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WHAT'S THE DEAL?

Series

Block Trades, Standalone Blocks, Blocks off of ATMs, Tricky ATM Issues and More

May 9, 2024

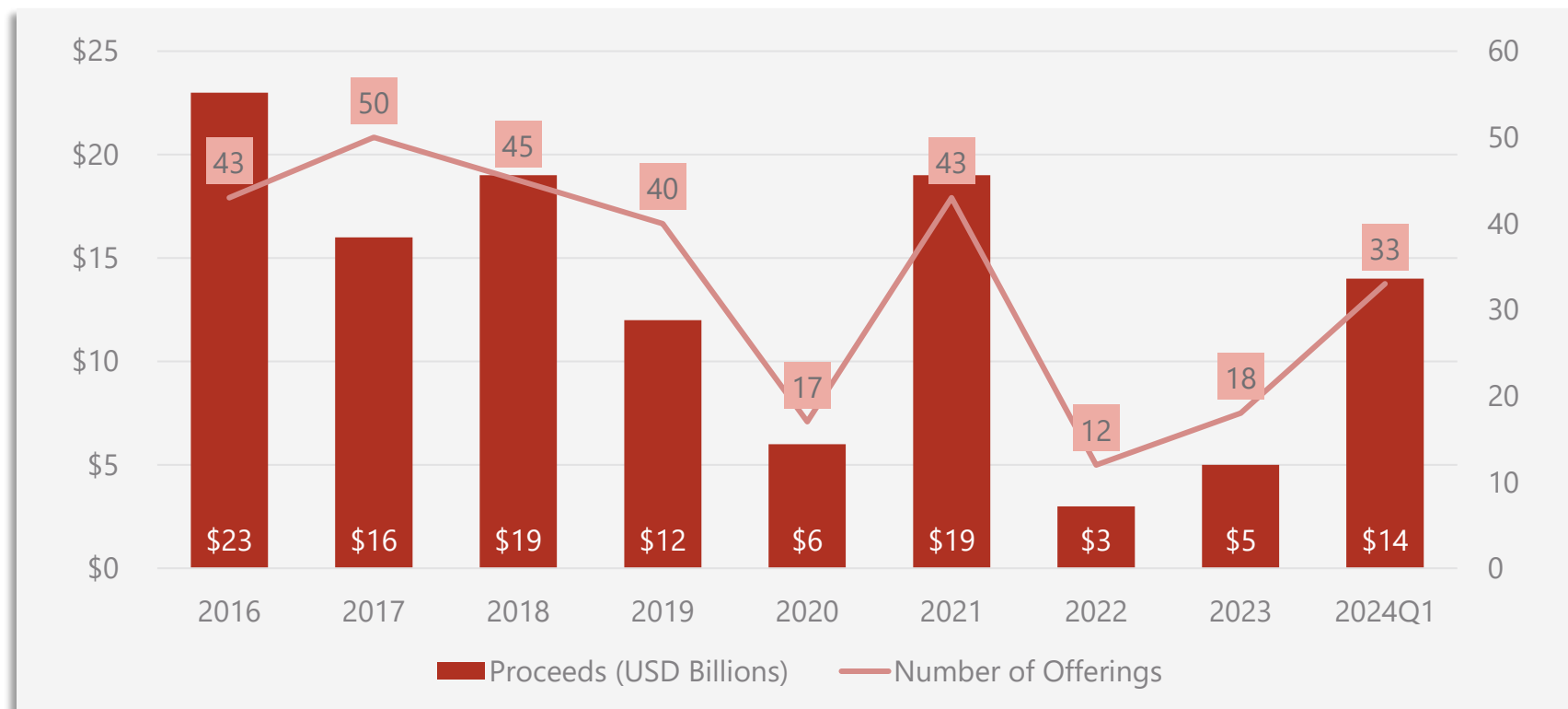
Block Trades

Block trades

- A “trade” of a large quantity of stock usually consisting of at least 10,000 shares of stock
- Shares may be “restricted” securities or may be offered pursuant to a shelf registration statement
- An investment bank may execute a block trade on an agency basis or on a principal basis

Block trades (cont'd)

- An overall increase in block trade activity in recent periods—largely driven by sponsor blocks



Source: ICR Capital, FactSet, Bloomberg and Dealogic

Who uses block sales and why?

Who?

