

Financing Alternatives for Banks

October 27, 2021

Bradley Berman

Counsel

Mayer Brown

+1 212 506 2321

bberman@mayerbrown.com

Anthony Ragozino

Managing Director

RBC Capital Markets

+1 212 519 8445

anthony.ragozino@rbccm.com



Agenda

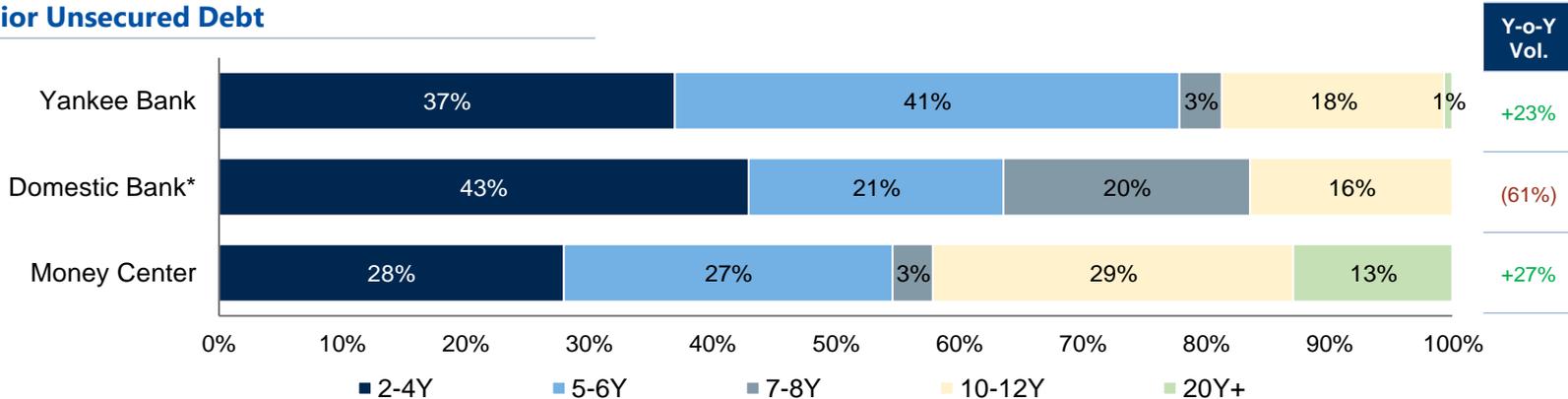
- Current market trends
- Exemptions from registration
- Regulatory issues
- Disclosure requirements and practices for exempt offerings
- Other matters and liabilities

Bank Debt Financing Activities

Type of bank debt issuances	Issuing entities	Issuance formats
<ul style="list-style-type: none">• Senior unsecured debt• Senior secured debt• Subordinated debt• Structured debt (e.g., equity-linked and commodity-linked notes)• Preferred stock	<ul style="list-style-type: none">• U.S. banks• Home offices of foreign banks• U.S. branches of foreign banks• Other affiliated entities of foreign banks• U.S. branches of foreign banks as guarantors• Bank holding companies	<ul style="list-style-type: none">• Section 3(a)(2) offerings• Rule 144A offerings• SEC registered

