



WHAT'S THE DEAL?

Medium-Term Note ("MTN") Programs

Here's the deal:

- MTN programs are designed to enable frequent debt issuers to access the market quickly, without the burden of negotiating a suite of takedown documents for each debt issuance.
- MTN programs may be either registered with the Securities and Exchange Commission ("SEC") or exempt from registration, such as in Section 3(a)(2) bank note programs, Rule 144A and Regulation S programs.
- MTN program documents typically include a distribution or program agreement (which provides a framework for continuous offerings, as opposed to an underwriting agreement used in individual offerings), a fiscal agency agreement or indenture, and ancillary documents such as a calculation agency agreement.
- MTN offerings settle and clear in the United States through the issuance of securities in global, book-entry form, and are held by direct and indirect participants of The Depository Trust Company ("DTC").

What's the Deal?

Medium-term note ("MTN") programs enable companies to offer and sell a wide range of debt securities, which may have similar or different terms, on a periodic and/or continuous basis, by using pre-agreed offering and distribution documents and a simplified clearing process. With an MTN program, the issuer is able to use streamlined documentation for each offering and rely on the master program documentation and disclosure documents.

MTN programs were historically developed by the commercial paper departments of investment banks and often were administered by a bank's specialty group rather than through the typical relationship bankers. Most of these offerings are made on a principal or agency basis through the MTN broker-dealer's trading desk. MTNs having tenors of between two to five years were conceptualized as a means to bridge the gap between short-term commercial paper maturing in nine months or less, and long-term debt securities maturing 30 years or more from the issuance date. However, it is not unusual for issuers to issue both short-term and long-term securities under an MTN program.

In light of the convenience offered by shelf registration and MTN programs, issuers use MTN programs (i) to effect small- and medium-sized offerings of debt securities to investors that seek specific terms such as a specified principal amount, with a specified credit rating and a specified maturity (known as reverse inquiry trades); (ii) to effect large syndicated offerings of debt securities that might, in the absence of an MTN program, be offered through a traditional shelf takedown; (iii) to offer structured notes, such as

equity-linked, index-linked, currency-linked and commodity-linked securities; and (iv) to operate a retail MTN program wherein an issuer offers MTNs with small minimum denominations to the retail investor market, while limiting administrative costs to the issuer to acceptable levels. In one type of retail MTN program, an issuer will post rates weekly with retail and/or regional brokers. During the week that these rates are posted, the brokerage firms that market the securities to retail investors will place orders in the applicable minimum denominations. At the end of the week, the retail and regional brokerage firms will contact the issuer and indicate the aggregate amount of orders for notes at each maturity, and the issuer will issue one series of notes for each maturity.

Offered Securities

MTN securities historically were principally fixed-rate, non-redeemable senior debt securities and eventually evolved to include other types of debt securities, including floating rate, zero coupon, non-U.S. dollar denominated, amortizing, multi-currency, subordinated or indexed securities. Common reference rates for floating rate securities issued under MTN programs include secured overnight financing rate ("SOFR"), the interbank offered rates ("IBORs") (though, of course, these are being phased out), the prime rate, the Treasury rate, the federal funds rate and the constant maturity swap ("CMS") rate. Most MTN programs are rated investment-grade by one or more nationally recognized credit rating agencies.

MTNs are usually sold on a best efforts basis. However, competitive pressures may sometimes lead a dealer to purchase MTNs securities as principal, and large syndicated MTN offerings often are effected on a firm commitment basis. In both cases, the MTN dealer is usually regarded as an "underwriter" for liability purposes under Section 11 of the Securities Act of 1933 (the "Securities Act").

