Cravath Quarterly Review
Finance and Capital Markets

Volume 1 | Issue 2

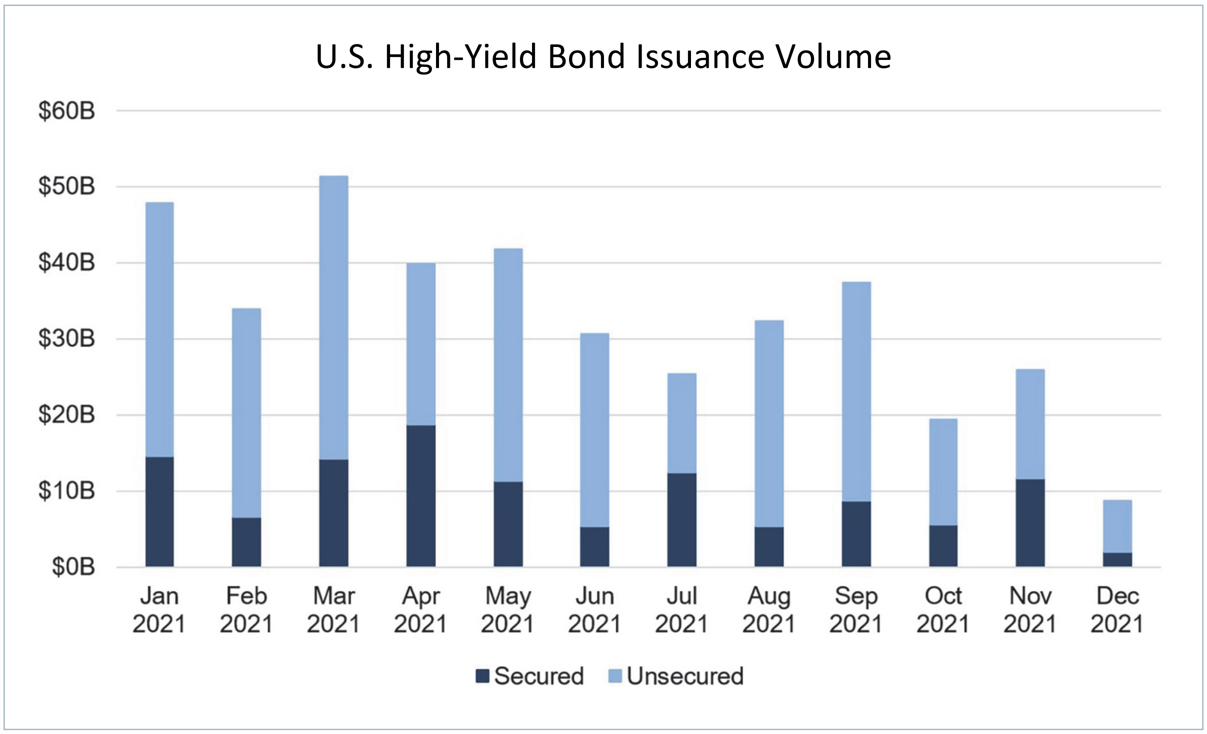
Q4 2021

Market Update

BONDS

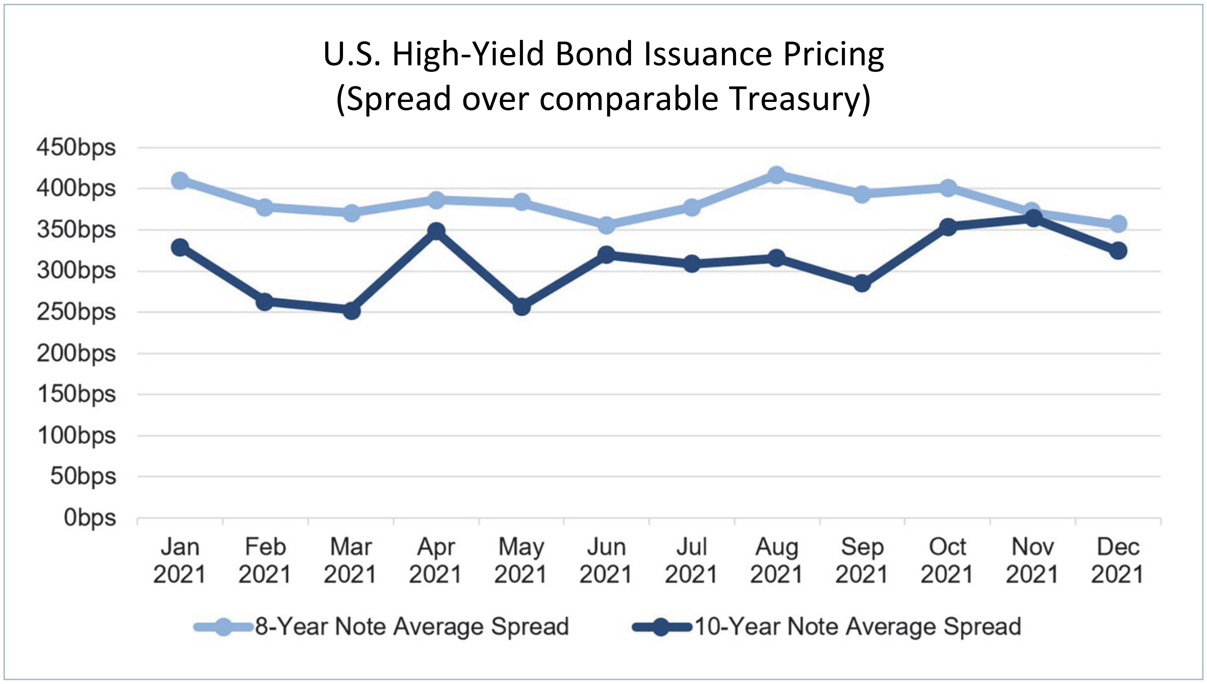
U.S. High-Yield Bonds

The pace of U.S. high-yield bond issuances slowed in the fourth quarter of 2021. The $54B in proceeds from issuances for the fourth quarter of 2021 was down 76% as compared to the third quarter of 2021 ($95B). Despite the fourth quarter slowdown, total high-yield bond issuance volume of $395B in 2021 topped the record-setting 2020 full-year total of $392B to establish a new all-time annual high.



