Cravath Quarterly Review
Finance and Capital Markets

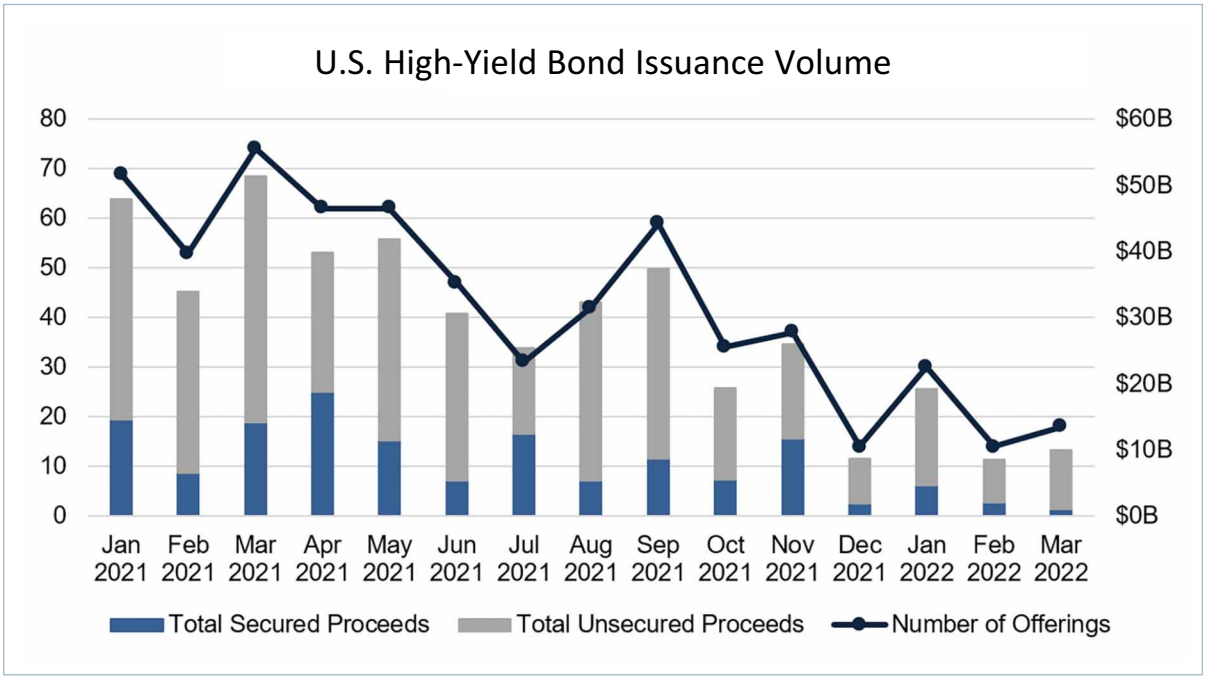
Volume 1 | Issue 3
Q1 2022

Market Update

BONDS

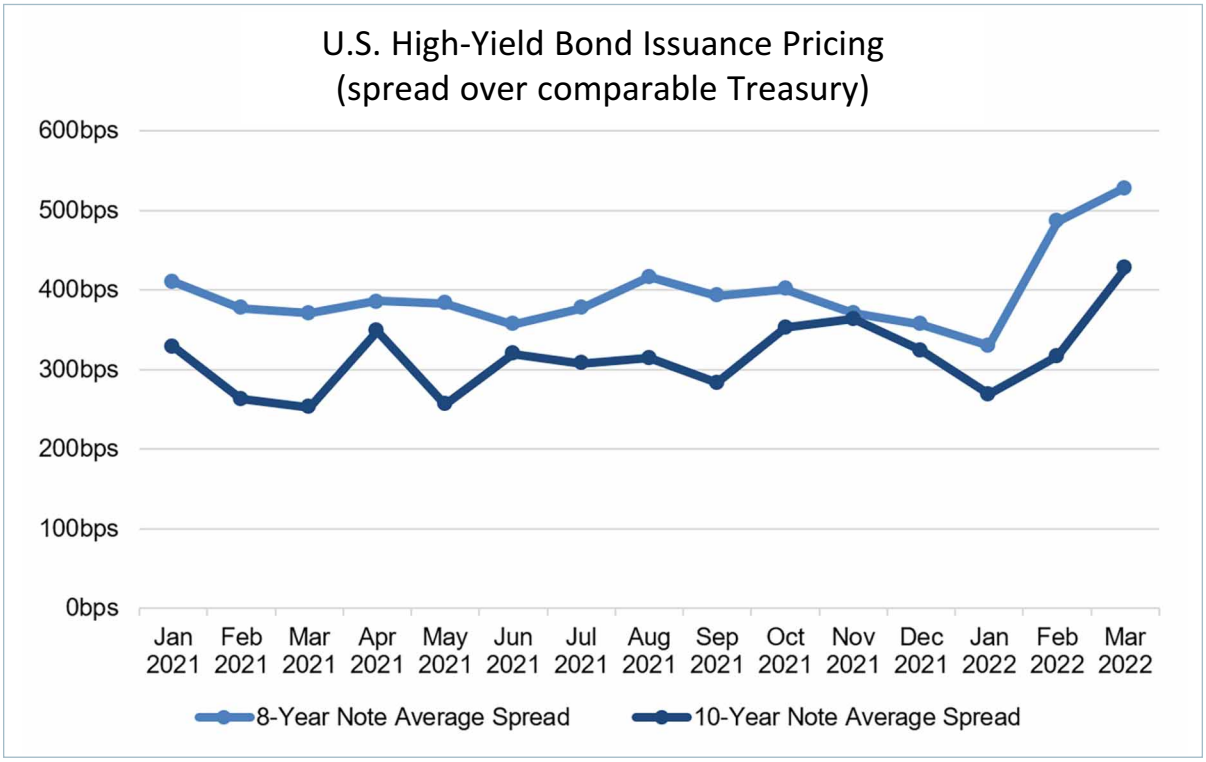
U.S. High-Yield Bonds

The pace of U.S. high-yield bond issuances declined in the first quarter of 2022, continuing the downward trend that began in the fourth quarter of 2021. The $38B in proceeds from issuances for the first quarter of 2022 was down 30% as compared to the fourth quarter of 2021 ($54B) and 72% from the first quarter of 2021 ($133B), representing the lowest quarterly total since the fourth quarter of 2018.