- Issuer may sell through a block trade
- Usually, block sales are used by sponsors, VCs, and other large stockholders (often securityholders that acquired stock in an M&A transaction or pre-IPO) to sell down their position and to obtain liquidity

Why?

- Cheaper than an underwritten transaction
- Effective execution for smaller amounts of stock
- Often an affiliate may not be able to meet the Rule 144 requirements and may choose to sell through a block sale instead

Working a block

- Block trade desk may or may not use “special selling efforts”
 - May sell into the market
 - May sell over the course of a few days
 - May have identified demand (reverse inquiries)

Resales of Restricted Securities

Resales of restricted securities

- Every offer and sale (including resales) of securities in the United States must be registered with the Securities and Exchange Commission unless an exemption is available
 - Otherwise, offer or sale violates Section 5 of Securities Act of 1933 (“Securities Act”)
- Key exemptions for private placements and resales of securities include:
 - Section 4(a)(1) of Securities Act: Exempts transactions by persons other than issuers, affiliates, underwriters or dealers
 - Section 4(a)(2) of Securities Act (and Regulation D safe harbor): Exempts transactions by the issuer not involving a public offering
 - Section 4(a)(3) of Securities Act: Generally exempts transactions by dealers not acting as underwriters
- Securities sold in a private offering are “restricted securities” that may not be resold freely in the U.S. public secondary market

Resales of restricted securities *(cont'd)*

- Restricted securities: Securities acquired in unregistered, private sales from the issuer or from an affiliate of the issuer
- Control securities: Securities held by an affiliate of the issuer
 - An “affiliate” of the issuer is a person controlling, controlled by or under common control with the issuer
 - “Control” means the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise
 - Generally, includes officers, directors and greater than 10% shareholders, but requires facts and circumstances analysis
- Sections 4(a)(1) and 4(a)(3) are not available for resales of restricted or control securities
- For resales of privately placed securities and securities held by an affiliate of the issuer, a holder needs to find other available exemptions for its resales or have its resales covered by a registration statement

Existing resale exemptions

- Resale exemptions include:
 - Rule 144: Non-exclusive safe harbor for public resale of restricted and control securities subject to compliance with certain conditions
 - “Section 4(a)(1^{1/2})”: Technique developed by bar to facilitate private resales similar to 4(a)(2) private placements
 - Rule 144A: Private resales to QIBs only
 - Regulation S under Securities Act: Resales of securities in “offshore transactions” with no “directed selling efforts” in the United States

Rule 144

- Rule 144 provides a non-exclusive safe harbor for public resales of restricted securities
 - Without the types of limitations imposed by the rule, investors in a private placement (and their transferees) may be deemed to be taking the securities with a view to distribution, and would be unable to rely on Section 4(a)(1) or, in the case of dealers, Section 4(a)(3), of the Securities Act
- If a holder satisfies all of Rule 144's applicable conditions, the holder is generally deemed not to be an "underwriter"
 - Conditions differ for affiliates and non-affiliates
 - Generally, not available for business combination-related shell companies or asset-backed issuers (one year look-back)
- Securities sold pursuant to Rule 144 are no longer "restricted securities" and may be resold freely by non-affiliate purchasers of the securities

Rule 144 – sales by affiliates

- Minimum holding period
 - For restricted securities held by an affiliate: (1) six months if the issuer has been a reporting company for at least 90 days; or (2) one year for other issuers
 - If shares are just control securities and not restricted securities, no holding period would apply
- Current public information
 - For reporting issuers, filed all required periodic reports in the last 12 months
 - For non-reporting issuers, certain specified company information is publicly available
- Manner of sale
 - For debt securities (including non-participatory preferred stock and asset-backed securities), no manner of sale limitations
 - For equity securities, the securities must be sold on an unsolicited basis and either in (1) “brokers’ transactions,” (2) transactions with a market-maker or (3) “riskless principal” transactions (subject to compliance with certain requirements)

Rule 144 – sales by affiliates *(cont'd)*

- Form 144 filing
 - If sales during any three-month period exceeds 5,000 shares or a price of \$50,000, a notice must be filed with the SEC (and if listed, relevant securities exchange)
 - Must have bona fide intention to sell within a reasonable time (generally three months)
- Volume limitation
 - For equity securities, an affiliate's Rule 144 sales cannot exceed, in the preceding three-month period, the greater of (1) 1% of the outstanding securities of the class and (2) the average weekly trading volume of the securities on relevant U.S. exchanges during the preceding four weeks
 - For debt securities, an affiliate's Rule 144 sales cannot exceed the greater of (1) limitations set by either of the two tests described above and (2) 10% of the principal amount of the tranche of debt securities in question (or class, when the securities are non-participatory preferred stock) in the preceding three-month period

