Guide to At-the-Market Programs for MJDS Issuers

September 2020

Prepared by

DORSEY™
always ahead

Guide to At-the-Market Programs for MJDS Issuers

This Guide is intended to provide general information for MJDS Issuers and advisors with respect to At-the-Market programs through U.S. national securities exchanges and is not intended to provide definitive legal or tax advice. No legal, tax or business decisions should be based solely on its content. Dorsey & Whitney LLP does not guarantee the completeness of the information contained in this Guide and we are not responsible for any errors or omissions in, or your use of, or reliance on, the information contained in this Guide.

Dorsey & Whitney LLP is an international law firm with offices throughout the United States, and in Canada, Europe and Asia, with expertise assisting Canadian companies with accessing the U.S. public markets. Dorsey provides U.S. legal advice in Canada. This *Guide to At-the-Market Programs for MJDS Issuers* was prepared by the following attorneys at Dorsey & Whitney LLP.

ABOUT THE AUTHORS

Kenneth Sam is a Partner in Dorsey's Denver office and a member of the firm's Canada cross-border practice group. Mr. Sam is recognized by *Chambers USA* as a leading corporate finance attorney. He is recognized by *Best Lawyers (USA)* and *Best Lawyers (Canada)* and *SuperLawyers.* Mr. Sam represents companies, underwriters, agents and investors on U.S. legal matters, including SEC registration and reporting, cross-border listings, mergers and acquisitions, takeover defense and other related issues. Mr. Sam can be contacted at 303-629-3445 or sam.kenneth@dorsey.com.

Christopher Doerksen is a Partner in Dorsey's Seattle office and a member of the firm's Canada cross-border practice group. Chris has been ranked by *Chambers USA* as one of America's leading business. Chris helps Canadian companies raise money in the U.S. through equity and debt offerings, list on U.S. national securities exchanges and the OTCQX/OTCQB, register and report with the SEC, satisfy U.S. corporate governance requirements, complete mergers and acquisitions and grant stock-based compensation in the U.S. He is also the co-editor of Dorsey's Cross-Border Counselor blog at https://crossbordercounselor.com. Chris can be contacted at 206-903-8856 or doerksen.christopher@dorsey.com.

Guide to At-the-Market Programs for MJDS Issuers

Table Of Contents

Guide to At-the-Market Programs for MJDS Issuers

Canadian companies listed on national securities exchanges in the United States (such as (Nasdaq, NYSE and NYSE American)(each, a "**U.S. National Exchange**") are increasingly using At-the-Market or "ATM" programs as an alternative capital raising strategy to traditional public underwritten offerings in volatile capital markets. An ATM program permits qualified issuers to offer and sell equity securities through one or more broker dealers in public, registered transactions through national exchanges at prevailing market prices over a period of time. This guide provides an overview of the requirements and procedures for Canadian issuers registered and reporting with the United States Securities and Exchange Commission (the "**SEC**") under the Canada-U.S. Multijurisdictional Disclosure System ("**MJDS**") and listed on a U.S. National Exchange to implement an ATM program through the facilities of its U.S. National Exchange.[1]

Description of ATM Program

A typical ATM is a public offering of securities through the facilities of a U.S. National Exchange.[2] An ATM is registered under the United States Securities Act of 1933, as amended (the "**Securities Act**"), under a shelf registration statement that permits an offer and sale of securities into the market at prevailing market prices, rather than at a fixed price. MJDS eligible issuers (*see,* MJDS Eligibility, below) typically register common shares offered in ATM programs under a base shelf registration statement on Form F-10, which was adopted by the SEC as part of MJDS, and a prospectus supplement. *See*, "*Form F-10*" and "*MJDS Prospectus Supplement,*" below.

ATM sales are conducted by one or more registered broker-dealers under the terms of an equity distribution agreement ("**Distribution Agreement**"), much like ordinary brokerage sales, except the issuer, rather than a shareholder, is the seller placing an order to sell securities with specific minimum prices and trade parameters. The Distribution Agreement provides for the terms of the ATM, sales commissions, representations and warranties, and customary underwriter protections, such as auditor comfort letters and opinions of counsel. *See*, "*Distribution Agreement*", below.

Benefits of ATMs

ATMs have several benefits and advantages to traditional public underwritten offerings.

