



# TOP 10 PRACTICE TIPS: AT-THE-MARKET OFFERINGS

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An at-the-market (ATM) offering is an offering of an issuer's securities into the existing trading market for such securities at publicly available bid prices. An issuer's internal legal team and outside counsel play critical roles in properly documenting an ATM offering. Below are 10 practice tips for attorneys that can help you effectively and efficiently assist with an ATM offering.

## 1. CONSIDER WHETHER THE ISSUER IS FORM S-3 ELIGIBLE.

Any issuer eligible to register on Form S-3 on a primary basis may set up an ATM program. An issuer is eligible to use Form S-3 to offer securities, on its own behalf in a primary offering, if (1) the aggregate market value of its voting and non-voting common equity held by non-affiliates (i.e., public float) is at least \$75 million or (2) one of the following four tests are satisfied: (i) the issuer has issued (as of a date within 60 days) at least \$1 billion in non-convertible securities over the prior three years; (ii) the issuer has outstanding (as of a date within 60 days) at least \$750 million of non-convertible securities; (iii) the issuer is a wholly-owned subsidiary of a well-known seasoned issuer (WKSI); or (iv) the issuer is a majority-owned operating partnership of a real estate investment trust that qualifies as a WKSI.

## 2. CONSIDER WHETHER THE ISSUER IS A WKSI.

An issuer that qualifies as a WKSI benefits from a more flexible offering registration process, including with respect to an ATM offering. In particular, any shelf registration statement filed by a WKSI with the Securities and Exchange Commission (SEC) will be automatically effective. WKSI's can amend the "Plan of Distribution" section in their existing automatically effective shelf registration statement to reference the ATM offering in the prospectus supplement. As a result, the WKSI will not have to delay its ATM offering to first receive and respond to SEC staff comments. Instead, the WKSI will be able to immediately utilize its ATM program following the filing of the automatically effective shelf registration statement with the SEC. A WKSI is an issuer that (i) is required to file reports with the SEC; (ii) meets the Form S-3 requirements noted above; and (iii) has a worldwide market value of its securities held by non-

affiliates of \$700 million or more (as of a date within 60 days) or has issued at least \$1 billion in non-convertible securities over the prior three years.

## 3. COMPLY WITH SEC FILING REQUIREMENTS.

Before commencing its ATM offering, an issuer must have an effective shelf registration statement on Form S-3 (or Form F-3 for foreign private issuers) on file with the SEC that permits the issuer to establish its ATM program. The issuer then must prepare a prospectus supplement (unless already included in the shelf registration statement) describing the particular terms of the ATM offering, including the terms and conditions of the equity distribution (or sales agency) agreement entered into between the issuer and the sales agent. Following execution of the equity distribution agreement, the issuer must file the agreement and a press release announcing the launch of the issuer's ATM offering on a Current Report on Form 8-K. In addition, the issuer must report quarterly on the number of shares that have been sold under the equity distribution program and the commissions paid to the sales agent and net proceeds received by the issuer, either by means of a prospectus supplement or in its periodic filings under Forms 10-K or 10-Q.

## 4. DETERMINE IF THE ISSUER'S SECURITIES ARE ACTIVELY TRADED.

An ATM offering by an issuer of securities that qualify as actively traded (i.e., average daily trading volume (ADTV) of at least \$1 million for an issuer with a public float of at least \$150 million) is not subject to the restrictions of Rule 101 (17 C.F.R. § 242.101) of Regulation M. Generally, most ATM offerings are conducted on behalf of issuers that meet this ADTV test. In the case of securities that do not meet this exception, each ATM offering must be analyzed based on its magnitude and whether such offering involves special

selling efforts by the sales agent in order to assess the applicability of Regulation M, including Rule 101. Notwithstanding the ADTV exemption, Rule 104 (17 C.F.R. § 242.104) of Regulation M prohibits stabilization activities by sales agents in connection with ATM offerings. However, most ATM offerings are conducted on a best efforts basis and are therefore exempt from the short sale restrictions of Rule 105 (17 C.F.R. § 242.105) of Regulation M.

