

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

FORM 8-K

**CURRENT REPORT
Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934**

Date of Report (Date of earliest event reported): February 15, 2023

89bio, Inc.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction
of incorporation)

001-39122
(Commission
File Number)

36-4946844
(IRS Employer
Identification No.)

142 Sansome Street, Second Floor
San Francisco, CA 94104
(Address of principal executive offices, including zip code)

(415) 432-9270
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, par value \$0.001 per share	ETNB	The Nasdaq Global Market

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Item 1.01 Entry Into a Material Definitive Agreement

On February 15, 2023, 89bio, Inc. (the “*Company*”) entered into Amendment No. 1 to the Sales Agreement, dated March 25, 2021 (as amended, the “*Sales Agreement*”), with SVB Securities LLC and Cantor Fitzgerald & Co. (the “*Sales Agents*”), pursuant to which the Company may offer and sell from time to time shares of the Company’s common stock, par value \$0.001 (the “*Shares*”), through the Sales Agents. The offering and sale of up to \$150,000,000 of the Shares has been registered under the Securities Act of 1933, as amended (the “*Securities Act*”), pursuant to the Company’s Registration Statement on Form S-3 (File No. 333-269471) (the “*Registration Statement*”), which was originally filed with the Securities and Exchange Commission (“*SEC*”) on January 31, 2023 and declared effective by the SEC on February 14, 2023, the base prospectus contained within the Registration Statement, and a prospectus supplement that was filed with the SEC on February 15, 2023.

Sales of the Shares, if any, pursuant to the Sales Agreement, may be made in sales deemed to be an “at the market offering” as defined in Rule 415(a)(4) promulgated under the Securities Act, including sales made directly on or through the Nasdaq Global Market or on any other existing trading market for the Company’s common stock. The Company has no obligation to sell any of the Shares under the Sales Agreement, and may at any time suspend offers under the Sales Agreement or terminate the Sales Agreement. The Sales Agents will act as sales agents and will use commercially reasonable efforts to sell on the Company’s behalf all of the Shares requested to be sold by the Company, consistent with their normal trading and sales practices, on mutually agreed terms between the Sales Agents and the Company. The Company currently intends to use the proceeds of the offering, if any, for development, manufacturing and scale-up, as well as for working capital and other general corporate purposes. The Company may also use a portion of the proceeds to license, acquire or invest in new programs or for drug development activities related to such programs; however, it has no current commitments to do so.

The Sales Agreement contains customary representations, warranties and agreements by the Company, as well as indemnification obligations of the Company for certain liabilities under the Securities Act. Under the terms of the Sales Agreement, the Company will pay the Sales Agents a commission of up to 3.0% of the aggregate gross proceeds from each Share sold through it under the Sales Agreement. In addition, the Company has agreed to reimburse certain expenses incurred by the Sales Agents in connection with the offering. The Sales Agreement may be terminated by the Sales Agents or the Company at any time upon notice to the other party, as set forth in the Sales Agreement, or by the Sales Agents at any time in certain circumstances, including the occurrence of a material and adverse change in the Company’s business or financial condition that may materially impair the Sales Agents’ ability to sell the Shares.

This Current Report on Form 8-K shall not constitute an offer to sell or a solicitation of an offer to buy any securities, nor shall there be any sale of these securities in any state or jurisdiction in which such an offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state or other jurisdiction.

Gibson, Dunn & Crutcher LLP, counsel to the Company, has issued an opinion to the Company, dated February 15, 2023, regarding the validity of the Shares. A copy of the opinion is filed herewith as Exhibit 5.1.

The description of the material terms of the Sales Agreement is not intended to be complete and is qualified in its entirety by reference to the Sales Agreement and Amendment No. 1 to the Sales Agreement, which are filed herewith as Exhibit 1.1 and Exhibit 1.2 and incorporated herein by reference.

Item 9.01 Financial Statements and Exhibits

(d) *Exhibits*.

EXHIBIT INDEX

<u>Exhibit No.</u>	<u>Description</u>
1.1*	Sales Agreement, dated March 25, 2021, by and among 89bio, Inc., SVB Leerink LLC and Cantor Fitzgerald & Co.
1.2	Amendment No. 1 to Sales Agreement, dated February 15, 2023, by and among 89bio, Inc., SVB Securities LLC and Cantor Fitzgerald & Co.
5.1	Opinion of Gibson, Dunn & Crutcher LLP
23.1	Consent of Gibson, Dunn & Crutcher LLP (contained in Exhibit 5.1)
104	Cover Page Interactive Data File (embedded within the Inline XBRL document).