Lower Market Impact: Once an ATM is established, issuers raise capital by selling newly issued shares into the natural trading flow of the market, without having to market and/or announce the offering. Normally this can be done without impacting the issuer's stock price. Investors cannot short the issuer's stock in advance of the offering since the timing of any particular takedown is not known.

Easy Access to Capital: Takedowns on an ATM provide an alternative to a longer lead time registered offering. ATMs are not generally used to replace larger traditional offerings, but can be used by issuers that frequently

[1] We understand that ATM programs may also be implemented through the facilities of Canadian exchanges. Dorsey & Whitney LLP practices only U.S. law. You should consult Canadian securities legal counsel for Canadian legal requirements for ATM programs discussed in this article.

[2] Although ATM offerings can be for any type of equity securities, in practice they usually involve common shares of a class traded on a national securities exchange. This Guide discusses ATM programs for common shares of a class traded on a U.S. National Exchange.

need smaller amounts of capital, periodic funds for balance sheet maintenance, funds for small acquisitions or capital for corporate growth. The issuer controls the timing and amounts raised under ATM programs.

Better Price and Reduced Price Risk: Traditional public offerings are often priced at a discount to the market in order to generate sufficient investor interest. In an ATM, shares are sold into the market at the prevailing market price. Sales can be effected on an agency or principal basis and the terms of each sale, including its timing and size, are agreed upon between the issuer and the placement agent, at the issuer's discretion. An issuer may set a minimum price limit and/or a percentage limitation on daily sales, and may time sales to occur when market demand and the share price are at their greatest. Since there is typically no issuer commitment to sell, the issuer can avoid selling securities below an acceptable price.

Lower Commissions: Placement agents do not need to engage in full marketing efforts, resulting in sales commissions that are typically lower for ATMs (usually 1-4%) compared to traditional registered offerings. In most ATMs, the placement agents act as sales agents to sell the issuer's securities in market transactions at market prices less sales commissions, which may result in lower cost of capital.

Lower Initial Cost: The initial costs of establishing an ATM program can be lower than the costs of a traditional, underwritten public offering, for both the issuer and the placement agent. While the required documentation, due diligence, opinions and comfort letters are fairly similar for each type of transaction, an ATM can be implemented without the time pressures and negotiation associated with a traditional offering. This can allow for a more cost effective process. The incremental costs of each drawdown to both the placement agent and issuer under the ATM program are relatively low; however, there are on-going periodic costs associated with bringing down due diligence, comfort letter and other protections during the term of the ATM.

No Kickers: Some more traditional offerings include negotiated "*kickers*" such as warrants and other investor rights or discounts to market prices as incentives for investors. Since securities are typically sold in market transactions at market prices, less sales commissions, there are no investor incentives or further potential dilution from securities issued as kickers.

No Roadshows: A typical offering involves road shows and other commitments of management. ATMs require no road shows or marketing efforts.

ATM programs are not intended to replace traditional capital market financing transactions, which can provide for larger capital raising transactions and greater certainty on timing. Instead, ATMs may be supplements to traditional offerings, providing the ability for issuers to raise capital quickly at market prices, while avoiding disruptions in trading. Some issuers have successfully raised significant amounts of capital using ATM offerings.

MJDS Eligibility

The Canada-U.S. Multijurisdictional Disclosure System ("**MJDS**") provides certain accommodations to qualified Canadian corporations in the United States and qualified U.S. corporations in Canada. A Canadian issuer is MJDS eligible under Form F-10 if it meets the following requirements:

(a) the issuer is incorporated or organized under the laws of Canada or any Canadian province or territory;

(b) the issuer is a foreign private issuer;[3]

(c) the issuer has been subject to the continuous disclosure requirements of any securities commission or equivalent regulatory authority in Canada for a period of at least 12 calendar months immediately preceding the filing of Form F-10 and is currently in compliance with such obligations; and

(d) the issuer has outstanding equity shares held by non-affiliates[4] with an aggregate market value of at least US$75 million.

MJDS registration forms, such as Form F-10, permit eligible Canadian issuers to register and publicly offer securities in the United States, often without SEC review, by using Canadian disclosure documents that are subject to review by Canadian securities authorities.

