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At-the-Market Offerings

December 2018

What is an at-the-market offering?

- An offering of securities into an existing trading market at publicly available bid prices
- Commonly referred to as “equity distribution” or “equity dribble out” programs
- Shares are “dribbled out” to the market over a period of time at prices based on the market price of the securities
- Generally, sales do not involve special selling efforts

Compare to traditional follow-on

At-the-Market Offering

- A continuous offering.
- Shares are dribbled out.
- Sold on an agency basis through one or more distribution agents; may be sold on a principal basis.
- Issuer determines amount, floor price, and duration of any issuance.
- Amounts, floor prices, and duration of placements may vary over the life of the program, and can be changed at any time.

Follow-on Offering

- A “bullet” or single offering.
- Shares are sold all at once.
- Sold as principal through a syndicate of underwriters.
- The clearing price and size of issuance is based on investor demand at a specific point in time.

Why use an ATM?

- Raise equity by selling stock into the natural trading flow of market
- Minimal market impact
- Requires no commitment of any kind; sales may be executed on an agency basis
- Increases the issuer's ability to better time its issuances and match offering proceeds to specific uses
- Often effective whether or not the market is receptive to other types of offerings

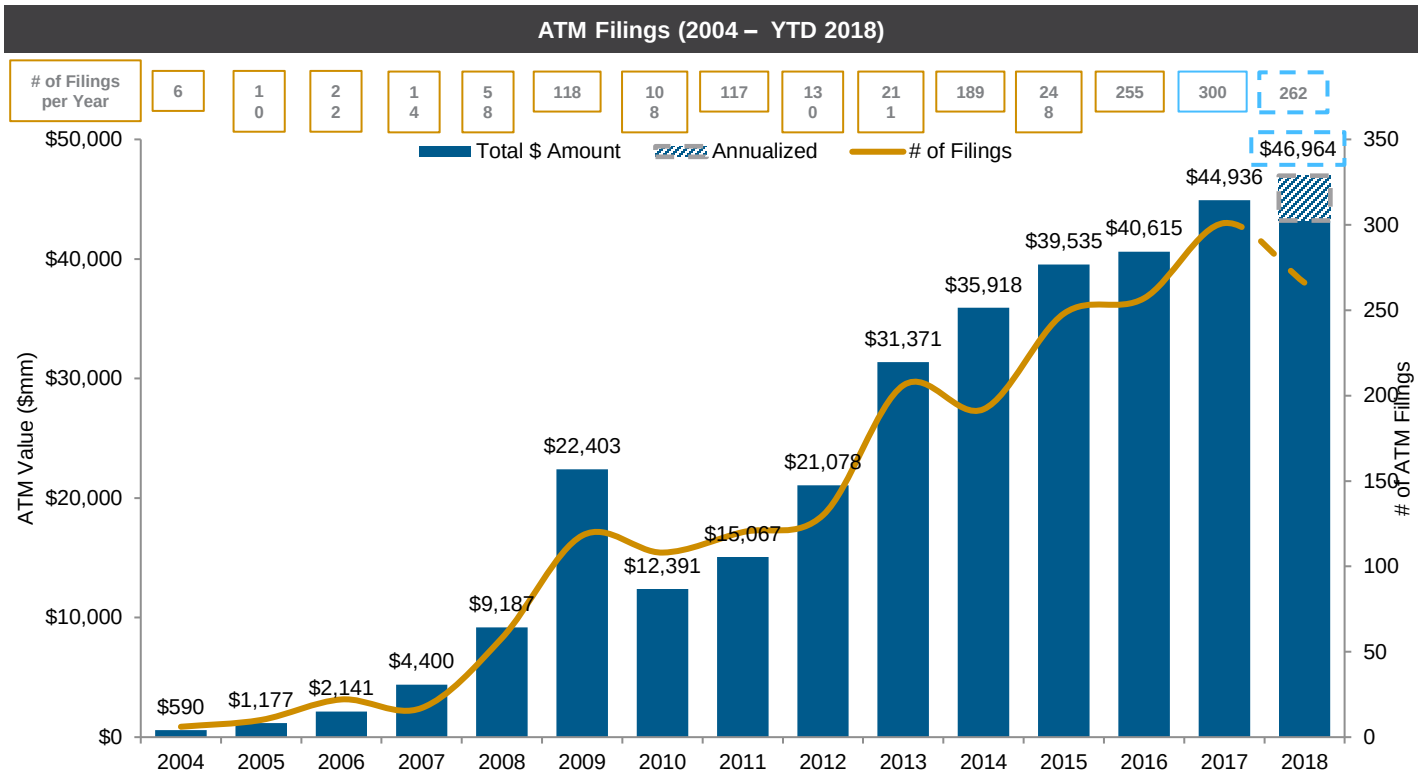
What type of issuers use ATMs?

