

# Market Trends 2019/20: At-the-Market Equity Offerings

A Lexis Practice Advisor® Practice Note by Eric Johnson, Michael Blankenship, Ben Smolij, and John Niedzwiecki, Winston & Strawn LLP



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This practice note discusses the market trends for at-the-market offerings (ATM offerings or ATM equity programs) in 2019 as well as deal structure and process, disclosure trends, and outlook for 2020. There has been an uptick in the number of ATM offerings that can be attributed to the

continued volatility of market conditions, with factors such as the continued trade war between the United States and China. 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 (with 13 ATM offerings announced), whereas in 2008 the total value of ATM offerings was \$323 million (with only two ATM offerings announced). In addition to providing some comfort in times of volatility, ATM offerings have remained an attractive capital raising option due to their low-cost nature as compared to other types of equity offerings.

For more information, see [At-the-Market Offerings](#) and [Equity Distribution Agreements for At-the-Market Offerings](#).

## 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 preexisting shelf registration statement or a newly filed shelf registration statement. Most companies utilize a preexisting 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 2018/19: Shelf Registrations and Takedowns](#), and [Top 10 Practice Tips: Shelf Registration Statements and Takedowns](#).

While using a preexisting 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 preexisting 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 preexisting shelf registration statement expire during the course of the ATM offering.

For those issuers that utilize a preexisting 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. 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 security offering. If the sales agent is acting as an agent, then the sales agent serves as a middleman 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 two 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 three 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 use of proceeds section in most prospectus supplements contains standard disclosure language, regardless of the industry to which the issuer belonged. Typically, companies included broad use of proceeds disclosure. 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. In the real estate and financial services sector, since most issuers were REITs, the proceeds were used to pay the minimum cash distributions to interest holders. In addition, issuers in this sector also used the fund for additional acquisitions in order to increase the size of their investment portfolios. 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 are typically 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, multiple agents were 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.

## 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% 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 (1) fixes the maximum number of shares that may be issued, (2) sets a time period during which such shares may be issued, and (3) 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

Given the stock market's continued volatility, and the political uncertainty surrounding the market, due to events such as Brexit, the current U.S.-China trade war, and the Fed's decisions concerning interest rates, it is likely that many companies will continue to rely on the certainty provided by ATM equity programs. Therefore, the upward trend in ATM offerings that began in 2016/2017 is likely to continue in 2020. Given that stock prices appear to be as volatile in 2020 as they have been in the past few years, the control offered by an ATM equity 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 equity 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 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 is likely to continue in 2020, as more issuers are expected to enter into equity distribution agreements or sales agreements with more than one agent. Whether this sustained upward trend in ATM offerings results in the SEC reconsidering its current laissez-faire approach to ATM offerings is something to pay attention to in 2020, especially in light of the fact that 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 2020 and beyond.

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Eric Johnson has extensive experience representing private and public energy companies, including master limited partnerships, in a broad range of corporate and securities matters. Eric has represented both publicly-traded and privately-held companies in numerous mergers, stock purchases, asset purchases, and acquisition and disposition transactions. He has represented issuers, underwriters, and selling stockholders in registered and private offerings of equity and debt securities, tender offers, and exchange offers. Eric assists his publicly-traded clients on corporate governance matters. He also assists clients in connection with general commercial and contractual matters.

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