* Previously filed

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

89bio, Inc.

Date: February 15, 2023

By: /s/ Rohan Palekar
Rohan Palekar
Chief Executive Officer

AMENDMENT NO. 1 TO THE SALES AGREEMENT

February 15, 2023

SVB SECURITIES LLC
1301 Avenue of the Americas, 12th Floor
New York, New York 10019

CANTOR FITZGERALD & CO.
499 Park Avenue
New York, New York 10022

Ladies and Gentlemen:

This Amendment No. 1 to the Sales Agreement (this "**Amendment**") is entered into as of the date first written above by 89bio, Inc., a Delaware corporation (the "**Company**"), and SVB Securities LLC and Cantor Fitzgerald & Co. (collectively the "**Agents**," and each individually an "**Agent**"), that are parties to that certain Sales Agreement, dated March 25, 2021 (the "**Original Agreement**"). All capitalized terms not defined herein shall have the meanings ascribed to them in the Original Agreement. The parties, intending to be legally bound, hereby amend the Original Agreement as follows:

1. The first and second paragraphs of Section 1 are hereby deleted in their entirety and replaced with the following:

Issuance and Sale of Shares. The Company agrees that, from time to time during the term of this Agreement, on the terms and subject to the conditions set forth herein, it may issue and sell through the Agents up to \$150,000,000 shares of common stock, \$0.001 par value per share, of the Company (the "**Common Stock**"), subject to the limitations set forth in Section 5(c) (the "**Placement Shares**"). Notwithstanding anything to the contrary contained herein, the parties hereto agree that compliance with the limitation set forth in this Section 1 on the aggregate gross sales price of Placement Shares that may be issued and sold under this Agreement from time to time shall be the sole responsibility of the Company, and that the Agents shall have no obligation in connection with such compliance. The issuance and sale of Placement Shares through the Agents will be effected pursuant to the Registration Statement (as defined below) filed by the Company with the Securities and Exchange Commission (the "**Commission**") and to be declared effective by the Commission, although nothing in this Agreement shall be construed as requiring the Company to issue any Placement Shares.

The Company has prepared and filed, in accordance with the provisions of the Securities Act of 1933, as amended, and the rules and regulations thereunder (collectively, the "**Securities Act**"), with the Commission a registration statement on Form S-3 (File No. 333-269471), including a base prospectus, relating to certain securities, including the Common Stock, to be issued from time to time by the Company, and which incorporates by reference documents that the Company has filed or will file in accordance with the provisions of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder (collectively, the "**Exchange Act**"). The

Company has prepared a prospectus supplement to the base prospectus included as part of such registration statement at the time the registration statement became effective, which prospectus supplement specifically relates to the Placement Shares to be issued from time to time pursuant to this Agreement (the “**Prospectus Supplement**”). The Company will furnish to the Agents, for use by the Agents, copies of the base prospectus included as part of such registration statement at the time it becomes effective, as supplemented by the Prospectus Supplement. The Company may file one or more additional registration statements from time to time that will contain a base prospectus and related prospectus or prospectus supplement, if applicable (which shall be a Prospectus Supplement), with respect to the Placement Shares. Except where the context otherwise requires, such registration statement or additional registration statements, including all documents filed as part thereof or incorporated by reference therein, and including any information contained in a Prospectus (as defined below) subsequently filed with the Commission pursuant to Rule 424(b) under the Securities Act or deemed to be a part of such registration statement pursuant to Rule 430B or Rule 462(b) under the Securities Act, is herein called the “**Registration Statement**.” The base prospectus, including all documents incorporated therein by reference, included in the Registration Statement, as it may be supplemented by the Prospectus Supplement, in the form in which such prospectus and/or Prospectus Supplement have most recently been filed by the Company with the Commission pursuant to Rule 424(b) under the Securities Act, together with any “issuer free writing prospectus” (as used herein, as defined in Rule 433 under the Securities Act (“**Rule 433**”)), relating to the Placement Shares that (i) is required to be filed with the Commission by the Company or (ii) is exempt from filing pursuant to Rule 433(d)(5)(i), in each case, in the form filed or required to be filed with the Commission or, if not required to be filed, in the form retained in the Company’s records pursuant to Rule 433(g), is herein called the “**Prospectus**.”

2. The third sentence of Section 6(a) is hereby deleted in its entirety and replaced with the following:

“At the time the Registration Statement originally became effective and, if later, at the time the Company’s most recently filed Annual Report on Form 10-K was filed with the Commission, the Company met the then-applicable requirements for use of Form S-3 (including General Instructions I.A and I.B.1.) under the Securities Act.”

