

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

FORM S-8

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

TherapeuticsMD, Inc.

(Exact name of registrant as specified in its charter)

Nevada

(State or other jurisdiction of
incorporation or organization)

87-0233535

(I.R.S. Employer Identification No.)

**951 Yamato Road, Suite 220
Boca Raton, Florida**

(Address of Principal Executive Offices)

33431

(Zip Code)

TherapeuticsMD, Inc. 2020 Employee Stock Purchase Plan

(Full title of the plan)

**Robert G. Finizio
Chief Executive Officer
TherapeuticsMD, Inc.
951 Yamato Road, Suite 220
Boca Raton, Florida 33431
(561) 961-1900**

(Name, address, telephone number,
including area code, of agent for service)

Copies to:

**James C. D'Arecca
Chief Financial Officer
TherapeuticsMD, Inc.
951 Yamato Road, Suite 220
Boca Raton, Florida 33431
(561) 961-1900**

**Joshua M. Samek, Esq.
DLA Piper LLP (US)
200 South Biscayne Boulevard, Suite 2500
Miami, Florida 33131
(305) 423-8500**

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or an emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company 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 7(a)(2)(B) of the Securities Act.

CALCULATION OF REGISTRATION FEE

Title of securities to be registered	Amount to be registered⁽¹⁾	Proposed maximum offering price per share⁽²⁾	Proposed maximum aggregate offering price	Amount of registration fee
Common Stock, \$0.001 par value per share	5,400,000	\$1.72	\$9,288,000	\$1,205.59

(1) Consists of 5,400,000 shares of common stock, \$0.001 par value per share (“Common Stock”), of TherapeuticsMD, Inc. (the “Registrant”) initially available for sale under the TherapeuticsMD, Inc. 2020 Employee Stock Purchase Plan (the “ESPP”). In addition, pursuant to Rule 416(c) under the Securities Act of 1933, as amended (the “Securities Act”), this Registration Statement on Form S-8 (this “Registration Statement”) also covers an indeterminate number of shares of Common Stock which may be offered or sold under the ESPP by reason of stock splits, stock dividends or similar transactions effected without the receipt of consideration which results in an increase in the number of outstanding shares of Common Stock of the Registrant.

(2) Estimated solely for purposes of calculating the registration fee pursuant to Rule 457(c) and (h) of the Securities Act. The proposed maximum offering price per share, proposed maximum aggregate offering price and the amount of the registration fee are based on the average of the high and low prices of Registrant’s Common Stock as reported on The Nasdaq Stock Market LLC on August 6, 2020.

PART I

INFORMATION REQUIRED IN THE SECTION 10(A) PROSPECTUS

The documents containing the information specified in this Part I will be sent or given to participants of the TherapeuticsMD, Inc. 2020 Employee Stock Purchase Plan as specified by Rule 428(b)(1) under the Securities Act of 1933, as amended (the "Securities Act"). In accordance with the rules and regulations of the Securities and Exchange Commission (the "Commission") and the instructions to Form S-8, such documents are not being filed with the Commission either as part of this Registration Statement or as prospectuses or prospectus supplements pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference in the Registration Statement pursuant to Item 3 of Part II of this Form S-8, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference.

The Registrant hereby incorporates by reference into the Registration Statement the following documents previously filed with the Commission:

- (1) The Registrant's Annual Report on Form 10-K for the year ended December 31, 2019, filed with the Commission on [February 24, 2020](#), as amended on [April 29, 2020](#);
- (2) The Registrant's Quarterly Reports on Form 10-Q for the quarters ended March 31, 2020 and June 30, 2020, filed with the Commission on [May 6, 2020](#) and [August 6, 2020](#), respectively;
- (3) The Registrant's Current Reports on Form 8-K filed with the Commission on [February 20, 2020](#), [March 24, 2020](#), [March 26, 2020](#), [April 22, 2020](#), [May 1, 2020](#), [May 15, 2020](#), [June 1, 2020](#) and [June 18, 2020](#) (provided that any portions of such reports that are deemed furnished and not filed pursuant to instructions to Form 8-K shall not be incorporated by reference into this Registration Statement); and
- (4) The description of the Registrant's Common Stock included under the heading "Description of Common Stock" in the prospectus forming a part of the Registration Statement on Form S-3 (File No. 333-207837), as filed with the Commission on [November 5, 2015](#), which description has been incorporated by reference in Item 1 of the Registrant's Form 8-A12B (File No. 001-00100), as filed with the Commission on [October 6, 2017](#), including any amendment or report filed with the Commission for the purpose of updating such description.