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

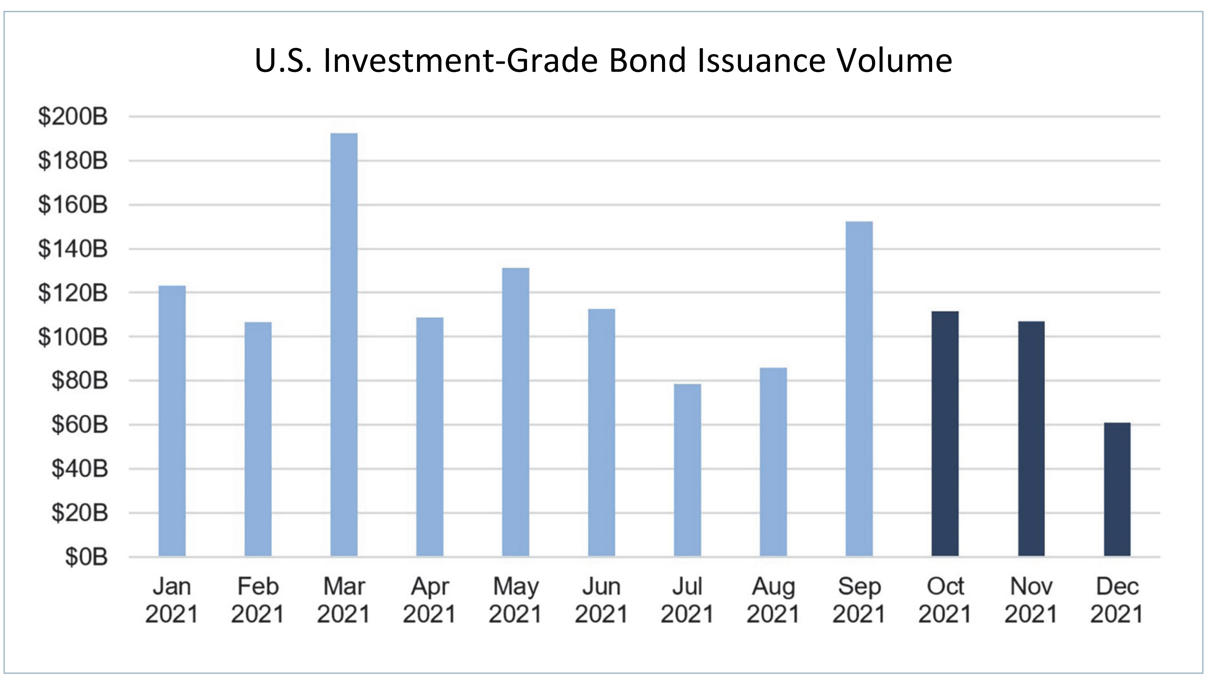
The decline in high-yield bond issuance volume in the fourth quarter of 2021 resulted in a supply-demand environment that tended to benefit issuers, which contributed to continued favorable pricing outcomes for issuers despite growing concerns over inflation. Overall, pricing (measured by spread over the comparable Treasury) on high-yield 8-year notes for 2021 was down 20.7% as compared to 2020 and pricing on high-yield 10-year notes was down 20.3% on the same comparison.



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

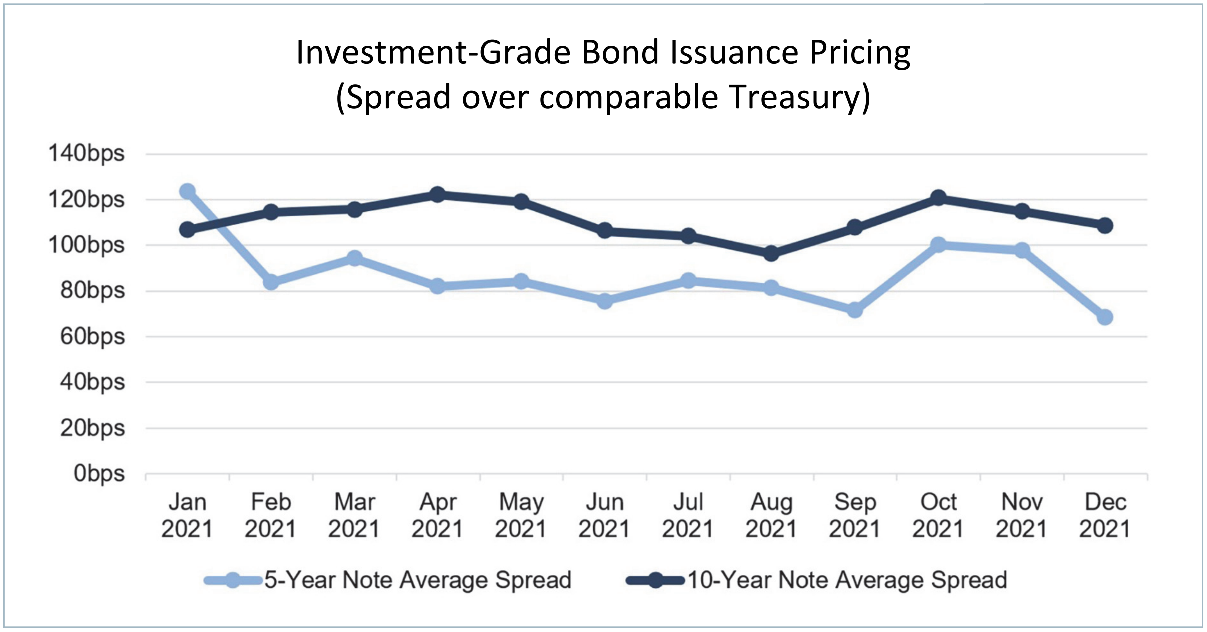
U.S. Investment-Grade Bonds

Total proceeds from investment-grade issuances were $1,687B in 2021, down 18.7% as compared to 2020, which was an historically busy year. The $279B in proceeds from issuances for the fourth quarter of 2021 was down 11.9% as compared to the third quarter of 2021 ($317B).



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

Pricing (measured by spread over the comparable Treasury) on U.S. investment-grade bond issuances in 2021 was significantly lower than the same period last year, with an overall decline on the 5-year note average spread of 55.3% as compared to the average for 2020. Pricing on 10-year notes in 2021 saw a similar but less significant decline of 44.6% as compared to the average spread in 2020.

