)(2) of the Securities Act [15 U.S.C. § 77q(a)(2)], and Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rule 13a-13 thereunder [17 C.F.R. § 240.13a-13], without admitting or denying the assertions contained therein (other than those relating to the jurisdiction of the Commission, which are admitted). The Complaint alleges that Salix's violative conduct occurred from about 2013 to 2014, prior to Salix being acquired by Valeant.

Valeant is a publicly traded company with its common stock listed on the New York Stock Exchange and is a reporting company under the Exchange Act. In its most recently filed Form 10-K, Valeant reported that it is a well-known seasoned issuer as defined in Rule 405 of the Securities Act.¹ Salix is a subsidiary of Valeant and was acquired by Valeant on April 1, 2015. All alleged conduct at issue occurred at Salix prior to Valeant's acquisition of Salix.

DISCUSSION

In 2005, the Commission revised the registration, communication, and offering processes under the Securities Act (the "Securities Offering Reform Rules").² As part of the Securities Offering Reform Rules, the Commission added a new category of issuer, the well-known seasoned issuer ("WKSI"). The Commission defined a WKSI as an issuer that is required to file reports pursuant to Section 13(a) or Section 15(d) of the Exchange Act and that satisfies other requirements, including the requirement that the issuer not be an ineligible issuer. The Securities Offering Reform Rules also permit, under Rules 163, 164 and 433 of the Securities Act, expanded communications with potential investors by issuers that are not deemed ineligible issuers.

Under Rule 405, an issuer will be deemed an ineligible issuer when, among other things: "(vi) Within the past three years (but in the case of a decree or order agreed to in a settlement, not before December 1, 2005), the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a government action that: (A) Prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws; (B) Requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or (C) Determines that the person violated the anti-fraud provisions of the federal securities laws."³

¹ See Valeant Pharmaceuticals International, Inc., Annual Report (Form 10-K) (Feb. 28, 2018).

² See Securities Offering Reform, Securities Act Release No. 8591 (July 19, 2005), Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,790 (Aug. 3, 2005).

³ Rule 405, 17 C.F.R. § 230.405 (definition of "ineligible issuer").

Under Rule 405, the Commission (or the Division of Corporation Finance pursuant to delegated authority⁴) is authorized to relieve an issuer of such status: “An issuer shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”⁵

In the Division’s Revised Statement on Well-Known Seasoned Issuer Waivers (the “Revised Statement”), issued on April 24, 2014, it identified certain factors relevant to its assessment in determining whether an issuer has shown good cause that ineligible issuer status is not necessary for the public interest or the protection of investors, including: (i) “the nature of the violation or conviction and whether it involved disclosure for which the issuer or any of its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosure currently and in the future”; (ii) “whether the conduct involved a criminal conviction or a scienter based violation, as opposed to a civil or administrative non-scienter based violation”; (iii) “who was responsible for and what was the duration of the misconduct”; (iv) “what remedial steps the issuer took”; and (v) “what the impact would be if the waiver request is denied.”⁶

As reported in its most recent Form 10-K, Valeant currently satisfies the requirements for WKSI treatment⁷ and benefits from the advantages resulting from such status, as well as other benefits available to issuers that are not “ineligible issuers,” as that phrase is defined under Rule 405. Absent the relief requested herein, Valeant would become an ineligible issuer because of the terms of the Judgment against Salix. For the following reasons, there is good cause that it is not necessary under the circumstances for Valeant to be considered an ineligible issuer, and Valeant respectfully requests a waiver, effective as of the date of the entry of the Judgment, from being considered an ineligible issuer under Rule 405 as a result of the Judgment.

1. A waiver is appropriate in view of the nature of the alleged misconduct. The misconduct alleged in the Complaint relates to alleged misstatements by *Salix* of wholesaler inventory levels to boost earnings and meet estimates by stock analysts, all of which is alleged to have occurred *before* Valeant acquired *Salix* in April 2015. The conduct alleged in the

⁴ Rule 30-1 provides in relevant part that “[p]ursuant to the provisions of Public Law No. 87-592 . . . , the Securities and Exchange Commission hereby delegates, until the Commission orders otherwise, the following functions to the Director of the Division of Corporation Finance to be performed by him or under his direction by such person . . . as may be designated from time to time by the Chairman of the Commission: [*Securities Act Functions*] (a) With respect to registration of securities pursuant to the Securities Act . . . (10) To authorize the granting or denial of applications, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer as defined in Rule 405.” 17 C.F.R. § 200.30-1(a)(10).

⁵ Rule 405, 17 C.F.R. § 230.405.

⁶ Division of Corporation Finance “Revised Statement on Well-Known Seasoned Issuer Waivers,” April 24, 2014.

⁷ See Valeant Pharmaceuticals International, Inc., Annual Report (Form 10-K) (Feb. 28, 2018).

