Cravath Quarterly Review

FINANCE AND CAPITAL MARKETS

Market Update

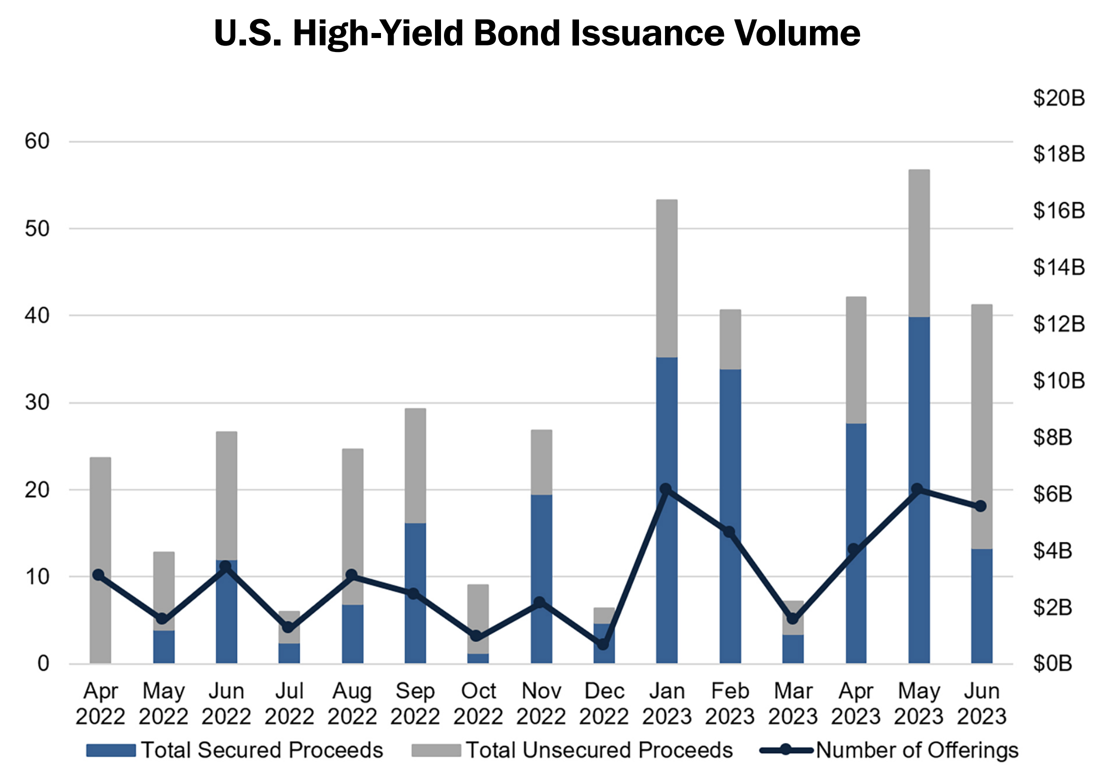
GENERAL TRENDS

Overall U.S. financing activity continued to rebound in the second quarter of 2023 as compared to the second half of 2022 in many markets. Activity in the U.S. high-yield bond market increased during the second quarter of 2023 relative to both the first quarter of 2023 and the second quarter of 2022, while activity in the U.S. investment-grade bond market increased relative to the second quarter of 2022 but decreased relative to the strong first quarter of 2023. Activity in the U.S. syndicated leveraged loan market (including the leveraged buyout market) picked up in the second quarter of 2023 as compared to the first quarter of 2023, but remained well below historical volumes. Activity in the direct lending market slowed in the second quarter of 2023 relative to both the first quarter of 2023 and the second quarter of 2022, but continued to outpace the syndicated loan market for both leveraged buyouts (“LBOs”) and non-LBOs. The U.S. equity markets remained far less active in the second quarter of 2023 as compared to the record-setting levels seen in 2021, but did see an uptick in total proceeds from each of IPOs and follow-on offerings as compared to recent quarters. The rally in the U.S. equity markets during the second quarter of 2023 has led to optimism that U.S. IPO activity will increase in upcoming quarters, particularly beginning in 2024.

BONDS

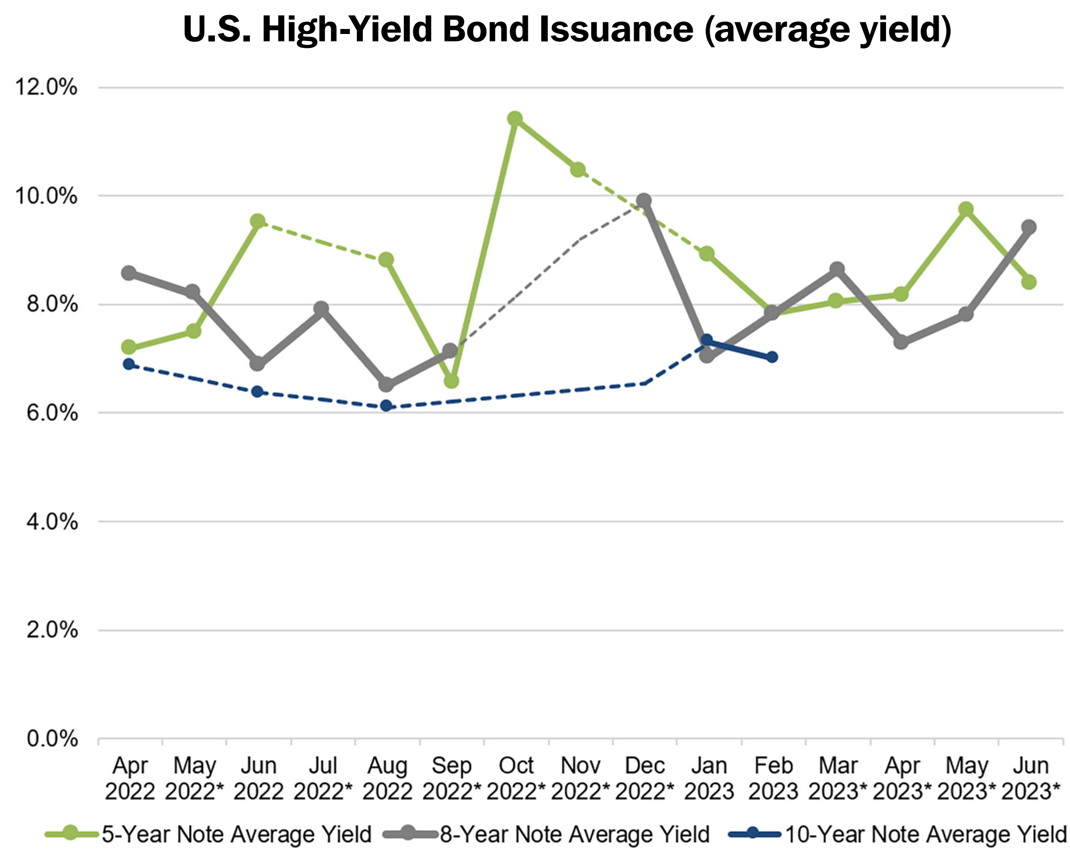
U.S. High-Yield Bonds

Total proceeds from U.S. high-yield bond issuances were $43.1B in the second quarter of 2023, up 33.2% as compared to the first quarter of 2023 ($32.4B) and up 121.7% as compared to the second quarter of 2022 ($19.4B). The volume of U.S. high-yield issuances increased from $2.2B in total proceeds in March to $13.0B in April and $17.4B in May, only to decrease to $12.7B in June. Total proceeds from secured bonds were $24.9B in the second quarter of 2023, up 408.3% as compared to $4.9B in the second quarter of 2022. The relative mix of secured bonds and unsecured bonds has trended towards secured bonds in 2023 as issuers are increasingly offering collateral as a means to offset in part elevated borrowing costs.



DATA SOURCE Leveraged Commentary & Data (LCD)

The average yield on high-yield 5-year notes issued in the second quarter of 2023 was 8.8%, as compared to 8.3% in the first quarter of 2023 and 8.1% in the second quarter of 2022. The average yield on high-yield 8-year notes issued in the second quarter of 2023 was 8.2%, as compared to 7.8% in the first quarter of 2023 and 7.9% in the second quarter of 2022. There were no high-yield 10-year notes issued in the second quarter of 2023.

