



Here's the deal:

- An "at-the-market" ("ATM") offering is an offering of securities into an existing trading market for the securities at a price or prices related to the then-market price of the securities.
- ATM offerings are continuous offerings, and provide issuers with a flexible way to raise modest amounts of capital with minimal market impact, at a low cost and with limited management involvement.
- ATM offerings are often utilized by issuers that have a frequent need to raise capital, whether to repay debt, fund the purchase price for a small acquisition or otherwise fund operations.

What's the Deal?

An ATM offering is a follow-on offering of securities utilized by publicly traded companies in order to raise capital over a period of time. In an ATM offering, an issuer sells newly issued shares into the trading market through a designated sales agent at prevailing market prices. These offerings are conducted pursuant to an equity distribution or sales agreement entered into between the issuer and one or more sales agents. The sales agent may act either on an agency (best efforts) or principal (firm commitment) basis; however, more often than not, transactions are undertaken on an agency basis.

Advantages of ATM Offerings

ATM offerings offer several advantages over traditional follow-on offerings, including:

- Minimal market impact. Issuers can quickly raise capital by selling newly issued shares into the natural trading flow of the market, without having to market and/or announce the offering. As a result, shares are able to "trickle" into the market without significant impact on stock price.
- Flexibility. Sales can be effected on an agency or principal basis, and the terms of each sale are agreed upon between the issuer and the sales agent, including the timing and size, at the issuer's discretion. This enables an issuer to match its issuances to its ongoing needs. For example, an issuer can implement a limit price below which sales will not occur and/or a percentage limitation on daily sales to reduce downward price pressure on its stock.
- Low cost. The distribution costs for ATM offerings (usually 1-3%) typically are lower than the fees associated with traditional follow-on offerings.
- Minimal management involvement. ATM offerings require no "roadshows."

- Forward sale option. Many ATM offerings have been structured to incorporate a forward sale option. A forward sale allows an issuer to sell its securities through the ATM offering at the current trading price without actually issuing any securities to satisfy the forward commitment until a future settlement date.

Disadvantages of ATM Offerings

ATM offerings tend to be substantially smaller than traditional follow-on offerings, and may not be as useful to issuers seeking to raise a large amount of capital within a short period of time. There are ongoing costs associated with the maintenance of an ATM program, which may seem substantial if the issuer is not making ATM offerings regularly.

Required Filings with the Securities and Exchange Commission

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 Securities and Exchange Commission (the "SEC"). The issuer can either (i) use an allocated portion of an already existing universal shelf registration statement specifically for ATM programs or (ii) prepare a new shelf registration statement specifically for an ATM program. If the issuer decides to use an already existing shelf registration statement, then the issuer must prepare a prospectus supplement specifically for the ATM program. The plan of distribution section included in the shelf registration statement, or in the related prospectus supplement, must describe the general terms of the ATM program, including the method of sale and commissions/fees to be paid by the issuer, and identify the sales agents that will participate in the ATM program.

Upon execution of the equity distribution or sales agreement governing the ATM program, the issuer will file with the SEC the prospectus supplement, as well as a current report on Form 8-K, which will include as an exhibit, the equity distribution or sales agreement. In addition, the issuer must report quarterly the number of shares sold under the ATM program, as well as the commissions paid and net proceeds to the issuer, either by means of a prospectus supplement or in the issuer's periodic reports.

Often an ATM program will allow the issuer to conduct block trades, which trades are effected at a fixed price. To the extent that an issuer conducts a block sale, it might consider and discuss with counsel whether a prospectus supplement relating to the transaction should be filed.

Eligibility

A public company is eligible to implement an ATM program if it has a public float of at least \$75 million or satisfies certain other qualifying thresholds. A company that qualifies as a well-known seasoned issuer ("WKSI") will have greater flexibility. A WKSI may file an automatically effective shelf registration statement and is not required to specify an aggregate dollar amount on the registration statement. As a result, a WKSI may access the market promptly after filing its registration statement. An issuer that is not a WKSI, and that does not have an effective shelf registration statement, will need to file a registration statement, which may be subject to SEC comment, that specifies the number of securities to be registered.

