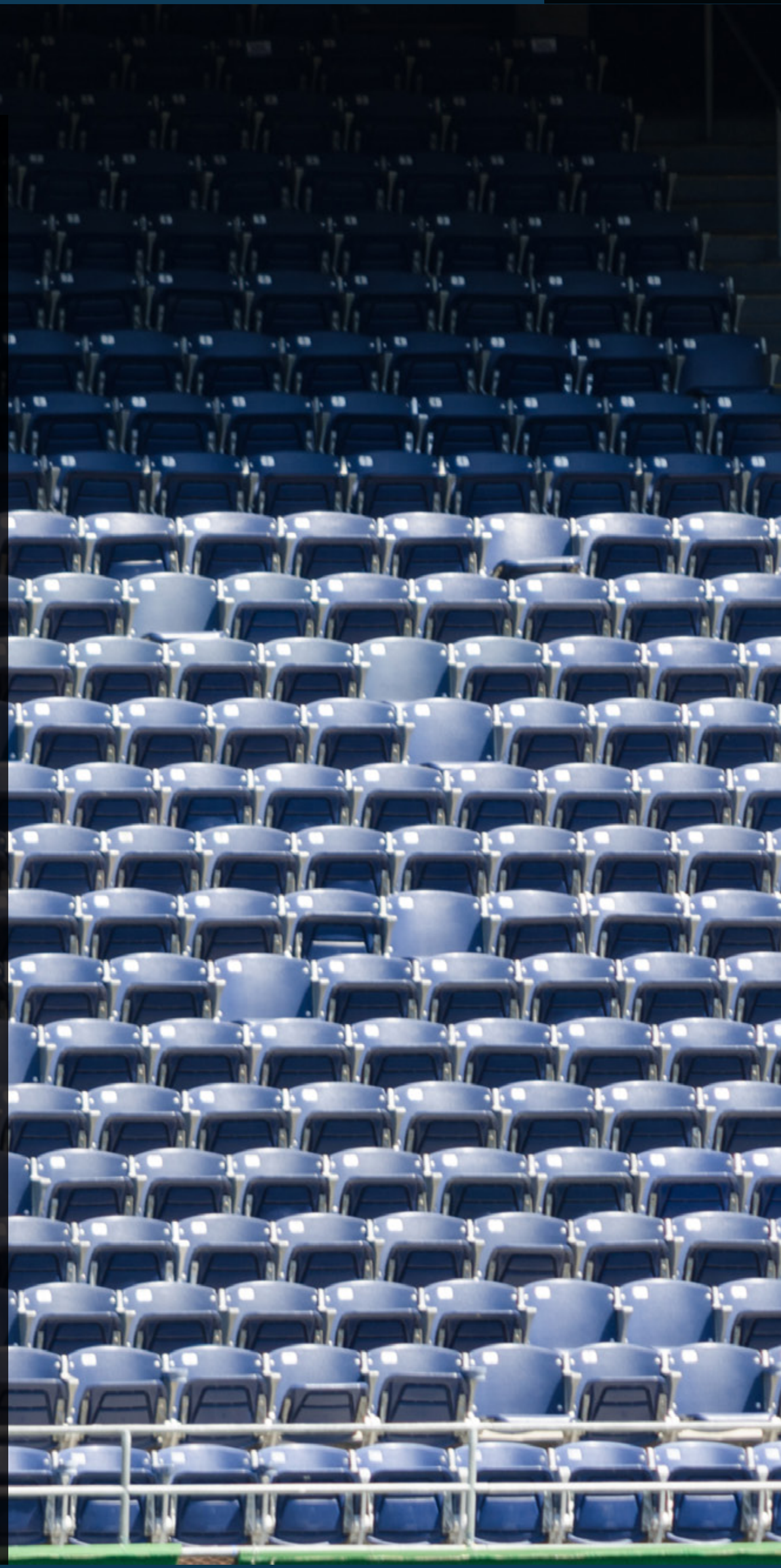
AIRA Journal

Volume 33 No. 2



WHAT'S INSIDE

9TH Annual Energy Summit is going Virtual, September 16 & 23, 2020, more details coming soon to www.aira.org.

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AIRA Journal is published four times a year by the Association of Insolvency and Restructuring Advisors, 221 Stewart Avenue, Suite 207, Medford, OR 97501.

From the Executive Director's Desk

JAMES M. LUKENDA, CIRA
AIRA

As the previous issue of AIRA Journal was released in June, the AIRA embarked on its first completely virtual annual conference. For those of you who attended any of the pre-conference programs, panel sessions, or keynote presentations (Anita Alverez on implications of human trafficking and money laundering, and Allen Sanderson on the relationship of sports, economics, and the law), I don't have to tell you that conference participants and the AIRA couldn't have had a more satisfying result. The overall experience has given us a lot to consider for future programs – those that will be provided virtually and, once we are able to safely convene again, those that will be live with online access for those unable to be present.

If you were unable to attend, or wish to revisit sessions and materials, they can be accessed at https://www.aira.org/AC20/materials, where you will find recordings of the 16 panel sessions, two keynote addresses and panel materials. For now, self-study CPE is unavailable for recorded sessions. I am just beginning to develop the necessary review and testing materials so the AIRA can issue CPE for these sessions online. We look forward to this opportunity to expand benefit from these excellent sessions.

Credit for the success of our AC20 Virtual Series is broadly spread. I thank the co-chairs, planning committee, panel chairs, and panel members for their collective effort to move ahead with an unexpected format, updating topics and materials on a moment's notice to assure relevance in an evolving situation. The AIRA staff, particularly Cheryl Campbell and Mike Stull, deserve recognition for keeping us organized and on schedule throughout, providing the support needed to assure comfort with both technology and presentation format. Also, to realize any annual conference, even as a web series, sponsorship plays a critical role; the AIRA has been very fortunate for the continued support of its sponsors. Without this collective effort, we would not have been able to meet the requirements of participants for whom this program has long been a significant educational resource.

While many have commented on the convenience of the Web Series format, many have also communicated their disappointment at not being able to gather in person, to network and spend time together. One aspect of our annual conferences has been to recognize the achievements of our members at the awards ceremony normally held at the annual dinner. In lieu of that event, please see the articles starting on page 44 and join us in recognizing the 2020 Manny Katten Award recipient, Tom Morrow, and the 2020 AlixPartners CIRA Awards winners.

One other aspect of the annual conference that the virtual presentation obscured is the transition in Association leadership. So, let me mark here for the membership the gavel has been passed. With the advent of the AC20 Virtual Series, Brian Ryniker's term as AIRA President has concluded and David Bart's term has begun. We are grateful to Brian for his leadership and his continuing participation; to David, congratulations and thank you for undertaking this important role.

So, I will again say, thank you to all—and now let's get ready for 2021! Whether we are able to come together or not, planning must commence soon: if you are interested in being on the AC21 planning committee, please reach out to Cheryl Campbell (ccampbell@aira.org). In addition, I hope you are planning to attend and consider other ways to support our two Fall 2020 programs, coming up soon: the Energy Summit (September), and Advanced Restructuring & Plan of Reorganization Conference (November) – both will be held virtually this year, planning is underway and more will be announced soon.

Stay well and enjoy the summer,

Jim

A Letter from AIRA's President

DAVID BART, CIRA, CDBV
RSM US LLP

To AIRA's membership and supporters:

I want to personally thank each and every one of you for your ongoing contributions and support of AIRA. We have just concluded AIRA's 36th Annual Bankruptcy and Restructuring Conference, but in many ways, it was a brand-new conference experience. Indeed, it was AIRA's first all-online conference undertaking, and it captured the enthusiasm, flexibility, and fun of a new venture. As a member, I express my gratitude to, and amazement with, the speakers and organizers for assembling and conducting a first rate gathering of the finest in the profession under these unusual COVID-19 pandemic conditions. Based on the sessions I saw online, they were fun and informative, and audience participation remained active in a webcast environment. Thank you to the conference Co-chairs – Nancy Peterman, Esq. (Greenberg Traurig, LLP), Alpesh Amin, CIRA (Conway

MacKenzie), and Jean Hosty (Piper Jaffray) – and thank you to the entire planning committee, our sponsors, and the AIRA staff for all their hard work and support in planning, implementing, and meeting the challenge this year. Kudos to all for a truly excellent job!!

Congratulations to this year's award recipients. Tom Morrow is a wonderful choice for this year's Manny Katten Award. He has made many contributions to the profession and to AIRA, and this award serves as a terrific recognition for the culmination of a fine career. See Jim Lukenda's letter at left and the related article on p. 45 for more information about Tom and the award. Congratulations also extend to this year's AlixPartners CIRA Award recipients: Merry Lin, Paul Stroup, Alexander Weckenbrock, and Charlie Altuzarra. You all deserve recognition for this fine accomplishment! See the article on p. 44 for additional information about this year's CIRA Awards.

The annual conference normally marks the transition for new AIRA presidents and board positions; although this year, we were not able to do this in a live setting due to COVID-19. Nevertheless, rest assured that AIRA continues to function well, and is providing exceptional services for its membership and the profession. Planning is already underway to provide flexible options (as live or, more likely, online experiences) at our many upcoming events in 2020 and early 2021, including the 2021 annual conference. Additional information will be forthcoming as these events draw closer. Active participation by our members is crucial to our success, and we are in turn passionately committed to your professional development. The AIRA Board seeks your input and suggestions on all AIRA activities, so please contact Jim Lukenda or myself with ideas!

Brian Ryniker, CIRA
Chairman; President, June 2019-2020

I would like to thank past president and now chairman, Brian Ryniker, for his tireless efforts and hard work. Brian has and will continue to play a vital role with the New York Advanced Restructuring and Plan of Reorganization Conference, the Annual Conference (especially the Toolbox sessions), and the various other activities. He has been steadfast in promoting and directing AIRA's mission and objectives. I have known and worked with Brian for many years. He is a great friend and a strong supporter of AIRA, and I look forward to his continuing support as he becomes AIRA's new Chairman of the Board.

Welcome to Rick Wright from BRG and Richard Newman from Alvarez & Marsal who have both joined the AIRA Board effective June 2020. We look forward to your support and ideas as we move forward this year. And, thank you to departing board members Ed Ordway from BRG and Ed Mosley from Alvarez & Marsal for their many contributions to AIRA; we wish you well on your future endeavors.

The summer is always a time to reflect and to gear up for fall activities. Please consider writing an article for the *AIRA Journal.* Many people have contributed to AIRA's flagship publication over the decades. In recent years, the *Journal* has been reinvigorated, and the quality of the content continues to be first rate. But, this is your publication: so please consider writing, or finding a friend or associate to write, interesting material for our readers. Contact Michael Lastowski at Duane Morris mlastowski@duanemorris.com or Boris Steffen at Province bsteffen@provincefirm.com with your submissions and ideas.

Please plan to join us at our future events. Planning remains subject to current COVID-19 circumstances, but these events will go forward, whether as a webcast or live.

- September 16 and 23, 2020 – 9th Annual Energy Summit Online.
- October, 2020 – NCBJ Annual AIRA Breakfast Program – NCBJ has been cancelled, arrangements are being made with ABI to offer this annual AIRA event as a webcast.
- November 16, 2020 – 19th Annual Advanced Restructuring & POR Conference at The Union League Club, New York, NY

Finally, AIRA continues to provide professional certification and education courses online. Information about AIRA's nearly two dozen CPE offerings is available on the website. CIRA and CDBV training programs are also available online. See the website www.aira.org for details. In addition, AIRA's Executive Director, Jim Lukenda, has developed and is providing a unique new offering that provides an introduction to the bankruptcy and restructuring environment. Jim developed this program in response to requests from a number of organizations that will have professionals addressing these concerns for the first time and who are not necessarily on a CIRA or CDBV certification track. For more information, please contact Jim Lukenda at jlukenda@aira.org.

I am honored to serve as the next AIRA President. It has been my privilege to work with the dedicated professionals serving the AIRA Board of Directors for more than a decade. I look forward to working with the Board, our executive director, Jim Lukenda, the rest of the AIRA staff and our members during my term as President. The past several months have been incredibly busy responding to COVID-19, but I am so pleased with AIRA's accomplishments during this time. The caliber of the professionals and the level of commitment to providing top-tier educational programming and resources for the insolvency profession is remarkable. I am very excited about the things to come this year.

I wish you all the best this summer,

David Bart

CARES ACT CORPORATE TAX PROVISIONS—IN HISTORICAL CONTEXT

MICHAEL BARTON, CIRA
RSM US LLP

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[1] The mammoth $2.2 trillion bill is approximately equal to 10% of US GDP[2] or 64% of total federal tax revenue for 2019.[3] The CARES Act contains myriad provisions relating to healthcare, Small Business Administration (SBA) loans and grants, as well as relief for individuals, businesses, organizations, and defense contractors.

This article discusses the major tax provisions relating to C Corporations and provides historical context for the changes contained in the legislation.

Historical NOL Carryback Periods

Carrybacks of net operating losses (NOLs)[4] were a persistent feature of the Internal Revenue Code (IRC) from 1950 to 2017.[5] For example, section 172(b)(1) of the 1954 Tax Code allowed for a NOL carryback to each of the two taxable years preceding the taxable year of loss and a NOL carryover to the each of the five taxable years following the taxable year of such loss.

During several economic downturns, Congress has temporarily increased NOL carryback periods to provide additional counter-cyclical fiscal relief. For example, after the recession caused by 9/11, the Jobs Creation and Worker Assistance Act[6] extended the general NOL carryback period from two years to five years for NOLs arising in 2001 and 2002.[7] The Joint Committee on Taxation report reflected the following reason for the change in law:

> The NOL carryback and carryover rules are designed to allow taxpayers to smooth out swings in business income (and Federal income taxes thereon) that result from business cycle fluctuations and unexpected financial losses. The uncertain economic conditions have resulted in

1 Public Law 116-136, 134 Stat. 281.

2 US Bureau of Economic Analysis (BEA) 2019 4th quarter US GDP estimated at $21.729 trillion. https://www.bea.gov/news/2020/gross-domestic-product-1st-quarter-2020-advance-estimate.

3 Congressional Budget Office, Monthly Budget Review: Summary for Fiscal Year 2019. https://www.cbo.gov/system/files/2019-11/55824-CBO-MBR-FY19.pdf.

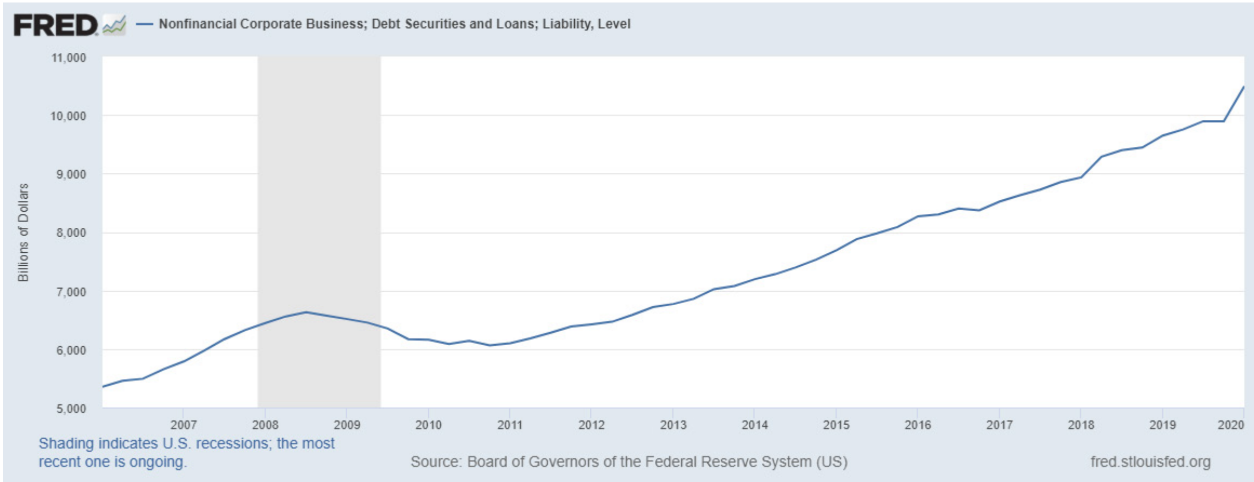
4 This article only discusses the carryforwards and carrybacks of regular tax NOLs. Certain losses, such as farming losses and alternative minimum tax losses are subject to additional rules beyond the scope of this article.

5 Section 204(b) of the 1918 Revenue Act provided for a limited one-year carryback of "net losses." From 1919 to 1949, the IRC variously allowed carryforwards and carrybacks of NOLs but only in certain tax years.

6 Job Creation and Worker Assistance Act of 2002 (Public Law 107-147).

7 JCWA Title I. Business Provisions. B. Five-Year Carryback of Net Operating Losses (Sec. 102 of the CARES Act and Secs. 172 and 56 of the Code).

Exhibit 1: US Nonfinancial Corporate Debt, 2006-2019



> many taxpayers incurring unexpected financial losses. A temporary extension of the NOL carryback period provides taxpayers in all sectors of the economy who experience such losses the ability to increase their cash flow through the refund of income taxes paid in prior years, which can be used for capital investment or other expenses that will provide stimulus to the economy.[8]

The Tax Cuts and Jobs Act

NOL Provisions

The Tax Cuts and Jobs Act (TCJA) was signed into law on September 22, 2017 by President Trump.[9] The far-reaching legislation lowered the corporate tax rate from 35% to 21%,[10] among many other provisions. The reduction in corporate tax rates was estimated to reduce federal revenues by $1.3 trillion from 2018 through 2017.[11] An offset to the cost of the TCJA corporate tax reduction was the repeal of corporate NOL carrybacks, which was estimated to provide an additional $201 billion from 2018 through 2017.[12]

An article in Politico concluded:

> At the time, the change was projected to generate $201 billion, making it one of the single-biggest payfors in the law. It didn't get much attention, and wasn't considered especially controversial – few seemed concerned with what it might mean in the next recession. "It was politically painless," said Buckley. "There's no organized lobby for people who might have losses in the future."[13]

While the TCJA removed NOL carrybacks, the CARES Act did extend the prior carryforward period from 20 years to an indefinite carryforward period.[14] The TCJA also generally imposed an 80% limitation on the use of NOL carryforwards.[15] For example, a company is formed in 2021 and generates an NOL of ($100) in that year. In 2022, taxable income is $100; only $80 of NOL carryforwards could be used in that year. The remaining $20 NOL carryforward could then be carried forward indefinitely. Note that any section 250 deductions[16] are taken after NOL deductions.[17]

Section 163(j) Limitations

While corporations can generally deduct interest expense,[18] they cannot deduct dividends paid to shareholders. From a tax viewpoint, this provides an incentive for corporations to borrow money rather than raise capital. According to the St. Louis Federal Reserve Bank, non-financial corporate debt increased by 50% to $10.1 trillion from 2006 to 2019, representing 121% of corporate earnings in 2019.[19] (Exhibit 1)

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8 General Explanation of Tax Legislation Enacted in 107th Congress. Prepared by the Staff of the Joint Committee on Taxation. January 24, 2003. https://www.govinfo.gov/content/pkg/CPRT-108JPRT83912/html/CPRT-108JPRT83912.htm.

9 Public Law No: 115-97.

10 The TCJA also eliminated the graduated corporate tax schedule. IRC § 11(b).

11 General Explanation of Public Law 115-97, Joint Committee on Taxation. Estimated Budget Effects of Tax Legislation Enacted in Public Law 115-97. https://www.jct.gov/publications.html?func=fileinfo&id=5152.

12 *Id.*

13 "How Republicans' tax overhaul could make a recession worse. Republicans' 2017 tax overhaul made changes to the tax code that will make it harder for businesses to bounce back from a downturn." Politico, March 16, 2020. https://www.politico.com/news/2020/03/16/republicans-tax-overhaul-recession-worse-132286.

14 IRC § 172(b)(1)(A)(ii)(I) — in the case of a net operating loss arising in a taxable year beginning before January 1, 2018, to each of the 20 taxable years following the taxable year of the loss; IRC § 172(b)(1)(A)(ii)(II) — in the case of a net operating loss arising in a taxable year beginning after December 31, 2017, to each taxable year following the taxable year of the loss.

15 IRC § 172(b)(2).

16 The section 250 deduction generally equals the sum of 37.5% of foreign-derived intangible income (FDII) plus 50% of global intangible low-taxed income (GILTI). IRC § 250(a). For taxable years beginning after December 31, 2015, the FDII deduction will be reduced to 21.875% and the GILTI deductions will be reduced to 37.5%. IRC § 250(a)(3).

17 IRC § 250(a)(2).

18 IRC § 163(a).

19 Board of Governors of the Federal Reserve System (US), Nonfinancial Corporate Business; Debt Securities and Loans; Liability, Level [BCNSDODNS], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/BCNSDODNS (Last visited May 16, 2020).