BANK FIXED-INCOME ISSUANCE SNAPSHOT 2021 YTD

Senior Unsecured Debt



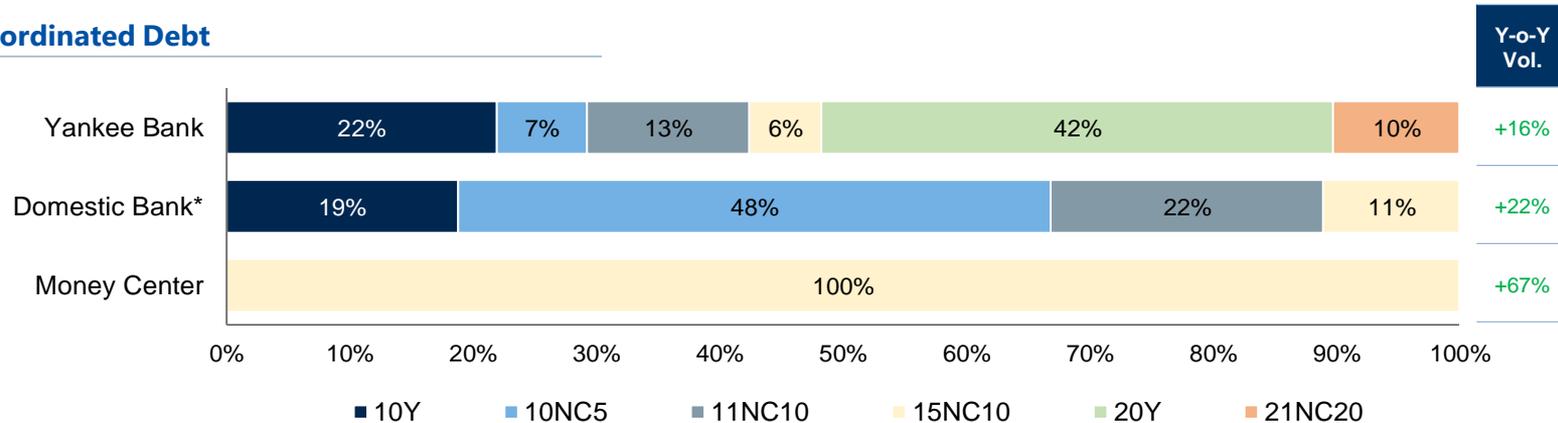
Highlights / Commentary

- YoY issuance in the non-money center domestic space is down significantly vs. 2020 driven by elevated liquidity in the system, and finalization of Moody's LGF lowering issuance for some.
- Money centers are the largest driver of domestic bank supply (up 27% vs. 2020's record year), supporting increased share repurchases
- Tenors evenly distributed across the curve with an uptick in shorter tenors (2-5yr) given increased receptivity to FRNs
- FRN issuance up 109% YoY as SOFR market develops and investors expect higher rates

*Domestic Banks = Non-money center domestic banks (trust / regional / cards)
Source: Bloomberg, Credit Flow Research, RBC Capital Markets

BANK FIXED-INCOME ISSUANCE SNAPSHOT 2021 YTD

Subordinated Debt



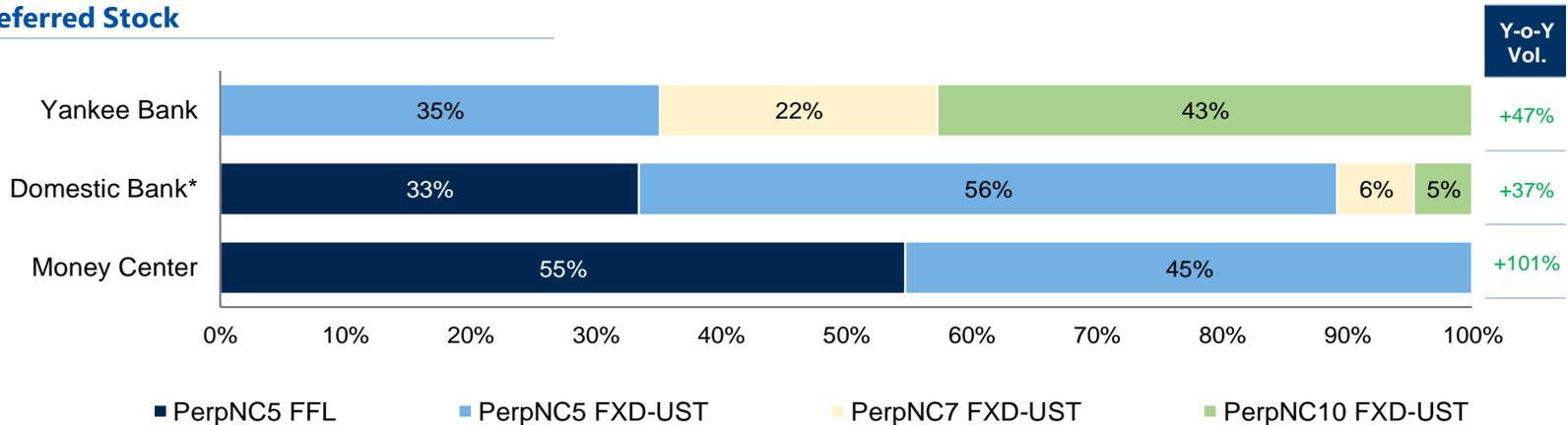
Highlights / Commentary

- Uptick in sub issuance in the space as domestic banks look to optimize capital stacks and refinance amortizing sub debt
- Given beta compression, issuers have achieved historically tight senior / sub differentials (~15-20bps)
- Callable structures have gained in popularity, especially in 15NC10 format, as premiums vs. bullet have narrowed (~12-15bps). Issuers have utilized both SOFR and UST back-ends

*Domestic Banks = Non-money center domestic banks (trust / regional / cards)
Source: Bloomberg, Credit Flow Research, RBC Capital Markets

BANK FIXED-INCOME ISSUANCE SNAPSHOT 2021 YTD

Preferred Stock



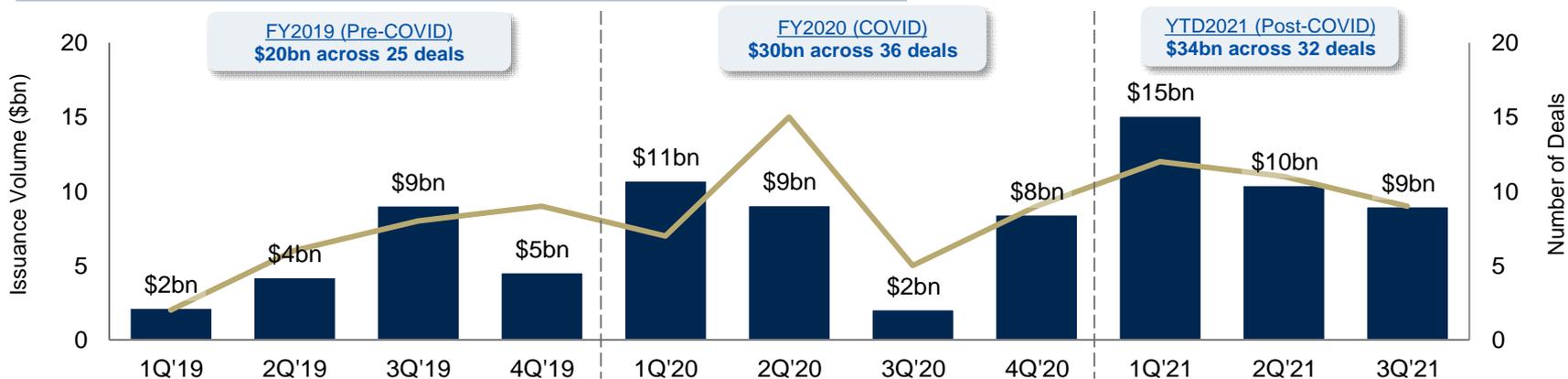
Highlights / Commentary

- Uptick in preferred issuance in 2021, especially from money centers, largely driven by high coupon refinancings as issuers take advantage of low rates
- Largely even distribution between fixed for life and fixed-resettable structures as issuers weigh locking in historically low yields in perpetuity vs. fixed-resettable options with lower up-front coupons
 - With the recent rate volatility, we have seen fixed-resettable structures underperform and differentials narrow vs. fixed-for-life

*Domestic Banks = Non-money center domestic banks (trust / regional / cards)
 Source: Bloomberg, Credit Flow Research, RBC Capital Markets

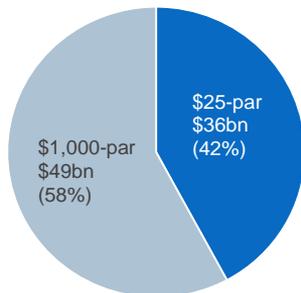
TRENDS IN THE PREFERRED MARKET FOR U.S. BANKS: ISSUANCE VOLUME SINCE 2019

Quarterly Preferred Issuance Volumes and Number of Deals

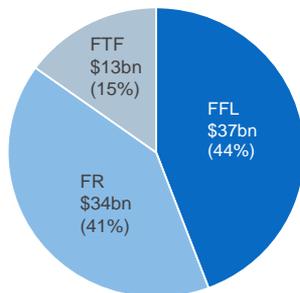


Aggregate Preferred Issuances by Feature

Market Type



Dividend Convention¹



Commentary

- New issuance volumes of >\$34bn in YTD2021 have surpassed FY2019 volumes of \$20bn and FY2020 volumes of \$30bn.
- The Post-COVID-era has seen individual deals grow in size, with 6 of the 11 largest preferred issuances since 1Q'19 occurring in YTD2021, including \$3.5bn by WFC, \$2.3bn by C and \$2.3bn by SCHW.
- We expect preferred issuances for the remainder of 2021 to be driven by:
 - Issuers navigating the historically low rate environment while balancing volatility driven by a potential rise in rates, ample market supply and earnings blackout considerations;
 - Management of LIBOR-exposed preferred securities, with multiple replacement benchmarks being used initially before eventually narrowing as perceptions about resilience and reliability come into focus; and
 - Outsized capital distributions offset by additional preferred issuances to ensure banks remain well-capitalized.

(1) Fixed-for-Life (FFL), Fixed-Rate Reset (FR), Fixed-to-Floating (FTF).