An issuer that has an aggregate market value of common equity held by non-affiliates of less than \$75 million, will be subject to Instruction 1.B.6(a) of Form S-3, which limits the amount the issuer can offer to up to one-third of the public float during any trailing 12-month period. This one-third limitation will apply to securities sold in any primary offering, including an offering made pursuant to the ATM program.

For issuers that are subject to this “baby shelf” rule, the full amount available under an ATM program (even the portion that remains unsold) counts against the one-third limitation, which can be quite punitive.

To calculate the public float for purposes of S-3 eligibility, an issuer may look back 60 days and select the highest of the last sales prices or the average of the bid and ask prices on the principal exchange. The registration capacity for a baby shelf is measured immediately prior to the offering and re-measured on a rolling basis in connection with subsequent takedowns. The shelf availability for a particular takedown is measured as the current allowable offering amount less any amounts actually sold under the shelf registration statement in prior takedowns. Accordingly, the available offering amount will increase as an issuer’s stock price increases, and decrease as an issuer’s stock price decreases.

Required Documentation

The equity distribution or sales agreement, entered into between the issuer and the sales agent(s), establishes the terms and conditions upon which the issuer and sales agent will conduct the ATM offering. The agreement typically provides for both agency and principal transactions, sets forth the sales agent’s commission, and contains representations, warranties and covenants from the issuer to the sales agent, as well as indemnification, contribution and termination provisions. The equity distribution or sales agreement typically terminates on either a fixed date or when the offering amount is reached.

The equity distribution or sales agreement usually requires the delivery to the sales agent of legal opinions (including a negative assurance from issuer’s and agent’s counsel), an officer’s certificate, and a comfort letter from the issuer’s independent auditors. Generally, the agreement also will require that the issuer bring-down its representations and warranties at the time of each sale, as well as periodic updates to the issuer’s deliverables to the sales agent.

Due Diligence Obligations

An ATM offering is a registered public offering. The sales agent and its counsel will conduct due diligence prior to the entry into the equity distribution or sales agreement and the commencement of the ATM offering. As discussed above, given the ongoing or continuous nature of the offering, the equity distribution or sales agreement will require that the issuer refresh or provide updated deliverables, including updates to the legal opinions and comfort letter.

The sales agent may be subject to liability under Section 11 of the Securities Act, even though it may be acting as an agent only on a best efforts basis, which means that the level of due diligence required is the same as that for any underwritten follow-on offering.

Executing ATM Sales

The sales agent generally will execute sales of the issuer’s securities through ordinary brokers’ transactions through securities exchanges or electronic trading systems at varying prices. These transactions do not involve any special selling efforts (i.e., no roadshow or other active solicitation) nor do they involve an amount of the issuer’s securities that would be considered significant relative to the issuer’s public float or daily trading volume. The commission payable by the issuer to the sales agent is consistent with the commission payable to a dealer executing trades rather than the type of fee that would be associated with underwriting compensation. Based on these various factors, the sales agent’s execution of ATM offerings

more closely resembles ordinary dealer activity than participation as an underwriter in a securities distribution.

Regulation M

Regulation M is intended to prohibit manipulative practices in the securities offered in a distribution. Rule 101 of Regulation M prohibits distribution participants and their affiliated purchasers from directly or indirectly bidding for, purchasing or attempting to induce another person to bid for or purchase the subject security or any reference security until the applicable restricted period has ended. Rule 102 of Regulation M prohibits issuers, selling security holders and their affiliated purchasers from directly or indirectly bidding for, purchasing or attempting to induce another person to bid for or purchase the subject security or any reference security until the applicable restricted period has ended.

An ATM offering 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. However, the restrictions of Rule 102 still apply to the issuer, any selling security holders and affiliated purchasers, unless the subject security is not issued by the issuer or any affiliate and the subject security has a reference security that itself qualifies as “actively traded.” Generally, most ATM offerings are conducted for issuers that meet the ADTV test. In the case of securities that do not meet this exception, it will be important to undertake a closer analysis of the Regulation M restrictions.

Note that Rule 104 of Regulation M prohibits stabilization activities in connection with ATM offerings. In addition, ATM offerings are “best efforts” offerings, which are exempt from the short sale restrictions of Rule 105 of Regulation M.