- Used by issuers that:
  - Have a frequent need to raise additional capital
  - Wish to engage in regular balance sheet maintenance
  - Seek to raise small amounts of organic growth capital
  - Seek to finance a small acquisition or series of small acquisitions

U.S. ATM FILINGS (2004 – YTD 2018)

The tremendous growth of ATM offerings is indicative of the success and acceptance of the product

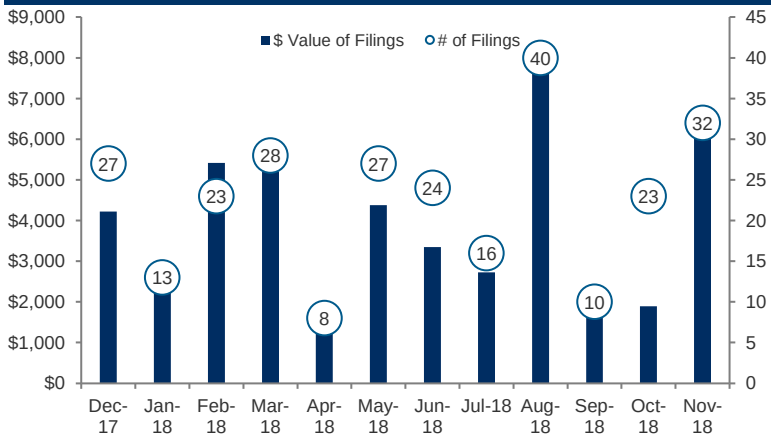
- $44.9 billion of ATM offerings were filed in the U.S. during 2017



Source: Bloomberg, FactSet, Capital IQ, Company Reports and Equity Research
Note: Excludes ATM filings by Bank of America ($16.9B) and Citigroup ($37.2B) in 2009 and 2010, respectively, as deal values are outliers

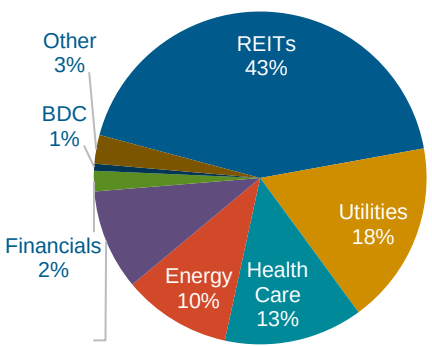
U.S. ATM FILINGS LAST TWELVE MONTHS

ATM Filings by Month(millions)

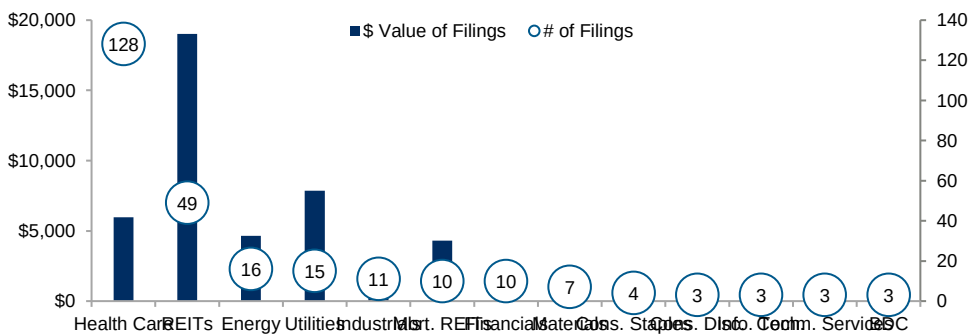


Trailing 12 Month ATM Filings(millions)