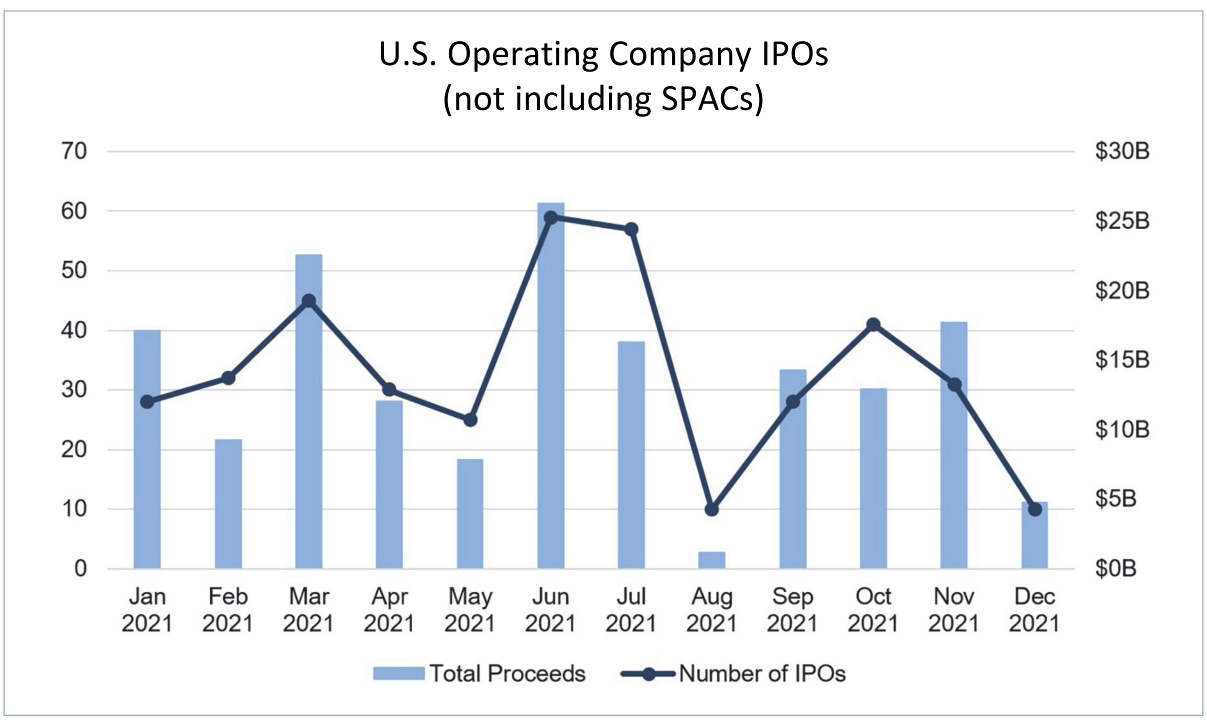


Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

EQUITY

U.S. IPOs

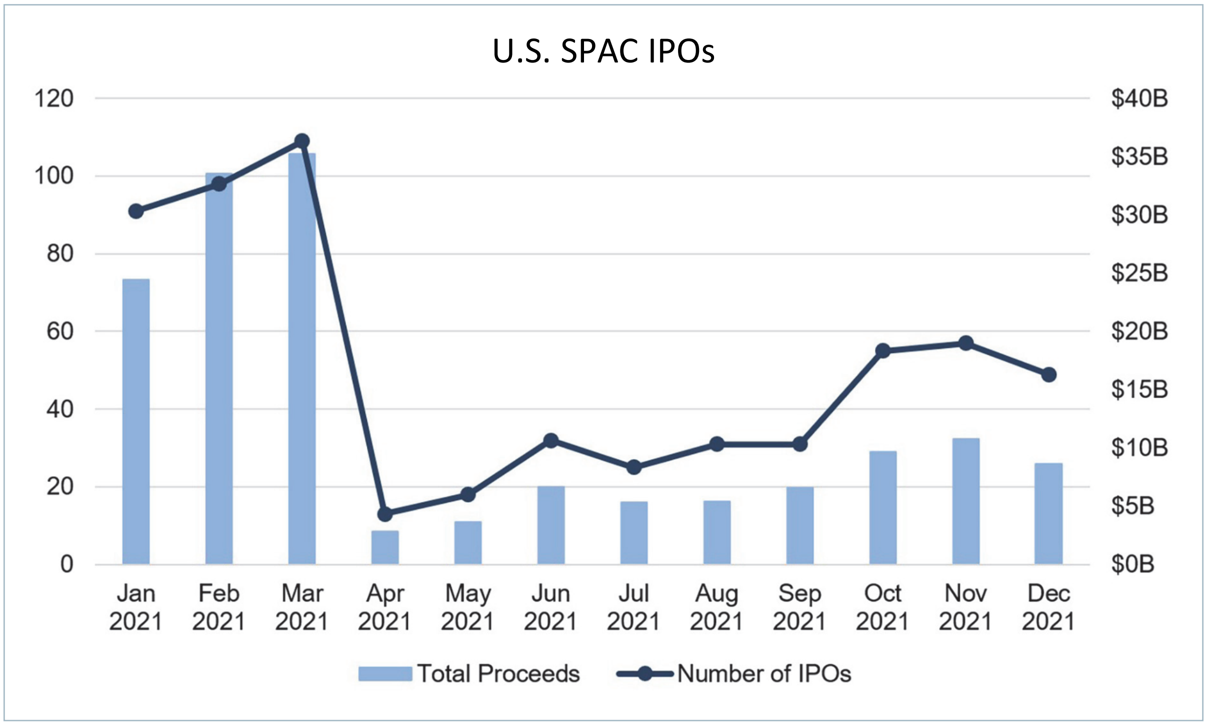
The U.S. IPO market (not including SPACs) rebounded slightly from the third quarter of 2021 but remained less active than both of the first two quarters of 2021. The $35.4B of total proceeds from U.S. IPOs (not including SPACs) for the fourth quarter of 2021 was up 11.6% as compared to the third quarter of 2021 ($31.7B). Total proceeds from U.S. IPOs (including both SPAC and non-SPAC IPOs) in 2021 set a new all-time annual high.



Data Source: Refinitiv, An LSEG Business

U.S. SPACs

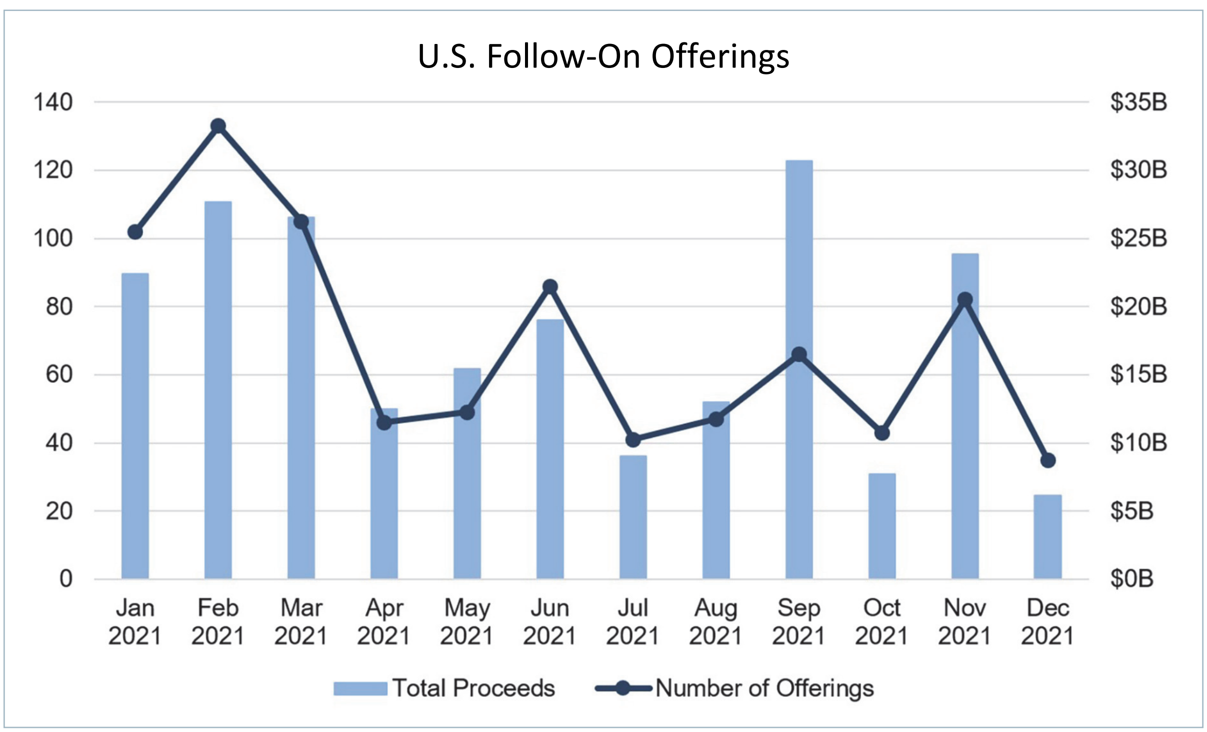
Despite an increase in U.S. SPAC IPOs in the fourth quarter of 2021, the U.S. SPAC market remains far less active as compared to 2020 or the first quarter of 2021. The $29.2B of total proceeds from U.S. SPAC IPOs for the fourth quarter of 2021 was up 67.8% as compared to the third quarter of 2021 ($17.4B) but was down 68.7% as compared to the first quarter of 2021 ($93.2B), driven by, among other things, accounting and regulatory uncertainty and trading levels at or below initial issue prices in the secondary markets.



Data Source: Refinitiv, An LSEG Business

U.S. Follow-On Offerings

The $37.7B in proceeds from U.S. follow-on equity offerings for the fourth quarter of 2021 was down 28.5% as compared to the third quarter of 2021 ($52.7B).