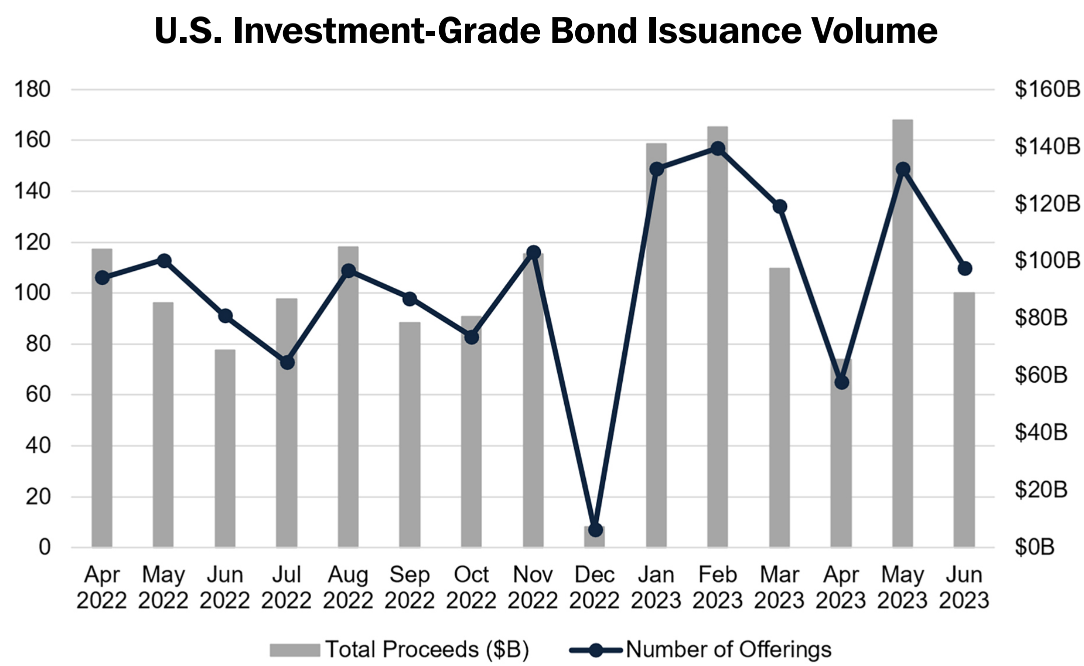


* No high-yield notes with a 5-year maturity were issued in July or December 2022. No high-yield bonds with an 8-year maturity were issued in October or November 2022. No high-yield bonds with a 10-year maturity were issued in May, July, September, October, November or December 2022, or March, April, May or June 2023.

DATA SOURCE Leveraged Commentary & Data (LCD)

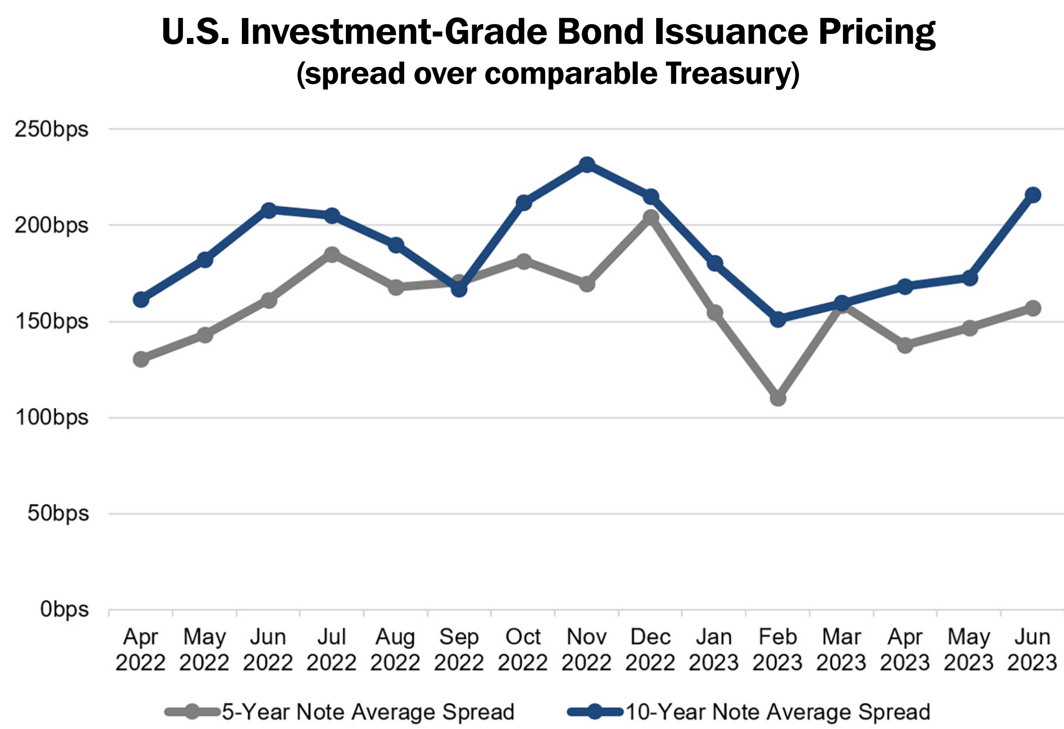
U.S. Investment-Grade Bonds

Total proceeds from U.S. investment-grade issuances were $303.9B in the second quarter of 2023, down 21.1% from $385.3B in the first quarter of 2023 and up 17.5% from $258.7B in the second quarter of 2022. The $149.3B in total proceeds in May increased 127.2% from $65.7B in total proceeds in April but decreased 40.5% to $88.9B in total proceeds in June.



DATA SOURCE Leveraged Commentary & Data (LCD)

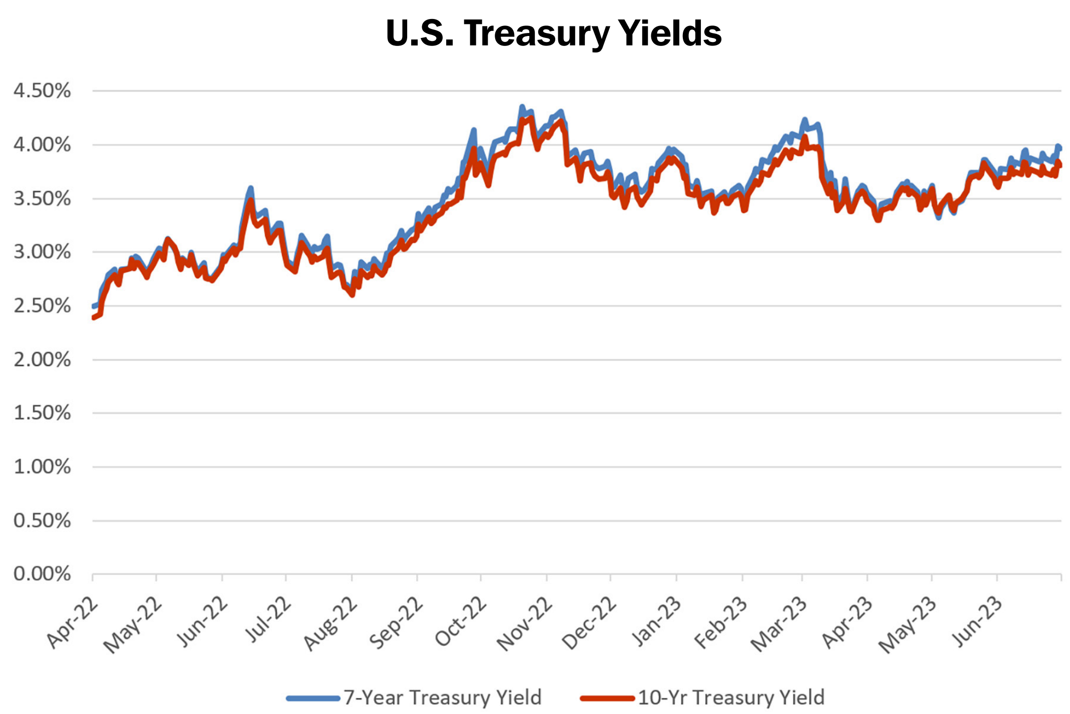
The average pricing spread (measured over the comparable Treasury) on U.S. issuances of 5-year investment-grade notes in the second quarter of 2023 increased 4.3% as compared to the average pricing spread for the first quarter of 2023 and increased 1.6% as compared to the average pricing spread for the second quarter of 2022. The average pricing spread (measured over the comparable Treasury) on U.S. issuances of 10-year investment-grade notes in the second quarter of 2023 increased 13.4% as compared to the average pricing spread for the first quarter of 2023 and increased 0.9% as compared to the average pricing spread for the second quarter of 2022.



DATA SOURCE Leveraged Commentary & Data (LCD)

U.S. Treasury 7-Year and 10-Year Yields

Since the Federal Reserve began aggressively increasing interest rates in March 2022, U.S. Treasury yields have significantly increased relative to the historically low rates in 2020. U.S. Treasury 7-year and 10-year yields in the second quarter of 2023 increased 93 bps and 83 bps, respectively, as compared to the end of the second quarter of 2022, representing an increase of 30.6% and 27.9%, respectively. The trend abated somewhat in the first quarter of 2023, when yields returned to levels comparable with the end of the third quarter of 2022. However, U.S. Treasury 7-year and 10-year yields again increased in the second quarter of 2023, up by 42 bps and 33 bps, respectively, as compared to the end of the first quarter, representing an increase of 11.8% and 9.5%, respectively.