A decline in market value of an issuer's outstanding equity shares below the US$75 million threshold after the effectiveness of a registration statement filed on Form F-10 does not affect the continued validity of such registration statement. Any post-effective amendment to the Form F-10 will require the issuer to re-satisfy the eligibility criteria of Form F-10. However, a Canadian prospectus supplement to the underlying Canadian base shelf registration statement filed pursuant to Canadian requirements may be filed as a supplement to the Form F-10 and will not be considered a post-effective amendment for the purpose of having to re-satisfy the eligibility criteria of Form F-10.

Issuers that are not MJDS eligible may use Form S-3 or F-3 to register securities offered in ATM programs. Generally, a non-MJDS issuer must be eligible to use Form S-3 or F-3 for primary offerings to take advantage of ATM offerings, whether pursuant to General Instruction I.B.1 (issuers with at least US$75 million aggregate market value of common equity held by non-affiliates (the "**Non-Affiliate Equity Value**")), or the "baby shelf" rules (for an issuer that is listed on a U.S. National Exchange, but does not satisfy the market capitalization

[3] A "foreign private issuer" is defined by Rule 405 of the Securities Act. Generally, a corporation incorporated in Canada will qualify as a foreign issuer unless, on the last business day of its most recently completed second fiscal quarter (or, in the case of an issuer filing its initial registration statement with the SEC, 30 days prior to such filing):

(a) more than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and
(b) any of the following:
  (i) the majority of the executive officers or directors are United States citizens or residents,
  (ii) more than 50 percent of the assets of the issuer are located in the United States, or
  (iii) the business of the issuer is administered principally in the United States.

A "holder of record" is defined by Rule 12g5-1 under the United States Securities Exchange Act of 1934 ("**Exchange Act**"). The issuer must look through the record ownership of institutional custodians, such as Cede & Co, CDS and other commercial depositories, by obtaining the list of accounts for which the securities are held by the depository and treating each of the accounts as a separate record holder. In addition, when an issuer is determining whether it is a foreign private issuer, the issuer must look through the record ownership of brokers, dealers, banks or nominees located in (i) the United States, (ii) the issuer's jurisdiction of incorporation, and (iii) the issuer's primary trading market who hold securities for the accounts of their customers, by obtaining the list of accounts for which the securities are held by the broker and treating each of the accounts as a separate record holder.

[4] Any person who beneficially owns directly or indirectly, or exercises control or direction over, more than 10% of the outstanding equity shares of an issuer at the end of the previous fiscal year is deemed to be an "affiliate" for the purposes of Form F-10. "Equity shares" include common shares, non-voting equity shares and subordinate or restricted voting equity shares, but not preferred shares. The market value of shares held by non-affiliates is determined as of a date (chosen by the issuer) within 60 days prior to filing the Form F-10. Note that "affiliate" status is determined for this purpose at the end of the last fiscal year – a holder that climbs above the 10% threshold after year end is not an affiliate for the purpose of the market value calculation, and its shares are included when calculating shares held by non-affiliates, and a 10% holder that drops below the percent threshold after year end remains an "affiliate," and its shares are excluded from the calculation.

requirement, so long as not more than one-third of its Non-Affiliate Equity Value is sold on Form S-3 or F-3 in any 12-month period).[5]

Form F-10

Form F-10 can be used by MJDS eligible issuers to register a specific offering of securities (specified terms and securities) or general unspecified offerings under a shelf registration. A Form F-10 largely consists of an underlying Canadian prospectus, which has been converted by some minor modifications into a U.S. prospectus, plus some additional disclosures and exhibits outside of the U.S. prospectus. When a Form F-10 is used for a shelf registration, takedowns may be made under the Form F-10 for as long as the Canadian shelf prospectus may continue to be used under Canadian law. The SEC's staff does not normally review or comment on a registration statement if it is filed on Form F-10. A Form F-10 that relates to a specific offering becomes effective upon filing, unless the Form F-10 is designated as preliminary material. A Form F-10 that relates to a shelf registration normally becomes effective within a few days after the final is filed with the SEC.