Complaint does not pertain to capital raising activities by Salix⁸ and does not relate *at all* to any activity (much less activity associated with raising capital) by Valeant or any of its subsidiaries while such subsidiaries were under the control of Valeant. Rather, the Complaint alleges conduct undertaken by Salix *prior* to Valeant's April 1, 2015 acquisition of Salix.

Furthermore, the alleged violations in the Complaint stem from the acts of *former officers of Salix*, whom Salix forced either to resign or to retire during the course of the Salix Audit Committee's then-ongoing investigation. Moreover, the alleged violations in the Complaint relate to the inventory levels for fiscal quarters in 2013 and 2014, and those levels subsequently were restated in November 2014.

Notably, none of the violations alleged in the Complaint involves individuals currently employed by Salix or Valeant. Following the April 2015 purchase of Salix by Valeant, Valeant removed the entire Salix management team, eliminating any risk that those individuals will repeat the alleged conduct. Accordingly, the violations alleged in the Complaint do not call into question the ability of Valeant to provide reliable disclosures currently and in the future.

2. The Complaint alleges scienter- and non-scienter based violations.

The Division of Corporation Finance's Revised Statement on Well-Known Seasoned Issuer Waivers states that the Division of Corporation Finance "will review whether the conduct involved a criminal conviction or scienter based violation, as opposed to a civil or administrative non-scienter based violation."⁹ Where there is a scienter-based violation involving disclosure for which an issuer's subsidiary was responsible, the issuer's burden to show good cause that a waiver is justified is significantly greater.¹⁰

The Complaint alleges that Salix violated Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder. These are scienter-based claims. The Complaint also alleges that Salix violated Section 17(a)(2) of the Securities Act, Section 13(a) of the Exchange Act, and Rule 13a-13 under Section 13(a) under the Exchange Act. These are not scienter-based claims. The Complaint relates only to civil causes of action, and no criminal charges were filed against Salix or any of its directors, officers, or other employees. As mentioned above, Salix neither admits nor denies the allegations in the Complaint (other than those relating to the jurisdiction of the Commission, which are admitted).

As discussed in this letter, Valeant satisfies the higher burden to show good cause that is applicable to the scienter-based claims in the Complaint. First, none of the conduct alleged in

⁸ The SEC's Complaint does allege that *Salix's* alleged misrepresentations were made in connection with limited instances where securities were sold or conveyed by Salix to five employees in connection with their exercise of Salix options during a three-month period. All alleged conduct occurred prior to Valeant's acquisition of Salix.

⁹ See Division of Corporation Finance "Revised Statement on Well-Known Seasoned Issuer Waivers," April 24, 2014.

¹⁰ See *id.*

the Complaint occurred during Valeant's ownership of Salix. As the Complaint acknowledges, all misconduct alleged therein occurred prior to Valeant's April 1, 2015 acquisition of Salix. Second, after acquiring Salix, Valeant promptly removed the entire Salix management team, and none of the individuals allegedly responsible for the conduct alleged in the Complaint is employed by Salix or Valeant. Third, as discussed below, Valeant took substantial remedial steps to address Salix's prior alleged conduct even though Valeant and its management are not responsible in any way for the conduct alleged in the Complaint.

3. Salix took prompt action to remediate the alleged misconduct, and Valeant continued to take remedial action after acquiring Salix. Even prior to Valeant's acquisition of Salix, the Salix Board of Directors took prompt and forceful remedial action. Upon learning of allegations involving its inventory levels, Salix's internal and external counsel immediately took action to determine if those allegations had any merit. After initial inquiries, all such advisors recommended to the Audit Committee of Salix's Board of Directors that the Salix Audit Committee should hire counsel to conduct a thorough and independent investigation. In response to these recommendations, the Audit Committee promptly engaged counsel (as well as an independent forensic accounting firm to work with counsel) to investigate the allegations in more detail, and to ascertain whether any additional problems existed. Audit Committee counsel was engaged formally in mid-October 2014, and in a matter of days Salix reported the alleged misconduct to the SEC on October 29, 2014.

Salix's Board of Directors forced the resignation or retirement of certain officers. At that time, Salix's bylaws required it to advance these officers' attorney fees. To ensure their cooperation in the investigation, Salix's Board persuaded each of these officers to sign agreements requiring, *inter alia*, that they cooperate with Salix in connection with any internal investigation or any external investigation or proceeding relating to Salix including by agreeing to provide truthful statements or testimony as a declarant or witness in connection with any such investigation. Those agreements also contained a provision that permitted the Board to claw back any unvested shares if the Board found that a relevant officer intentionally engaged in conduct detrimental to Salix. Such a clawback was not previously available under these officers' then-existing employment agreements.

Subsequently, in March 2015, after reviewing the findings of the Audit Committee's independent investigation and at Valeant's request, the Board executed the clawback provisions in those officers' agreements, and clawed back an extraordinary \$38.7 million in equity compensation from them. In addition, Salix eliminated or reduced bonuses for many high-level executives with knowledge of the alleged wrongdoing.