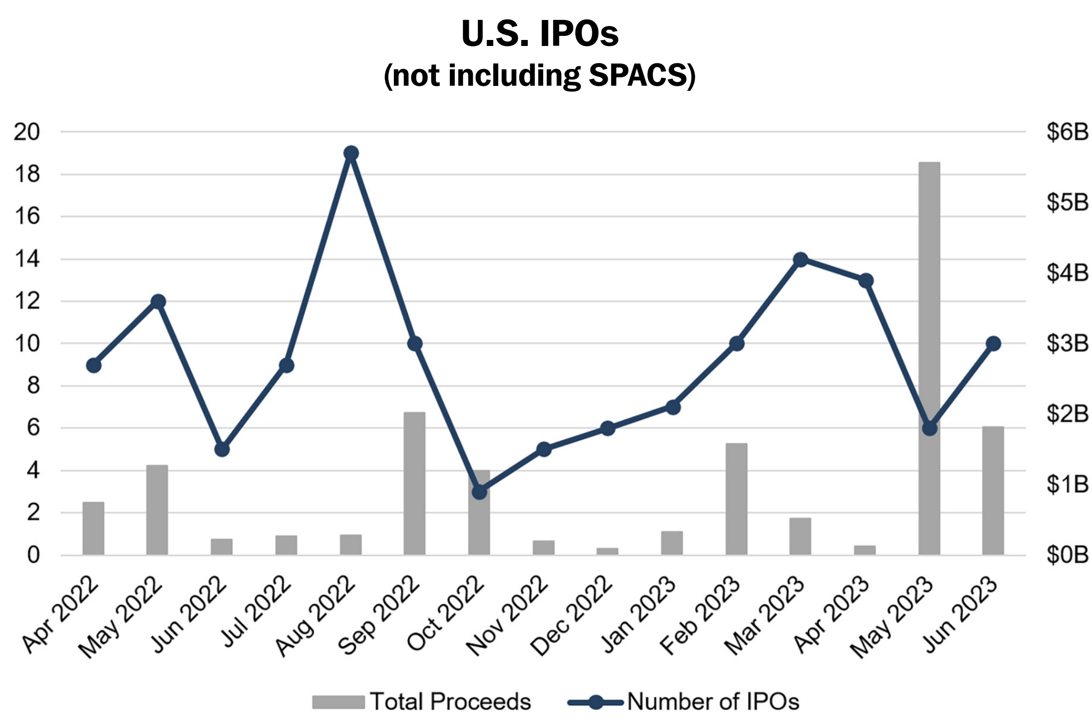


DATA SOURCE U.S. Department of the Treasury

EQUITY

U.S. IPOs

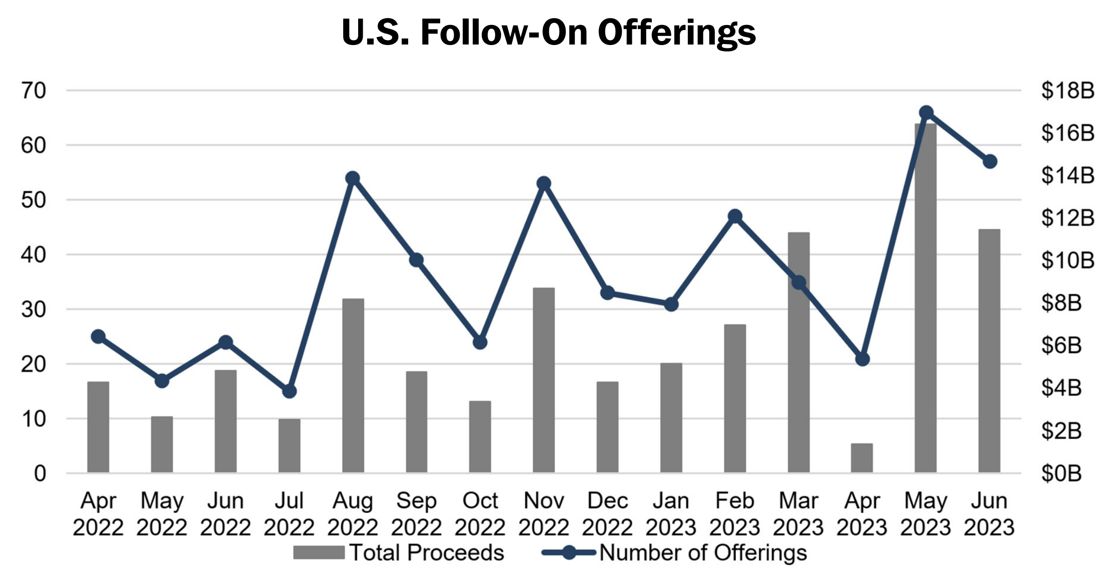
The U.S. IPO market in the second quarter of 2023 remained far less active compared to the record-setting levels seen in 2021, but rebounded most notably in May, which saw the highest total proceeds ($5.6B) for one month since January 2022. Of the $5.6B in total proceeds in May, $3.8B related to Johnson & Johnson's carve-out IPO of its consumer healthcare business, Kenvue Inc., which was the largest U.S. IPO since 2021 and the largest carveout IPO in two decades. The $7.5B in total proceeds from U.S. IPOs (not including SPACs) for the second quarter of 2023 was up 210.7% as compared to $2.4B in total proceeds in the first quarter of 2023 and up 236.1% as compared to $2.2B in total proceeds in the second quarter of 2022. Setting aside total proceeds from Kenvue's IPO, the $3.7B in total proceeds for the second quarter of 2023 was up 53.5% as compared to the first quarter of 2023 and up 66.0% as compared to the second quarter of 2022.



DATA SOURCE Refinitiv, an LSEG Business

U.S. Follow-On Offerings

Total proceeds from U.S. follow-on equity offerings declined to $1.4B in April, but rose to their highest mark since 2021 in May ($16.4B) and held steady in June ($11.5B). The $29.2B in total proceeds from U.S. follow-on equity offerings for the second quarter of 2023 was up 24.9% as compared to $23.4B in total proceeds in the first quarter of 2023 and up 149.1% as compared to $11.7B in total proceeds in the second quarter of 2022.

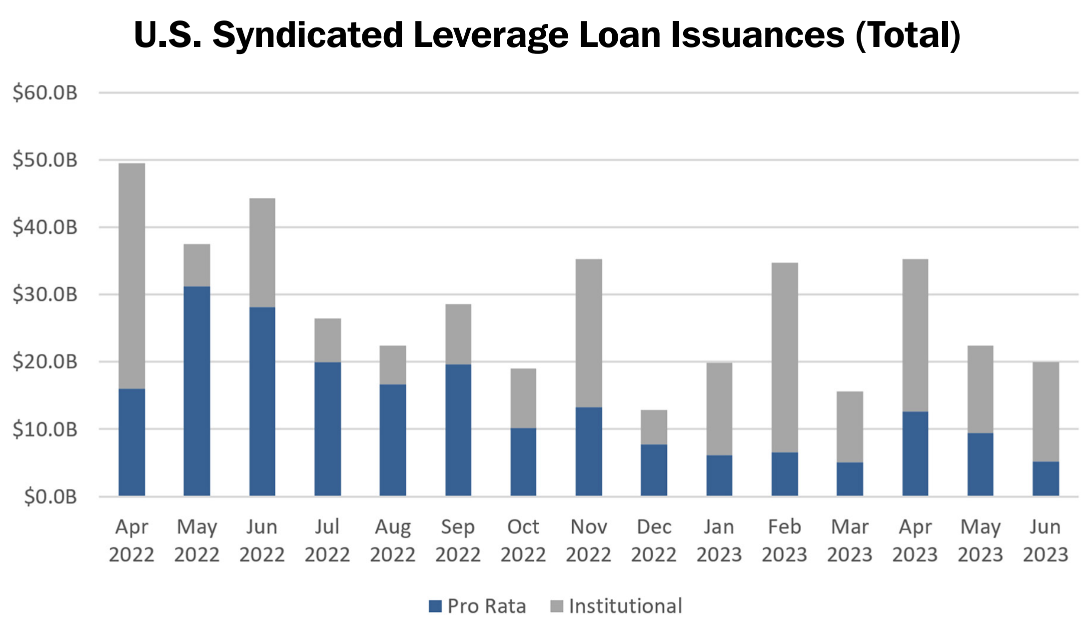


DATA SOURCE Refinitiv, an LSEG Business

LOANS

U.S. Syndicated Leveraged Loan Issuances

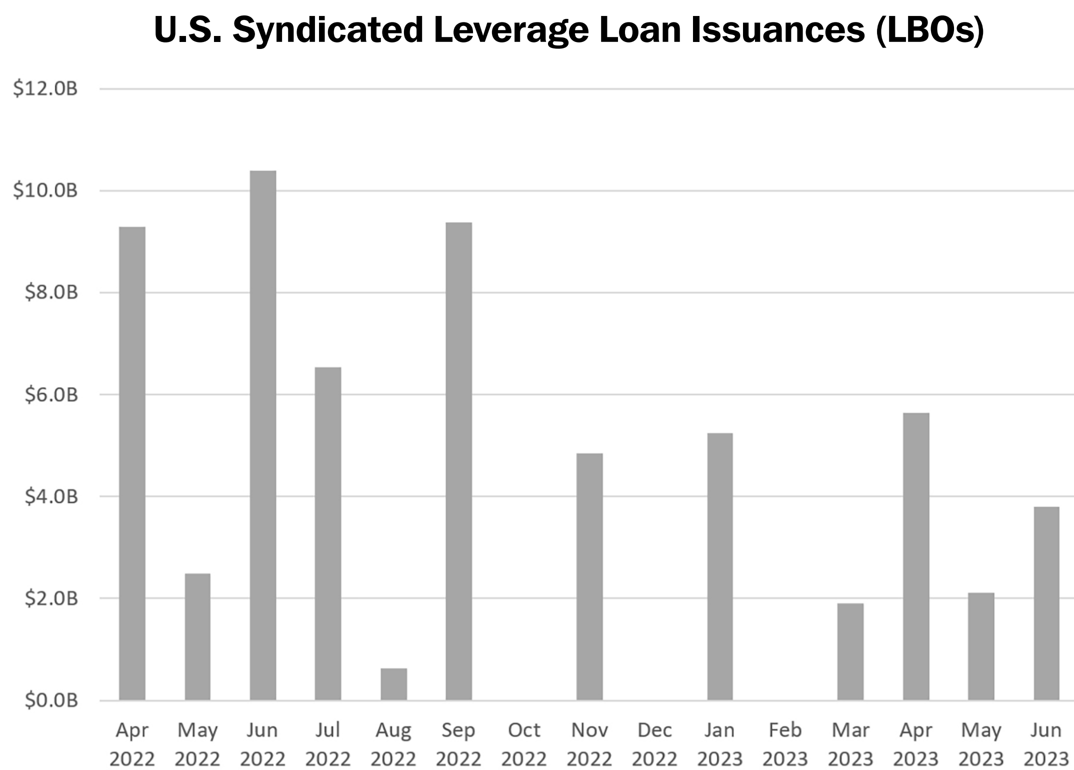
Activity in the U.S. syndicated leveraged loan market continued to increase slightly in the second quarter of 2023, with total volume up 11% as compared to the first quarter of 2023 (but down 41% as compared to the second quarter of 2022). Institutional term loan volume was $50.5B in the second quarter of 2023, down 4% compared to the first quarter of 2023 and down 10% as compared to the second quarter of 2022. By contrast, total pro rata loan volume increased to $27.3B in the second quarter of 2023, up from $17.9B in the first quarter of 2023, but down from $75.4B in the second quarter of 2022.