## 5. ENGAGE ONE OR MULTIPLE SALES AGENTS.

The ATM activities of the sales agent typically resemble ordinary dealer activities rather than underwriting activities by an investment bank. The sales agent typically executes ATM sales on a best efforts basis without using any special selling efforts (i.e., no road show or other solicitation). As a result, issuers typically engage more than one sales agent under a single equity distribution agreement in order to provide the issuer with an option to utilize more than one brokerage platform during the term of the ATM program. However, the issuer may not engage multiple sales agents to sell securities under the ATM program at the same time. The ATM program is typically deemed automatically suspended by the equity distribution agreement as it relates to other sales agents when a placement request is outstanding.

## 6. CONSIDER HOW FREQUENTLY THE ISSUER PLANS TO ACCESS THE ATM.

Most equity distribution agreements specify a maximum number of shares that may be sold on a particular day but otherwise provide the issuer with flexibility to specify a floor price or targeted sale price as frequently or infrequently as the issuer determines. However, if the issuer does not plan to use its ATM program very often, the issuer may want to limit diligence deliverables to a particular time period or allow for the ability to indefinitely suspend deliverables until the time that the issuer does plan to access its ATM program. The sales agent and its counsel will otherwise need to conduct ongoing due diligence regarding the issuer which will include the delivery of legal opinions and a comfort letter. The frequency of these periodic diligence updates (e.g., monthly, quarterly, or based on a specified dollar threshold) may be negotiated by the sales agent and issuer to align with the issuer's expected use of its ATM program.

## 7. SUSPEND ONGOING REPURCHASE PLANS DURING AN ATM OFFERING.

Prior to conducting an ATM offering, an issuer should suspend any ongoing repurchase programs or dividend reinvestment plans. An ongoing repurchase program is a program under which an issuer purchases or buys back, either directly or indirectly, its own shares in the open market. A dividend reinvestment plan automatically

reinvests shareholder dividends in additional shares of the issuer's stock. If the issuer has any ongoing repurchase programs or dividend reinvestment plans in place, the issuer should either suspend share repurchases and/or dividend reinvestments or limit any use of the ATM program to a pre-defined period that does not overlap with the repurchase program or dividend reinvestment plan.

## 8. USE FAMILIAR REPRESENTATIONS AND WARRANTIES.

The equity distribution agreement requires the issuer to make customary representations and warranties to the sales agents at the time the agreement is entered into and at the time of each ATM offering or upon the filing of an issuer quarterly report with the SEC. While the sales agents engaged in the ATM program may be different from the issuer's designated syndicate of underwriters, the equity distribution agreement typically uses the same representations and warranties as previously negotiated in connection with the issuer's recent underwritten transactions in order to avoid adding a lengthy and expensive negotiation of the representations and warranties to the ATM process.

## 9. MANAGE ONGOING DUE DILIGENCE REQUIREMENTS.

The sales agent will conduct ongoing due diligence, irrespective of any periodic updates, prior to each takedown (usually in the form of a bring-down due diligence call with the issuer), or if the equity distribution program has been inactive, then on a periodic basis (typically quarterly). If the due diligence requirements and required deliverables have not been arranged, the issuer will be unable to engage the sales agent and commence an ATM offering immediately. However, if the diligence requirements have been met as specified in the equity distribution agreement, the issuer will be able to proceed with an ATM offering at its sole discretion without obtaining the sales agent's formal consent.

## 10. CONSIDER USING AN ATM OFFERING FOR A SELLING STOCKHOLDER.

An ATM program may be set-up on behalf of a significant selling stockholder in order to take advantage of market opportunities to sell shares quickly. Such an ATM program allows the selling stockholder to exceed the volume limitations under Rule 144 (17 C.F.R. § 230.144) (in any three-month period, the greater of 1% of shares outstanding or the average weekly trading volume during the preceding four calendar weeks). Additional selling stockholders may be added by post-effective amendment or in a prospectus supplement. If the selling stockholder is an affiliate (director, executive officer, or 10% holder), then consideration should be given to establishing a Rule 10b5-1 (17 C.F.R. § 240.10b5-1) trading plan to create an affirmative defense to any insider trading allegations.