Data Source: Leveraged Commentary & Data (LCD)

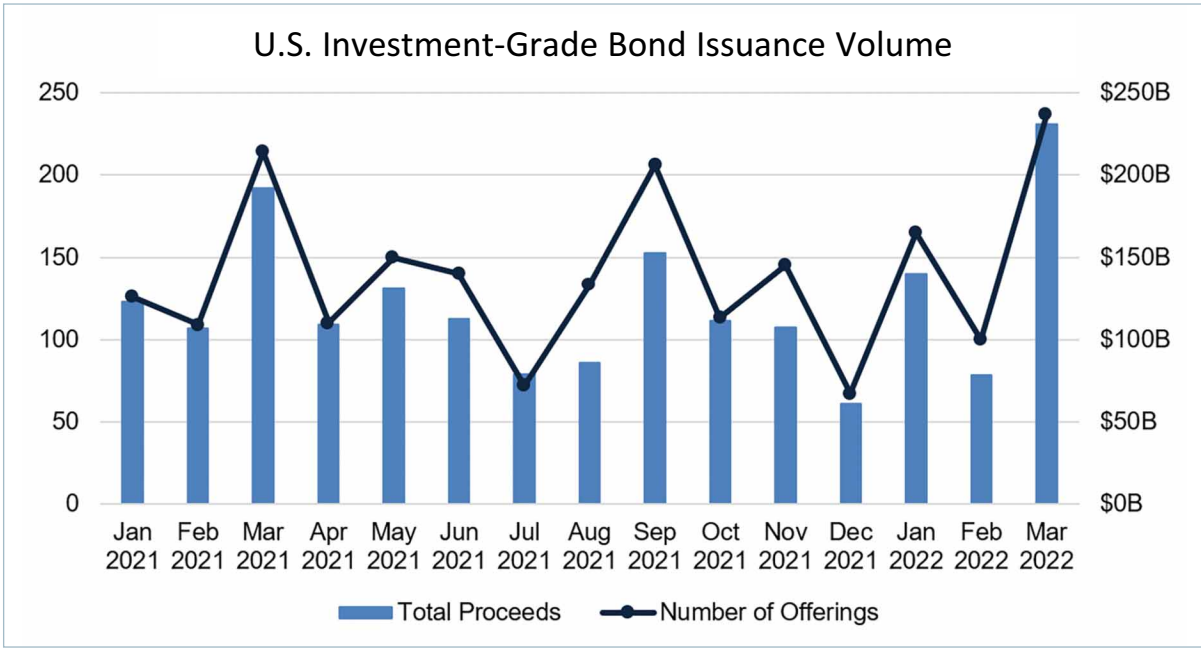
After an initial decrease in January, pricing (measured by spread over the comparable Treasury) for high-yield bond issuances increased in February and March of 2022 for both 8-year and 10-year maturities. Average pricing on high-yield 8-year notes in the first quarter of 2022 was 19% higher than in the fourth quarter of 2021, but pricing on high-yield 10-year notes was down 3% on the same comparison, driven by lower pricing on the 10-year notes in January and February.



Data Source: Leveraged Commentary & Data (LCD)

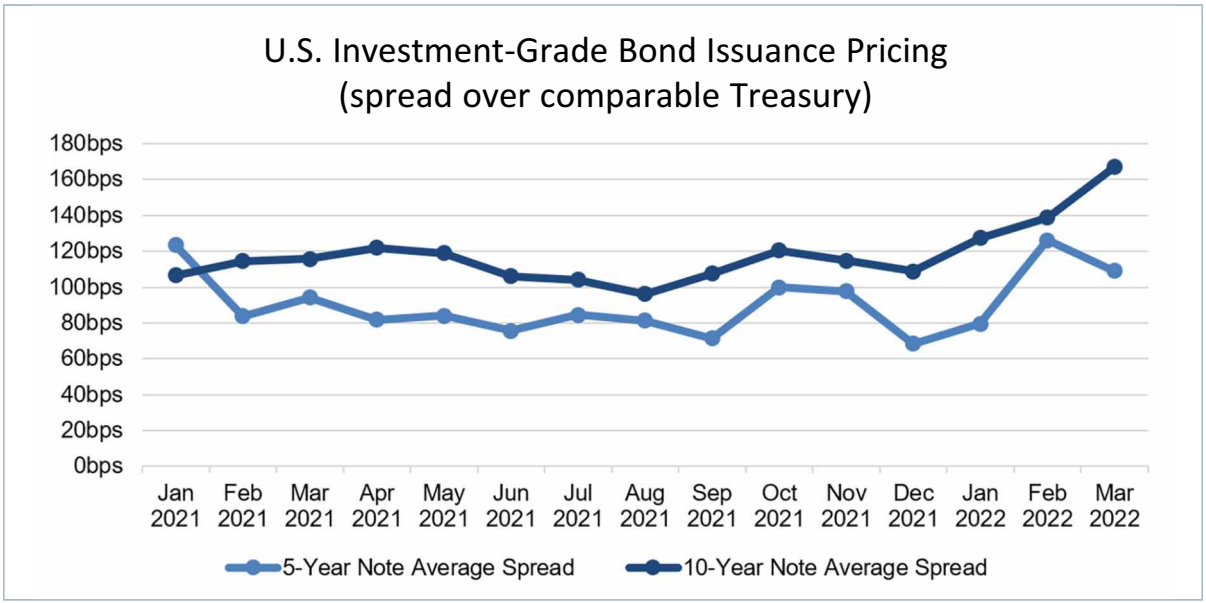
U.S. Investment-Grade Bonds

Total proceeds from U.S. investment-grade issuances were $449B in the first quarter of 2022, up 61% as compared to the fourth quarter of 2021 ($279B) and 6% from the first quarter of 2021 ($422B).



Data Source: Leveraged Commentary & Data (LCD)

Pricing (measured by spread over the comparable Treasury) on U.S. investment grade bond issuances in the first quarter increased over the prior quarter, with an overall increase on the 5-year note average spread of 18.3% as compared to the average for the fourth quarter of 2021. Pricing on 10-year notes in the first quarter of 2022 saw an increase of 26.0% as compared to the average spread in the fourth quarter of 2021.

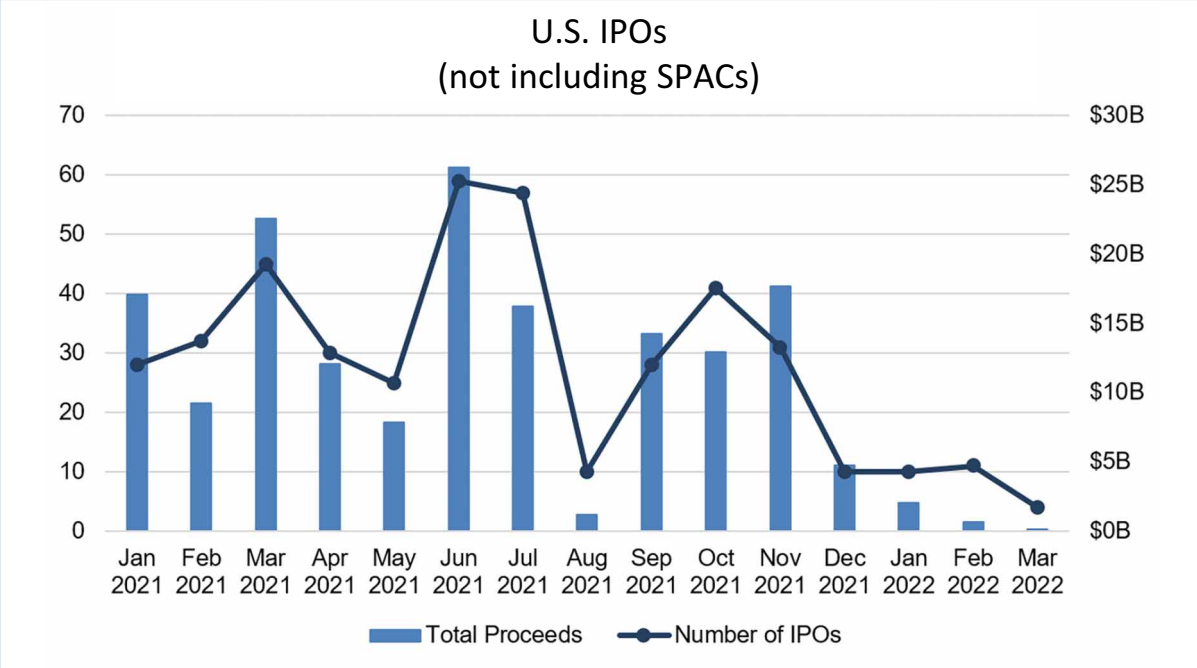


Data Source: Leveraged Commentary & Data (LCD)