DATA SOURCE Leveraged Commentary & Data (LCD)

U.S. Syndicated LBO Loan Volume

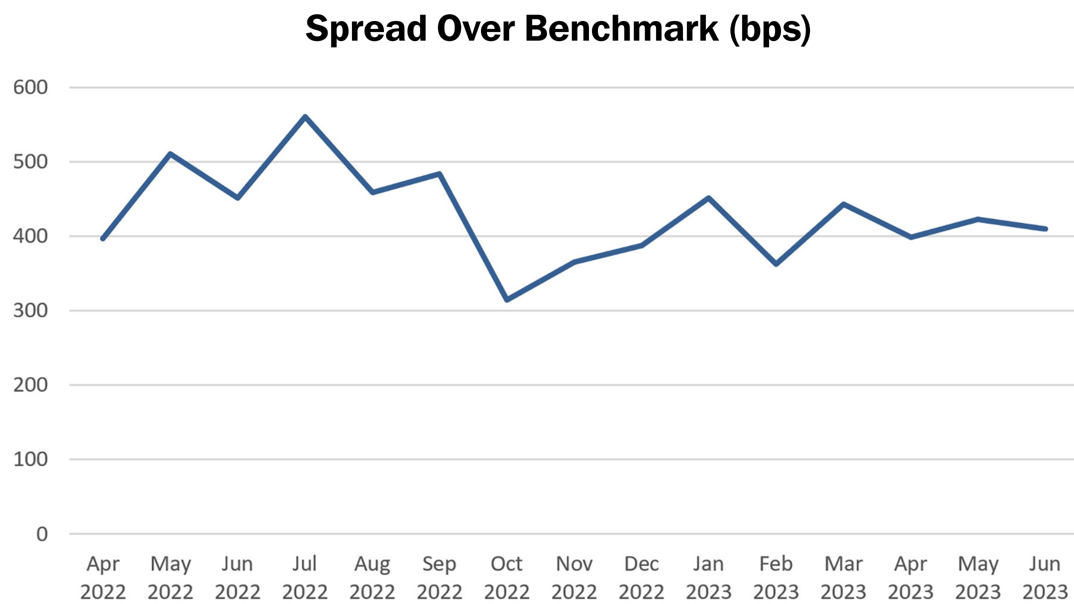
In the second quarter of 2023, there were $11.6B of U.S. syndicated LBO loans issued, an increase of 62% as compared to $7.1B in the first quarter of 2023 (but a decrease of 48% from $22.2B in the second quarter of 2022).



DATA SOURCE Leveraged Commentary & Data (LCD)

Primary Market Syndicated Institutional First-Lien Loan Spreads

Average spreads over benchmark rates on syndicated first lien institutional loans for large corporate leveraged loan transactions were 409 bps in the second quarter of 2023, which is consistent with the 410 bps average spread in the trailing twelve-month period.

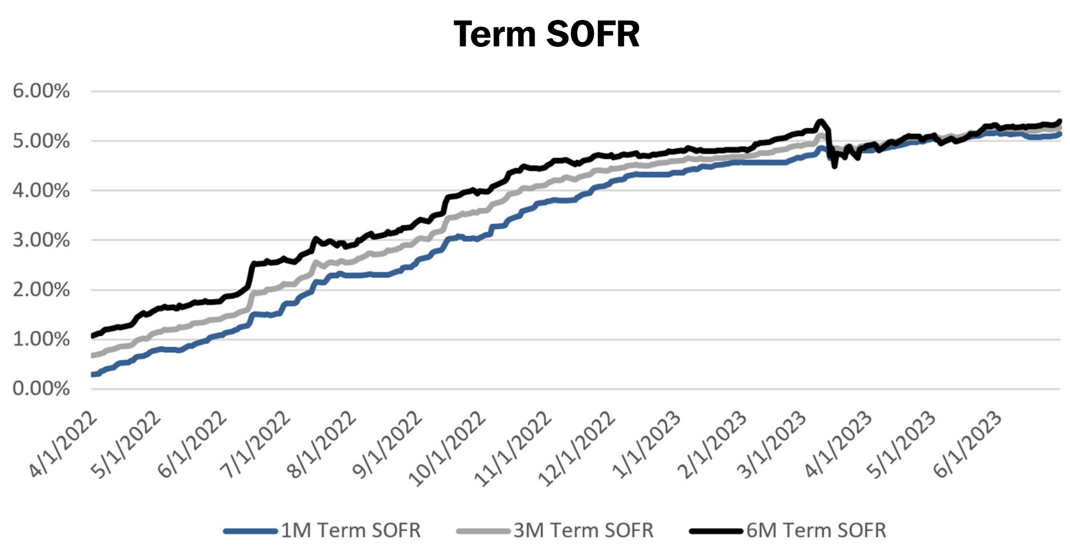


Note: Large corporate borrowers are defined as borrowers with an annual EBITDA of at least $50mm. Average spreads are dollar-weighted based on reported spreads, and do not reflect credit spread adjustments.

DATA SOURCE Leveraged Commentary & Data (LCD)

Term SOFR Reference Rate

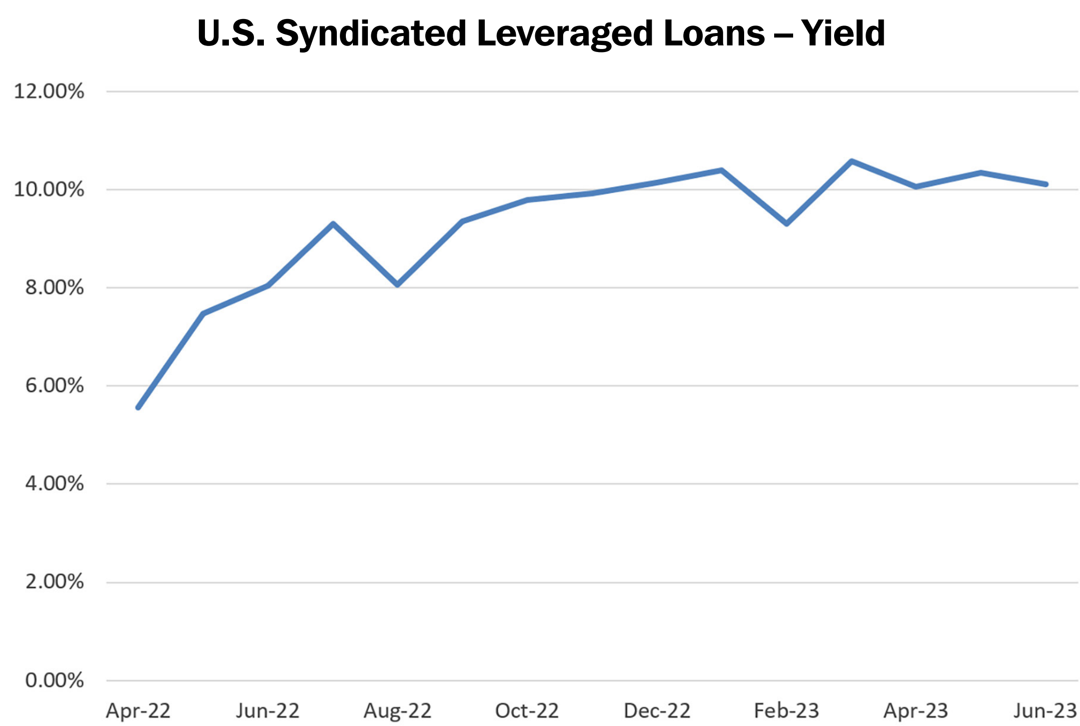
Term SOFR ended the second quarter of 2023 at 5.14%, 5.27% and 5.39% for the one-month, three-month and six-month tenors, respectively, for an increase of 34 bps, 36 bps and 49 bps, respectively, compared to the end of the first quarter of 2023. The Term SOFR curve has at times inverted, with the six-month tenor occasionally falling below Term SOFR for both the one-month and three-month tenors.



