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"Capital Raising in Turbulent Times"

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Audio Archive

With the ongoing turmoil in the financial markets, many companies are trying to determine whether traditional capital markets financing transactions remain a possibility for them, and exploring alternative means of raising equity capital. This webcast will review the current state of the new issues market for debt and equity, and explore financing and liability management alternatives. Join these experts:

- **Katherine Blair**, Partner, Manatt, Phelps & Phillips LLP
- **Richard Blake**, Partner, Wilson Sonsini Goodrich & Rosati
- **Rob Evans**, Partner, Locke Lord LLP
- **Mike Solecki**, Partner, Jones Day

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John Jenkins, *Editor, TheCorporateCounsel.net*: Hi. This is John Jenkins, editor of TheCorporateCounsel.net. I'd like to welcome you to today's program, Capital Raising in Turbulent Times.

We organized this panel before the COVID-19 crisis broke, so our discussion today probably looks a lot different than it would have if the world and the markets hadn't changed so dramatically over the last couple of months.

Fortunately, all of our panelists have been there and done that when it comes to helping companies raise capital under crisis conditions, so I think you'll find their insights really valuable here today.

Speaking of our panel, joining me are Katherine Blair, Partner of Manatt, Phelps; Richard Blake, Partner at Wilson Sonsini; Rob Evans, Partner of Locke Lord; and Mike Solecki, Partner of Jones Day. With that, I'm going to turn it over to Katherine to kick off the discussion with an overview of conditions in the capital markets. Katherine?

Overview of the state of the capital markets

Katherine Blair, *Partner, Manatt, Phelps & Phillips, LLP*: Well, thank you, John. I think that our key word for the day is "turbulent," as John mentioned.

I'm going to give a general overview of the market. I don't think any of it will be a complete surprise to all of you, unless you've been living under a rock for the past month. I'm generally going to be talking about, as you see in our agenda, where we are with IPOs, other types of offerings and the debt market.

As you know, the result of COVID-19 has caused a lot of extra stress on companies in a variety of ways, both in access to liquidity and also – as a result – with regards to the overhead, making layoffs for employees and cutting costs.

As a result, as I'm sure you've heard, unemployment has had a high of about 14.7%, and companies are trying to find ways to fortify their balance sheets. There's been a lot of programs that talk about accessing capital within USBA program, but public companies have been discouraged from seeking that out with the idea that they can access the capital market. I think the capital markets are, somewhat in this turbulent time, working for them even though today the stock market is down about 2%. Some days it's up.

This has been, from what I understand, the most turbulent and volatile time for the stock market. The Nasdaq hit a high of 9800 in mid-February. It was down as low as 6800. However, the S&P 500 has recently logged its best month in 33 years, so I don't know what to think about that.

Generally, just overall, since this has all happened, the market is just down a mere 9.3% this year and 35% from its peak. As I mentioned, a lot of volatility, and that is going to determine how companies access the capital markets.

People are saying that this volatility, if you look at the graph, it actually surpasses what we experienced in October 1987 also known as Black Monday; and then, more recently, December 2008, which was the big financial crisis that we thought was the crisis to be the crisis of our generation. Those were the good old days compared to this. We really haven't experienced a time in the market with a pandemic like this.

Now, some of the trends we're seeing were hitting prior to COVID-19 hitting us. IPOs generally are down 40% this year, but it doesn't mean they're not happening. IPO filings are down about 24%.

However, with those that are happening, the industries we're seeing, health care is the most active, the technology and financial sectors following. Also, surprisingly, we're seeing a lot of mid-market IPOs ranging from $12 million to $100 million.

Sometimes you see it's really the only large IPO, the well-known ones that you hear about, that are the successful ones. I actually think that this is a market. We are seeing a good amount of mid-sized IPOs.

As a matter of fact, just recently, I saw that a pharmaceutical company set its price range for $25 million IPO. Day investors plan to raise $100 million or maybe go declare bankruptcy, one or the other.

With regard to other offerings, you have a lot of companies that are already public, again, being discouraged from accessing a government fund. They're looking at the capital markets. There is a good number of blank check IPOs happening, and also, a good amount of PIPEs.

PIPEs have always been a great go-to for quick capital for companies. You don't have to do SEC filings. You can raise the capital on a private basis, so those have always been a good alternative for companies and later filing.