% ATM Filings $ by Sector



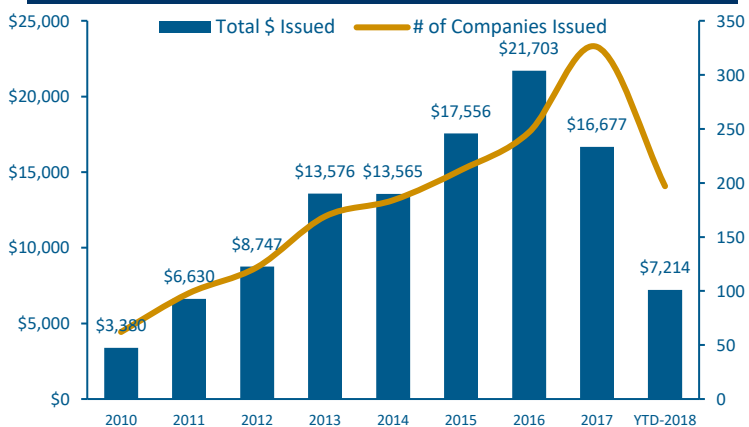
ATM Filings by Sector(millions)



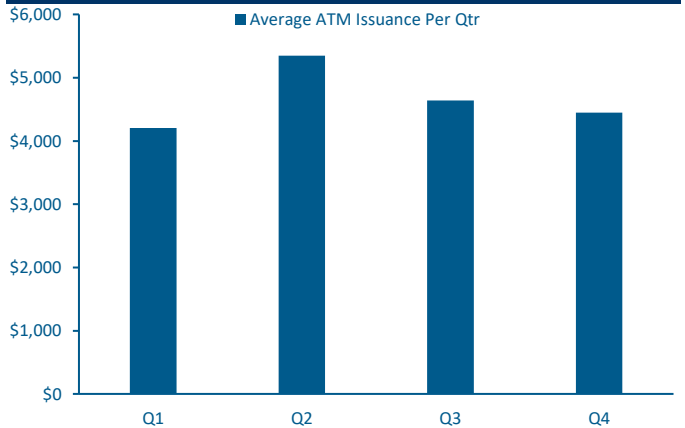
Source: Dealogic, FactSet
Data includes U.S. ATM filings from 12/4/2017 through 12/3/2018

OVERALL U.S. ATM ISSUANCE ACCELERATED AFTER 2014

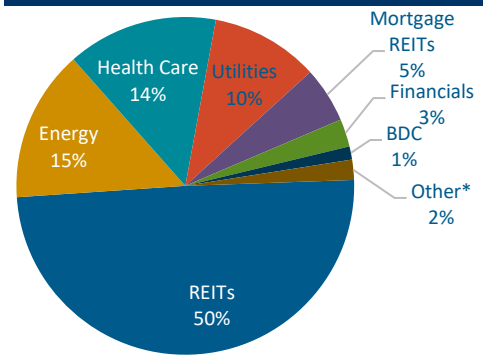
ATM Issuance 2010 – YTD 2018(millions)



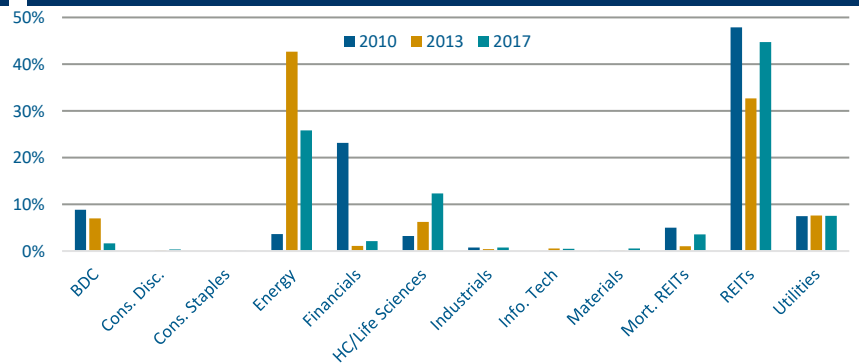
ATM Issuance 2015 – 2017 Occurs Most in Q2(millions)