DATA SOURCE Bloomberg Finance L.P.

Primary Market Syndicated Institutional First-Lien Loan Yields

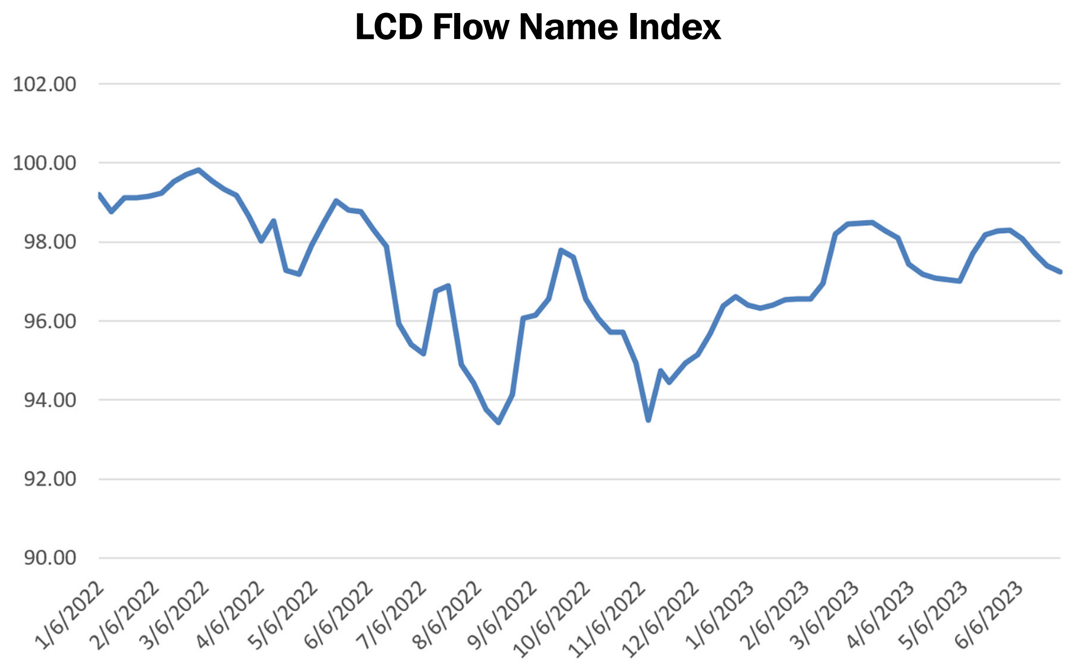
Yields on new-issue syndicated institutional first lien term loans continued to hold steady in the second quarter of 2023. The average yield dipped slightly to 10.06% in April 2023 and 10.12% in June 2023 for an increase of approximately 449 bps and 206 bps year-over-year, respectively, but rose slightly to 10.35% in May 2023 for an increase of approximately 286 bps year-over-year.



SOURCE Leveraged Commentary & Data (LCD)

Secondary Market Pricing

The average bid price of the LCD Flow Name Index as of the end of the second quarter of 2023 increased by 18 bps as compared to the end of the first quarter of 2023 and increased by 128 bps as compared to the end of the second quarter of 2022.



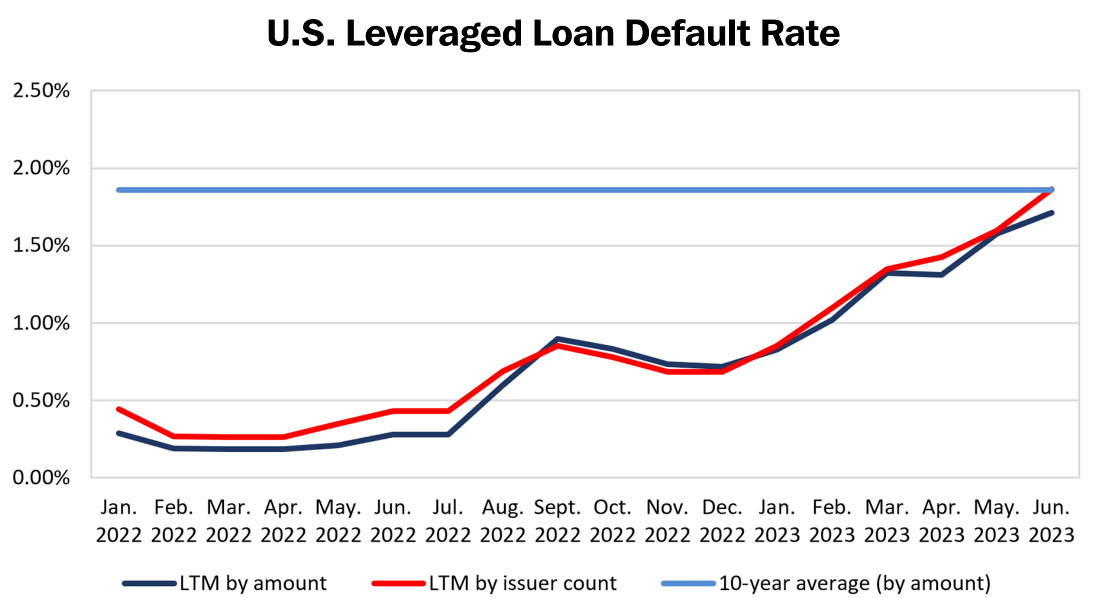
DATA SOURCE Leveraged Commentary & Data (LCD)[1]

1 The LCD Flow Name Index is a composite index of 15 institutional borrower names published on a twice-weekly basis by Leveraged Commentary & Data (LCD).

RESTRUCTURING

U.S. Leveraged Loan Default Rate

The default rate for U.S. leveraged loans increased significantly again in the second quarter of 2023. The default rate of the Morningstar LSTA US Leveraged Loan Index was 1.71% by amount and 1.86% by issuer count for the LTM period ending June 30, 2023, compared to 1.32% by amount and 1.35% by issuer count for the LTM period ending March 31, 2023. As reflected on the following chart, the upward trend has continued to rise towards the 10-year average default rate (by amount).

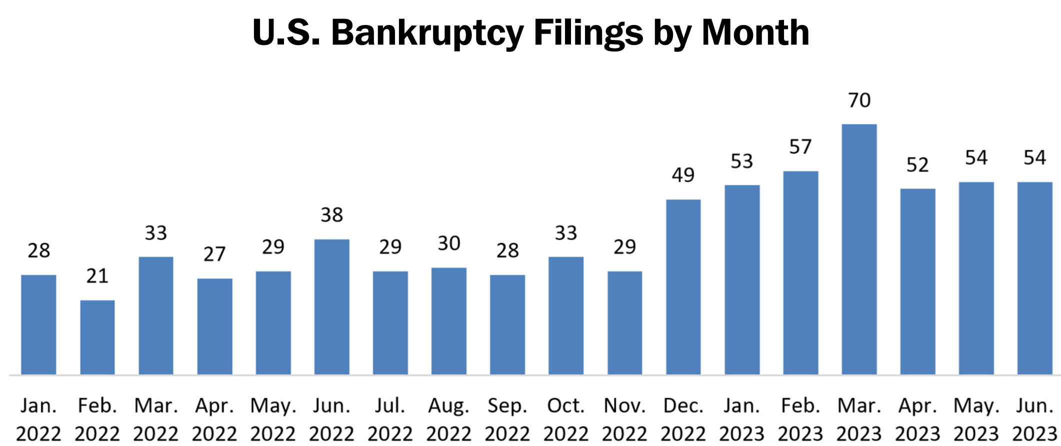


DATA SOURCE PitchBook | Leveraged Commentary & Data (LCD); Morningstar LSTA U.S. Leveraged Loan Index

U.S. Bankruptcy Filings

The number of U.S. bankruptcy filings remained elevated throughout the second quarter of 2023, leading to the highest level of U.S. bankruptcy filings for the first half of a year since 2010.

The consumer discretionary and industrial sectors had the most filings in the second quarter, with four of the largest bankruptcies of 2023 thus far filed in June.



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

Regulatory Updates

SEC Amends Rules Requiring Disclosures of Issuer Share Repurchase and Rule 10b5-1 Plans

On May 3, 2023, the SEC adopted final rules to add or update a number of disclosure requirements relating to an issuer's repurchase of its registered equity securities. The final rules replace the current requirements in Item 703 of Regulation S-K that domestic U.S. issuers disclose in their periodic reports repurchase data for the quarter on a monthly basis with extensive new quantitative and qualitative disclosures about issuer repurchases, including:

- daily quantitative data about the issuer's repurchases during the most recently ended quarter;
- narrative disclosure about the issuer's share repurchase programs, including the rationales behind, and objectives of, any share repurchases and the process or criteria used in determining the amount of repurchases; and
- disclosure regarding an issuer's adoption or termination of Rule 10b5-1 trading plans.

For domestic U.S. issuers, these disclosures will appear in quarterly reports on Form 10-Q or, for the fourth quarter, annual reports on Form 10-K. The final rules will also require foreign private issuers, other than Canadian issuers that report pursuant to the Multijurisdictional Disclosure System, to provide similar quarterly disclosures in a report on new Form F-SR, which will be due within 45 days after the end of each fiscal quarter. Domestic U.S. issuers will be required to comply with the new disclosure requirements, including mandatory tagging using Inline XBRL, in their periodic reports on Forms 10-K and 10-Q beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023.