Then, let's talk about the debt markets. Like the stock market, the debt market is in a very interesting place. The fed funds rate is currently at 25 basis points; a year ago, it was 2.5%.

As a matter of fact, I saw an article recently that said that the Federal Reserve confirms that they will not go negative on the fed fund rates. But, with that said, companies are also accessing the bond market and using high-yield bonds to raise a lot of money. That's attractive for investors.

Just recently, 24 U.S. companies raised about $13.6 billion in convertible bonds in April compared to $6 billion earlier. Delta did $3.5 billion; Yum! Brands did a $600 million bond offering at about 7%. And then, there was a gambling company that did both an equity offering and a bond offering, and both were upsized.

We're seeing, again, crazy market, both on the debt side and the stock market side being a public company, but it doesn't mean that that market is shutting down for public companies to access it. As you'll hear from our other speakers about the ways that the companies are accessing public markets, whether it's through IPOs or alternative methods such as PIPEs or others doing takedowns as well, that there is access and investors that are interested.

With that said, I'm going to hand it off to Rob who's going to talk about the equity financing alternatives for public companies.

Equity financing alternatives for public companies

Rob Evans, *Partner, Locke Lord LLP*: Thank you. Before I get into the details about ways that companies are accessing the equity capital markets, I want to make a couple of points about the state of the market.

In the last three weeks of March, there was only about $500 million of new equity issuance in the public capital markets. There's been rapid improvement from that low point, and capital raising is accelerating. About $25 billion of equity interest happened in April - $9 billion in the first two weeks and $16 billion in the last two weeks of April.

The first week of May, just in that one week, it was at $10 billion. This week, it's already over $20 billion. Half of the issuance has been common stock, and the other half convertible securities.

In a normal market, it's usually 75% common stock, 25% converts. Convertible bonds are doing well in this volatile market. Part of the reason is that there are real benefits from issuing a convertible security for a public company with a deep and liquid market in its common stock. And there are really attractive terms right now because when the stock market is showing a high volatility and interest rates are low, that creates attractive terms for buying convertible securities.

I think of a convertible security as an equity product (rather than a high yield debt product or straight debt product) because embedded in a convertible bond is the right of the investors to convert into common stock at a fixed price. That fixed price is set at a premium to where the common stock is trading.

If I'm the management or the board of a public company, and I need to shore up my balance sheet or raise capital to ensure that I have liquidity to run my business, I can issue convertible bonds that typically have little or no financial covenants. They have a low interest rate, so you don't have to pay out a lot of cash every six months the way you do on high yield debt.

Because the strike price of the convertible bond is at a premium, there is an expectation that, if the stock price recovers the way management expects it to do over the, say, five years that the convertible bond is outstanding, then investors will convert and receive common stock and company won't have to repay that convertible bond in the future.

A convertible when compared, for example, to selling just common stock is much less dilutive for your existing stockholders because the common stock issued upon conversion is sold at the higher strike price in the convert. It's an attractive way of raising capital now. It also allows you to approach two groups of investors, the equity investors and convertible bond investors. That's a slightly different universe.

Some of the convertible bond investors are hedge fund-type investors that will buy convertible bonds and simultaneously short common stock to hedge out the equity risk. Others are natural convertible bond buyers that like the potential equity upside in the bond but also like the downside protection of the company being required to repay the bond at maturity if the common stock price has not risen above the strike price.

Those are aspects of the convertible bond markets that are attractive equity financing opportunities. We expect there to be continued issuance of common stock and the convertible securities in the capital markets.

Companies are now through their earnings season. There is pretty strong investor appetite. The private equity sponsors who have been mostly on the sidelines will likely look to utilize the capital markets. Perhaps, for example, to sell some stock in their portfolio companies that have previously gone public.

We're seeing some increase in risk appetite from the investment banks, so it's possible that we'll see common stock block trades occurring. That type of offering is done basically overnight, where the risk of marketing the securities is shifted to the investment banks.

It's essentially the same as any other common stock offering, but there's not a public marketing period. One of the things that companies fear in a turbulent market like this is that, when they announce a public offering of their common stock, investors will start selling their common stock or shorting their common stock, driving down the stock price and making it very, very dilutive for the company to raise capital in that manner.

Another sort of theme that we'll see in our discussion today is that there will be real efforts to try and shorten the amount of exposure that the company has to the capital markets, while simultaneously trying to raise money in those markets.

You're likely to see deals where big investors are brought over the wall before a deal is publicly announced to try and get investors lined up before the deal is announced in public markets to reduce the risk of that potential downside in the pricing of the common stock.

You may see transactions that involve selling the stock before public announcement, like the PIPEs that were described earlier. In fact, that can often be a very powerful way to fill the hole in a company's balance sheet. If, for example, you're coming up to your next 10-Q filing and about to announce earnings for the second quarter.

Many companies have been able to announce results for the first quarter that were not so bad because the shutdowns really didn't happen until the middle of the third month of that quarter.

At the end of the second quarter, I think we'll see more companies with bigger holes in their balance sheet, and one way to utilize the PIPEs offering is to go to investors before the earnings announcement, so the investors know what the earnings look like and what the impact on the company's financials is, get the investors to agree to the price at which they will buy either common stock or preferred securities or convertible securities and what price they'll buy at.

Then, when you announce the earnings, you basically cleanse all the material non-public information that you've shared with those investors and you're able to announce not only that there's a hole in your balance sheet, but that you've filled the hold with the issuance of new equity. By executing a transaction like that, the company can avoid the market uncertainty and the likely pounding its stock price might take if it simply announced a hole in its income, a hole in the balance sheet, and did not show that it hase a solution to that.

Mike Solecki, *Partner, Jones Day*: Hey, Rob, one thing. You bring up a really good point about the wall cross. You know, to date, I've really just seen that utilized in equity deals. Now I've seen a lot more of that done on the debt side in a bunch of deals in the past couple of months. The new term that I've learned is not only there's a "red OM", but now there's a "pink OM" that we're sharing with people on a wall cross basis. I've seen a lot more of that over the last two months.

Evans: Yes. One of the interesting things about wall crossing – and this is something we saw back at the time of the financial crisis in 2008-2009 – was that, because the company often will have some incremental disclosure that it hasn't made yet (that they'll want to tell investors about) the wall crossing non-disclosure agreements often have a provision in them that says that, first of all, it's a confidentiality agreement for purposes of Regulation FD, so the investor cannot trade on the information it gets while it is subject to confidentiality and it lasts, say, for two weeks.

If the company hasn't done its deal within two weeks, then the confidentiality agreement expires. In some of those agreements, the company is forced to agree to put out an 8-K telling the market that they tried to get a deal done and the deal didn't go through; that's called a cleansing press release.

If you look back at the financial crisis, State Street put out an announcement like that and their stock price dropped 33% the next day because people thought, well, if you go out to investors and they won't give you any money, you don't have access to the capital markets. You need access to capital markets, otherwise you wouldn't have attempted it and, therefore, there's going to be a real hard time maintaining your stock price.

One of the things that companies need to watch out for in a wall cross situation is that they might be forced to have to disclose that they've been talking to investors and have been unable to get a deal done.

Over time, after the financial crisis, we started seeing more and more people get comfortable with the idea that, no, the financing is just opportunistic. The reason we did it on a wall cross basis was not to protect bad financial information, but it was to allow the company to do a financing without there being a lot of time that news of the offering out in the market. And so, people started dropping those cleansing press release requirements, but I wouldn't be surprised to see them coming back now.

Solecki: Yes. You've hit the nail on the head. I think this is coming up in terms of the back and forth on the NDA. I think, for the most part, we're getting more and more comfortable that either it's opportunistic or everybody and their brother is out looking for cash. If we don't come to an agreement and announce a deal, essentially there's no MNPI, and there isn't going to be anything cleansed. Obviously, that varies on a case-by-case basis.

Another interesting thing – particularly the deals that were done prior to 10-Qs being filed since we just kind of came through that season and there were a lot of deals done before that – is that you had almost everybody having to put out some sort of recent developments press release or 8-K prior to a launch.

We saw a lot of wishy-washy disclosure, particularly around flash numbers given the downturn and decrease in market capitalization, etc. There are a lot of components that people don't have their arms around, like potential goodwill impairments, etc.

A lot of disclosure had to build in more sensitivity or point out that, "look, we're still looking at these sorts of things, and there's likely to be an impairment and it could material. We just don't have our arms around it."

One of the interesting things I saw as well is that, obviously, recent developments disclosures are going out and need to go out in connection with a deal, but banks that are really pushing to getting the disclosure out not just immediately prior to the launch of a deal, but getting it out in the market

maybe a day or two before, seeing how investors react and if after that it would still be good market for companies to launch. A lot of my clients were wary and some pushed back and just decided, "We're going to put it out right before we launch," or they did put it out, but tried to shorten that timeframe and didn't want the exposure of having it out there for a full two days.

Evans: Right. That also goes to my point about the risk appetite of banks and the possibility of block trades coming back. It's part of the reason the banks would be pushing to put it out with time for the market to absorb; they don't want to be underwriting it, and then discover that the market really didn't like it and the banks would end up owning the stock. So, that's a good sign that you've got issuers that proceeded without that kind of a gap between the announcement and the deal.

Another thing about that – there is guidance from the SEC from back in the financial crisis about using flash-type numbers. Basically, the SEC – this was probably in January of 2010 – there were a bunch of IPOs that had been held up in the prior year, and so, they started coming in January when the market was recovering.

The SEC was quite concerned that if you're launcing an IPO and its more than a year audited financials, you're including information about your fourth quarter, but you haven't finished your audit.

So, you're putting out numbers – expected revenues or things like that and the SEC gave guidance – you can do this, but you have to be careful that you're not cherry-picking numbers and showing only the good numbers and not the bad numbers. That's something to keep an eye on if you're in that spot at the end of next quarter, trying to do a financing before the quarterly numbers are out.

There are a couple of things to add about equity financing alternatives. One is investment risks are still elevated. For example, the volatility index which hit a record high in the middle of March - by March 16, it was over 82.

The VIX is now around 35%. We think of a normal VIX as being less than 20%. The volatility is elevated, and that means that it'll be more important to try and keep the time period when your deal is exposed to market risk to a minimum.

You have a narrower execution window in the market, so you want to try and maintain confidentiality about your deal as long as you can. Then, try to be prepared and ready to go with the deal on very short notice. As part of the planning of the offering, try to front-end load some of the work. This is so you're not exposed and have the investment bank say, "We've got to go NOW." You want to be ready to go. Or if the bank says, "We don't want to go today, but maybe we can tweak the deal a little bit and get it done tomorrow." You need to be ready to adapt.

The types of offerings we'd expect to see are common stock or permanent capital for the company. Even though the price for which you might be selling your common stock is lower than you would hope, the bounce back we've seen in the equity markets means that many companies can raise common equity at a relatively good price.

If you are thinking that things will get worse once the second quarter numbers come out, or if ther are further developments in the COVID-19 pandemic, then it may be a good time to consider raising equity now to fund future growth and possibly fund future acquisitions.

I talked a little bit about block trades of common stock that we often see in shareholder sales of their stock positions, for example, private equity funds selling chunks of their portfolio companies into the market.

There may also be some primary issuance of stock in blocks of smaller deals where certainty of execution and price are key. Another tool that we saw a lot in the financial crisis, and we are seeing again, is the use of at-the-market offering programs.

This is designed to be a sale into the trading market and in a volatile trading market where there is a lot of trading, at-the-market programs can be an effective way to raise equity capital.

A company can probably sell 10% to 20% of the daily volume in its stock using an at-the-market offering program without driving down the stock price. There is less in the way of underwriting expenses, and it can also facilitate the possibility of somebody saying, "Well, I want to buy a big chunk of your stock. Can you sell it to me pursuant to this at-the-market offering program?" And, the answer is yes, that can be done.

A number of companies that are looking for capital are thinking that having an at-the-market offering program available on their shelf-registration statement can make sense, and they may announce it to the market. But then, they don't actually have to sell the stock if the stock price is not at a level they like.

Other alternatives for equity raising: we talked about converts. One of the things that you sometimes see with a convertible bond is something called a call spread or a capped call transaction.

Those are is essentially equity derivatives that the company can enter into with the investment banks that are doing the underwriting. Using those equity derivatives, the company is able to synthetically increase the strike price of the convertible bond.

So, basically, by taking a portion of the proceeds of the convertible bond offering and paying it to the investment banks and also issuing to the investment banks a warrant to buy the same number of shares, but at a higher strike price, they can sell into the convertible market a convertible bond within a strike price that's a 20% to 25% or other sort of typical premium to the common stock price.

Then, through these equity derivatives synthetically raise that conversion price so there's less potential dilution to the stockholders, if the stock price recovers to a level more than the strike price in the equity derivatives.