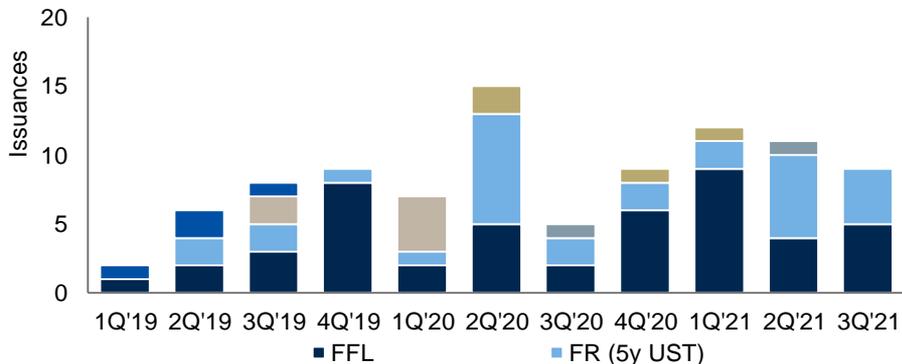
Source: Bloomberg, RBC Capital Markets

TRENDS IN THE PREFERRED MARKET FOR U.S. BANKS: FREQUENCY OF SELECT FEATURES SINCE 2019

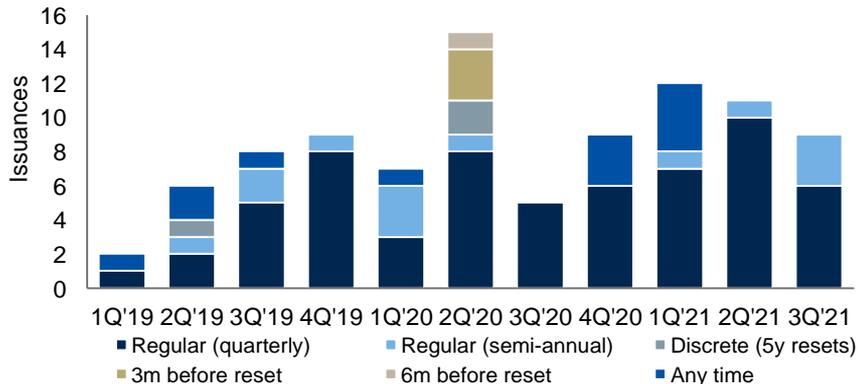
Commentary

- Dividend conventions are largely dependent on the issuers' objectives and the chosen market, i.e., FFL is predominately a retail convention, whereas FR tends to be targeted towards institutional investors.
 - FFL has been the dominant dividend convention** for preferred securities, accounting for 51% of issuances over the past 11 quarters.
 - FR is the second most frequent dividend convention** for preferred securities, accounting for 38% of issuances over the past 11 quarters.
- Dividend payment date calls remain the call frequency of choice**, demonstrating that issuers value call flexibility.
- Call notice periods can be dictated by listing requirements**, with the NYSE requiring a minimum of 30 days and Nasdaq requiring 5 days. Conversely, non-listed issuances, for which there is no formal requirement, have gravitated toward 10 days.
 - A shorter notice period can minimize negative carry for issuers that seek to have new issue proceeds in-hand before issuing a redemption notice.

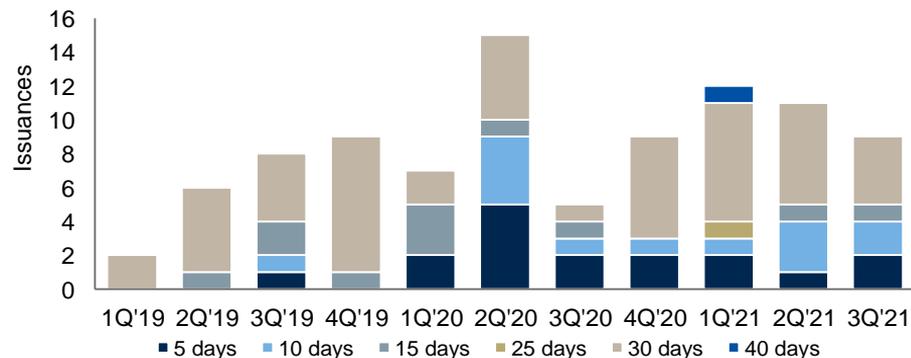
Dividend Conventions¹



Call Frequency



Call Notice Period



(1) Fixed-for-Life (FFL), Fixed-Rate Reset (FR), Fixed-to-Floating (FTF).
Source: Bloomberg, RBC Capital Markets

Section 3(a)(2) Offerings

Section 3(a)(2) Bank Note Programs

A Section 3(a)(2) bank note program is a medium-term note program that enables an issuing bank to offer debt securities on a regular and/or continuous basis.

- The issuer (or a guarantor of the notes) must be a “bank,” as defined in Section 3(a)(2) of the Securities Act of 1933.
- Bank note programs are exempt from registration under the Securities Act.

Types of Securities Issued

- Senior or subordinated.
- Fixed or floating rate, zero-coupon, non-U.S. dollar denominated, amortizing, multi-currency or indexed (structured) securities.
- Most bank note programs are rated “investment-grade” by one or more nationally recognized rating agencies.
- Section 3(a)(2) structured notes can be linked to reference assets not always seen in registered programs:
 - Complex underlying assets;
 - Credit-linked notes;
 - Small-cap stocks; and
 - Non-U.S. stocks that do not trade on U.S. exchanges.

Section 3(a)(2) and Offerings by Banks

- Section 3(a)(2) of the Securities Act exempts from registration under the Securities Act any security issued or guaranteed by a “bank.”
- Basis: Banks are highly regulated, and provide adequate disclosure to investors about their finances in the absence of federal securities registration requirements. Banks are also subject to various capital requirements that may increase the likelihood that holders of their debt securities will receive timely payments of principal and interest.

What Is a “Bank”?

- Under Section 3(a)(2), the institution must meet both of the following requirements:
 - It must be a national bank or, any institution supervised by a state banking commission or similar authority; and
 - Its business must be substantially confined to banking.
- Examples of entities that do not qualify:
 - Bank holding companies
 - Finance companies
 - Investment banks
 - Foreign banks
- Regulated U.S. branches and agencies of foreign banks may qualify

Guarantees

- Another basis for qualification as a bank: securities guaranteed by a bank.
 - Not limited to a guaranty in a legal sense, but also includes arrangements in which the bank agrees to ensure the payment of a security.
 - The guaranty or assurance of payment, however, has to cover the entire obligation; it cannot be a partial guarantee or promise of payment, and it must be unconditional.
 - Again, guarantees by foreign banks (other than those of an eligible U.S. branch or agency) would not qualify for this exception.
 - The guarantee is a legal requirement to qualify for the exemption; investors will not be looking to the U.S. branch for payment/credit. Investors will look to the home office.
 - Finance companies can issue under Section 3(a)(2), if the securities are guaranteed by a bank.

Non-U.S. Banks/U.S. Offices

- U.S. branches/agencies of foreign banks are conditionally entitled to rely on the Section 3(a)(2) exemption.
- 1986: The SEC takes the position that a foreign branch/agency will be deemed to be a “national bank” or a “banking institution organized under the laws of any state” if “the nature and extent of federal and/or state regulation and supervision of that particular branch or agency is substantially equivalent to that applicable to federal or state chartered domestic banks doing business in the same jurisdiction.”
- As a result, U.S. branches/agencies of foreign banks are frequent issuers or guarantors of debt securities in the U.S. Most issuances or guarantees occur through the NY branches of these banks.