ATM programs registered on Form F-10 begin with the filing of a Canadian shelf prospectus (sometimes referred to as a base-shelf or universal shelf), which normally registers a variety of issuer securities, which may include common shares, units, warrants, debt and convertible securities and other securities of the issuer. The plan of distribution in the Canadian shelf prospectus must permit at-the-market offerings. A registration statement on Form F-10 is concurrently filed with the SEC to qualify and register the securities to be offered under the Canadian shelf prospectus. Once a final receipt is obtained from the applicable Canadian securities commissions, an amendment to the Form F-10 is filed with the SEC containing the final Canadian shelf prospectus and an acceleration request is made by the issuer. Once the Form F-10 is declared effective, the issuer may offer registered securities in an ATM program by filing concurrent prospectus supplements to the Canadian shelf prospectus in Canada (National Instrument 44-102 – *Shelf Distributions*) and the Form F-10 with the SEC (pursuant to General Instruction II.L of Form F-10).

Some issuers worry that the filing of a universal shelf prospectus provides a signal to the market that the issuer is preparing to raise capital or that the shelf creates "overhang" for dilutive offerings. However, the practice has become commonplace as more and more issuers have filed universal shelf prospectuses and registration statements. There are several advantages in maintaining shelf prospectuses and registration statements for MJDS issuers that go beyond ATM programs, such as faster execution of other types of registered offerings.

Form F-10 is basically the Canadian prospectus with certain additional disclosures and filing requirements, including consent requirements for auditor and named experts. Form F-10, like other SEC filings, must be filed electronically on the EDGAR system. There are three parts to Form F-10, which require the following disclosure:

Part I – Information Required to be Delivered to Offerees or Purchasers

Home Jurisdiction Document

Form F-10 is essentially a wrap around the disclosure document(s) used to offer securities in Canada and filed with the principal jurisdiction for the offering in Canada (the "**Principal Jurisdiction**"). The disclosure

[5] Please consult your Dorsey & Whitney LLP attorney for information related to use of Form S-3 or F-3.

document(s) must be prepared in accordance with the requirements of the Principal Jurisdiction as interpreted and applied by the securities commission or other regulatory authority in such Principal Jurisdiction.

The prospectus filed in the United States need not contain any disclosure applicable solely to Canadian offerees or purchasers that would not be material to purchasers in the United States (including (i) the "red herring" legend used in Canada, (ii) any discussion of Canadian tax considerations not material to U.S. offerees or purchasers, (iii) the names of any Canadian underwriters not acting as underwriters in the United States and a description of the Canadian plan of distribution (except to the extent necessary to describe the material facts of the U.S. plan of distribution), and (iv) any description of purchasers' statutory rights under applicable Canadian, provincial or territorial securities laws (except where such rights are available to U.S. purchasers)). Further, the United States prospectus need not include any documents incorporated by reference into the Canadian prospectus that are not required to be delivered to offerees or purchasers pursuant to the laws of the Principal Jurisdiction.

Financial Statements

The prospectus used in the United States must contain any financial statements used in the Principal Jurisdiction document. If such financial statements are prepared in accordance with the International Financial Reporting Standards ("**IFRS**") as issued by the International Accounting Standards Board ("**IASB**"), then no reconciliation to U.S. GAAP is required. Because Canadian public companies prepare their financial statements in accordance with IFRS as issued with the IASB, a U.S. GAAP reconciliation is not normally required. In the rare case where financial statements have been prepared using a basis of accounting other than IFRS as issued by the IASB, Form F-10 requires an issuer to reconcile to U.S. GAAP and to provide all the information required by U.S. GAAP and Regulation S-X of the SEC.

Legends

The prospectus used in the United States must contain certain legends to the effect that (i) the prospectus was prepared in accordance with the disclosure requirements of the Principal Jurisdiction, (ii) financial statements were prepared in accordance with foreign generally accepted accounting principles, (iii) there may be tax consequences for investors in both the United States and Canada, (iv) the enforcement of civil liabilities may be adversely affected by the fact that the issuer is incorporated under the laws of a foreign country and (v) the securities offered have not been approved by the SEC. Prior to the effective date of the registration statement any prospectus must contain a legend stating that the information contained therein is subject to completion. Any legend required by the laws of any other jurisdiction in which the securities are offered must also be included.

Incorporation of Information by Reference

Information required by Form F-10, including exhibits, may be incorporated by reference at the issuer's option from documents the issuer has previously filed with the SEC. If information is incorporated by reference into Form F-10, the prospectus must provide the name, address and telephone number of an officer of the issuer from whom copies of the information may be obtained. Incorporation by reference of documents filed subsequent to the filing of the registration statement may be accomplished by the use of specific language included in the paragraph immediately following the "Documents Incorporated by Reference" section of the prospectus, if and to the extent that such documents are incorporated by reference in the Canadian prospectus. Such forward incorporation by reference will be required to keep any shelf registration statement current.

