Cravath Quarterly Review

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Market Update

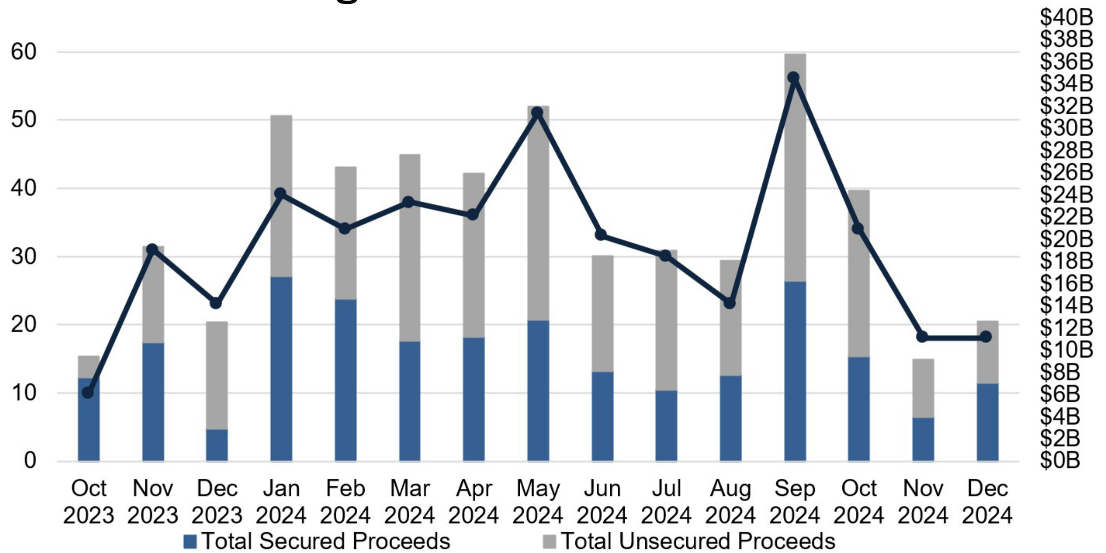
GENERAL TRENDS

U.S. financing activity in the fourth quarter of 2024 was generally lower than overall activity during the third quarter of 2024, but remained considerably elevated as compared to activity during the fourth quarter of 2023. Activity in the U.S. investment-grade bond market decreased significantly relative to the third quarter of 2024 and increased slightly as compared to the fourth quarter of 2023. Activity in the U.S. high-yield bond market declined slightly relative to the third quarter of 2024, but was significantly higher than the fourth quarter of 2023. Activity in the total U.S. syndicated leveraged loan market and the leveraged buyout ("LBO") market decreased in the fourth quarter of 2024 as compared to the third quarter of 2024, but increased as compared to the fourth quarter of 2023. The number of and total proceeds from U.S. follow-on equity offerings in the third quarter of 2024 increased relative to both the third quarter of 2024 and the fourth quarter of 2023, with a substantial increase from the fourth quarter of 2023. U.S. IPO activity in the fourth quarter of 2024 decreased as compared to the third quarter of 2024 but increased significantly as compared to the fourth quarter of 2023.

BONDS

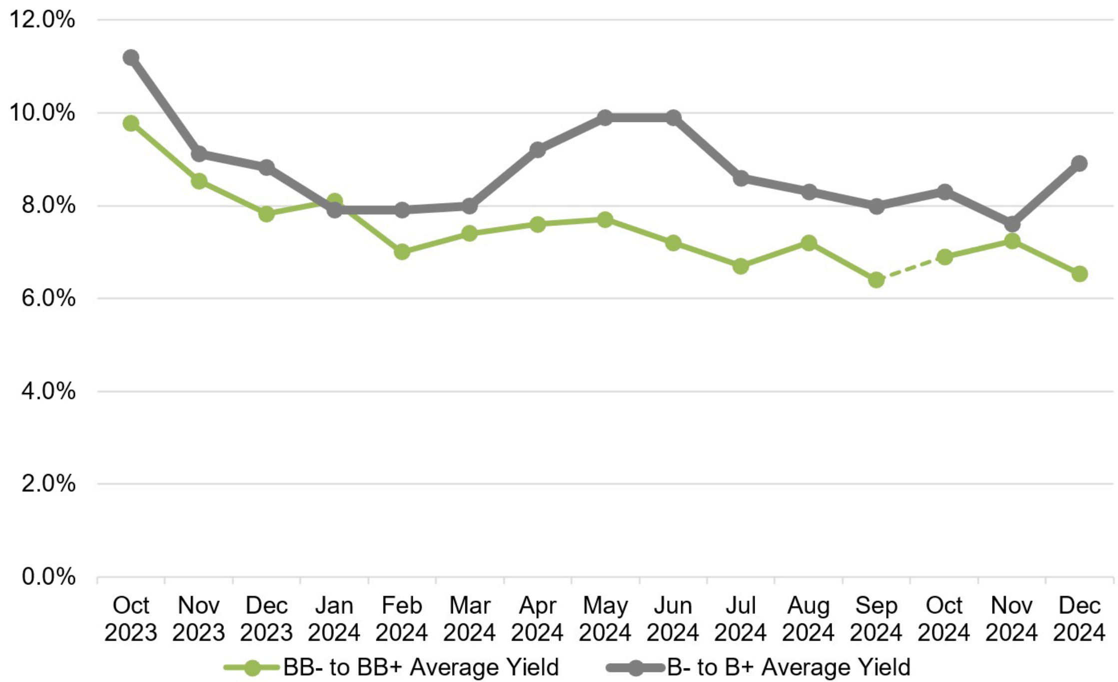
U.S. High-Yield Bonds

Total proceeds from U.S. high-yield bond issuances were $46.2B in the fourth quarter of 2024, down 37.4% as compared to the third quarter of 2024 ($73.8B) and up 11.8% as compared to the fourth quarter of 2023 ($41.3B). Total proceeds from unsecured high-yield bond issuances were $25.7B in the fourth quarter of 2024, down 40.7% as compared to $43.3B in the third quarter of 2024 and up 27.6% as compared to $20.1B in the fourth quarter of 2023. Overall, corporate bond issuances surged in 2024 compared to 2023, driven by tightened credit spreads. On a year-over-year basis, the $281.6B in total proceeds from issuances in 2024 increased 59.9% from the $176.1B in total proceeds from issuances in 2023.



DATA SOURCE Leveraged Commentary & Data (LCD)