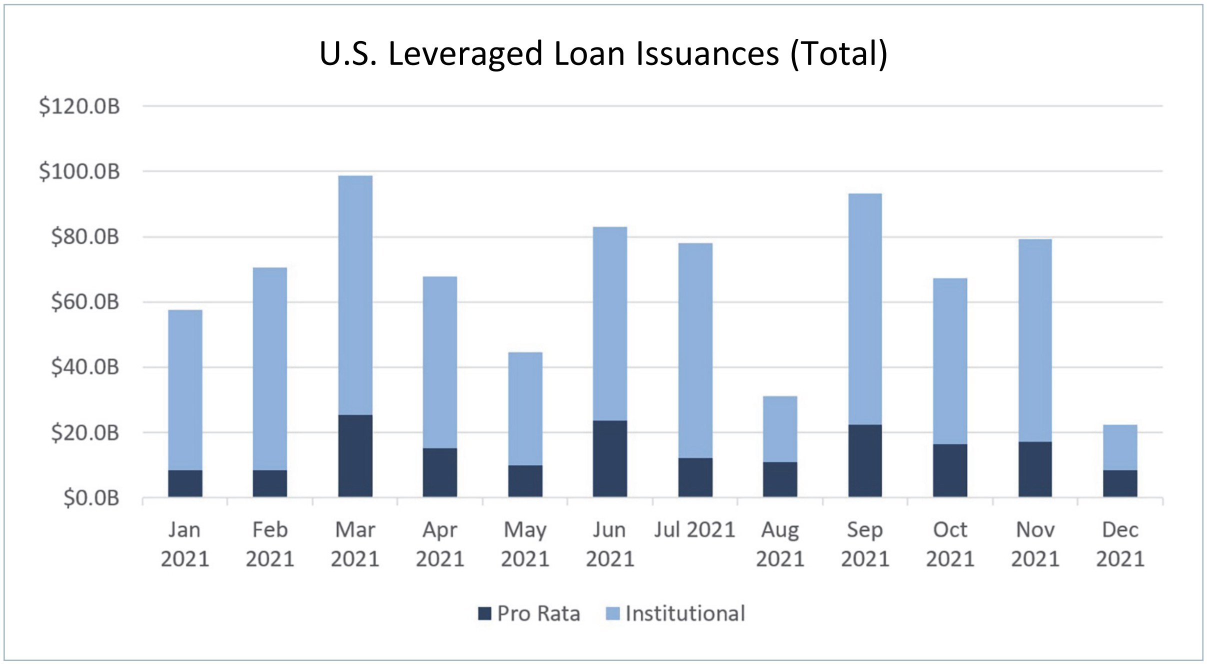


Data Source: Refinitiv, An LSEG Business

LOANS

U.S. Loan Issuance

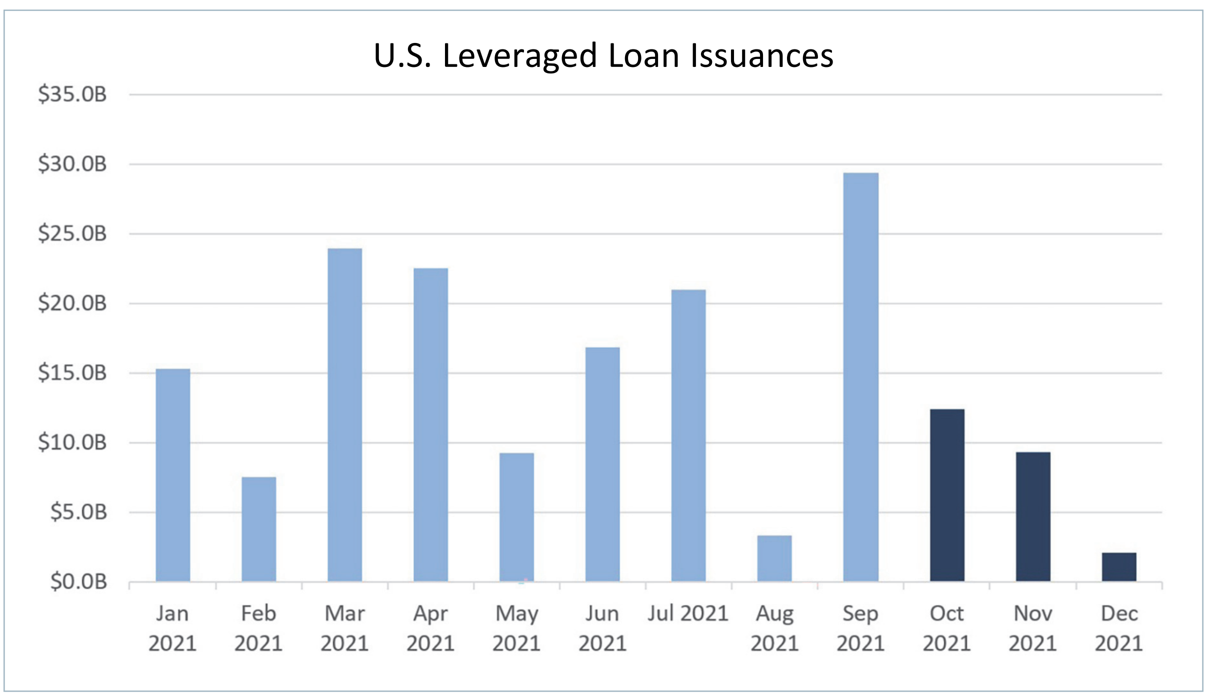
The U.S. leveraged loan market slowed in the fourth quarter of 2021 as compared to the third quarter, with total volume down 17%. Institutional volume was $13.8B in principal amount in December and $126.8B in the fourth quarter of 2021, bringing the total for 2021 to $615.2B, up 113% as compared to 2020. Pro rata volume was $8.5B in principal amount in December and $42.0B in the fourth quarter of 2021, bringing the total for 2021 to $178.4B, up 68% as compared to 2020.



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

U.S. LBO Loan Volume

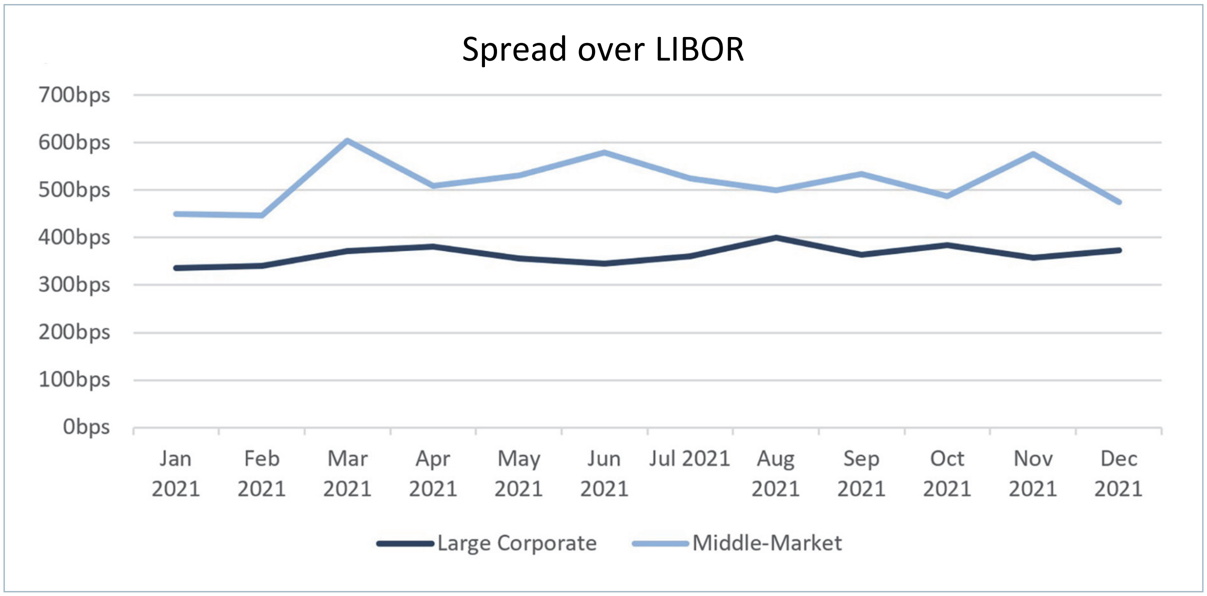
The U.S. LBO loan market slowed from historic levels in the third quarter of 2021. There were $23.8B in principal amount of U.S. LBO loans issued in the fourth quarter of 2021, as compared to over $53B in the third quarter. For the full year of 2021, U.S. LBO loan volume totaled $172.9B in principal amount, up 121% as compared to 2020.



