

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10059 / March 24, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 77436 / March 24, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17178

In the Matter of

**CANACCORD GENUITY
INC.**

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST
PROCEEDINGS, PURSUANT TO SECTION
8A OF THE SECURITIES ACT OF 1933
AND SECTION 15(b) OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (the “Commission” or “SEC”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against Canaccord Genuity Inc. (“Respondent” or “Canaccord”).

II.

In anticipation of the institution of these proceedings, Canaccord has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and the Offer, the Commission finds that:

RESPONDENT

Canaccord Genuity Inc. (“Canaccord”), a Delaware corporation with its principal offices in New York, NY is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act. Canaccord engages in securities transactions across the U.S. by providing broker-dealer services, including participating in the underwriting of securities offerings, from offices in ten cities across the U.S.

SUMMARY

A basic purpose of Section 5 of the Securities Act is to ensure that full and accurate information concerning an issuer and its securities is disseminated in connection with an offer and sale of the issuer’s securities. *See* Securities Act Rel. No. 33-3844, *Publication of Information Prior to or after the Effective Date of a Registration Statement* (Oct. 8, 1957). Information other than that which is found in a prospectus meeting the requirements of Section 10 of the Securities Act can artificially affect the price of an issuer’s security because it may not comprise full and accurate information about an issuer and its securities. *Id.* Therefore, a broker or dealer must be cognizant of its obligations to not improperly stimulate investor interest or condition the markets prior to a securities offering through the publication of information that fails to comply with Section 5(b)(1) of the Securities Act, which requires that any prospectus used to offer a security after the filing of a registration statement must meet the requirements of Section 10 of the Securities Act.

Canaccord violated Section 5(b)(1) of the Securities Act when it initiated research coverage of an issuer (the “Issuer” or the “Company”) on April 18, 2012, days after the Issuer invited Canaccord to participate as an underwriter for a secondary stock offering led by another broker-dealer that the Issuer was planning for mid-May. The initiation report constituted a written “offer” to sell the Issuer’s securities, but Canaccord violated Section 5(b)(1) because the report did not meet the requirements for a prospectus under Securities Act Section 10 or qualify for any of the safe harbors governing the publication or distribution of research reports.

On April 19, 2012, after Canaccord had initiated coverage, the Issuer changed its plans and decided to conduct an accelerated offering later in April. The Issuer asked Canaccord to act as the lead underwriter for this revised deal, and on April 24, 2012, Canaccord acted as the managing underwriter for the U.S. portion of a \$40 million stock offering that the Issuer conducted in the U.S. and Israel.

FACTS

A. Canaccord’s Role in the Issuer’s Failed January 2012 Offering

In December 2011, the Issuer completed a reverse merger with another company, and subsequently filed a Form S-3 shelf registration for an offering of up to \$75 million of the Company’s common stock. The Commission declared the registration statement effective on January 13, 2012.

In late December 2011, the Issuer and Canaccord entered into an agreement for Canaccord to act as the lead underwriter of a \$30-40 million secondary offering of the Issuer’s common stock. In mid-January, Canaccord investment bankers and members of the Issuer’s management

conducted a roadshow to meet with potential investors, but on January 24 the Company decided to cancel the proposed offering due to insufficient investor interest. On January 30, the Issuer's CEO sent an e-mail to Canaccord's then Managing Director, Head of U.S. Investment Banking (the "Canaccord Banker") in which he identified the following "next steps" by Canaccord and the Company as "critical": "coverage, quarterly reports, liquidity and [a] non-deal roadshow"

B. The Issuer Plans Another Offering

In March 2012, the Issuer once again began to plan a secondary offering of its common stock. On March 21, the Issuer's senior management met with investment bankers from another investment bank ("Bank A"), who made a pitch to lead such a deal. During this meeting, the Issuer and Bank A discussed other potential investment banks for the underwriting syndicate, including Canaccord. On March 26, the Issuer's CFO notified Bank A that it had been selected to be the managing underwriter for the Issuer's offering. On April 9, Bank A's internal review committee approved its participation as the lead underwriter for a \$50 to \$75 million dollar common stock offering by the Company planned for mid-May, after the Company's quarterly earnings announcement. The memorandum submitted to Bank A's internal review committee stated that Canaccord would participate as one of four co-managers.