The traditional market for MTNs is investor-driven wherein dealers continuously offer MTNs within a specific maturity range, and an investor can negotiate to have the dealer meet its particular investment needs. In making their investment decisions, MTN investors consider credit ratings, an evaluation of the issuer and its business, and the maturity and yield of the MTNs

MTN Programs: SEC-Registered and Exempt

MTN programs generally are limited to larger public companies with at least a \$75 million public equity float and are usually registered on a shelf registration statement under Rule 415 of the Securities Act, specifically under Rule 415(a)(1)(x) for continuous or delayed offerings of issuers that are eligible to use Form S-3 or Form F-3 on a primary basis, or under Rule 415(a)(ix) for continuous offerings of issuers that are not eligible to use Form S-3 or Form F-3 and cannot undertake delayed offerings. MTN programs may also be registered on Form S-1 or Form F-1, but this is rare.

Non-SEC reporting companies can also issue MTNs. MTN programs that are not required to be registered with the SEC include (i) bank note programs exempt from registration under Section 3(a)(2) of the Securities Act; (ii) Rule 144A programs in which the securities are offered exclusively to qualified institutional buyers; (iii) private placements made through continuous Section 4(a)(2) offerings; and (iv) Regulation S programs in which the MTNs are offered outside the United States. The issuer and the selling agents for these offerings may use a variety of term sheets to offer these MTNs, which are not subject to the filing requirements of the Securities Act.

Even though MTN offerings under Section 3(a)(2) are exempt from registration under the Securities Act, they are public securities offerings conducted by banks and must be filed with the Financial Industry

Regulatory Authority, Inc. ("FINRA") for review under Rule 5110(a)(2) when there is a FINRA member involved in the distribution, unless the issuer has outstanding investment grade rated unsecured non-convertible debt with a term of issue of at least four years, or the non-convertible debt securities are so rated. Transactions under Section 3(a)(2) and Rule 144A must also be reported through FINRA's Trade Reporting and Compliance Engine, or TRACE, to provide greater transparency for investors.

MTN Program Participants

The working group involved in establishing an MTN program generally includes:

1. *Issuer*, which usually will be a large corporate or financial services issuer, which has an ongoing need for capital and that is eligible to file a shelf registration statement for delayed and continuous offerings, as well as government-sponsored entities, such as Fannie Mae and Freddie Mac;
2. *Guarantor* (in some cases), such as the issuer's subsidiary or a special purpose finance subsidiary, which may have a higher credit rating on its indebtedness than the issuer;
3. *Arranger*, which is usually an investment bank that (i) serves as principal selling agent for the MTNs; (ii) advises the issuer as to potential financing opportunities in the MTN market; (iii) communicates to the issuer any offers from potential investors to buy MTNs; (iv) advises the issuer as to the form and content of the offering documents, including the types of securities to be included; (v) negotiates the terms of the agreements on its own behalf and on behalf of the other selling agents; (vi) coordinates settlement of the MTNs with the issuer, the trustee and the paying agent; and (vii) makes a market in the issued and outstanding securities under the MTN program;
4. *Selling Agents*, other than the arranger, are often added to an MTN program if not at establishment, then, through an accession letter, which is a short form of agreement between the issuer and the new selling agents that makes the new selling agents parties to the existing MTN program agreement. Selling agents may be added for the entirety of the program or as dealers for a day to participate in a specific MTN offering. Having multiple selling agents fosters competition among the selling agents to market the issuer's MTNs, and helps to attract more reverse inquiry transactions that may likely bring down the issuer's financing costs;
5. *Regional dealers* (in some cases) may be included by the selling agents, and, if so, are paid by selling agents through selling concessions;
6. *Law Firms* acting as counsel to the issuer and to the investment banks and, at program establishment, to the trustee or fiscal and paying agent;
7. *Accounting firm*, which audits the issuer's financial statements and is expected to deliver a comfort letter at the establishment of the program and then from time to time as required under the distribution agreement;
8. *Rating agencies* (typically at least two) that will provide credit ratings to the issuer's indebtedness generally or credit ratings that are specific to notes issued pursuant to the MTN program;
9. *Trustee or fiscal and paying agent* serves a variety of roles, including (i) processing payments of interest, principal and other amounts on the MTNs from the issuer to the investors;