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

Primary Market Institutional First-Lien Loan Spreads

Average LIBOR spreads on first lien institutional loans for large corporate leveraged loan transactions were 370 bps in the fourth quarter of 2021, 14 bps wider than the 356 bps average over the first three quarters of 2021. Middle-market spreads were 535 bps in the fourth quarter of 2021, 17 bps wider than the 518 bps average over the first three quarters of 2021.



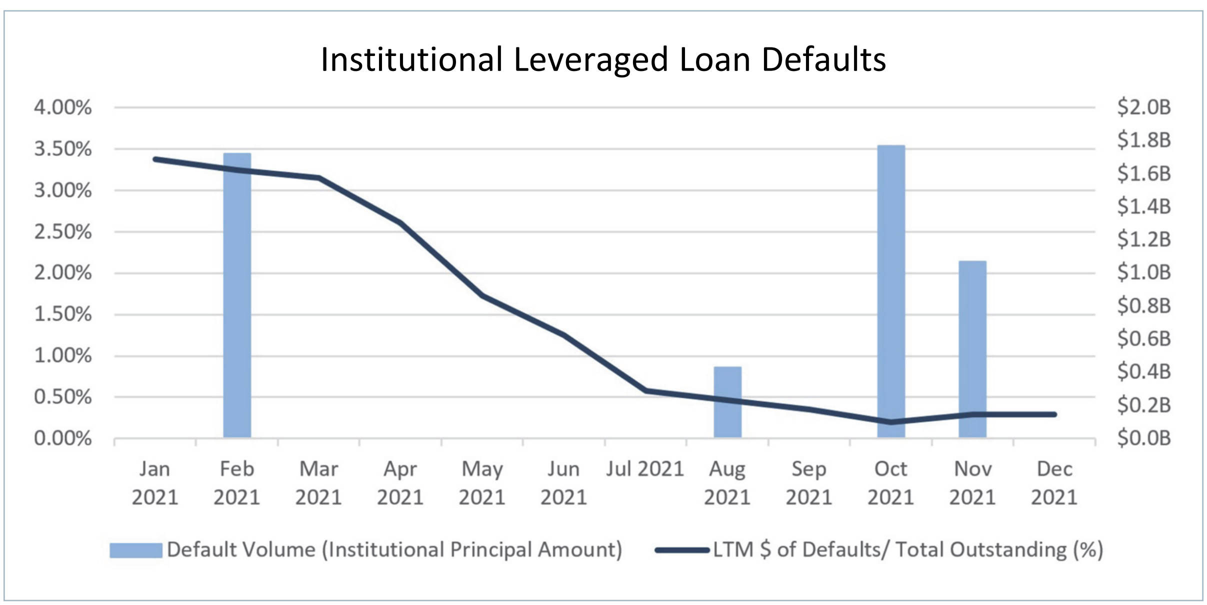
Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence

Note: Middle market is defined as borrowers with an annual EBITDA of less than $50mm. Averages are dollar-weighted based on reported spreads.

RESTRUCTURING

U.S. Institutional Leveraged Loan Defaults

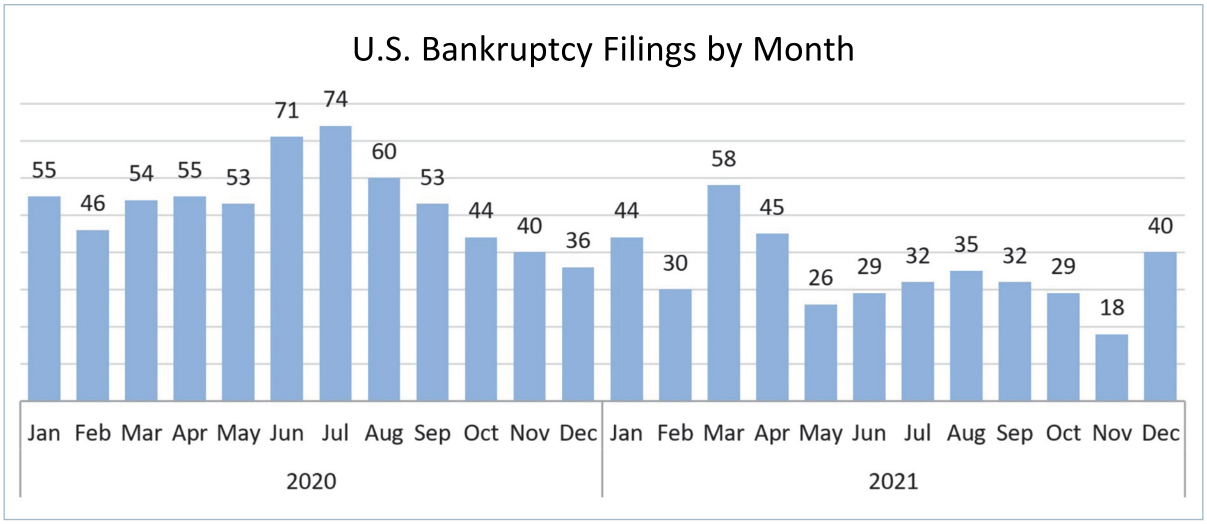
The fourth quarter saw two significant U.S. institutional leveraged loan defaults in the aggregate amount of $2.8B. The principal amount of U.S. institutional leveraged loans that have defaulted in 2021 totaled $5.0B, down 91% as compared to 2020.



Data Source: Leveraged Commentary & Data (LCD), an offering of S&P Global Market Intelligence. S&P/LSTA Leveraged Loan Index.