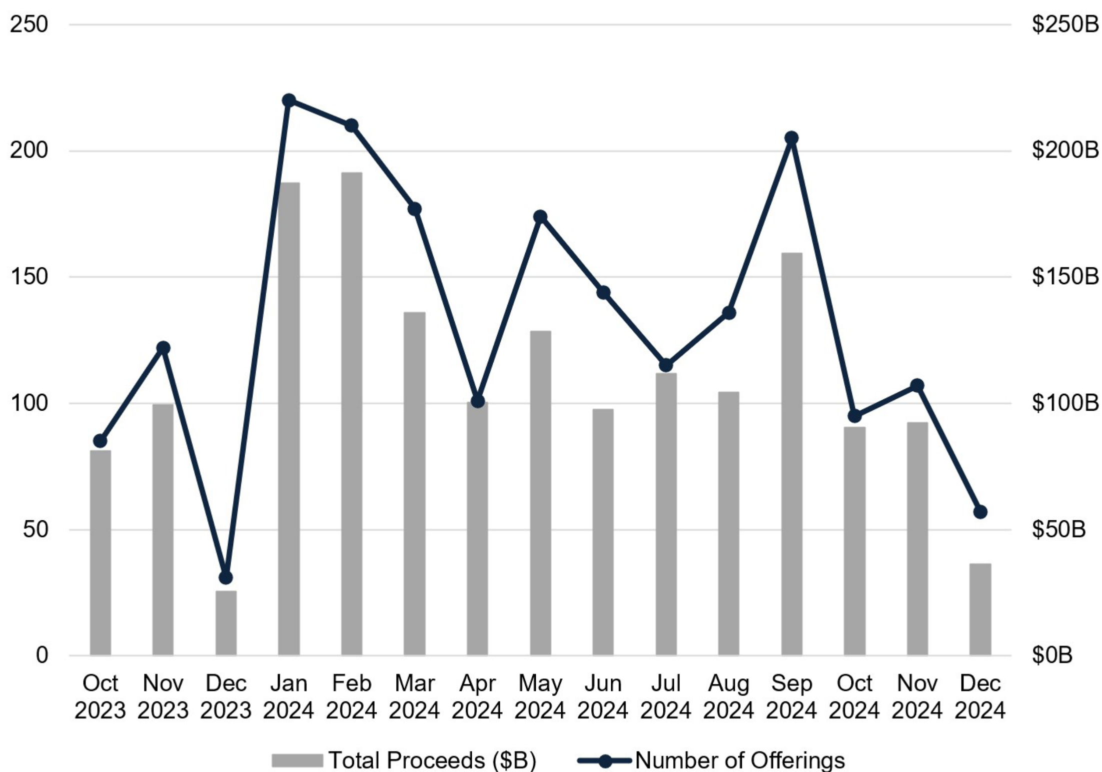
The average initial yield on high-yield notes rated BB- to BB+ issued in the fourth quarter of 2024 was 7.6%, as compared to 6.8% in the third quarter of 2024 and 8.7% in the fourth quarter of 2023. The average initial yield on high-yield notes rated B- to B+ issued in the fourth quarter of 2024 was 8.3%, roughly equivalent to the third quarter of 2024 and lower than the average initial yield of 9.7% in the fourth quarter of 2023. On a year-over-year basis, the average initial yield on high-yield notes rated BB- to BB+ issued in 2024 was down 11.3% as compared to 2023, and the average initial yield on high-yield notes rated B- to B+ issued in 2024 was down 8.2% as compared to 2023.



DATA SOURCE Leveraged Commentary & Data (LCD)

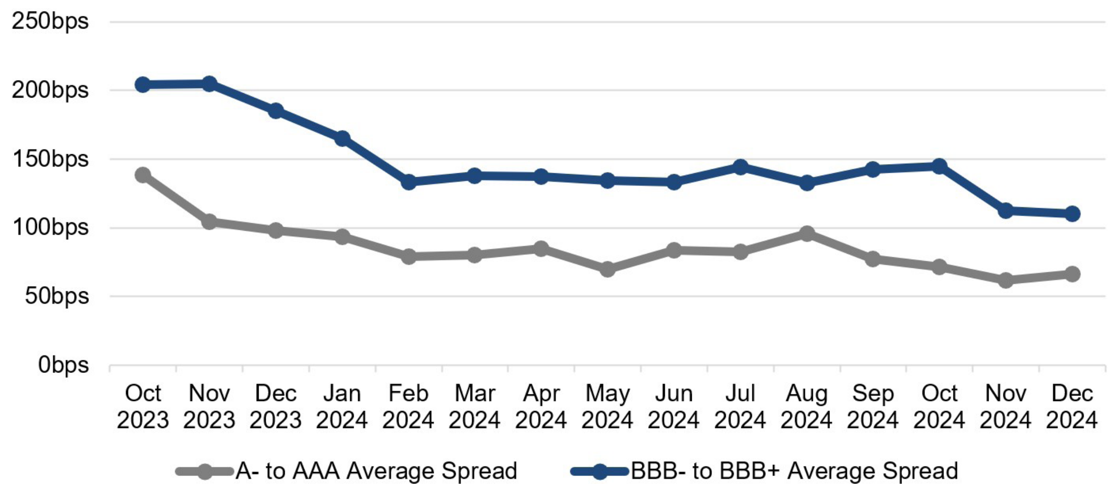
U.S. Investment-Grade Bonds

Total proceeds from U.S. investment-grade issuances were $218.7B in the fourth quarter of 2024, down 41.8% from $375.7B in the third quarter of 2024 and up 6.1% from $206.1B in the fourth quarter of 2023. On a year-over-year basis, the $1,434.8B in total proceeds from issuances in 2024 was up 22.9% as compared to the $1,167.6B in total proceeds from issuances in 2023.



DATA SOURCE Leveraged Commentary & Data (LCD)

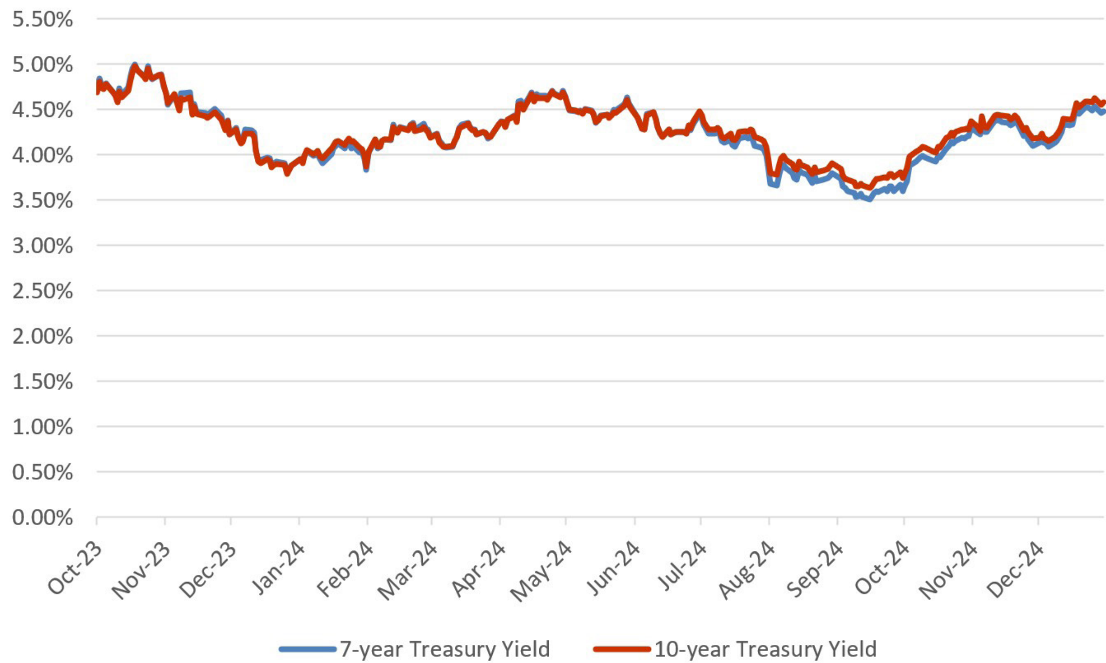
The average pricing spread (measured over the comparable Treasury) on U.S. issuances of investment-grade notes rated A- to AAA in the fourth quarter of 2024 decreased 22.0% as compared to the average pricing spread for the third quarter of 2024 and decreased 41.5% as compared to the average pricing spread for the fourth quarter of 2023. The average pricing spread (measured over the comparable Treasury) on U.S. issuances of investment-grade notes rated BBB- to BBB+ in the fourth quarter of 2024 decreased 12.3% as compared to the average pricing spread for the third quarter of 2024, and decreased 38.2% as compared to the average pricing spread for the fourth quarter of 2023. On a year-over-year basis, average pricing spreads (measured over the comparable Treasury) on U.S. investment-grade bond issuances in 2024 decreased substantially from 2023, with an overall decrease of 29.8% for notes rated A- to AAA and a decrease of 30.0% for notes rated BBB- to BBB+.



DATA SOURCE Leveraged Commentary & Data (LCD)

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

In the fourth quarter of 2024, the Federal Reserve implemented its third consecutive quarter-point rate cut, lowering the benchmark rates to the 4.25%–4.50% range. U.S. Treasury 7-year yields increased 81 bps to 4.48% at the end of the fourth quarter of 2024, up 22.07% as compared to 3.67% at the end of the third quarter of 2024. U.S. Treasury 10-year yields increased 77 bps to 4.58% at the end of the fourth quarter of 2024, up 20.21% as compared to 3.81% at the end of the third quarter of 2024. This increase brought U.S. Treasury yields above the levels seen at the end of the fourth quarter of 2023 at 3.88% for both 7-year yields and 10-year yields.

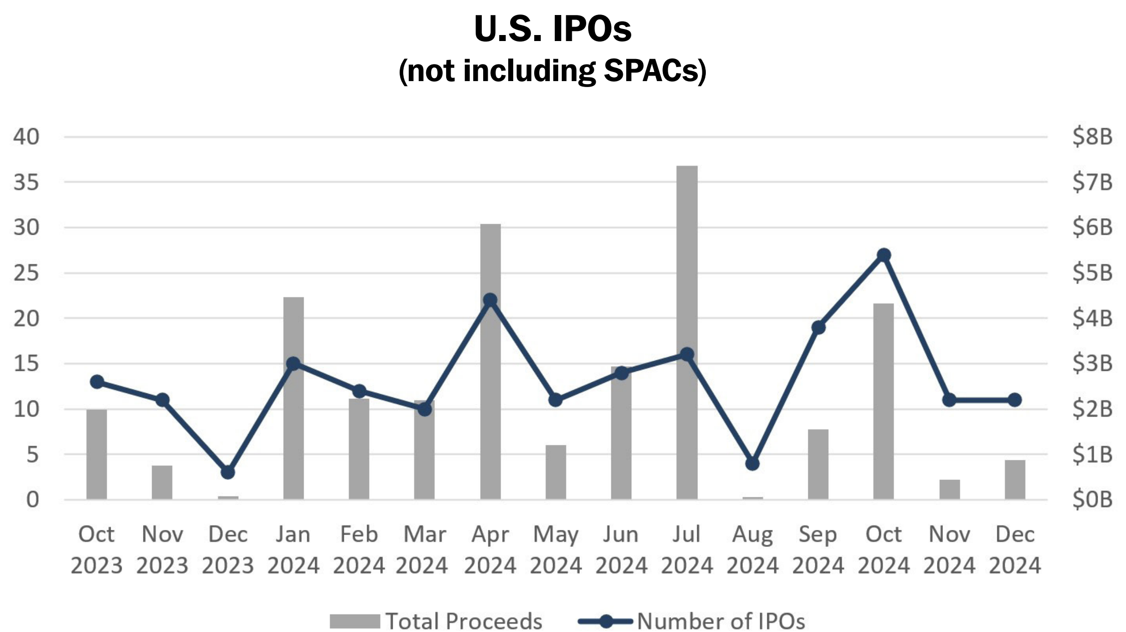


DATA SOURCE U.S. Department of the Treasury

EQUITY

U.S. IPOs

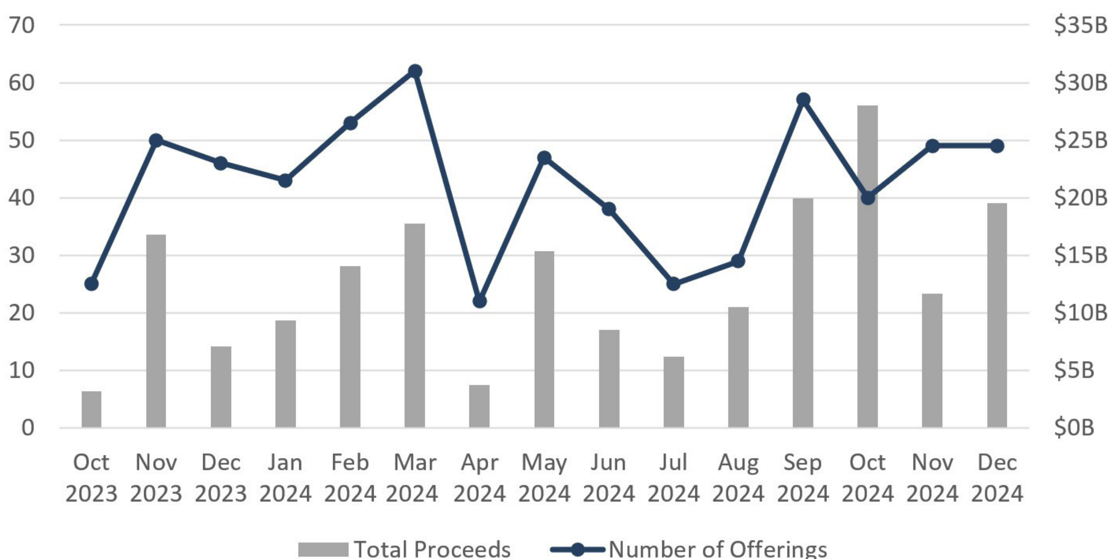
The U.S. IPO market in the fourth quarter of 2024 experienced a decrease in activity since the third quarter of 2024. The $5.6B in total proceeds from U.S. IPOs (not including SPACs) in the fourth quarter of 2024 was down 37.0% as compared to $9.0B in total proceeds in the third quarter of 2024 and up 101.3% as compared to $2.8B in total proceeds in the fourth quarter of 2023. On a year-over-year basis, the $33.7B in total proceeds from U.S. IPOs (not including SPACs) in 2024 was 31.0% higher than the $25.7B in total proceeds in 2023 and 240.5% higher than the $9.9B in total proceeds in 2022.



DATA SOURCE Refinitiv, an LSEG Business

U.S. Follow-On Offerings

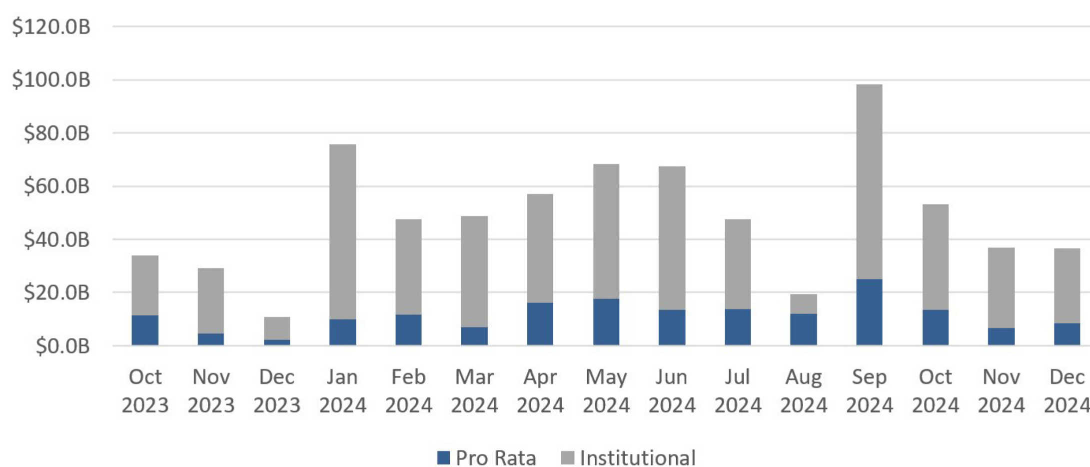
The $59.1B in total proceeds from U.S. follow-on equity offerings in the fourth quarter of 2024 was up 61.4% as compared to $36.6B in total proceeds in the third quarter of 2024 and up 118.7% as compared to $27.0B in total proceeds in the fourth quarter of 2023. On a year-over-year basis, total proceeds from U.S. follow-on equity offerings were $164.5B in 2024, up 67.3% as compared to $98.3B in total proceeds in 2023 and 226.0% higher than the $50.5B in total proceeds in 2022.



