

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10811 / July 31, 2020

SECURITIES EXCHANGE ACT OF 1934
Release No. 89444 / July 31, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-19901

In the Matter of

HOWARD B. SCHILLER,

Respondent.

**ORDER INSTITUTING CEASE-
AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A OF
THE SECURITIES ACT OF 1933
AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND
IMPOSING A CEASE-AND-DESIST
ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against Howard B. Schiller (“Schiller” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent 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 Respondent and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease and-Desist Proceedings Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This matter involves material misstatements and omissions in quarterly earnings presentations and calls and periodic filings for the period from Q3 2014 through Q1 2015 that were made, approved and/or signed by Respondent Howard B. Schiller's ("Schiller") as the chief financial officer and a member of the board of Valeant Pharmaceuticals International, Inc. ("Valeant"), now known as Bausch Health Companies Inc. ("Bausch Health"). Bausch Health is a publicly-traded global pharmaceutical and medical device company that develops, manufactures, and markets a broad range of branded, generic and branded generic pharmaceuticals, over-the-counter products, and medical devices. Due to its growth by acquisition business strategy in 2014 and 2015, Valeant supplemented its disclosures pursuant to Generally Accepted Accounting Principles ("GAAP") with non-GAAP financial measures as "a meaningful, consistent comparison of the company's core operating results and trends." During earnings call presentations, Valeant management, including Schiller, presented on same store organic growth, which represented growth rates for businesses owned for one year or more, and "Cash EPS," which excluded costs associated with business development, among other things. When discussing certain GAAP and non-GAAP financial measures, Valeant, Schiller, and others failed to disclose to investors certain material information about these measures.

2. Valeant helped establish a mail order pharmacy, Philidor Rx Services, LLC, in 2013 and played a significant role in Philidor's business. In 2013, Valeant provided an advance of \$2 million and entered into agreements with Philidor to dispense Valeant's products. From Q3 2014 through Q1 2015, Valeant increasingly sold products to Philidor. Growth in sales to Philidor contributed to Valeant's U.S. organic growth in particular.

3. On October 26, 2015, in response to media and analyst attention over its relationship with Philidor, Valeant gave an investor presentation concerning Philidor. Schiller helped draft the presentation and was one of the speakers. In this presentation, Valeant failed to disclose material facts regarding its Philidor relationship or explain how sales to Philidor impacted certain of its GAAP and non-GAAP performance measures Valeant presented in earlier quarters. Valeant also claimed that disclosure of its December 2014 option purchase agreement with Philidor was not required under its pre-established internal disclosure threshold, and Schiller knew or should have known this was inaccurate. On April 29, 2016, in its annual report for 2015, Valeant restated its financial statements for the year ended December 31, 2014 to reduce previously reported fiscal year 2014 Philidor revenue by approximately \$58 million due to such revenue being recognized prematurely. Among other things, Valeant acknowledged the existence

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

of material weaknesses in its internal control over financial reporting, including “tone at the top of the organization, with its performance-based environment, in which challenging targets were set and achieving those targets was a key performance expectation.”

4. Based on the foregoing and the conduct described herein, Schiller violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and Section 304(a) of the Sarbanes-Oxley Act, and caused Valeant’s violations of Sections 13(a) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder.

Respondent

5. **Howard B. Schiller**, age 58, resides in Telluride, Colorado. Schiller was Valeant’s executive vice president and CFO (principal accounting officer) from December 2011 to June 30, 2015, and a member of Valeant’s board from September 2012 to June 2016. As CFO, Schiller signed and certified Valeant’s periodic reports through Q1 2015, and also reviewed Valeant’s earnings presentations and spoke during earnings calls.

Relevant Entities

6. **Valeant Pharmaceuticals International, Inc.**, now known as **Bausch Health Companies Inc.** (“Bausch Health”), is a British Columbia corporation headquartered in Laval, Quebec with its principal administrative offices in Bridgewater, New Jersey. On July 13, 2018, Valeant changed its name to Bausch Health. Bausch Health’s common stock is registered under Section 12(b) of the Exchange Act and is dually listed on the New York and Toronto Stock Exchanges.