Another way that some people have talked about doing equity raises is with something called a registered direct. That's a situation where, instead of working through underwriters, the company would sell directly to investors, but it would do so off its shelf registration statement. The investors get freely tradable stock, and you get the certainty of execution without the public offering out into the markets which then could trigger a down draft in your common stock price. That's what I have about the equity alternatives.

Jenkins: Why don't we turn it over to Mike then? Mike, walk us through what the debt markets are like right now.

Debt financing alternatives: Investment grade/non-investment grade issuers

Solecki: Thanks, John. Unlike what happened in 2008 with the recession, which essentially shut down the debt markets, it is sort of the exact opposite here in the COVID-19 pandemic. There's been a tremendous amount of activity in the debt capital markets, particularly after the March 23 announcement by the Fed that it would be buying back investment grade and high yield bonds in the market.

So, just in general, given the outlook companies now had on their businesses in connection with the pandemic, issuers have taken pretty aggressive steps to shore up their balance sheets and their overall liquidity.

A large number of companies drew down either in full, or at least in significant amount in part, their lines of credit, which led to a lot of debate about what if companies in terms of whether or not we had to Item 2.03 8-K those draws, etc. That was a lot of fun.

Then, whether they drew down or not, a lot of companies, as Katherine mentioned, hit the debt markets, whether investment grade or high yield. Rob already touched on the convertible market and how much that was utilized.

What we generally have seen – the investment grade market has really been open since around the end of February, early March, but it's really been wide open, again, after that Fed announcement.

Post-Fed announcement, we've seen almost $600 billion in issuances by investment grade companies. Last week alone, there were roughly $100 billion. We've seen big deals, such as Disney for $11 billion and PayPal for $4 billion. Some pretty large issuances out there.

Across the spectrum, a lot – I'll talk a little bit later on the high yield side in terms of the tenor – of leaning towards the shorter term, but people also taking advantage of, again, relatively cheap money and taking some longer 10-year, 20-year plus money.

General uses have been to refinance existing debt, pay off short-term debt, commercial paper (the CP market has generally been shut down) or pay down revolver, particularly revolver borrowings that were just made.

Overall, we're seeing general corporate purposes as the use of proceeds shore up balance sheet and liquidity, particularly as people head into the second quarter where there's going to be a lot more uncertainty. Companies were not untouched in the first quarter, but in January and February companies were relatively unscathed by the pandemic and people started feeling the ill effects in March.

On the high yield side, it's open. I wouldn't say wide open. Again, it's kind of started opening back up post Fed announcement. The earlier deals that were done either right before that or after, there was definitely a preference to having those notes done with security, particularly if an issuer already had a series of secured notes out there.

The rates were certainly at the high end. In terms of security, it was more than your typical types of collateral. You saw the standard collateral, but then we're also seeing people that didn't have real estate secured bonds all of a sudden use real estate to issue like a Nordstrom, for example.

Then, the industries that were hit particularly hard – travel – when you see Carnival utilizing their ships as security and the airlines using airplanes and gates and landing spots of security. Nothing really left to the imagination in terms of what would secure these bonds.

We did start seeing – again, post-Fed announcement, and then more towards the middle of April, at a time when issuers didn't necessarily need to get deals done for acquisitions, but really just to shore up balance sheet –we started seeing what I consider to be more regular way deals. For one issuer, we were waiting to do a deal for an acquisition, but one that won't close until later this year. It really didn't need to jump into the market, and we just kept talking to the banks; there were the discussions where we're really waiting for a comparable deal, somebody near our rating to get out there that really didn't need the money on an immediate basis. That really took until the middle of April at least from what I was seeing.

In terms of the use the proceeds – issuances were driven to some extent by acquisitions, but some of the same things you saw on the investment grade side. Debt repayments, near-term maturities and general corporate purposes.

Additionally, we did see a couple new features pop in a little bit in terms of the high yield terms themselves.

With the CARES Act out there and the uncertainty – we can probably do two webcasts on who can get money out of the CARES Act. There's a lot of uncertainty there. We worked on one of the first deals that had it in there – it was a CARES Act redemption similar to an equity redemption, with companies not quite sure whether or not they'd be able to receive any money in under the CARES Act. Under the CARES Act redemption provision, issuers are able to redeem notes in the short term anywhere between 90 days and 120 days after issuance with the amount that you receive under CARES Act or comparable legislation about half of the coupon, which is better than what you'd see in an equity clawback. Equity clawback is typically 100% of the coupons. So, that was one of the new provisions.