DATA SOURCE Refinitiv, an LSEG Business

U.S. Syndicated Leveraged Loan Issuances

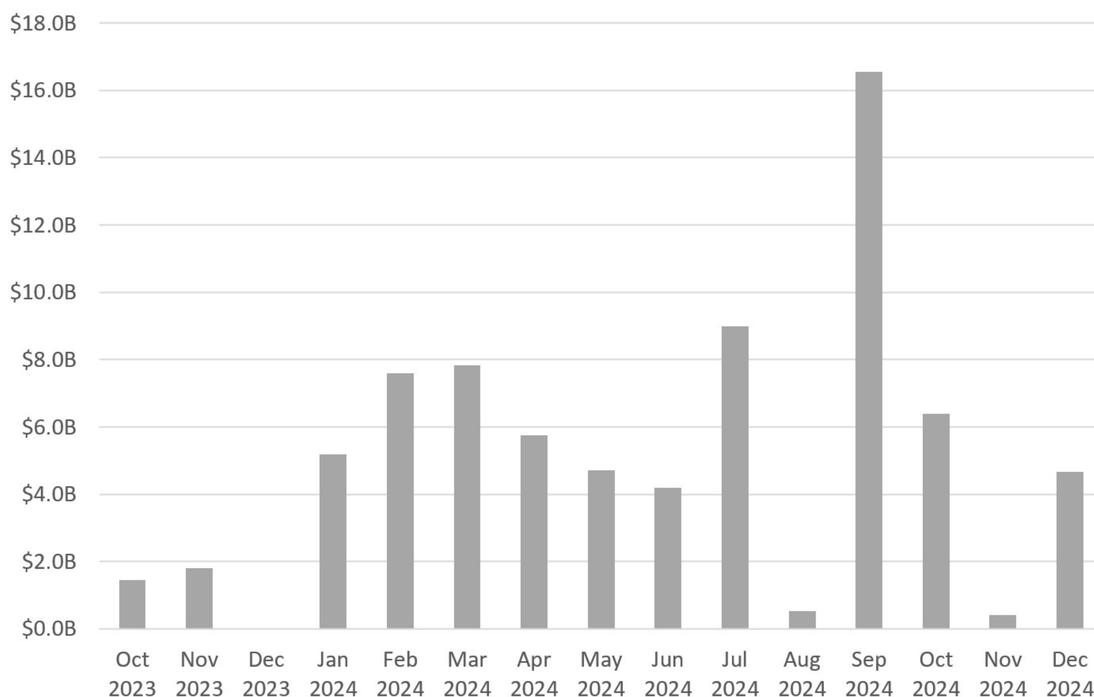
Activity in the U.S. syndicated leveraged loan market decreased in the fourth quarter of 2024, with total volume of $126.8B, down 23% as compared to the third quarter of 2024 ($165.1B). The decrease came primarily from pro rata loan volume, which decreased by 44% as compared to the previous quarter, whereas institutional loan volume decreased by 14% as compared to the previous quarter. While deal volume decreased as compared to the previous quarter, total deal volume in the fourth quarter was stronger than last year, with an increase in total deal volume of 72% as compared to the fourth quarter of 2023 ($73.8B), driven by both institutional loan volume, which was $98.4B in the fourth quarter of 2024, up 77% as compared to the fourth quarter of 2023 ($55.7B), and pro rata loan volume, which was $23.8B in the fourth quarter of 2024, up 57% as compared to the fourth quarter of 2023 ($18.0B).



DATA SOURCE Leveraged Commentary & Data (LCD)

U.S. Syndicated LBO Loan Volume

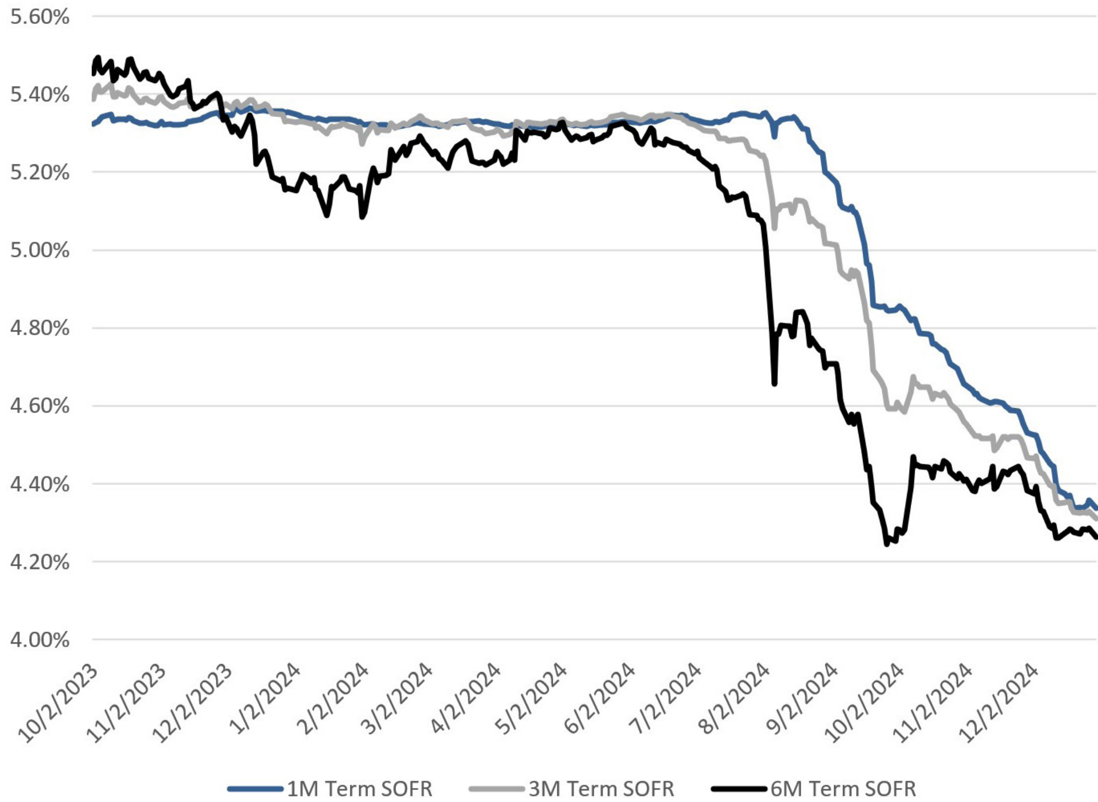
In the fourth quarter of 2024, there were $11.5B of U.S. syndicated LBO loans issued, which was a decrease of 56% as compared to $26.1B in the third quarter of 2024 and an increase of 251% as compared to $3.3B in the fourth quarter of 2023.



DATA SOURCE Leveraged Commentary & Data (LCD)