Continued from p.7

In May of 2019, Federal Reserve Bank Chairman Powell presciently noted:

> Business debt has clearly reached a level that should give businesses and investors reason to pause and reflect. Not only are debt levels high, but recent growth has been concentrated in riskier forms of borrowing.
>
> If the economic and financial conditions deteriorated, overly indebted companies could face significant strains, forcing more layoffs and cutbacks in investment, which could make any downturn more painful. Investors, financial institutions and regulators need to focus on this risk today, while times are good.[20]

The TCJA attempted to address the issue of excessive corporate debt by modifying section 163(j). Under the TCJA, interest expense deductions are limited to the sum of business interest plus 30% of adjusted taxable income plus floor financing interest (for auto dealerships).[21] Any interest disallowed under this section is allowed to be carried forward indefinitely until it can be deducted.[22]

As more fully articulated in a prior *AIRA Journal* article, "New Tax Law May Limit Interest Deductions for Distressed Businesses,"[23] distressed businesses experience disproportionately higher taxes with correspondingly lower cash flows as a result of the section 163(j) adjusted taxable income limitation.

Repeal of Corporate Alternative Minimum Tax

The TCJA repealed the corporate alternative minimum tax (AMT) for tax years beginning after December 31, 2017.[24] For tax years beginning after 2017 and before 2022, the remaining prior year minimum tax credits are refundable in an amount equal to 50% (100% for tax years beginning in 2021) of the excess of the credit for the tax year over the amount of the credit allowable for the year against regular tax liability.[25] For example, a taxpayer has a $100 minimum tax credit carryforward as of December 31, 2017. In 2018, the corporation has a regular tax liability of $40. The refundable minimum tax credit would thus be $30 [($100 MTC – $40 regular tax = $60 excess), then ($60 excess * 50% limitation = $30)]. The taxpayer would thus pay $10 of tax in 2018 ($40 regular tax less $30 minimum tax credit).

The CARES Act

The Senate stated that the purpose of the CARES Act is "to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic."[26] The CARES Act amended several of the corporate tax changes in the TCJA, made some technical corrections to the TCJA, and includes other provisions which were collectively designed to provide unprecedented fiscal stimulus.

NOL Carrybacks and Carryforwards

Section 2303 of the CARES Act modifies rules relating to net operating losses to allow taxpayers to carry back net operating losses in the 2018, 2019 and 2020 tax years for up to five years, and allows taxpayers to offset 100% of their income with NOL loss carryforwards in the same three tax years.[27]

Assume a taxpayer in 2020 generates a ($100) NOL. If the NOL could not be carried back, it would be subject to the 80% income limitation as it is carried forward to future years.[28] Moreover, the NOL carryforward could only offset 21%[29] of federal income tax in future years (the TCJA corporate income tax rate). However, if the NOL could be carried back to a tax year before 2018, the ($100) NOL could generate up to a $35 refund (the pre-TCJA highest marginal tax rate was 35%).

As described above, a temporary five-year carryback was last enacted after the recession caused by 9/11 and was designed "to increase their cash flow through the refund of income taxes paid in prior years, which can be used for capital investment or other expenses that will provide stimulus to the economy."[30] As discussed above, an additional benefit of CARES Act carrybacks is the rate differential between the current TCJA 21% tax rate and the pre-TCJA tax rate of 35%.

As carrybacks are only allowed for the 2018, 2019 and 2020 tax years, taxpayers with NOLs beginning in the 2021 tax year will only be able to carryforward such losses. In addition, for tax years beginning after December 31, 2020, the CARES Act reinstates the TCJA 80% income limitation.

Taxpayers who recognize cancellation of indebtedness income that is excluded under bankruptcy and insolvency exceptions in section 108(a) generally first reduce NOLs by the amount excluded.[31] However, the

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[20] "Fed Chairman Powell warns of economic risks from rising business debt." https://www.wsj.com/articles/fed-chairman-powell-warns-of-economic-risks-from-rising-business-debt-11558393203?mod=searchresults&page=2&pos=11. Last visited May 20, 2019.
[21] IRC § 163(j)(1).
[22] IRC § 163(j)(2).
[23] Loretta Cross and Jaime Peebles, New Tax Law May Limit Interest Deductions for Distressed Businesses, *AIRA Journal* Vol. 31 No. 4-2018.
[24] IRC § 53.
[25] *Id.*
[26] Senate Bill 3548, 116th Congress, § 2 (2020).
[27] IRC § 172(b)(1). Note taxpayers can elect under IRC § 172(b)(3) to completely waive the carryback period for NOLs arising in the 2018, 2019 and 2020 tax years.
[28] As well as other potential limitations such as those imposed by IRC § 382.
[29] IRC § 11(b).
[30] General Explanation of Tax Legislation Enacted in 107th Congress. Prepared by the Staff of the Joint Committee on Taxation. January 24, 2003. https://www.govinfo.gov/content/pkg/CPRT-108JPRT83912/html/CPRT-108JPRT83912.htm.
[31] IRC § 108(b)(2)(A).

reduction is made after any NOL carrybacks.[32] As such, if the NOL was carried forward it would be reduced in attribute reduction, while a carryback of the same NOL might result in a $35 refund for every $100 carried back.

Potential Issues with CARES Act NOL Carrybacks

Myriad issues can arise with the CARES Act 5-year carrybacks. Three of the most prominent issues are:

1. ***Separate return limitation year carrybacks*** – Assume a subsidiary was acquired from a consolidated return group in 2016 by another consolidated return group. If the consolidated return group buyer is now considering carrying back a loss to the seller's 2016 consolidated return group, the stock purchase agreement should be reviewed to determine who contractually has rights to the refund. If the buyer does not want to carryback a loss to the seller's consolidated return group, an irrevocable election can be made to relinquish the carryback to the seller's consolidated return.[33]
2. ***Carrybacks to Section 965 Years*** – As part of the transition from a world-wide to a territorial taxation system, the TCJA included section 965 which required United States shareholders to pay a transaction tax on the untaxed foreign earnings of certain specified foreign corporations as if those earnings had been repatriated to the United States. This "section 965 inclusion" tax could have been paid in one lump sum, or, pursuant to an election under section 965(h), in eight annual installments.[34] The IRS has stated that: "A taxpayer may not receive a refund or credit of any portion of properly applied section 965 year tax payments unless and until the amount of payments exceeds the entire income tax liability for the section 965 year, which includes all amounts to be paid in installments under section 965(h) in subsequent years, if a section 965(h) election was made.[35] As such, taxpayers may make an election under section 172(b)(1)(D)(v)(I) for NOLs arising in those years to exclude tax years in which they have section 965(a) inclusions (section 965 inclusion years) from the carryback period.
3. ***Effect on Other Provisions*** – Taxpayers should carefully consider the effect of carryback and carryforwards of NOLs, and consider the effect of election(s) to: (1) waive the entire carryback, (2) waive carrybacks to separate return limitation years, or (3) waive carrybacks to 965 inclusion years. The carryforward and carrybacks of NOLs can affect the section 250 deduction (for FDII and GILTI), BEAT liability, foreign tax credits and the section 965 inclusion. For example, GILTI is normally taxed at a 10.5% tax rate.[36] Section 250(a)(2)(A) limits the sum of GILTI and FDII deductions to 50% of taxable income. As such, if an NOL eliminates taxable income there would be no GILTI deduction and GILTI income would thus effectively be taxed at a full 21% rate. Note that carryforwards and carrybacks are not allowed for any section 250 deductions. In other words, section 250 deductions are either taken in the year incurred or are forfeited.

Minimum Tax Credit Refunds

As stated above, the TCJA eliminated the alternative minimum tax and allowed for minimum tax credits to be applied against regular tax liabilities at 50% from 2018 to 2020 and then 100% beginning in 2021. Section 2305 of the CARES Act modified this rule to allow 100% of minimum tax credits to be applied against regular tax for 2018 and 2019.[37] Moreover, the CARES Act allows for immediate refund of all minimum tax credits in 2019 or by election in 2018.[38] Notice 2020-26 allows a corporate taxpayer to file a Form 1139, "*Corporate Application for Tentative Refund,*" to request a refund of all minimum tax credits for 2018 by July 15, 2020. After that date, only a Form 1120X may be filed, with a deadline of December 31, 2020.

Temporary Increase to Section 163(j) Expense Limitation

As described above, the TCJA amended 163(j) to limit interest deductions to the sum of: (1) business interest income, (2) 30% of adjusted taxable income (ATI) and (3) floor plan financing interest. Section 2306 of the CARES Act added section 163(j)(10) to increase the ATI limitation from 30% to 50% for taxable years beginning in 2019 and 2020 unless they elect out of the change.[39] Moreover, taxpayers may also elect to use 2019 ATI for taxable years beginning in 2020.[40]

Taxpayers should carefully evaluate the effects of applying the 50% ATI rule in 2019 and 2020, or electing out, as well as electing to use 2019 ATI for taxable years beginning in 2020. For example, applying the increased 50% limitation may reduce the ability to take section 250 deductions (for FDII and GILTI). While the disallowed section 163(j) amounts may be carried forward, as stated above, section 250 deductions can only be used in the year incurred.

32 IRC § 108(b)(4)(A).
33 Reg. § 1.1502-21(b)(3)(ii)(B). See also, Temp. Reg. § 1.1502-21T.
34 IRC § 965(h).
35 Frequently asked questions about carrybacks of NOLs for taxpayers who have had Section 965 inclusions, Question 4. https://www.irs.gov/newsroom/frequently-asked-questions-about-carrybacks-of-nols-for-taxpayers-who-have-had-section-965-inclusions.
36 IRC § 250(a)(1)(B) currently allows a deduction equal to 50% of GILTI. At a 21% tax rate, the 50% deduction thus effectively taxes GILTI at 10.5%.
37 IRC § 53(e)(1).
38 IRC § 53(e)(5).
39 IRC § 163(j)(10)(A)(ii). "Election out".
40 IRC § 163(j)(10)(B).

Continued from p.9

Delays and Deferments

Estimated Tax Payments – Section 2201 of the CARES Act delays corporate estimated tax payments until October 15, 2020.

Payroll Tax Provisions – Section 2202 of the CARES Act allows employers to defer their portion of social security and certain railroad retirement taxes equal to 6.2% of wages up to $137,700 incurred from March 27, 2020 through December 31, 2020. Fifty percent (50%) of the deferred taxes are due December 31, 2021 with the remaining 50% due December 31, 2022.

Technical Fixes to TCJA

The CARES Act contained two "technical fixes" relating to TCJA drafting issues:

1. ***Fiscal Years 2017 Taxpayers*** – While calendar year taxpayers could carryback NOLs two years, a drafting "glitch" in the TCJA prevented fiscal year taxpayers from carrying back NOLs from 2017. Section 2303 of the CARES Act amended section 172(b)(1)(A)(ii)(II) to allow two-year carrybacks for fiscal year 2017 taxpayers. Affected taxpayers have until July 27, 2020 to file amended returns for 2017.
2. ***Qualified Improvement Property*** – Section 2307 of the CARES Act modified section 168(e)(3)(E) to include qualified improvement property[41] as 15–year property, making it eligible for 100% bonus depreciation under section 168(k).[42] Under the TCJA, such property was depreciated under the straight-line method for 39 years. Taxpayers may amend their 2018 returns for this change or file an automatic accounting change to begin bonus depreciation for qualified improvement property in 2019.[43]

[41] IRC § 168(e)(6) defines qualified improvement property as any improvement to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date such building was first placed in service by any person. However, QIP does not include any improvement for which the expenditure is attributable to the enlargement of the building, any elevator or escalator, or the internal structural framework of the building.

[42] The TCJA amended IRC § 168(k) to provide that tangible assets depreciated under MACRS with a recovery period of 20 years or less, that are placed in service after September 27, 2017 and before January 1, 2023, are eligible to elect 100% bonus depreciation.

[43] Complex accounting methods issues may be involved, including whether the 2019 return was filed prior to the enactment of the CARES Act.

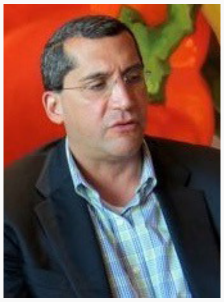
Summary

The corporate tax provisions of the CARES Act are designed to provide taxpayers with substantial countercyclical fiscal stimulus. The CARES Act will generally be most beneficial to taxpayers with losses in 2018, 2019 and 2020 tax years who have sufficient carryback potential to prior years.

Many of the provisions in the CARES Act are temporary and can create unexpected consequences as they variously interact with different sections of the Internal Revenue Code. Taxpayers should carefully model alternative scenarios to determine which elections, carrybacks, amended returns, depreciation methods and other options will produce the most optimal (or perhaps least worst) result. Each taxpayer will have unique facts and outcomes might be counterintuitive. In addition, taxpayers should also take into account projections of income or loss for the 2020 and 2021 tax years, mindful that no carrybacks are available in 2021 or for later tax years under current law.

As the CARES Act does not restore the permanent overall NOL carryback regime that existed prior to the TCJA, the lack of consistent legislative guidance will require future Congresses to affirmatively add carryback provisions during the next economic downturn, if they so choose. The projected $201 billion savings from eliminating NOL carrybacks in the TCJA was a mirage. The economic cycle was not eliminated as a result of the enactment of the TCJA. Hopefully, future Congresses will be more farsighted and enact permanent legislation restoring a pragmatic and longstanding feature of the tax code.

ABOUT THE AUTHOR



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Mr. Barton is a Senior Director in the RSM Mergers and Acquisitions Tax group in New York. Michael has over 20 years of experience with distressed companies, corporate bankruptcies, loss preservation, stock basis, attribute reduction, loss disallowance, earnings and profits, and general M&A issues. He received a BA from Emory University, MBA and JD degrees from Tulane University, and an LLM in Taxation from NYU. Michael is a licensed attorney and holds CPA licenses in New York, California and Louisiana. Email: **michael.barton@rsmus.com**.

SUING YOUR SISTER, INVESTIGATING YOUR MOM: INDEPENDENT COUNSEL IN BANKRUPTCY

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Members of a corporate family often operate together as a unit. That corporate unity can remain intact, even in bankruptcy. Corporate families regularly file Chapter 11 bankruptcy petitions at the same time, functionally operate in the same manner as they did before bankruptcy, and receive guidance from the same restructuring advisors and counsel who may be providing a unified restructuring strategy. Sometimes, though, bankruptcy can drive the family apart. Corporate families stitched together through acquisition, for example, can find themselves with member companies that have different stakeholders, debt covenants, liquidity, and prospects. Insolvent family members owe duties principally to their specific creditors in bankruptcy, while solvent family members remain beholden to their parents and owners. If family members have different creditors, they also may face competing interests. Corporate children may need to investigate or take actions against their siblings, parents, and owners to maximize value for their own creditors.

These scenarios can generate a raft of potential conflicts for corporate directors, in-house counsel, and restructuring advisors and counsel. Generally, neither the directors of the corporate parent nor restructuring counsel for the family can represent all or multiple sides of these conflicts. Doing so risks challenges from competing stakeholders that might distract from—or worse, completely derail—the restructuring process. Here, it can make sense for companies to appoint disinterested, separate individual directors for the different affiliated entities. These independent directors owe their fiduciary duties to and can make decisions for the benefit of the entities they serve. This independence can help resolve questions of independence and perceived conflicts when dealing with intra-family matters. These independent boards and directors can retain independent counsel and other separate advisors to separately manage and respond to litigation and investigations at each entity.

This article presents a case study on the role that independent counsel (sometimes called conflicts counsel) can play in supporting disinterested directors as a part of the overall restructuring effort led by restructuring counsel. The bankruptcy of energy company Alta Mesa Resources, Inc. ("AMR") is the focus of the discussion.[1]

[1] *In re Alta Mesa Resources, Inc.*, No. 19-bk-35133 (Bankr. S.D. Tex.) (Isgur, J.) (bankruptcy petition filed Sept. 11, 2019).

There, hard-fought intra-company litigation between two sister subsidiaries and comprehensive investigations of corporate affiliates and owners undertaken by two separate sets of independent counsel and advisors at the direction of disinterested directors were essential to securing the sale of the debtors' assets.

The "God Factor" Strikes

AMR was formed in 2018 based on a billion-dollar private equity bet on accelerated drilling for oil and gas in Oklahoma. Through a Byzantine corporate structure, AMR combined two pre-existing businesses: Alta Mesa Holdings ("AMH"), an "upstream" company that drilled wells and extracted oil and gas, and Kingfisher Midstream ("KFM"), a "midstream gatherer" for AMH and other producers that processed gas and moved oil and gas from the wells through local gathering pipelines to larger interstate pipelines.

Prior to the merger, AMH had been drilling oil and gas in Oklahoma and elsewhere as a privately held company. AMH was owned principally by its founder, CEO, other senior management, and two private equity sponsors through a holding company. KFM was created in 2015 and was owned by a combination of AMH's holding company, one of the private equity sponsors of AMH, and a third-party that operated KFM. Although separate companies, AMH and KFM were tied together through a series of "gathering agreements" that nominally committed AMH to use KFM to gather and process any oil and gas AMH produced from many of AMH's wells.

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AMH and KFM merged into AMR as part of an investment by a third private equity sponsor and through an initial public offering. The creation of AMR, the third private equity sponsor's investment, and the IPO were meant to finance a program to increase the density of wells operating on existing AMH mineral leases. The hope was that the new drilling program would increase production at lower drilling costs. That did not pan out. After early success with the drilling program, the "God factor struck," as AMR's chairman later testified, and production fell far below expectations.[2] Lower than expected production reduced the expected value of AMH's oil and gas reserves in the ground. Since AMH's credit was limited as a function of its oil and gas reserves, the drop in its reserves eventually reduced AMH's available credit and liquidity, and jeopardized AMH's financing. AMH, and thus AMR, and eventually KFM, were in trouble. In late 2018, AMR replaced many of its executives, and in 2019 it hired restructuring counsel.

As the restructuring process and negotiations with creditors unfolded, it became clear that AMH's creditors (a combination of secured bank debt and unsecured bonds), KFM's creditors (different secured bank debt), and AMR's three equity sponsors all had competing interests. One option on the table was a sale of all of AMH's and KFM's assets as part of a joint sale process. Although a joint sale of AMH's and KFM's assets was possible, AMH's creditors were mindful of the possibility that AMH's assets—principally its mineral rights—could be more valuable alone than with costly gathering contracts with KFM. KFM's creditors and equity sponsors wanted to keep KFM out of bankruptcy and to keep those contracts in place. Disinterested directors were brought in to manage AMH's and KFM's conflicting interests, and each entity retained independent counsel.

A "Gathering" Storm

AMH's and KFM's independent counsel played two roles: litigation and investigation. Litigation took center stage first. The day after AMR and AMH filed for bankruptcy, AMH's independent counsel, at the direction of AMH's disinterested director, sued KFM.[3] The goal: to terminate the costly natural gas and crude oil gathering agreements that were at the heart of the AMH-KFM business relationship before the AMR merger. AMH, supported by both secured and unsecured creditors, believed these agreements were overpriced and one-sided in favor of KFM, and AMH sought to reject the agreements in order to maximize the value of AMH's remaining assets. KFM wanted to keep those agreements in place.

Debtors in bankruptcy can reject executory contracts based on business judgment. But, KFM argued the agreements were covenants that ran with the land, meaning they were property rights that encumbered AMH's mineral interests (AMH's main assets), and, therefore, they could not be rejected. So, anyone who acquired AMH's assets would need to continue paying KFM's gathering rates. AMH argued these agreements did not run with the land, citing a favorable decision from a bankruptcy court in New York, *In re Sabine Oil & Gas*.[4] The *Sabine* court concluded similar agreements did not run with the land and permitted the debtor to reject them. AMH also challenged the contracts as fraudulent transfers and breaches of fiduciary duty executed by AMH's leadership prior to AMH's consolidation into AMR. They pointed to AMH management's stake in KFM at the time, which caused AMH to accept above-market agreements. AMH further alleged that KFM had breached the crude oil gathering agreement.

Complicating matters, the litigation was on the clock, and AMH had only four months to litigate the case. Why so fast? Because AMH's secured lenders required AMH to receive bids within four months of entering bankruptcy in exchange for AMH's lenders' agreement to allow AMH to use its cash collateral for operations. For the litigation to have an impact on AMH's sales price, it needed to conclude before the bids were received. So, the parties set a breakneck schedule for depositions, expert reports, summary judgment, and trial, all with a goal of obtaining a decision from the bankruptcy court on AMH's claims in time to inform any bidders that might be interested in acquiring AMH's assets separate from KFM's assets. If the agreements were terminated by the litigation, then AMH's assets might be worth more in a separate sale.

Eventually, the bankruptcy court concluded that the gathering agreements were covenants that ran with the land, and that they could not be rejected on that basis. But, the court denied KFM's motion for summary judgment on the other claims and sent the case to trial on the fraudulent transfer, breach of fiduciary duty, and breach of contract claims. In the meantime, initial bids for AMH's and KFM's assets continued to be received. After two days of testimony, stakeholders for AMH and KFM reached a temporary truce and agreed to negotiate a resolution based on the bids that had already been received. The litigation was over, but now the investigation took the stage.

[2] Trial Transcript for Dec. 10, 2019 at 124-132, *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC*, No. 19-ap-3609 (Bankr. S.D. Tex.), ECF No. 212.

[3] *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC*, No. 19-ap-3609 (Bankr. S.D. Tex.) (complaint filed Sept. 12, 2019).

[4] *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 69 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018).

"Extreme" Investigations

While the litigation raced ahead and the overall bankruptcy process continued, the disinterested directors directed the respective independent counsel for AMH and KFM to investigate potential claims against related parties, including AMH's and KFM's claims against each other and affiliated parties. The investigations were intended to identify potential claims against affiliates and equity sponsors. They also aimed to determine the value of any releases that an affiliate or sponsor might seek as part of a bid by the affiliate or sponsor to purchase AMH's or KFM's assets. With those objectives in mind, independent counsel took the lead on the investigations, cooperating with the UCC, but avoiding the potential larger expense of an independent UCC investigation. In four months, independent counsel reviewed tens of thousands of documents, conducted interviews, deposed witnesses, and prepared comprehensive reports.

As the litigation wound down, bids came in. The leading bidders were AMH's unsecured bondholders and one of AMR's equity sponsors. When comparing the bids, AMH's disinterested director had to account for the value of potential claims against the equity sponsor–bidder, in part because the sponsor–bidder sought a release from claims by AMH as part of the sale. AMH's disinterested director, relying in part on the analysis by the independent counsel, determined the claims were of little value and that the equity sponsor's bid was superior for that and other reasons. The UCC, whose principal constituent was the unsecured bondholders, challenged the sale to the equity sponsor, and specifically the valuation of potential claims by AMH against the equity sponsor.

The court heard lengthy testimony at the sale hearing. The analysis provided in AMH's independent counsel's reports formed the heart of AMH's disinterested director's defense of his decision to recommend acceptance of the equity sponsor's bid. The KFM disinterested director likewise relied on KFM's independent counsel's analysis. Despite aggressive arguments and cross-examination by the UCC, the court approved the sale to the equity sponsor, citing the "extreme analysis" undertaken by independent counsel to vet potential claims against the equity sponsor–bidder.[5] AMH's and KFM's assets were sold jointly to the equity sponsor–bidder, and the proceeds were distributed amongst their creditors pursuant to a separate agreement between the creditors.

Considerations for Advisors to Debtors

The AMR bankruptcy was unusual, but it offers lessons for any corporate family that could find its corporate house divided and its restructuring process imperiled by conflicts.

- **Identify potential intra-company conflicts early.** In-house counsel, restructuring counsel, and restructuring advisors can be in the best position to watch for potential conflicts between family members, such as where family members have separate creditors, where intra-company agreements favor one family member over another, or where potential bidders in a sale of debtor assets are part of (or affiliated with) the corporate family. Designating disinterested directors and independent counsel from the outset can help avoid later accusations of conflicts. In the AMR case, the early appointment of disinterested directors and independent counsel who performed their own independent detailed investigations was key to the court's approval of the sale over the UCC's objections.
- **Maintain open lines of communication.** Management and restructuring counsel may find it disconcerting to hand over the reins for a portion of the restructuring process to disinterested directors and independent counsel. That is natural because disinterested directors and their counsel will need to act independently. They may need to sue or seek sensitive discovery from the management or company that hired restructuring counsel, or the disinterested directors and independent counsel may need to take steps that do not fit within restructuring counsel's overall plan. Thus, restructuring counsel and independent counsel can benefit from communicating often and with candor. That way, both sides can understand each other's objectives, allowing independent counsel to protect its client's interests while minimizing disruption to,

[5] Sale Hearing Transcript for Jan. 24, 2020 at 226-227, *In re Alta Mesa Resources, Inc.*, No. 19-bk-35133 (Bankr. S.D. Tex.), ECF No. 1035.

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and usually playing an essential part in, the overall restructuring goals that restructuring counsel is driving towards.

- **Cooperate to make the process efficient.** Independent counsel and restructuring counsel can work together to ensure that the litigation or investigation process is as efficient as possible. For instance, in the AMR litigation, the parties agreed to forego Rule 30(b)(6) corporate designee depositions when it became clear that any designee would be a shared employee of both sides and the parent company. Also, restructuring counsel managed document productions and facilitated witness interviews and depositions for both AMH and KFM. The parties also used Federal Rule of Evidence 502(d) agreements to avoid complex privilege fights and inadvertent privilege waivers. This sort of cooperation between independent counsel and restructuring counsel helped preserve limited debtor resources without compromising each counsel's separate objectives.
- **Prepare for disclosure of privileged investigations.** Disinterested directors may have to rely on privileged investigative reports prepared by independent counsel to inform their business judgment. If their decisions are questioned by a creditor or other party, the best defense may be waiving privilege and disclosing the investigative report. For example, the UCC's challenge to the AMH disinterested director's selection of the sponsor–bidder's offer was rebuffed, in part, by producing independent counsel's detailed reports to the court. That strategy works best if independent counsel prepares the investigative reports with an eye towards possible public disclosure to an audience other than the client. Protecting business information in the reports is another concern. Rule 502(d) agreements and protective orders can be used to avoid those disclosures causing broader waivers of privilege.

Bankruptcy is often a costly and stressful process for the debtor and its stakeholders, even when every member of the corporate family is rowing in the same direction. The idea that members of the corporate family might add to that expense and stress by hiring their own independent lawyers to sue and investigate each other can seem unfathomable. The AMR case shows that delegating authority to disinterested directors to manage intra-company disputes and hiring independent counsel to investigate and litigate those intra-company disagreements can be essential to the success of the overall bankruptcy. It also demonstrates that aggressive litigation and diligent investigations by independent counsel can avoid accusations of conflicts of interest that might otherwise distract from the restructuring process, and can be efficient when managed carefully and collaboratively by restructuring counsel and independent counsel.

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PERSPECTIVES ON CRISIS CASH MANAGEMENT

DAVID BART, CIRA, CDBV and DAN JARES, CFE
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The ongoing COVID-19 pandemic has forced many companies to take a hard look at their understanding of sources and uses of cash. The immediate priority placed on cash has forced numerous C-suite executives to face unprecedented disruptions that now require crisis-level approaches to cash management and liquidity planning at the highest levels of the organization. The near-term, pandemic-induced environment that exists in the summer of 2020 and the longer-term economic outlook for the remainder of the year continues to be highly uncertain across the U.S. and internationally.

Due to this uncertain environment and unknown timelines, proactive assessments and real-time, rapidly responding management of cash resources may prove critical to identifying and planning for future risks as the economic effects of this situation continue to unfold.

While many companies can, or have, withstood a short-term disruption in cash, a general slowdown in the velocity of cash transfers throughout the economy brings significant liquidity risk. C-suite executives should carefully evaluate where liquidity soft spots may exist from daily, weekly and monthly perspectives to anticipate issues and to manage the business based on closely monitored and projected sources and disbursements of cash. Tactful and collaborative, data-informed evaluation and communication with stakeholders (both internal and external) can help preserve cash resources and marshal the business forward.

Pressures Are Mounting

The ongoing uncertainty, timing, and severity of the COVID-19 pandemic, and the resulting shutdowns can affect cash flows in many ways, including:

- Changes in business operations guidance and regulations are placing new demands on business leadership.
- Supply and demand shock have jolted the value chain.
- A highly dynamic and quickly shifting environment that faces uncertain but constricting pressures can significantly stress operations and workforce management and require the preservation of cash.
- The desirability of pursuing various restructuring options (out of court or through a legal proceeding such as bankruptcy) may change as circumstances and company situations evolve.

In short, business continuity may be at risk from a range of factors in the current environment.

Phases of Response

Based on our experience and observations, priorities should focus on gaining a clear line of sight toward future direct cash flows. Those prospective direct cash flows will define constraints that can limit the organization's abilities to undertake highly focused and tactical operational responses. Well-developed and tested scenario modeling based on carefully prepared and reliable cash management projections can become critical information points that educate and inform management's perspectives and responses to available options. Grounded insights into cash can provide a foundation for the C-suite to guide and communicate critical operational decisions, enabling the creation of a real-time, dynamic management environment, which can help extend the cash runway for the organization and minimize liquidity risks during the recovery process.

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Based on our observations, several critical steps can be important factors to developing a cash-focused orientation.

- ***Form a Crisis Team:*** A crisis team can include both senior management and support functions. Team members can then coordinate and work together to obtain and develop information from relevant departments across the organization. Key executives may include the CEO/President, CFO, COO, Treasurer, HR, general counsel, or other senior people. Board level representation can help to facilitate rapid communication and enhance board level oversight and commitment to management's efforts. Outside advisors may be retained to provide financial advisory/consulting services or outside legal services.
- ***Assess Options:*** Assessments and development of options can be evaluated using real time financial dashboarding, iterative cash flow forecasts and projections, and the development of multiple scenarios. Functional leaders can bring their perspectives and data to bear on the analysis, e.g. from operations, procurement, production, service delivery, sales, and human resources.
- ***Develop Longer Term Outlooks and Assessments:*** The results of short-term tactical options can be evaluated for their longer-term impacts using actual to forecasted and actual to projected experiences. Options can be viewed from weekly to monthly to quarterly to annual perspectives as the crisis unfolds and implications for recovery plans become more apparent. These analyses may have bearing on collateral management, exploration of tax and government support, or even the use of bankruptcy or restructuring alternatives.
- ***Implement and then Re-assess:*** Dynamic planning that uses dashboards and financial modeling to manage cash can help create and implement a proactive environment. Development of financial projections that incorporate dashboard data permit management to create scenario analyses for evaluating potential management decisions and plans. Scenario modeling provides an important tool for proactively managing options and communicating to lenders, vendors, lessors, workforce, and customer relationships. In addition, regulatory and tax support strategies can be assessed and implemented in a coordinated fashion based on common data and expectations.

Important Liquidity Concerns

We have seen a wide range of efforts undertaken by companies to understand their cash situations. Some have brought complex, highly sophisticated approaches; others are undertaking these efforts for the first time. Liquidity is driven by many factors. We have found that a number of issues can be paramount, such as:

- **Cash** – Use of dashboarding for current information and use of multiple scenarios with short- and long-term time horizons can help management to understand the ramifications of the current environment and the potential outcomes of management actions on cash. The potential length of time and duration of this situation and business environment will depend on the virus, government responses, the economy, the industry sector, and the company's own circumstances.
- **Debt and obligations** – Proactively informing and working with lenders, financial institutions, trade creditors and others may offer opportunities for cooperation and development of alternatives, e.g., A/P prioritization, modifications to lines of credit, deferrals on interest and payment obligations, temporary reprieve on covenant requirements, or other options.
- **Workforce management** – Staff planning, optimization, furloughs, notification requirements for salary versus wage employees, as well as planning for the impact on payroll, benefits, retirement, etc. may provide ways to reduce workforce expenses.
- **Sales demand and mix** – Analyzing fluctuations/changes to customer, product and channel mix may generate idea for new strategies that can conserve cash and help reduce financial risk.
- **Supply chain** – Closely managing the supply of core goods, fluctuations in material/supply costs, and developing updated strategies based on current information may reduce the risks to supplies as well as conserving cash.
- **Receivables** – Evaluating and modeling current days sales outstanding, understanding customer mix and COVID-19 impacts, updating credit strategies, assessing promotions and the use of discount initiatives may be considered.
- **Inventory management** – Analyzing SKU level adjustments, updating supplier strategies and inventory management offer other approaches to conserving cash.
- **Economic and tax incentives** – Closely monitoring governmental economic relief opportunities, tax and other incentives may offer a much-needed source of funds.

Triaging Cash and Projecting Outcomes

During the course of the COVID-19 pandemic, the timing of responses and related actions and timely communication to stakeholders are already proving to be critical components of company strategies. Frequent measurement and analysis of the components of cash and liquidity can become essential to understanding current and projected positions relative to the economy, competitors, and a company's historic financial performance relative to its plans for the future. Frequent triage may be necessary for businesses to prioritize their responses to a changing environment.

The use of direct cash flow projections permit the development of responses based on an informed understanding of the potential outcomes and impact of those responses to the factors that drive cash flows. This information can enable management to prioritize their focus among a wide range of issues. For example:

- The assessment of creditor issues may benefit from the data, information, and insights drawn from runway (time) analysis, scenario analysis, dashboarding, and informed lender analysis and negotiations together with informed creditor analysis and negotiations and/or leaseholder negotiations that can benefit from an assessment of realistic recovery planning.
- Operations may benefit from implementation of stricter controls over cash, production management, and accounting management. Anticipated cash shortfalls may permit better planning and implementation of workforce issues, such as WARN Act compliance, employee benefits, and headcount/staffing resources. Changes to shareholder and debt securities, issuances of customer notices, and sending vendor notices can be anticipated and paced to coincide with the availability of cash resources.
- Asset strategies may require an assessment of cash availability and projected cash flows to evaluate furlough/wind-down planning, temporary closures, leases, asset sales, regulatory issues (e.g. SEC/FCC/state regulations), staff reductions, and/or inventory options.
- A range of other matters may also require rapid assessments of cash balances and projected cash flows, such as: collateral testing and compliance, asset sales, union issues and notices, taxes, and other compliance reporting.

Employing Cash Dashboards and Using Cash Projections

In a crisis environment where cash is often king, and where cash preservation forms an important part of survival outcomes, the C-suite may select a dedicated team whose purpose is to monitor, project, and plan the sources, uses, and cash balances with increased frequency. Based on our experience, a dashboard and forecasting team can function more effectively if it includes a single point of control to organize and oversee the process.

- ***Team Structured Information:*** Coordination and teamwork by both senior management and support functions can organize and streamline information and data contributions from relevant departments. The head of the dashboard and projection team may be the CFO, Treasury Director, Head of Finance, or other senior person. Representatives from treasury/finance, operations, accounting, procurement, sales, and collections may all play a role. Team composition and structure will vary depending on the facts and circumstances of each situation, the industry, the financial operations of the business, and other factors.
- ***Automated Dashboarding:*** Integrated, automatic information flow into useful financial dashboards that capture relevant financial information and important metrics can permit the team to focus on analysis and development of strategic and tactical options. The information should be accurate and reliable. Coordination with IT and/or technical consultants is often useful to determine the most efficient way of compiling data. It will be important to understand the capabilities of company data systems or enterprise software applications as well as senior and functional level management capabilities when designing dashboards.
- ***Scenarios and Planning:*** Development of financial projections that incorporate real-time or the most current available dashboard data permit management to create meaningful scenario analyses for evaluating potential management decisions and plans. Scenario modeling provides an important tool to determine time horizons and frequency of reporting, and facilitates a data driven dialogue with management and potentially with key stakeholders about possible scenario outcomes or decision options that may have significant liquidity effects. Upside and downside scenarios can be developed that incorporate the latest information and thinking about the key drivers of cash flow and possible outcomes.
- ***Maintaining and Updating Data:*** The crisis team can more fully utilize dashboards and financial projections by developing processes that update and maintain the data and the financial dashboards and projections. For example, supplemental schedules can present projected to actual variances, assumptions can be updated based on feasibility and organizational decisions, and model design and information sources can incorporate updated

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or refined data from departments. Upside and downside scenarios can be further updated and modified as a dynamic and adaptable planning environment is established.

Characteristics of Cash Management Dashboards

The range of information represented on cash management dashboards can be quite broad. The cash management team should select relevant data and information that are pertinent to the industry and the company. For example, companies with lending obligations will want individual loan balances monitored, covenants tested, and borrowing capacity calculated. Key operating statistics can be selected for each situation. The operating statistics will vary by industry and by company, e.g. the key metrics and cash flow drivers for a healthcare provider differ from a service company, a manufacturer, or a wholesaler.

Daily and weekly projected to actual results can be monitored and refined to revise projection assumptions, or to completely re-project outcomes depending on the scenarios being assessed. Potential information may include balances, operating metrics, anticipated weekly collections, payroll, or other disbursements. The scope can be quite broad, so the team should consider and select the most relevant information it believes constitute the significant drivers of cash flow and important factors to review. Some examples of important information to monitor are as follows:

- Cash on hand
- Debt metrics (e.g., loan covenants, borrowing base, borrowing capacity)
- Immediate payment needs
- Outstanding receivable balances and collections
- 13-week cash flow summary (sources and uses of cash, actual to projected results by period)
- Financial metrics (e.g., days sales outstanding, days payable, inventory days)
- Payables and critical vendors
- Other relevant account balances.

Some Considerations for Projecting Direct Cash Flows

A common time horizon for cash management planning extends to 13 weeks, with weekly increments. A 13-week horizon provides time to develop a strategic outlook and tactical planning options. During the 13 weeks, weekly projections and actual results can provide a rolling view of the business and its trajectory. It is not uncommon to extend 13-week projections to monthly, quarterly or annual time horizons based upon each individual situation.

A 13-week direct cash flow projection and related financial dashboards can be used to track actual cash movements and show exactly how much cash is on hand or anticipated to be on hand in future periods. The 13-week cash flow projection provides a view of a company's ability to generate sufficient cash to fund continuing operations under a set of defined assumptions. It can provide advanced information about potential liquidity shortfalls, allowing management to plan proactive responses. And, weekly projected to actual variance analysis provides real time feedback on management's business decisions, allowing dynamic responses to the tactical implementation of crisis plans.

The 13-week direct cash flow model is not a simple balance sheet and income statement reconciliation. Its structure can be equated to a detailed checkbook style of thinking about cash flows, with a focus on daily or weekly sources of cash, uses of cash, and cash on hand reconciliations.

A direct cash projection model is only as good as the information that is input, and the reliability of the formulas used. Assumptions should be reasonable and feasible based on company and market conditions. Changes to these assumptions should be tied to specific anticipated business decisions or options under analysis. Each assumption should be determined with consideration to its complexity and its potential impact on the company's liquidity. Multiple scenario outcomes can be developed.

Each model may vary depending on the situation, but detailed, build-up assumptions can be developed. Some examples include:

- **Key assumptions** – Items with substantial liquidity impact, where significant scenario outcomes from potential decisions can be tested by changing interactive assumptions.
- **Variable cost assumptions** – Items that can be projected as a percentage of another metric or based on some other variable assumption that can be modelled using a relationship-derived formula, such as revenue or units of production, or units produced and/or sold.
- **Fixed cost and low impact assumptions** – Items that have relatively constant costs or that have little liquidity impact can be grouped for later analysis, or potentially addressed with simplifying assumptions.
- **Capital structure assumptions** – Loans, leases, and other contracts can be tested for debt capacity, covenant compliance, or possible modification of terms, e.g. forbearance terms, and different interest rates (or the impact of penalty interest and fees).

Closing Thoughts

The COVID-19 pandemic has placed a premium on management's abilities to optimize its cash on hand. Management's skills in responding to a rapidly changing business environment may be demonstrated, in part, by the amount of cash it preserves and the reliability of its direct cash flow projections. Important questions may simplify to whether management can reasonably anticipate the months ahead, and whether management has the necessary cash and liquidity to respond. The severe economic shock to supply chains, service delivery, production capacity, workforce management, and many other factors have placed unprecedented demands on senior management to be directly involved with this direct cash planning.

Effective cash flow dashboarding and scenario modeling requires widespread involvement and buy-in, which in turn can develop a more robust environment for dynamic and effective cash plan implementation. Top down insight and control can be significantly strengthened through use of important bottom up information that is based on analyses that understand the key cash flow drivers.

Thus, the development of effective cash flow management stems, in part, from the development of good financial data and well-reasoned assessments of potential financial outcomes. Dashboarding and scenario modeling provide tools for that information to be corralled and utilized. Timing and communication to manage among strategic and tactical options during the crisis requires top down insight and control. Effective cash management crisis teams that can develop the ability to monitor and project those items can bring the power of their financial information to bear while weathering the storm.

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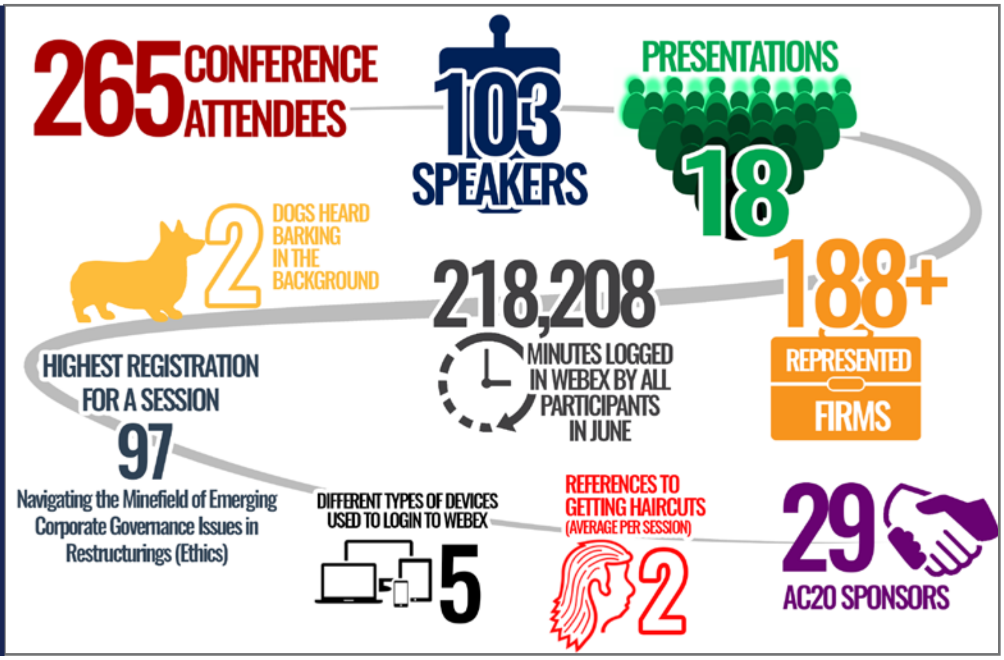
A special thank you to our AC20 planning committee, sponsors, speakers, and all those that participated for helping to make the AC20 Virtual Series an overwhelming success. We hope to see you next year for AC21 in Newport Beach, CA, June 9-12th.