As discussed in the Q4 2022 edition of this newsletter, the SEC adopted amendments to Rule 10b5-1 under the Securities Exchange Act of 1934 (the "Exchange Act") and imposed new disclosure requirements under Regulation S-K. The Rule 10b5-1 amendments became effective on February 27, 2023. Compliance with the new Item 408 under Regulation S-K, however, will be phased in gradually. For example, under Item 408(a) of Regulation S-K, companies other than smaller reporting companies are required to disclose the adoption, modification and termination of Rule 10b5-1 plans and other trading arrangements on their Form 10-Q starting from the first full fiscal quarter that begins on or after April 1, 2023. For companies with calendar year end, this means Item 408(a) disclosure requirements are applicable to Form 10-Q quarterly reports as early as the quarter ended June 30, 2023.

As guidance for the Rule 10b5-1 amendments, the SEC's Division of Corporation Finance issued three Compliance and Disclosure Interpretations ("CDIs") on May 25, 2023. The new CDIs outline the transition timing for quarterly and annual disclosures, confirm the requirement for companies to provide disclosures of Rule 10b5-1 plans in proxy statements at the first annual meeting for director elections and clarify the cooling-off period requirements for individuals operating multiple Rule 10b5-1 plans. The CDIs are available here.

In response to the amendments, on May 12, 2023, the U.S. Chamber of Commerce sued the SEC to challenge the recently adopted disclosure rules for share repurchases. The complaint makes claims based on the First Amendment and the Administrative Procedure Act, alleging that the rules compel speech on important business decisions to the detriment of investors. The case is currently pending in the U.S. Court of Appeals for the Fifth Circuit.

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SEC Removes References to Credit Ratings from Regulation M

On June 7, 2023, the SEC announced that it had adopted amendments to remove and replace references to credit ratings from certain exceptions to Rules 101 and 102 of Regulation M, and substitute in their place new exceptions based on alternative standards of creditworthiness. Rules 101 and 102 restrict distribution participants, securityholders and their respective affiliates from taking certain actions regarding a distribution of "covered securities" within a specified restricted period. Prior to the amendments, nonconvertible debt securities, nonconvertible preferred securities and asset-backed securities that had received an investment-grade rating from at least one nationally recognized statistical rating organization were carved out of the definition of "covered security". The exceptions to Rules 101 and 102 for investment-grade securities are commonly reviewed in the case of (i) re-openings that offer additional securities identical to certain outstanding securities and (ii) sticky offerings where an underwriter is unable to sell all of the offered securities due to a lack of demand.

Investment-grade securities will now be subject to the restrictions in Rules 101 and 102, unless qualifying for another exception. The SEC created new exceptions for nonconvertible debt and preferred securities of issuers with a probability of default below 0.055%, derived from a structural credit risk model, as determined by the lead manager of the distribution, as well as exceptions for asset-backed securities that are offered pursuant to an effective shelf registration statement on Form SF-3. These amendments will become effective 60 days after publication in the Federal Register.

SEC to Require Additional Disclosure from Private Funds

On May 3, 2023, the SEC voted to approve amendments to Form PF, a confidential form filed by certain SEC-registered investment advisors to private funds. Citing the growing interconnection of private funds with the capital markets, as well as "recent market events", the SEC heightened reporting requirements for private fund advisors that cross certain thresholds of assets under management ("AUM"), with information to be reported both to the SEC and to the Financial Stability Oversight Council ("FSOC"). First, large hedge fund advisors (defined to be those with at least $1.5 billion in AUM), upon the occurrence of certain trigger events, must file a current report as soon as practicable, but no later than 72 hours after the event occurs. On the other hand, private equity fund advisors (defined to be those with at least $150 million in AUM) must file event reports upon the occurrence of certain trigger events within 60 days of the end of each fiscal quarter. Examples of trigger events include extraordinary losses, certain margin and default events, terminations of or restrictions on prime broker relationships and certain events related to withdrawal and redemption requests. Finally, large private equity fund advisors (defined to be those with at least $2 billion in AUM) will have to report additional information regarding their investment strategies and potentially market-moving events to the FSOC. All of this information will be submitted confidentially to the SEC and to the FSOC, to aid in their assessment of systemic risk and market trends. These amendments will become effective six months after publication of the adopting release in the Federal Register.

Litigation Developments

Supreme Court Holds that Federal District Courts May Hear Structural Constitutional Challenges to Ongoing SEC and FTC Enforcement Proceedings

On April 14, 2023, the Supreme Court of the United States unanimously held in a consolidated opinion in *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran* that district courts retain federal-question jurisdiction over challenges to the constitutionality of SEC and Federal Trade Commission ("FTC") administrative proceedings when an enforcement action from either agency is pending. In an opinion written by Justice Kagan, the Supreme Court held that the Exchange Act and the Federal Trade Commission Act did not strip district courts of the jurisdiction to hear collateral arguments on the constitutionality of the respective administrative proceedings. Both challenges in *Axon* and *Cochran* were not specific to any particular administrative law judge or agency decision, but instead challenged the constitutionality of "the structure or very existence of [the agency]" or administrative adjudication process. The outcome of this case means that future potential litigants will not need to wait until the appeal of an adverse SEC or FTC decision to raise such arguments in a federal district court.

Supreme Court Limits Section 11 Liability in Slack Direct Listing Case

On June 1, 2023, the Supreme Court vacated a decision by the U.S. Court of Appeals for the Ninth Circuit in *Slack Technologies, LLC v. Pirani*, resolving a circuit split on the question of standing for investors bringing a claim under Section 11 of the Securities Act of 1933, as amended (the "Securities Act") in connection with a direct listing. The Supreme Court's opinion practically eliminates Section 11 liability for companies going public through a direct listing, requiring plaintiffs to plead and prove that the securities at issue are traceable to the particular registration statement alleged to contain material misstatements or misleading omissions.

Since 2018, the New York Stock Exchange (the "NYSE") and the Nasdaq Stock Market (the "Nasdaq") have allowed companies to go public through a direct listing in lieu of a traditional underwritten IPO. In a traditional underwritten IPO, existing shareholders typically cannot trade their unregistered shares for a period of time after the IPO, and so all publicly traded shares are easily traceable to the registered offering for some period of time after the IPO. In contrast, in a direct listing, selling stockholders (and, in the case of a primary direct listing, the issuer) can sell shares registered as part of the direct listing concurrently with sales by selling stockholders of shares that were previously acquired in private placements and that can be publicly resold pursuant to Rule 144 or another available registration exemption, making tracing securities to a particular registration statement challenging.

In 2019, Slack went public through a direct listing on the NYSE, in which selling stockholders offered 118 million registered shares and 165 million unregistered shares previously acquired in private placements. When Slack's stock price dropped following the direct listing, Fiyyaz Pirani filed a class-action lawsuit under Sections 11 and 12 of the Securities Act, alleging that the shares he purchased were issued pursuant to a materially misleading registration statement. Arguing that Pirani could not trace the purchased shares to its registration statement, Slack moved for a motion to dismiss for failure to state a claim. The district court denied the motion to dismiss but granted Slack's motion for interlocutory appeal. As discussed in the Q4 2022 edition of this newsletter, the Supreme Court granted certiorari to resolve a circuit split following the Ninth Circuit's affirmation of the district court's decision to deny Slack's motion to dismiss.

Historically, most lower courts have held that Section 11 liability attaches only to shares that are traceable to a particular registration statement. Under Section 11, issuers are subject to strict liability for any material misstatements or misleading omissions in their registration statement. As such, the issue of standing is particularly significant in determining Section 11 liability and has been strictly construed. While the Supreme Court's ruling in *Slack v. Pirani* does not completely rule out the possibility of Section 11 liability for companies going public through a direct listing, this decision implements a very high bar on the question of standing, requiring securities to be traced to a registration statement.

While Pirani initially filed the class-action lawsuit under both Sections 11 and 12 of the Securities Act, the Supreme Court declined to consider the merits of the Section 12 claim and vacated the Ninth Circuit's judgment on this claim for reconsideration, noting that the Ninth Circuit did not distinguish between the two provisions in its 2021 ruling.

Kirschner v. JPMorgan Chase Bank, N.A.

As discussed in the Q1 2023 edition of this newsletter, the United States Court of Appeals for the Second Circuit (the "2nd Circuit") continued to adjudicate the *Kirschner v. JPMorgan Chase Bank* case, in which the court will decide whether the syndicated term loans at issue are securities and are therefore subject to state and federal securities laws and regulations—a decision that could have dramatic ramifications on the $1.4 trillion syndicated loan market. After soliciting the SEC's views on the issue, the 2nd Circuit granted the SEC multiple extensions to file a response to the 2nd Circuit's request. However, on July 18, 2023, the SEC notified the 2nd Circuit that it was not in a position to file a brief on the issue, and as a result, the litigation will proceed in its normal course without feedback from the SEC.