EQUITY

U.S. IPOs

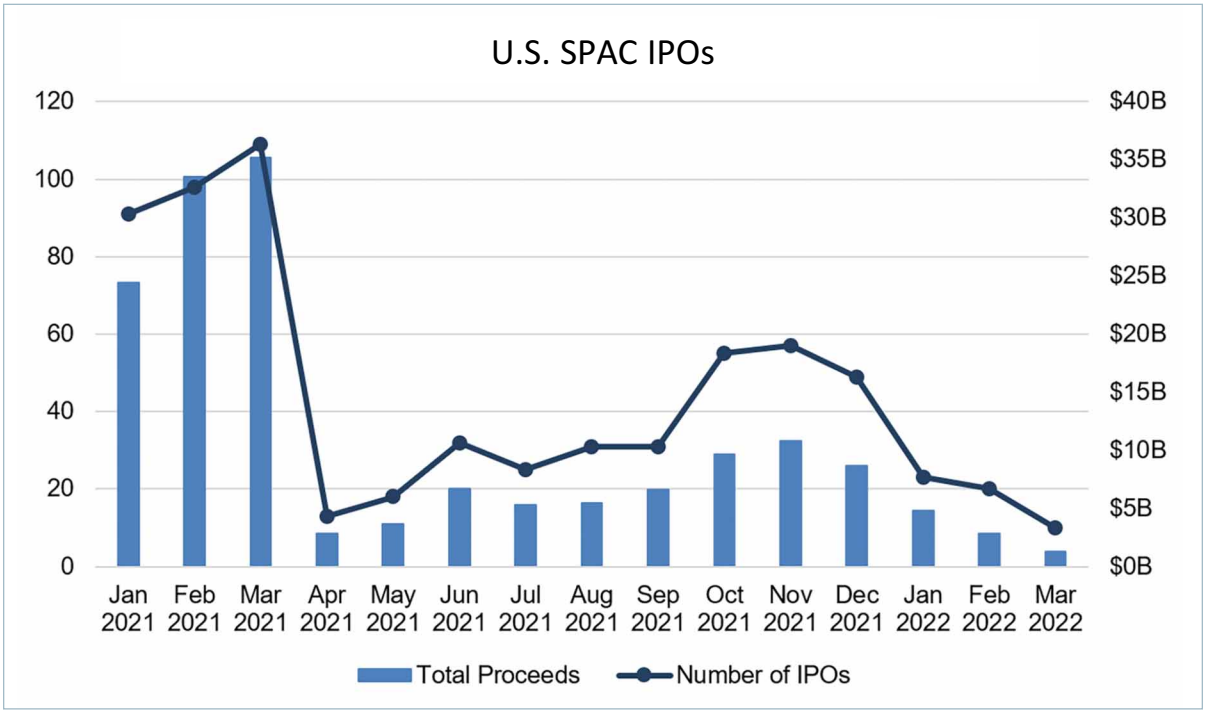
The U.S. IPO market (not including SPACs) saw a dramatic decrease in activity in the first quarter of 2022 compared to the record-setting levels seen in 2021, driven by volatile market conditions and stock market declines. The $2.8B of total proceeds from U.S. IPOs (not including SPACs) for the first quarter of 2022 was down 92.0% as compared to the fourth quarter of 2021 ($35.4B) and 94.2% as compared to the first quarter of 2021 ($48.9B).



Data Source: Refinitiv, an LSEG Business

U.S. SPACs

After rebounding slightly in the fourth quarter of 2021, the U.S. SPAC market saw a significant decrease in activity in the first quarter of 2022, and remains far less active as compared to 2020 or the first quarter of 2021. The $8.9B of total proceeds from U.S. SPAC IPOs for the first quarter of 2022 was down 69.5% as compared to the fourth quarter of 2021 ($29.2B) and was down 90.5% as compared to the first quarter of 2021 ($93.2B), driven by, among other things, accounting and regulatory uncertainty and trading levels of U.S. SPAC IPOs at or below initial issue prices in the secondary markets.



Data Source: Refinitiv, an LSEG Business

U.S. Follow-On Offerings

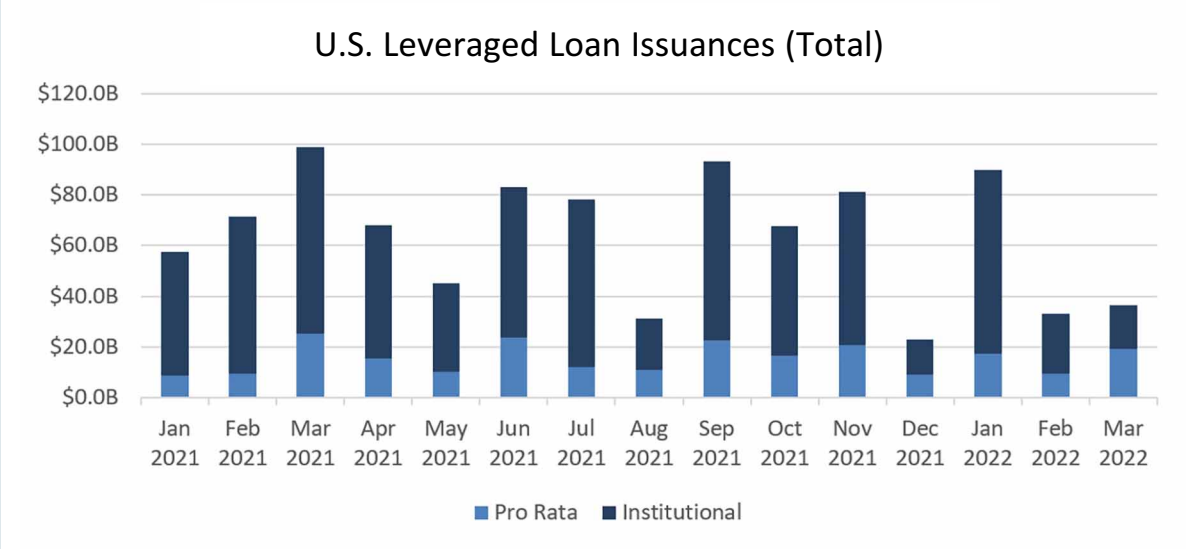
The $12.5B in proceeds from U.S. follow-on equity offerings for the first quarter of 2022 was down 66.8% as compared to the fourth quarter of 2021 ($37.7B).