Covenant packages I would say generally were largely the same as prior issuances from companies, dependent though a little bit on the industry and upon the companies. There was some tightening in the covenants with respect to some companies, particularly around the ability to incur secured debt. But, otherwise, even companies with pretty light covenant packages were able to issue new notes with those some packages.

We did see some make-whole pricing provisions applicable upon acceleration be included. What we did not see was anything COVID-19 specific in terms of addbacks to EBITDA. It's unlike the bank market where you are starting to see some loosening, but that's a little different, obviously. You can always go back to the banks and get a consent or an amendment where it's harder to go back to the note holders.

Evans: One thing that I've noticed in the debt markets is because of the drop in or the concern about companies' business futures, the debt that they have outstanding maybe trading at a discount, a meaningful discount to its par value.

One of the ways that investment grade issuers, in particular, but high yield as well, have increased the amount of debt securities that they have outstanding is by adding additional notes to an already outstanding series.

The benefit of that historically has been that there's a premium for liquidity, so a bigger bond offering may trade better than a smaller bond offering, and adding on additional bonds to an already outstanding securities may be an efficient way to do it. There's also an existing trading market for the bonds that are outstanding, so that gives you a way to price the bonds without worrying about a new issue type discount.

However, because if the old bonds are trading at a discount from their face value, the new bonds issued at that same price may have original issue discount on them and, therefore, may not trade fungibly with the old series. That's something to watch out for in this context.

Solecki: Yes, I definitely agree, Rob. And we saw that. We did an additional secured note offering for a company early in the process. That traded so well that we reopened the prior series because it was trading at such a premium. We did see that a bunch the last couple of months as well, so good point.

I've mentioned with the investment grade, the tenor is definitely shorter. – Given the higher rates that we're seeing in the high yield market, particularly the earlier issuances, most people targeted tenors of three to five years. The 90% plus of the issuances the last couple of months have been in that area. These are non-call-2 (no ability to call for 2 years), essentially. The investors want that protection for at least two years. But issuers generally want the ability in two plus years, when things will change, to have the ability to go back and redeem these. Like I said, about 90% of the issuances were of this shorter duration, as opposed to usually around 26% of that tenor.

That is what I saw in the high yield market. I think Rob stole my thunder on the convert market already, but as he mentioned, it really is more as an equity instrument than a debt instrument. Given

the lower rates and the ability, given that there are a few restrictions, it makes it a pretty fast product to market. We did see a ton of that as Rob mentioned.

I hit a little bit of this before already of the things we're thinking about in terms of disclosures. Definitely required recent development sections or people issuing post 10-Q to really beef up – not that they hadn't already, but really beef up their disclosure – what they've been doing, and how they think COVID-19 is going to affect them going forward.

And, certainly – Rob will probably echo this as well – there was a tremendous amount of focus on COVID-19. I wouldn't necessarily call them projections, but disclosure regarding cash burn and how their businesses are going to be impacted in the second quarter versus the first quarter.

There's been a tremendous amount of focus on the banks even more so than normal. All it took was the SEC to mention COVID-19, and I think every in-house counsel in Wall Street became hyper focused on your disclosures.

Evans: Well, there is a difficulty with what the SEC has said about COVID-19 disclosure. There's that statement out from Chairman Clayton and from the head of Corp Fin, Bill Hinman, that suggests that companies should disclose their expectations and plans concerning various ways that the company could be affected by COVID-19.

Their suggestion seemed to say that you should give, through management's eyes, how are we going to respond to this crisis in the future? Those sorts of requests put the company in a real bind because you can be at real risk when projecting how things are going to play out.

If the past is any evidence here, a lot of people get a lot of things wrong. You don't want to put the company in a position of forecasting financial results and then have it fail to meet those forecasts because they may have a securities lawsuit on their hands from investors.

On the other hand, it's good disclosure advice. The more robust your disclosure is, the more you let investors see how management and the company are going to respond to potential developments, the more investors will understand the risks and rewards of an investment. And you may be able to protect yourself somewhat.

What we're seeing is more robust risk factors, subsequent event footnotes in quarterly financials and a real pressure around new disclosure, how they will disclose what they feel comfortable disclosing without falling over into the trap of disclosing too much on a forward-looking basis and putting them at risk of future litigation.