Rule 144 – sales by affiliates *(cont'd)*

- A “non-affiliate” is any person who is not an affiliate of the issuer at the time of sale and has not been an affiliate for at least 90 days prior to that time
- Minimum holding period
 - The same holding periods that apply to sales of restricted securities by affiliates also apply to sales by non-affiliates (i.e., a six-month holding period for securities of reporting companies and a one-year holding period for securities of non-reporting companies)
- Current public information
 - During the period from six months to one year, non-affiliates may resell publicly securities of a reporting company so long as that company continues to make available the information required by Rule 144(c)
 - After one year, non-affiliates may resell publicly securities of both reporting companies and non-reporting companies
- No other Rule 144 conditions apply to sales by non-affiliates

Rule 144 – riskless principal

- Riskless principal transactions are only permitted where:
 - The offsetting trades are executed at the same price (exclusive of an explicitly disclosed markup or markdown, commission equivalent or other fee);
 - The transaction is reported as riskless principal;
 - Broker neither solicits nor arranges for solicitations of customer orders in anticipation of the trade, provided that this does not preclude: inquiries by broker of other brokers or dealers who have indicated an interest in the securities in the preceding 60 days; inquiries by broker of customers who have indicated an unsolicited bona fide interest in the preceding 10 business days; the publication of bid/ask quotes in an interdealer quotation system (subject to certain requirements);
 - Broker obtains and retains written evidence of indications of bona fide unsolicited interest; and
 - After reasonable inquiry, broker concludes that seller is not an underwriter and shares are not part of a distribution of securities of the issuer
- The seller may want price certainty and that may be best obtained when a block is executed on a riskless principal basis

Rule 144 recap

	Affiliate or Person Selling on Behalf of an Affiliate	Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)
Restricted Securities of Reporting Issuers	<p><u>During six-month holding period:</u> No resales under Rule 144 permitted.</p> <p><u>After six-month holding period:</u> May resell in accordance with all Rule 144 requirements including:</p> <ul style="list-style-type: none"> • Current public information • Volume limitations; • Manner-of-sale requirements for equity securities; and • Filing of Form 144. 	<p><u>During six-month holding period:</u> No resales under Rule 144 permitted.</p> <p><u>After six-month holding period but before one year:</u> Unlimited public resales under Rule 144 except that the current public information requirement still applies.</p> <p><u>After one-year holding period:</u> Unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
Restricted Securities of Non-Reporting Issuers	<p><u>During one-year holding period:</u> No resales under Rule 144 permitted. After one-year holding period may resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> • Current public information; • Volume limitations; • Manner-of-sale requirements for equity securities; and • Filing of Form 144. 	<p><u>During one-year holding period:</u> No resales under Rule 144 permitted.</p> <p><u>After one-year holding period:</u> Unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.</p>
Unrestricted Securities	<p><u>No holding period:</u> May resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"> • Current public information • Volume limitations • Manner-of-sale requirements for equity securities; and • Filing of form 144. 	<p><u>No holding period:</u> Unlimited public resales under Section 4(a)(1) of the Securities Act. Former affiliates cannot freely resell securities for a period of 90-days after they cease to be affiliates.</p>

The “4(a)(1½) exemption”

- The Section 4(a)(1½) exemption has evolved in practice, without the benefit of any official rulemaking.
- It is a hybrid consisting of:
 - A Section 4(a)(1) exemption that exempts transactions by anyone other than an “issuer, underwriter or dealer,” and
 - A Section 4(a)(2) analysis to determine whether the seller is an “underwriter,” i.e., whether the seller purchased the securities with a view to distribution.
- In 1980, the SEC recognized the Section 4(a)(1½) exemption, which although not specifically provided for in the Securities Act, “[is] clearly within its intended purpose,” provided that the established criteria for sales under both Sections 4(a)(1) and 4(a)(2) are satisfied.

When is the “4(a)(1^{1/2}) exemption” used?

- The Section 4(a)(1^{1/2}) exemption can be used by institutional investors to resell restricted securities purchased in a private placement.
- The Section 4(a)(1^{1/2}) exemption can also be used by affiliates for the sale of control securities when Rule 144 is unavailable.
- It is still used for resales to accredited investors.

