

Strafford

presents

At-the-Market Offerings: Legal Considerations for Issuers and Investors

Evaluating and Using ATMs to Raise Public Equity

A Live 60-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Dean M. Colucci, Partner, **DLA Piper**, New York
Joshua Feldman, Director, **Cantor Fitzgerald**, New York
James T. Seery, Partner, **DLA Piper**, New York

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The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.
Please refer to the dial in/ log in instructions emailed to registrants.

AT-THE-MARKET OFFERINGS

An overview of our practice



EVERYTHING MATTERS

DLA Piper has acted as counsel in more At-the-Market transactions than any other firm

Despite the dislocation in the capital markets, during the past year one financial product has shown resilience: At-the-Market Offerings, which enable public companies to sell to the public periodically during the term of the offering, through a broker-dealer, registered common or preferred stock in amounts and at a times and prices of the issuer's choosing. While at various times during the past 12 months the capital-raising window for other products has effectively been closed, a substantial amount of equity capital has been raised using ATMs by companies in a wide variety of industry sectors, including automotive, airlines, banking, energy, life sciences, natural resources, real estate investment trusts, technology and utilities.

Recent issuers filing ATM programs include, among others, Avanir Pharmaceuticals, Bank of America, Calamos Convertible and High Yield Fund, CompuGen Ltd., Dominion Resources, Essex Property Trust, Ford Motor Company, Freeport McMoRan Copper & Gold Inc., HealthCare Realty Trust, KeyCorp, Martin Marietta Materials Corp., MFA Financial, Inc., Mid-America Apartment Communities, Nationwide Health Properties, PNC Financial Services, Inc., ProLogis Trust, Southern Company, StemCells Inc. and Valence Technology Inc.

These offerings are referred to in the marketplace by a variety of service

marks or trade names, such as CEOs or Controlled Equity Offerings, ATMs, ESTs, DOCs and dribble-outs.

THE DLA PIPER DIFFERENCE

DLA Piper has acted as counsel in more ATM transactions than any other firm—approximately 50, with a market value, calculated at time of filing, of more than \$6 billion.

Our experience in this area is sweeping. We have acted as counsel in ATM offerings in the energy, life sciences, transportation, technology, Canadian income trust and REIT sectors. We were underwriter's counsel on the only ATM offering completed under the Multi-Jurisdictional Disclosure System for a Canadian issuer listed on both the NYSE and TSX. We were also underwriter's counsel for the first ATM done for a company dually-listed on both the NASDAQ and the Tel Aviv exchange. Growing our knowledge of this area, our lawyers have analyzed the global application of ATM-type products in such jurisdictions as the United Kingdom, France, Sweden, India and Hong Kong.

Whether you are an issuer considering alternatives, such as an ATM, to raising equity capital or an investment bank considering the development of an ATM or other equity raising product, either in the US or globally, let us put our experience to work for you.

WHAT YOU NEED TO KNOW: DOCUMENTATION AND LEGAL FRAMEWORK

ATMs are available for use solely by companies eligible to conduct shelf offerings using Form S-3 under Rule 415 of the Securities Act (or Form F-3 as used by foreign private issuers). Thus, for prospective ATM users with a non-affiliated public float of greater than \$75 million, to be S-3 eligible, the issuer must have a class of securities registered under Section 12 of the Exchange Act or be required to file reports pursuant to Section 15(d) of the Exchange Act, and have timely filed all required reports under the Exchange Act during the 12 months preceding the later of the filing of the shelf registration statement or annual report on Form 10-K. For those prospective issuers with a public float of less than \$75 million, in addition to the preceding requirements, the issuer must have a class of common equity securities listed and registered on a national securities exchange, not have been a shell company for a minimum of 12 months prior to the filing of the registration statement, and not sell more than one-third of its public float under Form S-3 over a period of 12 months.

The documentation for an ATM consists of a sales or distribution agreement which is filed with the SEC as an exhibit to Form 8-K and a

prospectus supplement or pro supp (filed pursuant to Rule 424(b)(2) or (5) of the Securities Act).

The sales agreement is, in form and substance, almost identical to a standard underwriting agreement. The main distinctions between an underwriting agreement and an ATM sales agreement are that for an ATM (a) the broker-dealer can act in either an agent or principal capacity, (b) the sales agreement stays in place for as long as there is unsold stock (which can be as long as two years) and sales are made periodically throughout the term and not in one single takedown, (c) there are ongoing obligations for the issuer throughout the term, including an obligation to provide quarterly comfort letters from the company's auditors and negative assurance letters from its counsel and (d) there is generally no lock-up period under an ATM program, so the issuer is free to pursue a traditional deal if it desires while still keeping the ATM in place.