AC20 VIRTUAL SERIES BY THE NUMBERS



KEY U.S. ANTITRUST ISSUES IN BANKRUPTCY SALE-TRANSACTIONS[1]

ROSA EVERGREEN, MICHAEL B. BERNSTEIN and JUSTIN HEDGE
Arnold & Porter

The COVID-19 pandemic has created significant financial distress for many businesses and there have been a number of bankruptcy filings recently,[2] with more likely on the horizon. As a result, there is likely to be an increase in acquisitions of companies or assets out of bankruptcy.[3] Companies considering bankruptcy sale-transactions need to consider the structure that best suits their needs—e.g., a " 363 sale" offering a separate sale process and potentially speed, or a sale as part of the plan of reorganization or liquidation plan, which allows for the sale to be incorporated into the plan process. It also is important to recognize that just because a target has filed—or is likely to file—for bankruptcy, does not mean that the transaction is immune from the antitrust laws. Parties to transactions meeting certain thresholds must file notification with the Federal Trade Commission and Antitrust Division of the Department of Justice and observe a waiting period prior to closing. And, the US antitrust authorities will continue to scrutinize and investigate transactions raising substantive antitrust issues—whether meeting the threshold for filing or not. Both the filing and substantive review occur independent of the bankruptcy court's approval.

Below is a summary of the key issues to consider when contemplating acquisitions in bankruptcy, especially those that may raise antitrust issues.

Bankruptcy Overview

There are a number of considerations for a company when contemplating acquiring the assets of a distressed company; one is whether to acquire the assets pursuant to a section 363 sale or a sale under a confirmed plan of reorganization/liquidation.

363 Sale

In a sale pursuant to section 363 of the Bankruptcy Code, a buyer typically negotiates a purchase and sale agreement (PSA) pursuant to which the buyer agrees to acquire all or certain of the assets of the target company, and agrees on the liabilities that the buyer is willing to assume in connection with the acquisition of the identified assets. The parties also agree upon the contracts that will be assumed and assigned to the buyer in connection with the acquisition of the identified assets. In connection with the negotiation of the PSA, the buyer and target company also negotiate the terms and conditions of bidding procedures that will be operative in connection with the sale of the assets pursuant to the PSA. These procedures generally include, among others, a "break-up fee" and "expense reimbursement" that will be payable to the buyer if a third-party outbids the buyer at any auction.

Under the sale process described above, the buyer is often referred to as the "stalking horse bidder" and the requisite PSA and associated bid procedures to be implemented in connection with the sale of the assets to the stalking horse bidder are generally fully negotiated between the buyer and the target company prior to the commencement of the bankruptcy proceedings. In this scenario, the fully negotiated PSA and bid procedures, and the motions seeking the approval of the PSA and the bid procedures, are then submitted to the bankruptcy court for approval at the same time (or close in time) to the commencement of the bankruptcy proceedings.

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[1] This article was first published by *Law 360,* July 2, 2020, Reprinted with permission.

[2] For example, as of the end of May 2020, there were already a number of well-known retailers and restaurant chains that filed for bankruptcy, with the vast majority of those filings occurring between March and May 2020. These include Tuesday Morning, J. Crew, Pier 1, Modell's Sporting Goods, True Religion, Lucky's Market, Earth Fare, Neiman Marcus, John Varvatos and others. *See* Business Insider, *These 16 Retailers and Restaurant Chains Have Filed for Bankruptcy or Liquidation in 2020* (June 1, 2020); *see also J.Crew, Neiman Marcus, and Others Are Filing For Bankruptcy. What Does That Mean, Exactly?* (May 12, 2020).

[3] *See e.g.* Business Insider, *Dean Foods Receives Court Approval for the Sale of Substantially All of Its Assets* (Apr. 4, 2020); Construction Dive, *Judge Approves McDermott Reorganization, $2.7B Sale of Lummus Technology* (Mar. 13, 2020); Reuters, *U.S. Bankruptcy Court Approves $220 Million Sale of Shale Firm Alta Mesa* (Apr. 2020); The Real Deal, *Costar Acquires Troubled Rental Listings Firm for $588M* (Feb. 12, 2020).

In other cases, typically where a company has not identified an agreed-upon buyer prior to its bankruptcy filing, the company (now a debtor in bankruptcy) instead seeks approval of bid procedures without an identified stalking horse bidder and attempts to use the process of soliciting bids as a way to find a potential buyer during the bankruptcy.

In either case—that is, with a stalking horse bidder or simply the debtor seeking to establish bid procedures separately during the bankruptcy case, upon receipt of the bankruptcy court's approval of the bid procedures—the debtor can conduct the auction process to ascertain if there are any qualified bidders or any qualified competing bidders, as applicable, and to the extent any such bidders are identified, conduct an auction to determine the ultimate winning bidder. Once the winning bidder has been determined, the actual sale of the assets is submitted to the bankruptcy court for approval, and subject to receipt of the bankruptcy court's approval (and any closing conditions in the PSA), the sale may be consummated.

Some benefits of an acquisition of assets pursuant to a section 363 sale in bankruptcy include:

- Speed—potential for 60-90 days to closing;
- Potential for lower transaction costs;
- Ability to "cherry pick" assets and liabilities to be assumed;
- Assets can generally be obtained free and clear of liens and claims;
- Restricted contracts can often be assumed and assigned to the buyer; and
- Buyer protections—including potential "break-up" fees, "expense reimbursements," ability to influence minimum overbid amount and other terms of the bidding procedures.

Plan of Reorganization/Liquidation

In addition to acquiring the assets of a target company pursuant to a section 363 sale, an interested buyer may seek a sale-process effectuated under a confirmed plan of reorganization or liquidation. In this context, the target company/debtor proposes a plan pursuant to which the debtor agrees to sell the designated assets, subject to the assumption of agreed upon liabilities, to an identified buyer pursuant to a section 363-like process that is incorporated into the plan; that is, such sale is subject to the debtor's receipt of higher and better offers from third parties, which could be solicited pursuant to bidding procedures implemented in connection with the plan.

Although a sale of assets in connection with a plan is like a section 363 sale in that the buyer ultimately acquires the designated assets generally free and clear of liens and claims, subject only to the agreed upon assumed liabilities, because the sale is implemented in connection with the plan process it may be subject to all of the uncertainties, time delays, procedural requirements and impediments that are generally inherent in the plan process. For these reasons, the acquisition of assets by means of a sale process implemented in connection with a plan is generally utilized only where agreement has been reached among the debtor and its key creditor constituencies prior to the commencement of the bankruptcy proceedings regarding the sale of the debtor's assets. In this context, the plan is effectively "pre-packaged" or "pre-negotiated" by the debtor with its key creditor constituencies in order to avoid any unforeseen circumstances or time delays.

Generally, the benefits of acquiring assets pursuant to a "pre-packaged" or "pre-negotiated" plan include:

- Major stakeholders have agreed on critical terms prior to the filing;
- Assets can generally be transferred free and clear of encumbrances and interests;
- Restricted contracts can often be transferred;
- Transfer tax exemption under Section 1146(a) of the Bankruptcy Code;
- Potentially shortens and simplifies the bankruptcy process;
- With respect to a "pre-packaged" plan, votes for the plan have often already been solicited and approval received prior to the filing;
- Parties' interests more likely aligned, facilitating bankruptcy court approval of the plan and the documentation of the sale transaction; and
- Once filed, the bankruptcy generally proceeds fairly quickly.

Antitrust Considerations in Bankruptcy-Related Transactions

Hart-Scott-Rodino Act (HSR) Filings Can Have Accelerated Waiting Periods in Bankruptcy, but Not Always

Acquisitions of voting securities or assets above the annually adjusted thresholds,[4] including those made during a bankruptcy process, require notification under the HSR Act.[5] Under the HSR Act, parties typically must wait to close a transaction until they have observed the 30-day waiting period from the date both parties made their HSR notification with the DOJ and FTC. And, that waiting period may be extended if the antitrust authorities determine they need to investigate the

[4] The current lowest size-of-transaction threshold is $94 million. All current thresholds can be found at https://www.govinfo.gov/content/pkg/FR-2020-01-28/pdf/2020-01423.pdf.

[5] 15 U.S.C. 18a.

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transaction further.[6] Even if the transaction does not meet the filing thresholds, the antitrust authorities may investigate the transaction and go to court to seek to block the closing.

For transactions covered by section 363(b) of the Bankruptcy Code, there is a shortened waiting period of only 15 days from the day both parties made their notifications under the HSR Act.[7] This means sales pursuant to section 363 of the Bankruptcy Code can receive a shorter waiting period; however, all other bankruptcy transactions subject to the HSR Act fall within the typical 30-day waiting period and do not receive an abbreviated waiting period.

Antitrust Review of Bankruptcy or Distressed Deals Proceed as Normal, but Parties May Have a Good Failing Firm Defense

The US antitrust authorities review bankruptcy related transactions in the same manner as they would any other transaction—by assessing whether the transaction would substantially lessen competition.[8] This is the case for both HSR reportable transactions, as well as transactions that do not trigger a filing requirement under the HSR Act. And, both the FTC[9] and DOJ[10] have made clear that the COVID-19 pandemic has not changed that approach.[11]

When the target is distressed, or even entering bankruptcy proceedings, there is a logical argument that its competitive significance has been reduced. The antitrust authorities, however, seek to maintain whatever competitive pressure remains and preserve the potential for such targets to become more competitive in the future where possible. As a result, it is not atypical for the authorities to investigate and even challenge transactions made out of bankruptcy—particularly when the parties are competitors

For instance, in November 2019, Dean Food's filed for Chapter 11 bankruptcy, and in March 2020, pursuant to bidding procedures entered in the bankruptcy proceeding, Dean Food's selected Diary Farmers of America, Inc. (DFA) as its winning bidder for the majority of its assets.[12] In May 2020, the DOJ Antitrust Division, together with the Massachusetts and Wisconsin attorneys general, filed a lawsuit in the District Court for the Northern District of Illinois to prevent the sale on antitrust grounds.[13] Simultaneously with the filing of the complaint, the parties entered into a settlement requiring the divestiture of certain milk processing plants to alleviate the competition concerns with the proposed transaction.[14]

Similarly, in June 2020 real estate information service provider, CoStar, received bankruptcy court approval to buy Rentpath pursuant to the confirmation of Rentpath and its affiliated debtors joint Chapter 11 plan (with the sale transaction incorporated into the terms of the plan). In April 2020, CoStar reported that the FTC had issued a Second Request and opened an investigation into the competitive effects of the proposed transaction.[15] The transaction still has not closed as of this publication.

And in a number of instances, after a thorough investigation, the authorities may believe the transaction out of bankruptcy will substantially lessen competition and seek to litigate. For example, while the case was ultimately settled, DOJ sued to block US Airways' acquisition of American out of bankruptcy in 2013.[16] In 2001, the DOJ also litigated to enjoin a proposed SunGard's acquisition of Comdisco out of bankruptcy.[17] The bankruptcy court had approved SunGard, a competitor to Comdisco as the winning bidder. DOJ challenged the transaction on the grounds that it would substantially lessen competition for disaster recovery services. DOJ ultimately lost its bid to enjoin the transaction, but it demonstrates that the antitrust authorities may challenge transactions even when a target has entered bankruptcy.

However, the antitrust authorities will consider the competitive standing of a company that is in bankruptcy or how COVID may be reshaping certain market conditions. These are important considerations that the antitrust authorities will evaluate. In fact, courts and the antitrust authorities have recognized that in certain circumstances a "failing firm" defense is valid and a complete defense to potential antitrust concerns. In short, if it is so obvious that the assets will otherwise exit the market, it alleviates the potential competitive concerns with the transaction.

6 16 CFR 803.10(b).

7 16 CFR 803.10(b) (providing for a 15-day waiting period for an acquisition covered by 11 U.S.C. 363(b)). HSR guidance also provides for the filing by multiple bidders to file on a court's order but clarifies that "it's only a 363(b) filing that gets the shortened waiting period." *See* FTC Informal Interpretation #1307002.

8 *See* 15 U.S.C. 18.

9 FTC stated it would "not suspend {its} usual rigorous approach" even though it was "navigat{ing} uncharted waters" and working remotely. FTC, Antitrust review at the FTC: staying the course during uncertain times (Apr. 6, 2020).

10 DOJ made similar statements that while it will cooperate with parties in navigating process changes made due to COVID, it will still act consistently with its responsibilities under the antitrust laws. DOJ, *Justice Department Announces Antitrust Civil Process Changes for Pendency of COVID-19 Event* (March 17, 2020).

11 This continued rigor by the antitrust authorities impacts not only the review of acquisitions, but also the review of potential buyers of any divestitures to be made to resolve competitive concerns with a transaction. As a result, divestiture buyers should be even more prepared to explain their ability to finance the acquisition and rationale for buying the assets, provide business plans, and make personnel from the buyer and its financing sources available.

12 Complaint, *United States v. Dairy Farmers of Am.*, 20-cv-02658 (May 1, 2020).

13 *Id.*

14 Proposed Final Judgment, *United States v. Dairy Farmers of Am.*, 20-cv-02658 (N.D. Ill. May 1, 2020).

15 CoStar Group Form 8-K April 30, 2020.

16 Complaint, *United States v. US Airways Group, Inc.*,13-cv-01236 (D.D.C. Aug. 13, 2013).

17 Complaint, *United States v. Sungard Data Systems, Inc.*, 01-2196 (D.D.C. Oct. 22, 2001).

To use this defense, however, a buyer must demonstrate not just that the target is merely in distress or that bankruptcy may be imminent. Rather, the defense will only be accepted in a narrower set of circumstances.

Guidance the DOJ and FTC have issued is instructive.[18] The antitrust authorities require the following to establish the defense:

- Evidence that the allegedly failing firm is not able to meet its financial obligations in the near future or reorganize successfully under Chapter 11 of the Bankruptcy Code;
- Evidence the failing firm "made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger;"[19] and
- To the extent there were other offers, evidence that it rejected other suitors for good reasons, in good faith, or had no alternative buyers from which to choose.

Often, when the parties cannot demonstrate the narrow circumstances of the failing firm defense, they may attempt to argue that the distressed or "flailing firm" nature of the target is relevant to the analysis of potential competitive effects. However, this alone is typically not likely to be sufficient to resolve competition concerns. For example, in *Promedica Health Sys. v. FTC*, the Court called the defense the "the Hail–Mary pass of presumptively doomed mergers." *Promedica Health Sys., Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 572 (6th Cir. 2014).

As such, parties anticipating that they will advance arguments about the target being in distress still should be prepared to engage in an in-depth factual analysis and advocacy as they would in other merger circumstances.

Key Takeaways

- ❖ Parties involved in bankruptcy transactions need to consider (1) whether there is a requirement to file under the HSR Act, and (2) whether the transaction raises any substantive antitrust concerns that might be investigated and delay closing.
- ❖ Buyers that pose significant antitrust issues or risks, may not represent the "highest and otherwise best" offer to be selected as the "winning bidder" in a bankruptcy auction, despite having the highest purchase price because their ability and timeline to get to closing may be in question.
- ❖ If buyers that pose some substantive antitrust risk want to have a realistic risk of closing on the quicker timelines of a bankruptcy or distressed sale, they should invest upfront and develop a strategy to (1) convince the seller that the risk is manageable, (2) convince the other stakeholders in the bankruptcy and/or the bankruptcy court that the antitrust issues will not be an obstacle to closing, and (3) convince the antitrust authorities that the transaction does not raise significant concerns (including by potentially offering divestiture remedies and an upfront buyer ready if needed).
- ❖ Parties to smaller transactions must still be cognizant of the potential antitrust issues that may arise, even if the transaction is not reportable under HSR Act. The US antitrust authorities can—and do—investigate non-reportable transactions

18 Dep't of Justice & FTC, Horizontal Merger Guidelines § 11 (Aug. 19, 2020).

19 *Id*. Examples of good-faith efforts to elicit reasonable alternative offers can include: (1) hiring investment bankers or search consultants; (2) publicizing the sale; (3) formulating a detailed and thorough proposal process; (4) seeking out a number of potential partners; or, (5) a bankruptcy auction.

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that raise substantial issues when they are aware of such transactions. In fact, due to the public nature of the bankruptcy proceedings and related press coverage, the antitrust authorities are likely to be aware of the transaction even without having to be notified about it. Therefore, they will have the opportunity to investigate—and even potentially intervene in the bankruptcy proceeding—if there are substantive antitrust concerns that they believe merit an investigation.

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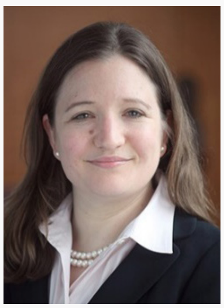

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VALUATION IN THE FACE OF MARKET DISLOCATION

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Introduction

Up until the COVID-19 pandemic, the United States had been in a benign credit cycle dating back to 2010. Still, between 2012 and 2018, 130 companies with liabilities greater than $1 billion filed for protection under the Bankruptcy Code.[1] Notable among these was Sears, Roebuck & Company, which with $11.3 billion in liabilities and $7 billion in assets, filed for Chapter 11 on October 14, 2018.[2] Since the first week of March 2020, however, the markets have been anything but acquiescent. On March 3, U.S. stocks plunged more than 7.5% -- the worst day on Wall Street since the financial crisis.[3] Treasury yields collapsed, with the entire U.S. yield curve falling below 1% for the first time in history, while crude declined the most since the Gulf War in 1991, with WTI and Brent falling 25%. Enterprise valuation in dislocated markets such as these is anything but business as usual whether for a merger, acquisition or restructuring.

Market Dislocation

Under the Law of One Price in Finance, arbitrage parities should ensure that prices of identical assets move in a way that the opportunity to earn a risk-free return, if actionable, is short-lived.[4] For example, Covered Interest Rate Parity holds that the relationship between domestic spot and forward exchange rates and their associated nominal interest rates, while allowing riskless borrowing in the domestic currency and lending in the foreign, should preclude a risk-free profit; i.e., $[E_{Spot} (1 + i_{domestic})] = [E_{Foreign} (1 + i_{foreign})]$. In times of market dislocation, however, financial markets fail to price assets correctly on an absolute and relative basis. Past instances include Mexico in 1994–1995; East Asia in 1997; Long-Term Capital Management and Russia in 1998; Argentina in 2001–2002; and the 2008 Global Financial Crisis.

The COVID-19 Dislocation

Equity Markets

Between February 12, 2020 and March 17, 2020, the Dow Jones Industrial Average fell by 8,324 points, or 28 percent, from 29,551 to 21,237.[5] On March 16, 2020 alone, the Dow fell 2,999 points, approximately 10 percent of the decrease. Materials stocks fell 46.1%; energy, 38.4%; industrials, 37.6%; financials, 32.4%; consumer discretionary, 30.8%; information technology, 25.5%; communication services, 20.4%; health care, 13.6%; and consumer staples, 7.7%. Industries particularly hard hit included airlines, automakers, cruise lines, hotels, oil & gas, restaurants, retail, shipping and transportation.[6] Similarly, the S&P 500 fell 25%, while the CBOE Volatility Index, or VIX, which measures volatility in the stock market, reached an all-time peak of 83, significantly above its historical average of 20.[7]

Fixed Income Markets

Premiums demanded by investors to hold debt increased significantly over concerns the pandemic

1 Edward I. Altman, Edith Hotchkiss, Wei Wang, *Corporate Financial Distress, Restructuring, and Bankruptcy*, 4th ed. (Hoboken: John Wiley & Sons, Inc., 2019), xiii.

2 Michael Corkery, Sears, the original everything store, files for bankruptcy, nytimes.com, Oct. 14, 2018, https://www.nytimes.com/2018/10/14/business/sears-bankruptcy-filing-chapter-11.html

3 Claire Ballentine and Vildana Hajric, Bloomberg Markets, Mar. 8, 2020, https://www.bloomberg.com/news/articles/2020-03-08/yen-slides-as-oil-price-war-adds-to-global-worries-markets-wrap

4 Pasquariello, Paolo, Financial Market Dislocations (December 14, 2012). AFA 2013 San Diego Meetings Paper. Available at SSRN: https://ssrn.com/abstract=1769771 or http://dx.doi.org/10.2139/ssrn.1769771

5 Dave Merrill and Esha Dey, Bloomberg.com, March 18, 2020, https://www.bloomberg.com/graphics/2020-stock-market-recover-dow-industrial-decline/

6 Grant Suneson, Industries hit hardest by the coronavirus in the US include retail, transportation, and travel, USAToday: Money, March 30, 2020, https://www.usatoday.com/story/money/2020/03/20/us-industries-being-devastated-by-the-coronavirus-travel-hotels-food/111431804/

7 Ing-Haw Cheng, Opinion: VIX clues show how stock investors underpriced the risk of the coronavirus pandemic, MarketWatch.com, April 3, 2020, https://www.marketwatch.com/story/how-stock-investors-underpriced-the-risk-of-the-coronavirus-pandemic-2020-04-03

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would lead to credit rating downgrades, defaults and bankruptcies.[8] The premium for junk-rated debt rose to 904 basis points over Treasuries on Wednesday, March 18, 2020, its highest level since 2011, while the premium for investment-grade credit increased to 303 points over Treasuries, the highest since 2009. The prices of credit default swaps demonstrated a similar trend, with prices for firms exposed to travel and leisure markedly higher. The price of CDS on Royal Caribbean debt increased over the preceding month by 1,312% to 1,040 basis points, while the price of Carnival Corp CDS increased by 1,164% to 655 basis points. Over the same period, American Airlines Group Inc. CDS prices increased by 622% to 1016 basis points, as the price of Delta Air Lines Inc. CDS increased by 672% to 502 basis points. Following suit, Boeing's CDS rose 736% to 490 basis points given its sensitivity to decreased demand for jetliners.

Manufacturing Output

In March, manufacturing output fell 6.3%, the largest decline since February 1946.[9] Accounting for 11% of the U.S. economy, factory production dropped at a 7.1% annualized rate over the first quarter, the steepest decline since the first quarter of 2009. Production of motor vehicles and parts decreased 28.0%, business equipment, 8.6%; transit equipment, 22.8%; construction supplies, 5.8%; business supplies, 6.7% and oil and gas well drilling, 1.3%. Business investment, which had declined for three consecutive quarters, the longest period since the Great Recession, continued to drop, while capacity utilization declined by 4.3 percentage points to 72.7%, 7.1 percentage points below the average for 1972-2019.

The CARES Act Intervention

On April 9, 2020, the Federal Reserve announced it planned to provide $2.3 trillion of credit to a wide variety of businesses and governmental agencies to support the economy.[10] The specifics included:

1. purchasing up to $600 billion in loans through the Main Street Lending Program, with the Treasury Department using $75 billion available under the CARES Act of 2020 to provide equity;
2. increasing the amount of the Primary and Secondary Market Corporate Credit Facilities in addition to the Term Asset-Backed Securities Loan Facility to support up to $850 billion in credit backed by $85 billion in equity investments funded by the Treasury Department;
3. establishing a Municipal Liquidity Facility to provide up to $500 billion in loans to states, cities and counties, with credit protection provided by the Treasury Department in the form of $35 billion in equity investments; and
4. providing term financing to banks making loans to small businesses under the Paycheck Protection Program ("PPP") by means of the Paycheck Protection Program Liquidity Facility ("Facility"), with the Facility taking the loans as collateral at face value with recourse only to the underlying PPP loans.[11]

Valuation Implications

Historical v. Expected Performance

For purposes of preparing projections and testing their reasonableness, the historical performance of a healthy company operating in an efficient and liquid market may be used as a reference for estimating future cash flows.[12] The cash flows of a firm experiencing distress due to an event such as the COVID-19 pandemic may have decreased significantly, however, with a return to normalcy not expected until some point in the future. Consequently, the expected financial performance of the firm may differ significantly from its historical results, adding to the uncertainty of the projections. In a DCF analysis, in part this requires that the discrete projection period be long enough to account for the time required for the firm to return to a steady state. If the use of market multiples is feasible, they should be based on forward-looking benchmarks, perhaps from the first year representative of normalized operations.

Scarcity of Comparables

The relevance of comparable companies and transactions can be limited if the industry in which a company operates is itself distressed.[13] Examples where distress has occurred industrywide include airlines, automobiles, oil and gas, metals, retail and travel & leisure. Under such circumstances, the cash flows of firms otherwise deemed comparable may be negative or depressed. In addition, acquisitions of distressed firms commonly occur at discounts to healthy firms. As a result, the use of market multiples may not be feasible or result in a relevant or reliable indication of value.

8 Alwin Scott and Kate Duguid, Credit markets flash red as coronavirus hits corporate America, Reuters.com, March 19, 2020, https://www.reuters.com/article/us-health-coronavirus-corporatecredit/credit-markets-flash-red-as-coronavirus-hits-corporate-america-idUSKBN2160VK

9 Lucia Mutikani, U.S. manufacturing output posts largest drop since 1946, Reuters.com, April 15, 2020, https://www.reuters.com/article/us-usa-economy-manufacturing/u-s-manufacturing-output-posts-largest-drop-since-1946-idUSKCN21X1X5

10 Board of Governers of the Federal Reserve, Press Release, April 9, 2020, https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm

11 Squire Patton Boggs, CARES Act Financial Assistance to Business Enterprises, States and Municipalities, April 10, 2020, https://www.squirepattonboggs.com/-/media/files/insights/publications/2020/04/cares-act-financial-assistance-to-business-enterprises-states-and-municipalities/cares_act_financial_assistance.pdf

12 Ibid., 92

13 Ibid., 93.

Comparables data from bankruptcy plans may be biased by the proceedings,[14] as holders of claims with bargaining power or aligned with debtor management may act to influence the value on which plan distributions are based. For instance, equity holders and junior claimants may be incented to advocate for high values, while senior claimants may favor low. If adjudicated, the familiarity of the Court with valuation practice, its policy objectives and the desire to resolve the case expeditiously may also influence the valuation.

Relevance of Market Prices

The market capitalization of a firm is calculated by multiplying the price of its stock by its stock price.[15] That value may be a reliable indication of the fair market value of the company's equity for a healthy firm trading in an efficient and liquid market. In a volatile, dislocated market, however, the observed stock price is likely not reliable on either an absolute or relative basis. In addition, for a distressed firm, its stock price may indicate the value of a call option on the firm, which will have value even if the value of the firm's assets falls below the face value of its debt, contrary to a DCF analysis indication.[16]

On the liability side, while the debt of healthy firms may trade at par, debt of distressed firms can trade at substantial discounts.[17] Though the prices of defaulted publicly registered debt have been available on the TRACE system since 2005, the prices of loans and trade debt are not reported on any centralized platform. Where influenced by negotiations, the prices of observed debt may also be of questionable relevance.

Dealing with Distress

Relative Valuation

Revenue and EBITDA multiples may be used to value distressed firms if it is not feasible to calculate a multiple as other measures of income are negative.[18] For example, EBITDA may be positive and net income negative for a highly levered, capital-intensive firm with significant charges to operations for depreciation and interest expense. It may be possible to account for distress explicitly in a relative valuation, however, using multiples of other distressed firms in the same business provided the sample of comparables is of sufficient size and comprised of firms that became distressed around the same time. Another approach is to analyze the multiples of comparable firms in different bond rating classes to determine the discount attributed by the market to different levels of distress. The multiple of the subject firm can then be adjusted to that indicted by the corresponding credit rating. Given a sufficient number of firms, either approach might work for a specific sector. If not, the analysis might be expanded to the whole market depending on the facts and circumstances.

The financial statements of the company and comparables should be normalized.[19] This requires the operating results of the subject firm and comparables be adjusted to reflect the base-level of earnings used to calculate the cash flows the firm is expected to generate on a recurring basis. Included might be adjustments for accounting differences, non-operating income and expenses, and unusual or extraordinary items, consistent with the applicable valuation standard, premise and interest level. In a distressed context, typical adjustments include severance costs, professional fees, plant closings and cost savings programs.

Discounted Cash Flow Analysis

Where the likelihood of distress is high, access to capital is limited and the proceeds realized from distressed asset sales fall below going concern value, a discounted cash flow analysis may overstate the value of a firm and its equity, even if the cash flows and cost of capital are estimated correctly. Ways in which the effects of distress may be evaluated directly include simulations and scenario analyses.[20]

Simulations

In traditional DCF analysis, the expected value of each assumption (i.e., revenue growth rate, operating profit margin, reinvestment rate, tax rate, cost of capital, long-term growth rate) is estimated as a single variable. Each input, however, represents the expected value of a distribution of possible values. In a simulation, the analysis considers the entire distribution rather than just its expected value, which allows distress to be considered explicitly.

Factors considered in deciding what parameters will indicate distress and what will occur as a result include the firm's business mix, its industry, assets, the capital markets and economy. This framework serves as the basis for selecting the variables to which probability distributions are assigned. Some may be specific to the firm, such as revenue growth and margins, while others, such as interest rates, are specific to the economy. Historical data, cross-sectional data or a statistical distribution that fits the variability of the input may be used to define the probability distributions assigned. In each simulation run, one outcome from the distribution

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14 Ibid., 94.

15 Ibid., 93.

16 Aswath Damodaran, *Investment Valuation, Tools and Techniques for Determining the Value of Any Asset,* 3rd ed. (Hoboken: John Wiley & Sons, Inc., 2012), 826-91.

17 Altman, Hotchkiss, Wang, *Corporate Financial,* 93.

18 Aswath Damodaran, *Damodaran on Valuation*, 2nd ed. (Hoboken: John Wiley & Sons, Inc., 2006) 633.

19 Certification in Distressed Business Valuation, Part 3, The Association of Insolvency & Restructuring Advisors, 2017.

20 Aswath Damodaran, *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses*, 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2010), 385.

of each variable is drawn and used to calculate the firm's earnings and cash flows. If the distress parameters are set off, a distress sale value is calculated. If not, the firm is valued as a going concern. The average of all simulated values is taken as the indicated value of the firm.

Scenarios

Scenario analysis incorporates the effects of distress by modeling the probability that a firm will fail in its cash flows.[21] To do so requires:

- determining what factors the scenarios will be geared to, focusing on those most critical to the firm's value;
- deciding how many scenarios to analyze for each factor given differences among the scenarios;
- calculating the cash flows for each year in each scenario; and
- assigning probabilities to the cash flows for each year and each scenario.[22]

The results may be reported for each scenario individually or as an expected value across scenarios.

The Discount Rate [23]

The cost of capital, or discount rate, is the interest rate that makes the present value of an expected series of cash flows equal to their price.[24] To estimate the cost of equity component, the framework most often applied is the capital asset pricing model (CAPM). With the CAPM, the expected return on a stock $E(R_i)$ is equal to the risk-free rate of interest (r_F), plus the equity risk premium for the market as a whole $[E(R_m) - R_F]$, scaled by the stock's equity beta (β_i), which measures the stock's systemic, or nondiversifiable risk. In formulaic terms,

$$E(R_i) = r_F + \beta_i\,[E(R_m) - R_F]$$

Risk-Free Rate

The risk-free rate is commonly measured using the yield to maturity on an outstanding long-term Treasury security as of the valuation date.[25] This involves selecting a proxy for the risk-free asset, whether a U.S. government bond or AAA corporate bond, and a maturity for the proxy chosen. The choice relates to the duration of the cash flows being valued and is linked to the equity risk premium selected. For example, given the maturity premium that exists between bonds of different terms to maturity, if the risk-free rate used in the CAPM is estimated using a long-term government bond as of the valuation date, and the equity risk premium is measured using a security with a short-term maturity, the maturity premium should be subtracted from long-term government bond. This adjustment would not be necessary if the equity risk premium was estimated using a security with a long-term maturity.

Since the global financial crisis of 2008, however, as in the COVID-19 dislocation, whenever current yields appear to differ from long-term expectations, analysts have debated whether to use a current market yield or "normalized" yield for the risk-free rate.[26] One approach to normalization has been to estimate the risk-free rate using the Fisher equation, which holds that the nominal yield on a bond is equal to the sum of its real interest rate plus expected inflation.[27] A second method has been to calculate averages of yields to maturity on long-term government securities over different time periods, assuming that bond yields revert to the mean, and that a historical average can be identified suitable for use as a proxy of the future.[28]

While normalizing the risk-free interest rate may appear reasonable given that in most periods interest rates move within a "normal" range, and that rates above or below the range correct over time, there are three potential problems with the approach.[29] To start with, there is no consensus among analysts as to what is "normal." Analysts with different backgrounds over different time periods make different judgements based on their experiences. Using a normalized rate rather than the current risk-free rate to value a firm will also affect the concluded value, which will be lower and perhaps undervalue the company. Whether that conclusion is a function of the analyst's perspective regarding interest rates or the company, however, will be confounded. In addition, as interest rates change through time due to changes in underlying fundamentals (i.e., inflation, growth), using a normalized rate different from the current risk-free rate without adjusting the fundamentals that underly it will result in an inconsistent valuation. Considering then that in general it is not ideal to include idiosyncratic views of interest rates in valuing a firm,[30] there are four paths to choose from in dealing with low

[21] Ibid., 64.
[22] Ibid., 386.
[23] Ibid., 387.
[24] Enrique R. Arzac, *Valuation for Mergers, Buyouts, and Restructuring*, 2nd ed. (Hoboken: John Wiley & Sons, Inc., 2008), 37.
[25] Robert W. Holthausen and Mark E. Zmijewski, *Corporate Valuation: Theory, Evidence & Practice*, 2nd ed. (Westmont: Cambridge Business Publishers, LLC, 2020), 360.
[26] Shannon P. Pratt and Roger J. Grabowski, *Cost of Capital: Applications and Examples*, 5th ed. (Hoboken: John Wiley & Sons, Inc., 2014), 109.
[27] Ibid., 96.
[28] Carla Nunes and James P. Harrington, Cost of Capital and Other Valuation Considerations in the Current Environment, Duff & Phelps, May 12, 2020, https://www.duffandphelps.com/insights/publications/valuation-insights/valuation-insights-second-quarter-2020/cost-of-capital-valuation-current-environment
[29] Aswath Damodaran, *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses,* 2nd ed. (Upper Saddle River: Pearson Education, Inc., 2010), 161.
[30] Ibid., 164.

risk-free rates in valuation: dysfunctional, depressed, denial and dynamic.[31]

The *dysfunctional valuation* uses the current, low risk-free rate together with a historical equity risk premium and nominal growth rate from when the economy was doing well. With this model, everything will appear to be dramatically undervalued. However, the approach is internally inconsistent in that it combines a crisis level risk-free rate with an equity risk premium and growth rate from when the economy was sound.

The *depressed valuation* uses a higher, normalized risk-free rate in place of the current, low risk-free rate together with a higher equity risk premium and nominal growth rate characteristic of a crisis market. The inconsistency with this model is that it combines a risk-free rate for a sound economy with an equity risk premium and nominal growth rate indicative of a crisis market. The result is that the indicated value of the company will be too low.

In the *denial valuation*, each of the current risk-free rate, equity risk premium, cash flows and nominal growth rate inputs are normalized assuming each will revert to the mean as the crisis is forgotten. Consequently, even as the current risk-free rate, equity risk premium and nominal growth rate change, the indicated value of the company will remain constant. Unlike the dysfunctional and depressed valuations, this approach is internally consistent and perhaps used by contrarian investors who believe markets overreact and adjust back to norms over time.

The *dynamic valuation* combines the current, low risk-free rate with a high, equity risk premium and low, nominal growth rate characteristic of a crisis. Like the denial valuation, this approach is internally consistent. However, the indicated value of the company will be volatile and change as the macro environment changes, contrary to the belief of some who believe that the intrinsic value of a company is a stable number that stays constant over time.

Comparing the models, aside from being internally inconsistent, the dysfunctional approach results in too high an indication of value while the depressed approach results in one too low. Choosing between the denial and dynamic valuations may depend on expectations as to when asset prices and historical returns will revert to their long-run mean. In evaluating the alternatives, considerations include that the risk-free rate is:

- not just an input to a calculation, but an opportunity cost and rate that will be earned if investments of greater risk are foregone,
- an indication of what the market expects for the foreseeable future with respect to inflation and growth, and
- not the only measure of risk affected by the "flight to safety" during crises. Equity risk premiums and cap rates on real estate increase, while default spreads on corporate bonds widen.

Equity Beta

In the CAPM, systemic, non-diversifiable risk attributable to a security is measured by the equity beta, which is a function of the relationship between the expected return on the security and return on the market.[32] Typically, the market is represented by a broad index such as the S&P 500. As such, the equity beta measures the expected sensitivity of an individual security to changes in the market. Stated differently, the equity beta measures the degree to which a stock's returns move more or less in comparison to the market portfolio.[33]

The method used most widely to estimate the equity beta entails regressing excess returns on a public company's stock on the excess returns of a market portfolio over a look-back period. Where distress is an issue, however, an equity beta estimated using regression analysis will typically lag the distress due to the long time periods over which betas are estimated.[34] Where the look-back includes the period the market recognized the company had become distressed, a regression using realized returns will also underestimate the risk of the firm and its cost of equity.[35]

As to why, historical stock returns are typically negative for a company experiencing financial distress, and consequently do not reflect the returns stockholders expect from a profitable going concern. Historical performance is also less relevant for a distressed firm that has undergone a restructuring of its assets. Moreover, the stock of a distressed firm often trades more like an option rather than a traditional stock, decreasing the relevance and reliability of the methods used to estimate its beta.

One way to address this in calculating the cost of equity is to use the firm's bottom-up unlevered beta and current debt-to-equity ratio to recalculate its levered beta. Alternatively, it may be possible to use a beta indicative of a healthy firm and add to it a premium for distress.[36] The premium may be calculated from historical returns earned by investing in the equity of distressed firms, or by the difference between the firm's pre-tax cost of debt and its industry average.

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31 Aswath Damodaran, Risk free rates and value: Dealing with historically low risk free rates, Blog: Musings on Markets, Sept. 30, 2011, accessed online at http://aswathdamodaran.blogspot.com/2011/09/risk-free-rates-and-value-dealing-with.html

32 Pratt and Grabowski, *Cost of Capital,* 203.

33 Holthausen and Zmijewski, *Corporate Valuation,* 331, 351.

34 Aswath Damodaran, *Dark Side*, 387.

35 Pratt and Grabowski , 51.

36 Aswath Damodaran, *Dark Side*, 387; Pratt and Grabowski, *Cost of Capital*, 419, 422-6 .

Continued from p.29

A premium for distress should not be warranted, however, if the associated risk is reflected in the forecasted cash flows. In a discounted cash flow analysis, the forecasts should reflect the expected value of all potential outcomes, whether they are systemic and relate to the general economy or are idiosyncratic and company specific. So unless the risk is related to the economy and affects the non-diversifiable risk of the firm, it should not be added to the discount rate.[37]

Equity Risk Premium

The equity risk premium, also referred to as the market risk premium, is equal to the return expected over that of the risk-free rate investors demand to invest in the market portfolio.[38] In practice, it is calculated as the difference between the return expected on a market proxy (often the S&P 500 index) and the proxy for the risk-free rate (commonly U.S. Government Bonds and Treasury Bills). As in estimating an equity beta, the selection of the index follows from what securities are included, their weighting and treatment of dividends. In general, it is typical to use a value-weighted index of stocks which includes dividends.[39] Elements that influence the size of the premium include investor risk aversion, economic risk, information asymmetry, liquidity and catastrophic risk.[40]

For instance, as investors' collectively grow more risk adverse, the equity risk premium increases. The equity risk premium will also be higher when inflation, interest rates and economic growth are volatile rather than predictable, and in markets where informational asymmetry exists between investors and the firms they invest in due to lack of transparency and disclosure requirements. And in times of economic crisis or decline, or in markets with high transactions costs, illiquidity will cause investors to pay less for securities, thereby implicitly demanding a higher equity risk premium. Catastrophic risk arises from extraordinary events such as the Great Depression of 1929 and collapse of Japanese equities in the 1980s, in which investors saw the value of their investments fall to an extent that it was unlikely they would recover in their lifetimes.

While there is no one universally accepted methodology,[41] the two methods used most often to estimate the equity risk premium are the historical approach and supply-side approach. With the former, the arithmetic mean difference between the annual total or income returns on the market proxy and proxy for the risk-free rate is typically calculated using all available data over a historical time period dating back to 1926.[42] This assumes that the expected premium has not changed in 90 years, that using more data yields greater precision, and that a long time-period will cover all types of economic and political environments, including, but not limited to, wars, economic expansions and contractions, excessive inflation, natural disasters and energy price shocks. With the supply-side approach, the focus is on the income return on the risk-free asset rather than total returns. As compared to the historical approach, the supply-side model subtracts from the market return the portion attributable to the change in the market's earnings growth forecast based on changes in the price to earnings ratio. This has resulted in an equity risk premium approximately 1% lower than the historical method.

Using these methods to estimate the equity risk premium prior to the 2008 Crisis, it was customary to make the estimate once a year, since even if there was a change, it was not large. Starting in September 2008, however, certain analysts found that using a long-term average of realized risk premiums was not realistic as the cost of equity capital would be too low, decreasing at a time when the risk in the economy was arguably at its highest.[43] For example, as of December 2008, the cost of equity using the average realized risk premium decreased from 11.6% to 9.5%. The discussion since then has been on whether the equity risk premium should be calculated using a forward looking, ex ante approach such that it is conditional, meaning it reflects current market conditions.

There are four categories of forward-looking, ex ante methods that might be used to estimate the equity risk premium: bottom-up implied, top-down implied, top-down risk premium and surveys. The bottom-up implied method requires calculating the implied rate of return from expected growth in earnings or dividends for each company in the population of firms selected. The returns are then averaged based on market value, and the risk-free rate subtracted to calculate the equity risk premium. Similarly, the top-down implied method involves calculating the implied rate of return from expected growth in earnings or dividends from the aggregate of all companies that comprise a stock index such as the S&P 500. The risk-free rate is then subtracted to derive the equity risk premium. For both the bottom-up and top-down methods, the dividend discount model may be used to solve for the required return on equity. Using the top-down risk premium method, the equity risk premium is estimated based on relationships with factors including changes in the implied equity risk premium for the S&P 500, spreads between bond yields and credit default swaps. The survey method is based on the opinions of investors with respect to their expectations regarding overall market returns and the excess over the risk-free rate.

37 Holthausen and Zmijewski, *Corporate Valuation*, 232-3.
38 Ibid., 351.
39 Ibid., 353.
40 Aswath Damodaran, *Dark Side*, 170.
41 Pratt and Grabowski, *Cost of Capital*, 113.
42 Holthausen and Zmijewski, 355-6.
43 Pratt and Grabowski, 131-2.

Compared to historical realized premiums, implied premiums reflect changes in the equity risk premium even over short time periods.[44] Notwithstanding, advocates of historical premiums argue equity risk premiums do not change sufficiently in the short term to warrant concern. As the COVID-19 dislocation and other shocks through time have demonstrated, however, market crises can result in steep increases in the equity risk premium in the short term in emerging as well as mature markets.

Debt

The debt portion of the capital structure of a firm includes long-term, interest-bearing debt; the current portion of long-term debt classified as short-term debt on the balance sheet; short-term interest-bearing debt used as if it were long-term debt; and off-balance sheet operating leases.[45] Other commonly observed off-balance sheet liabilities that are not part of the capital structure but must be evaluated in measuring whether total liabilities exceed the fair market value of the firm's assets include warranty reserves, postretirement obligations, restructuring liabilities and contingent liabilities such as pending legal judgments.[46]

Estimating the cost of debt included in the capital structure requires information regarding the risk-free rate of interest, default spread and marginal tax rate.[47] If the firm has bonds outstanding that are liquid and reflect the overall debt of the firm, the yield to maturity on the bonds can be used as the cost of debt. Alternatively, the cost of debt may be estimated using the default spread implied by the firm's bond rating. As the default spread is equal to the difference in yield between a U.S. Treasury Bond (proxy for the risk-free rate) and a debt instrument of the same maturity but different credit risk, the firm's pre-tax cost of debt can be calculated as the sum of the risk-free rate and default spread. It is also possible to estimate a "synthetic" bond rating by comparing a firm's financial ratios with ratios that correspond to ratings assigned by established rating agencies. The default spread associated with the "synthetic" rating can then be used together with the risk-free rate to estimate the pre-tax cost of debt. The after-tax cost of debt is equal to the sum of the risk-free rate and default spread multiplied by one minus the marginal tax rate. The marginal (rather than the effective) tax rate is used, given that the interest expense associated with debt reduces taxes at the margin.

[44] Aswath Damodaran, *Dark Side*, 188.
[45] Pratt and Grabowski, 522-33.
[46] Ibid., 430-1.
[47] Aswath Damodaran, *Dark Side,* 36.

Weighted Average Cost of Capital

The calculation of the weighted average cost of capital (WACC) requires estimates of the weights of debt and equity. The current market value of debt to capital is appropriate to start with. In future years, the ratio should be adjusted to reasonable levels in line with expected improvements in operating results. Assuming a constant ratio over the discrete forecast period for an overleveraged firm that is deleveraging may lead to misleading indications of value. The adjusted present value procedure, a variant of DCF analysis, might be used to resolve this concern.[48]

Conclusion

Business valuations are typically calculated using the present value of projected future cash flows alone or in combination with the market values of comparable companies and transactions. Though these methods have been accepted by the Courts and used in the financial community for years, the projections are by no means certain. Further, even in an efficient and liquid market, let alone a market dislocation like that brought about by the COVID-19 pandemic, their application, even if appropriate, can result in significantly different values. In a distressed environment, the challenges of applying these techniques are compounded given differences between historical and expected performance, scarcity of comparables and potential lack of relevant market prices, each of which may influence the valuation models selected and assumptions relied on. The failure to recognize, understand and resolve these issues can lead to a misleading conclusion of value, lending credence to the observance by some that "entity valuation is much like 'a guess compounded by an estimate.'"[49]

[48] Enrique R. Arzac, *Valuation for Mergers, Buyouts, and Restructuring*, 2nd ed. (Hoboken: John Wiley & Sons, Inc., 2008) p. 97.
[49] *In re Spansion, Inc.,* 426 B.R. 114, 130 (Bankr.D.Del. 2010).

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MAKING THE MOST OF CORPORATE RESTRUCTURING FOR MIDDLE-MARKET COMPANIES

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Companies seeking chapter 11 bankruptcy protection have the advantage of restructuring their financial obligations under the one of the world's most effective, and complex, insolvency systems. However, for middle-market companies seeking to restructure their debt, the chapter 11 process can be another story. Middle-market companies face specific challenges that differ in scale and proportion to large, mega corporations.

In recent months, the COVID-19 pandemic has multiplied these challenges, and with that, adding new layers of complexity for middle-market companies undergoing corporate restructuring. Furthermore, the forecasted wave of corporate bankruptcies that is expected to hit in the coming months will undoubtedly drag many of them into insolvency. While in some cases they may need to find an alternative path to restructuring, middle-market companies can find their way through chapter 11 with a successful outcome.

The Pitfalls of Chapter 11 Bankruptcy for Middle-Market Companies

A common misperception exists in the corporate bankruptcy community that middle-market bankruptcies are not complicated due to their smaller size and scope. However, they are not necessarily "easy," and in fact, the bankruptcy aspect of the case is identical whether it is a middle-market borrower or a mega, publicly owned company. The middle-market company may involve fewer affected parties, but the legal issues are not different, which presents equally challenging complexities when compared to bankruptcies involving larger companies.

Among their unique challenges, middle-market companies often lack internal resources and infrastructure within their debtor companies, particularly in the financial and accounting department. This often stems from inconsistent or unreliable books and records, especially when bookkeepers may be used instead of accountants, or the company was a wildly successful start-up that grew too fast to keep pace with its internal needs. Smaller companies also may not have access to enterprise-level accounting and people management software which can lead to reporting issues for monthly operating reports (MORs), schedules of assets and liabilities and schedules of financial affairs (SOFA), and litigation support needs. With less training and staffing in the finance department, financials also may not be professionally audited or even reliable.

The founders, or families of founders, of middle-market companies can also complicate matters in the manner with which they handle financial affairs surrounding the company. They may have an elevated level of control over their employees, sometimes even following their departure from the company, and take certain actions with less oversight and involvement from others. In some instances, they may even put aside potential wrongdoing, or cut a deal because they have personal relationships that may make the difference between business success and business failure. These types of control mechanisms lead to investigation and litigation

that add time and expense to a bankruptcy case. Complicating matters further, it is not uncommon for the company's capital contributions to come from the founder, and especially just before filing secured debt, giving rise to potential debt equity re-characterization issues and breach of fiduciary duty allegations that only complicate an already difficult process.

Fraudulent transfer issues can arise within middle-market bankruptcies as pre-petition transactions in smaller companies typically do not involve business brokers and investment bankers, and the founders may be in control of the entities involved in these transfers without any oversight. There may be other debtor and non-debtor entities controlled by the founder that are engaged in intercompany transactions, also potentially giving rise to fraudulent transfers. Further damage can be caused if the transaction was not conducted for reasonably equivalent value, or the company was rendered insolvent or dangerously undercapitalized as a result. If post-petition resources are limited, there may be insufficient funds to investigate all of the transactions in question thoroughly, and there may be an unwillingness to pursue claims on a contingency fee or hybrid contingency-fee basis; thus, limiting the available exit options for the chapter 11 debtor to emerge from bankruptcy.

In some middle-market bankruptcies, founders treat the debtor's estate as their personal piggy bank without any thought of how their transactions may affect creditors, and without any awareness or consideration of creditor's rights. This is especially true when the company is insolvent, and an owner's duty shifts to all creditors and not just the owners of the company. For instance, in the recent case of a substance abuse clinic undergoing bankruptcy, the debtors purchased its facilities several years prior to the bankruptcy, and while the transaction was paid in full, the property was titled in the owner's name instead of the business name. This may have been necessary initially to obtain a mortgage at a lower interest rate but offers an example of the types of transactions that will be challenged and are more likely to exist in a middle-market bankruptcy case. Middle-market companies are usually privately held without any SEC reporting requirements, which means it can be harder to determine what actually happened pre-petition, increasing the potential for creditor paranoia, anger and resistance. Without public records, there may be misinformation circulating among involved parties based on what has been seen in the press or leaked out to creditors. In some instances, first-day declarations, which can serve to clarify facts of the case, are not even filed, making matters worse. Full disclosure, regardless of the size of the case, is mandated in chapter 11 bankruptcies.

Unlike their mega case counterparts, smaller companies typically lack the resources to hire a chief restructuring officer (CRO) or sophisticated financial advisory team skilled in restructuring to assist with the process. A lack of familiarity with bankruptcy processes among the founders and leadership of middle-market companies can cause unexpected hurdles and delays and actually lead to increased professional fees as the company relies more on counsel's assistance for routine bankruptcy tasks. There may be heightened emotionalism on the part of founders, directors, and officers, with a greater need for handholding by professionals and a greater risk of key employees who cannot be replaced jumping ship. Creditors may also be less experienced with legal and bankruptcy procedures, which can create additional layers of complexity and needless litigation.

Middle-market bankruptcies often struggle due to limited access to funding for chapter 11. Traditional DIP financing sources might be completely unavailable, and there is a greater possibility that there will not be financial or strategic investors willing to buy the business. In addition, there may not be the wherewithal to retain an investment banker to properly market the assets. As there may be limited funds to hire the needed professionals in the case, creditor interests and the viability of the business to survive as a going-concern can be at high-risk.

Although the common sentiment is that professional fees should be lower in mid-to-small market cases, that is not necessarily the case. Given the reliance on professionals as a result of the company's unfamiliarity with bankruptcy, it is not uncommon for professional fees to actually be higher in some middle-market bankruptcies. Having said that, in some lower middle-market cases, professionals have agreed not to be paid in full on the chapter 11 plan effective date even though they are entitled to because there are insufficient funds to pay them at that point. In order to achieve a confirmable and feasible chapter 11 plan, professionals sometimes are asked to waive a portion of their fees or agree to be paid post-effective date so unsecured creditors will receive a distribution.

In addition, there may be limited resources to retain or fairly compensate creditors' committee counsel and financial advisors. Without these, creditors may be left in the dark and subjected to inappropriate conduct by the debtor post-petition. Or if a creditors' committee hires counsel and a financial advisor, the cost of doing so can dwarf any benefit of doing so and, as such, leave a bankruptcy case administratively insolvent. Even if there is sufficient funding at the onset, creditor issues can potentially kill the business if the case drags on for an extended amount of time and the business cannot sustain that level of fees, or if protracted litigation ensues and eats through any available proceed from a sale of the company's assets. Therefore, it is important for debtor's counsel to be open and transparent and to build trust and confidence early in the case to avoid a creditor revolt or a motion for a chapter 11 conversion or trustee.

To compound matters, middle-market companies are less likely to have directors & officers (D&O) insurance coverage, or at least in a sufficient amount, reducing the likelihood that claims are collectable against founders, particularly if the founders are essential to the success of the go-forward business. A portion of founders may also have personal guaranties related to debt and other obligations, but the value and collectability of such guaranties may be of suspect value given the demise of the company.

As the case progresses, business competitors, co-investors, and litigation targets may file motions and objections to obstruct and slow down the process and increase the cost of bankruptcy for tactical purposes. Such delays make the viability of the chapter 11 case suspect and often taints the Court's view of the debtor.

On other fronts, the venue for middle-market bankruptcies may be less relevant than it is for larger companies because filing in the jurisdictions with familiarity with chapter 11 processes, such as the Southern District of New York or the Districts of Delaware or Houston, may not be an option. Although there are other competent jurisdictions, they may have more administrative issues at the court-level given that they do not confront middle-market or mega chapter 11 cases on a regular basis. When there is a choice, in addition to other considerations such as applicable Circuit law, debtors should consider filing in jurisdictions where the courts have a higher volume of chapter 11 cases and where there is likely to be greater efficiencies and experience.

COVID-19 Pandemic Adds Complexity to Middle-Market Bankruptcies

The fall-out from the COVID-19 pandemic has created new complications for middle-market companies seeking to restructure under chapter 11. Under the additional burdens and insurmountable debt imposed by the economic shutdown to contain the outbreak, some distressed middle-market companies are throwing in the towel and seeking to liquidate their assets and operations rather than continue as a going-concern. In fact, for some retailers, plans to "re-open" are focused on how best to implement an orderly liquidation of inventory rather than returning to any form of profitability. Most of these companies were in financial distress prior to the pandemic, but business closures forced them out of the market.

The closure of "non-essential" businesses created a new obstacle to business operations within chapter 11 as debtors may linger in bankruptcy without the ability to comply with their rent, payroll, and other related post-petition obligations. As seen in recent cases, some have requested a "motion to pause" to delay their rent obligations in hopes that they can resume them at a time when the economy and their unique circumstances will improve and certain Bankruptcy Courts have been accommodating to such requests, thus further demonstrating that as courts of equity, Bankruptcy Courts typically have the best interests of the business in mind.

While the Coronavirus Aid, Relief and Economic Security Act's (CARES Act) Paycheck Protection Program (PPP) is intended to serve as a lifeline for struggling small and middle-market companies, it also has brought new headaches for those who are considering or undergoing chapter 11. As the Small Business Administration (SBA) has deemed that companies undergoing bankruptcy are ineligible for the funds, corporate debtors are filing suits against the SBA claiming that these funds should be made available to them. While some courts have granted decisions in their favor, this adds yet another hurdle to the process and as of this article no chapter 11 debtor actually received such funding while in chapter 11. Furthermore, larger middle market companies must consider how the public will perceive their acceptance of PPP funds, as larger companies receiving the funds have faced backlash from consumers and others who feel that the loans should be reserved for smaller companies with fewer financing options. Finally, no one yet knows how the SBA will enforce the rules associated with PPP loans when things calm down and there once again is time to investigate any wrongdoing, whether purposeful or not.

Alternatives to Chapter 11 for Middle-Market Companies

While the obstacles facing middle-market companies are numerous and may seem daunting, they are not insurmountable, even in the wake of the COVID-19 crisis. These companies can still find their way through a successful chapter 11 process. However, for middle-market companies that are not equipped to navigate a traditional chapter 11 restructuring due to these potential pitfalls, there are alternatives they may consider with the support of their team of professionals and advisors. Each of these alternatives may also present their own set of challenges and must be evaluated carefully, particularly in the light of the impact of the COVID-19 pandemic on the economic environment.

For companies seeking to sell their assets to escape from unsurmountable debt levels, section 363 of the U.S. Bankruptcy Code offers a mechanism under which they can efficiently execute this strategy while in chapter 11. While this approach can pose additional costs and generally requires 45-90 days, it also offers

debtors a more streamlined sale process and significant benefits, including the ability to assume and assign leases and sell the assets free and clear of liens, claims, and encumbrances. As Court approval is required, any concerns or challenges regarding the sale are resolved prior to closing and assure buyers that they are purchasing the assets with limited risk of successor liability. Additionally, chapter 11 provides a forum to de-lever a distressed balance sheet via a plan of reorganization, which can be done in an expedited time frame if provided the ability to craft such plan and file early in the case.

An assignment for the benefit of creditors (ABC) offers another alternative for middle-market companies seeking a distressed sale. Under an ABC, the company assigns its assets to a designated independent third party who liquidates such assets and distributes the proceeds to creditors, typically in a manner similar to the Absolute Priority Rule in chapter 11. Unlike a 363-bankruptcy sale, an ABC can proceed more quickly, within as short as 10 days of the assignment, and is far less costly to administer. However, there may be challenges raised following the sale, as assets may not be sold free and clear of liens and the company loses control over the sale of such assets. There is also no automatic stay to protect the assignee from litigation or being forced into an involuntary bankruptcy.

State or federal receiverships can provide a cost-effective solution for middle-market companies seeking to resolve debt and address business challenges. They are most often used in situations where the business has limited opportunity to continue as a going-concern or where fraudulent issues have presented roadblocks. Under a receivership, the state or federal court appoints a receiver to administer and, in some instances, liquidate the estate of a troubled company. With the primary goal of protecting the interests of stakeholders and preserving the company's estate, the receiver follows an appointment order from the presiding judge to recover value for the company and its creditors.

Some middle-market companies may also seek to resolve their debt obligations through Article 9 of the Uniform Commercial Code (UCC), which provides a mechanism by which lenders and secured creditors can create and foreclose on their security interests in the debtor. As a result of recent events, when faced with a situation where a business cannot re-open or be sold for significant value, this may be the most cost-efficient means for a company to exit the business operations. Lenders typically sell the business to a third party via a "friendly foreclosure." While the selling company cannot be related to the purchaser, it is not uncommon for purchasers to hire the management team of the selling company to continue to operate the business affairs. While Article 9 is most advantageous to secured lenders, savvy companies may be able to structure transactions to third parties via "friendly foreclosure" to maximize the value of extremely distressed assets.

Best Practices for Middle-Market Chapter 11 Bankruptcies

Despite the challenges facing them, middle-market companies can indeed find a successful pathway and outcome through chapter 11 with strategies and solutions to circumvent obstacles whenever possible to make the most of the restructuring process. The following best practices can help debtors and professionals find greater success.

- **Plan ahead and be prepared for the obstacles and issues that may occur in middle-market bankruptcies.** The biggest problem with most middle-market bankruptcies is that the owners and management team realized way too late that they needed to file bankruptcy. While not every case will present extreme challenges, restructuring teams can make the most of middle-market business reorganizations by anticipating roadblocks and averting them before they cause significant delays or problems.
- **Maintain transparency throughout the process.** Chapter 11 is an open forum. Assets, liabilities, transactions, and daily business operations will be made public. Being transparent with creditors, the United States Trustee, and the Court is paramount to a successful chapter 11 case.
- **Enlist the support of experienced professionals who are familiar with the nuances of middle-market bankruptcy.** There are unique challenges involved in middle-market bankruptcies and having an experienced, seasoned team of professionals to deal with them will help the debtor to more successfully navigate them. The cost structure of a middle-market bankruptcy is vastly different than a

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mega case and restructuring professionals familiar with that model are a necessity.

- **Confirm the financial support is there to achieve the goals of the case.** With all the variables and risks that exist within a middle-market bankruptcy, it's important for professionals to understand going into each case that there is ample funding for their fees and retainers.

Conclusion

The journey through corporate restructuring may not be an easy one for middle-market companies, however, there is hope that they can navigate the process to resolve their financial and operational issues by being aware of the challenges as well as the alternatives. To be sure, the COVID-19 pandemic has cast a shadow across the economic landscape that will have a significant impact on the ability of middle-market companies and bankruptcies to succeed, yet those who approach corporate restructuring strategically will have a fighting chance to emerge leaner and stronger.

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Christopher Ward has represented clients in corporate bankruptcy, financial restructuring, bankruptcy litigation, and distressed asset sales for the last two decades. As Chair of the Bankruptcy and Restructuring Practice and Managing Shareholder of the Delaware office of Polsinelli, Christopher routinely tackles financial restructurings, litigation, and distressed asset sales with a creative and aggressive approach not only in Chapter 11, but in non-bankruptcy alternatives. He specializes in representing distressed borrowers and Chapter 11 debtors, as evidenced by his engagements in Lucky's Market, Bayou Steel Group, Elements Behavioral Health, Orchids Paper Products Company, ActiveCare, Jet Midwest Group, and PhaseRx.