How are 4(a)(1½) sales structured?

- In a Section 4(a)(1½) transaction:
 - The seller must sell in a “private” offering to an investor that satisfies the qualifications (for example, sophistication, access to information, etc.) of an investor in a Section 4(a)(2) private offering; and
 - The investor must agree to be subject to the same restrictions imposed on the seller in relation to the securities (for example, securities with a restricted legend).
- Given that a Section 4(a)(1½) transaction seeks to replicate a statutory private placement, it is our view that general solicitation cannot be used in connection with this transaction.

Common practices for 4(a)(1½) sales

- Because the 4(a)(1½) exemption seeks to recreate the conditions that enabled the original private placement, a number of common practices have emerged among practitioners in connection with 4(a)(1½) transactions, including:
 - Purchaser agrees to resale restrictions and to make representations and warranties regarding its sophistication and investment intent;
 - Inquiring into the identity of the purchaser, including its financial condition, in order to assess the likelihood that the purchaser will be able to hold the securities for investment and not resell prematurely;
 - Legal opinions confirming the view that no registration is required;
 - Restrictive legends on the securities to alert the purchaser to the restricted nature of the securities;
 - Stop transfer instructions from the issuer; and
 - Reselling the restricted securities in large minimum denominations or investments to bolster the purchaser's claims regarding its sophistication and investment intent.

Selling stockholder PIPE transaction

- A selling stockholder may hold a substantial block of stock, and the holder may want to dispose of the transaction in an orderly way, without signaling to the market
- The selling stockholder can participate in a PIPE transaction
- The entire selling stockholder position is sold to PIPE buyers in a Section 4(a)(1^{1/2}) transaction
- If the selling stockholder has registration rights, then the PIPE buyers will receive the benefit of those registration rights (assuming that these are transferable)

Summary: What should you ask?

- Who is selling? What is their status?
- How long have they held?
- Why are they selling?
- Are the securities legended or “clean”?
- How will shares be sold? Over what period of time?
- Is there a concern regarding public reporting (trade reporting, or “reporting to the tape”) the block?
- Is there a concern regarding price certainty for the block or will the shares constituting the block be sold at varying prices?
- Do sellers have a resale registration statement?
- Has a fee been negotiated and documented?

Trade Reporting Requirements

Block trade reporting summary

- The following table provides a summary of the various reporting requirements for different types of block trades, including unregistered block trades that may or may not qualify as “distributions” under Regulation M.
- If a block trade must be reported, the report must generally include (1) the symbol of the stock, (2) the number of shares bought or sold, (3) the price paid or received for such shares (for the relevant trade), (4) whether, for the reporting party, the trade was a buy, sell-or-cross-transaction, and (5) the time of execution.

Block trade reporting summary *(cont'd)*

REPORTING BY DEAL TYPE		
Type of Trade	Does the Trade Involve a "Distribution"?	Does the Trade Need to be Reported?
Section 4(a)(2):		
Issuer Shares	Yes No	No No
Section 4(a)(1½):		
Affiliate Shares	Yes No	No Yes ²
Non-affiliate Shares	Yes No	No Yes ²
Section 4(a)(7):¹		
Affiliate Shares	Yes No	No Yes ²
Non-affiliate Shares	Yes No	No Yes ²
Rule 144:		
Affiliate Shares	No ³	Yes
Non-affiliate Shares	Yes No	No Yes
Shelf Takedown		
Issuer Shares	Yes No	No No
Affiliate Shares	Yes No	Yes ⁴ Yes ⁴
Non-affiliate Shares	Yes No	Yes ⁴ Yes ⁴

Block trade reporting summary *(cont'd)*

REPORTING BY DEAL TYPE <i>(cont'd)</i>		
Type of Trade	Does the Trade Involve a "Distribution"?	Does the Trade Need to be Reported?
ATM Sale:		
Issuer Shares	Yes	No
	No	No
Affiliate Shares	Yes	No
	No	No
Non-affiliate Shares	Yes	No
	No	No
Registered Sale (Non-shelf):		
Issuer Shares	Yes	No
	No	Yes
Affiliate Shares	Yes	No
	No	Yes ⁴
Non-affiliate Shares	Yes	No
	No	Yes ⁴
Clean Shares: (not being sold pursuant to registration statement):⁵	Yes	No
	No	No

¹ Although FINRA has yet to provide guidance with respect to trade reporting for Section 4(a)(7) offerings, we anticipate that the trade reporting requirements will be similar to that for Section 4(a)(1½) offerings.