Data Source: Refinitiv, an LSEG Business

LOANS

U.S. Leveraged Loan Issuances

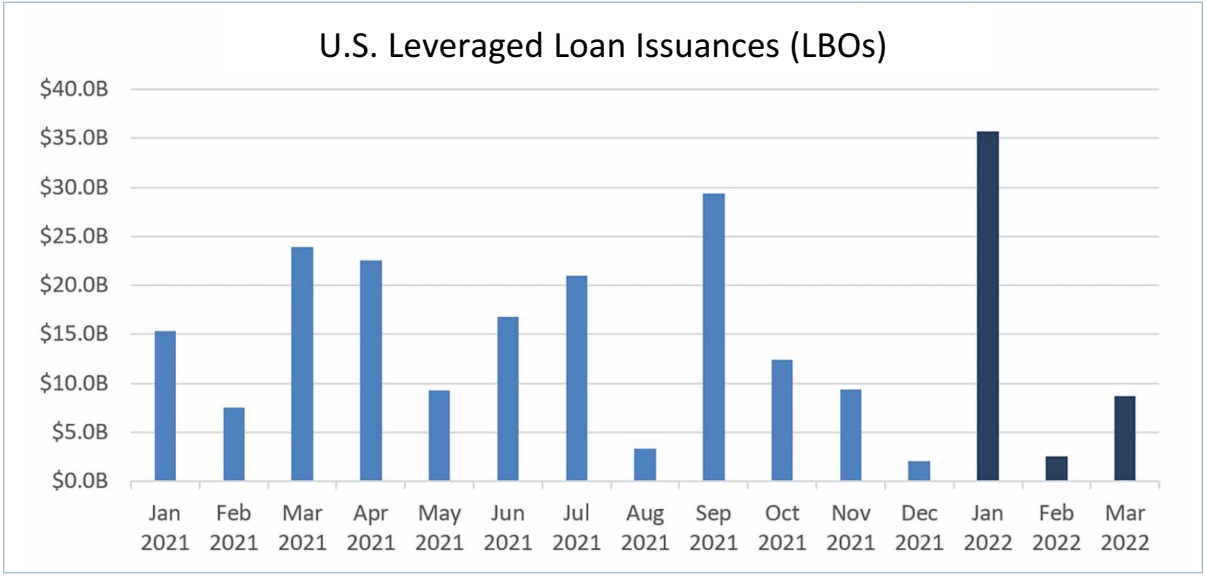
The U.S. leveraged loan market slowed in the first quarter of 2022 as compared to the fourth quarter of 2021, with total volume down 7% (and down 30% as compared to the first quarter of 2021). Institutional volume was $113.9B in the first quarter of 2022, down 9% compared to the fourth quarter of 2021 (and down 38% as compared to the first quarter of 2021). Pro rata volume was $45.4B in the first quarter of 2022, down 2% compared to the fourth quarter of 2021 (and up 5% as compared to the first quarter of 2021).



Data Source: Leveraged Commentary & Data (LCD)

U.S. LBO Loan Volume

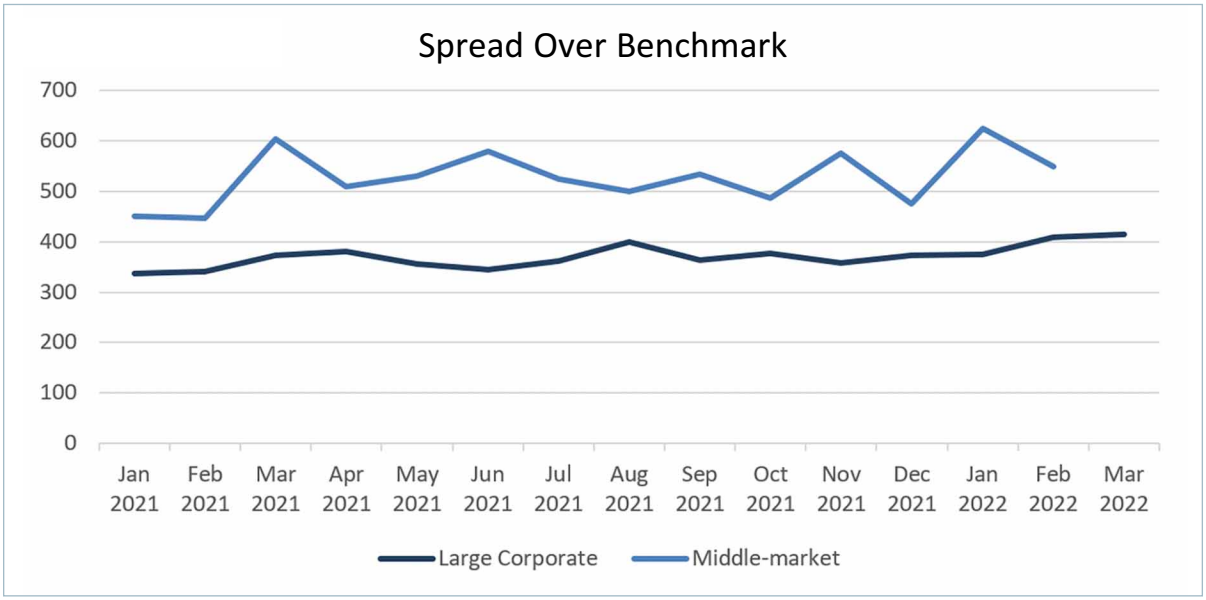
The U.S. LBO loan market started 2022 with a record-setting monthly volume of $35.6B in January 2022. However, volume dropped 93% to $2.6B in February 2022 with the onset of hostilities in Ukraine and related market turmoil. There were $47.0B of U.S. LBO loans issued in the first quarter of 2022, as compared to $23.8B in the fourth quarter of 2021, largely driven by the outsized January volume.



Data Source: Leveraged Commentary & Data (LCD)

Primary Market Institutional First-Lien Loan Spreads

Average spreads over benchmark rates on first lien institutional loans for large corporate leveraged loan transactions were 387 bps in the first quarter of 2022, 29 bps wider than the 358 bps average spread in 2021. Middle market spreads were 615 bps in the first quarter of 2022, 91 bps wider than the 524 bps average spread in 2021.



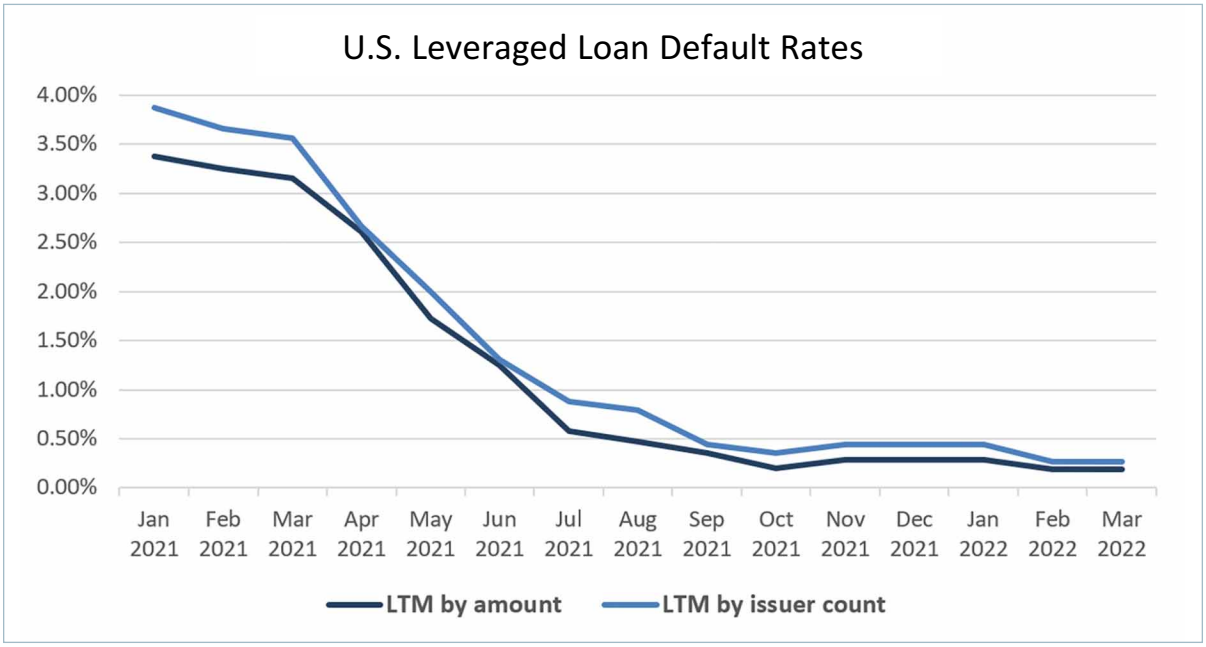
Data Source: Leveraged Commentary & Data (LCD)