Restructuring Updates

The Need for Financial Distress: In re Aearo Technologies LLC

On June 9, 2023, the U.S. Bankruptcy Court for the Southern District of Indiana dismissed the bankruptcy of Aearo Technologies LLC. Previously, in July 2022, Aearo Technologies, a wholly owned subsidiary of 3M that holds liabilities related to 3M's Head, Eye, Ear, Hearing and Face Safety business, and six affiliated debtors each filed a voluntary petition for Chapter 11 relief with the U.S. Bankruptcy Court for the Southern District of Indiana. At the time of filing, Aearo also asserted its intent to create a $1 billion bankruptcy trust to pay out damages claims relating to hearing loss in military veterans. Judge Jeffrey Graham of the U.S. Bankruptcy Court for the Southern District of Indiana quickly rejected Aearo's position and on August 26, 2022, the Aearo debtors' initial request for a preliminary injunction to extend the automatic stay protections offered in bankruptcy to 3M, their solvent, non-debtor parent company, was denied. As a result, lawsuits were able to continue against 3M in ongoing multi-district litigation ("MDL") in the U.S. District Court for the Northern District of Florida.

Judge Graham highlighted how the debtor, Aearo in this case, must demonstrate "cause" pursuant to §1112(b) of the Bankruptcy Code in order to receive the protections of the Bankruptcy Code, which in turn hinges on a finding of "good faith". A primary test of good faith is whether the bankruptcy serves a "valid reorganizational purpose", of which the need for "relief" is "central to that inquiry". Much of the reasoning behind the bankruptcy court's dismissal of Aearo's bankruptcy relied on a recent instructive decision by the Third Circuit in *In re LTL Management LLC* ("*LTL*"), in which the court held that "financial distress" or "need" is a requirement to establish a finding of good faith. The court concluded that Aearo did not need to file for bankruptcy, largely because of a funding arrangement it had entered into with 3M, through which 3M would fully cover all the costs related to these liabilities without any repayment obligations for Aearo. 3M was also funding and managing the MDL on behalf of Aearo, so Aearo could not claim management distraction as a basis for relief. The Aearo debtors have appealed directly to the U.S. Court of Appeals for the Seventh Circuit and Judge Graham *sua sponte* certified his decision for direct review, but the court of appeals still must determine whether to accept a direct appeal.

Based on the recent Third Circuit decision in LTL and commentary by the Seventh Circuit at prior oral arguments, it appears likely that the decision of the bankruptcy court will be affirmed. This dismissal will need to be taken into account by parent companies seeking to isolate liabilities by putting a subsidiary in bankruptcy where the costs related to those claims will be funded in full by the parent company. Though the standard is not entirely black and white, and a debtor need not be insolvent in order to seek Chapter 11 relief, it is clear that a funding agreement that provides complete indemnification by a solvent parent may eliminate the financial distress or need necessary to finding that a bankruptcy petition was filed in "good faith".

Uncertainty Surrounding §363 Sales: Mall of America Mall Holdings LLC v. Transform Holdco LLC et al.

On April 19, 2023, Justice Jackson delivered an opinion on behalf of a unanimous Supreme Court of the United States ruling in favor of landlord MOAC Mall Holdings LLC. As further described below, the Court ruled that the district court in question had jurisdiction to review Mall of America's challenge of Transform's lease transfer and that §363(m) of the United States Bankruptcy Code is not a jurisdictional provision that would deprive a district court from hearing challenges to a completed §363 sale, even if the challenger had not obtained a stay pending appeal.

This case arises out of Sears's 2018 bankruptcy, through which it sold substantially all of its assets to Transform Holdco LLC in a sale approved by the bankruptcy court under §363(b). One of these assets was the right for Transform to designate the party to whom a lease between Sears and MOAC would be assigned. Transform elected to designate its wholly owned subsidiary as the transferee of the MOAC lease, and the bankruptcy court approved the assignment despite objections made by MOAC on the grounds that Transform could not provide adequate assurance of future performance as required pursuant to §365 of the Code.

In the case of a sale approved under §363(b) of the Code, interested parties may file an objection to such a sale, and may appeal an authorization by the court over their objection. But §363(m) prevents even a successful appeal from impacting the validity of the sale, once approved. MOAC, concerned that §363(m) would limit or bar an appeal of the assignment order, sought a stay which the bankruptcy court denied on the basis of Transform's assurance that they would not raise a §363(m) argument against appeal by MOAC. MOAC appealed the assignment order to the U.S. District Court for S.D.N.Y., which sided with MOAC and vacated the bankruptcy court's prior approval of the lease assignment. However, after losing on the merits, Transform went against its prior assurance to the bankruptcy court and filed for a rehearing in front of the district court, arguing that §363(m) deprived the district court of jurisdiction to review the assignment. Despite its criticism of Transform's conduct, the district court determined that Second Circuit precedent required the treatment of §363(m) as jurisdictional and dismissed the appeal, which the Second Circuit affirmed.

In overturning the Second Circuit's ruling, the Supreme Court opinion focused its holding on matters of textual statutory and judicial interpretation in determining that §363(m) is not a jurisdictional provision as a result of lack of Congressional intent to place "a limit on judicial power, rather than a mere restriction on the effects of a valid exercise of that power when a party successfully appeals a covered authorization".

The implications of this ruling are probably relatively limited as a practical matter. Bankruptcy sale orders still provide significant protections to buyers in §363 sales, and the statutory and structural foundations for the finality of bankruptcy sale orders remain firm. While appellate courts will have jurisdiction to hear sale appeals regardless of whether a stay pending appeal is obtained, the Bankruptcy Code itself still provides that the validity of the sale to a good faith purchaser cannot be overturned on appeal. Parties who wish to appeal a §363 sale should also still seek obtain a stay pending appeal to avoid waiver of their rights, but the failure to obtain a stay should not act as a complete jurisdictional bar to an objecting party's appellate rights. Appellate courts will need to fashion remedies without undoing the sale itself.

Other Developments

Update on Silicon Valley Bank and Signature Bank and the Failure of First Republic

As discussed in the Q1 2023 newsletter, in March 2023, after Silicon Valley Bank ("SVB") and Signature Bank ("Signature") were placed into receivership and the Federal Deposit Insurance Corporation (the "FDIC") established "bridge banks" for SVB and for Signature, the FDIC published a Financial Institution Letter providing guidance on the treatment of contracts that are transferred to such bridge banks, establishing that contractual obligations continue after such contracts are transferred.

In the weeks following the failures of SVB and Signature, the FDIC entered into purchase and assumption agreements for substantially all deposits and certain loan portfolios of the two bridge banks. SVB's assets were purchased by First-Citizens Bank and Trust Company, and Signature's assets were purchased by New York Community Bancorp's Flagstar Bank, N.A.

On May 1, 2023, First Republic Bank ("First Republic") was also placed into receivership. The FDIC sold First Republic's deposits and most of its assets to JPMorgan Chase Bank, N.A. ("JPMCB") in a negotiated transaction. In contrast to the recent failures of SVB and Signature, First Republic did not require the establishment of a "bridge bank" because of the immediate sale to JPMCB.

Following the failures of SVB, Signature and First Republic, regulators have increased scrutiny of the banking sector. For example, the Federal Reserve intends to: (a) ensure that regulatory and supervisory standards intensify quickly as firms grow in size or complexity; (b) build a dedicated novel activity supervisory group to focus on the risks of novel activities (such as fintech or crypto); (c) increase capital and liquidity requirements for firms with inadequate risk controls; and (d) apply stronger standards to a broader set of firms regarding interest rate, liquidity and capital risks. It should be noted that changes to the regulatory framework will not be effective for several years because of the standard notice and comment rulemaking process and will be accompanied by an appropriate phase-in, but supervisory changes will be implemented more quickly.

SEC Issues $279 Million Whistleblower Award

On May 5, 2023, the SEC announced that it had issued the largest whistleblower award in its history, to an undisclosed person who assisted the SEC in successful enforcement actions. At $279 million, the award was more than double the size of the previously largest award of

$114 million, granted in October 2020. The whistleblower's cooperation involved three related enforcement actions, which were brought in federal district court and resulted in the disgorgement of an amount that the SEC did not disclose. The SEC order granting the award was heavily redacted, concealing details on the enforcement actions in order to protect the whistleblower's identity.

SEC Settles First Enforcement Action Brought by Climate and ESG Task Force

On March 28, 2023, the SEC announced that it had settled an enforcement action in the U.S. District Court for the Eastern District of New York against Vale, S.A., an SEC-registered and NYSE-listed Brazilian mining company. The action was the first brought by the Climate and ESG Task Force of the Division of Enforcement, which the SEC established in March 2021. The SEC's April 2022 complaint alleged that Vale knowingly made false disclosures regarding the safety of its Brumadinho dam, whose 2019 collapse resulted in the death of 270 people. With the knowledge that the dam did not meet international safety standards, the SEC alleged, Vale fraudulently stated otherwise in SEC filings, webinars, sustainability reports and other investor materials. The dam collapse resulted in significant damage to Vale's market capitalization and thus to the value of its equity securities and its credit rating. Under the terms of the settlement, Vale agreed to pay a $25 million civil penalty and to disgorge $30.9 million, including prejudgment interest.

SEC Reopens Comment Period for Proposed Amendments to Modernize Beneficial Ownership Reporting

On April 28, 2023, the SEC reopened the comment period for proposed amendments to modernize the rules governing beneficial ownership reporting. 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. Additionally, the staff of the SEC's Division of Economic and Risk Analysis released a memorandum that provides supplemental data and analysis related to the proposed amendments' economic effects. The public comment period ended on June 27, 2023.