C. Canaccord is Invited to Participate in Underwriting the Issuer's Offering

Two days later, on the morning of April 11, the Issuer's CFO asked the Canaccord Banker to call him so they could speak about the Company's "thoughts on next steps regarding financing/timing etc." The CFO and the Canaccord Banker spoke by telephone later that morning, and shortly thereafter the CFO sent an email to the Issuer's CEO about the call. According to the CFO's e-mail, he told the Canaccord Banker that the Issuer was considering a financing after the Company held its earnings call on May 15 (with an organizational meeting of the Company and its underwriters to be held during the week after the earnings call), and proposed that Canaccord participate as a co-manager of the offering and receive 20% of the underwriting fees. The CFO's e-mail stated that the Canaccord Banker's initial response was to suggest that he could persuade Canaccord's Commitment Committee to participate in the Issuer's financing if Canaccord received 25% of the underwriting fees and "senior co-manager status." The CFO responded that he would see what could be done, but that he and the Issuer's CEO already had pushed hard to get Canaccord 20% of the underwriting fees.

The CFO also stated in his email that he told the Canaccord Banker that he needed Canaccord's research analyst to initiate research coverage of the Issuer before the Company's May earnings release in order to avoid restrictions on Canaccord's ability to participate in the offering.¹ According to the CFO's e-mail, the Canaccord Banker responded that once he received feedback from the Issuer regarding his requests for senior co-manager status and 25% of the underwriting fees, he would ask Canaccord's head of research to have the firm's research analyst publish the initiation report on the Issuer during the following week.

¹ At the time, the CFO was aware that Canaccord's research analyst was preparing to initiate coverage of the Issuer. Contrary to his belief, however, the initiation of research coverage in April in advance of the Company's May earnings report would not have avoided issues relating to Canaccord's compliance with Section 5(b) of the Securities Act.

Later in the afternoon of April 11, 2012, an investment banker at Bank A emailed his colleagues that, based on his discussions with the Issuer, Bank A would receive 60% of the underwriting fees from the planned May offering, with the remaining 40% allocated among three co-managers, including Canaccord, which would receive 25% of the fees. He also noted that the Issuer's CFO had informed him that Canaccord was seeking to be designated as the "senior co-manager" on the deal and would initiate research coverage of the Issuer the following week, which would "help us in marketing the transaction."

The next day, April 12, the Canaccord Banker emailed the Issuer's CFO that, based on his conversation with "a couple of the key member[s]" of Canaccord's Commitment Committee, he believed that Canaccord would participate in the Issuer's offering if given the status of "co-lead" and 25% of the underwriting fees. That evening, the CFO responded that he had received clearance that Canaccord would have "senior co-manager" status and expected that he could get Canaccord 25% of the underwriting fees after some "arm-twisting" with Bank A. On April 13, the Canaccord Banker e-mailed the Issuer's CFO to thank him "for going to bat for us."

D. Canaccord Initiates Research Coverage of the Issuer

Beginning in March 2012 and continuing through the period that Canaccord was seeking a role in the Issuer's stock offering, Canaccord's Managing Director, Medical Technology Equity Research Analyst (the "Canaccord Research Analyst"), was preparing to initiate research coverage of the Issuer. Throughout the second half of March 2012, the Canaccord Research Analyst and his associate sought information from the Issuer's management for the Canaccord Research Analyst's financial model of the Company. On April 9, the Canaccord Research Analyst contacted the Issuer's CFO to schedule a call to discuss his financial model, and the two spoke on Friday, April 12. The Canaccord Research Analyst contacted the Issuer's CFO again on April 16, and the two spoke again on April 17 about the Canaccord Research Analyst's financial model. On the afternoon of April 17, the Canaccord Research Analyst emailed the Issuer to request additional information for the financial model with the subject line "Please help me. Time sensitive." After the markets closed on April 18, Canaccord initiated research coverage of the Issuer with a "Buy" Rating and a price target of \$22, more than 60% above the Company's then-current stock price.²

E. The Issuer Selects Canaccord to Lead an Accelerated Offering

From April 14 to April 19, 2012, the Issuer's senior executives traveled to Israel to meet with fund managers and other potential investors. Based on the interest in purchasing the Company's stock that some of these investors expressed, the Issuer decided to cancel its plans for a May secondary offering, and instead do an accelerated dual offering in Israel and the U.S. The Company's board of directors approved this decision at an emergency meeting on April 19.