Term SOFR Reference Rate

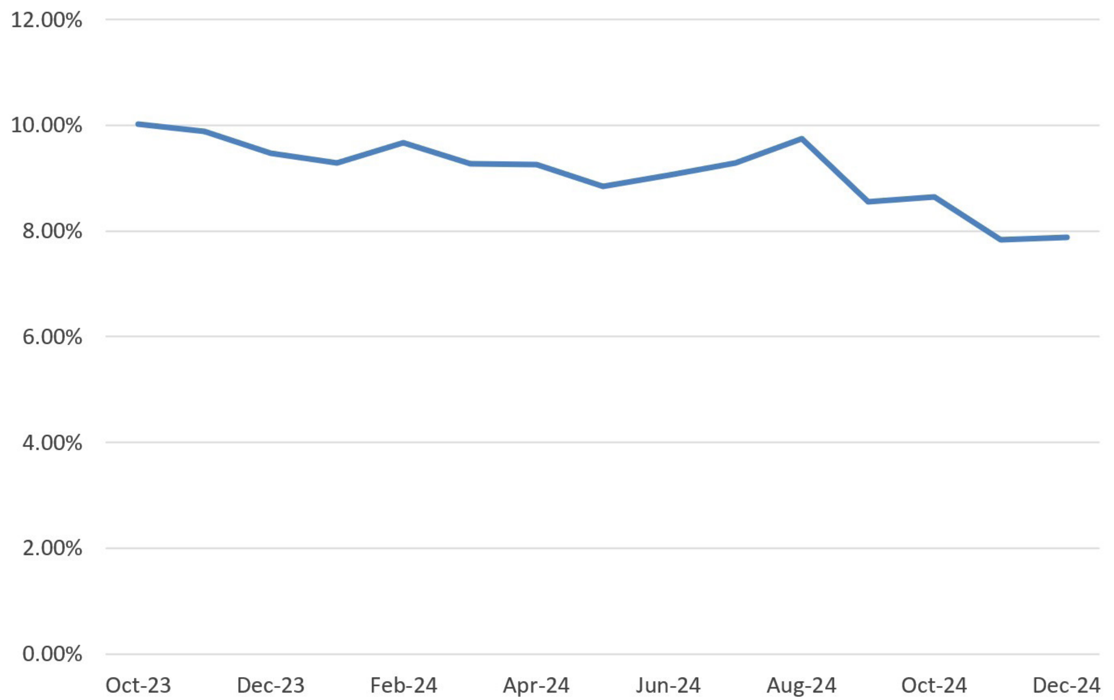
Term SOFR ended the fourth quarter of 2024 at 4.86%, 4.68% and 4.47% for the one-month, three-month and six-month tenors, respectively. Term SOFR for the one-month, three-month and six-month tenors decreased by 50 bps, 64 bps and 78 bps, respectively, as compared to the end of the third quarter of 2024. The yield curve inversion that began on November 30, 2023 persisted throughout the fourth quarter of 2024 but was less pronounced than in the third quarter of 2024. During the fourth quarter, Term SOFR for the six-month tenor was on average 13 bps lower than the three-month tenor and 22 bps lower than the one-month tenor, as compared to 26 bps lower than the three-month tenor and 40 bps lower than the one-month tenor in the third quarter of 2024.



DATA SOURCE Bloomberg Finance L.P.

Primary Market Syndicated Institutional First-Lien Loan Yields

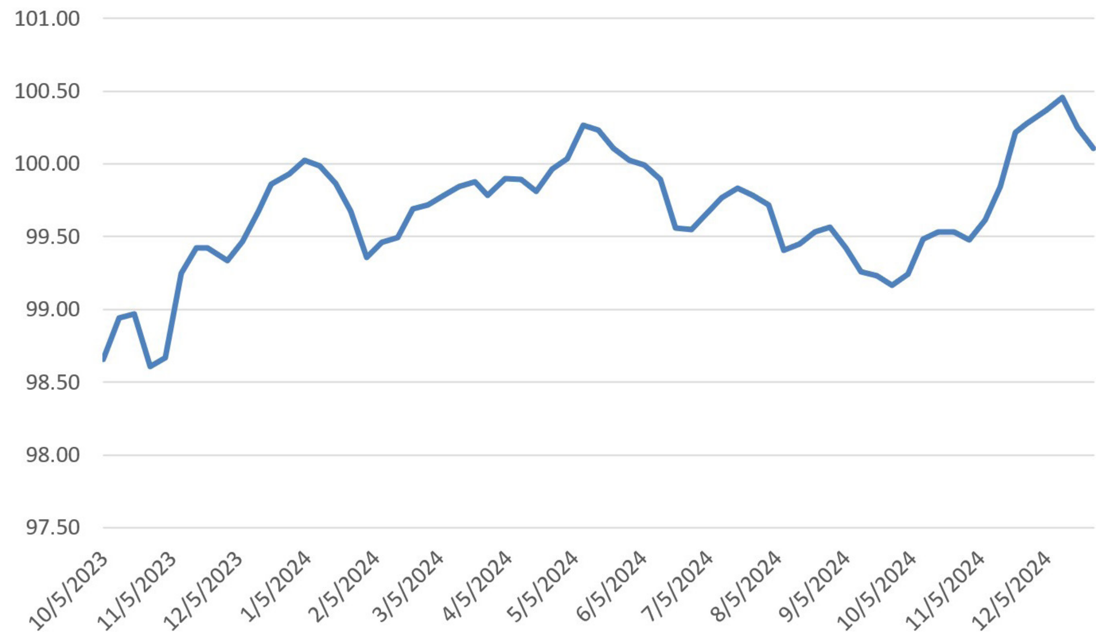
Yields on new-issue syndicated institutional first-lien term loans, inclusive of original issue discount, decreased in the fourth quarter of 2024. The average yield of 8.12% in the fourth quarter of 2024 represented a decrease of 108 bps as compared to the average yield of 9.20% in the third quarter of 2024 and a decrease of 93 bps as compared to the average yield of 9.05% in the second quarter of 2024.



SOURCE Leveraged Commentary & Data (LCD)

Secondary Market Pricing

The average bid price of the LCD Flow Name Index as of the end of the fourth quarter of 2024 increased by 35 bps as compared to the end of the third quarter of 2024 and decreased by 6 bps as compared to the end of the second quarter of 2024.



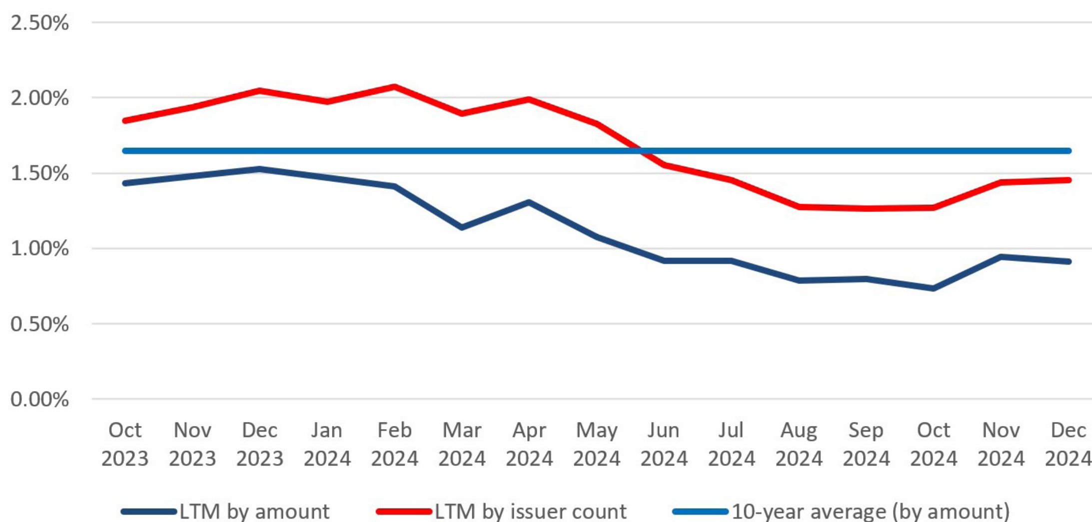
DATA SOURCE Leveraged Commentary & Data (LCD)[1]

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 throughout the fourth quarter of 2024. The default rate of the Morningstar LSTA U.S. Leveraged Loan Index was 0.91% by amount and 1.45% by issuer count for the LTM period ending December 31, 2024, compared to 0.80% by amount and 1.26% by issuer count for the LTM period ending September 30, 2024. The default rate by amount remained below the 10-year average default rate.