ATM Issuance 3Q17-2Q18 by Sector



% of Total $ Issuance has Shifted to Include HC/Life Sciences



Source: Dealogic, FactSet, Bloomberg, SEC Filings
ATM Issuance data available up to 2Q18
*Other Includes Information Technology, Industrials, Consumer Discretionary, Materials

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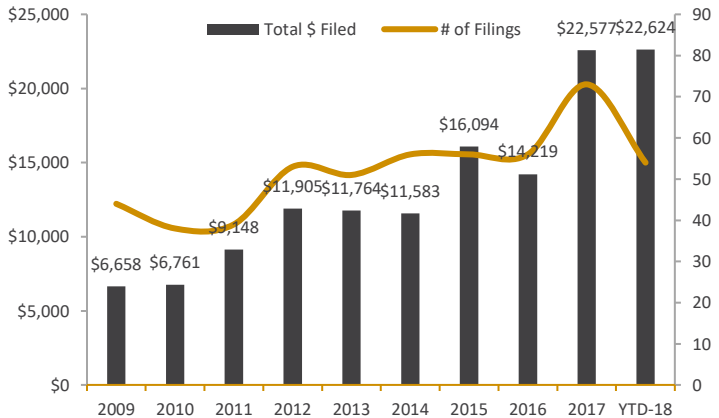
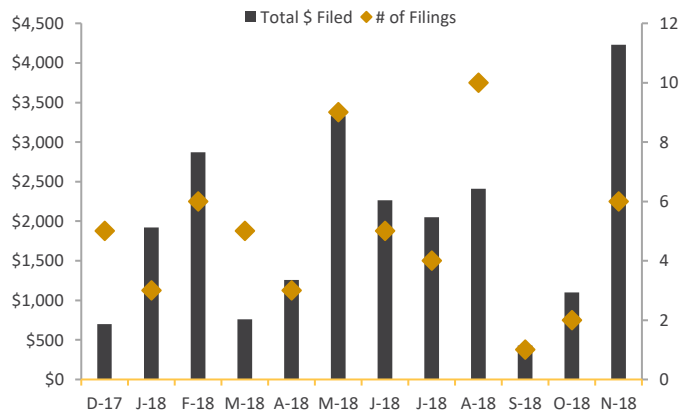
U.S. REIT EQUITY ISSUANCE LEANING HEAVIER TOWARDS ATM

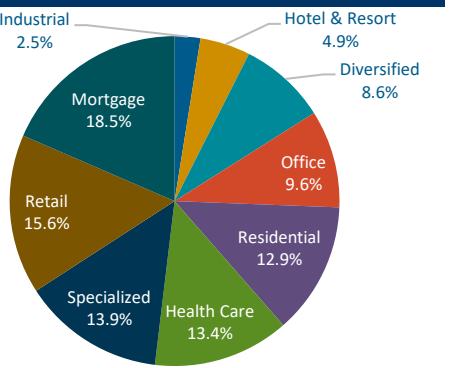
REIT ATM Filings 2009 – YTD 2018(millions)



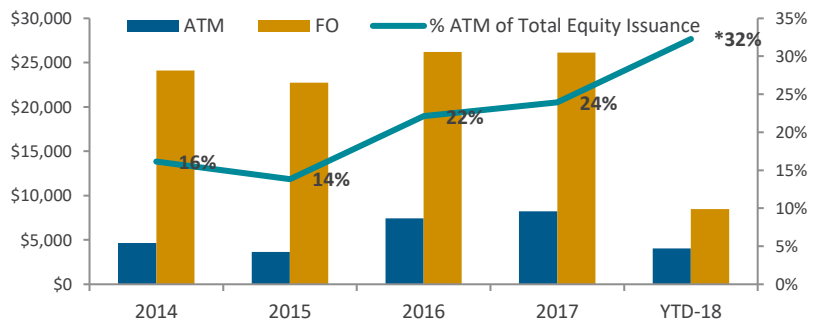
REIT ATM Filings LTM(millions)



REIT ATM Filings LTM by Sub-Industry



REIT ATM Issuance vs. Traditional FO Offerings(millions)



Source: Dealogic, FactSet, Bloomberg, SEC Filings
*as of 6/30/2018

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CURRENT TOPICS REQUIRING ATTENTION