List of Documents filed with the SEC

A list of all documents filed with the SEC as part of the registration statement must be set forth in or attached to the U.S. prospectus.

Additional Information

Under Rule 408 of the Securities Act, in addition to the information expressly required by the instructions to Form F-10, further material information must be disclosed, if any, as is necessary to make the required statements, in light of the circumstances under which they were made, not misleading[6]. In addition, under the MJDS, the issuer and the underwriters are still subject to liability under the U.S. civil liability and antifraud provisions of U.S. securities laws if the Form F-10 filing contains a material misstatement or omission.

Part II – Information Not Required to be Delivered to Offerees and Purchasers

Indemnification

A brief description of the indemnification provisions relating to the directors, officers and controlling persons of the issuer, including indemnification provisions in the issuer's constating documents, governing corporate statute, agreements and insurance, against liability arising under the Securities Act, must be provided in the Form F-10 together with a clause to the effect that such indemnification provisions against liability arising under the Securities Act are, in the opinion of the SEC, against public policy and unenforceable.

Exhibits

The following must be attached as exhibits to Form F-10:

i. The manually signed written consent of any accountant, engineer or appraiser, or any person whose profession gives authority to a statement by such person, who is named in any part of the offering document as having prepared or certified any part of the offering document, or any report or valuation used in connection with the offering document. Each consent must specifically reference consent to the use of such person's report in the registration statement. Further, every amendment relating to a certified financial statement must include the signed written consent of the certifying accountant;

ii. Any reports or information that, in accordance with the requirements of the Principal Jurisdiction, must be made publicly available in connection with the offering;

iii. Copies of any documents incorporated by reference into the registration statement and any publicly available documents filed with the Principal Jurisdiction or any other Canadian regulatory authority concurrently with the prospectus; and

iv. A copy of any indenture relating to the registered securities. If the Form F-10 registers debt, a debt indenture must be attached as an exhibit.

[6] In addition to the supplemental prospectus information required by the MJDS rules, certain additional disclosures (e.g., a discussion of U.S. tax consequences, disclosure of exchange rates, etc.) are generally provided because of their relevance to U.S. purchasers. Marketing considerations and investor expectations in the United States have often led issuers to include certain supplemental disclosures not required in Canada but normally included in U.S. disclosure documents (e.g., capitalization tables and summary financial information).

Part III – Undertaking and Consent to Service of Process

Undertaking

An issuer must provide the following undertaking: "The Registrant undertakes to make available, in person of by telephone, representatives to respond to inquiries made by the Commission staff and to furnish promptly, when requested to do so by the Commission staff, information relating to the securities registered pursuant to Form F-10 or to transactions in said securities."

Consent to Service of Process on Form F-X

Form F-X must be filed with the SEC contemporaneously with the filing of Form F-10. Form F-X is used to appoint an agent for service of process in the United States[7].

Signatures

Form F-10 must be signed by the issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, at least a majority of the board of directors or persons performing similar functions and its authorized representatives in the United States.

Prospectus Supplement

After the final Canadian base shelf prospectus has been filed and the Form F-10 has become effective, the securities to be sold in the ATM are qualified for sale under the Canadian base shelf prospectus and registered under the Form F-10 by filing a prospectus supplement in Canada and with the SEC, respectively. The prospectus supplement is normally a short, summary type disclosure document that discloses the terms of the ATM program. Exemptions from prospectus delivery requirements are generally available.

Equity Distribution Agreement

The Equity Distribution Agreement (or sales distribution agreement) is an agreement between the issuer and one or more designated broker-dealer sales agents under which the issuer may instruct the sales agent to sell securities (issuer common shares listed for trading) on its behalf during the term of the ATM program. The agent's obligation to sell securities is normally on a "commercially reasonable" efforts basis, rather than a "firm commitment" basis. The sales agent is considered an "underwriter" under the Securities Act.