The Financial Industry Regulatory Authority (“FINRA”) requires sales agents to file Regulation M Restricted Period Notification Forms and related Regulation M Trading Notification Forms if the relevant transaction is considered a “distribution” as defined in Regulation M. In most cases, as discussed above, because the issuer’s securities qualify as “actively traded,” a restricted period is not imposed. However, to determine whether a proposed ATM offering is considered a distribution, Regulation M requires an analysis of factors that may distinguish the proposed offering from ordinary trading activity, such as the magnitude of the offering, the presence or absence of special selling efforts and methods, the number of shares to be sold, the percentage of outstanding shares of the proposed offering compared to the public float and the security’s normal trading volume.

Rule 10b5-1 Plans

An affiliate of an issuer may utilize a Rule 10b5-1 trading plan in conjunction with an ATM offering as a means of disposing of its securities. Any person or entity executing preplanned transactions pursuant to a Rule 10b5-1 plan that was established in good faith at a time when that person or entity was not aware of material non-public information has an affirmative defense against accusations of insider trading, even if actual trades made pursuant to the plan are executed at a time when the individual or entity may be aware of material non-public information.

In order to benefit from the safe harbor, a Rule 10b5-1 plan incorporated into an ATM offering must:

- specify the amount, price (which may include a limit price) and specific dates of purchases or sales; or

- include a formula or similar method for determining amount, price and date; and
- give the sales agent the exclusive right to determine whether, how and when to make purchases and sales, as long as the sales agent does so without being aware of material nonpublic information at the time the trades are made.

Compliance Considerations for Sales Agents

Sales agents participating in an ATM program should consider, among other things, how to address their participation in an ATM program with respect to any restricted or watch lists. Using watch and restricted lists may permit the sales agent's compliance and legal departments to monitor the firm's activities relating to the issuer, including research activities, and initiate proper conflict resolution procedures.

A sales agent generally can participate in an ATM offering even if it already provides research coverage regarding the issuer or plans to provide such coverage in the future. Rule 139(a) of the Securities Act permits a sales agent that participates in a distribution of securities of an issuer meeting the eligibility requirements of Form S-3 to publish a "research report" regarding the issuer or any class of its securities without having the research report considered an "offer" or a non-conforming prospectus, provided that the research report is included in a publication distributed with reasonable regularity in the normal course of the sales agent's business. Additionally, the "research report" must include similar information, opinions or recommendations with respect to a substantial number of companies in the issuer's industry or subindustry, or contain a comprehensive list of securities currently recommended by such sales agent and the research covering the issuer is given no materially greater space or prominence than that given to other securities or companies.

In those instances where the sales agent does not already provide research coverage, a question may arise whether the sales agent can commence research coverage during the term of the ATM offering. Since there is little guidance to rely on, it is helpful to analogize and rely on the regulatory guidance regarding the commencement of research coverage preceding a follow-on public offering. A FINRA member cannot publish a research report on an issuer for which the FINRA member acted as a manager or co-manager of a follow-on offering by the issuer for three calendar days following the date of the offering. In this case, the sales agent may consider instituting a policy that it will not commence research coverage or provide a research report for a period of not less than three calendar days following the establishment of an ATM offering.

Sales agents must consider and institute guidelines regarding the review process that should be undertaken regarding research on the securities of issuers for which it is acting as an agent. These guidelines should include procedures for handling research reports that discuss earnings projections or a change in credit rating, as well as those reports issued outside the sales agent's regular course of business.

Checklist of Key Questions

- Does the issuer have enough authorized and unissued shares to accommodate the number of shares that may be issued in connection with the ATM offering?
- Is there a shelf registration statement available or must a new registration statement be filed?
- Is the issuer subject to Form S-3's baby shelf limitation?
- Will the ATM offering program include multiple sales agents?
- Will the ATM program be structured to incorporate the ability to undertake block sales?
- What are the quarterly diligence deliverables that are expected in connection with the ATM offering?
- What restrictions does Regulation M impose on the issuer and the sales agent?
- Has the issuer considered whether a forward sales agreement would be useful in connection with the ATM offering?