SEC Spring 2023 Regulatory Agenda

On June 23, 2023, the U.S. Office of Information and Regulatory Affairs released the Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions, which included a list of regulatory actions the SEC plans to take in the near term and long term. Thirty-seven proposed rules are indicated as intended to be finalized by October 2023, including proposals related to climate change disclosure, cybersecurity, shareholder proposals under Rule 14a-8, modernization of beneficial ownership reporting and restrictions on special purpose acquisition companies. Additionally, the agenda suggests the SEC may propose 18 new rules, including on topics such as amendments to disclosure rules regarding corporate board diversity and human capital management and amendments to the "held of record" definition for purposes of Section 12(g) of the Exchange Act.

PCAOB Proposes Amendments to PCAOB Auditing Standards Related to a Company's Noncompliance with Laws and Regulations

On June 6, 2023, the Public Company Accounting Oversight Board ("PCAOB") proposed amendments to its auditing standards related to the auditor's responsibility for considering a company's noncompliance with laws and regulations, including fraud, in an audit. The proposed amendments to the auditing standards would enhance auditor obligations in identifying, evaluating and communicating with respect to noncompliance with laws. Among other things, the proposed amendments would establish new requirements for auditors to perform procedures to identify laws and regulations with which noncompliance could reasonably have a material effect on the financial statements. The proposed amendments would also change the auditor's responsibility to communicate potential noncompliance, requiring the auditor to communicate to the appropriate level of management, as well as the audit committee, as soon as they are made aware that noncompliance with laws or regulations may have occurred, prior to any evaluation by the auditor of such noncompliance. If adopted as proposed, the amendments would significantly expand the auditors' responsibility for evaluating legal matters, likely increasing audit costs. Comments on the proposal are due by August 7, 2023.

NYSE and Nasdaq Update

On June 9, 2023, the SEC approved amendments proposed by the NYSE and Nasdaq to their listing standards to implement the clawback requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendments provide that:

a. if an accounting restatement is required, any erroneously awarded incentive-based compensation received on or after October 2, 2023 must be clawed back; and

b. listed companies must adopt a compliant clawback policy no later than December 1, 2023.

The NYSE amendments also include technical updates to the delisting process, including that:

1. non-compliance with the listing standards (not limited to failure to adopt a compliant clawback policy) may be subject to a cure period; and

2. NYSE's requirement to initiate suspension and delisting procedures will commence on the first anniversary after NYSE sends a delinquency notice to such listed company, rather than the first anniversary of the compliance deadline.

The Nasdaq amendments do not include any analogous technical updates.

New Bill Calls for SPAC Transparency

Senator John Kennedy of Louisiana introduced the Sponsor Promote and Compensation Act ("SPAC Act") on May 8, 2023 to require more disclosures in SPAC transactions for the protection of retail investors. The bill would require enhanced disclosures regarding the impact of founders' shares on the value of retail investors' shares in IPO and de-SPAC filings. If passed, this bill could be significant for SPAC sponsors since it mandates greater transparency on fee arrangements and founder contributions. This may render SPAC transactions more cumbersome to conduct, and, together with the SEC's proposal for new SPAC regulations announced in March 2022, lead to further decline in SPAC activity.

Updates on LIBOR Transition

LIBOR CESSATION, SYNTHETIC LIBOR & GUIDANCE ON EURIBOR:

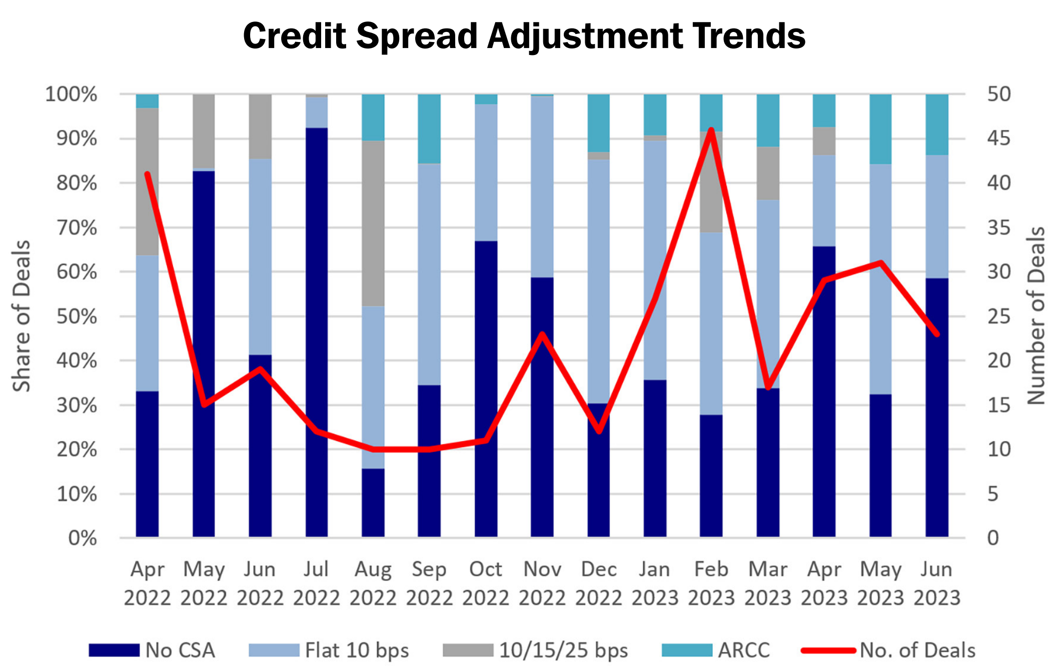
On July 3, 2023, the UK's Financial Conduct Authority ("FCA") officially announced the end of LIBOR publication as of June 30, 2023. Overnight and 12-month LIBOR settings permanently ceased, while one-, three- and six-month LIBOR settings will continue to be published using a synthetic methodology until September 30, 2024 (as discussed in the Q1 2023 newsletter, "synthetic LIBOR"). Notwithstanding the availability of synthetic LIBOR, these settings are now permanently unrepresentative of the underlying markets they previously sought to measure, and any new use of synthetic LIBOR is prohibited under the Benchmarks Regulation.

Relatedly, although there are no current plans to terminate publication of EURIBOR, on May 4, 2023, European regulators reiterated their guidance from May 2021 for firms to ensure that their EURIBOR-based contracts include robust fallbacks in case EURIBOR were to cease publication.

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 second quarter of 2023. According to data from Leveraged Commentary & Data (through June 30, 2023), slightly over half (51.6%) of new institutional deals on a dollar-weighted basis in the second quarter of 2023 had no CSA, an increase as compared to the first quarter of 2023 (30.7%), but a decrease as compared to the fourth quarter of 2022 (57.9%).

Dynamic credit spread adjustment tools are also being explored. For example, the USD Across-the-Curve Credit Spread Index (AXI), represents a forward-looking dynamic credit sensitive spread that can be used in conjunction with SOFR to form a credit-sensitive interest rate benchmark.



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

Crypto Updates

Continued Regulatory Focus on Digital Assets

As part of its efforts to regulate the crypto industry, the SEC initiated a series of enforcement actions in the second quarter of 2023 against major crypto exchanges that facilitate sales of allegedly unregistered securities. On June 5, 2023, the SEC filed a lawsuit against Binance Holding Ltd. ("Binance"), the operator of the world's largest crypto exchange platform, in the U.S. District Court for the District of Columbia. One day after suing Binance, the SEC filed a second lawsuit against Coinbase, Inc. ("Coinbase"), the operator of the largest crypto trading platform in the United States.

The SEC's complaint against Binance alleges that Binance and its founder, Changpeng Zhao, misappropriated customer funds, engaged in manipulative trading, illegally traded in cryptocurrencies that are securities and operated the platform as a broker, exchange and clearing agency without registering any of these functions with the SEC. Similar to its complaint against Binance, the SEC charges Coinbase with operating an illegal exchange, broker and clearing agency without registering any of these functions with the agency, in violation of the Exchange Act. It also alleges that Coinbase has engaged in the offer and sale of unregistered crypto assets that are securities and failed to register its staking-as-a-service program as a securities offering, in violation of the Securities Act.

In addition to lawsuits against crypto exchange platforms, the SEC and the government have also advanced insider trading cases against individuals trading in digital assets. For example, on May 3, 2023, a former manager of Ozone Networks, Inc. d/b/a OpenSea ("OpenSea"), Nathaniel Chastain, was convicted of wire fraud and money laundering for trading non-fungible tokens ("NFTs") based on insider information. Instead of bringing a traditional securities fraud case for insider trading, federal prosecutors charged Chastain with wire fraud and money laundering, which allowed the case to proceed without addressing the issue of whether the NFTs at issue are classified as securities. In addition, on May 20, 2023, the SEC announced the settlement of its first crypto insider trading case against a former Coinbase product manager, Ishan Wahi, and his brother, Nikhil Wahi. In the complaint, the SEC alleged that the Wahi brothers tipped and traded securities based on material nonpublic information from Coinbase regarding tokens that would soon list on the platform. In public statements, the agency made clear that they intend to apply insider trading laws to crypto assets just as they are applied to traditional forms of securities.

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