That same day, the CFO called the Canaccord Banker and told him that the Company planned to do an accelerated dual offering and wanted Canaccord, rather than Bank A, to act as the lead underwriter for the revised deal. On April 24, 2012, Canaccord acted as the managing underwriter for the U.S. portion of a \$40 million offering that the Issuer conducted in the U.S. and Israel.

² The Issuer's Share Price closed at \$13.65 on April 18, 2012.

LEGAL ANALYSIS

Section 5(b) of the Securities Act is intended to prohibit efforts to improperly stimulate investor interest or condition the market prior to an offering of securities. Section 5(b)(1) requires that any prospectus used to offer a security after the filing of a registration statement must meet the requirements of Section 10 of the Securities Act. Section 2(a)(3) of the Securities Act broadly defines “offer” to include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Section 2(a)(10) of the Securities Act broadly defines “prospectus” to include any written communication that offers any security for sale. A research report meets this definition of a “prospectus” under Section 2(a)(10) of the Securities Act if it is in writing, amounts to an “offer” to sell securities, and is not excluded from the definition of “prospectus” pursuant to an available safe harbor, such as Rule 139.

The Commission has issued long-standing guidance concerning when a broker or dealer becomes subject to the restrictions of Section 5(b)(1) of the Securities Act. *See* Securities Act Rel. No. 33-5009, *Publication of Information Prior to or after the Filing and Effective Date of a Registration Statement Under the Securities Act of 1933* (Oct. 7, 1969). Specifically, a broker or dealer that publishes research on an issuer or its securities is subject to Section 5(b)(1): (a) while seeking to participate in the underwriting of the issuer’s securities offering; (b) after having been invited to participate by the issuer in the underwriting of its securities offering; or (c) after reaching an understanding with the issuer that it will participate as a managing underwriter in the issuer’s securities offering. Securities Act Rule 139 provides a safe harbor from the Section 2(a)(10) definition of “prospectus” for research reports that meet the conditions of the rule, even if published by a broker or dealer that is participating as an underwriter of a registered offering; however, this safe harbor does not apply to a broker’s or dealer’s initiation of research coverage on an issuer or its securities.

When Canaccord initiated coverage of the Issuer on April 18, 2012, it was seeking to participate in the offering that the Issuer was planning for mid-May, and had been invited by the Company to participate as a senior co-manager of the deal. Canaccord’s initiation of research coverage constituted an “offer” to sell the Issuer’s securities under Section 2(a)(3) of the Securities Act because, among other things, the research report included a “Buy” rating and a price target that was more than 60% higher than the Company’s then-current stock price. Because the initiation report was a written offer to sell the Issuer’s securities, it was a “prospectus” under Section 2(a)(10) of the Securities Act. However, the research report did not meet the requirements of a “prospectus” articulated in Section 10 of the Securities Act. The research report also did not fall within the Rule 139 safe harbor because it was an initiation of research coverage. Canaccord, therefore, willfully violated Section 5(b)(1) of the Securities Act when it published the April 18 research report.³

³ A willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Canaccord's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that Canaccord:

- A. shall cease and desist from committing or causing any violations and any future violations of Section 5 of the Securities Act;
- B. is censured; and
- C. shall pay to the Commission within ten (10) days of the entry of this Order \$550,198 comprised of \$407,481 in disgorgement; \$42,717 in prejudgment interest; and \$100,000 in civil money penalties for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment of disgorgement and prejudgment interest is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600, and if timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Canaccord Genuity, Inc. as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549-5720B.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within thirty (30) days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary