Marketing Trends 2017/18: At-the-Market Equity Offerings

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OVERVIEW

At-the-market offerings (ATM offerings or ATM programs) enable companies to access the capital markets in a quick and efficient manner. This article discusses the market trends for ATM offerings in 2017 as well as deal structure and process, disclosure trends, and outlook for 2018. ATM offerings had a record year in 2017, with the combined value of announced ATM offerings equaling approximately $27.82 billion. By comparison, in 2016 the combined value of all ATM offerings equaled $23.01 billion. Overall, there were approximately 205 ATM offerings announced by exchange-listed companies in 2017. This was up from the 189 ATM offerings announced the year before, but just short of the record 209 ATM offerings announced in 2015.

The increase in ATM offerings in 2017 can partly be explained by volatile market conditions and the uncertainty surrounding the Trump administration's economic policies, including the Tax Cuts and Jobs Act. History has shown that more companies conduct ATM offerings in such uncertain times. For instance, at the height of the recession in 2009, the total value of ATM offerings reached approximately $18 billion, whereas in 2008 the total value of ATM offerings was $323 million. ATM offerings provide a flexible, low-cost option for companies to raise capital without much downside, which is why 2017 was a record year for ATM offerings. For more information, see At-the-Market Offerings and Equity Distribution Agreements for At-the-Market Offerings.

NOTABLE TRANSACTIONS

ONEOK, Inc.

On July 19, 2017, ONEOK, Inc. (ONEOK), an Oklahoma based energy company, announced its ATM offering for up to $1 billion of shares of its common stock. According to the prospectus supplement, ONEOK plans to use the net proceeds from the offering for "general corporate purposes, including repaying…indebtedness and funding working capital." ONEOK entered into an equity distribution agreement with twelve sales agents, who are permitted to sell securities as an agent or purchase them directly from ONEOK as a principal. As of the end of 2017, ONEOK raised $448.3 million through its ATM equity program.

Realty Income Corporation

Realty Income Corporation (RIC), a shopping mall investor, announced its ATM program on October 27, 2017, offering up to 17 million shares of its common stock, which had an approximate total value of $920 million at the time of the announcement. RIC entered into a sales agreement with twelve agents. The sales agreement provides that RIC can either sell its shares to the sales agents as a principal or use the sales agent as an agent to sell its shares to a third party. According to the filed prospectus supplement, the proceeds are to be used for general corporate purposes, including the payment of RIC's credit facility and the development and acquisition of additional real estate properties. In 2017, RIC raised approximately $621.7 million from both its previous ATM program (which was conducted from 2015 to September 2017) and the new ATM program it announced on October 27, 2017. In the fourth quarter of 2017, under its new ATM program, RIC had raised approximately $135.8 million.

DEAL STRUCTURE AND PROCESS

In order to conduct a successful ATM offering, issuers must comply with the filing requirements of the Securities and Exchange Commission (SEC). Issuers must have filed with the SEC a shelf registration statement on Form S-3. This is a prerequisite before an issuer can proceed with an ATM offering. The issuer can either use a pre-existing shelf registration statement or a newly filed shelf-registration statement. In 2017, most companies utilized a pre-existing shelf-registration statement. This emphasizes one of the advantages of ATM offerings, which is the short time in which an issuer can create an ATM program. By using a shelf-registration statement already on file, the issuer does not have to go through the process of filing another registration statement with the SEC, which may be subject to SEC review. This also means the issuer will save money on fees related to the drafting and filing of the shelf-registration statement. However, as will be discussed in further detail below, an issuer will still have to prepare and file a prospectus supplement for the ATM offering. For further information, see Shelf Registration, Market Trends 2017/18: Shelf Registrations and Takedowns, Shelf Offerings, and Top 10 Practice Tips: Shelf Registration Statements and Takedowns.

While using a pre-existing shelf-registration statement has been a popular method among issuers, there are several factors issuers must consider before doing so. For instance, an issuer must confirm there is a sufficient number of shares available under its pre-existing shelf registration statement. An issuer must also be aware of the expiration date of its shelf-registration statement. Shelf registration statements expire after three years. Since ATM programs can be open for as long as three years, issuers do not want to have their pre-existing shelf-registration statement expire during the course of the ATM offering.

For those issuers that utilize a pre-existing shelf registration statement, they must also file with the SEC a prospectus supplement specifically for the ATM offering that they wish to conduct. Prospectus supplements for ATM offerings are straightforward documents. In 2017, nearly all companies in every industry that filed prospectus supplements for ATMs included the following disclosures:

- The size of the offering
- A description of the securities to be offered
- The plan of distribution, which includes the method of sale for the securities
- The use of proceeds from the offered securities
- Disclosures relating to the sales agent(s), including the identity of one or more sales agent and the sales agent fee

For further information on prospectus supplements, see Rule 424 Prospectus Supplements Filing.

Concurrent with the filing of the prospectus supplement or registration statement, issuers will file a Form 8-K with the SEC including a press release in compliance with Rule 134 (17 C.F.R. § 230.134) of the Securities Act of 1933, as amended, announcing the ATM offering. For further information on Rule 134, see Contents of a Communication Permitted Under Rule 134 Checklist. The Form 8-K filing will disclose the terms of the equity distribution agreement or similar sales agreement. The issuer is required to disclose, on a quarterly basis, any sales made under the ATM offering, including the number of shares sold, the fees paid to the sales agent, and the net proceeds to the issuer. Whether this information is disclosed on a Form 8-K or made as part of the issuer's Form 10-Q or 10-K filing usually depends upon the terms of the equity distribution agreement or sales agreement.

In ATM offerings, the plan of distribution—the method of sale of securities—is accomplished by the sales agent acting as either a principal or agent. If the sales agent acts as a principal, then the sales agent purchases the offered securities directly from the issuer and then goes to the secondary market to resell the securities. This is similar to the role underwriters play in a typical one-time securities offering. If the sales agent is acting as an agent, then the sales agent serves as a middle man or broker between the issuer and a third-party purchaser, who will buy the securities directly from the issuer. Many equity distribution agreements or sales agreements provide that the sales agent may act as both a principal and agent, depending on the transaction and at the discretion of the issuer. For a form of sales agency agreement, see Sales Agency Agreement ("At-the-Market" Offering).

ATM Offerings as Compared to Traditional Underwritten Offerings

Below is a table briefly summarizing some key differences, and advantages, that ATM offerings provide over traditional underwritten equity offerings.

	Traditional Underwritten Offering	At-the-Market Offering
Impact on Stock Price	Moderate to substantial impact	Moderate
Timing	At least a month to put together	Can be put together in at least 2 weeks
Frequency	Issuer must restart the whole process for each offering	Issuer can conduct as many equity sales under the ATM program as it chooses, for up to 3 years
Control	Issuer maintains less discretion over sale terms	Issuer has discretion over the terms of each sale
Fees	5-7% to the underwriter(s)	1-3% to the sales agent(s)
Management Involvement	Substantial (e.g., road show presentations)	Little to no involvement
Lock-ups	Typically entered into by Issuer's executives	Rarely used

For further information, see Equity Offerings Comparison Charts.

DISCLOSURE TRENDS

The average deal value of all announced ATM offerings in 2017 was approximately $135.70 million. As mentioned earlier, there were several ATM offerings announced that are looking to raise between $500 million to $1 billion; however, most ATM offerings announced in 2017 were within the range of $1 million to $100 million.

The use of proceeds section in most prospectus supplements contained similar disclosure language, regardless of the industry to which the issuer belonged. Typically, companies included broad use of proceeds disclosure. For example, ONEOK stated that it intends to "…use the net proceeds from the sale of the offered securities for general corporate purposes. These purposes may include repayment and refinancing of debt, acquisitions, working capital, capital expenditures and repurchases and redemptions of securities." See ONEOK's Prospectus Supplement on Form 424(b)(5), filed with the SEC on July 19, 2017. However, there were certain trends as to what general corporate purposes came to mean depending on the issuer's industry.

For example, in the three most popular and capital-intensive industries that engaged in ATM offerings (energy, life sciences, and real estate), general corporate purposes meant something different. In the energy sector, most issuers used the proceeds to help finance large capital expenditure projects, such as new pipelines or processing plants. Also, within the energy sector, if the issuer was a master limited partnership (MLP), then proceeds were used to make distributions to members, since MLPs, like real estate investment trusts (REITs), must make certain quarterly minimum cash distributions. In the real estate sector, since most issuers were REITs, the proceeds were used to pay the minimum cash distributions to interest holders. Whereas in the life sciences sector, proceeds were typically used to continue funding operations on a day to day basis since many life science issuers are usually focused on researching and producing a small number of products that might not reach the market for years, sometimes decades.