Note: Middle market is defined as borrowers with an annual EBITDA of less than $50mm. Average spreads are dollar-weighted based on reported spreads, and do not reflect credit spread adjustments. As of April 15, 2022, LCD reported no middle market first lien institutional loans for March 2022.

RESTRUCTURING

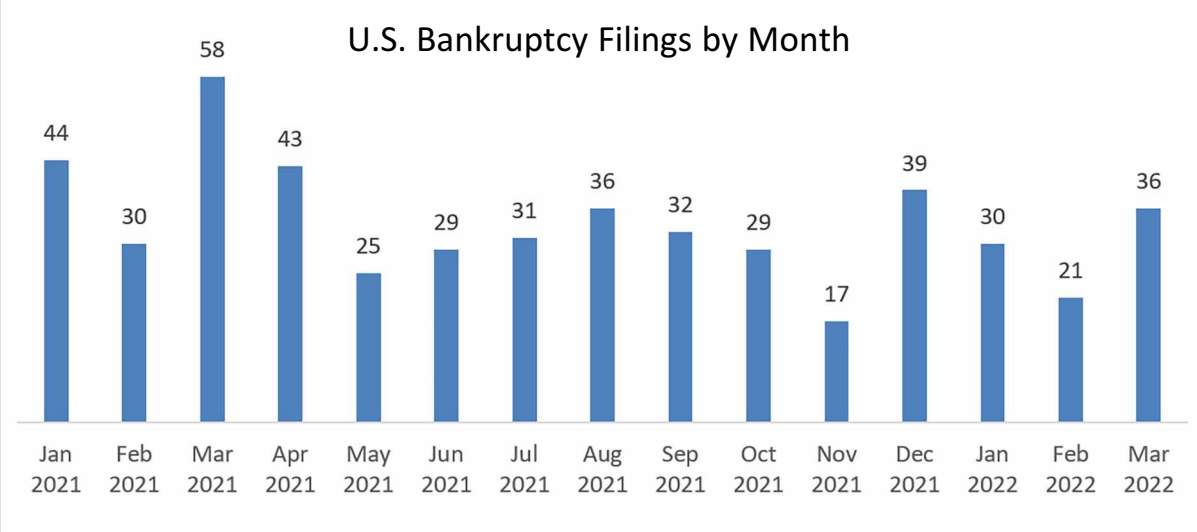
U.S. Leveraged Loan Default Rates

Default rates for U.S. leveraged loans declined throughout 2021 and have been below 1% since mid-2021. Default rates ended the quarter at 0.19% by amount and 0.27% by issuer count for the LTM period ending March 31, 2022, compared to 3.15% by amount and 3.56% by issuer count for the LTM period ending March 31, 2021.



Data Source: Leveraged Commentary & Data (LCD); S&P/LSTA Leveraged Loan Index

U.S. Bankruptcy Filings
Despite rising interest rates and record inflation, U.S. bankruptcy filings remained at historic lows in the first quarter of 2022. Industrials constituted the largest category of filings in the first quarter, including companies in the aerospace, defense, trucking, construction and engineering sectors.



Data Source: S&P Global Market Intelligence

Note: Bankruptcy filing data limited to public companies or private companies with public debt where either assets or liabilities at the time of the bankruptcy filing are greater than or equal to $2 million, or private companies where either assets or liabilities at the time of the bankruptcy filing are greater than or equal to $10 million.

Regulatory Updates

SEC Proposes Landmark Rules To Enhance and Standardize Climate-Related Disclosures
On March 21, 2022, the U.S. Securities and Exchange Commission (SEC) proposed long-awaited rules to enhance and standardize climate-related disclosures for public companies. The proposed rules include significant and detailed line-item disclosures in a number of climate-related areas, such as climate risk identification, management and governance; requirements to report Scope 1 and Scope 2 emissions, and if material or if included in an emissions target, Scope 3 emissions; mandatory third-party attestation over Scope 1 and Scope 2 emissions; requirements to report GHG emission reduction targets, if any, and related information about targets and goals; and new requirements under Regulation S-X requiring climate-specific disclosures in a new note to registrants' audited financial statements. The requirements will apply to both domestic and foreign private issuers. A phase-in period for certain requirements is included, with the compliance date dependent on a registrant's filer status. There is also an additional phase-in period for Scope 3 emissions disclosure requirements and certain attestations. The comment period on the proposed new rules will close on May 20, 2022.

SEC Proposes Rules Requiring Enhanced Disclosure for SPAC Transactions
On March 30, 2022, the SEC proposed rules that will enhance disclosure required in conjunction with transactions involving SPACs. The new rules would require additional disclosures to public shareholders in connection with SPAC and de-SPAC transactions about SPAC sponsors, conflicts of interest and sources of dilution, as well as the fairness of de-SPAC transactions to the SPAC's public shareholders (as contrasted with fairness to the SPAC) and related financing information. If adopted as proposed, this requirement would effectively mandate fairness opinions in de-SPAC transactions. The proposed rules would also make the forward-looking statements liability safe harbor granted by the Private Securities Litigation Reform Act of 1995 unavailable in de-SPAC filings. For de-SPAC transactions, the proposed rules "clarify" that underwriters in the SPAC initial public offering would also be deemed to be statutory underwriters in the de-SPAC, if the underwriter takes steps to facilitate the de-SPAC or any related financing transaction (or otherwise participates, directly or indirectly, in the de-SPAC). For SPAC transactions, if the SPAC satisfies certain proposed conditions related to its duration, asset composition, business purpose and activities, it will not need to register as an "investment company" under the Investment Company Act of 1940. The comment period on the proposed new rules will close on the later of May 31, 2022 or 30 days from publication in the Federal Register.

SEC Proposes Rules To Enhance and Standardize Cybersecurity-Related Disclosure for Public Companies

On March 9, 2022, the SEC proposed new rules that would require public companies to disclose cybersecurity incidents, risk management, strategy and governance in their SEC filings. In particular, a public company would have four business days to report under a new Item 1.05 of Form 8-K any material cybersecurity incident, to be triggered based on a determination of materiality. Regulation S-K would also be updated to require public companies to provide updates on previously reported cybersecurity incidents on Forms 10-Q and 10-K and Form 20-F for foreign private issuers. Companies would also be required to disclose on Form 10-K policies and procedures on cybersecurity risks and their boards' oversight of and management's role in assessing and managing such risks. Companies would be asked to list any members of their boards of directors who have expertise in cybersecurity and specify the nature of such expertise in their Forms 10-K and proxy statements. The comment period on the proposed new rules will close on May 9, 2022.