3. The second sentence of Section 6(dd) is hereby deleted in its entirety and replaced with the following:

“The United States federal income tax returns of the Company through the fiscal year ended December 31, 2020, have been filed and no assessment in connection therewith has been made against the Company.”

4. Section 6(jj) is hereby deleted in its entirety and replaced with the following:

“None of the Company, any of its Subsidiaries or, to the knowledge of the Company, any director, officer, agent, employee, affiliate or representative of the Company or any of its Subsidiaries is an individual or entity (“**Person**”), currently the subject or target of any sanctions administered or enforced by the United States Government, including, without limitation, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“**OFAC**”), the United Nations

Security Council, the European Union, His Majesty's Treasury, or other relevant sanctions authority (collectively, "**Sanctions**"), nor is the Company located, organized or resident in a country or territory that is the subject of Sanctions; and the Company will not directly or indirectly use the proceeds of the sale of the Securities, or lend, contribute or otherwise make available such proceeds to any Subsidiaries, joint venture partners or other Person, to fund any activities of or business with any Person, or in any country or territory, that, at the time of such funding, is the subject of Sanctions or in any other manner that will result in a violation by any Person (including any Person participating in the transaction, whether as underwriter, advisor, investor or otherwise) of Sanctions."

5. Section 6(u) is hereby amended to include the following as the last sentence:

"The Company meets the definition of the term "experienced issuer" specified in FINRA Rule 5110(j)(6)."

6. The first paragraph of **Schedule 1** is hereby deleted in its entirety and replaced with the following:

"Pursuant to the terms and subject to the conditions contained in the Sales Agreement, dated March 25, 2021, as amended by Amendment No. 1 to the Sales Agreement, dated February 15, 2023 (as amended, the "**Agreement**"), by and among 89bio, Inc., a Delaware corporation (the "**Company**"), SVB Securities LLC and Cantor Fitzgerald & Co, I hereby request on behalf of the Company that Designated Agent sell up to [] shares of common stock, \$0.0001 par value per share, of the Company (the "**Shares**"), at a minimum market price of \$ per share; *provided* that no more than [] Shares shall be sold in any one Trading Day (as such term is defined in Section 3 of the Agreement)]. Sales should begin [on the date of this Placement Notice] and end on [DATE] [until all Shares that are the subject of this Placement Notice are sold]."

7. The first paragraph of **Exhibit 7(m)** is hereby deleted in its entirety and replaced with the following:

"Each of Rohan Palekar, the duly qualified and elected Chief Executive Officer of 89bio, Inc., a Delaware corporation (the "**Company**"), and Ryan Martins, the duly qualified and elected Chief Financial Officer of the Company, does hereby certify in his respective capacity and on behalf of the Company, pursuant to Section 7(m) of the Sales Agreement, dated March 25, 2021, as amended by Amendment No. 1 to the Sales Agreement, dated February 15, 2023 (as amended, the "**Sales Agreement**"), by and among the Company, SVB Securities LLC and Cantor Fitzgerald & Co., that, after due inquiry, to the best of the knowledge of the undersigned:"

8. Except as specifically set forth herein, all other provisions of the Original Agreement shall remain in full force and effect.

9. The Company represents and warrants to, and agrees with the Agents that: (a) this Amendment has been duly authorized, executed and delivered by, and is a valid and binding agreement of, the Company, enforceable in accordance with its terms, except as rights to indemnification hereunder may be limited by applicable law and except as the enforcement hereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights and remedies of creditors or by general equitable principles; and (b) on the date hereof, the Company will file a Prospectus Supplement and that delivery of a Placement Notice thereafter constitutes a Representation Date.

10. This Amendment together with the Original Agreement (including all schedules and exhibits attached hereto and thereto and Placement Notices issued pursuant hereto and thereto) constitutes the entire agreement and supersedes all other prior and contemporaneous agreements and undertakings, both written and oral, among the parties hereto with regard to the subject matter hereof. Neither this Amendment nor any term hereof may be amended except pursuant to a written instrument executed by the Company and the Agents. In the event that any one or more of the provisions contained herein, or the application thereof in any circumstance, is held invalid, illegal or unenforceable as written by a court of competent jurisdiction, then such provision shall be given full force and effect to the fullest possible extent that it is valid, legal and enforceable, and the remainder of the terms and provisions herein shall be construed as if such invalid, illegal or unenforceable term or provision was not contained herein, but only to the extent that giving effect to such provision and the remainder of the terms and provisions hereof shall be in accordance with the intent of the parties as reflected in this Amendment. No implied waiver by a party shall arise in the absence of a waiver in writing signed by such party. No failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder. All references in the Original Agreement to the "Agreement" shall mean the Original Agreement as amended by this Amendment; *provided, however*, that all references to "date of this Agreement" in the Original Agreement shall continue to refer to the date of the Original Agreement.