4. After acquiring Salix, Valeant removed Salix's management and subjected Salix to Valeant's robust internal controls. Immediately after acquiring Salix, Valeant removed the entire Salix management team, and literally none of Salix's management or employees who were involved in any way with the alleged misconduct continued to work at Valeant—eliminating any prospect of those individuals repeating the alleged conduct at Valeant. Additionally, Valeant's

own internal controls became effective with respect to Salix's products. Unlike Salix, which had no inventory management agreements prior to the acquisition, Valeant immediately applied its wholesaler distribution agreements to the Salix products. Currently, Valeant has distribution agreements with the three largest wholesalers in the United States.¹¹ Pursuant to these agreements, Valeant receives actual on-hand inventory and sales data on a daily basis and receives inventory demand data on a weekly basis, enabling all relevant parties to access accurate data. To limit the amount of inventory at Valeant's wholesalers, the distribution agreements contain target inventory levels between half a month and two months of Valeant's products, based on historical demand.¹² Valeant's management reviews these inventory levels on a weekly, monthly, and quarterly basis.

Valeant also has specific policies and procedures to which Salix is subject. For example, product returns are processed in accordance with an established return policy, and Valeant only grants credit for products that are returned within six months before the expiration date of the product or within 12 months after the expiration date. The return policy does not allow credit for returns of saleable product, such as a wholesaler's overstock. Any credit for a return outside of the policy's criteria requires approval pursuant to a matrix that is based on the dollar value of the product to be returned. Valeant also has an enterprise resource planning system that ensures delivery of products to wholesalers is booked in the quarter in which the sale contractually occurred. This system will not allow a shipment to be recorded in a period after the period has ended. In addition, Valeant performs proof-of-delivery testing on shipments to wholesalers to ensure proper revenue recognition.

5. Valeant and Salix have cooperated extensively with the Division of Enforcement.

Valeant has a strong record of compliance with the federal securities laws, and Valeant and Salix have cooperated extensively with the Division of Enforcement. After self-reporting to the SEC, Salix (before and after it was acquired by Valeant) cooperated extensively with the SEC Enforcement Staff through document preservation, collection, and production efforts; the creation of mutually agreeable search terms; the prioritization of certain SEC requests; voluntarily identifying key documents and information identified in Salix's investigation; facilitating SEC testimony of relevant former Salix employees; and in-person, voluntary meetings and numerous teleconferences with the Staff. In all, to comply with the SEC's subpoena for documents, Valeant reviewed approximately 1.7 million documents and produced a total of approximately 427,000 of those documents. Valeant has expended millions of dollars to comply with the SEC's subpoena.

6. Loss of WKSI status would impact significantly the ability of Valeant to access the capital markets quickly and effectively. Valeant relies upon its WKSI status to access the capital markets quickly and efficiently. For example, on June 10, 2013, Valeant filed an automatically effective shelf registration statement for well-known seasoned issuers on Form S-3ASR. And on

¹¹ See Valeant Pharmaceuticals International, Inc., Annual Report (Form 10-K) at 90 (Feb. 28, 2018).

¹² See *id.*

June 17, 2013, Valeant commenced a registered offering of common stock that culminated in a June 19, 2013 prospectus supplement indicating that Valeant was offering \$2.0 billion of common shares. If not for Valeant's WKSI status, the SEC's review of the Form S-3 would have delayed Valeant's access to the capital markets to the detriment of Valeant's shareholders.

Loss of WKSI status would restrict Valeant's ability to raise capital through its recently-filed shelf registration statement. On March 2, 2018, Valeant filed an automatic shelf registration statement for well-known seasoned issuers on Form S-3ASR.¹³ In the registration statement, Valeant indicated that it may offer securities from time to time. Loss of WKSI status would have an unnecessary and prejudicial impact on Valeant's ability to raise capital pursuant to this registration statement. Furthermore, if Valeant loses its WKSI status as a result of *Salix's* alleged pre-acquisition conduct, then Valeant's innocent shareholders—who in no shape, manner, or form benefitted from *Salix's* alleged conduct—will be harmed significantly by the slower, less efficient, and more costly access to the capital markets associated with loss of WKSI status.

CONCLUSION

In light of the above, we respectfully request that, pursuant to Rule 405, the Commission (or the Division pursuant to delegated authority) waive, effective as of the date of entry of the Judgment, any disqualification under Rule 405 with regard to Valeant arising as a result of such entry.

Please let us know if you have any questions.

Sincerely,



Bradley J. Bondi

cc: Erin Wilson (SEC)
Michael Kaplan (Davis Polk & Wardwell LLP)
Sophia Hudson (Davis Polk & Wardwell LLP)

¹³ See Valeant Pharmaceuticals International, Inc., Registration Statement (Form S-3ASR) (Mar. 2, 2018).