- Frequency of due diligence and comfort letters once the ATM offering is filed
    - Quarterly vs. Annually
- Block size threshold for 8-K announcement requirement
- Definition for communications
    - Specifically related to the communication used to sourced liquidity from investors and how to engage our salesforce on ATM executions
- Use of 10b5-1 Plans for ATM issuance through a blackout window

ESTABLISHING A PROGRAM

Set up

- Any issuer eligible to register on Form S-3 on a primary basis may set up an ATM.
- Prepare and file S-3
  - Include relevant language in the plan of distribution section.
  - If an S-3 is already on file, file a post-effective amendment to retrofit the S-3 by including the ATM language in the plan of distribution.
- Execute distribution agreement.
- File prospectus supplement and distribution agreement.
  - Distribution agreement filed on Form 8-K
- Prospectus or prospectus supplement must describe the program
- Issuer directs the distribution agent to sell shares into the market.

Required documentation

- Prospectus or prospectus supplement must describe the program:
  - General terms of the at-the-market offerings to be conducted;
  - Description of common stock;
  - Size of program; and
  - Participating distribution agents.
- Distribution Agreement:
  - Principal and agency transactions;
  - Representations, warranties and covenants, including delivery of legal opinions, comfort letters (refreshed generally quarterly; alternatively, at each takedown);
  - Sales notice – direction by issuer to distribution agent to sell shares; often sets a floor price; and
  - Standard market-out termination provisions.

Prospectus supplements and disclosure

- Periodically, issuer must disclose the number of shares sold and proceeds raised under the program are filed.
  - Some issuers choose to disclose sales in prospectus supplements at quarter's end
  - Some issuers choose to disclose in their 10-Qs and 10-Ks
  - If sales are completed on an underwritten (principal) basis, a prospectus supplement for the trade

Execution of ATM sales

- Broker-dealers historically have structured their ATM arrangements somewhat differently. However, by and large, most execute these programs from their block trading desks.
- Most ATMs:
  - Specify a maximum number of shares to be sold on a particular day; and
  - Permit the issuer to specify a floor price or provide that the sale price will be equal to the VWAP for that day (less a discount), or the higher of VWAP and the floor.
- Depending on the ATM structure, the distribution agent may sell out the shares or may purchase and resell the shares.
- Distribution agents generally will execute through electronic trading systems like Bloomberg Trade Book, DOT orders routed directly to the NYSE floor, or though other ECNs (electronic communication systems).
- Some distribution agents execute above the floor, in anonymous third-market/OTC trades, or in response to institutional inquiries (reverse inquiry basis).

LEGAL CONSIDERATIONS

Due diligence

- The distribution agent is subject to liability under Section 11 of the Securities Act
  - Distribution agent should therefore perform due diligence and obtain legal opinions and comfort letters at the program's inception
  - Distribution agent also should perform ongoing diligence—often this ongoing diligence is timed to coincide with the issuer's earnings calls
  - Distribution agent also should obtain legal opinions and comfort letters periodically; there are differences in market practice related to the periodic “update” requirements

Statutory underwriter or dealer activity

- A distribution agent for an ATM may be considered a statutory underwriter.
- However, depending on the marketing efforts (or lack thereof) the activities the distribution agent engages in may only rise to the level of ordinary dealer activity.
  - Presence of special selling efforts
- If the distribution agent engages in special selling efforts, it may also require compliance with Reg M for takedowns

Issues for “continuous” offerings

- In a continuous offering, both the issuer and distribution agent need to be mindful of the anti-fraud provisions of the securities laws.
- Need to be cautious of making sales under the program when the issuer and the distribution agent are in possession of material, non-public information.
- Consider limiting sales to pre-defined trading windows or, in order to permit sales to continue during trading blackout periods, an issuer would adopt a 10b5-1 program.