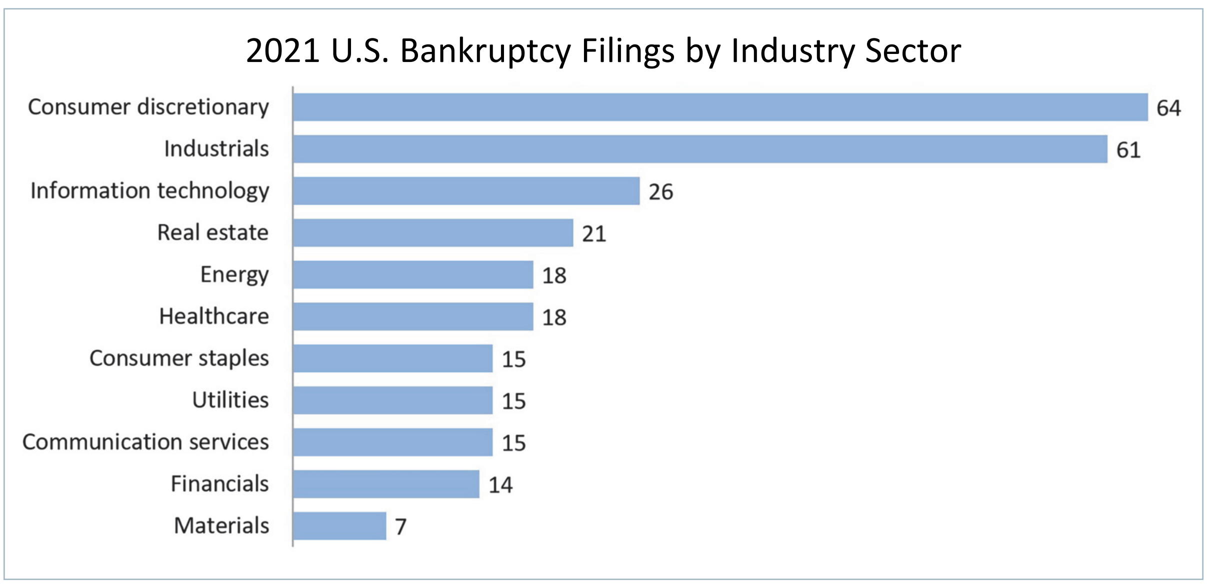
U.S. Bankruptcy Filings

U.S. bankruptcy filings saw an uptick in December 2021, while total filings for the year were historically low as the continued availability of capital has allowed distressed companies to restructure their balance sheets to avoid defaults. The consumer discretionary and industrials sectors had the most filings by far in 2021. Many expect filings to pick up in 2022 as interest rates rise.



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.



Data Source: S&P Global Market Intelligence

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Regulatory Updates

SEC Proposes to Amend Rule 10b5-1 and Issues Proposals for Rules Related to Disclosure of Insider Trading Policies and Compensatory Incentive Awards

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 amended rules, which are subject to a comment period prior to being finalized, would also prohibit having multiple, overlapping plans at one time and would require written certifications by the insider. The comment period for the proposed amendments to Rule 10b5-1 will run 45 days after the proposal has been published in the Federal Register. The SEC also proposed new disclosure requirements about companies' insider trading policies and more detailed information about compensatory option awards than currently required.

SEC Proposes New Form SR to Report Issuer Share Repurchases

On December 15, 2021, the SEC proposed a new Form SR on which issuers would be required to report details about their share repurchases, including price and volume information as well as the timing of the issuer's repurchase. Proposed Form SR, which is subject to a comment period prior to being finalized, would be due within one business day of an issuer's repurchase and would also require disclosure of information about:

- the objective and rationale of share repurchases, as well as process or criteria used to determine the amount of repurchased shares;
- policies and procedures relating to purchases or sales of the issuer's securities by officers and directors during a repurchase program;
- whether repurchases were made in reliance on the affirmative defense of Rule 10b5-1 or the safe harbor provided by Rule 10b-18; and
- if an officer or director purchased or sold any of the issuer's securities that are part of the repurchase program within 10 business days before or after the announcement of such program.

SEC Chair Gensler Signals SPAC Regulation Priorities

On December 9, 2021, SEC Chair Gary Gensler delivered a speech at the Healthy Markets Association Conference that elaborated on how the SEC is exploring ways to reduce the risks faced by investors in SPACs. In addition to emphasizing that the SEC would continue to take enforcement action when appropriate, Chair Gensler explained that he has asked the SEC to consider rule-making recommendations in the following areas, among others:

- how to better align the legal treatment of SPACs and their participants with the investor protections provided in other IPOs, with respect to disclosure and marketing practices and obligations of gatekeepers (*e.g.*, auditors, brokers and underwriters);
- how investors might be better informed about the fees, projections, dilution and conflicts that may exist during all stages of SPACs, and how investors can receive those disclosures at the time they make their investment decisions;
- how to guard against improper conditioning of the market upon announcement of a SPAC transaction, such as by requiring more complete information at that time; and
- how to better align incentives between gatekeepers and investors, and how to address the status of gatekeepers' liability obligations.

SEC Amends Filing Fee Disclosures and Payment Methods

On October 13, 2021, the SEC adopted amendments to modernize filing fee disclosure and payment methods. The amendments update most fee-bearing forms, schedules, statements and related rules to require each filing fee table and accompanying disclosure to include all required information for filing fee calculation in a structured format. Additionally, the amendments now provide an option for filing fee payment via Automated Clearing House (ACH), while less frequently used options such as paper checks and money orders are no longer available for filing fee payment. The amendments will generally become effective on January 31, 2022, with the payment option amendments to become effective on May 31, 2022.

SEC Chair Gensler Signals Greater Scrutiny of Private Funds

On November 10, 2021, SEC Chair Gensler delivered remarks to the Institutional Limited Partners Association Summit outlining guiding principles for future SEC oversight of private funds. Chair Gensler focused first on "efficiency, competition, and transparency" with respect to fees and expenses, side letters and performance metrics, signaling that staff recommendations will be targeted at increasing transparency in these areas. Chair Gensler also emphasized "market integrity" as a priority for SEC staff, stating that the SEC will look to mitigate the effects of conflicts of interest between general partners, their affiliates and investors. Chair Gensler spoke lastly of "resiliency," specifically indicating an intention to refresh Form PF to enhance reporting and disclosure.

SEC Releases GameStop Report

On October 21, 2021, the SEC released a Staff Report on Equity and Options Market Structure Conditions in Early 2021, which focused on the January 2021 trading activity of GameStop Corp. In January 2021, GameStop and other "meme stocks" experienced dramatic increases in their share prices, driven by bullish sentiments of individual investors shared on social media. As trading volume surged and prices skyrocketed, several retail broker-dealers temporarily prohibited certain activity in some of these stocks and options. The SEC's report provides an overview of the equity and options market structure for individual investors and examines the factors that contributed to the meme stock episode. While the report is primarily explanatory and does not offer specific policy recommendations, it concludes by identifying areas of market structure and the regulatory framework for further study and consideration:

- forces that may cause a brokerage to restrict trading;
- digital engagement practices and payment for order flow;
- trading in dark pools and wholesalers; and
- the market dynamics of short selling.

Restructuring Updates

Non-Consensual Third-Party Releases: *In re Purdue Pharma, L.P.*

On December 16, 2021, Judge Colleen McMahon of the Southern District of New York vacated Bankruptcy Judge Robert Drain's order confirming the chapter 11 plan of reorganization in *Purdue*. The ruling, if affirmed by the Second Circuit, would have a significant impact on the ability to confirm a plan of reorganization within the Second Circuit.

The specific issue in *Purdue* was the ability of a bankruptcy judge to release third parties' direct claims against non-debtors on a non-consensual basis. Under the plan confirmed by the bankruptcy court, claims by third parties against over 1,000 individuals and entities related to the Sackler family would have been released in exchange for a $4.275 billion contribution by the Sackler family to the Purdue estate. The plan was overwhelmingly supported by creditors, with over 95% of votes cast in favor of the plan.

Courts in the Second Circuit have generally relied on the Second Circuit's 2005 decision in *In re Metromedia Fiber Network, Inc.* for the authority to grant non-consensual third-party releases. However, rather than reading Metromedia as signaling that such releases may be permissible in appropriate circumstances, Judge McMahon interpreted the case as merely "caution[ing] that statutory authority for non-consensual non-debtor releases outside of the asbestos context was at best uncertain". After surveying provisions of the Bankruptcy Code and related caselaw, Judge McMahon concluded that the Bankruptcy Code in fact provides no statutory authority for such releases.