In addition, all documents that the Registrant files pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, as amended, subsequent to the effective date of this Registration Statement (except for any portions of the Registrant's Current Reports on Form 8-K furnished pursuant to Item 2.02 or Item 7.01 thereof and any corresponding exhibits thereto not filed with the Commission), but prior to the filing of a post-effective amendment to this Registration Statement indicating that all securities offered hereby have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of filing such documents.

For purposes of this Registration Statement, any document or statement contained in a document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such document or statement in such document. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities.

Not applicable.

Item 5. Interests of Named Experts and Counsel.

None.

Item 6. Indemnification of Directors and Officers.

The Registrant is a Nevada corporation and generally governed by the Nevada Private Corporations Code, Chapter 78 of the Nevada Revised Statutes ("NRS").

Section 78.138 of the NRS provides that, unless the corporation's articles of incorporation provide otherwise, a director or officer is not individually liable to the corporation or its stockholders or creditors for damages as a result of any action or omission to act as a director or officer unless the trier of fact determines that the presumption that the director or officer acted in good faith, on an informed basis and with a view to the interests of the corporation, is rebutted and it is proven that (i) the director's or officer's acts or omissions constituted a breach of his or her fiduciary duties, and (ii) such breach involved intentional misconduct, fraud, or a knowing violation of the law.

Section 78.7502 of the NRS permits a Nevada corporation to indemnify its directors and officers against expenses, judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with a threatened, pending, or completed action, suit, or proceeding, if the officer or director (i) is not liable pursuant to Section 78.138 of the NRS, or (ii) acted in good faith and in a manner the officer or director reasonably believed to be in or not opposed to the best interests of the corporation and, if a criminal action or proceeding, had no reasonable cause to believe the conduct of the officer or director was unlawful. Section 78.7502 of the NRS precludes indemnification by the corporation if the officer or director has been adjudged by a court of competent jurisdiction, after exhaustion of all appeals, to be liable to the corporation or for amounts paid in settlement to the corporation, unless and only to the extent that the court determines that in view of all the circumstances, the person is fairly and reasonably entitled to indemnity for such expenses and Section 78.7502 requires a corporation to indemnify its officers and directors if they have been successful on the merits of the action or otherwise in defense of any claim, issue, or matter resulting from their service as a director or officer.

Section 78.751 of the NRS permits a Nevada corporation to indemnify its officers and directors against expenses incurred by them in defending a civil or criminal action, suit, or proceeding as they are incurred and in advance of final disposition thereof, upon determination by the stockholders, the disinterested board members, or by independent legal counsel. Section 78.751 of the NRS provides that the articles of incorporation, the bylaws or an agreement may require a corporation to advance expenses as incurred upon receipt of an undertaking by or on behalf of the officer or director to repay the amount if it is ultimately determined by a court of competent jurisdiction that such officer or director is not entitled to be indemnified by the corporation if so provided in the corporation's articles of incorporation, bylaws, or other agreement. Section 78.751 of the NRS further permits the corporation to grant its directors and officers additional rights of indemnification under its articles of incorporation, bylaws, or other agreement.