² Unless the block trade is effected off the floor of the exchange, which would typically be the case.

³ Under Rule 144, sellers who are affiliates would be subject to volume and manner of sale limitations, thus precluding a "distribution."

Distribution, or not?

- A block trade may or may not be a “distribution” for securities law purposes
 - The intermediary should consider the following:
 - Primary or secondary shares?
 - If secondary, are these shares held by an affiliate?
 - Magnitude of the offering relative to the total shares outstanding, as well as relative to the average trading volume for the stock
 - Intended sales process (agency or principal; length of sales period; use of special selling efforts)
- Depending on whether a trade is viewed as a distribution, the trade reporting requirements will differ
 - There may be a rationale for concluding that a block is a distribution
 - If it is a distribution, there will be less transparency regarding the execution and for larger positions there may be less market impact (not reported to the tape intraday)
 - But, if it is a distribution, then, that does suggest that other considerations may be applicable (for example, Reg M notice, diligence, etc.)

Policies and procedures to assess presence of a distribution

- Many firms have policies and procedures that are designed to provide some consistency relating to their analysis of blocks
- Firms might consider, among other factors, the following:
 - The size of the block—is there a minimum size or size range, and will this be based on the FINRA large block definition, or a notional size range, or percentage of average daily or weekly trading volume (analogizing to Rule 144 or to 10b-18), or to a percentage of public float
 - The identity of the seller
- A policy might also address:
 - Documentation
 - Whether “special selling efforts” were present
 - Regulation M calculations and filings

Other areas of risk to consider

Areas of risk

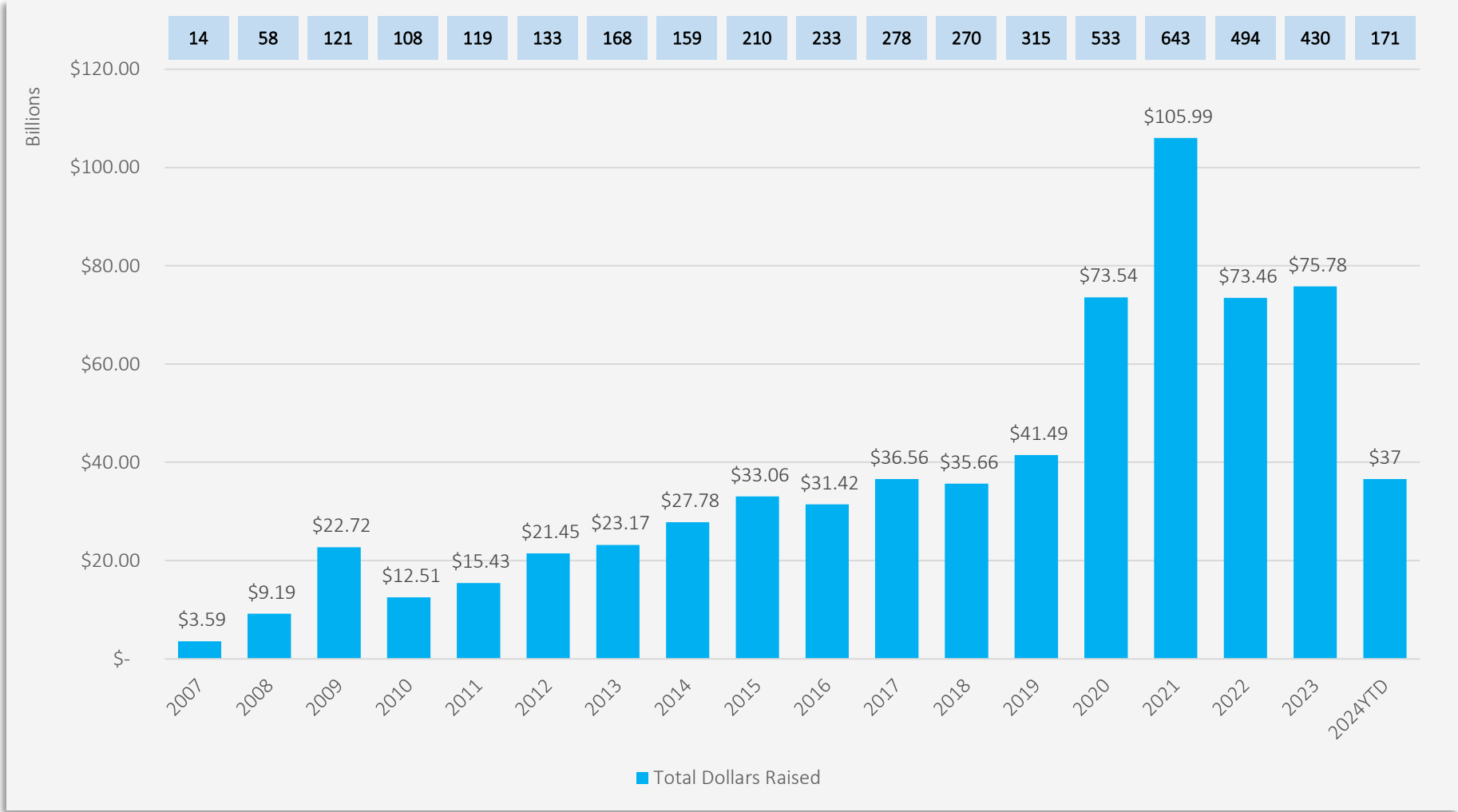
- SEC enforcement matter focused on the execution of blocks from selling stockholders and the handling of potential material nonpublic information (MNPI)—these were in the context of auctions as well as negotiated blocks
- Firm was invited to bid on, or was negotiating terms of, blocks and shared information with investors; investors used this information to establish short positions in the securities
- Firm failed to enforce written policies and procedures relating to MNPI and its information walls
- The firm engaged in pre-marketing activities in certain instances

