

## At-The-Market Offerings – Current Trends and Developments

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### Introduction

At-The-Market offerings ("ATMs") are one of the most efficient ways for public companies to raise capital. Any publicly traded company that meets the requirements to use an effective shelf registration statement may sell its shares over the existing trading market from time to time by engaging an investment bank as a selling or distribution agent. ATMs have been used more frequently than in the past. For example, U.S. companies raised approximately \$2 billion through 60 ATM offerings across 20 industries in the first quarter of 2011 alone. Compared to the first quarter of 2010, this dollar amount represents almost a 29 percent increase in the use of ATMs for the same quarter in 2011. Due to the increase in the use of ATMs, we have provided some of the current trends and developments in this product.

### ATMs: In General

An ATM offering is a registered offering by a publicly traded issuer of its listed securities directly into the market at other than fixed prices. The issuer may, at its discretion, sell newly issued stock into the trading market from time to time through a designated sales or distribution agent at market prices. This differs from traditional underwritten offerings where a fixed number of shares are sold at a fixed price all at once.

ATMs are available for use by issuers that are eligible to conduct shelf offerings using Form S-3 under Rule 415 of the Securities Act of 1933, as amended (the "Securities Act"), (or Form F-3 for foreign private issuers)<sup>1</sup> on a primary basis<sup>2</sup>. For an ATM offering, an issuer must have a Form S-3 or Form F-3 registration statement on file and effective with the Securities and Exchange Commission (the "SEC"). The issuer can either (1) use a portion of an existing shelf registration statement specifically allotted for ATM offerings, or (2) file a new shelf registration statement. If using an existing shelf registration statement, a prospectus supplement will be filed including, among other things, a description of the securities to be issued, the size of the program, the general terms, and the commissions or fees that the issuer will pay.

Prior to entering into an ATM transaction, the issuer and agent will enter into a sales or distribution agreement (which is filed as a material agreement along with the press release with a Form 8-K), which sets forth the terms and conditions under which the sales or distribution agent and issuer will carry out the ATM offering. Since a sales or distribution agent is considered an "underwriter" under the Securities Act, the agent will usually have conducted due diligence before the offering (performed at the same level as underwriters in traditional underwritten offerings), manifesting in representations and warranties within the sales or distribution agreement similar to those in traditional underwriting agreements. The program generally requires that legal opinions, a 10b-5 negative assurance letter from issuer's counsel, an officer's certificate and a comfort letter from the independent registered public accounting firm each be delivered to the agent (prior to the commencement of the offering). In addition, bring-downs of the issuer's representations and warranties as well as updates of the issuer's deliverables to the agent must be made on a quarterly and/or annual basis. The company must also disclose the aggregate number of shares sold and commission amounts paid to the sales or distribution agent on a quarterly basis on a Rule 424(b) prospectus supplement or, if provided for in the sales or distribution agreement, as part of the company's quarterly report on Form 10-Q.

Furthermore, any sales of stock that the issuer considers material (such as a block trade) may require prompt disclosure following such sales.

## **Current Trends and Developments in ATM Offerings:**

**1. Diverse Participants.** The SEC's December 2005 Securities Offering Reform and 2008 amendments to Form S-3 eliminated certain procedural restrictions related to ATM offerings, increasing their use and attractiveness. A diverse range of industries are taking advantage of ATM offerings, including REITs, oil & gas enterprises, and life sciences and financial services companies. For example, in 2010, the life sciences sector alone raised over \$180 million through ATM offerings, roughly 2 percent of the approximate \$8 billion raised by ATM offerings that year. REITs account for a large share of the money registered by ATM offerings (approximately 80 percent of all ATMs offered this year to date).

**2. Public Offerings of Preferred Stock Followed by ATM Programs.** Given the current market uncertainty and volatility, some issuers are hesitant to pursue traditional equity offerings due to concerns regarding favorable pricing or offering size, as well as the negative implications of downsizing or terminating a public offering after its announcement. Some companies are able to conduct a public offering of a new series of preferred stock listed on a stock exchange in a modest amount and then follow it up with a larger ATM offering. ATM offerings have generally been designed to take advantage of potential future market opportunities without any process delays (i.e., registration, due diligence and document negotiation). As a result, many issuers are increasingly using ATM offerings as a supplement to, and not a replacement for, traditional offerings or other capital raising methods. Furthermore, issuers are successfully negotiating carve-outs to lock-up provisions in underwriting agreements covering fully marketed offerings, thereby permitting them to continue takedowns under an existing ATM program after the closing of a fully marketed offering.

**3. Cross-border ATMs.** ATMs are increasingly being used by non-U.S. companies. Dual listed companies in Canada, Hong Kong, Australia and Israel also have been participating in ATMs in the United States. Many jurisdictions do not have a process equivalent to an ATM, so dual-listed companies take advantage of their U.S. listing to effect an ATM.