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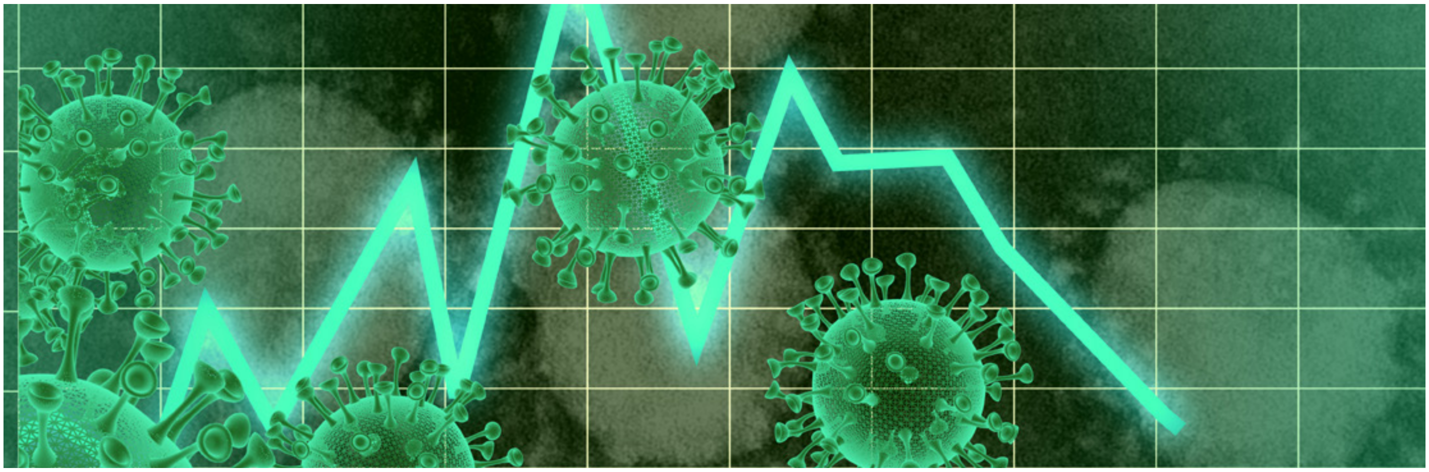
Travis Vandell brings more than 20 years of turnaround experience to his role as managing director at Stretto. Drawing on his substantive knowledge and valuable insight as a former corporate-restructuring attorney, he applies a practical application to case management for his clients. Throughout his career, Travis has effectively led teams on chapter 11 matters from a diverse range of industries. Turnaround professionals and corporate advisors rely on Travis' ability to implement processes and procedures that lead to improved overall efficiency for their teams.



DON'T EXPECT A V-SHAPED CORPORATE RESTRUCTURING CYCLE[1]

RICHARD J. SHINDER
Theatine Partners

Over the last several weeks, as the severity of the economic impact of the COVID-19 pandemic has become more apparent, economists and research analysts at major financial firms have continuously revised down their GDP estimates for the first half of 2020. On March 31st, Goldman Sachs changed its estimates for a 6% contraction in Q1 and 24% in Q2 to down 9% and 34%, respectively (they also bumped up their peak unemployment rate estimate to 15% from 9%). Other market participants have made comparable revisions to their 1H 2020 economic outlooks, alongside corollary predictions that economic activity will rebound ferociously in the second half of 2020 (Goldman is estimating a 19% bounce in GDP growth for Q3).[1]

Over the past six weeks, global capital markets have responded as expected to this radically changed economic environment, with prices of risk assets among the hardest hit. While U.S. equity markets have experienced significant volatility and equity indices are close to 30% off their recent record highs, leveraged corporate credit (high yield bonds and leveraged loans) have arguably taken a more significant hit. On April 2nd, Fitch Ratings revised its baseline and downside scenarios for corporate defaults in the U.S. and Europe in 2021-22 to a range of 12-15% and 17-25%, respectively (by comparison, 2019 ended with a 3.1% default rate).

Such draconian estimates notwithstanding, a "short and (very) sharp" recession may lead market participants and observers to assume that corporate credit markets –in their own right, but also as indicia for the prospect of a material wave of corporate financial restructurings – will snap back in a manner similar to that believed for projected economic activity. To the contrary, there are many reasons the COVID-19 recession of 2020 may prove to be a catalyst for a U.S. restructuring and bankruptcy cycle of materially longer duration.

A long, slow boom. With apologies to public health professionals, the U.S. economy's recovery from the 2008-9 financial crisis was a prime example of a "flattened curve". The fiscal and regulatory drag associated with late Bush and Obama administration policies, combined with significant Federal Reserve activity in the form of quantitative easing, resulted in a long but shallow economic recovery. Extended periods of economic growth, however weak, allow for structural excesses (a decline in lending standards, excessive leverage, financial engineering for its own sake without underlying economic purpose) to accrete and build to dangerous levels. Moreover, human nature endows all of us (financial professionals are no exception) with short memories, which when combined with a generational shift and related loss of restructuring and workout talent (many market participants currently in important roles have never seen an economic or market downturn) can be a toxic combination.

A Federal Reserve low on ammunition. In response to the 2008-9 financial crisis, the Federal Reserve increased the size of its balance sheet from $870 billion in August 2007 to $4.5 trillion at its pre-COVID peak in early 2015 in order to provide the capital markets with liquidity and inspire confidence among market participants. After declining modestly to under $3.8 trillion in September 2019, the Fed's balance sheet grew by over $1 trillion in March 2020 alone (to over $5.2 trillion), leaving it in uncharted territory. Having already fired more than a

[1] This article was published April 13, 2020, by The Hill, and is reprinted with permission. Available at https://thehill.com/opinion/finance/491738-dont-expect-a-v-shaped-corporate-restructuring-cycle.

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few bullets to shore up investor sentiment during the scariest early moments of the COVID-19 outbreak, the Fed's future financial wherewithal is uncertain. A Fed with less fuel in the tank – along with the uncertainty surrounding its emergency lending authority associated with Dodd-Frank– arguably leaves the Fed's cupboard worryingly bare compared to 2008-9.

Changes in the post-crisis financial architecture. As I wrote in *Pensions & Investments* in late 2018,[2] the intermediation of corporate credit has changed meaningfully since the 2008-9 financial crisis, with unregulated entities (CLOs, BDCs and private debt funds) having largely displaced regulated commercial lenders among significant segments of the corporate lending market. The durability of this new financial architecture has yet to be tested in a wide-scale, systemic manner. There are objective reasons to believe the lack of regulatory oversight, underinvestment in credit infrastructure, structural and documentary limitations, and carried interest financial incentives associated with these lending formats may not prove up to the task of navigating a leverage markets tsunami.

Multi-constituent pain. Past credit downturns and significant financial restructuring cycles of recent memory have typically been marked by disproportionate distress concentrated in certain sectors (such as energy in 2014-15) or segments of industrial value chains, while other parts of the economy remained relatively healthy. Even broader economic downturns (including the one catalyzed by the 2008-9 financial crisis) have experienced pockets of relative industrial strength within an otherwise ugly macroenvironment. None of these recessions, however, evidenced an effective shutdown of considerable swathes of the economy as has been the case with COVID-19. Consider the example of a toy store. Demand vanishes as children aren't having birthday parties and people can't shop, resulting in canceled orders and an inability to pay vendors, employees are laid off due to shelter-in-place mandates, landlords have no alternatives for finding a replacement tenant, and lenders dare not push for a liquidation of collateral through going-out-of-business sales no one can attend. Who blinks when all is frozen and parties are unable to run their customary workout playbooks?

Fundamental changes in behavior and socioeconomic arrangements. A standard premise underpinning financial restructurings and reorganizations is that an operational and/or financial fix – whether it be shedding obligations, shuttering money-losing divisions, raising fresh capital, and/or converting debt-to-equity – will address a company's idiosyncratic problems and return it to *terra firma*. But what if the ground isn't so stable? We may look back and find ourselves presently in the earliest stages of acknowledging what are potentially permanent changes in consumer behavior and economic organization. How does one assess the prospects of a restaurant chain when one is unsure whether people will still want to eat out, or at least to the degree and manner in which they did previously? Will people still want to take cruises? What does the ready acceptance of Zoom videoconferencing suggest for business travel? Will corporate America (with a firm hand in its back from government) "onshore" strategic sectors and industrial supply chains, and if so, what are the economic implications of doing so? Lightning-speed, "in and out in a day" pre-packaged chapter 11 filings – which were all the rage for restructuring companies near the end of the long boom – will likely be less common as these tectonic shifts reveal themselves over time.

Nobody has a crystal ball, and few would have guessed a global pandemic would have been the catalyst for the next recession. Similarly, in these still early days of a public health crisis, it is impossible to know exactly what the future might hold – economically or otherwise. But the factors above certainly suggest a much longer and deeper process of decomposing and reconstituting traditional economic arrangements and the companies operating within them. Moreover, given the severity of the economic impact of the downturn on individuals and businesses, the risk of unpredictable government action – for good or ill – is correspondingly heightened.

Fasten your seatbelts. It's going to be a bumpy ride.

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Richard J. Shinder is the founder and Managing Partner of Theatine Partners. He has 30 years' experience as a financial services professional, working in restructuring advisory, distressed investing, direct lending, and leveraged and project finance positions throughout the course of his career. Mr. Shinder has served in advisory, principal, and managerial roles for firms including The Blackstone Group, Goldman Sachs, and Perella Weinberg Partners, among others. His experience includes successfully completing scores of transactions in financial restructuring and bankruptcy, distressed investing, and corporate, project, and sovereign/sub-sovereign credit. He is a frequent lecturer, speaker, and panelist on business and financial topics, and has written extensively on economic, financial, geopolitical, cultural, and corporate governance-related issues.

2 Richard J. Shinder, The coming crack up in middle-market corporate credit, Pensions&Investments, Nov. 20, 2018. Available at https://www.pionline.com/article/20181120/ONLINE/181129999/commentary-the-coming-crackup-in-middle-market-corporate-credit

ATTACK OF THE DOS/DDOS

THESE WEBSITE INCURSIONS ROB BUCKS AND REPUTATION[1]

ROBERT E. HOLTFRETER, PH.D., CFE
Theatine Partners

Denial of service and distributed denial of service attacks on organizations' websites are increasing.[1] Fraudsters are doing more than shutting down sites by flooding them with millions of automated inquiries. They're infecting websites with malware that unsuspecting users are downloading on their devices. Here's how to advise your organizations and clients to protect domain name servers that will prevent loss of revenue, productivity and reputation.

Jake Feeney, who worked for a cybersecurity company, thought he was savvy about computer technology trends. He replaced his devices every three years with the latest and greatest. So, he was perplexed when a favorite website wasn't downloading on his laptop. A colleague told him that the company that owned the site probably had experienced a denial of service (DoS) or distributed denial of service (DDoS) attack. A fraudster might have flooded the company's system with thousands, if not millions, of unwanted incoming inquiries that prevented others from accessing the website quickly or not at all.

1 This article was published in *Fraud Magazine*, January/Feburary, 2020, reprinted with permission.

While the fraudster distracted the company with the cyberattack, he then uploaded malware on the website company's computer network. When the company finally reestablished its site, users unwittingly downloaded nasty viruses onto their devices.

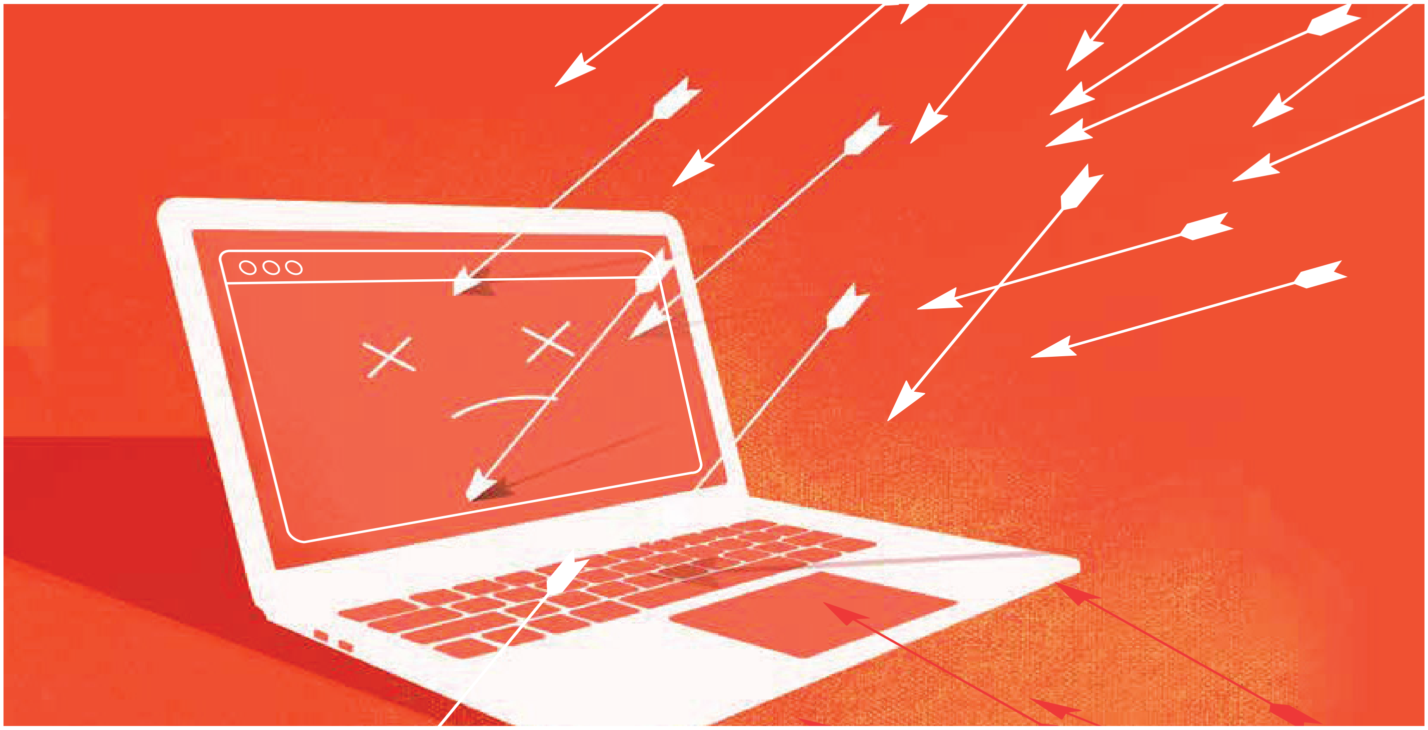
This case is fictional, but it shows how DoS or DDoS attacks can compromise the speed of organizations' network performance and steal valuable personally identifiable information and money from their clients and users.

The information in this article can help you advise your organizations and clients.

Increasingly Thorny Problem

DoS and DDoS attacks are escalating annually with no end in sight. They're increasingly inflicting all types of organizations worldwide.

On July 24, 2019, US Signal, a data center services provider, released its "State of Web and DDoS Attacks" survey of 100 IT decision makers in U.S.-based companies with up to 750 employees. (See tinyurl. com/yxguoxb4.) The study found that 83 percent of the



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83 percent OF ORGANIZATIONS HAD EXPERIENCED A DDoS ATTACK WITHIN THE PREVIOUS TWO YEARS.

More than half OF THESE COMPANIES EXPERIENCED MULTIPLE ATTACKS.

ON AVERAGE *a DDoS attack caused* **12 hours of downtime,** AND 30% REPORTED **20** HOURS OF DOWNTIME.

More than a third CONSIDERED REVENUE LOSS THE MAIN CONCERN.

34% *reported a loss of* ***IT productivity.***

20% REPORTED A LOSS OF ***reputational damage.***

17% *didn't have or weren't sure if they had a DDoS protection provider or tool.*

81% ***experienced a cybersecurity attack on their web applications the previous two years.***

Nearly half of these COMPANIES EXPERIENCED MULTIPLE CYBERSECURITY ATTACKS.

THE AVERAGE *financial impact of a cyberattack was* **$152,000.**

91% OF SUBJECTS SURVEYED *still consider their websites and application security* **satisfactory** WITH ***three in five*** *saying it was* **highly satisfactory.**

SOURCE: US SIGNAL 2019 STATE OF WEB AND DDOS ATTACKS SURVEY

organizations had experienced a DDoS attack within the previous two years (2017 and 2018). More than half of these companies experienced multiple attacks. Here are more of the report's findings:

- On average, a DDoS attack caused 12 hours of downtime, and 30% reported 20 hours of downtime.
- More than a third considered revenue loss the main concern.
- 34% reported a loss of IT productivity.
- 20% reported a loss of reputational damage.17% didn't have or weren't sure if they had a DDoS protection provider or tool.
- 81% experienced a cybersecurity attack on their web applications the previous two years.
- Nearly half of these companies experienced multiple cybersecurity attacks.
- The average financial impact of a cyberattack was $152,000.
- 91% of the subjects surveyed still consider their websites and application security satisfactory with three in five saying it was highly satisfactory.

"To combat these threats," the survey reported, "many respondents are turning to managed service providers to help monitor and maintain a mixture of cybersecurity technologies, including cloud-based firewalls (73 percent), DDoS protection (71 percent) and email security (62 percent). In addition, 97 percent of participating organizations scan and test for vulnerabilities within their web applications." (See tinyurl.com/yyrnsuy7.)

However, the best firewalls and intrusion prevention tools still aren't always useful to defend against complex DoS and DDoS attacks.

The aftermath of responding to attacks can be expensive and time-consuming. They're an effective way to distract and confuse security teams while inflicting serious damage to their brands, particularly if attackers use them to simultaneously cover up their malicious actions, such as data theft and malware downloads.

DoS/DDoS Attacks Defined

Cyberterrorists often design DoS and DDoS attacks for political causes and criminal purposes. And hackers, either malicious or non-malicious, use them both to disrupt or close down websites for profit or nonprofit reasons.

But these two types of attacks have their differences depending on the number of computers and networks that aggressors deploy. For example, a DoS attacker floods a victim's server or network with malicious traffic (data requests or packets) that will overload its bandwidth and the organization's means to immediately stop it, which will result in the interconnecting network, website or web application going offline and unavailable.

A DDoS attack is functionally similar, but it employs many devices — such as large botnets of compromised computers — to launch a series of simultaneous attacks to kick a victim's website, web application or network offline thus also making them useless for legitimate users.

According to the SSL Store, in 2018, during one of the world's largest DDoS attacks, hackers effectively flooded the web servers of an organization called GitHub with inbound traffic of 126.9 million data packets per second (PPS), measuring 1.35 terabits per second (tbps), which is extremely fast. A terabit is a unit used to measure data transfer rates. (See "The Largest DDoS Attacks in history," hashed-out, May 29, 2019, tinyurl.com/y5cw752m.)

A data packet includes the payload (or the part of transmitted data that's the actual intended message) and headers containing certain types of metadata along with routing information to enable payload delivery. "Data packets are used in Internet Protocol (IP) transmissions for data that navigates the Web, and in other kinds of networks," according to Technopedia. "Data packets also may have trailers that help refine data transmission." (See tinyurl.com/yylchpmj.)

Massive amounts of incoming data packets can quickly swamp and exceed the bandwidth of web servers, so they effectively fail. The GitHub servers, after they were attacked, couldn't immediately react to legitimate users who were attempting to address its website.

In 2019, two of Imperva's unnamed clients (Imperva is a cybersecurity software and services company) experienced even larger DDoS attacks, according to The SSL Store. In the first attack, which occurred in January 2019, the cyberfraudsters directed 500 million packets per second (PPS) at Imperva's client's network or website. In April 2019, an attack against another Imperva client peaked at 580 million PPS. (See tinyurl.com/y5cw752m.) We'll see even larger DDoS attacks because they're relatively cheap to pull off.

Kaspersky, a cybersecurity and anti-virus provider headquartered in Moscow, said that the total number of DDoS attack indicators increased in the first quarter of 2019, according to a research report. (See tinyurl.com/y63ycnzm.) The total number of attacks climbed by 84%, and the number of sustained (more than 60 minutes) DDoS sessions doubled. Kaspersky said the average duration of an attack increased by 4.21 times, and the segment of extremely long attacks posted a massive 487% growth. Here are additional report findings:

- China remains out in front in the geographical distribution of attacks. The geographical distribution of targets roughly mirrors the geographical distribution of attacks. The top three were: China (59.85%), the U.S. (21.28%) and Hong Kong (4.21%).
- Geographic top 10s saw relatively little reshuffling compared to previous quarters. Survey respondents didn't see any additional sudden growth in botnet activity in unexpected places.
- The most dangerous day of the week for DDoS attacks was Saturday; Sunday remains the calmest.
- The maximum attack duration decreased by more than a day against the previous quarter, although the percentage share of sustained DDoS sessions continued to rise and amounted to 21.34% (versus 16.66% in Q4 2018).
- The share of Linux botnets decreased slightly, but it still remains predominant (95.71%).
- Most botnet command-and-control (C&C) servers are still located in the U.S. (34.10%), with the Netherlands in second place (12.72%) and Russia in third (10.40%). The once perennial leader, South Korea, returned to the top 10, albeit in last place (2.31%). C&C servers are computers that issue directives to digital devices that have been infected with rootkits or other types of malware, such as ransom-ware. See tinyurl.com/yyn8y8ft.

