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PERSPECTIVE

At-the-market offering program: a strategic financing tool

By Sara L. Terheggen

Undertaking a traditional underwritten registered offering can expose a company to the risk of a "closed" window. A closed window is when the market is just not receptive to new offerings or will only entertain a deal with a steep discount to market price. An "at-the-market" offering — ATM — program is one capital markets financing tool that a company who is S-3 or F-3 eligible can use on an as-and-when-needed basis. An ATM program allows a company to sell securities into their existing trading market at prevailing market prices. Since companies control when sales occur and at what price and also have flexibility to modify the parameters, companies can maximize sales effectively. For example, companies can take advantage of a temporarily high stock price or capitalize on recent good news. ATMs have provided many companies over the years with a strong source of liquidity. In fact, companies have increasingly seen the value of adding an ATM program to their financing toolkit. According to league tables, in just the first quarter of 2021 alone, close to 300 companies implemented an ATM program as part of their financing strategy. It is helpful if companies remember that an ATM program can be a primary source of capital raising but more often it is used as a complementary source of capital.

Setting up an ATM Program

Shelf Registration Statement and Prospectus Supplement: An ATM program is relatively easy to implement once a company has an effective shelf registration statement on file. If a shelf is not on file, a company should focus on this as a first step. The shelf should contain broad language in the plan of distribution section that provides sales may be made from time to time at prevailing market prices. The shelf can include a sales agreement prospectus which would eliminate the need for the company to file a separate prospectus supplement once the shelf is effective. The alternative is to just file the shelf and then file a prospectus supplement specific to the ATM program once the shelf is effective. The sales agreement prospectus or prospectus supplement, as applicable, will specify the amount to be offered through the ATM program, describe the securities to be issued under the program (i.e., common stock, senior notes, etc.), describe the terms of the ATM program and identify the sales agents and commission amounts to be paid to such agents.

Sales Agreement: The other key step to establishing an ATM program is entering into the sales agent agreement. This agreement is similar to an underwriting agreement and documents the commission to be paid to the sales agent, representations and warranties of the company, covenants, deliverables, indemnification and termination provisions. At the launch of the ATM program, the sales agreement is typically filed as an exhibit to an 8-K or may be an exhibit to the registration statement if a sales agreement prospectus is included as part of the shelf.

ATM Program Closing Deliverables: Just like any other registered public offering, the sales agreement will mandate delivery of certain closing deliverables. These generally include a comfort letter from auditors, a legal opinion and negative assurance letter and officer's certificate.

FINRA Eligibility: Once the company has their shelf on file, the shelf will need to be made eligible with FINRA unless the company qualifies for an exemption. The new shelf eligibility process with FINRA is straightforward. The filing can be submitted with relative ease and once the associated fee is paid, a company will receive a no objections letter in short order.

Diligence: Counsel for the company and the sales agent will perform standard and customary diligence procedures, including reviewing public filings and requesting non-public documents. There will also typically be a company diligence call and an auditor diligence call. At times and depending on the familiarity of the sales agent with the company, there may be a need for specialist diligence calls or customer calls.

ATM Execution and Maintenance

Once the required documentation is in place, diligence is complete and all deliverables have been provided, sales under the ATM program may begin. The company will issue a placement notice to the sales agent specifying the number of shares to be sold in any one day and any minimum price below which sales may not be made. The sales agent will either accept or reject the notice but once accepted, the agent will execute on sales in accordance with their normal trading and sales practices. Once sales are made, the sales agent will inform the company of the number of shares sold on any given day and the aggregate proceeds based on the market price at which the shares were sold. Settlement of the shares will generally occur on the second trading day following the date of the sale. Fees paid to the sales agent, which generally range from 1-5% for ATM sales, will be deducted from the proceeds of the sales. Sales will continue until the ATM program is terminated or the program is exhausted.

Because of the ongoing nature of an ATM program, a sales agent will require periodic bring-down of diligence as well as closing deliverables. Typically, a company will be required to have bring-down diligence calls following each 10-K and 10-Q filing and will deliver an officers' certificate at that time bringing down representations made in the sales agent agreement. Company counsel will provide a negative assurance letter every quarter and auditors will update their comfort letter annually in connection with the filing of the company's 10-K. From a disclosure perspective, companies will typically disclose aggregate sales and commission amounts paid on a quarterly basis in their 10-Qs.

ATM Programs: Strategic and Subtle

ATM programs can be very advantageous to companies and provide much needed capital over time. They also typically have minimal market impact because of the trickle effect of the offering itself and once established, the program practically runs itself with minimal management involved. Because ATM programs do not prohibit other capital raising activity and can be implemented relatively easily and quickly, they serve as a strategic complementary financing tool for companies. ■

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