Judge McMahon also ruled on a very important jurisdictional issue, finding that the claims covered by the releases are not the type of "core" claims on which a bankruptcy judge may enter a final judgment. As the releases "are the equivalent of a final judgment" on the non-core claims they cover, Judge McMahon held that a bankruptcy judge may not enter an order approving them on a final basis, and instead may only provide a report and recommendation on the releases to the district court judge. The releases would then be incorporated into the plan only if the district court judge approved them.

If upheld, Judge McMahon's ruling would have significant consequences for all participants in chapter 11 cases in the Second Circuit, as it would likely result in greater difficulty in reaching consensus on, and confirming, certain types of plans of reorganization that have become increasingly common in recent years. Specifically, if the holding on the statutory issue is upheld, then non-consensual releases of third parties' direct claims against non-debtors would effectively be precluded in the Second Circuit absent an act of Congress—and, in fact, Senator Elizabeth Warren and Representative Jerrold Nadler have introduced parallel legislation that would expressly prohibit the type of third-party releases upon which the *Purdue* plan was founded. On the other hand, if the holding on the jurisdictional issue (but not the statutory issue) is upheld, then such releases may still be available, but significant uncertainty would be injected into the plan process by requiring two layers of judicial review before the releases may be approved on a final basis.

However, until the Second Circuit rules on the issues, Judge McMahon's opinion is not binding on the other district judges of the Southern District of New York (who may disagree), or even the bankruptcy judges of the Southern District of New York in other cases. (The decision also has no binding effect outside of the Southern District of New York.) On January 7, 2022, Judge McMahon authorized the appeal to the Second Circuit, while requiring the parties to request an expedited hearing "given the urgency of the opioid crisis and the importance of the issue to the resolution of this case". There will certainly be further developments in this area, both in court and in Congress.

Make-Wholes: *Wells Fargo Bank, N.A. v. Hertz Corp. (In re The Hertz Corp.)*

On December 22, 2021, Bankruptcy Judge Mary Walrath issued an opinion in *Hertz* with many significant holdings on make-whole issues. The case follows a familiar fact pattern: (i) notes were accelerated due to a bankruptcy filing, (ii) the indentures provide that the make-whole is due if the notes are voluntarily redeemed and (iii) the notes were redeemed post-petition (in this case, paid in full under the plan). These facts presented the familiar question: are the debtors required to pay the make-whole?

Following Third Circuit precedent, Judge Walrath held that, in general, it was possible for a voluntary redemption to occur after maturity—*i.e.*, after acceleration due to a bankruptcy filing had caused the maturity date to become the petition date. Judge Walrath specifically noted that, although the debtors redeemed the notes under the plan, they were not required to do so, as they had the option to reinstate the notes with their original maturity date pursuant to section 1124(2). Therefore, Judge Walrath found that the noteholders had stated a plausible claim that the redemption under the plan was a voluntary redemption that triggered the make-whole under the indentures.

Next, Judge Walrath analyzed whether the make-wholes had become payable under the relevant provisions in the indentures relating to the two sets of notes that were at issue. For the first set of notes, the indenture provided that the make-whole would be payable if the notes were redeemed "prior to maturity". As the bankruptcy filing and attendant acceleration caused the notes to mature, Judge Walrath found that the notes could not have been redeemed "prior to maturity". However, Judge Walrath indicated that the outcome would be different if the make-whole had been payable "prior to the Stated Maturity" (*i.e.*, the original maturity date), as the original maturity date had not passed at the time the notes were redeemed. For the second set of notes, the make-whole was payable if the notes were redeemed before a certain date (without any reference to maturity or Stated Maturity). As the noteholders alleged that the notes were redeemed before that date, Judge Walrath concluded that there was a plausible claim that the make-whole was payable.

Judge Walrath then analyzed whether the make-whole, if payable, would be disallowed under section 502(b)(2), which provides that a claim for "unmatured interest" is not allowed in bankruptcy. Noting that "courts look to the economic substance of the transaction to determine what counts as interest", Judge Walrath seemed to take a more functional and fact-specific view of the application of section 502(b)(2) to make-wholes than the majority of courts, which tend to categorize make-wholes as liquidated damages not subject to disallowance under section 502(b)(2). However, Judge Walrath determined that whether the make-whole was the "economic equivalent of interest" (and therefore disallowed under section 502(b)(2)) was a question of fact on which the parties must submit evidence, rather than a question of law that could be decided on a motion to dismiss.

Finally, the noteholders argued that, as the debtors were "wildly solvent" (a rare occurrence at plan confirmation), the noteholders were entitled to interest on their claims at the contractual default rate for the post-petition period. In dismissing that claim, Judge Walrath held that unsecured creditors in a "solvent debtor" case are limited to post-petition interest at the federal judgment rate.

That result is consistent with other recent large solvent debtor cases (most notably *PG&E*, which Judge Walrath cited in her decision), although it conflicts with a recent decision by another bankruptcy court in the Southern District of Texas in *Ultra Petroleum*.

Judge Walrath's decision serves as a reminder of the importance of clear drafting and the drastic consequences that can follow from imprecision, as well as the multitude of issues regarding make-wholes that remain unsettled and the extreme divergence in outcomes that may occur in different courts.

LIBOR Update

Activity relating to the replacement of the London interbank offered rate (LIBOR) as a benchmark rate quickened in the fourth quarter of 2021 in the syndicated lending market in light of the December 31, 2021 date for the cessation of (1) all Euro LIBOR settings, (2) subject to "synthetic" settings for certain tenors for certain legacy contracts, all GBP and Yen LIBOR settings, (3) all Swiss franc LIBOR settings and (4) the 1-week and 2-month U.S. Dollar LIBOR settings, and the Federal Reserve Board, Federal Deposit Insurance Corporation (FDIC) and Office of the Comptroller of the Currency's (OCC) supervisory guidance to cease entering into contracts that use LIBOR as the reference rate after the year-end.

Of particular note were the following developments:

- On October 20, 2021, the Federal Reserve Board, Consumer Financial Protection Bureau, FDIC, National Credit Union Administration, OCC and state bank and credit union regulators published a joint statement encouraging supervised institutions to continue towards an orderly transition away from LIBOR. In particular, the statement clarified the meaning of "new" LIBOR contracts to include an agreement that (i) creates additional LIBOR exposure for a supervised institution or (ii) extends the term of an existing LIBOR contract. A draw on an existing agreement that is legally enforceable (*e.g.*, a committed credit facility), however, would not be viewed as a new contract.

- On November 16, 2021, the Financial Conduct Authority (FCA) released a notice prohibiting the new use of U.S. Dollar LIBOR by supervised entities after December 31, 2021. The FCA also announced that it will permit the use of "synthetic" 1-, 3- and 6-month GBP and yen LIBOR settings for the duration of 2022 by supervised entities for legacy contracts.

- On November 19, 2021, the Federal Reserve issued an additional frequently asked questions document in response to questions from institutions regarding the transition away from using LIBOR as a reference rate. Among other things, the additional guidance provided some clarity over whether certain arrangements would be viewed as new LIBOR contracts prohibited after December 31, 2021. Specifically, the Federal Reserve stated that (i) contracts that automatically renew after December 31, 2021 would be viewed as a new contract and that supervised institutions should take steps to address automatic renewals and (ii) the physical settlement of a contract that existed prior to year-end 2021 would not be viewed as a new contract. The Federal Reserve also confirmed that institutions may engage in the secondary trading of LIBOR-linked investments issued prior to December 31, 2021.

- On December 6, 2021, the ARRC published recommended form provisions for the replacement of 1-week and 2-month U.S. Dollar LIBOR tenors with SOFR in response to New York and Alabama state LIBOR legislation affecting certain legacy contracts.