**4. ATMs for American Depositary Shares and American Depositary Receipts.** ATMs can be used to issue different types of equity securities, including American Depositary Shares and American Depositary Receipts. There are additional mechanical issues for these types of equity issuances, but ATMs for these securities have been used without any material additional requirements.

**5. Multiple Sales or Distribution Agents.** Many ATMs use multiple sales agents which rotate to provide the issuer with the ability to work with more financial advisors. Typically, only one agent at a time is permitted to effect sales in the securities.

**6. Stock Exchange Familiarity and Action without Shareholder Approval.** The NYSE, NYSE Amex and Nasdaq generally require stockholder approval of securities transactions that may result in the issuance or sale of 20 percent or more of a listed company's outstanding common stock or voting power. Obtaining shareholder approval prior to any securities transaction is a costly process that can oftentimes take months, with no guaranteed outcome, and can thwart an issuer's ability to access the market quickly. However, the NYSE, NYSE Amex and Nasdaq exchange rules include an exception to this rule, which provides that shareholder approval is not required in the case of a public offering for cash. These exchanges have clarified that ATM offerings for cash are generally considered true public offerings, which are exempt from the shareholder approval requirement. Therefore, a Nasdaq, NYSE or NYSE Amex issuer can sell 20 percent or more of its outstanding shares as part of an ATM offering without obtaining shareholder approval.

The NYSE also requires shareholder approval if an issuance of securities to a director, officer or substantial security holder of the issuer (each, a "Related Party") may exceed 1 percent of the voting power or the number of shares of common stock outstanding before such issuance. If the Related Party involved in the transaction is purely a substantial security holder, and if the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market values of the issuer's common stock, then shareholder

approval will not be required unless the number of shares of common stock to be issued exceeds either 5 percent of the voting power or the number of shares of common stock outstanding before such issuance. In such instances, the NYSE usually requires a representation letter stating that the issuer has complied with these rules in connection with the ATM.

**7. Regulation M.** Issuers and agents should understand the impact of Regulation M. Regulation M is intended to prevent distribution participants from manipulating the trading market by prohibiting the direct or indirect bidding for, purchase, or attempt to induce another person to bid for or purchase a covered security in a securities offering until the restricted period has ended. ATM offerings by an issuer of "actively traded" securities (an issuer with an average daily trading volume ("ADTV") of at least \$1 million and a public float of at least \$150 million) are not subject to these restrictions. ATM offerings by issuers that do not satisfy these ADTV and public-float values must be analyzed based on the magnitude of the offering and whether it involves special selling efforts that could be perceived as market manipulation. If the ATM offering is deemed a distribution, then the issuer and agent must coordinate any selling efforts of the issuer's securities to ensure compliance with Regulation M.

**8. FINRA Compliance.** FINRA's Corporate Financing Rules require issuers that engage agents for ATM programs to file information regarding the offering and the agent's compensation with FINRA's Corporate Financing Department ("CFD"). The issuer may only commence an ATM program once it receives a "no objection" letter related to the proposed compensation from CFD. However, if the issuer has been public for at least 36 months and has a public float of at least \$150 million (or \$100 million and an annual trading volume of 3 million shares for the 12 months preceding commencement of the ATM offering), then the issuer is exempt from the Corporate Financing Rule's filing and pre-approval requirements. FINRA's option for Same Day Clearance allows an issuer that makes the requisite filings to obtain the "no objection" letter efficiently so that transactions are not delayed.

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1. To be eligible to use a Form S-3, the issuer, among other things: (1) must have a class of securities registered under the Securities Exchange Act of 1934, as amended (the "Exchange Act") (or must be required to file reports under Section 15(d) of the Exchange Act); (2) must have been subject to the reporting requirements of Section 12 or 15(d) of the Exchange Act for at least 12 calendar months immediately preceding the filing of the registration statement and have timely filed all required reports with the SEC during that period; and (3) cannot have failed to pay any dividend or sinking fund installment on preferred stock, or defaulted on any installments on indebtedness for borrowed money or on material leases since the end of the last year covered by its audited financial statements that, in the aggregate, are material to the financial position of the issuer.
  2. An issuer is primarily eligible to use a Form S-3 or Form F-3 registration statement for an offering of securities for cash on its own behalf in an ATM offering if: (1) the public float of the issuer is at least \$75 million; or (2) the securities being offered are non-convertible investment grade securities. Smaller companies (those with less than \$75 million in public float) may register primary offerings of its securities on a Form S-3 or F-3 registration statement, if the company: (1) meets the general eligibility conditions for the use of a Form S-3 or F-3 registration statement; (2) has a class of common equity securities that is listed and registered on a national securities exchange (which includes the NYSE, NYSE Amex and all levels of Nasdaq, but does not include the OTC Bulletin Board or other over-the-counter markets); (3) has not sold securities valued at more than one-third of its public float over the previous 12 calendar months; and (4) is not and has not been a shell company for at least 12 calendar months.



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