11. This Amendment shall be governed by and construed in accordance with the laws of the state of New York without regard to the principles of conflicts of laws. Specified times of day refer to New York city time. Each party hereby irrevocably waives, to the fullest extent permitted by applicable law, any and all right to trial by jury in any legal proceeding arising out of or relating to this Amendment or the transactions contemplated hereby.

12. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of New York, Borough of Manhattan, for the adjudication of any dispute hereunder or in connection with any of the transactions contemplated hereby, and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is brought in an inconvenient forum, or that the venue of such suit, action or proceeding is improper. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy (certified or registered mail, return receipt requested) to such party at the address in effect for notices under Section 12 of the Original Agreement, as amended hereby, and agrees that such service shall constitute good and sufficient notice of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any manner permitted by law. The provisions of this paragraph shall survive any termination of this Amendment.

13. This Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Delivery of an executed amendment by one party to the other may be delivered by facsimile transmission, electronic mail delivery (including portable document format (PDF) file) or any electronic signature complying with the U.S. federal ESIGN Act of 2000 or the New York Electronic Signature and Records Act or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes to the fullest extent permitted by applicable law.

[Remainder of Page Intentionally Blank]

If the foregoing correctly sets forth the understanding between the Company and the Agents, please so indicate in the space provided below for that purpose, whereupon this letter shall constitute a binding amendment to the Original Agreement between the Company and the Agents.

Very truly yours,

SVB SECURITIES LLC

By: /s/ Peter M. Fry

Name: Peter M. Fry

Title: Head of Alternative Equities

CANTOR FITZGERALD & CO.

By: /s/ Sage Kelly

Name: Sage Kelly

Title: Global Head of Investment Banking

**ACCEPTED as of the date
first-above written:**

89BIO, INC.

By: /s/ Rohan Palekar

Name: Rohan Palekar

Title: Chief Executive Officer

[Signature Page to Amendment No. 1 to the Sales Agreement]

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
555 Mission Street
San Francisco, CA 94105-0921
Tel 415.393.8200
www.gibsondunn.com

Client: 26925-00001

February 15, 2023

89bio, Inc.
142 Sansome Street, 2nd Floor
San Francisco, CA 94104

Re: *89bio, Inc.*
Registration Statement on Form S-3

Ladies and Gentlemen:

We have examined the Registration Statement on Form S-3 (File No. 333-269471), as amended (the "Registration Statement"), of 89bio, Inc., a Delaware corporation (the "Company"), filed with the Securities and Exchange Commission (the "Commission") pursuant to the Securities Act of 1933, as amended (the "Securities Act"), and the prospectus supplement thereto dated February 15, 2023 (the "Prospectus Supplement"), in connection with the offering by the Company of up to \$150,000,000 of the Company's common stock, par value \$0.001 per share (the "Shares").

In arriving at the opinion expressed below, we have examined originals, or copies certified or otherwise identified to our satisfaction as being true and complete copies of the originals, of specimen common stock certificates and such other documents, corporate records, certificates of officers of the Company and of public officials and other instruments as we have deemed necessary or advisable to enable us to render the opinions set forth below. In our examination, we have assumed without independent investigation the genuineness of all signatures, the legal capacity and competency of all natural persons, the authenticity of all documents submitted to us as originals and the conformity to original documents of all documents submitted to us as copies. We have further assumed that all offers and sales of the Shares will comply with the minimum offering price and pricing formula set forth in the authorization of the offering and sale of the Shares by the Company's Board of Directors.

Based upon the foregoing, and subject to the assumptions, exceptions, qualifications and limitations set forth herein, we are of the opinion that the Shares, when issued against payment therefor as set forth in the Registration Statement and the Prospectus Supplement thereto, will be validly issued, fully paid and non-assessable.

We consent to the filing of this opinion as an exhibit to the Registration Statement, and we further consent to the use of our name under the caption "Legal Matters" in the Registration Statement and the Prospectus Supplement. In giving these consents, we do not thereby admit that we are within the category of persons whose consent is required under Section 7 of the Securities Act or the Rules and Regulations of the Commission.

Very truly yours,

/s/ Gibson, Dunn & Crutcher LLP