A list of U.S. branches of foreign banks by branch size can be found at <http://www.federalreserve.gov/releases/iba/201803/bycntry.htm>

Non-U.S. Banks/U.S. Offices *(cont'd)*

Examples of Issuing Entities:

- U.S. branch as direct issuer: UBS, CS, NAB, CBA and ANZ
- U.S. branch as guarantor, headquarters as issuer: BNP, Rabo, SocGen, SMBC, Svenska
- U.S. branch as guarantor, SPV/Cayman branch as issuer: Fortis, BNP
 - More banks are using a guarantee structure to allow greater flexibility for use of proceeds.

Which Regulator?

- Most U.S. branches have elected the N.Y. State Department of Financial Services (“NYDFS”) as their primary regulator with their secondary regulator the Federal Reserve.
- Some U.S. branches have opted for the Office of the Comptroller of the Currency (“OCC”) as their primary regulator.

OCC Registration/Disclosure

- National banks or federally licensed U.S. branches/agencies of foreign banks regulated by the OCC are subject to the OCC's securities offering (Part 16) regulations.
- Part 16 of OCC regulations provides that these banks or banking offices may not offer and sell their securities until a registration statement has been filed and declared effective with the OCC, unless an exemption applies.
- An OCC registration statement is generally comparable in scope and detail to an SEC registration statement; as a result, most bank issuers prefer to rely upon an exemption from the OCC's registration requirements. Section 16.5 provides a list of exemptions, which includes:
 - Regulation D offerings
 - Rule 144A offerings to QIBs
 - Regulation S offerings outside of the United States
- General solicitation would be allowed for Regulation D offerings and Rule 144A offerings; the Rule 506 "bad actor" disqualifications would also apply.

Part 16.6 of the OCC Regulations

- 12 CFR 16.6 provides a separate partial exemption for offerings of “non-convertible debt” to accredited investors in denominations of \$250,000 or more.
- Federal branches/agencies, as issuers, may rely on this exemption by furnishing to the OCC parent bank information which is required under Exchange Act Rule 12g3-2(b), and to purchasers the information required under Securities Act Rule 144A(d)(4)(i).
- The securities are “investment grade” — the definition focuses on the probability of repayment, rather than an external investment grade rating (Dodd-Frank Act requirement).
- The offering document and any amendments are filed with the OCC no later than the fifth business day after they are first used.

New York Regulatory Requirements

New York branches or agencies of foreign banks should contact the NYDFS prior to issuing bank notes.

- An agency of a foreign bank subject to New York banking regulations would have to obtain a pre-offer no-objection letter from the Superintendent of the NYDFS, and would be able to sell only to certain authorized institutional purchasers in minimum denominations of \$100,000.
- New York branches of foreign banks typically issue bank notes in \$250,000 minimum denominations in order to avoid the notes being viewed by a regulator as an impermissible retail deposit.
 - This limitation does not apply when the New York branch is a guarantor and the issuing entity is the foreign bank.

FINRA Requirements

- Even though securities offerings under Section 3(a)(2) are exempt from registration under the Securities Act, public securities offerings conducted by banks must be filed with the Financial Industry Regulatory Authority (FINRA) for review under Rule 5110(a)(2), unless an exemption is available.
 - **Exemption:** 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.
- Recent amendments to FINRA Rule 5110 clarified that the “same class” exemption applies explicitly to securities issued by a bank, and also defined “bank” to include a branch or agency in the U.S. of a foreign bank that is supervised and examined by a federal or state banking authority.
- If an affiliated dealer is an agent for the offering, there is “prominent disclosure” in the offering document with respect to the conflict of interest caused by that affiliation and the bank notes are rated investment grade or in the same series that have equal rights and obligations as investment grade rated securities, then no filing will be required.
- Transactions under Section 3(a)(2) must also be reported through FINRA’s Trade Reporting and Compliance Engine (TRACE). TRACE eligibility provides greater transparency for investors. Rule 144A securities are also TRACE reported.

Denominations

- The 3(a)(2) exemption does not require specific minimum denominations in order to obtain the exemption.
- However, for a variety of reasons, denominations may at times be significantly higher than in retail transactions:
 - Offerings targeted to institutional investors
 - Complex securities
 - Relationship to 16.6's requirement of \$250,000 minimum denominations
- New York regulated agencies and branches.

Blue Sky Regulation

- Securities issued under Section 3(a)(2) are considered “covered securities” under Section 18 of the Securities Act.
- However, because bank notes are not listed on a national securities exchange, states may require a notice filing and a fee in connection with an offering of bank notes.
- Generally, blue sky filings are not needed in any state in which the securities are offered.
- State blue sky laws should be examined to ensure that either no notice filing or fee is required, or the state’s existing exemption for securities issued by banks does not require a filing.
- A state may not view an agency of a foreign bank, whose securities are eligible for the Section 3(a)(2) exemption, as within the state’s exemption for securities issued by banks.
- Rule 144A offerings of bank notes will fall within a state’s institutional purchaser exemption.

