WINSTON & STRAWN LLP

CLIENT ALERT

FAQ Resource, by the Bank Receiverships Task Force

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The Bank Receiverships Task Force published this FAQ resource on March 15, providing the legal and business community a reference guide of the most frequently asked questions surrounding the failed banks.

WILL THE FAQS CONTINUE TO BE UPDATED?

Yes. The task force will continue to upload updates to the FAQs and routinely circulate email alerts.

FIRST REPUBLIC BANK UNDER BANK RECEIVERSHIP: WHAT YOU SHOULD KNOW

The second largest bank closure in U.S. history happened very early Pacific time on May 1, 2023. This press release, dated May 1, 2023, from the California Department of Financial Protection and Innovation (the licensing authority of First Republic Bank) announces the closure of First Republic Bank. The CDFPI appointed the FDIC as the receiver of First Republic Bank. View this link to the FDIC's press release.

Clients that are depositors of the failed First Republic Bank are now JPMorgan Chase Bank, N.A. depositors. With respect to loans, the initial indication is that JPMorgan has acquired the loan portfolio of First Republic Bank. Clients that are borrowers of the failed First Republic Bank should continue dealing with their points of contact at First Republic Bank until loan operations are migrated to JPMorgan.

As affected bank clients are now depositors and/or borrowers of JPMorgan Chase Bank, N.A., effective May 1 the changes will be self-executing. We continue to counsel clients to follow a prudent deposit diversification strategy. Please see our client alert on this topic published in March, which is still relevant.

Subscribe to our Bank Receiverships Task Force mailing list

Disclaimer. This does not constitute legal advice.
The FAQs below should not be construed as legal advice because we are not considering the facts of your specific situation and the situation is constantly evolving. The review and receipt of this FAQ does not create an attorney-client relationship and is not subject to attorney-client privilege. If you have a particular situation on which you need advice, please reach out to your Winston contact or any member of our Bank Receiverships Task Force.

FDIC Receivership/Customer FAQs

Question 1: When will depositors have access to all of their deposits from Silicon Valley Bank ("SVB") and Signature Bank (each, a "Failed Bank")?

A: The Federal Deposit Insurance Corporation ("FDIC") has indicated that the total balances in deposit accounts held at Silicon Valley Bank and Signature Bank, including checking, savings, money markets, certificates of deposit and retirement accounts, have been transferred to successor "bridge" banks Silicon Valley Bridge Bank, N.A. and Signature Bridge Bank, N.A. (the "Bridge Banks"). In a joint statement issued by the U.S. Department of the Treasury ("U.S. Treasury"), the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") and the FDIC in the early evening of Sunday, March 12, the agencies stated that depositors of the Failed Banks will be fully protected, noting that shareholders and certain unsecured debtholders will not be protected. According to subsequent guidance from the FDIC, Signature Bridge Bank, N.A. and Silicon Valley Bridge Bank, N.A. are both functioning as their original banks.

Question 2: Will taxpayers bear any risk of loss associated with the resolution of a Failed Bank?

A: No losses associated with the resolution of a Failed Bank will be borne by the taxpayer. Any losses to the Deposit Insurance Fund to support uninsured depositors will be recovered by a special assessment on all insured depository institutions.

Question 3: Is the Federal Reserve Board offering additional help to address any liquidity pressures that may arise?

A: The Federal Reserve Board announced in the early evening of Sunday, March 12 that it will make available additional funding to eligible institutions to help assure banks can meet the needs of all their depositors through the creation of a new Bank Term Funding Program ("BTFP"). The BTFP will offer loans to any U.S. federally insured depository institution (including a bank, savings association, or credit union) or U.S. branch or agency of a foreign bank that is eligible for primary credit, pledging eligible collateral (e.g., U.S. Treasuries, agency debt and mortgage-backed securities, and other qualifying assets). These assets will be valued at par. The BTFP will be an additional source of liquidity against high-quality securities, eliminating an institution's need to quickly sell those securities in times of stress.

Question 4: What are the key terms of the BTFP?

- Term = up to one year
- Size of advance = limited to the value of eligible collateral pledged by eligible borrower
- Rate = one-year overnight index swap rate + 10 bps

- Collateral valuation = par value
- Prepayment = at any time without penalty, including for purposes of refinancing
- Fees = there are no fees associated with the program
- Recourse = beyond the pledged collateral to the eligible borrower
- Program duration = advances can be requested until at least March 11, 2024

Question 5: Is the U.S. Treasury offering additional assistance?