Solecki: Agree. You're even seeing – think about two to four weeks ago when things were essentially shut down and people issuing more of a doom-and-gloom disclosure – things opening back up, gradually, but still opening.

It's even harder for companies, particularly with operations throughout the country, because they're going to be impacted differently as each state is doing their own thing. That's all I had on the debt side.

Jenkins: Great. We will turn it over to Richard now to talk about the IPO market and alternatives for each stage for every company. Richard?

The IPO market and alternatives for late stage private companies

Richard Blake*, Partner, Wilson Sonsini Goodrich & Rosati*: Absolutely. Well, Katherine teed up our conversation on IPOs really well by giving the headline that there's been a 40% drop off year to date in IPOs. At this point, in 2019, there had already been 60 IPOs out of the 160 that were eventually

done in 2019. Assuming that the deals that have already announced that they're trying to price in May do price through May 2020, we're going to be at 35, so a sizable drop off.

Most of that drop off has come from the tech side, which is pretty quiet right now. These are companies whose IPO valuations tend to be closely linked with peer companies that are already trading in the public markets.

With the volatility that we're seeing in the stock market in the last few months, tech companies have not really been willing to jump into the IPO waters and risk having a poor valuation when they go out.

As has been discussed earlier, the market is pretty open for life sciences companies who want to do IPOs. Their IPO pricing is typically more a function of their prospects and the last pre-IPO round of financing that happened with quality investors.

We're seeing, of the few IPOs that are happening, many of them are life sciences. We had a client working in pharmaceuticals price last month. They are developing a cancer-resistance medication. They are trading 90% above their IPO price. There are a couple others who are also trading in those same levels post their IPOs.

We're also seeing some tech companies from China, interestingly enough. Two China-based tech companies priced their IPOs in April, WiMi Hologram and Kingsoft Cloud.

Those companies in China are a couple of months farther down the road in the COVID-19 pandemic than we are. We don't know if that could be a leading indicator of the markets opening back up. We'll just have to wait and see on that.

In the IPOs that are getting done, there's a couple of interesting developments. Rob and Mike talked about how in offerings for already public companies they are trying to get investors lined up in advance of an offering, so that the company and the underwriters have a good sense that a deal is actually going to happen.

Of the IPOs that are happening, we are seeing that same phenomenon through testing the waters meetings and other pre-launch activities with investors. Companies are wanting to make sure that there are some anchor investors that are going to be lined up or potentially able to anchor the IPO. That very well may be a phenomenon that carries on even after the IPO market opens up even more fulsomely.

The other interesting development that we're seeing is the roadshow timing and format. For most of my career, the typical IPO roadshow has been about 10 days, maybe 14 days, with a lot of flying around the country and in both large group meetings and in-person one-on-one meetings.

Right now, if you look, most of the roadshows are less than a week and, for obvious reasons, are all happening virtually. With different states being in different stages of reopening after "stay at home" orders were issued related to the COVID-19 pandemic, it'll be interesting to see whether IPO roadshow formats stay short and virtual or whether management and investment bankers do what they've done for dozens and dozens of years and get on planes and fly around the country. That will be an interesting thing to look for as the IPO market reopens.

Another item is a disclosure point and governance point. In March, the Delaware Supreme Court ruled that forum selection bylaws that mandated that '33 Act fraud claims be brought solely in federal district court rather than in state courts were facially valid.

The Supreme Court overturned the Chancery Court, which had ruled earlier that a forum selection clause that selected the federal district courts as the sole forum for adjudicating '33 Act fraud claims

was not valid. Companies now have the option to adopt a bylaw that would bring all '33 Act fraud cases in federal court as opposed to state court.

We saw before and we're seeing companies again adopt those bylaws. The staff at the SEC has been commenting on disclosure around those bylaws, however, and wants to make very clear that this doesn't affect Exchange Act cases or other securities law cases. If you're planning on adopting such a bylaw, which is a good idea, be prepared to disclose it properly.

Where do we go from here? What's the outlook for IPOs? We're seeing a lot of energy being put in by tech companies trying to price deals around September or early October, if at all possible, if there is an IPO market open then.

Some of these companies have already confidentially filed and have been on the sidelines waiting for a market opening. There are some companies that are kicking off a process right now with the hope to be able to price in September or October, if there is a market. That's sort of the big question mark: "what will the market look like then."