Since most ATM offerings were valued at under $100 million, most issuers typically relied on only one sales agent to help conduct the ATM offering. However, for the larger ATM offerings, such as ONEOK's $1 billion ATM offering or RIC's $920 million ATM offering, multiple agents are used. In nearly all ATM offerings, the typical fee for the sales agent was between 1-3%, no matter the size of the offering. Compared to the typical 5-7% fee for underwriter commissions, the lower fees are just one reason why ATM offerings are a low-cost alternative to a typical underwritten equity offering.

INDUSTRY INSIGHTS

While many different companies utilized ATM offerings to satisfy their capital needs, companies in the energy, real estate, and life sciences industries continued to be among the most frequent users of ATM offerings. Energy companies and real estate companies also made up a majority of the top ten largest ATM programs announced in 2017, such as the previously mentioned ONEOK and RICATM offering programs. Likewise, TransCanada Corporation also announced an ATM offering program worth roughly $750 million ($1 billion in Canadian dollars). Out of the top ten largest ATM programs, six were announced by REITs.

LEGAL AND REGULATORY TRENDS

At the federal level, there has not been much change to the legal and regulatory framework surrounding ATM offerings over the past several years. Aside from disclosure filing requirements, issuers seeking to raise money through an ATM offering must comply with applicable stock exchange rules. For companies listed on the New York Stock Exchange (NYSE) or the Nasdaq Stock Market (Nasdaq), this would include the requirement that the issuer seek stockholder approval of any offering that may result in the sale or issuance of at least 20 percent of the issuer's outstanding common stock (although MLPs are not subject to this requirement). See 20% Rule and Other NYSE and NASDAQ Shareholder Approval Requirements.

At the state level, one relatively recent change has had a direct impact on an issuer's ability to conduct an ATM offering. In 2015, Section 152 of the Delaware General Corporate Law (the DGCL) was amended to specifically allow a board of directors to authorize stock to be issued in one or more transactions in such numbers and at such times as is determined by a person or body other than the board of directors or a committee of the board, provided that the board's resolution so authorizing such person or body (i) fixes the maximum number of shares that may be issued, (ii) sets a time period during which such shares may be issued, and (iii) establishes a minimum amount of consideration for which such shares may be issued.

The amendments permit a formula to be used to determine the consideration for the stock, and such formula may include reference to or be made dependent upon the operation of extrinsic facts, such as market prices on one or more dates. As such, the board may authorize stock to be issued pursuant to “at the market” programs and does not require the board or committee of the board to authorize each individual stock issuance pursuant to such program.

Delaware’s loosening of the statutory rules regarding a stock issuance has given greater freedom to issuers who decide to pursue an ATM offering. Before, an issuer’s board of directors would have to pass a resolution each time the issuer wanted to issue shares through an ATM offering program. To get around this legal speed bump, many issuers would elect a board committee of one person to make the process as efficient as possible. The amendments to DGCL Section 152 create a more efficient corporate governance process for issuers by eliminating the need for a board committee of one. As previously stated in this article, certain factors have had a significant impact on the marked increase in ATM offerings over the past couple of years (e.g., volatility of the stock market and higher cost of underwritten offerings); however, the 2015 amendments to Section 152 have only increased the attractiveness of ATM offerings to issuers, at least those incorporated in Delaware, looking for a low-cost, easy, and quick way to raise capital.

MARKET OUTLOOK

The current legal predictability surrounding ATM offerings, coupled with the stock market’s current volatility, suggests that ATM offerings will have another record year in 2018. With stock prices to date fluctuating drastically on a day to day basis, the control offered by an ATM program allows issuers to raise capital safely without the risk of conducting an offering at a downturn in prices. Whereas, the time and money spent preparing for a traditional offering may mean an issuer is committed to the offering even though the time is not right, an ATM program allows the issuer to abort a potential sale of equity without much downside.

ATM offerings were once a niche market, only used by specialized industries and smaller companies. However, the trend in 2017, and over the past five years, has been a dramatic increase in not only the number of ATM offerings but the size of the offerings as well. In addition, companies not in traditional ATM industries (e.g., the energy, life sciences, or real estate sector) are turning to ATM offerings as another way to raise capital. The increase in the size of ATM offerings may continue in 2018, as more issuers are expected to enter into equity distribution agreements or sales agreements with more than one agent. The upward trend in ATM offerings may also mean we see a change in the SEC’s current laissez-faire approach to ATM offerings. While the current legal framework has remained stationary for most of the past decade, an increase in ATM offerings may also mean an increase in fraud. Thus, issuers should be on notice that the SEC will likely be keeping a closer eye on ATM offerings conducted in 2018 and beyond.

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