A: The U.S. Treasury will make available up to $25 billion from the Exchange Stabilization Fund as a backstop for the BTFP. The Federal Reserve Board does not anticipate that it will be necessary to draw on these backstop funds.

Question 6: What can borrowers expect during interim servicing of loans by a Failed Bank?

A: When a bank fails, the FDIC sends written notice with payment instructions and points-of-contact to the borrowers whose loans it has retained as a result of the bank closing. Because the FDIC is not a bank, it informs the borrowers that they are strongly encouraged to seek a new lender that will refinance their loan and serve as a replacement source of funding. In some instances, the FDIC may offer borrowers an incentive to refinance by offsetting some or all of the associated closing costs. The FDIC may also offset a borrower's outstanding loan balances against the uninsured deposit balance (if any) of the same borrower, if certain parameters are met. No "offset" is possible unless the obligations are "mutual" - meaning that the borrower and the depositor must be the same person or legal entity acting in the same legal capacity.

Question 7: What are the FDIC's procedures for marketing some or all of the assets of a failed bank?

A:

Overview of Marketing Process/Creation of Bid List

- When the FDIC seeks to market the assets of a failed bank, it creates a "bid list" from a pool of potential bidders that have previously indicated interest in acquiring the assets of the failed bank ("Bid List").
- Bid Lists are created for each acquisition opportunity based on a potential acquirer's qualifications and interests and characteristics of the failing bank, such as capital ratios, regulatory ratings, assets and core deposits as reported on the failed bank's most recent call report and geographic location of the failed bank.
- Each Bid List is developed using several criteria to identify approved potential bidders ("Approved Potential Bidders") for an acquisition opportunity, while considering factors that match likely Approved Potential Bidders to an acquisition opportunity.

Eligibility for Bid List and Application

- To be included on a Bid List, an institution or organizing group must be an insured financial institution or have a shelf charter approved.
- The FDIC has procedures for private equity investors that may be interested in participating in an acquisition. To start the application process, private equity investors must contact the FDIC at expbidprocess@fdic.gov.
- Additionally, the FDIC may offer alliance bidding opportunities ("Alliance Bidding") to facilitate the resolution of larger banks with diverse geographic footprints or distinct lines of business. Alliance Bidding allows two or more parties to join together to submit a bid, with one party designated as the group's Lead Acquirer responsible for executing the terms of the bid with the other parties to the bid. Potential Alliance Bidders are required to execute confidentiality agreements and authorize the FDIC to convey acquisition preferences (e.g., geographic area, assets, liabilities) to other alliance bidder prospects that have agreed to the same disclosure terms. To express interest in Alliance Bidding opportunities, potential bidders should send an email to the FDIC at institutionsales@fdic.gov.

- Federal regulations prohibit certain persons from acquiring any assets of a failed institution from the FDIC, including a person or its associated person, who:
  - has participated, as an officer or director of a failed institution or of an affiliate of a failed institution, in a material way in one or more transaction(s) that caused a substantial loss to that failed institution;
  - has been removed from, or prohibited from participating in the affairs of, a failed institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Federal Reserve Board, the FDIC, or any of their predecessors or successors;
  - has demonstrated a pattern or practice of defalcation regarding obligations to any failed institution;
  - has been convicted of committing or conspiring to commit certain offenses affecting any failed institution (e.g., receiving commissions or gifts for procuring loans, theft, embezzlement, or misappropriation, and other offense) and there has been a default with respect to one or more obligations owed by that person or its associated person; or
  - would be prohibited from purchasing the assets of a covered financial company from the FDIC (e.g., a person who engaged in improper conduct with, or caused losses to, a covered financial company).
- To be considered for a Bid List, interested potential buyers must fill out the "FDIC Potential Bidder Contact Form" and submit it to the FDIC. The FDIC then chooses from among the potential buyers those that it deems eligible to be participate in the specific bidding process.
  - The purpose of the FDIC Potential Bidder Contact Form is to indicate general and not specific interest in being a potential bidder, so it does not include an option for indicating interest in a specific acquisition.
  - However, a potential bidder may contact the FDIC and note its interest in specific acquisitions. Although there is no specific email address dedicated to such inquiries, the general email address related to institutional sales is institutionsales@fdic.gov.