7. **Philidor Rx Services LLC** is a defunct Delaware limited liability company that was formed in January 2013. Philidor was a licensed pharmacy based in Hatboro, Pennsylvania. Approximately 95% of the product dispensed by Philidor and its affiliated pharmacies (collectively, “Philidor”) consisted of Valeant branded drugs. Valeant acquired an option to purchase Philidor on December 15, 2014, and terminated its relationship with Philidor on October 30, 2015. Valeant fully paid for but never exercised its option to purchase Philidor.

Facts

8. Valeant management identified Philidor as a key strategy to turn around the dermatology unit in 2014, and Schiller as a board member received presentations reflecting that information. Valeant’s agreements with Philidor included similar terms as with any wholesaler, but there were several other important aspects to Valeant’s relationship with Philidor. Valeant: 1) provided an advance of \$2 million to Philidor, 2) was involved in setting up its infrastructure and hiring of key employees, 3) maintained a sales force to promote access to its products through Philidor to health care providers, and 4) advised and assisted Philidor on its launch and expansion to other states. In addition, Valeant agreed to reimburse Philidor for the cost of Valeant drugs that the third-party payors and insurance companies did not cover and deducted this obligation from gross revenue. Valeant internally recorded this obligation as the “alternative fulfillment subsidy” or

“AF subsidy.” Valeant’s sales to Philidor increased throughout 2014 and 2015 and Philidor sales became one of the growth drivers for Valeant’s dermatology products.

9. During the relevant period, Valeant’s management including Schiller received reports that tracked product sales as the quarters progressed. Schiller participated in weekly calls in which business unit heads discussed their latest revenue numbers and expected sales against targets, which he helped set. Schiller also received regular updates on sales that indicated increases in quarterly sales made to Philidor.

10. Toward the end of Q3 2014, Valeant received a \$75 million order from Philidor. Others approved a \$70 million credit increase to process this order, without the justification and documentation required by Valeant’s Standard Operating Procedure (“SOP”) for credit limits, and forwarded the increase to Schiller for his final approval. At the time of the credit increase Philidor’s accounts receivable balance was \$32 million, with \$8.5 million of the balance over 61 days past due.

11. In Q4 2014, Valeant received a \$130 million order from Philidor in early December. Once again Schiller and others similarly approved a credit increase to Philidor in relation to the order. At the time, Philidor’s accounts receivable balance was approximately \$78.3 million, of which approximately \$41 million was past due.

12. The \$130 million order included one-time special pricing implemented for Philidor orders placed between November 24 and December 5, 2014, in which Philidor paid 4% over the wholesale cost. As Valeant’s CFO, Schiller was told of the one-time pricing after the Philidor orders were placed. None of Valeant’s other customers purchased Valeant products at prices above the wholesale cost.

13. When Valeant discovered one of the products on the order was out of stock, Philidor acquiesced to Valeant’s request to substitute the out-of-stock product, a topical medication for mild acne, with an oral antibiotic for severe acne in a sufficient quantity to meet the dollar amount of the out-of-stock product. Schiller knew and inquired about the fact of the product substitution, asking in an email, “did we fill the hole with other products?”

14. The timing and amount of the \$130 million order, one-time pricing, and product substitution occurred less than two weeks before December 15, 2014, when Valeant acquired the option to purchase Philidor for \$100 million cash and began consolidating Philidor in its financial statements. Schiller knew that upon the closing of the option agreement, Valeant would consolidate Philidor in its financial statements and would have to wait to recognize the Philidor revenue until Philidor sold the product through to patients. In part through Schiller’s approval of the credit limit increase with respect to the \$130 million order, Valeant concluded at the time that it was able to recognize revenue when the products were delivered to Philidor. Valeant later restated the revenue from this order.

15. Valeant management, including Schiller, evaluated Valeant’s disclosure obligations in light of the option agreement. Valeant maintained internal disclosure thresholds concerning

whether and how to disclose acquisitions. As of December 1, 2014, Valeant's disclosure thresholds called for Valeant to disclose details about transactions of the size of the Philidor transaction, including mentioning the acquiree by name, in its annual report on Form 10-K for 2014. On December 10, 2014, Valeant management increased the thresholds to amounts that exceeded the anticipated total option purchase price for Philidor. Under the increased thresholds, Valeant would no longer disclose transactions of the size of the Philidor transaction by name in the 2014 Form 10-K. Management informed the Board's audit and risk committee about the increased disclosure threshold, including its impact on disclosure of the Philidor option transaction.

16. In early 2015, Valeant management, including Schiller, was informed that Philidor was found to have violated the terms of pharmacy network agreements that governed Philidor's participation in three of the pharmacy networks for health plans or pharmacy benefit managers.