Section 3(a)(2) Offering Documentation

- The offering documentation for bank notes is similar to that of a registered offering.
- Base offering document, which may be an “offering memorandum” or an “offering circular” (instead of a “prospectus”).
- For foreign issuers:
 - IFRS financials or “home country” GAAP financials are acceptable;
 - Will need a reconciliation footnote or explanation if non-U.S. GAAP or non-IFRS is used;
 - U.S. GAAP financials are preferable;
 - Annual audited and at least semi-annual unaudited financial statements; and
 - Typically include Guide 3-type statistical disclosures or something similar.
- The base document is supplemented for a particular offering by one or more “pricing supplements” and/or “product supplements.”
- These offering documents may be supplemented by additional offering materials, including term sheets and brochures.

SEC Registered Offerings

- Bank holding companies offer registered securities through shelf registration statements
- Exchange Act reporting companies with publicly available financial information, including audited annual financials
 - Compare to the bank subsidiary's call reports
- Certainty – No exemptions to meet
- Speed – Most bank holding companies are WKSIs and have automatic shelf registration statements
 - Can incorporate by reference most of the offering document from Exchange Act reports

Rule 144A Offerings

Rule 144A – Overview

- Rule 144A provides a clear safe harbor for offerings to institutional investors.
- Does not require extensive ongoing registration or disclosure requirements.
- “Benchmark” sized issuances have good liquidity in the Rule 144A market.
- A U.S. bank may use a Rule 144A program for marketing reasons — A desire to be clearly identified with the QIB market.
- **OCC Part 16.5:** OCC regulated banks can issue in minimum denominations of less than \$250,000 (a Section 3(a)(2) exempt security issued as a Rule 144A transaction).
- Rule 144A provides a non-exclusive safe harbor from the registration requirements of Section 5 of the Securities Act for resales of restricted securities to “qualified institutional buyers” (QIBs).

Rule 144A – Overview *(cont'd)*

- **The premise:** Not all investors are in need of the protections of the prospectus requirements of the Securities Act.
- The rule applies to offers made by persons other than the issuer of the securities (i.e., “resales”).
- The rule applies to securities that are not of the same class as securities listed on a U.S. securities exchange or quoted on an automated inter-dealer quotation system.
- A reseller may rely on any applicable exemption from the registration requirements of the Securities Act in connection with the resale of restricted securities (such as Regulation S or Rule 144).

Types of Rule 144A Offerings

- Rule 144A offering for an issuer that is not registered in the U.S. — usually a standalone.
- Rule 144A continuous offering program
 - Used for repeat offerings, often by financial institution and insurance company issuers, to institutional investors.
 - Often used for structured products sold to QIBs.

How are Rule 144A Offerings structured?

- The issuer initially sells restricted securities to investment bank(s) as “initial purchasers” in a Section 4(a)(2) or Regulation D private placement.
- The investment bank reoffers and immediately resells the securities to QIBs under Rule 144A.

Issuer → Initial Purchaser → QIBs

- Often combined with a Regulation S offering.

Conditions for Rule 144A Offering

- Reoffers or resales only to a QIB, or to an offeree or purchaser that the reseller reasonably believes is a QIB.
- Reseller must take steps to ensure that the buyer is aware that the reseller may rely on Rule 144A in connection with such resale.
- The securities reoffered or resold **(a)** when issued were not of the same class as securities listed on a U.S. national securities exchange or quoted on a U.S. automated inter-dealer quotation system **and (b)** are not securities of an open-end investment company, UIT, etc.
- For an issuer that is not an Exchange Act reporting company or exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, the holder and a prospective buyer designated by the holder must have the right to obtain from the issuer, upon the holder's request, certain reasonably current information.

What is a QIB?

- The following qualify as “QIBs”:
 - Any corporation, partnership or other entity (but not an individual) that owns and invests on a consolidated basis \$100 million in the aggregate in securities of non-affiliates (other than bank deposits and loan participations, repurchase agreements and securities subject thereto, and currency, interest rate and commodity swaps);
 - Registered dealers that own or invest \$10 million of such non-affiliate securities or are engaged in “riskless principal transactions” on behalf of QIBs (to qualify, the QIB must commit to the broker-dealer that the QIB will simultaneously purchase the securities from the broker-dealer);
 - Any investment company that is part of a “family” that has the same investment adviser and together own \$100 million of such non-affiliate securities; and
 - Any U.S. or foreign bank or S&L that owns and invests on a consolidated basis \$100 million in such non-affiliate securities and has a net worth of at least \$25 million.
- A QIB can be formed solely for purpose of conducting a Rule 144A transaction

How can a reseller ascertain a person is a QIB?

- A reseller may rely on the following (as long as the information is no more than 16 months old):
 - The purchaser’s most recent publicly available annual financial statements;
 - Information filed with the SEC or another government agency or self-regulatory organization;
 - Information in a recognized securities manual, such as Moody’s or S&P;
 - Certification by the purchaser’s chief financial or other executive officer specifying the amount of securities owned and invested as of the end of the purchaser’s most recent fiscal year; and
 - A QIB questionnaire.
- The SEC acknowledges that the reseller may use other information to establish a reasonable belief of eligibility.