Section 78.752 of the NRS provides that a Nevada corporation may purchase and maintain insurance or make other financial arrangements on behalf of any person who is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another company, partnership, joint venture, trust, or other enterprise, for any liability asserted against him and liability and expenses incurred by him in his capacity as a director, officer, employee, or agent, or arising out of his status as such, whether or not the corporation has the authority to indemnify him against such liability and expenses. The Registrant has obtained primary and excess insurance policies insuring its directors and officers and its subsidiaries against certain liabilities they may incur in their capacity as directors and officers. Under such policies, the insurer, on the Registrant's behalf, may also pay amounts for which the Registrant has granted indemnification to the directors or officers.

The foregoing discussion of indemnification merely summarizes certain aspects of indemnification provisions and is limited by reference to the above discussed sections of the Nevada Private Corporations Code.

The Registrant's amended and restated articles of incorporation, as amended, provide that the Registrant may indemnify to the full extent of its power to do so, all directors, officers, employees, and/or agents. Insofar as indemnification by the Registrant for liabilities arising under the Securities Act may be permitted to officers and directors of the Registrant pursuant to the foregoing provisions or otherwise, the Registrant is aware that in the opinion of the Commission, such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable.

Item 7. Exemption from Registration Claimed.

Not applicable.

Item 8. Exhibits.

<u>EXHIBIT NUMBER</u>	<u>DESCRIPTION</u>
4.1	Composite Amended and Restated Articles of Incorporation of the Registrant, as amended (incorporated by reference to Exhibit 3.1 of the Registrant's Quarterly Report on Form 10-Q for quarter ended June 30, 2020, filed with the Commission on August 6, 2020).
4.2	Bylaws of the Registrant (incorporated by reference to Exhibit C of the Registrant's Definitive 14C Information Statement, filed with the Commission on June 29, 2010).
4.3	First Amendment to Bylaws of the Registrant (incorporated by reference to Exhibit 3.1 of the Registrant's Current Report on Form 8-K, filed with the Commission on December 22, 2015).
4.4	Form of Certificate of Common Stock of the Company (incorporated by reference to Exhibit 4.2 of the Registrant's Registration Statement on Form S-3, filed with the Commission on January 25, 2013).
5.1	Opinion of DLA Piper LLP (US).
23.1	Consent of Grant Thornton LLP, Independent Registered Public Accounting Firm.
23.2	Consent of DLA Piper LLP (US) (contained in Exhibit 5.1).
24.1	Power of Attorney (included on signature page).
99.1	TherapeuticsMD, Inc. 2020 Employee Stock Purchase Plan (incorporated herein by reference to Appendix B of the Registrant's Definitive Proxy Statement on Schedule 14A filed on May 4, 2020).

Item 9. Undertakings.

(a) The undersigned Registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective Registration Statement;

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement;

Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) herein do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Registration Statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(b) The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the Registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, as amended, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Boca Raton, State of Florida, on August 7, 2020.

THERAPEUTICSMD, INC.

By: /s/ Robert G. Finizio

Name: Robert G. Finizio

Title: Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Robert G. Finizio and James C. D'Arecca, and each one of them acting alone, as his true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him and in his name, place, and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them acting alone, full power and authority to do and perform each and every act and thing requisite and necessary to be done in connection therewith, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or any of them, or his or their substitute or substitutes, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

<u>Name</u>	<u>Position</u>	<u>Date</u>
<u>/s/ Robert G. Finizio</u> Robert G. Finizio	Chief Executive Officer, Director (Principal Executive Officer)	August 7, 2020
<u>/s/ James C. D'Arecca</u> James C. D'Arecca	Chief Financial Officer (Principal Financial Officer)	August 7, 2020
<u>/s/ Michael Donegan</u> Michael Donegan	Chief Accounting Officer (Principal Accounting Officer)	August 7, 2020
<u>/s/ Tommy G. Thompson</u> Tommy G. Thompson	Chairman of the Board of Directors	August 7, 2020
<u>/s/ Paul M. Bisaro</u> Paul M. Bisaro	Director	August 7, 2020
<u>/s/ J. Martin Carroll</u> J. Martin Carroll	Director	August 7, 2020
<u>/s/ Cooper C. Collins</u> Cooper C. Collins	Director	August 7, 2020
<u>/s/ Karen L. Ling</u> Karen L. Ling	Director	August 7, 2020
<u>/s/ Jules A. Musing</u> Jules A. Musing	Director	August 7, 2020
<u>/s/ Gail K. Naughton, Ph.D.</u> Gail K. Naughton, Ph.D.	Director	August 7, 2020
<u>/s/ Angus C. Russell</u> Angus C. Russell	Director	August 7, 2020



