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Raising Capital in the Current Environment IV: Five Things to Know for Your Debt Offerings

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**Presented by:
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Today's Panelists



Boris Dolgonos is a partner in the New York office of Gibson, Dunn & Crutcher and a member of the Capital Markets and Securities Regulation & Corporate Governance Practice Groups. Mr. Dolgonos has more than 20 years of experience advising issuers and underwriters in a wide range of equity and debt financing transactions, including initial public offerings, high-yield and investment-grade debt offerings, leveraged buyouts, cross-border securities offerings, and private placements. Mr. Dolgonos has represented public and private companies, investment banks and other financial institutions and sovereign entities in transactions across North and South America, Europe, Asia and Africa. He has experience in many industries, including metals and mining, biotechnology, industrials, aviation, hospitality, media and telecommunications, financial services, technology, and retail.



Doug Rayburn is a partner in the Dallas and Houston offices of Gibson, Dunn & Crutcher and a member of the firm's Capital Markets, Energy & Infrastructure, Mergers & Acquisitions, Global Finance, Private Equity and Securities Regulation & Corporate Governance Practice Groups. His principal areas of concentration are securities offerings, mergers and acquisitions and general corporate matters. He has represented issuers and underwriters in over 200 public offerings and private placements, including initial public offerings, high-yield offerings, investment-grade and convertible note offerings, offerings by MLPs, and offerings of preferred and hybrid securities. Additionally, Mr. Rayburn represents purchasers and sellers in connection with mergers and acquisitions involving both public and private companies, including private equity investments and joint ventures. His practice also encompasses corporate governance and other general corporate concerns.



Robyn E. Zolman is a partner in the Denver office of Gibson, Dunn & Crutcher and a member of the firm's Capital Markets, Securities Regulation & Corporate Governance and Energy Practice Groups. Her practice is concentrated in securities regulation and capital markets transactions. Ms. Zolman represents clients in connection with public and private offerings of equity and debt securities, tender offers, exchange offers, consent solicitations and corporate restructurings. She also advises clients regarding securities regulation and disclosure issues and corporate governance matters, including Securities and Exchange Commission reporting requirements, stock exchange listing standards, director independence, board practices and operations, and insider trading compliance. She provides disclosure counsel to clients in a number of industries, including energy, telecommunications, homebuilding, consumer products, life sciences and biotechnology.



Agenda – Five Things to Know

- Extraordinary Issuance Volume During 2020
- Recent Developments in Covenants
- Enhanced Focus on Diligence
- Amendments to Financial Disclosure for Guarantors / Non-Guarantors
- Considerations for Public vs. Private Offerings

Extraordinary Volume of Debt Issuance

- Record levels of issuance in 2020
 - Year to date, the US market has seen nearly \$2 trillion of debt issuance, which is already more than the annual record
 - Of this amount, only 12% (\$240 billion) was issued before March 17
 - Volume driven by Fed intervention, historically low interest rates, push for liquidity, and investor enthusiasm
- Records are falling in all segments of the bond markets
 - Fallen angels are on track for \$640 billion; previous record was \$488 billion
 - Investment inflows into high yield were \$25 billion in Q2
 - Each of May, June, July and August set a record for monthly high-yield volume
 - August high-yield volume through August 24 was \$291 billion – 75% higher than comparable amount in 2019
- Much of the issuance was during the height of the pandemic
- Bonds were issued at meaningfully lower average rates than ever before
- Defaults and downgrades may increase in the short- and medium-term, which could lead to higher average rates
- In light of lower interest rates and depressed debt trading prices, there has been an increase in liability management transactions and debt repurchases

Focus on Green Bonds

- Record levels of issuance
 - Green bond issuance through August is \$157 billion – another record
- Yields for green bonds are slightly lower but investors have shown a preference for green bonds compared to non-green equivalents
 - Green bonds also outperform non-green bonds in secondary markets
- Green bonds still remain a small fraction of the total bond market
- The pandemic is expected to intensify the focus of issuers and investors on social and environmental issues
- Continued focus on ESG (environmental, social, governance)

Recent Developments in Covenants

- Covenants relief
 - Suspending / waiving maintenance covenants
 - Adjusting covenants for a period
- Increased draw-downs under revolvers
 - Issues include material adverse effect, solvency, compliance with material contracts
- Continued interest in covenant-lite deals
- Tighter covenants for distressed issuers
 - Shorter-term, more secured issuances
 - Some absolute prohibitions on debt and restricted payments until issuers achieve leverage metrics
 - Premium payments upon events of default
- Minimum liquidity covenants replace leverage and fixed-charge covenants
 - Lenders are less focused on earnings during the pandemic
 - Reversion to leverage covenants in 2021
- EBITDAC
 - Borrowers have attempted to add back COVID-related expenses (including restructuring costs)
 - This adjustment was more relevant in the early months of the pandemic
 - Companies say EBITDAC provides continuity with past results – stripping out a temporary disruption

Recent Developments in Covenants (cont'd)

- **Change of Control**

- The Change of Control covenant requires the issuer to make an offer to purchase the bonds in the event the issuer undergoes a change of control (so the bondholders have a put right).
- Two aspects of this covenant are a focal point:
 - Merger Prong – a change of control includes a merger in which the equity holders of the issuer pre-merger do not represent a majority of the equity ownership in the surviving entity.
 - Two Trigger Change of Control – requires a change of control and a ratings event before there is an obligation to repurchase bonds.
 - High yield issuers - significant pushback on having the ratings decline trigger.
 - IG issuers – if at risk of losing IG status, consider adopting a ratings decline provision.