- On December 7, 2021, the SEC released a statement identifying certain key considerations for market participants relating to the LIBOR transition, including in the case of public companies "detailed and specific disclosure . . . about the progress of the company's transition efforts to date", such as "notional value of contracts referencing LIBOR and extending past December 31, 2021 or June 30, 2023" and "what the company has done [in respect of the LIBOR transition], what steps remain, and the timeline for further efforts".

- On December 8, 2021, the U.S. House of Representatives passed the Adjustable Interest Rate (LIBOR) Act of 2021, following the passage of a similar New York State statute that came into effect on April 6, 2021 (Senate Bill S297B). If passed by the Senate and signed into law, the Adjustable Interest Rate (LIBOR) Act would provide for a replacement rate for certain financial contracts that do not contain sufficient fallback language.

The FCA has previously announced that the overnight, 1-month, 3-month, 6-month and 12-month U.S. Dollar LIBOR settings will continue to be provided until June 30, 2023 for legacy contracts.

Credit Spread Adjustments: As we head into the first quarter of 2022, a topic of discussion and negotiation between borrowers and arrangers has been credit spread adjustments (CSAs) to account for the fact that SOFR, as a secured risk-free rate, is generally lower than LIBOR. Based on a review of publicly filed new U.S. dollar syndicated credit facilities entered into in 2022 using Term SOFR as the reference rate, the market has not settled on an approach, with many credit facilities applying a 10 basis point adjustment to 1-month Term SOFR, a 15 basis point adjustment to 3-month Term SOFR and a 25 basis point adjustment to 6-month Term SOFR, some applying the ARRC-recommended CSAs of 11.448/26.161/42.826 basis points for 1-month/3-month/6-month Term SOFR, others with more bespoke negotiated CSAs and others not including any adjustments. We have seen adjustments of 10 basis points across all three interest periods, as well. As 2022 unfolds and the syndicated lending market continues to adjust to the post-LIBOR world, this topic will likely remain a key focus for borrowers and lenders alike.

1-week and 2-month LIBOR Interpolation: With the cessation of the 1-week and 2-month USD LIBOR settings, questions have arisen regarding whether those tenors can be interpolated between LIBOR settings that continue to be quoted for legacy contracts (*i.e.*, the overnight, 1-month and 3-month settings). The answer depends, first, on whether the given credit agreement contains express interpolation provisions—although those have become common, they might not be in the older deals and, in more recent deals, some agent banks have been seeking to remove them for administrative ease. In credit agreements that do contain interpolation provisions, typical formulations would permit interpolation to a 2-month setting, but being able to interpolate to a 1-week setting (which requires usage of an overnight setting, which typically is not an interest period that is available under credit agreements) is more fact dependent on the exact text of the given credit agreement. We have seen borrowers and agents proceed with interpolation to a 1-week setting, as well as other borrowers that have chosen to seek technical amendments to expressly permit such interpolation.

Crypto Update

The global market value of cryptoassets reached a peak market cap of $3 trillion in November 2021 before falling to approximately $2.4 trillion at year-end 2021. In the fourth quarter, bank and market regulators and global standard-setting organizations continued to drill down on cryptoasset issues. After receiving a number of comments from the banking industry on its June 2021 consultation on the prudential treatment of cryptoasset exposures, the Basel Committee on Banking Supervision announced that it will issue a new consultative document by mid-2022 that would further specify the proposed capital requirements. In the United States, the Office of the Comptroller of the Currency published a November 2021 letter by its Chief Counsel clarifying earlier interpretive letters regarding certain cryptoasset activities of banks regulated by the agency. The letter clarified that the activities addressed in the earlier interpretive letters are legally permissible only if the bank can demonstrate that it has controls in place to conduct the activity in a safe and sound manner. In November 2021, President Joe Biden signed a $1.2 trillion bipartisan infrastructure bill, including new legislation that would require certain cryptoasset tax reporting from brokers starting in 2023. The term "broker" is broadly defined in the legislation and could be interpreted to apply to many network participants such as miners, validators and developers who do not have access to the identity of cryptoasset users, yet effectuate transfers for the network.

The fourth quarter also brought increased scrutiny of stablecoins by global financial regulators. In October 2021, the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions published a consultative report providing guidance for regulators on the application of the *Principles for financial market infrastructures* to stablecoin arrangements that are systemically important. In the United States, the President's Working Group on Financial Markets and other financial agencies issued a report in November 2021 setting forth certain recommendations for the regulation of stablecoins, focusing on arrangements that are pegged to a fiat-currency. Among other things, the report recommended for the U.S. Congress to "promptly" pass legislation to require stablecoin issuers to be insured depository institutions and to provide federal agencies with significant regulatory authority over custodial wallet providers and other key participants in stablecoin arrangements. In the absence of congressional action, the report recommended that the U.S. Financial Stability Oversight Council pursue its authority to designate certain activities conducted within stablecoin arrangements as systemically important payment, clearing and settlement activities. In the near term, the Federal Reserve Board is expected to release its own long-awaited white paper on the "future of money", covering central bank digital currencies, stablecoins and other cryptoassets.

We expect the debate surrounding cryptoasset regulation to continue to build in 2022 in the United States and globally. In November 2021, the U.S. federal banking agencies issued a brief statement outlining cryptoasset-related issues that the agencies will address in the coming year, including lending collateralized by cryptoassets. In December 2021, it was reported that Benoît Cœuré, chief of the Bank for International Settlements' innovation hub, called for financial regulators to agree on a global framework for cryptoassets in 2022. We believe that the policy process for cryptoassets is likely to take some time but, ultimately, conclude with more regulation of nonbank actors and more clarity about how and under what conditions banks may engage in cryptoasset activities.

ESG Updates

ESG Consideration in Retirement Funds

The Biden Administration has proposed a rule that would allow for funds to consider ESG in retirement saving plans. This would effectively negate a Trump-era rule that only permitted retirement plans to consider financial factors when making investment decisions. Acting Assistant Secretary for the Employee Benefits Security Administration Ali Khawar stated: "[a] principal idea underlying the proposal is that climate change and other ESG factors can be financially material and when they are, considering them will inevitably lead to better long-term risk-adjusted returns, protecting the retirement savings of America's workers." The comment period for the proposed rule closed on December 13, 2021.

ESG Bond Volume in 2021

As of December 23, 2021, global sustainable bond issuance volume totaled $859 billion for the year, up nearly 61% from 2020's total of $534 billion. Green bond issuances accounted for over half of that total, at $481.8 billion, and social bond issuance volume accounted for $191.8 billion. BofA analysts estimated that ESG bonds priced an average of 2.4 basis points tighter compared to other bonds over the last four years.

Sustainability-Linked Loan and Bond Volume Hits Record Heights

2021 has seen an explosion of sustainability-linked debt issuances worldwide. Unlike green bonds, the proceeds of which must be used for specified environmentally friendly projects, sustainability-linked loans and bonds may be used for general corporate purposes, providing greater flexibility for borrowers. Rather than requiring the proceeds to be used for environmentally friendly projects, the terms of the sustainability-linked debt itself are linked to predetermined ESG metrics, through pricing incentives, penalties or amendment mechanics tied to sustainability KPIs.

Though the majority of the sustainability-linked bond issuances have been in Europe to date, 2021 figures indicate significant growth in North America. Worldwide, sustainability-linked bond issuance volume reached $92.9 billion as of December 23, 2021, representing a massive increase from the 2020 total of $8.2 billion. Total volume for sustainability-linked loans saw a similarly dramatic increase, from $14 billion in 2020 to $133 billion as of December 17, 2021.