SEC Posts New CDIs

The SEC's Division of Corporation Finance issued new Compliance and Disclosure Interpretations (CDIs) on March 22, 2022. Of note, the CDIs addressing Form 8-Ks specify which material terms and conditions of a material definitive agreement should be disclosed under Item 1.01 and whether the material definitive agreement should be filed as an exhibit to Item 1.01. The CDI regarding SPACs notes that although SPAC redemptions tend to take the form of a tender offer (*i.e.*, SPAC security holders are given a limited time to request redemptions), if the SPAC sponsor also plans to purchase shares outside of the redemption offer, SEC Staff will not object to such purchases as long as certain listed conditions are satisfied.

Comments to SEC's Proposed Amendments To Rule 10b5-1 and New Form SR

As discussed in our previous issue, on December 15, 2021, the SEC issued proposed amendments to Rule 10b5-1 and the affirmative defense it provides against charges of insider trading and to Form 4 (which insiders must file to report their transactions in issuer securities) to include reporting of gifts within two days and to provide new disclosures about whether the insider's trades were made pursuant to a 10b5-1 trading plan. The amendments to Rule 10b5-1 would include new requirements of a mandatory cooling-off period between the date of adoption of any Rule 10b5-1 trading plan and the start of trades pursuant to the plan (proposed to be 120 days for officers and directors and 30 days for issuers structuring a share repurchase plan under Rule 10b5-1). The comment period for this proposal expired on April 1, 2022. 169 comments were submitted, including a comment letter from Cravath. Many of the comments submitted, including Cravath's, focused on the proposed mandatory cooling-off period and were generally supportive of a cooling-off period for officers and directors (though many advocated for such period to be shorter than the proposed 120 days), but opposed a cooling off-period for issuers.

On December 15, 2021, the SEC also proposed a new Form SR on which issuers would be required to report details about their share repurchases, including price and volume information and the timing of the issuer's repurchase. The proposed Form SR would be due within one business day of an issuer's repurchase. The comment period for this proposal also expired on April 1, 2022. Approximately 100 comments were submitted, including a comment letter from Cravath. Many commenters, including Cravath, were generally supportive of the proposal in principle, but expressed concern about the proposed requirement for daily disclosures, arguing that such frequent disclosures would be unduly burdensome for issuers and could actually be detrimental to investors and other market participants.

SEC Proposes Amendments To Form PF

On January 26, 2022, the SEC proposed amendments to Form PF, the confidential reporting form forinvestment advisers to private funds and certain commodity pool operators and commodity trading advisors. The proposed new rules would mandate hedge fund and private equity fund advisers to file a Form PF within one business day after an event that indicates stress or potential harm to investors or the financial system. As a result, the Financial Stability Oversight Council and the SEC would be provided with more timely disclosure. Additionally, the proposal decreases the reporting threshold from $2 billion to $1.5 billion for private equity advisers. The proposal also requires large private equity funds and liquidity funds to offer enhanced disclosure on information used for risk assessments. The comment period closed on March 21, 2022.

SEC Proposes Rule Amendments To Modernize Beneficial Ownership Reporting
On February 10, 2022, the SEC proposed amendments to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934. The proposed amendments would, among other things, expand the application of Regulation 13D-G to certain derivative securities to include a holder of a cash-settled derivative security, other than a security-based swap, if the derivative is held "with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect". In addition, the proposed amendments expand the circumstances under which two or more persons are deemed to have formed a "group" subject to beneficial ownership reporting obligations by specifying that two or more persons who "act as" a group for purposes of acquiring, holding or disposing securities will be treated as a "group". Finally, the proposed amendments generally shorten the deadlines for filing Schedules 13D and 13G and their related amendments. The comment period on the proposed amendments closed on April 11, 2022.

Case Law

Securities and Exchange Commission v. Matthew Panuwat
On January 14, 2022, the U.S. District Court for the Northern District of California denied a motion to dismiss an action by the SEC against Matthew Panuwat alleging that Panuwat violated insider trading laws by engaging in "shadow trading", which refers to the practice of trading in the securities of a competitor company based on material nonpublic information about the insider's own company. In this case, the SEC alleged that Panuwat, the then-head of business development at Medivation, purchased short-term, out-of-the-money stock options of a competitor, Incyte, shortly after learning that Pfizer would acquire Medivation at a significant premium and prior to such information being announced publicly. The SEC alleged that Panuwat purchased the options of Incyte with the expectation that the value of the options would increase materially upon the announcement of the acquisition of Medivation by Pfizer. Following the announcement of the Medivation acquisition, Incyte's stock price increased by approximately 8% and Panuwat made profits of $107,066 on his call options.

The suit represents the first time the SEC has attempted to extend the misappropriation theory of insider trading to cover trading in the securities of a company based on material nonpublic information about the impending acquisition of a different, but "economically linked" company. The SEC alleged that Panuwat "knowingly misappropriated confidential, material, and nonpublic information for securities trading purposes, in breach of a duty arising from a relationship of trust and confidence owed to the source of the information." In his motion to dismiss, Panuwat argued that the SEC had failed to adequately plead that (1) the information at issue was material and nonpublic information about Incyte, (2) he had breached his duty to Medivation and (3) he had acted with intent to defraud. He also argued that the SEC's expansion of the misappropriation theory violated his due process rights.

The court concluded that confidential information about one company can be material to another company, citing the broad language in Section 10(b) of the Securities Exchange Act of 1934, which refers to "any manipulative or deceptive device" concerning "any security", and similarly broad language in Rule 10b-5. The court also found that Panuwat had breached his duty to Medivation because Medivation's insider trading policy explicitly prohibited trading in the company's securities or the securities of another publicly traded company while in possession of important, nonpublic information about Medivation. The court further rejected Panuwat's argument that he had not acted with intent to defraud, citing the fact that he placed the trades within minutes of receiving an email from Medivation's CEO with details of the proposed acquisition. Finally, though the court acknowledged that the SEC's theory of liability was an expansion of the misappropriation theory, it concluded that it was within the general framework of insider trading and the expansive language of Section 10(b), and therefore did not violate Panuwat's due process rights.

While Panuwat's liability has not yet been established, the denial of the motion to dismiss shows that courts may be willing to consider the expansion of the SEC's enforcement authority to "shadow trading". In light of this decision, companies may want to review their own insider trading policies and consider whether to include prohibitions on the trading of securities of competitors where material nonpublic information about the company could impact the price of a competitor's securities.

Restructuring Update

"Texas Two-Step": *LTL Management, LLC*

On February 25, 2022, Chief Judge Michael B. Kaplan of the United States Bankruptcy Court for the District of New Jersey issued an opinion denying motions to dismiss the bankruptcy case of LTL Management, LLC (LTL) as being filed in bad faith.