(ii) communicating notices from the issuer to the investors; (iii) coordinating settlement of the MTNs with the issuer and the selling agent; (iv) assigning security identification codes to the MTNs (in the case of U.S. programs, the trustee typically obtains a block of CUSIP numbers for the relevant issuer's MTN program and assigns them on an issue-by-issue basis); (v) processing certain tax forms that may be required under the MTN program; and (vi) in the case of a trustee of a series of U.S.-registered MTNs, acting as representative of the investors in the event of any claim for payment if a default occurs;

10. *Listing agent* if the relevant MTNs are to be listed or the program is to be qualified for listing on a securities exchange, usually a European securities exchange;

11. *Clearing systems* such as DTC, Euroclear and Clearstream; and

12. *Financial printer* to the extent printing is required.

MTN Program Documentation

The offering documents for a registered MTN program may include a "universal" shelf registration statement for debt and other securities, or a shelf registration statement relating only to debt securities. The base prospectus, which is included in the registration statement, will include a general description of the issuer's debt securities that may be issued as well as the possible benchmark rates that may be referenced, and any other potential terms of the securities that are then known. For an exempt MTN program, the offering document will be an offering circular or offering memorandum, rather than a base prospectus, with a form of pricing supplement or final terms to be used for individual offerings made pursuant to the program. In the structured notes context, there may be a need to file a more detailed prospectus supplement describing the notes to be issued under the MTN program, and free writing prospectuses and/or pricing supplements, each of which will include the specific details of each offering or each type of note that may be issued pursuant to the program.

An issuer and the selling agent may also use several other disclosure documents in the offering process, including preliminary and final term sheets, subject to the filing requirements of Rule 433 and other SEC rules relating to "free writing prospectuses" to negotiate the terms of an offering with potential investors, to market an offering, or to set forth the agreed-upon final terms of an offering; free writing prospectuses that may be brochures or other educational materials, and websites and other types of documents used to market potential offerings from an MTN program; product supplements for issuers of structured products to describe the detailed terms, risk factors and tax consequences of a particular type of product to potential investors; and press releases, particularly in the context of syndicated offerings.

If not otherwise filed with the registration statement, the issuer must also file:

- the *distribution agreement* entered into with the selling agents, which also may be called a "program agreement" or a "sales agency agreement" designed to provide for multiple offerings during the term of the MTN program, and typically includes (i) representations and warranties of the issuer, deemed to be made both at the time of the signing of the agreement and at the time of each takedown, as to the accuracy of the offering documents, the authorization of the applicable issuance documents and the indenture or fiscal and paying agency agreement; (ii) the steps to be followed if the MTN prospectus supplement is amended or the size of the program is increased; (iii) the steps to be followed, and the approvals required, if any free writing

prospectuses are to be used; (iv) requirements as to the conditions precedent, documents and deliverables required to establish the MTN program and/or conduct takedowns, which may be reverse inquiry transactions, or agented or syndicated takedowns; (v) requirements as to any subsequent deliverables from the issuer to the selling agents, such as periodic comfort letters, legal opinions and officer's certificates; (vi) provisions allocating program expenses among the issuer and the selling agents; (vii) indemnification of the selling agents for liabilities under the securities laws; (viii) provisions relating to the determination of the selling agents' compensation or a schedule of commissions; and (ix) provisions for adding additional selling agents, whether for the duration of the program or for a specific offering. Beginning on January 1, 2019, U.S. global systemically important banks and their subsidiaries began adding stay provisions in their securities contracts, such as the distribution agreement. These arose from the qualified financial contract ("QFC") stay rules requiring "covered entities" to include standardized contractual stay language in their QFCs in order to mitigate the risk of destabilizing closeouts of their QFCs, which could be an impediment to an orderly resolution of such financial institutions if there were a failure of such institutions.

