

CORPORATE AND SECURITIES LAW

Alert

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Capital Markets Trend: At-the-Market Offerings

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What is an At-the-Market Offering?

An at-the-market offering involves the sale by an issuer of equity securities into the market periodically over time, typically at the prevailing market price, through a placement agent, or designated broker-dealer. Pursuant to a distribution or sales agreement with the broker-dealer, the issuer maintains complete control over when securities are sold, the amount sold, and the minimum price at which they may be sold. The broker-dealer is paid a commission on the securities sold, and the issuer may stop the offering at any time. Because there is no lock-up period, the issuer is generally free to pursue a traditional deal if it desires while still keeping the at-the-market program in place.

Who May Conduct an At-the-Market Offering?

In the current market environment, a variety of companies have raised capital utilizing at-the-market offering programs, particularly companies which frequently need to raise additional capital, including companies in the automotive, airlines, banking, energy, life sciences, natural resources, technology and utilities industries, and real estate investment trusts.

In order to conduct an at-the-market offering, an issuer must be eligible to use Form S-3 (i.e. among other requirements, be current in its SEC filings and either (i) have a market capitalization (public float) of at least \$75 million or (ii) be listed on a national securities exchange and not sell more than one-third of its public float in any 12-month period). A well known seasoned issuer, or WKSI, which generally has a public float of more than \$700 million, is eligible to use an automatically effective registration statement, or Form S-3ASR.

In addition, due to FINRA regulations and constraints imposed by Regulation M and other SEC requirements, issuers with a public float of less than \$150 million will be limited in their ability to engage in at-the-market offerings until certain approvals are obtained or other conditions met.

What are the Benefits of an At-the-Market Offering?

In contrast to a traditional underwritten offering, sales in an at-the-market offering can be accomplished quickly and with minimal disclosure into the existing secondary market, providing for minimal impact on

the market price and few arbitrage opportunities. Sales may be large or small, depending on the issuer's need and perceived demand in the market, and the issuer can set minimum stock prices, so the issuer is never obligated to sell at a disappointing market price, as may occur in a traditional underwritten offering. Because the issuer controls the timing and size of each sale, the issuer also has the flexibility to time sales based on specific capital needs. In addition, the costs are generally substantially lower than traditional underwritten offerings, with the broker-dealer's compensation being typically a percentage of the gross sales price per share for any share sold pursuant to the distribution agreement.

What are the Legal Steps Involved?

The issuer first must have an effective shelf registration statement on Form S-3 on file, or, if the issuer is a WKSI, a Form S-3ASR may be filed simultaneously with the commencement of the offering. The broker-dealer and its counsel will conduct a due diligence review of the issuer's operations, and the distribution agreement will typically provide for the delivery of accountants' comfort letters and legal opinions, both initially and on an on-going, often quarterly, basis. When the issuer and the broker-dealer enter into the distribution agreement, the issuer usually files it as a material agreement on a Form 8-K along with a press release announcing the commencement of the program. The issuer will file a prospectus supplement describing the terms of the at-the-market offering program and naming the distribution agent. Once these initial steps have been completed, sales may begin on the issuer's demand. Equity issuances made under an at-the-market offering program are disclosed at the end of each quarter in the issuer's periodic reports made under the Exchange Act.

At-the-market offerings are considered a "distribution" for Regulation M purposes. No market making, passive or active, is permitted during a distribution.

Where can I get More Information?

Bass, Berry & Sims PLC has acted as counsel in numerous at-the market offerings, both as counsel to the issuer and as counsel to the broker-dealer. If you are interested in learning more about at-the-market offerings, please contact one of the attorneys listed below.

Bass, Berry & Sims PLC's Corporate Finance—1933 Act Subgroup monitors and advises on developments in the area of initial public offerings, follow-on public offerings of equity and debt securities and Rule 144A offerings. If you have any questions regarding the issues addressed in this Corporate and Securities Law Advisory or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroups listed below.

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