Areas of risk *(cont'd)*

- Considerations
 - Review written policies and procedures and evaluate how blocks are addressed
 - Consider which side of the wall handles block execution and when and how information is shared over the wall
 - Consider when names are added to watch or restricted lists
 - Consider pre-marketing activities, if any
 - What are the reasonable expectations of bank customers that approach the bank to obtain pricing on a block?

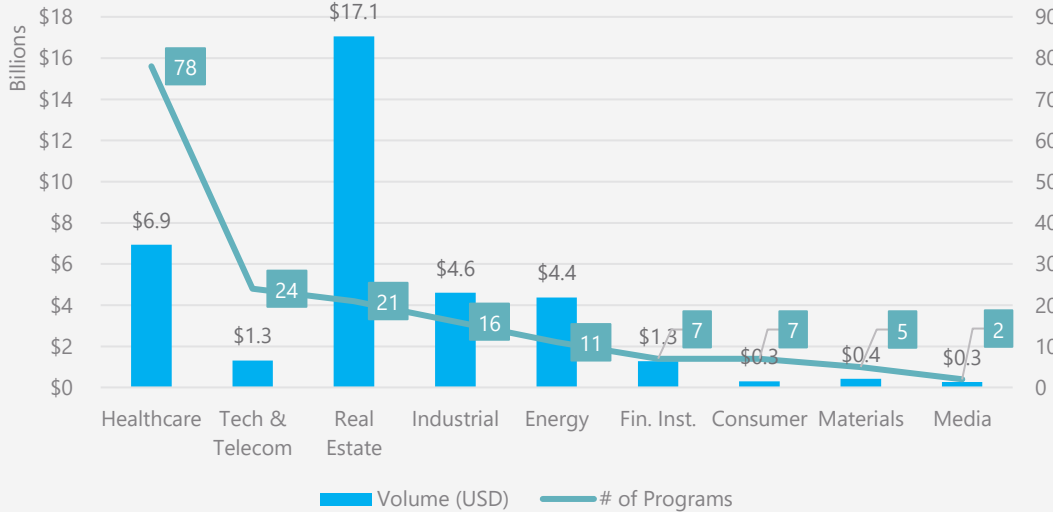
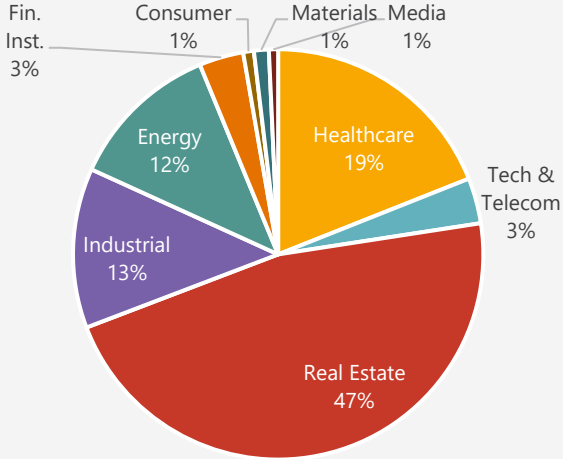
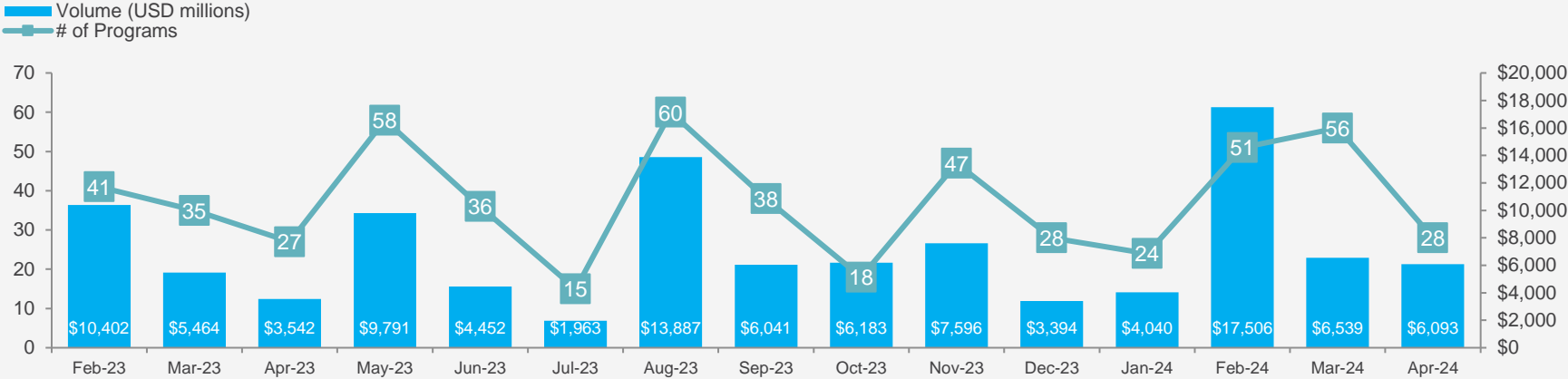
At-the-market offerings