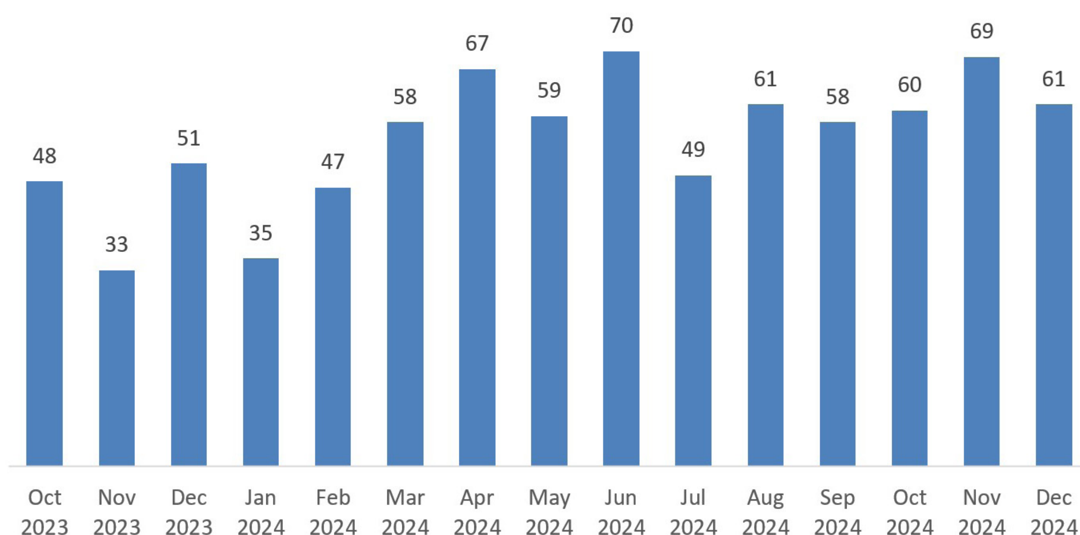


DATA SOURCE PitchBook | Leveraged Commentary & Data (LCD); Morningstar LSTA U.S. Leveraged Loan Index

U.S. Bankruptcy Filings

U.S. bankruptcy filings increased slightly in the fourth quarter of 2024, with a total of 61 bankruptcy filings in December 2024, compared to 60 and 69 in October and November, respectively. The year ended with the most bankruptcy filings of any year since 2010.

The consumer discretionary, industrials and healthcare sectors set the pace for bankruptcies in 2024, with 108 bankruptcy filings for consumer discretionary companies, 88 filings for industrials and 65 filings for healthcare companies.



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 Greenlights Nasdaq Rule Change on Reverse Splits and Compliance Periods for Minimum Bid Price Requirement

On October 7, 2024, the Securities and Exchange Commission (the "SEC") approved a proposed amendment by The NASDAQ Stock Market LLC ("Nasdaq") to Nasdaq Listing Rule 5810(c)(3)(A), which impacts the utilization of reverse stock splits to cure noncompliance with Nasdaq's $1.00 per share minimum bid price requirement. If a company's bid price falls below $1.00 per share for 30 consecutive business days, Nasdaq will deem the company noncompliant and issue a deficiency notice. The company then has 180 calendar days from the deficiency notice date to regain compliance by maintaining a minimum bid price above $1.00 for at least 10 consecutive business days. Previously, companies have utilized reverse stock splits to increase their share price through share consolidation in order to cure a minimum bid price deficiency.

Under the new rule, a company cannot regain compliance with the minimum bid price requirement if the reverse stock split results in noncompliance with another Nasdaq listing requirement. A company will not regain compliance until it cures both the minimum bid price requirement deficiency and the secondary deficiency.

On September 30, 2024, New York Stock Exchange LLC ("NYSE") proposed a similar rule change to limit the conditions under which a NYSE-listed company may use a reverse stock split to meet the minimum bid price requirement. Specifically, NYSE proposed to amend Section 802.01C of the NYSE Listed Company Manual to provide that if a company's share price does not meet the minimum bid price requirement and the company has implemented a reverse stock split over the prior one-year period or has implemented at least one reverse stock split over the prior two-year period with a cumulative ratio of 200 shares or more to one, then the company would be ineligible for any compliance period under Section 802.01C. In such circumstances, NYSE would immediately commence suspension and delisting procedures for the impacted security. The SEC approved NYSE's proposed rule on January 15, 2025.

Restructuring Updates

Open Market Purchases: In re Serta Simmons Bedding, LLC

On December 31, 2024, in the case of *In re Serta Simmons Bedding, LLC,* a three-judge panel of the United States Court of Appeals for the Fifth Circuit held, in an opinion by Circuit Judge Andrew S. Oldham, that an uptier transaction privately negotiated outside the secondary market for syndicated loans was not an "open market purchase" and thus was not permissible under the applicable provisions of the credit agreement.

In 2016, Serta Simmons Bedding, LLC ("Serta") issued $1.95 billion in first lien syndicated loans and $450 million in second lien syndicated loans. Under the first lien credit agreement, Serta agreed to distribute all payments pro rata among the lenders of each class, subject to several exceptions. Serta could repay lenders on a non-pro rata basis through either (i) a Dutch auction open to all lenders or (ii) an "open market purchase". Any modification to the pro rata payment scheme required unanimous consent of the lenders.

In 2020, Serta completed an uptier transaction, offering some—but not all—lenders the opportunity to purchase $200 million of new, first-out superpriority term loans and to exchange $1.2 billion of their first lien and second lien term loans for $875 million in new, second-out superpriority term loans. In order to issue this new priming debt, Serta and the participating

lenders amended the first lien and second lien credit agreements, as the participating lenders represented a narrow majority of the outstanding debt. Serta also agreed to indemnify the participating lenders against all claims in connection with the uptier transaction.

The uptier transaction was challenged in numerous lawsuits, alleging that it was a privately negotiated, structured and cashless debt exchange, that did not qualify as an "open market purchase" under the existing credit agreements and was therefore required to comply with the pro rata sharing requirements set forth therein. One group of lenders received a favorable ruling in March 2022, when Judge Katherine Polk Failla of the United States District Court for the Southern District of New York denied a motion to dismiss filed by Serta on the basis that the definition of "open market purchase" was ambiguous in its application to the uptier transaction in question.

In January 2023, Serta filed a chapter 11 petition in the Bankruptcy Court for the Southern District of Texas and on the same day filed an adversary proceeding seeking a declaratory judgment that the uptier transaction was permitted under the credit agreements. On March 28, 2023, former Bankruptcy Judge David R. Jones heard oral argument and quickly held in an oral ruling that, notwithstanding Judge Failla's earlier decision, the uptier transaction was "very clearly" an "open market purchase" and therefore not prohibited by provisions in Serta's credit agreement. Serta sought confirmation of a chapter 11 plan that incorporated both the uptier transaction and the indemnities of the participating lenders. The bankruptcy court confirmed the plan and upheld the indemnity. The bankruptcy court then certified its decision for direct appeal to the Fifth Circuit.

Writing for the Fifth Circuit panel, Judge Oldham found that the uptier transaction did not constitute an "open market purchase". Judge Oldham discussed the meaning of an "open market purchase" before affirming that an "open market purchase" must be tied to a specific market intended for the product. For the uptier transaction in question, the specific market for the first lien debt was the secondary market for syndicated loans.

The Fifth Circuit emphasized that an "open market purchase" must necessarily be open to all lenders. If the "open market purchase" exception were to encompass arm's-length transactions between private parties, then this exception would have subsumed the Dutch auction exception and rendered it redundant. Because Serta did not purchase the loans on the secondary market, and instead chose to privately negotiate with lenders outside the secondary market in a manner not open to all lenders, the uptier transaction could not have been structured as an "open market purchase".

The Fifth Circuit also struck down the indemnities of the participating lenders, holding that the indemnities violated Section 502(e)(1)(B) of the Bankruptcy Code, which prohibits claimants co-liable with the debtor from bringing contingent reimbursement claims. As a result, the Fifth Circuit reversed the bankruptcy court's ruling on the legitimacy of the uptier transaction and remanded the case for consideration of the non-participating lenders' breach of contract counterclaims.

This ruling may have significant impact on liability management transactions. Within the past several years, financially distressed companies have increasingly relied on the "open market purchase" exception to facilitate debt exchanges for additional capital. After *Serta*, borrowers may opt for entirely different language when drafting loan buyback provisions in credit agreements. Ultimately, the legitimacy of a liability management transaction will depend on the text of the applicable agreement. In fact, in *Ocean Trails CLO VII v. MLN Topco Ltd.*, the First Appellate Division of the New York County Supreme Court permitted—in a decision that

came down the same day as *Serta*—a liability management transaction that relied on a "purchase" exception to pro rata distribution, rather than the "open market purchase" exception described in *Serta*. Either way, liability management transactions will continue to receive close judicial scrutiny.