Rule 144A – Legending

- The reseller will make the buyer aware that the security is a Rule 144A security by:
 - Legending the security (i.e., the security must include language that it is not registered under the Securities Act);
 - Including an appropriate statement in the offering memorandum;
 - Obtaining an agreement that the purchaser understands that the securities must be resold pursuant to an exemption or registration under the Securities Act; and
 - By obtaining a restricted CUSIP number.

Current Information Requirements

- For securities of a non-public company, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request, the following information:
 - A brief statement of the nature of the business of the issuer, and its products and services;
 - The issuer’s most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation; and
 - The financial statements should be audited, to the extent reasonably available.
- The information must be “reasonably current.”

Rule 159: “Time of Sale Information”

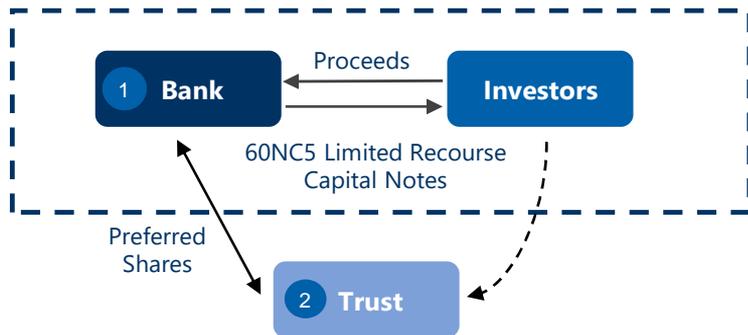
- Although Rule 159 under the Securities Act is not expressly applicable to Section 3(a)(2) or Rule 144A offerings, many investment banks apply the same treatment, in order to help reduce the risk of liability.
- Use of term sheets and offering memoranda supplements, to ensure that all material information is conveyed to investors at the time of pricing.
- Counsel is typically expected to opine as to the “disclosure package,” as in the case of a public offering.

Comparison of Section 3(a)(2) and Rule 144A

	Section 3(a)(2)	Rule 144A
Required issuer	Need a U.S. state or federal licensed bank as issuer or as guarantor	No specific issuer or guarantor is required
Exemption from Securities Act	Section 3(a)(2)	Section 4(a)(2)/Rule 144A
FINRA Filing Requirement	Subject to filing requirement and payment of filing fee (but investment grade rating exemption is available).	Not subject to FINRA filing
Blue Sky	Generally exempt from blue sky regulation	Generally exempt from blue sky regulation
Listing on a non-U.S. exchange	May be listed if issued in compliance with Part 16.6	Normally not
"Restricted"	No; considered "public" and therefore eligible for bond indices, TRACE reporting	Yes, but subject to TRACE reporting
Required governmental approvals	Banks licensed by OCC are subject to Part 16.6 limitations, unless exemption available.	Generally none.
Permitted Offerees	All investors, which means there's a broader market. However, banks licensed by OCC are subject to Part 16.6 limitations, unless exemption is available. Generally, sales to institutional "accredited investors."	Only to QIBs. No retail.
Minimum denominations	All denominations, subject to some limitations. Yet, banks licensed by the OCC are subject to a \$250,000 minimum denomination requirement under Part 16.6.	No minimum denominations requirement.
Role of Manager/Underwriter	Either agented or principal basis.	Must purchase as principal.
'40 Act	"Banks" not considered investment companies. Foreign banks will want to review 1940 Act guidance.	Non-bank issuer should consider whether there's a 1940 Act issue.
Settlement	Through DTC, Euroclear/Clearstream.	Through DTC, Euroclear/Clearstream

A NEW ADDITIONAL TIER 1 ALTERNATIVE IN CANADA

Simplified Structural Overview – Limited Recourse Capital Notes (“LRCN” or the “Notes”)



- ✓ **Legal form of instrument as debt with a dated maturity issued to institutional investors**
- ✓ **Qualifies as Additional Tier 1 Capital as investors' recourse is limited to the underlying Preferred Shares held in the Trust, which upon a Recourse Event are delivered to holders of the LRCN**

1 Bank (Issuer)

- LRCN issued directly by Bank to Investors
- Ongoing coupon payments are paid by Bank to Investors and derived from Bank's internal cash flow generation

2 Trust (Holds Bank Preferred Shares for holders of the LRCN)

- Bank establishes a Trust and the Trust acquires Non-Cumulative Preferred Shares (“Preferred Shares”) from Bank
- Upon a Recourse Event⁽¹⁾, which includes a non-payment of interest which has not been cured within 5 business days or a failure to redeem the LRCN in cash, the Preferred Shares are delivered to holders of the LRCN
- The dividend rate (including reset spread and benchmark reference) and payment frequency of the Preferred Shares match those of the LRCN

(1) “Recourse Event” occurs (a) if there is non-payment by Bank of the principal amount of the LRCN, together with any accrued and unpaid interest, on the Maturity Date, (b) upon a non-payment of interest which is not cured within 5 business days, (c) if Bank does not pay the redemption price in connection with a redemption of the LRCN in cash, or (d) upon an event of default under the LRCN

Launching a Bank Note Program

Where do we start?