Prospectus delivery

- For most ATMs, a broker or dealer need not deliver a prospectus.
  - A broker or dealer effecting a transaction on a national securities exchange or through any trading facility is deemed under Rule 153 to have satisfied its prospectus delivery obligations if:
    - Securities of the same class are traded on a national securities exchange;
    - None of the issuer, underwriter or dealer, or the registration statement is the subject of a pending proceeding under Section 8A; and
    - The issuer has filed a 10(a) prospectus.
- For sales other than to broker-dealers, pursuant to Securities Act Rules CD&I 150.01, ATM sales are "primary sales" and there may be a prospectus delivery obligation to their clients who acquired those securities (which may be satisfied in reliance on Rule 172) and similarly may have an obligation to provide a notice pursuant to Rule 173. http://sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm

Regulation M considerations

- Rules 101 and 102 (activities in a distribution):
  - An at-the-market offering for an issuer whose securities meet the requirements of being actively traded (ADTV of at least $1 million/public float of at least $150 million) is not subject to Rules 101 and 102.
  - Most ATMs meet this test.
  - If actively traded ADTV test not met:
    - Need to analyze transaction for magnitude and whether special selling efforts are used (each dribble out analyzed separately).
    - Is distribution agent a “market-maker”?
    - Need to establish procedures to get “out of the box”
    - Certification of ADTV in sale notice

Regulation M considerations *(cont'd)*

- An issuer contemplating an ATM should assess whether it has repurchase programs in place, such as an announced stock buyback or indirect buyback, as well as whether it has a DRIP in place.
- For Reg M purposes, and in order to avoid other potential market manipulation concerns, the issuer should plan its ATM carefully and consider suspending repurchases or limiting ATMs and repurchases to pre-defined window periods.
- If an issuer intends to set up various ATMs, each using different selling/distribution agents, it should take care to ensure that different agents are not selling during the same periods.

Restricted lists

- Consider whether, once the distribution agreement is executed, the issuer's securities should be placed on either the grey/watch or restricted list for the term of the program.
  - Enables the compliance or legal department to monitor firm's activities related to the issuer:
    - Can firm undertake engagements on the issuer's behalf?
    - Can firm undertake an engagement that may pose a business conflict?
    - Can firm commence research, change recommendations or release a new report?
    - Does firm have appropriate information wall procedures in place?

Research coverage

- Is the distribution agent participating in a distribution?
- Safe harbor provided by Rule 139 — publish research about an issuer or any class of securities.
  - Issuers in an ATM are S-3 eligible.
- If already providing research, monitor for life of program:
  - Information contained in a publication that:
    - Is distributed with regularity in normal course; and
    - Includes similar information on a number of companies in the industry or a comprehensive list of recommended securities; and
  - Information is given no materially greater space or prominence.

Research coverage *(cont'd)*

- If not already providing research, can firm commence coverage if engaged as distribution agent?
  - Analogize and rely on regulatory guidance for commencement of research after a follow-on offering.
  - A FINRA member cannot publish on an issuer for whom it acted as a manager or co-manager for 3 calendar days after a follow-on offering.
  - Consider policy requiring that firm not commence research for a period of not less than 3 calendar days following establishment of ATM.

Conflicts issues

- What if firm is rendering a fairness opinion for issuer?
  - Do distribution agent activities raise independence concerns?
- What if firm is acting as financial advisor in a restructuring?
  - Do distribution agent activities raise independence concerns?

SELLING STOCKHOLDERS

An ATM for Selling Stockholders

- Permits selling stockholders to take advantage of market opportunities to sell shares quickly.
- Allows selling stockholders to exceed the volume limitations under Rule 144 (in any three-month period, the greater of 1% of shares outstanding or the average weekly trading volume during the four calendar weeks preceding the filing of a Form 144).
- May add selling stockholders by amendment or in a prospectus supplement.
  - Can be used for:
  - Principal (firm commitment) offerings
  - Agency (best efforts) offerings
  - Block sales

Affiliate Selling Stockholders

- If the selling stockholders are affiliates, then they should set up a Rule 10b5-1 trading plan.
- Rule 10b5-1 under the Exchange Act creates an affirmative defense to insider trading allegations by creating a plan for future purchases or sales of stock.
- To be effective, a Rule 10b5-1 trading plan must be in writing and must specify:
  - Number of shares to be bought or sold
  - Prices at which the shares will be bought or sold
  - Timing of the purchases or sales
- Affiliates may include:
  - Directors
  - Executive officers
  - 10% holders
  - Other persons with the power to direct the management and policies of the issuer, whether through the ownership of voting securities, by contract or otherwise.