The general convention is that, by the middle of October, the window could be closed through the election depending on market certainty at that point. There are lots of companies who were poised to go public in 2020 that have put that whole process on a pause saying, "well, – given the pandemic and everything else, we're just going to hunker down and wait for 2021."

So, if the market does come back and if things in the economy start to stabilize a little bit more, 2021 could shape up to be a pretty massive IPO year. I know that there's a lot of ifs in that sentence, so it's mostly a wait-and-see game.

Let's talk about late-stage financings. If you can't do an IPO and you need to raise money as a late-stage private company, what do you do? Well, for good companies, there's still a lot of options available.

A downturn is always a good time for investors to get into good companies. So, we're seeing the same sorts of late stage financings for quality companies still getting done, crossovers with public company investors who often invest in IPOs who have started over the last 10 years investing in pre-IPO companies, as well as private equity.

We're even seeing some up rounds even though generally, pricing is tougher. For good pre-IPO companies, they are not getting knocked so hard that they end up with a down round where their price at a financing now is lower than the last financing that they did. It depends on the company, and it depends on their situation, but good companies are still getting venture deals done.

In addition, we're seeing a phenomenon on the tech side that has been around for a few years in the biotech side and that is late-stage convertible note offerings, where you have maybe one anchor investor, maybe a couple of others come in, and enter into a convertible note with a company. It's convertible upon the later of one year or when the company goes public.

Sometimes, it has a strike price that the investors and the company negotiate. Sometimes, they just have discount or weighted trailing average price to the IPO or to a post-IPO trading price. There are some advantages if there's not a strike price.

One is that you don't end up having to set a valuation in a time where there's a volatile market or otherwise an asset that's difficult to value. This sort of a non-strike price discount to IPO or discount to market price sort of a note can be advantageous to both the company and the investors. We've seen this for a few years with biotech companies, which often have difficult assets to value, but we're now starting to see it with tech companies as well.

The other thing that we are seeing is lines of credit. Many pre-IPO companies that have existing lines of credit have drawn down on that line even if they're just sitting on the money just to make sure that there's plenty of cash on the balance sheet.

We're also seeing some good pre-IPO companies entering into lines of credit for the first time to give themselves that added flexibility in case they need capital on a short-term basis so that they have liquidity available to them. So good late-stage companies are still getting financed in many of the typical ways as they did in a pre-COVID-19 world.

Jenkins: OK. Great. Rob, do you want to say a few words about liability management in a few minutes we have left?

Liability management: Buybacks, tender offers & exchange offers

Evans: Liability management is sort of a fancy investment banking name for having a company manage its outstanding liabilities. The ways that companies can do that is with buybacks – typically that would be of debt or preferred securities.

You could also do stock buybacks, but you wouldn't typically call that liability management. Tender offers and exchange offers are other ways that companies can buy back their outstanding securities.

If your debt is trading at a discount and the company doesn't have other capital needs it can buy back debt at a discount, which can be good for both the investors who get cash instead of the badly trading debt and good for the company which retires liabilities at a discount to their face amount.

What we typically see in a financial or public health crisis like this is companies using these techniques when they're in distress, when they have a maturity coming up that they can't pay, and they want to push that maturity off and they're willing to enter into a new debt securities with more collateral or debt securities with other sweeteners to entice investors to agree to sell back to the short-dated bond and take a longer dated bond, perhaps with a higher interest rate, or with additional security provided to them.

Those are difficult transactions to execute. There are a lot of SEC rules that apply if they are done as tender offers. If they're done as private exchanges, that can be done with fewer SEC rules applying, particularly if a limited number of bond holders hold a particular series of bond that's coming due.

On the other hand, if the company has wherewithal to execute a bond buy back and that signals to the market that the trading price of the debt is too low, then the company may not be able to buy back debt on an opportunistic basis.

This is on a spectrum, leading into the ultimate backstop of liability management, which is bankruptcy. We expect there may be some opportunistic tender offers and exchange offers by companies that have not been affected by the crisis. But, more broadly, we would expect to see people using these mechanisms to extend or to replace short-dated debt with longer-dated debt.

Jenkins: Well, we've covered quite a bit around an hour, folks. That was a very informative webcast, to say the least. I want to thank all of our panelists for a really great discussion, and I want to thank everyone for listening. Stay safe and well, everybody. This concludes today's webcast. Thanks again.