Valeant's Disclosures Regarding Philidor

17. Valeant reported its results for the quarters ended September 30, 2014 through September 30, 2015 in earnings calls and presentations. For Valeant's quarterly earnings calls from Q3 2014 through Q1 2015, Schiller participated in drafting Valeant's presentations and spoke during the calls. Valeant's disclosures did not reveal the material impact of the Philidor sales on certain of Valeant's GAAP and non-GAAP financial measures, which Schiller knew or should have known.

- a. *Same Store Organic Growth:* Valeant announced U.S. organic growth in the double digits for each quarter from Q3 2014 through Q1 2015. Philidor represented an increasingly larger portion of Valeant's U.S. organic growth and Valeant would have failed to achieve it without Philidor.
- b. *Cash EPS:* Valeant exceeded its guidance and analyst consensus estimates of \$2.55 for Q4 2014 when it announced Cash EPS of \$2.58 in its earnings presentation. Valeant's sales to Philidor contributed \$0.12 to Valeant's Q4 2014 Cash EPS.
- c. *Dermatology unit revenue:* Valeant announced dermatology unit's revenue of \$273 million for Q3 2014 and \$425 million for Q4 2014 in its earnings calls. Valeant conveyed no information regarding the material contribution of the sales made by Philidor, which represented over 13% of the third quarter dermatology revenue or over 16% of the fourth quarter dermatology revenue.
- d. *Dermatology unit's performance:* Valeant highlighted the performance of the dermatology unit in its earnings call presentations, variously describing it as experiencing a "turnaround" (Q3 2014), having "strong growth for promoted brands" (Q4 2014), and experiencing "positive organic growth" for all promoted brands (Q1 2015). During the earnings call for 4Q and full year 2014, Schiller attributed the "turnaround and the outstanding result" of

the dermatology business to many factors, including “[t]he outstanding work of our sales team, implementation of innovative marketing approaches, great leadership, a portfolio of great products, and our four new launch products,” but failed to mention the significant contribution made by the Philidor channel. From time to time Valeant management disclosed the company’s alternative fulfillment channel, but Valeant and Schiller did not provide details about its relationship with Philidor nor explain how sales through Philidor contributed to dermatology performance.

18. Valeant failed to disclose requisite material information about Philidor in the Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”) in its quarterly reports on Form 10-Q for Q3 2014, annual report on Form 10-K for 2014, and quarterly reports on Forms 10-Q for Q1, Q2, and Q3 2015. Schiller reviewed Valeant’s MD&A disclosure for the period from Q3 2014 through Q1 2015. Item 303(b)(2) requires issuers to disclose in quarterly reports “any material changes in the registrant’s results of operations . . . with respect to that fiscal quarter and the corresponding fiscal quarter in the preceding fiscal year.” Item 303(b)(2) of Regulation S-K, 17 C.F.R. § 229.303(b)(2). Regulation S-K also requires that the discussion of material changes in results of operations during the quarter “shall identify any significant elements of the registrant’s income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant’s ongoing business.” 17 C.F.R. § 229.303(b), Instruction 4. Additionally, reporting companies must disclose in the MD&A section of Form 10-K information “necessary to an understanding of [the company’s] financial condition, changes in financial condition and results of operations” and “any known trends or uncertainties” or “any unusual or infrequent events or transactions” that materially affected a company’s operations. Item 303(a) of Regulation S-K, 17 C.F.R. § 229.303(a).

- a. *Relationship with Philidor:* Schiller knew or should have known Valeant made sales to Philidor of dermatology drugs facing eroding market share or reimbursement blocks, or newly launched products to boost prescription volume. Valeant’s MD&A made no mention of its unique relationship with Philidor, even as Valeant’s sales to Philidor increased each quarter.
- b. *Risks related to Philidor:* Although Schiller knew or should have known the risks arising from Valeant’s relationship with Philidor, particularly beginning in Q1 2015 when he was informed that three pharmacy benefit managers had informed Philidor that it was in violation of certain terms of its pharmacy network agreements, Valeant’s MD&A did not disclose any such risk.