U.S. ATM Market (2007 – 2024YTD)



Source: PrivateRaise, as of May 6, 2024

U.S. ATM Environment (Approximately last 15 months)



Source: PrivateRaise, as of May 6, 2024

Forward sale option

- More programs now include a forward sale option that allows the issuer to sell its securities through the ATM program at the current trading price without actually issuing any securities to satisfy the sale until a future date
- Generally, at its discretion, the issuer is permitted to enter into an agreement with a forward purchaser, which would purchase a fixed number of the issuer's securities at a fixed price at any time during the term of the forward contract
 - Instead of selling newly issued securities, the ATM agent borrows already outstanding securities and sells those short into the market
 - The issuer can elect cash or physical settlement for all or part of the transaction
 - If the issuer elects to cash settle and the market price at settlement is higher than the forward price, the issuer pays the applicable cash amount (difference between the market and forward price) to the forward purchaser
 - The forward purchaser would pay the same cash amount to the issuer in the event the market price at settlement is lower than the forward price. If the issuer share settles, shares with a current value equal to the cash amount would be delivered in lieu of cash

Forward sale option *(cont'd)*

- The forward, though documented pursuant to an ISDA, will not be considered a “swap.” A forward will generally qualify for the exclusion from the “swap” definition available for “any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a contingent basis that is subject to the Securities Act of 1933 and the Securities Exchange Act of 1934” (CEA 1a(47)(B)(vi)), or, alternatively, for the “capital raising” exclusion (CEA 1a(47)(B)(viii))
- Issuer should make a representation to the forward purchaser at the time the issuer makes the settlement election confirming that the issuer does not have any material non-public information
- When do you make your Reg M filing when your ATM has a forward sale option?
 - File the Reg M notice at the inception of the program

