OSLER

At-the-market (ATM) offerings using the Multijurisdictional Disclosure System (MJDS)

APRIL 30, 2018 7 MIN READ

Related Expertise

- Banking and Financial Services

Authors: Rob Lando, Jason Comerford, Jie Chai

How the MJDS can turn your U.S. listing into an automated teller machine (the other kind of ATM)

An at-the-market (ATM) program may be just the right way to raise additional equity capital quickly and inexpensively, especially for Canadian companies that are listed on a U.S. stock exchange and eligible to use the Multijurisdictional Disclosure System (MJDS).

When people in the finance industry talk about an ATM, they probably mean an at-the-market offering, and not an automated teller machine like the kind that dispenses cash at banks and supermarkets. But, in a lot of ways, the two are similar. An at-the-market offering is a way to raise capital by having a dealer sell your company's shares directly into the market through a stock exchange, at current market prices.

ATM offerings have become very popular in the United States. They allow a company to add equity to the balance sheet with less impact on the trading price than a conventional public offering or private placement. The new shares are sold into the market slowly over time and at unpredictable times, so there is no significant dilution and no opportunity for investors to sell short in anticipation of a drop in trading price, the way they might in other types of offerings. In a way, an ATM offering is a mirror image of a normal course issuer bid (NCIB) or market share repurchase program. Companies use an NCIB to slowly repurchase shares in the market when they have extra cash and want to use it to reduce the number of outstanding shares without having to make a formal issuer bid or public tender offer to repurchase their shares. Companies can use an ATM to slowly sell shares in the market when they need extra cash and want to raise equity capital by selling new shares. Once an ATM program is in place, it can be accessed on short notice and without the need for much time and effort on the part of management, as there are no "roadshows" or one-on-one meetings with investors required to market the offering. Further, the cost of raising additional capital through an ATM is generally much lower than in a conventional offering, as the dealers involved will typically charge a much lower commission.

In the United States, a company that wants to put an ATM in place will work with one or more securities dealers to create a program governed by a distribution agreement, under which the dealers will agree to sell shares into the market for the company, either as agents (without risk) or as principal (meaning that the dealers buy the shares themselves first, and then resell them into the market later). The shares being sold into the market must be registered under the U.S. Securities Act of 1933 (the 1933 Act), which means the company must have filed a shelf registration statement covering future sales of its shares from time to time, or file a new one. U.S. companies that are well-known seasoned issuers (WKSIs), with the required reporting history and more than a US$700-million public float, can file a shelf registration statement that becomes automatically effective. Other companies that meet the eligibility requirements for a primary offering shelf can also put an ATM in place, but must go through a Securities and Exchange Commission (SEC) review process to clear the registration statement that they file under the 1933 Act. Once the shelf registration statement is in place, the company will file a prospectus supplement describing the ATM program. The company will then be free to ask the dealers involved to activate sales into the market, at the times of their choosing.

ATM programs are also becoming increasingly popular in Canada, but there is more complexity involved. A Canadian company that wants to sell shares on the TSX or another Canadian stock exchange or market must already have a shelf prospectus on file with the Canadian securities regulators covering future sales of its shares from time to time, or file a new one. The Canadian shelf prospectus rules generally require that the specific offering price for a security being sold under a shelf prospectus be specified in the shelf prospectus supplement, which cannot be done in an ATM program because, when the program is active, the shares will be sold into the market at varying current market prices. There is, however, an exemption for ATM programs built into the Canadian shelf rules, which will allow a company to sell up to a maximum of 10% of the aggregate market value of its outstanding securities in an ATM program, as measured at the end of the month before beginning the program. Despite this exemption, a Canadian company seeking to use an ATM program in Canada must still apply to the Canadian securities regulators for relief from the requirement to deliver a copy of the shelf prospectus and prospectus supplement to each purchaser of shares in the ATM program, as the usual requirement to deliver a copy of the prospectus to the purchaser is unworkable in the context of market sales. It is also necessary to obtain corresponding relief from the requirement to disclose to purchasers the statutory rights and remedies they would have for a misrepresentation in the prospectus, and from the statutory withdrawal rights that usually permit purchasers of securities under a prospectus to withdraw from the purchase agreement until two days after they have received a prospectus. The Canadian regulators have been routinely willing to grant all of these exemptions, but the application process still involves time and expense. It is also customary for the Canadian regulators to impose a condition that ATM sales in Canada cannot account for more than 25% of the company’s daily trading volume and to also require that the company prepare and file special monthly reports regarding its ATM sales.

For Canadian companies that are already listed on a U.S. stock exchange or are thinking about a U.S. listing, MJDS provides an opportunity to use the Canadian shelf prospectus rules to create an ATM program for sales of shares on a U.S. stock exchange, without the need for any regulatory relief in Canada and without any SEC review being required. Once listed on a U.S. stock exchange, a Canadian company will be eligible to use MJDS for an ATM program for sales on that exchange so long as it has at least a one-year reporting history in Canada, and at least a US$75-million public float for its equity securities. The company can do the following:

- Use a Canadian shelf prospectus to qualify sales of equity securities in Canada under the Canadian shelf prospectus rules, subject to the limit of 10% of the aggregate market value of its outstanding shares.
- File a corresponding MJDS registration statement to register its securities under the 1933 Act.
- Work with one or more U.S. dealers to put a distribution agreement in place covering ATM sales on the NYSE, NASDAQ or other U.S. exchanges or market places from time to time, similar to a usual U.S. ATM program, and prepare and file a shelf prospectus supplement describing the ATM program.

- Avoid the need to apply to the Canadian regulators for relief from the Canadian prospectus delivery requirements, statutory rights of action disclosure requirements and withdrawal rights that apply to sales of securities in Canada, if all sales under the ATM are only being made in the United States.
- Activate the program for sales of shares into the U.S. market at any time, and from time to time, during the 25-month period that the Canadian shelf prospectus remains current and available for use under the Canadian shelf prospectus rules.

It is important to remember, however, that sales under an ATM program are still sales of registered securities that are subject to the liability provisions of the 1933 Act, and the dealers involved will want to follow all of the procedures and safeguards that they would normally follow in a U.S. registered offering. The dealers participating in the program will conduct due diligence and will expect to receive comfort letters from the company's auditors, and "10b-5 opinions" (negative assurance letters) from legal counsel. Typically, if the program extends for a period of time, the due diligence will be updated on a periodic basis. While the company is selling shares into the market under an ATM, it will also have to consider the implications of being in the course of an offering, such as the potential impact on the ability of analysts to publish research, and restrictions on purchases of securities by the company or affiliated persons that may apply.

While there are always costs and complexities involved when a company sells its securities, MJDS provides an attractive opportunity for Canadian companies with U.S. listings to put an ATM program in place for sales in the United States, without the need for the types of relief from Canadian regulators that would be required to make ATM sales in Canada.