The pro supp is generally quite brief, unless other circumstances dictate that additional disclosure is necessary. Typically, the pro supp contains a plan of distribution, unless the base prospectus contained in the Form S-3 specifies that the issuer may be engaging in at-the-market transactions under Rule 415. As long as sales are made "at-the-market" under Rule 415(a)(4), a pro supp need only be filed at the initiation of the ATM program. The pro supp for an

ATM is usually filed concurrently with the Form 8-K which contains the sales agreement as an exhibit.

Additional legal considerations include the following:

- Equity issuances made under an ATM program are disclosed at the end of each quarter in the issuer's periodic reports made under the Exchange Act.
- ATM programs can be used to issue all types of equity securities, including common stock, preferred stock and ADRs.
- The agent under a sales agreement may be considered an underwriter for purposes of Section 11 liability under the Securities Act.
- ATM programs are considered a distribution for Regulation M purposes.
- During an ATM, the underwriter needs to be mindful of various compliance-related issues.
- Broker-dealers may be limited in their ability to issue research during the ATM program but may be able to rely on the safe harbor provisions of Rule 139 under the Securities Act.
- For Nasdaq issuers, ATM programs are considered public offerings under Nasdaq's Rule 5635; therefore, shareholder approval is not required if the issuer desires to issue more than 20 percent of its common stock or voting securities through an ATM offering.

- Issuers should be mindful of potential integration issues that may arise in connection with a private placements conducted while an ATM offering is on file for an issuer at the SEC.
- Depending on the issuer's public float and other factors, the broker-dealer may be required to make a corporate financing filing with FINRA.
- ATM programs require no roadshows and involve limited prospectus preparation and delivery requirements.

PRACTICAL ASPECTS OF ATM OFFERINGS

The ATM allows issuers to execute sales of equity from time to time in any amount (large or small), generally in response to natural institutional investor demand or existing market liquidity.

The ATM gives the issuer the ability to instruct the broker-dealer to sell, as agent, a specified number of shares at or above a threshold price which the issuer determines. There is no obligation under an ATM program to sell shares, and the issuer controls the parameters of sale, including minimum price, number of shares and timing. Issuance parameters can be changed as often as desired and the ATM may be turned on or off at a company's discretion, including intraday.

Contrary to statements that have appeared periodically in the financial press regarding the limitations of ATM offerings, an issuer can raise a substantial amount of capital in a relatively short period if there is sufficient liquidity in its stock. Issuers with average daily trading volumes in excess of 100,000 shares per day are typically viewed as excellent candidates for ATM programs because volume at those levels provides the broker-dealer with sufficient market liquidity to rapidly raise capital. This does not mean that issuers with lower average daily trading volumes are precluded, but rather they might not be able to raise capital as quickly.

Historically, the broker-dealers that are most active in ATM issuances have been able to execute ATMs at average purchase prices that have exceeded the volume weighted average price (VWAP) over the execution period authorized by the client, thereby reducing dilution and the all-in cost of issuance.

The ATM does not replace traditional offerings but instead enables issuers to raise incremental capital when needed and gives issuers the ability to better match sources and uses of funds.

BENEFITS OF ATMS COMPARED TO OTHER SECONDARY OFFERING PRODUCTS

Equity lines of credit, registered directs and PIPEs tend to be more dilutive, frequently require warrant

coverage and typically involve greater transaction costs.

The equity research analyst community has typically viewed an issuer's filing of an ATM program quite favorably. Analysts have focused on the ATM's benefits, such as (a) allowing issuers to raise low cost capital while having ultimate control over the size and timing of sales, (b) expanding institutional ownership, (c) limiting the dilutive effects of an offering, (d) reducing the risk of having an issuer's stock price drop in the market in the period between announcement of a deal and pricing and (e) eliminating the distraction to management that occurs in connection with a road show or the marketing of a deal.

There is no obligation to use an ATM program once it is filed and issuers are not precluded from effecting another capital markets transaction, such as a fully underwritten deal, while a company has an ATM program in place. The filed ATM program can be turned on or off at will. Therefore, a company wishing to do an alternate capital markets transaction need only turn the program off by ceasing the issuances under the program until the other transaction is fully completed or any lockup has expired.

Depending on the broker-dealer involved, the ATM can provide a company with unique insight and/or opportunities to take advantage of increased demand for a company's stock by utilizing the broker-dealer's market presence.

ABOUT US

DLA Piper is an international legal practice with lawyers across Asia, Europe, the Middle East and the United States.

From the quality of our legal advice and business insight to the efficiency of our legal teams, we believe that when it comes to the way we serve and interact with our clients, everything matters.

FOR MORE INFORMATION

To learn more about DLA Piper, please visit www.dlapiper.com. For more information about ATM products, please contact:

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