August 7, 2020

TherapeuticsMD, Inc.
951 Yamato Road, Suite 220
Boca Raton, FL 33431

Re: Registration Statement on Form S-8

Ladies and Gentlemen:

We have acted as legal counsel to TherapeuticsMD, Inc., a Nevada corporation (the "Company"), in connection with the preparation of the Company's Registration Statement on Form S-8 (the "Registration Statement") to be filed with the Securities and Exchange Commission (the "Commission") on or about August 7, 2020 relating to the registration under the Securities Act of 1933, as amended (the "Act"), of 5,400,000 shares (the "Shares") of the Company's common stock, par value \$0.001 per share (the "Common Stock"), issuable pursuant to the TherapeuticsMD, Inc. 2020 Employee Stock Purchase Plan (the "Plan").

With respect to the opinion set forth below, we have examined originals, certified copies, or copies otherwise identified to our satisfaction as being true copies, of the following: (i) the Amended and Restated Articles of Incorporation of the Company, as amended, as currently in effect; (ii) the Bylaws of the Company, as amended, as currently in effect; (iii) resolutions of the Board of Directors of the Company adopting the Plan, authorizing the issuance of the Shares and authorizing the filing of the Registration Statement; (iv) the Plan; (v) the Registration Statement; and (vi) such other documents, records and other instruments as we have deemed appropriate for purposes of the opinion set forth herein.

In making the foregoing examinations, we have assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified or photostatic copies and that the persons executing the documents examined by us have the legal capacity to execute such documents. We have also assumed that the offer and sale of the Shares complies and will comply in all respects with the terms, conditions and restrictions set forth in the Registration Statement and the Plan. As to various questions of fact material to this opinion, we have relied, to the extent we deemed reasonably appropriate, upon representations of officers or directors of the Company and upon documents, records and instruments furnished to us by the Company, without independently checking or verifying the accuracy of such documents, records and instruments.

Based upon the foregoing examination and assumptions and further assuming that (i) the Company maintains an adequate number of authorized and unissued shares of Common Stock available for issuance pursuant to the Plan and (ii) the consideration, if any, required to be paid in connection with the issuance of underlying Shares issued pursuant to the Plan is actually received by the Company as provided in the Plan, we are of the opinion that the Shares to be issued pursuant to the Plan will be duly authorized, validly issued, fully paid and nonassessable.



TherapeuticsMD, Inc.
August 7, 2020
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The opinion expressed herein is specifically limited to the laws of the State of Nevada and the federal laws of the United States of America and speaks only as of the date hereof. Further, our opinion is based solely upon existing laws, rules, and regulations, and we undertake no obligation to update or supplement such opinion to reflect any facts or circumstances that may hereafter come to our attention or any changes in law that may hereafter occur. This opinion is rendered solely in connection with the transactions covered hereby and may not be relied upon for any other purpose, without our prior written consent.

We hereby consent to the inclusion of this opinion as an exhibit to the Registration Statement. In giving such consent, we do not admit that we come within the category of persons whose consent is required under Section 7 of the Act or the rules or regulations of the Commission thereunder.

Very truly yours,

/s/ DLA Piper LLP (US)

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We have issued our reports dated February 24, 2020 with respect to the consolidated financial statements and internal control over financial reporting of TherapeuticsMD, Inc. included in the Annual Report on Form 10-K for the year ended December 31, 2019, which are incorporated by reference in this Registration Statement. We consent to the incorporation by reference of the aforementioned reports in this Registration Statement.

/s/ Grant Thornton LLP

Fort Lauderdale, Florida
August 7, 2020