Executing blocks off of an ATM

- Often initiated on a reverse inquiry basis from the buy-side or the sales agents
- Allows for a fast and cost-efficient execution since the sales agents are likely current on diligence and legal deliverables
- To the extent that an issuer conducts a block sale, the issuer should consider whether a prospectus supplement relating to the transaction should be filed with the SEC
 - How is the block trade priced? If at a fixed price (as opposed to a market-based price), the issuer will most likely be required to file a pricing or prospectus supplement to its existing ATM prospectus in order to disclose the pricing
- Confirm availability under the shelf registration statement and the ATM program and confirm that the “Plan of Distribution” section in the ATM prospectus includes a statement to the effect that sales may also be made in privately negotiated transactions to or through a market maker other than on an exchange
- Certain regulated issuers (such as business development companies) may require an additional board approval that makes executing a block off of an ATM program impractical
- Consider applicability of stockholder approval rules
 - NYSE has given informal, unwritten advice that block trades should not be included within an ATM offering without the issuer receiving prior approval from the exchange

Timing of filing the Reg M notice

- When does the sale agent or distribution agent file the Reg M notice in connection with an ATM?
- Various approaches in the market
 - Some market participants file the Reg M notice at program inception
 - Some market participants file the Reg M notice at the time that the program is first used or when the sales agent will first commence sales under the program (particularly in instances in which there are a number of sales agents and the issuer rotates through the various sales agents)
- What if an issuer suspends its use of the program (not terminate the program)?
 - May make sense to file a Reg M notice suspending the program and then file a new Reg M notice upon resumption of the program by the issuer
- What about with a block trade completed pursuant to an ATM program?
 - Many sales agents will rely on their already filed Reg M notice rather than filing a separate Reg M notice

Issuer black out periods

- Generally, ATMs will be paused for issuer black out periods
 - Possible to arrange timing of bring-down diligence deliverables to maximize ATM trading window
- Can the issuer suspend providing agents with ATM deliverables if not issuing shares?
- What happens if the shelf registration statement expires?
- Consider impact of the baby shelf limitation for smaller cap issuers potentially making the ATM program or other registered securities offerings unavailable
- What about other periods in which the ATM is not available aside from quarterly black out periods?
 - Should not be in the market repurchasing shares at the same time an ATM issuance notice is outstanding
 - Material non-public information considerations

ATMs and Research Coverage

- Sales agents participating in an ATM program should consider, among other things, how to address their participation in an ATM program with respect to any restricted or watch lists
- Using watch and restricted lists may permit the sale agent's compliance and legal departments to monitor the firm's activities relating to the issuer, including research activities, and initiate proper conflict resolution procedures
- A sales agent generally can participate in an ATM offering even if it 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 sales agent that participates in a distribution of securities of an issuer meeting the eligibility requirements of Form S-3 to publish a "research report" regarding the issuer or any class of its securities
 - Must be distributed with reasonable regularity in the normal course of the sales agent's business.
 - Must include similar information, opinions or recommendations with respect to a substantial number of companies in the issuer's industry
 - Issuer must be given no materially greater space or prominence than that given to other securities or companies

Fee sharing agreements

- Fee sharing agreements attempt to provide syndicate like economics
- Section 11(e) of the Securities Act contains a “hold-down” provision that modifies the joint and several rule for underwriters
- Under Section 11(e) an underwriter cannot be held liable under Section 11 for damages in excess of the total price at which the securities “underwritten by...[it] and distributed to the public were offered to the public” unless that underwriter knowingly received from the company “for acting as an underwriter some benefit, directly or indirectly, in which all the other underwriters similarly situated did not share in proportion to their respective interests in the underwriting.”
- So if you receive a fee even if you are not selling securities, does that give rise to an issue?
- Also, if you receive a fee even when you are not actively participating in ATM sales, does it create questions under Reg M depending on how you structure your Reg M filings?
- Generally, if you are not selling you are not in a distribution for Reg M, but if you are getting a fee, arguably you are “participating” in a distribution



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- Brian represents US and foreign private issuers, sponsors, and investment banks in registered and unregistered securities offerings, including:
 - Initial public offerings
 - Follow-on offerings
 - Private placements (including Rule 144A and PIPE transactions)
 - At-the-market offerings
 - Registered direct offerings
 - Liability management transactions
 - Preferred stock and debt offerings
- Brian serves clients on specialty finance, real estate and real estate investment trusts (REITs), business development companies (BDCs), and life sciences company deals. He also assists public company clients with ongoing securities law compliance requirements, listing standards of the major US stock exchanges, SEC public reporting obligations, shareholder-related disputes, and governance matters.



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- Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including IPOs and other public offerings and private placements of equity and debt securities.
- She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including tech, telecommunications, healthcare, financial institutions, REITs and consumer and specialty finance.

Additional resources

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- [ATM Transaction Resource Center](#)
- [Rule 144 Resources](#)



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