- Does the bank have an affiliated dealer that may be the lead dealer for the program?
- If the affiliated dealer does not have expertise in the particular market (e.g., structured products), an unaffiliated dealer with expertise should be brought in;
 - If the bank is planning on issuing structured products, it should engage a dealer that is familiar with FINRA's suitability rules and has internal compliance procedures in place for sales of structured products;
 - The dealer may have particular views as to acceptable financial statements, if a foreign bank is the issuer;
- If the dealer plans on distributing through third-party dealers, the issuer should inquire about the dealer's "know your distributor" policies;
- If the issuer uses an affiliated dealer, the appropriate FINRA filing exemption must be used; and
- Dealer's counsel will want to start its diligence early in the process in order to identify any potential issues.

Launching a Bank Note Program – Offering Circular

Documentation

- The offering circular tends to have information similar to that in a registered offering, due to 10b-5 concerns.
 - OCC 16.6 content requirements:
 - Description of the business of the issuer similar to that in a Form 10-K;
 - Description of the terms of the notes;
 - Use of proceeds; and
 - Method of distribution.
 - Branches or agencies of foreign banks' disclosure is very limited, usually the address, primary business lines and the date of establishment; disclosure about the parent or headquarters is usually sufficient;
 - If a guarantee structure is used, a description of the guarantee; and
 - Product and pricing supplements for particular structures of structured notes.

Launching a Bank Note Program – Distribution Agreement

- Very similar to an MTN distribution agreement for a registered offering;
- Which deliverables, and when? Comfort letters, officers' certificates and opinions:
 - Negotiate the scope of opinions early in the process;
 - Will multiple counsel give opinions (U.S., non-U.S., internal, underwriters' counsel)?
 - Plan for future regular diligence session with the agents.
- Does the issuer have a designated underwriters' counsel?
 - If so, they will have a view as to the form of the distribution agreement.

Launching a Bank Note Program – Fiscal and Paying Agency Agreement

- Who will be the fiscal and paying agent? Will it be an affiliate of the bank?
- Usually, the form of fiscal and paying agency agreement will be suggested by the paying agent.
- Generally, indentures are not used.
 - Disclosure should clearly point out the differences between an indenture and a fiscal and paying agency agreement; i.e., no trustee in a fiduciary relationship with the note holders.

Liability Concerns

Securities Liability – Rule 144A and Section 3(a)(2)

- Neither Rule 144A offerings or securities offerings of, or guaranteed by, a bank under Section 3(a)(2) are subject to the civil liability provisions under Section 11 and Section 12(a)(2) of the Securities Act.
- Rule 144A offerings and offerings under Section 3(a)(2) are subject to Section 10(b) of the Exchange Act and the anti-fraud provisions of Rule 10b-5 of the Exchange Act.
- Impact on offering documents, and use of offering circulars to convey material information and risk factors.

Liability Under the Exchange Act

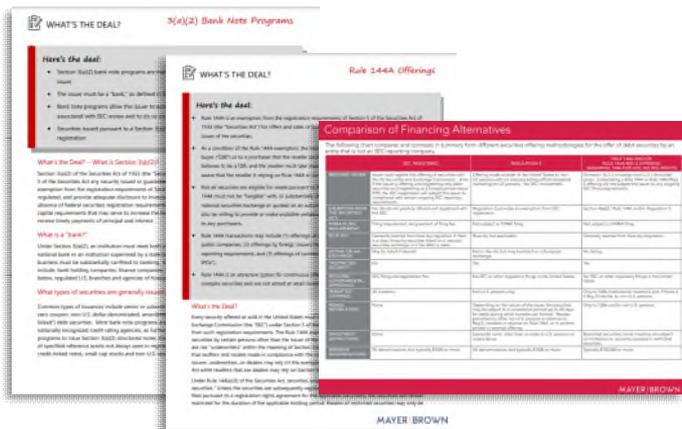
- Rule 10b-5 applies to registered and exempt offerings.
- Rule 10b-5 of the Exchange Act prohibits:
 - The use of any device, scheme, or artifice to defraud;
 - The making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading; or
 - The engaging in any act, practice, or course of business that would operate to deceive any person in connection with the purchase or sale of any securities.
- To bring a successful cause of action under Rule 10b-5, the plaintiff must prove:
 - That there was a misrepresentation or failure to disclose a material fact,
 - That was made in connection with plaintiffs' purchase or sale of a security,
 - That defendants acted with "scienter," or the intent or knowledge of the violation,
 - That plaintiffs "relied" on defendants' misrepresentation or omission, and
 - That such misrepresentation or omission caused plaintiffs' damages.

Additional Resources



Read:

- [What's the Deal? – Section 3\(a\)\(2\) Bank Notes](#)
- [What's the Deal? – Rule 144A](#)
- [Comparison of Financing Alternatives](#)



OUR FREE WRITINGS & PERSPECTIVES BLOG PROVIDES NEWS AND VIEWS ON SECURITIES REGULATION AND CAPITAL FORMATION.

The blog provides up-to-the-minute information regarding securities law developments and commentary on developments relating to private placements, IPOs, and other securities topics.



SUBSCRIBE



FOR EXPLANATIONS OF OVER 900 SECURITIES, DERIVATIVES, FINANCIAL SERVICES, AND CAPITAL MARKETS TERMS AND PHRASES.

writingonthewall.com



[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

mayerbrown.com

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.