Affiliate Selling Shareholders *(cont'd)*

- The mechanics of the distribution agreement will need to work with the Rule 10b5-1 trading plan.
- Public announcement of the adoption of a Rule 10b5-1 trading plan is not required.

Section 16 Filings

- A Form 4 must be filed with the SEC within two business days of the "deemed execution date" of the sale.
  - If the sale satisfies the affirmative defense conditions of Rule 10b5-1(c) and the affiliate did not select the execution date, then the "deemed execution date" is the date on which the executing broker notifies the affiliate of the execution of the sale.
  - If the broker does not notify the affiliate of the sale within three business days of the actual execution date, then the third business day following the actual execution date will be the "deemed execution date."
- Form 4 filings should include a footnote explaining that the reported sale was effected pursuant to a Rule 10b5-1 trading plan.
- The establishment or termination of a Rule 10b5-1 trading plan by itself will not trigger a Form 4 filing under Section 16.
- Form 5 filings are required to report any sales that should have been reported earlier on a Form 4 or were eligible for deferred reporting, and are due 45 days after the end of the company's fiscal year.

Non-Affiliate Selling Stockholders

- If the selling stockholders are not affiliates, then a Rule 10b5-1 trading plan is not necessary.
- The filing requirements under Section 16 would not be applicable.
- Disgorgement of short-swing profits under Section 16(b) would not be applicable.

Application of Other Federal Securities Laws to Rule 10b5-1 Trading Plans

- If an affiliate is selling shares without registration (in other words, outside of the equity shelf program) but still pursuant to a Rule 10b5-1 trading plan, then the affiliate must still comply with requirements of Rule 144.
- The filing requirements for Schedules 13D and 13G would also be applicable (if the affiliate is a 5% holder).
- Disgorgement of short-swing profits under Section 16(b)
  - If an affiliate conducts a single purchase and sale, in any order, within a six-month period and realizes a profit, then the profits must be disgorged to the issuer.
  - Where there are multiple purchases and sales, the lowest price in and highest price out are matched, but the shares can only be matched once.
  - May split up or combine blocks of shares to match with smaller or larger blocks, share by share if necessary, to achieve a maximum calculated profit under the lowest in, highest out method, and purchases and sales can be matched to opposite transactions six months before or after.

CLOSED-END FUNDS

Special considerations for closed-end funds

- Issuers that are registered investment companies, which include closed-end funds, may rely on no-action letter guidance (Pilgrim and Nuveen no-action letters) to register shares in reliance on Rule 415 using an N-2.
- There is only a limited ability to incorporate by reference on Form N-2.
- N-2 issuers are not technically eligible to rely on “access equals delivery” (Rules 172 and 173).
- Certain issuers may not be able to sell securities at a discount to NAV.
- A FINRA filing may be required in connection with clearing compensation arrangements.
- Section 17 of the 1940 Act may impose restrictions on selling agents/distribution agents that are "underwriters" of the registered investment company.

Section 17

- Section 17 of the 1940 act prohibits certain transactions involving investment companies and "affiliated persons"
- These prohibitions are designed to prevent insiders from using the investment company to benefit themselves and to the detriment of the investment company and its shareholders
- Specifically, Section 17(a)(2) prohibits a "principal underwriter" for a registered investment company (or any affiliate thereof) from selling any security or other property to such registered investment company and from knowingly purchasing any security or other property from such registered investment company.

Section 17 *(cont'd)*

- Section 17 raises interesting questions in the context of an at-the-market offering
  - In the case of a traditional underwritten offering, one can clearly identify the commencement of the distribution and the completion of the distribution and can conclude that an underwriter is acting as a "principal underwriter" during that finite period
  - However, by contrast, an at-the-market offering may have a term of three or six months (or longer), and it is not clear whether the distribution agent would be considered a "principal underwriter" during the term of the at-the-market offering
  - Assuming that the distribution agent is considered a "principal underwriter" during the entire term of the at-the-market offering, then the distribution agent may not be able to render other services to the closed-end fund during the term of the program, unless an express exemption is available under Section 17