Most Equity Distribution Agreements are similar to underwriting agreements used for a traditional follow-on public equity offerings registered under the Securities Act. The Equity Distribution Agreement normally provides for both principal and agency transactions and sets forth the terms of the ATM program; sales commissions;

[7] At the time of filing of a registration statement on Form F-10, Canadian issuers must file with the SEC a Form F-X containing an irrevocable consent to service of process in SEC proceedings or civil actions arising out of or relating to the offering or the securities being offered, an appointment of a U.S. person as agent for service of process, a consent to service of an administrative subpoena and an undertaking to assist the SEC with an administrative investigation. If the agent for service of process resigns, is dismissed or is unable to continue serving as agent, the issuer generally must appoint a successor agent unless the issuer has ceased filing reports under the Exchange Act for a period of more than six years. The agent for service designated in Form F-X is authorized to accept service of process on the issuer's behalf in connection with any investigations or administrative proceedings conducted by the SEC and any civil suits brought against the issuer in any federal or state court in the United States.

standard representations, warranties and covenants by the issuer; conditions to the obligations of the sales agent and indemnification provisions. Deliverables under an Equity Distribution Agreement include officer certificates, legal opinions, 10b-5 negative assurance letters, comfort letters and other documents, which are delivered on execution of the Equity Distribution Agreement and filing of the prospectus supplement. During the term of the ATM program, the issuer will have certain bring-down obligations, which include bring-down deliveries of 10b-5 negative assurance letters, comfort letters and other documents, and participation in "bring-down" due diligence sessions, typically with the filing of quarterly or annual reports or material change information. The Equity Distribution Agreement will also provide for the term of the ATM program, termination provisions and market out provisions.

Unlike typical underwriting agreements, the Equity Distribution Agreement is filed in Canada as a material agreement and furnished to the SEC on Form 6-K.

Due Diligence

ATM programs are registered public offerings under the Securities Act and generally subject to the same due diligence requirements as traditional public offerings. The sales agent is considered an underwriter and is subject to liability under Section 11 of the Securities Act. The sales agent and its legal counsel will conduct due diligence prior to the commencement of the ATM program in addition to requiring the delivery of legal opinions, 10b-5 letters and auditor comfort letters. ATM programs also require ongoing due diligence as documents are incorporated into the disclosure package and periodic updates to the initial legal opinions, 10b-5 letters and comfort letters. The frequency of the periodic updates is usually an important negotiating point in the Equity Distribution Agreement.

ATM Sales Process

Sales are effected pursuant to the terms of the Equity Distribution Agreement. In most cases, the issuer provides the sales agent a transaction notice with the following information:

(a) The number of common shares or gross dollar proceeds to be sold by the sales agent;

(b) The sales period in which sales are to be effected; and

(c) Price restrictions on the sales (i.e., minimum sales price).

Upon receipt of a transaction notice, the sales agent will commence selling the issuer's shares, often on the stock exchange on which the common shares are listed or through electronic communications networks. Most sales are made in ordinary brokered transactions, with no special selling efforts to comply with Regulation M restrictions.[8] Most sales agents will monitor trading volume and price in order to effect share sales throughout the trading day, and provide reports to the issuer of trading activities. Normally sales are made in volumes

[8] Regulation M prohibits the issuer, all distribution participants and certain affiliated persons from directly or indirectly bidding for or purchasing, or attempting to induce any person to bid for or purchase, the issuer's common stock during a specified period before the distribution is complete, subject to exceptions. Special selling efforts may result in a "distribution" under Regulation M. In SEC Release No. 33-7375 (December 20, 1996), the SEC stated that sales of securities in ordinary trading transactions into an independent market without any special selling efforts will generally not constitute a distribution under Regulation M, provided that the sales agreement does not contain unusual transaction-based compensation for sales.

averaging less than 10-15 percent of the issuer's average daily trading volume in order to avoid putting downward pressure on the share price and to respond to changing market conditions. The typical settlement cycle is T+2.

Issuers and sales agents normally do not permit ATM sales during issuer "black-out" periods imposed by insider trading policies (such as "go dark" periods prior to the issuance of financial statements). ATM sales should never be conducted if an issuer is in possession of material non-public information.

Disclosure and Communications

The filing of the prospectus supplement under Form F-10 and the Equity Distribution Agreement on Form 6-K will be publicly available and alert the market and investors to the ATM. Most issuers also issue a press release on launch of the ATM program, which may provide an explanation of the program. Any press release should comply with the requirements of Rule 134 of the Securities Act, unless the issuer is eligible to use a free writing prospectus and elects to use and file the press release with the SEC as a free writing prospectus.