Focus on Diligence

- **COVID-19 Impacts**
- Significant focus of due diligence inquiries and attention on diligence calls.
 - Broad range of impacts
 - Remote work arrangements
 - Contingency plans
- Attention to COVID disclosures:
 - Recent developments
 - Risk factors
 - Forward-looking statements
 - Be mindful of SEC guidance
- Ongoing process. As impacts evolve, so should disclosures.

Focus on Diligence (cont'd)

- **Cybersecurity**
- Numerous headlines of major breaches at retailers, credit reporting agencies and other companies.
- Cyber incidents worldwide have continued to increase.
- In February 2018, the SEC approved an interpretive release updating guidance on public company disclosure and other obligations concerning cybersecurity matters.
- The underwriters want to establish their due diligence defense by conducting reasonable diligence.
 - Discussions with company IT and other company personnel.
 - Evaluation of company's disclosure of cybersecurity risks and incidents.
 - Additional cyber representation in underwriting agreements.

Amendments to Rule 3-10

- **Guaranteed Securities Disclosures Under S-X Rule 3-10**
- Registered debt securities with guarantees
- Condensed consolidating financial information historically required
- Time consuming; weighed in favor of “private for life” bond offerings
- **2020 Amendments**
- Reduce and simplify financial disclosure requirements for guaranteed debt offerings
- Easier to omit separate financial statements
- More abbreviated financial and nonfinancial disclosures
- Not required in the financials
- Shorter duration
- Effective January 4, 2021, but voluntary early compliance permitted
- Comfort considerations

Public Offering vs. Private Placement

- SEC Registered or Rule 144A / Regulation S
 - Rule 144A / Regulation S may include registration rights or may be “144 for life”
- Considerations
 - Registration Statement
 - Guarantor registration and financial information
 - FINRA filings
 - Tack-on offerings

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Boris Dolgonos is a partner in the New York office of Gibson, Dunn and Crutcher and a member of the Capital Markets and Securities Regulation and Corporate Governance Practice Groups.

Mr. Dolgonos has more than 20 years of experience advising issuers and underwriters in a wide range of equity and debt financing transactions, including initial public offerings, high yield and investment-grade debt offerings, leveraged buyouts, cross-border securities offerings, and private placements. He also regularly advises U.S. and non-U.S. companies on corporate governance, securities laws, stock exchange rules and regulations, and periodic reporting responsibilities.

Mr. Dolgonos has represented public and private companies, investment banks and other financial institutions and sovereign entities in transactions across North and South America, Europe, Asia and Africa. He has experience in many industries, including metals and mining, biotechnology, industrials, aviation, hospitality, media and telecommunications, financial services, technology, and retail.

Mr. Dolgonos received his law degree in 1995 from the University of Virginia, where he served on the *Virginia Law Review*. He graduated *magna cum laude* from Harvard College in 1991. He served as a law clerk to Judge Robert Smith Gawthrop III of the U.S. District Court for the Eastern District of Pennsylvania from 1995 to 1996.

Mr. Dolgonos has been recognized as a leading corporate and capital markets lawyer by *The Best Lawyers in America*[®], *The Legal 500 United States*, *The Legal 500 Latin America* and *Super Lawyers*.

Mr. Dolgonos co-chairs the board of directors of the International Senior Lawyers Project, which provides pro bono legal assistance to governments and civil society organizations in developing countries.

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Additionally, Mr. Rayburn represents purchasers and sellers in connection with mergers and acquisitions involving both public and private companies, including private equity investments and joint ventures. His practice also encompasses corporate governance and other general corporate concerns.

Mr. Rayburn has been consistently ranked in Texas Capital Markets Debt & Equity by *Chambers USA*, with sources noting him as "an outstanding lawyer who is as good as it gets" and "he knows his stuff and works hard to find compromises to divisive issues. Doug is a true gentleman who is invariably pleasant to work with." He has also been widely recognized, including *The Legal 500 U.S.* (2013), *The Best Lawyers in America*® (2008-2019), and *Texas Super Lawyer* (2006-2018).

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In 2015, *Law360* selected Ms. Zolman as one of eight "Rising Star" capital markets attorneys under 40 to watch nationwide. She was named a Top Woman in Energy by the *Denver Business Journal* in 2015 and 2017 -2020 and to its Who's Who in Energy list in 2019, and was one of the *Denver Business Journal's* 40 under 40 in 2017. Ms. Zolman was selected as a "Next Generation Lawyer in Capital Markets: Debt Offerings" by *The Legal 500 U.S.* in 2018 -2020 and as a Top Lawyer: Securities by *5280 Magazine* in 2018-2020. Ms. Zolman was named a 2021 Lawyer of the Year for Securities/Capital Markets Law, Denver by *Best Lawyers in America*®.

Ms. Zolman graduated *cum laude* from Harvard Law School in 2002, where she served as an Executive Editor of the *Harvard Law Review*. She received a Bachelor of Arts degree in Political Science and Environmental Studies *summa cum laude* from the University of Colorado in 1999.