- the *indenture* duly qualified under the Trust Indenture Act of 1939 (in the case of an SEC-registered program), which is usually open-ended, does not limit the amount of debt securities that can be issued, and may have restrictive covenants, affirmative covenants and events of default; or *paying agency agreements* (in the case of an exempt or unregistered program);
- an *administrative procedures memorandum*, which is usually an exhibit to the distribution agreement and describes the exchange of information, settlement procedures and responsibility for preparing documents among the issuer, the selling agents, the trustee or paying agent, and the applicable clearing system in order to offer, issue and close each series of securities under the MTN program;
- a *calculation agency agreement* wherein the calculation agent, oftentimes the trustee or the paying agent, agrees to calculate the rate of interest due on floating rate notes;
- an *exchange rate agency agreement* wherein the exchange rate agent, which may be the trustee or paying agent, will, in the case of notes with payments to be made in a non-U.S. currency, convert the non-U.S. currency into U.S. dollars;
- an *Exhibit 5.1 opinion* about the legality of the notes to be issued under the program;
- in the case of complex securities, an *Exhibit 8.1 opinion* on the disclosure of the US federal income tax consequences of investing in the MTNs; and
- the *form of the master note or certificate representing the MTNs* which typically is in global form, with a single master certificate representing each series, and for more efficient takedowns, containing detailed provisions that could apply to many different types of notes (fixed and floating; the calculation of different types of base rates) and a short leading page or cover page for the note that indicates (through check boxes and blank lines) which of those detailed terms are applicable to the specific issuance.

Depending upon the arrangements between the issuer and the selling agents, some or all of the comfort letters, opinions and officer's certificates called for by the distribution agreement will be required to be

delivered to the selling agents on a periodic basis as part of the ongoing due diligence process because the selling agents are subject to liability as “underwriters” under Section 11 of the Securities Act as noted above. These “deliverables” will help the underwriters establish a “due diligence” defense against any potential Section 11 claims against them for misstatements or omissions in the offering documents.

An MTN program takedown is intended to be relatively straightforward since the distribution or program agreement and the principal governing documents were negotiated and agreed when the program was established. The issuer and the arranger (and the other selling agents, if applicable) will agree on the terms of the takedown, commonly done orally with written confirmation to follow; and the agents will deliver the base prospectus, MTN prospectus supplement and pricing supplement to investors (which may occur via “access equals delivery” under SEC Rule 172 in the case of a registered program). In the case of a syndicated MTN issuance, an updated comfort letter, legal opinions and one or more officers’ certificate are also provided to the selling agents at the closing of the offering. For a registered offering, the issuer will file with the SEC under Rule 424 a pricing supplement containing the title of the securities, issue date, maturity date, interest rate, any redemption dates, the names of the underwriters or selling agents and their compensation for the offering, and the legal opinion language. The issuer will also instruct the trustee or issuing and paying agent to complete the form of the note or certificate representing the MTNs in global or certified form.

Checklist of Key Questions

- Is the establishment of an MTN program consistent with the issuer’s financing needs, taking into consideration the costs and process for periodic deliverables and due diligence?
- Does the issuer’s board of directors and pricing committee understand the MTN program structure?
- Does the base prospectus or offering circular describe the range of potential benchmark rates that may be used by the issuer? Are there provisions regarding the transition away from IBOR rates?
- If there is a limit specified in the MTN prospectus supplement, is there a sufficient amount available for issuance taking into consideration both the amounts authorized and issued?
- Are the selling agents acting on a best efforts or firm commitment basis?
- Is the selling agent an affiliated broker-dealer of the issuer? If so, are the potential conflicts of interest disclosed in the manner required by FINRA rules?
- Is the MTN program rated investment grade to exempt the issuer from FINRA’s Rule 5110 review?
- What documents will be required to be delivered on a quarterly (or other periodic) basis by the issuer to the selling agents?

- What documents are required to be negotiated and entered into in connection with a syndicated offering?
- If there is no selling agent for a particular issuance, has the issuer made arrangements for DTC settlement through the trustee?