Section 17 *(cont'd)*

- Alternative approaches
  - Structure the program to provide for agency only transactions: this will be a helpful fact (Sec 17(e) would be applicable in this case, and not Sec 17(a))
  - Take the view that an at-the-market offering is not a "distribution" of securities, because it does not meet the "magnitude" or the "special selling efforts" criterion for a distribution; or
  - Take the view that a "distribution" is ongoing only during certain periods when the closed-end fund accesses the at-the-market offering program (thus, the distribution agent is only a "principal underwriter" during these periods); or
  - Structure the arrangements between the closed-end fund and the distribution agent such that the distribution agent is not a "principal underwriter"

Alternative approaches

- Take the view that an at-the-market offering is not a "distribution" of securities, because it does not meet the "magnitude" or the "special selling efforts" criterion for a distribution
  - For Regulation M purposes, a distribution is an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods
  - An argument can be made that the draw downs under equity shelf programs do not meet the magnitude test
  - There are no "special selling efforts" in connection with an equity shelf program since trades are executed on an exchange

Alternative approaches *(cont'd)*

- Take the view that a "distribution" is ongoing only during certain periods when the closed-end fund accesses the at-the-market offering program (thus, the distribution agent is only a "principal underwriter" during these periods)
  - The closed-end fund can specify certain weeks during a month or certain months during the year when it will use the equity shelf program, and then it is only during these particular periods that the closed-end fund would be deemed to be in a "distribution" and the distribution agent may be deemed to be a "principal underwriter"
  - This would require close monitoring by the distribution agent's compliance department

Alternative approaches *(cont'd)*

- Structure the arrangements between the closed-end fund and the distribution agent such that the distribution agent is not a "principal underwriter"
  - A "principal underwriter" of or for a closed-end fund means "any underwriter who, in connection with a primary distribution of securities: (A) is in privity of contract with the issuer or an affiliated purchaser of the issuer; (B) acting alone or in concert with one or more person, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution."
  - The closed-end fund can contract with its broker-dealer/distributor affiliate, and not with the distribution agent.
  - The fees payable to the broker-dealer/distributor affiliate and the distribution agent can be structured to more closely resemble ordinary commissions.

SAMPLE TIMELINE

Indicative timetable

Key	
CO	Company
DA	Distribution Agent
CC	CO's Counsel
DAC	DA's Counsel
AUD	CO's Auditor

Date		Event	Responsibility
Phase 1	■	Conduct due diligence (legal, business and financial)	All Parties
	■	Draft shelf registration statement (including base prospectus and a form of prospectus supplement) and the distribution agreement	All Parties
Phase 2	■	Finalize shelf registration statement and distribution agreement	All Parties
	■	Coordinate internal logistics and administrative, filing and settlement operations	CO, DA
	■	File shelf registration statement	CO
Phase 3	■	Obtain effectiveness of shelf registration statement and file prospectus	
	■	Conduct 'bring down" due diligence	All Parties
	■	Deliver legal opinions, comfort letter, and other required documents	CC, AUD
	■	File prospectus supplement for the program with SEC	CO
	■	Activate program	CO, DA

Required documentation

Documentation	Timing	Responsibility
Prior to Activation		
New Account Form	Prior to activation	DA
Settlement Instructions	Prior to activation	CO
Certificate of Incorporation	Prior to activation	CO
Secretary's Certificate	Prior to activation	CO
Good Standing and Foreign Qualification Certificates	Prior to activation	CO
Corporate Resolutions Authorizing the Program	Prior to activation	CO
Officers' Certificates	Prior to activation	CO
Opinions of Counsel	Prior to activation	CC , DA
Comfort Letter	Prior to activation	AUD
File Distribution Agreement with SEC (via Form 8-K)	Prior to activation	CO
File Program Prospectus or prospectus supplement with SEC	Prior to activation	CO
Ongoing		
Confirmation of Shares	Following issuance of shares	DA provides to CO
Officer's Certificate	In conjunction with periodic SEC filings	CO
Prospectus Supplement/10-K or 10-Q	Periodic, following issuance of shares	CO
Opinions of Counsel	In conjunction with periodic SEC filings	CC , DA
Comfort Letters	In conjunction with periodic SEC filings	AUD

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