The motions to dismiss focused on the so-called "Texas Two-Step", which refers to a divisional merger effected under Texas law and the subsequent bankruptcy filing of one of the resulting entities. This strategy was undertaken in *LTL* by splitting Johnson & Johnson Consumer Inc. (Old JJCI), a subsidiary of Johnson & Johnson (J&J), into two new entities, LTL and a new entity also called Johnson & Johnson Consumer Inc. (New JJCI). Pursuant to the divisional merger, Old JJCI ceased to exist, and its talc liabilities, certain royalty payment streams and its rights under the funding agreement discussed below were allocated to LTL, while the operating assets of Old JJCI were allocated to New JJCI. After the divisional merger, LTL filed bankruptcy in order to reach a global resolution of asbestos-related claims through a trust provided for under section 524(g) of the Bankruptcy Code, while New JJCI continued to operate the rest of what was Old JJCI's business outside of bankruptcy.

The motions to dismiss argued that the divisional merger and the LTL bankruptcy filing were simply maneuvers to gain a litigation advantage over personal injury tort claimants, and served no valid bankruptcy purpose. The court forcefully rejected this argument, finding that "the filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code".

The court also rejected the argument that tort claimants had been disadvantaged by the divisional merger and subsequent bankruptcy. In doing so, Judge Kaplan focused on the funding agreement between the debtor on the one hand and J&J and New JJCI on the other, which obligates J&J and New JJCI to fund the asbestos claimants' trust. The funding agreement requires payment to fund the trust up to the greater of (i) the value of Old JJCI at the time of the divisional merger and (ii) the value of New JJCI. In other words, the asbestos claimants' trust benefits from any increase in value of New JJCI, and the full value of Old JJCI pre-separation serves as a floor on the amount of J&J and New JJCI's contribution to a creditor-approved trust. Importantly, a trust of this type can only be implemented if it is approved by at least 75% of the asbestos claimants.

While *LTL* was not the first divisional merger bankruptcy, it has certainly received the most attention, including by Congress. The Nondebtor Release Prohibition Act of 2021—in addition to prohibiting nonconsensual third-party releases (such as those in *Purdue Pharma*, discussed below)—would also prohibit divisional merger bankruptcies. In fact, one week before the hearing on the motions to dismiss the *LTL* chapter 11 case, the United States Senate held a hearing entitled "Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy" that focused on the propriety of divisional merger bankruptcies, with a particular focus on *LTL*.

Cravath partner Paul Zumbro testified at the Senate hearing in his capacity as a leading national expert on bankruptcy law. Notably, Judge Kaplan's finding that the *LTL* "chapter 11 is being used, not to escape liability, but to bring about accountability and certainty" tracked closely the view expressed a week earlier by Mr. Zumbro in his Senate testimony ("At the core, the funding agreement evidences an affirmative acceptance of financial responsibility and access to the value of the company that existed pre-separation, not a corporate effort to side-step accountability.").

On March 30, 2022, Judge Kaplan certified his decision for direct appeal to the United States Court of Appeals for the Third Circuit. (The direct appeal would bypass review by the district court, which is the first court of appeal from the bankruptcy court, but the Third Circuit may still either accept or reject the appeal.) If upheld on appeal, the *LTL* opinion may pave the way for companies to resolve mass tort liabilities through the bankruptcy process without subjecting the entire business to a costly and unpredictable bankruptcy proceeding. While the movants in *LTL* argued that allowing the case to proceed would "open the floodgates" to similar bankruptcy filings, the court responded that, given "that the establishment of a settlement trust within the bankruptcy system offers a preferred approach to best serve the interests of injured tort claimants and their families, maybe the gates indeed should be opened". Whether such a flood will occur, or whether further court decisions (in the *LTL* appeal or in other cases) or Congressional action will prevent future divisional merger bankruptcies, remains to be seen.

Nonconsensual Third-Party Releases: *Purdue Pharma, L.P.*

Developments continue in the *Purdue Pharma* bankruptcy case. As discussed in our previous issue, in December 2021, Chief Judge McMahon of the Southern District of New York vacated the bankruptcy court's order confirming the chapter 11 plan of reorganization of Purdue Pharma, L.P., reasoning that bankruptcy courts have no statutory authority to approve nonconsensual third-party releases as part of a plan of reorganization. The debtors appealed Judge McMahon's opinion, and the appeal is now pending before the United States Court of Appeals for the Second Circuit.

Soon after Judge McMahon's opinion was issued, the bankruptcy court appointed Judge Shelley C. Chapman of the United States Bankruptcy Court for the Southern District of New York as mediator between the Sackler family (the current owners of Purdue Pharma) and the eight states and the District of Columbia that appealed the bankruptcy court's confirmation order (the Nine), in an effort to reach a consensual resolution of the Nine's objections to the plan. On March 3, 2022, Judge Chapman announced that the parties had reached a settlement by which the Sacklers would pay a total of $5.5 to $6 billion—$1.175 to $1.675 billion more than the $4.325 billion that was the basis for the prior settlement and plan of reorganization—in exchange for the Nine's agreement to be bound by the plan.

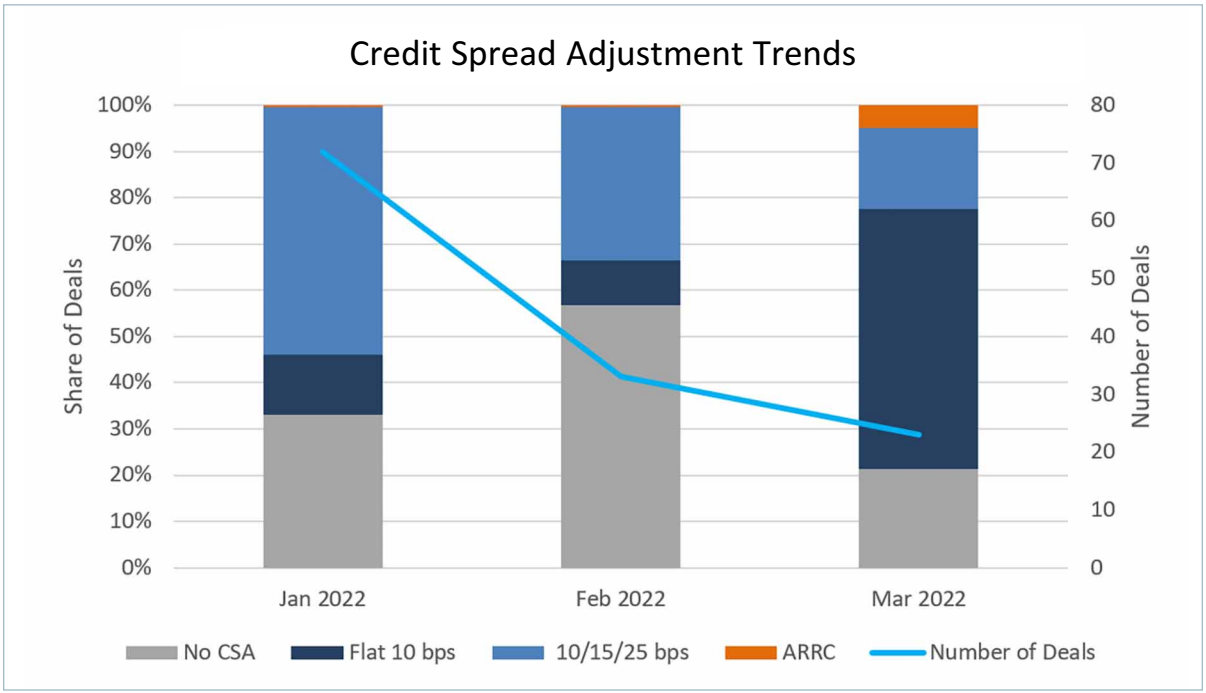
As the third-party releases are no longer nonconsensual with respect to the Nine, each member of the Nine has agreed to withdraw its opposition to the debtors' appeal of the district court's decision vacating approval of the plan. While the settlement eliminates a significant amount of opposition to the plan, it has not rendered the appeal moot, as the third-party releases remain non-consensual with respect to hundreds of thousands of other creditors.