DNS Servers Explained

When you use a computer to access a web-site housed on another computer, it's much simpler to remember and use a domain or hostname like ACFE.com than it is to remember the site's IP address, such as 141.111.139.111. Each computer device has its own IP address, which allows it to inter-face and communicate with other devices within a global computer network.

When you enter a domain or host name on your computer, it's sent to a do-main name system (DNS) server — also known as the internet's phonebook — to translate it into an IP address. Domain name servers contain a large database of host names and their related public IP addresses. The DNS is an integral part of the worldwide internet infrastructure that translates host names into IP addresses, which allow you to access the websites of other computers or send emails.

Because DNS servers provide a public service to the network, they've become a major attack vector for hackers. According to the International Data Corporation (IDC) 2019 Global DNS Threat Report, a "DNS (server) is a primary target for cy-berattacks, causing business damage in terms of downtime and financial loss, as it remains one of the critical elements in delivering IT services." (See tinyurl.com/y6a6bkck.) Here are some key findings from the report:

- 82% of companies have experienced a DNS attack.
- The average number of attacks per company were 9.45 compared to 7.08 in 2018.
- The average cost per company to recover from a DNS attack was $1.7 million.
- 63% of the companies suffered application downtime compared to 30% in 2018.

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- 45% of the companies suffered a compromised website compared to 45% in 2018.
- 13% lost sensitive information compared to 22% in 2018.
- 26% suffered brand damage compared to 23% in 2018.
- 27% experienced a loss of business compared to 22% in 2018.

According to the report, the spectrum of DNS attacks was much broader in 2019 compared to 2018, and the percentage of each attack type suffered has significantly increased. DoS/DDoS attacks have burgeoned from 20% in 2018 to 30% in 2019. Hackers are increasingly attacking DNS servers to launch attacks and generate other malicious activity.

Extra Bonus: Malware Infections

During a DoS or DDoS attack, a victim organization is preoccupied in the frenzy with getting its website back online. But the culprit's primary motive for flooding the site with millions of inquiries might have been to distract the victim organization's attention so he could look for vulnerabilities to download malware, such as adware, spyware, ransomware or viruses. Then once the website is back, users will unwittingly upload malware on their devices.

For example, according to Lifewire, let's say your computer is using Google's DNS servers. You enter your bank's website URL and find its familiar homepage. However, your computer contains mal-ware from a DoS/DDoS attack that has changed your DNS server settings. Your system no longer contacts Google's DNS servers but a hacker's server that poses as your bank's website. The fake bank site harvests your user-name and password. Lights out, game over. Your money is gone because it was auto-matically wired to the fraudster's bank ac-count. (See "What Is a DNS Server?" by Tim Fisher, Lifewire, Sept. 18, 2019, tinyurl.com/yyn8m5y5.)

According to Fisher's Lifewire article, malware attacks that hijack your DNS server settings might also redirect traffic away from your popular websites to ones that are full of advertisements or to fake sites that could scare you into believing your computer has been infected with viruses and coerce you to buy their software program to remove it.

Maintaining Quality DNS

Your organization must maintain quality DNS to ensure service continuity. According to IDC's 2019 Global DNS Threat Report, faulty or ineffective DNS services can negatively affect clients,' partners' and employees' perceptions, and your e-commerce applications, which can result in lost revenue and a ruined brand.

Developing appropriate measures to help ensure the security of DNS servers is essential to reduce DoS and DDoS attacks. IDC recommends these DNS measures, some of which are quite technical, but I'll explain what they mean:

- Implement internal threat intelligence to protect your enterprise data and services. Using real-time DNS analytics helps detect and thwart advanced attacks such as "domain generation algorithm" (DGA) malware and "zero-day malicious domains." A hacker will use a DGA mal-ware technique to periodically spawn many random fake domain names for an organization's C&C server, which makes it very difficult for a malware analyst to identify the real domain name or IP address of the invading server and take it down. A zero-day malicious domain's IP address contains malware, which attacks vulnerable systems. If an unsuspecting user visits an infected domain, malware could be loaded on their computer to carry out malicious activities. "Zero-day" is the day the exploit is identified; the longer it takes for an organization to identify it, the higher the probability the hacker has inflicted malicious activity.
- Use DNS for ensuring security compliance. Integrating DNS with IP address management (IPAM — a way to plan, track and manage the IP address space in a network) in network security orchestration processes helps automate management of security policies and keep them current, consistent and auditable.
- Leverage DNS' unique traffic visibility in your network security ecosystem to help SOCs' remediation. SOC, or "system on a chip," refers to the integration of all the required electronic circuits of various functions onto one chip to form a complete system to perform complex functions. Implementing real-time behavioral threat detection over DNS traffic allows qualified security events rather than logs to be sent to SIEMs. (Security information and event management software products provide real-time analysis of security alerts.)

Configuring DNS Servers to Prevent Attacks

Operators of DNS servers should ensure their systems are properly configured to prevent attacks. Rivalhost offers these 14 recommendations to help protect against DoS and DDoS attacks:

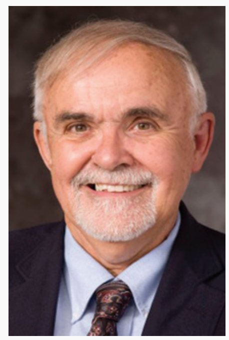
- Create an action plan in advance.
- Monitor traffic levels.

- Pay attention to connected devices in the "internet of things."
- Install extra bandwidth.
- Train your customers on security.
- Set up secured virtual private server hosting.
- Drop packets from obvious false sources of attack.
- Purchase a dedicated server that pro-vides you with more bandwidth and control over security.
- Block spoofed IP addresses.
- Frequently install patches and updates — especially on open-source plat-forms like WordPress.
- Aggressively monitor "half-open connections," which are vulnerable to attacks. In a half-open connection, two parties are trying to communicate but can't because the connection at one end has crashed or has been removed. Hackers can exploit this problem until the connection is fixed.
- Use proxy protection, which provides an extra layer of DDoS protection for any website and keeps your website safe from complex cyberthreats. An example is a proxy server — a computer that serves as an intermedi-ary between an individual's computer and another host such as the internet. For example, when someone uses a computer to find a resource, such as a webpage on the internet, the request goes to the proxy server first. If the proxy server locates the page from a local cache of previously viewed pages, it sends it to the primary user thus bypassing the request to the internet. If the proxy server doesn't find the requested webpage locally, it requests one from the internet by using one of its IP addresses. When the webpage is found on the internet, it's returned to the proxy server, which forwards it to the user. Thus, the proxy server adds another layer of protection for the user.
- Filter UDP traffic with "remote black holing." User Datagram Protocol (UDP) is a protocol for sending data packets over the internet via an IP address. Remote black holing is a filtering technique that allows someone to rid undesirable traffic before it enters a protected network. (See "DDoS Protection: 14 Unique Ways to Protect Yourself from DDoS Attacks," by Todd Reagor, Jan. 23, 2017, tinyurl.com/y2u8ery3.) Examine familiar websites' appearances to look for obvious imperfections such as spelling errors, changes in color, etc., which signal the sites are fake. Report them to IT so its technicians can resolve. DNS server operators should take measures to ensure systems are properly configured to prevent attacks.

Head Off Dastardly Attacks

DoS and DDoS attacks are seriously threatening organizations' data security and resources. You must protect your DNS servers. Overloading of websites with millions of automated inquiries are more than a nuisance. You lose revenue, productivity and reputation. And hackers might use them to download malicious malware that can harm your organization and customers. Be smart and get way ahead of the fraudsters.

ABOUT THE AUTHOR



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An Invitation from AIRA Journal

AIRA members and others are invited to submit articles, proposed topics and content-related questions to the AIRA Journal Editorial Board: Michael Lastowski mlastowski@duanemorris.com, David Bart David.Bart@rsmus.com and Boris Steffen bsteffen@provincefirm.com. Articles are currently being accepted for upcoming quarterly issues; see AIRA Journal information and Authoring Guidelines at www.aira.org.

To inquire about placing an ad in AIRA Journal contact Michael Stull mstull@aira.org

AlixPartners CIRA Awards

The AIRA established the Certified Insolvency and Restructuring Advisor program in 1992 to recognize by public awareness and certification those individuals who possess a high degree of knowledge and proficiency across a spectrum of functions related to serving clients in situations involving distressed and/or insolvent entities. Such expertise includes accounting, operations, strategic, taxation and finance issues related to business bankruptcy and insolvency.

As part of the firm's many years of support for the CIRA program, Zolfo Cooper (through 2018) and now AlixPartners (starting in 2019), have generously sponsored annual awards for the highest composite scores on all three parts of the CIRA exam series, calculated at end of the year of completion and awarded at the next Annual Conference.

The AIRA is pleased to recognize the winners of this year's AlixPartners Awards:

FIRST PLACE

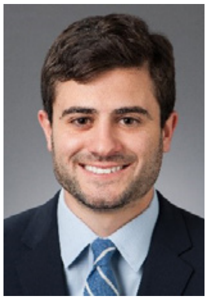
Merry Lin is a Senior Advisor on the White House National Economic Council. She develops and coordinates U.S. economic policies on China and advises senior leaders on technology and manufacturing supply chain issues to bolster U.S. economic competitiveness. She led the U.S.-Japan Economic Dialogue, which resulted in new trade agreements, and participated in negotiations to improve the U.S.-Korea Free Trade Agreement. She previously served as the Director for Global & Asia Economics on the National Security Council. Merry studied at Northwestern University and The Wharton School, University of Pennsylvania; she is a CFA, certified FRM, and Millennium Fellow at the Atlantic Council.

SECOND PLACE (TWO AWARDS)

Paul Stroup is a Managing Director with FTI Consulting's Turnaround & Restructuring practice, specializing in financial restructurings, operational turnarounds and capital markets transactions. He has experience providing financial advisory services in numerous engagements involving troubled situations, strategic evaluation and implementation, mergers and acquisitions and other corporate finance transactions. Mr. Stroup has industry experience in consumer, education, healthcare, media, natural resources, publishing, restaurants, retail and telecommunications. He holds a B.A. in Economics from Davidson College, and certifications in FINRA Series 7 and 63.

Alexander Weckenbrock, CIRA, is Vice President of AlixPartners' Turnaround and Restructuring Practice (Dallas office), specializing in turnaround, performance improvement, bankruptcy and financial restructuring services to distressed and underperforming companies. He has worked in both in- and out-of-court restructurings, helping clients with cash flow and liquidity-related matters and providing guidance on strategic assessments and business plan development. Prior to that, he worked for EY's assurance and advisory practices. He holds an MBA, Tulane University, and M.Sc. from WHU - Otto Beisheim School of Management (Finance and Accounting). He is a CPA and CFA Charterholder, and enjoys spending time with family, playing tennis, golf, sailing and scuba diving.

THIRD PLACE



Charlie Altuzarra is a Senior Consultant in the Corporate Finance & Restructuring group at FTI Consulting in New York. Charlie joined FTI in 2016 after graduating from the University of Southern California, where he double majored in Finance and Accounting. During his time at FTI, Charlie has advised companies, lenders, and other interested parties on restructurings both in Chapter 11 and in non-bankruptcy driven resolutions. He has supported FTI personnel serving in interim management roles, such as Chief Restructuring Officer, and worked with management teams at distressed companies to assess short-term liquidity, longer-term business viability, and otherwise support restructuring efforts and transactions. Charlie is a licensed CPA in the state of California.

DISTINGUISHED PERFORMANCE AWARDS

In addition, the following candidates are congratulated for outstanding total scores not far behind the top three places:

Stacy Thompson, *Keegan Linscott & Associates, PC*

Carl Charlotin, CIRA, *Pension Benefit Guaranty Corporation*

Mitchell Chubinsky

Ramiro Balladares, CIRA, *Stout Risius Ross*

James Bender, *FTI Consulting*

Florian Matena, *KPMG LLP*

AIRA Board Names Tom Morrow as 2020 Manny Katten Award Recipient

At its October 1999 meeting, the Board voted to establish as a memorial, the Manny Katten Award, which is bestowed annually on an individual, selected by the Board, who has demonstrated exceptional leadership, dedication, and service to the bankruptcy, restructuring, and turnaround field.

Manny was the Chairman of the first AIA Annual Conference and a founding Board Member. He was a prominent practitioner based in Chicago and known for his expertise and good will. A former partner and friend of Mr. Katten attested, "Manny was a big, affable guy who liked everyone and in return was loved by all. With his passing from cancer, he left us way too soon.

At its January 2020 meeting, the AIRA Board selected our Executive Director Emeritus, Thomas A. Morrow, CIRA, as the 21st recipient of the Manny Katten Award.

Over the past 20 years, this award has been presented at AIRA's annual meeting dinner before the attending membership with testimonials in recognition of the awardee's contributions to our industry. In the world of COVID-19, we present the award virtually and hope we are in a position to give greater recognition to Tom in the not too distant future.

Tom began his career with the powerful combination of an undergraduate degree in accounting from University of Michigan and later an MBA from University of Chicago. His early work related to distressed businesses arose from his position as a bank credit analyst and loan officer. Among the matters to which Tom was called was addressing Michigan National Bank's $200 million exposure to the failed Penn Square Bank in Oklahoma City in the early 1980s.

Tom went on to management consulting and a position of Director of Franchise Development for Wendy's International, Inc. where among other responsibilities he restructured over 30 franchisees controlling more than 300 stores. In 1994 he joined Jay Alix and retired 20 years later from the position of Managing Director of AlixPartners, LLP. While with AlixPartners Tom focused on assisting his clients in solving financial and strategic challenges. His industry involvement extended from forestry (Pacific Lumber) to convenience stores (Core-Mark International) to automotive (General Motors Corporation) both in the U.S. and overseas.

While managing his client commitments, Tom made contributions to his community and to our industry through board involvement. He served as the treasurer to the Village of Franklin, MI, for eight years. He was awarded American Bankruptcy Institute's Service Award in 2010 and subsequently served on ABI's Board of Directors in 2013-2015.

Tom became a member of AIRA in 1997. He joined the Board of Directors in 2007. He was elected AIRA President for the June 2015-2016 term. In January 2016 Tom stepped down from the Board to become the second Executive Director of AIRA with the retirement of our founding Executive Director, Grant Newton. As Executive Director, Tom oversaw the organization of web-based marketing and social media information, development and implementation of webinars and self-study courses for CPE credit, and updated strategic planning for the future of the organization. After successfully implementing a succession transition plan he retired (again) in January 2020.

The Board of AIRA gratefully acknowledges the contributions to the bankruptcy, restructuring, and turnaround industry and most importantly to our organization and thought leadership with this awarding of the 2020 Manny Katten award to Thomas A. Morrow, CIRA.

Manny Katten Award Recipients

2020	Thomas A. Morrow
2019	Jay Alix
2018	Robert Bingham
2017	Jay Crom
2016	Grant Newton and Valda Newton
2015	Walter Greenhalgh
2014	Grant Stein
2013	Alan Holtz
2012	Dan Armel
2011	Jack Almquist
2010	Robert Remian
2009	Robert Medlin
2008	Michael Policano and Ron Sutter
2007	Dennis Bean
2006	Barry Monheit
2005	Tracy Gopal
2004	Alexander Knopfler
2003	Alan Gittelson
2002	Matt Schwartz
2001	Elmer Heupel
2000	Steve Cooper

NEW MEMBERS

Joshua Noble
Conway MacKenzie
Hoboken, NJ

Max St. Aubin
PwC
Canoga Park, CA

Josh Goodelman
PwC
Tampa, FL

Robert Green
PwC
Floral Park, NY

Grace Kelley
PwC
Belle Harbor, NY

Adrienne Rukavina
PwC
New York, NY

Thomas Baumer
PwC
Jacksonville Beach, FL

Hyejin Kim
PwC
Port Washington, NY

Chad Crawford
PwC
Jacksonville, FL

Morgan Eberle
PwC
Cincinnati, OH

Martin Drott
Ernst & Young LLP
Dallas, TX

John Schlant
Berkeley Research Group, LLC
New York, NY

Christopher Haeckel
AlixPartners LLP
Franklin, TN

Yue Shen
AlixPartners
New York, NY

Bryan Wakefield
Cordia Technical Accounting Services, LLC
Vienna, VA

Robert Rath
PwC
Chicago, IL

Frederic Stupart
Eaglestone Advisors LLC
Bronxville, NY

Julio Picard
Positano
Chihuahua, Chihuahua

Zachary Goldsmith
Huron
West Hempstead, NY

Aashish Chaturvedi
AlixPartners
San Diego, CA

Lu Cheng
AlixPartners
Chicago, IL

Guadalupe Delacruz
AlixPartners
Houston, TX

Mark Dowdall
AlixPartners
Dallas, TX

Michael Fajardo
AlixPartners
New York, NY

William Hodges
AlixPartners
New York, NY

Varun Kotharu
AlixPartners
Houston, TX

Lan Nguyen
AlixPartners
Chicago, IL

Joshua Pupkin
AlixPartners
Dallas, TX

Katherine Schrichte
AlixPartners
NY, 10022

Jason Seigel
AlixPartners
New York, NY

Yujing Sun
AlixPartners
New York, NY

Javier Zermeno
AlixPartners
Chicago, IL

James Shen
AlixPartners
Long Island City, NY

Kim Heathcott
Heathcott Consulting
Dallas, TX

Britton Bissett
Conway MacKenzie
Houston, TX

Terrence Rice
Terrence Rice, CPA
Milwaukee, WI

Lee Hiles
Larx Advisors Inc.
Atlanta, GA

Yian Chen
FTI Consulting
Los Angeles, CA

Neil Heyside
Conway MacKenzie
Atlanta, GA

Philip Patman
Huron Consulting
Bellaire, TX

Samir Bhatnagar
Crisil
New York, NY

Jingying Guo
PricewaterhouseCoopers LLP
Sugar Land, TX

Jesus Mattei
Rockelis Partners
Guaynabo, PR

Christopher Cuomo
AlixPartners
New York, NY

Bryon Sergeant
Alvarez & Marsal
Chicago, IL

Robert Trenk
GlassRatner
New York, NY

Daniel Corredor
The Strategic CFO, LLC
Houston, TX

Kevin Glassman
AlixPartners
Houston, TX

Daniel Pillitteri
AlixPartners
New York, NY

Mo Chandra
AlixPartners
New York, NY

Kevin Rios
14809 Needles St.
North Hills, CA

Roberto Marley-Douyon
Adelphi, MD

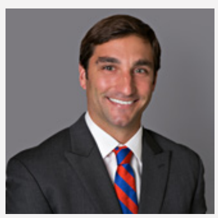
MEMBERS ON THE MOVE:

Los Angeles, Calif. (May 27, 2020) – Stapleton Group announced it has expanded its team with three key hires:

Joan Hadeed, an AIRA member, has been hired as **Associate Director, Financial Advisory Services**. After beginning her career at Ernst & Young, transitioned to the private sector to diversify her skills. She delivers the critical financial analyses and projections clients need to develop strategic plans.

Michael Husted joined Stapleton as **Director, Operations**. He brings 15 years of operations and business development experience from previous senior operations positions at a global manufacturing and service company, a fin-tech business and a top regional law firm.

Emily Chen has been hired as **Associate Director, Accounting Services**. She applies over 20 years' experience to provide clients with the information they need for business decisions. She also streamlines accounting systems and controls and ensures compliance.



In addition, **Jake Diiorio** has been promoted to **Managing Director**. He has been a key member of Stapleton's team for over 10 years, serving as lead engagement manager on receiverships, bankruptcy matters, assignments for the benefit of creditors (ABCs) and advisory assignments.

Learn more about Stapleton at stapletoninc.com

CLUB 10

*Organizations with 10+ professionals who are active CIRAs or have passed all three parts of the exam**

AlixPartners, LLP	**98**
FTI Consulting, Inc.	**64**
Alvarez & Marsal	**59**
Ernst & Young LLP	**34**
Berkeley Research Group, LLC	**22**
Huron	**21**
PBGC	**19**
Conway MacKenzie, Inc.	**17**
Deloitte	**17**
Ankura Consulting Group, LLC	**16**
KPMG LLP	**14**
Office of the U.S. Trustee	**14**
BDO USA, LLP	**13**
GlassRatner Advisory & Capital Group LLC	**13**
PricewaterhouseCoopers LLP	**11**
Protiviti Inc	**10**
SOLIC Capital Advisors, LLC	**10**

**Note: The last issue of AIRA Journal indicated the number of active CIRA members employed by PBCG was 31; the correct number was 19. The Office of the US Trustee was indicated to have 29; the correct number was 14.*

BOARD OF DIRECTORS

The Association of Insolvency and Restructuring Advisors is governed by a board composed of up to 40 directors (several former directors continue to serve as directors emeritus). Directors are elected by majority vote at a meeting of the Board, serve for a term of three years (or such less term as the Board may determine or until their successors are duly elected and qualified) and may serve an unlimited number of terms, whether or not consecutive. The majority of the directors on the Board must have a CIRA Certificate; although most are financial advisors, a number of directors are attorneys. New officers assumed their duties at the end of the June AC20 Virtual Series and will serve for one year.

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