Sales under the ATM program are normally disclosed in aggregate in the issuer's quarterly reports furnished on Form 6-K or annual reports filed on Form 40-F. An issuer may report sales that it or its advisors deem to be material to the issuer by issuing a press release or material change report in Canada, furnished on Form 6-K.

Stock Exchange Notices

The stock exchanges in Canada and the United States may require the issuer to submit a listing application to qualify the issuance of securities under the ATM program. NASDAQ requires 15-day advance notice for certain transactions that may result in the issuance of more than 10 percent of the outstanding common shares or voting power. NYSE and NYSE American requires a supplemental or additional listing application to be filed with it for transactions that may result in the issuance of common shares.

ATM offerings are considered public offerings under NASDAQ Rule 5635 and can be implemented without shareholder approval. Also, an ATM offering can generally be implemented without shareholder approval under NYSE or NYSE American rules.

An issuer should evaluate the notice requirements in Canada and the United States prior to effecting an ATM program.

Broker-Dealer Compliance Matters

Broker-Dealers and market participants are subject to numerous compliance requirements under Financial Industry Regulatory Authority, Inc. ("**FINRA**") regulations and securities laws. Participation in an ATM program as a sales agent may give rise to various compliance considerations, including:

Regulation M: Regulation M is intended to protect the trading markets by prohibiting persons having an interest in a securities offering from undertaking certain actions in connection with the securities offering that could manipulate the market for the security. An analysis of Regulation M requirements should be evaluated in connection with the ATM program.

Research Coverage: A sales agent can participate in an equity distribution program even if the firm already provides research coverage regarding the issuer or plans to provide such coverage in the future. Rule 139(a) of the Securities Act permits a broker-dealer that participates in a distribution of securities of an issuer meeting the eligibility requirements of Form S-3 or F-3 for an unlimited primary offering (similar to MJDS eligibility) to publish a "research report" regarding the issuer or any class of its securities without having the research report considered an "offer" or a non-conforming prospectus, provided that the research report is included in a publication distributed with reasonable regularity in the normal course of the broker-dealer's business. The sales agent must ensure compliance with the requirements of the Rule 139(a) safe harbor during the term of the ATM program.

Financial Advisor Services: Often a sales agent participates in an issuer's ATM program to build relationships with the issuer in anticipation of offering other investment banking services. Conflicts may arise if the sales agent is engaged for other investment banking services, such as acting as a financial advisor for M&A transactions or providing fairness opinions for another transaction.

Watch Lists: Watch or restricted lists are normally maintained by broker-dealer compliance departments to monitor securities that may be the subject of investment banking or other corporate finance activity by the firm. These lists are designed to monitor trading activity, publication of research or commencement of research coverage to ensure compliance with FINRA rules and regulations.

Conclusions

Canadian companies listed on a U.S. National Exchange are increasingly using ATM programs as an alternative capital raising strategy to traditional public underwritten offerings in volatile capital markets. An ATM program permits qualified issuers to offer and sell equity securities through one or more broker dealers in public, registered transactions through national exchanges at prevailing market prices over a period of time. ATMs are relatively easy to implement and may provide several advantages to traditional public offerings.

ATM programs are not intended to replace traditional capital market financing transactions, which can provide for larger capital raising transactions and greater certainty on timing. Instead, ATMs may be supplements to traditional offerings, providing the ability for issuers to raise capital quickly at market prices, while avoiding disruptions in trading.

For additional information on ATM programs, contact your attorney at Dorsey & Whitney LLP.

Authors:

Kenneth Sam
DORSEY & WHITNEY LLP
1400 Wewatta Street
Suite 400 | Denver, CO 80202-5549
Phone: 303-629-3445
Email: sam.kenneth@dorsey.com

Christopher Doerksen
DORSEY & WHITNEY LLP
Columbia Center
701 Fifth Avenue, Suite 6100 | Seattle, WA 98104-7043
Phone: 206-903-8856
Email: doerksen.christopher@dorsey.com.

Visit Dorsey's Cross-Border Counselor blog at https://crossbordercounselor.com

DORSEY™
always ahead

dorsey.com