The Second Circuit has scheduled oral argument on the appeal for April 29, 2022. Cravath has filed an amicus brief on behalf of The Association of the Bar of the City of New York (Committee on Bankruptcy and Corporate Reorganization), arguing that nonconsensual third-party releases can be an important tool in appropriate cases to promote the fundamental bankruptcy principles of maximization of recovery, equality of distribution and efficient resolution of complex disputes and that, accordingly, the district court's decision should be overturned by the Second Circuit.

LIBOR Update

Adjustable Interest Rate (LIBOR) Act: On March 15, 2022, President Biden signed into law the Consolidated Appropriations Act, 2022, which includes the Adjustable Interest Rate (LIBOR) Act (LIBOR Act). The LIBOR Act preempts the similar New York State statute that came into effect on April 6, 2021 (NY Senate Bill S297B), and provides for a replacement rate for certain financial contracts that do not contain sufficient fallback language. Under the LIBOR Act, LIBOR contracts using the overnight, 1-, 3-, 6- and 12-month tenors of U.S. dollar LIBOR that either (1) do not contain benchmark fallback provisions or (2) contain benchmark fallback provisions, but the provisions do not identify the party responsible for selecting the benchmark replacement and do not identify a specific benchmark replacement, would have their benchmarks automatically replaced on the first London banking day after June 30, 2023, by operation of law, by the SOFR-based benchmark replacement selected by the Federal Reserve Board, unless the parties to such contract opt out of the scope of the LIBOR Act. The Federal Reserve Board is directed to issue related regulations within 180 days of the enactment of the LIBOR Act.

Credit Spread Adjustments: Credit spread adjustments (CSAs), which are designed to account for the fact that SOFR, as a secured risk-free rate, is generally lower than LIBOR, continue to be a topic of discussion and negotiation between borrowers and arrangers in the first quarter of 2022, with the overall trend being that borrowers are finding success in obtaining no credit spread adjustment, or smaller adjustments than the ARRC-recommended CSAs of 11.448/26.161/42.826 basis points for 1 month/3-month/6-month Term SOFR based on data from Leveraged Commentary & Data (through March 17, 2022). On a dollar-weighted basis, a majority of institutional deals reported by LCD in the first quarter of 2022 had either no CSA or a flat 10 bps across each interest period.



Data Source: Leveraged Commentary & Data (LCD). Deal share calculated on a dollar-weighted basis.

In addition, certain borrowers have negotiated CSA provisions that fall away, for example, based upon the identification of a threshold number of publicly available credit agreements of qualifying borrowers that contain no CSAs.

Relatedly, given the move in the market away from the ARRC-recommended CSAs, some borrowers with legacy agreements that use LIBOR as the benchmark rate may find a benefit to triggering an "early opt-in" election if their fallback language permits the selection of an alternative benchmark rate that gives consideration to market convention to implement favorable CSAs.

Crypto Update

SEC STAFF ACCOUNTING BULLETIN 121

On March 31, 2022, the SEC published Staff Accounting Bulletin (SAB) No. 121 to address accounting for SEC filers that have obligations to safeguard crypto-assets held for their platform users. SAB No. 121 instructs relevant SEC filers to record on their balance sheets their obligations to safeguard crypto-assets as liabilities and the crypto-assets held for their platform users as assets. The safeguarding liability should be measured at initial recognition and at each reporting date at the fair value of crypto-assets that the SEC filer is responsible for holding for its platform users. Assets should be recognized at the same time that it recognizes the safeguarding liability, measured at initial recognition and at each reporting date at the fair value of the crypto-assets held for its platform users. In practice, SAB No. 121 will have the overall effect of increasing both sides of the balance sheet. This SAB is effective as of April 11, 2022 for those in process of registering securities, with a transition period for already reporting companies until its their financial statements covering the first interim or annual period ending after June 15, 2022. Registrants will not be required to restate prior periods.

Other Developments

SIFMA Model Make-Whole Redemption Provisions

In November 2021, the Securities Industry Financial Markets Association (SIFMA) published the investment-grade bond make-whole redemption model provision. Market participants had expressed a desire for standardized language in investment-grade bond make-whole redemption provisions because these provisions can vary by issuer, and investment banks can vary in the methodology they use to calculate the make-whole redemption price. The model provision is intended to provide issuers, banks, investors and others with clarity and consistency. The model provisions have been widely adopted in new investment-grade offerings in the first quarter of 2022 and are expected to continue being incorporated into new offerings going forward.

Expanded Beneficial Ownership Reporting under the Corporate Transparency Act

On February 7, 2022, the comment period for the U.S. Department of the Treasury's Financial Crimes Enforcement Network's (FinCEN) proposed rule implementing the beneficial ownership reporting requirements of the Corporate Transparency Act (CTA) ended, with FinCEN reporting that it received over 230 comments. The proposed rule is the first of three planned rulemakings that will implement the CTA and update FinCEN's existing customer due diligence (CDD) rule to meet the expanded requirements under the CTA.

The CTA, which was enacted in January 2021, will establish a centralized beneficial ownership registry by requiring all corporations, LLCs and similar entities formed in the U.S. or registered to do business in the U.S., subject to certain exclusions, to directly report beneficial ownership information to FinCEN. In contrast, the existing CDD rule requires that covered financial institutions collect beneficial ownership information from their customers, but only requires reporting of such information upon FinCEN's request or if suspicious activity is detected.

In addition, whereas the existing CDD rule defines "beneficial owner" to include any individual who "directly or indirectly . . . owns 25% or more of the equity interests of a legal entity customer" and "[a] *single* individual with significant responsibility to control, manage, or direct" (emphasis added) such legal entity customer, the proposed rule expands the control prong to include "*any* individual who, directly or indirectly . . . exercises substantial control over the entity" (emphasis added), which is expected to significantly expand the number of individuals covered by the reporting requirement. The proposed rule would also expand the ownership prong by including other interests, including certain convertible debt instruments, in addition to straight equity interests.

Of particular note was the American Bankers Association comment letter that objected to, among other things, the expansion of the number of beneficial owners that need to be reported. Following the finalization of this first proposed rule, FinCEN would have one year under the CTA to amend the CDD rule.

SEC Proposes Rule To Shorten Settlement to T+1

On February 9, 2022, the SEC proposed a set of amendments to the securities clearing and settling process intended to shorten the settlement cycle for most broker-dealer transactions from two business days after the trade date (T+2) to one business day after the trade date (T+1). These amendments would also require broker-dealers to complete any affirmations, confirmations and allocations necessary for a trade as soon as possible on the trade date (T+0), while central matching service providers would be required to adopt processes intended to facilitate straight-through processing (*i.e.*, fully automated transaction processing). As proposed, these new requirements would take effect March 31, 2024. The comment period for these proposed changes closed April 10, 2022.