19. Valeant improperly recognized revenue and net income for the second half of 2014 by \$58 million and \$33 million, respectively. Rule 4.01 of Regulation S-X states that financial statements filed with the Commission that are not prepared in accordance with GAAP are presumed to be misleading or inaccurate. Accounting Standards Codification (ASC) 605, “Revenue Recognition,” states that revenue should not be recognized until it is realized or realizable and earned. One criterion generally necessary for revenue to be realizable is for

collectability to be reasonably assured. During Q3 and Q4 2014, Schiller and others approved increases to Philidor's credit limits to process certain Philidor orders. These approvals did not comport with Valeant's SOPs for credit limit increases and Valeant did not reasonably assure collectability for those orders.

20. From Q3 2014 through 1Q 2015, Schiller reviewed Valeant's periodic reports, signed and certified Valeant's Forms 10-Q for Q3 2014 and Q1 2015, and Form 10-K for 2014.

21. On October 26, 2015, Valeant gave an investor presentation concerning Philidor. Schiller helped draft the presentation and was one of the speakers. In this presentation, Valeant did not disclose material facts regarding its Philidor relationship or explain how sales to Philidor had impacted certain GAAP and non-GAAP measures Valeant presented in earlier quarters. Valeant also claimed that disclosure of the Philidor purchase option was not required under its pre-established internal disclosure threshold. Schiller knew or should have known this was inaccurate. Valeant increased its disclosure thresholds on an ad hoc basis as the company grew, and it did so in early December 2014, shortly before the purchase option closed.

Valeant's Internal Accounting Control Failures

22. Valeant did not design and maintain sufficient internal accounting controls. Valeant failed to implement sufficient accounting controls with respect to the Philidor sales transactions, such that there were no reasonable assurances that transactions are recorded as necessary to, among other things, permit the preparation of financial statements in conformity with GAAP and to maintain the accountability of assets.

Offer and Sale of Securities

23. Valeant offered and sold securities throughout the relevant time period. On March 18, 2015, Valeant issued and sold 7.3 million shares of common stock pursuant to a prospectus supplement to a Form S-3 registration statement filed on June 10, 2013. During Q1 2015, Valeant also issued four senior notes with the total par value of \$9.5 billion. From Q3 2014 through Q1 2015, Valeant also offered and sold 11,319 shares of common stock to its employees pursuant to the company's employee stock purchase plan.

Violations

24. As a result of the conduct described above:
- a. Respondent Schiller violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, which prohibit any person in the offer or sale of securities from directly or indirectly obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or engaging in any transaction, practice, or course of business which operates or would

operate as a fraud or deceit upon the purchaser. Claims under Sections 17(a)(2) and 17(a)(3) of the Securities Act do not require a showing of scienter; instead, a showing of negligence is sufficient. *Aaron v. SEC*, 446 U.S. 680, 697 (1980); *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997).

- b. Schiller caused Valeant's violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, which require issuers of securities registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual, current, and quarterly reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.
- c. Schiller caused Valeant's violations of Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP.
- d. Section 304 of the Sarbanes-Oxley Act of 2002 requires the chief executive officer and chief financial officer of any issuer required to prepare an accounting restatement due to material noncompliance with the securities laws as a result of misconduct to reimburse the issuer for: (i) any bonus or incentive-based or equity-based compensation received by that person from the issuer during the twelve-month periods following the false filings; and (ii) any profits realized from the sale of securities of the issuer during those 12-month periods. Schiller has not, to date, reimbursed Bausch Health for any portion of his incentive-based compensation or stock sale profits received during the 12-month periods following the filing of inaccurate financial statements described above and, therefore, Schiller violated Sarbanes-Oxley Section 304.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent Schiller cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder, and Section 304(a) of the Sarbanes-Oxley Act.

B. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$100,000.00 to the Securities and Exchange Commission. If timely payment 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 Schiller 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 Alka Patel, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower Street, Suite 900, Los Angeles, CA 90071.

C. Respondent shall, within 14 days of the entry of this Order, reimburse Bausch Health for a total of \$110,000.00 representing incentive-based compensation pursuant to Section 304(a) of the Sarbanes-Oxley Act. Schiller shall simultaneously deliver proof of satisfying this reimbursement obligation to Alka Patel, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Los Angeles Regional Office, 444 South Flower Street, Suite 900, Los Angeles, CA 90071.

D. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the penalties referenced in paragraph IV.B above. 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, he shall not argue that he is entitled to, nor shall he 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 he shall, within 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 Securities and Exchange 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.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Vanessa A. Countryman
Secretary