Consensual Third-Party Releases: In re LaVie Care Centers LLC

Earlier this year, the Supreme Court of the United States held in *Harrington v. Purdue Pharma L.P.* that chapter 11 plans cannot grant non-consensual third-party releases. The opinion did not, however, offer any specific guidance on what constitutes a consensual third-party release and, thus, left open the question of whether an opt-out mechanism for third-party releases could qualify as consent. On December 5, 2024, in the case of *In re LaVie Care Centers LLC*, Bankruptcy Judge Paul Baisier confirmed a plan with an opt-out mechanism for third-party releases and imposed the releases on all creditors who did not opt out, including those who did not return a ballot.

LaVie Care Centers LLC is a skilled nursing facility operator that once operated over 100 facilities across multiple states. In the years following the pandemic, LaVie Care Centers experienced financial struggles and ended up transferring the majority of its facilities to new operators.

In June 2024, LaVie Care Centers and many of its affiliated entities filed chapter 11 petitions in the Bankruptcy Court for the Northern District of Georgia. After a short period of mediation, the parties reached a global settlement that included certain third-party releases. The debtors then submitted an amended plan to the bankruptcy court, incorporating the global settlement and the third-party releases described therein.

The plan stipulated that all creditors who voted in favor of the plan thereby consented to the third-party releases. For the creditors who did not wish to consent to the third-party releases, the plan required them to opt out of being a releasing party and either vote against the plan or abstain from voting. The vast majority of voters, however, took no action, as only 850 out of approximately 6,400 creditors returned a ballot.

At issue in *In re LaVie Care Centers, LLC* was to what extent the plan's opt-out mechanism made the third-party releases consensual. No federal appellate court has addressed whether an opt-out mechanism could render a third-party release consensual, and bankruptcy courts are split on this issue.

After briefly surveying the case law, Judge Baisier decided to determine consent based on an evidence-of-consent standard. Judge Baisier found creditors who voted in favor of the plan to have also consented to the third-party release based on the plain terms of the plan. As for creditors who voted against the plan or abstained from voting but did not choose to opt out as a releasing party, Judge Baisier interpreted their informed decision not to opt out as evidence of their consent to the release. Lastly, for creditors who did not return a ballot, Judge Baisier created a rebuttable presumption that their inaction implied consent to the release. Judge Baisier then held, accordingly, that the confirmation order must provide an opportunity for creditors who did not return their ballot to challenge this presumption and retain their claims against the relevant third parties (for example, if there were specific circumstances such as serious illness that precluded the creditor from taking action).

Other bankruptcy courts have decided not to impose releases on creditors who did not return their ballots. For example, in September 2024, Delaware Bankruptcy Judge Craig T. Goldblatt held in *In re Smallhold, Inc.* that creditors must give affirmative consent based on principles of contract law in order to be bound by third-party releases contained in a chapter 11 plan. Judge Goldblatt enforced the releases as to creditors who voted for or against the plan but did not opt

out because the affirmative act of voting with full knowledge of the consequences of the vote and a simple mechanism for opting out confers consent, according to general principles of contract law. He held that, by contrast, however, creditors who did not return a ballot made no affirmative act and, thus, could not be bound by the releases.

Overall, no clear consensus has been reached by courts on this issue. Until the appellate courts address whether opt-out mechanisms establish creditor consent to third-party releases, the extent to which these releases may be imposed on different groups of creditors will remain unclear.

Litigation Updates

Corporate Transparency Act Reporting Requirements Temporarily Reinstated, Then Again Enjoined

On December 3, 2024, the United States District Court for the Eastern District of Texas issued a nationwide preliminary injunction halting enforcement of, and compliance with, the Corporate Transparency Act ("CTA"). On December 11, 2024, the Department of Justice (the "DOJ") filed a motion to stay such preliminary injunction, which was denied on December 17, 2024. The DOJ also filed an emergency motion to stay the preliminary injunction, pending appeal, with the Fifth Circuit Court of Appeals on December 13, 2024, which was granted by a panel of the Fifth Circuit on December 23, 2024.

However, on December 26, 2024, the Fifth Circuit vacated the stay granted on December 23, 2024, which again enjoined the enforcement of the CTA. On December 31, 2024, the DOJ, on behalf of the Treasury, filed an application with the Supreme Court to stay the injunction. On January 23, 2025, the Supreme Court granted the federal government's request to stay the December 3, 2024 preliminary injunction.

However, a separate preliminary injunction issued on January 7, 2025 by a different federal judge in the Eastern District of Texas remains in effect, maintaining the suspension of the reporting obligations.

The Fifth Circuit issued an expedited briefing schedule, with oral arguments scheduled for March 25, 2025.

A recent alert issued by the Financial Crimes Enforcement Network stated that reporting companies are not required to file and will not be subject to liability if they fail to file while the order is in effect; however, reporting companies may still voluntary file.

Additional discussion of the CTA can be found in the Cravath Emerging Company and Venture Capital Insights newsletter, entitled "2023 Recap and 2024 Outlook."

SEC Grants a Partial Stay of the Amendments to Rules 610 and 612 of Reg NMS

On December 12, 2024, the SEC granted a partial stay of the amendments to Rules 610 and 612 of the Regulation National Market System ("Reg NMS").

As previously discussed in the Q3 2024 edition of this newsletter, the SEC approved amendments to Rules 610 and 612 of Reg NMS on September 18, 2024. Soon after the approval, petitions for review challenging the final rule amendments were filed in the United States Court of Appeals for the District of Columbia Circuit. On December 3, 2024, Nasdaq and Cboe Global Markets, Inc., among others, filed a motion to stay the effectiveness of the amendments, pending judicial review of the Reg NMS final rule amendments.

In its Order Granting Partial Stay, the SEC stated that a partial stay avoids the potential for market disruption and regulatory uncertainty during the

pendency of the judicial review. The SEC's partial stay affects the amendments to Reg NMS Rules 600(b)(89)(i)(F), 610(c) and 612, which involve reducing access fee caps and minimum pricing increments for specific NMS stocks. The SEC did not stay the amendments to Rule 610(d), which require that all exchange fees charged and rebates paid for executing an order of NMS stock are determinable at the time of execution. The SEC stated that it did not find any substantive arguments concerning the validity of the amendments to Rule 610(d) in the petitioners' motion.

The compliance date for Rules 610 and 612 of Reg NMS remains the first business day of November 2025.

SEC Charges Four Companies with Misleading Cyber Disclosures

On October 22, 2024, the SEC charged four companies—Unisys Corporation ("Unisys"), Avaya Holdings Corp. ("Avaya"), Check Point Software Technologies Ltd. ("Check Point") and Mimecast Limited ("Mimecast") (collectively, the "Charged Companies")—with making materially misleading disclosures related to SolarWinds Corporation ("SolarWinds")'s Orion software and other incidents in 2020 and 2021.

The investigations found that the Charged Companies became aware of unauthorized access to their systems, which likely originated from the same threat actor behind the 2020 SolarWinds cybersecurity incident. Each of the Charged Companies agreed to pay a penalty for providing materially misleading statements regarding the unauthorized access.

- The SEC found that Unisys framed actual incidents and risks as hypotheticals. Additionally, the SEC found that Unisys had deficient disclosure controls, which in part contributed to its misleading disclosures. Unisys agreed to pay a $4 million penalty.
- The SEC found that Avaya omitted material information that it knew of at the time of filing, including the likely source of the activity, the length of the unauthorized activity and the extent of sensitive information that was exposed. Avaya agreed to pay a $1 million penalty.
- The SEC found that Check Point described the incidents only in generic terms and omitted new and material risks. Check Point agreed to pay a $995,000 penalty.
- The SEC found that Mimecast provided misleading statements by quantifying certain information but omitting other material information related to the scope and impact of the incident. Mimecast agreed to pay a $990,000 penalty.

Commissioners Hester M. Peirce and Mark T. Uyeda opposed the charges and accused the Commission of "playing Monday morning quarterback" and engaging "in hindsight review to second-guess the disclosure".

United States District Court for the Northern District of Texas Holds That SEC Dealer Rules Exceed Statutory Authority

On February 6, 2024, the SEC adopted Rules 3a5-4 and 3a44-2 (the "Dealer Rules") under the Securities Exchange Act of 1934 (the "Exchange Act"), which introduced two qualitative standards for determining whether an entity must register as a dealer or government securities dealer. Marking a significant departure from the SEC's historical approach, the Dealer Rules implemented a registration requirement for entities whose trading activities regularly provide liquidity to the market. The Dealer Rules went into effect on April 29, 2024, mandating compliance by April 29, 2025.

Market participants responded to the Dealer Rules with skepticism, fearing they were overly broad and far-reaching. The Dealer Rules

expanded broker-dealer regulatory requirements to cover net capital requirements and certain customer protection regulations. Industry participants argued that these requirements were unrealistic and unsustainable for trading firms and funds whose operations do not serve the types of customers that the broker-dealer regulatory framework is designed to protect. Two sets of plaintiffs representing private fund managers and the digital asset industry sued the SEC. The plaintiffs claimed that the Dealer Rules exceeded the SEC's authority under the Exchange Act and were arbitrary and capricious under the Administrative Procedure Act.

On November 21, 2024, the United States District Court for the Northern District of Texas granted motions for summary judgment in the two cases challenging the Dealer Rules and vacated the Dealer Rules in their entirety. The court agreed with the plaintiffs' argument that the SEC lacked statutory authority to implement the Dealer Rules.

Other Developments

Year-End SEC Enforcement Overview

On November 22, 2024, the SEC released enforcement statistics for fiscal year 2024. According to its report, the SEC filed 583 enforcement actions, marking a 26% decrease from the previous year, and obtained orders of $8.2 billion in remedies. Despite the decrease in the number of enforcement actions, the $8.2 billion in remedies marked the largest amount obtained in a fiscal year. The $8.2 billion in remedies included $6.1 billion in disgorgement and prejudgment interest as well as $2.1 billion in civil penalties.

Over half of the total financial remedies for the year resulted from the monetary judgment the SEC obtained against Terraform Labs and Do Kwon, as previously discussed in the Q1 2024 edition of this newsletter. The charges brought against Terraform Labs and Do Kwon marked one of the largest securities frauds in United States history. Other notable actions included $98 million disgorgement and prejudgment interest paid by SAP SE to resolve the SEC's charges for bribery schemes in violation of the Foreign Corrupt Practices Act and a $100 million civil penalty from a large utility company for a multi-year political corruption scheme. Other major fraud cases included the SEC charging two individuals for their involvement in HyperFund, a crypto asset pyramid scheme that raised more than $1.7 billion from investors globally, and charging NovaTech Ltd. for allegedly carrying out a fraudulent scheme that raised more than $650 million in crypto assets from over 200,000 investors around the world.

In addition to the financial remedies, the SEC obtained orders against 124 individuals that bar them from serving as officers or directors of public companies. The SEC also received 45,130 tips, complaints and referrals, the most received in one year. Of those notifications, more than 24,000 were whistleblower tips, resulting in $255 million awarded to whistleblowers.

SEC Division of Examinations Publishes 2025 Examination Priorities

On October 21, 2024, the SEC's Division of Examinations ("Examinations") released its 2025 examination priorities, outlining key focus areas for the year ahead. Although a new administration may bring additional priorities to the SEC's examination program, the announced priorities remain largely consistent with previous years. In particular, Examinations' 2025 priorities include, among others, a focus on key risk areas such as cybersecurity, crypto assets and artificial intelligence ("AI").

Cybersecurity continues to be a primary focus for Examinations, particularly due to the ongoing

threat of cyberattacks. Examinations will assess how registrants manage cybersecurity risks, including the protection of sensitive customer information, data breach reporting, access controls, data loss prevention and responses to ransomware incidents. Additionally, Examinations will continue to evaluate registrants' cybersecurity practices related to third-party vendors, subcontractors and service providers.

Examinations will continue to monitor the offer, sale and trading of digital currencies, focusing on whether registrants are adhering to required standards of conduct when advising clients on crypto assets. Examinations will also review registrants' compliance practices (including crypto asset wallet reviews and Bank Secrecy Act compliance reviews), risk disclosures and operational resilience.

"Emerging Financial Technologies" appears as a new risk section in the 2025 priorities, and Examinations stated that it will review registrants' AI capabilities disclosures and AI monitoring procedures. Specifically, the SEC will review registrants' procedures for the use of AI in tasks related to fraud prevention, anti-money laundering, trading functions and back-office operations.

In addition to key risk areas such as cybersecurity, crypto assets and AI, Examinations highlighted priorities for investment advisers, investment companies and broker-dealers. Examinations will assess investment advisers' adherence to fiduciary duties, particularly when recommending clients high-cost products, difficult-to-value assets, unconventional instruments or assets sensitive to higher interest rates or changing market conditions. The SEC remains focused on investment advisers' compliance programs, including advisers' policies related to marketing, portfolio management, custody, valuation, and addressing and monitoring conflicts of interest. Moreover, Examinations set forth a new priority focused on the review of private fund advisers' procedures related to conflicts of interest involving the use of debt and fund-level lines of credit.

Examinations will also review registered investment companies' disclosures and practices involving fund fees and associated waivers and reimbursements, oversight of service providers, portfolio management practices and disclosures for consistency with fund filings and marketing materials and issues associated with market volatility. Broker-dealers will face continued monitoring to ensure compliance with Regulation Best Interest, particularly around product recommendations, disclosure of conflicts of interest and review of available alternatives for clients.

Examinations will also assess registrants' compliance with new rules related to the shortening of settlement cycles under Rules 15c6-1 and 15c6-2 of the Exchange Act.

Fifth Circuit Court of Appeals Strikes Down Nasdaq Board Diversity Rules

As discussed in the Q1 2024 edition of this newsletter, in November 2023, attorneys general from 19 states submitted an amicus brief supporting two conservative groups in a case challenging the Nasdaq's board diversity rule, which required that companies listed on Nasdaq disclose board diversity data and, if a board does not have at least one woman and at least one minority member, to provide an explanation for the lack of diverse representation. On February 19, 2024, a majority of the circuit judges in active service on the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") voted to rehear the case *en banc* and vacated the October 2023 decision upholding the Nasdaq rule.

On December 11, 2024, after rehearing the case *en banc*, the Fifth Circuit vacated the SEC's order approving the Nasdaq's board diversity rules in a 9-8 decision. The majority held that the rules did not relate to the purpose of the Exchange Act. The Fifth Circuit also stated that the SEC acted

beyond its scope in approving the rules under the major questions doctrine, which restricts agencies from deciding questions of major economic and political significance unless Congress explicitly grants them statutory authority to do so.

A Nasdaq representative voiced disagreement with the court's ruling but confirmed that Nasdaq does not intend to pursue an appeal. An SEC spokesperson has confirmed the agency is reviewing the ruling and will determine an appropriate course of action.

Fourth Quarter of 2024 Saw Record-Setting Repricing Activity

While demand from retail investors and CLOs was high in the fourth quarter of 2024, syndicated loan issuance to finance LBOs and other acquisitions was nearly 40% below the 10-year average for the quarter, creating favorable dynamics for 2024's second wave of repricings. The fourth quarter saw $279 billion in repricing volume, a record-setting amount, and repricings accounted for 70% of total activity in the quarter. Whereas December is typically one of the slowest months in the syndicated loan market, repricing demand led to leveraged loan activity in December of 2024 that was more than four times greater than the historical monthly average. Across the whole of 2024, the nominal spread on outstanding loans decreased by 28 bps across the index as compared to the beginning of the year.

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