Access to Virtual Data Room

- Approved Potential Bidders will receive an email notification of an acquisition opportunity from an FDIC project email box, which will include a link to a virtual data room ("VDR") site for a specific failed bank. Because the marketing process is short (generally a few weeks up to 90 days), the FDIC suggests that Approved Potential Bidders respond quickly when notified about an acquisition opportunity.
- After executing the FDIC's electronic confidentiality agreement, Approved Potential Bidders will receive equal access to the FDIC's VDR and may conduct due diligence on the assets that are being offered for sale. The VDR site will host detailed information covering the failed bank's loans, deposits, general ledger and operations, as well as information regarding the transaction terms, sample legal documents and a bid form.
- An Approved Potential Bidder may request to perform on-site due diligence by notifying an FDIC marketing specialist, who will set a time and location for the due diligence and introduce the Approved Potential Bidder to the on-site FDIC representative.

Bid Process and Purchase and Assumption Agreement

- Within a few weeks, the FDIC notifies Approved Potential Bidders of the results of their bids. Typically, this marketing process occurs over a 60-to-90-day period.
- The FDIC does not negotiate transaction terms. Instead, the FDIC conducts a sealed bid process, with bids submitted by Approved Potential Bidders to the FDIC electronically.
- If a bid from an Approved Potential Bidder is accepted by the FDIC, the FDIC and the Approved Potential Bidder will enter into a purchase and assumption agreement ("P&A"). An FDIC P&A generally includes the following provisions:
  - Assets are purchased without representations or warranties.

- The acquirer assumes all deposits, or the insured deposits and secured public deposits, and certain other liabilities of the institution. Bank premises may be offered on an optional basis, either in the bid or within a certain time period after the sale date.
- The FDIC may offer optional loan pools or may specifically exclude certain assets from the transaction.
- The FDIC provides limited indemnification designed to protect the acquirer against liabilities created by the failed bank prior to the sale date that are not assumed by the acquirer.
- The acquirer will provide space for the FDIC as receiver, retain certain records of the failed bank and continue limited data processing and accounting services until the FDIC's assets and liabilities can be transferred to the FDIC's systems.

- Frequently, the marketing and sale process occurs before a bank closure is publicly announced. In such a case, within a few days after a bank is closed, the FDIC publishes on its website the P&A with the acquiring bank under the institution's name on the Failed Bank List.
- In the case of Silicon Valley Bank and Signature Bank, the FDIC is operating bridge banks as it markets the assets of the failed banks.

Updates on Marketing and Bid Processes

- Press reports state that the FDIC indicated there has been substantial interest from multiple parties, and that the bidders need more time to explore all options in order to maximize value and achieve an optimal outcome. The FDIC has reportedly received some interest in SVB's credit business from Apollo Global Management, and Blackstone has reportedly discussed making a bid. The FDIC has also reportedly splitting the sale into two components, consisting of a sale of: (1) SVB's traditional deposits unit; and (2) SVB's private bank.
- On March 20, 2023, the FDIC announced that it has entered into a P&A with Flagstar Bank, National Association, a wholly owned subsidiary of New York Community Bancorp, Inc. for substantially all deposits and certain loan portfolios of Signature Bridge Bank

Question 8: Has the FDIC raised the insured deposit limit? What assurance do depositors at other banks have that this action is reliable precedent for their deposits?

A: Treasury Secretary Yellen has stated that any future depositors should not expect coverage beyond the FDIC insurance limit of $250,000. The additional funds to cover SVB and Signature Bank funds were paid from the Deposit Insurance Fund.

Question 9: Will receivership certificates be issued for uninsured depositors of SVB?

A: In its initial guidance, the FDIC stated that it would issue receivership certificates to uninsured depositors. Subsequently, in a joint statement issued by the U.S. Treasury, the Federal Reserve Board and the FDIC on March 12, the agencies stated that depositors of the Failed Banks will be fully protected, noting that shareholders and certain unsecured debtholders will not be protected. As a result, this may render receivership certificates for uninsured depositors unnecessary, but the FDIC has not formally updated its initial statement.

Question 10: What is the status of service provider contracts and SVB's obligations to pay for services prior to and after its failure?

A: The FDIC as receiver has the right to repudiate "burdensome" obligations of a failed bank within a reasonable period of time. Unless and until such obligations are repudiated, however, Silicon Valley Bridge Bank and SVB's vendors, suppliers, and service providers must honor their contractual obligations to one another. According to press releases from Silicon Valley Bridge Bank and the FDIC, all counterparties to agreements with SVB should continue to fulfill the terms of their contracts.

Question 11: Did either of the Failed Banks transfer deposits offshore (i.e., out of the U.S.)?

A: Regulatory press releases indicate that deposits were moved to the Failed Banks' respective bridge banks and did not indicate whether any deposits were transferred offshore.

Question 12: Are securities held in the brokerage accounts of the Failed Banks fully secured? Can they be withdrawn/transferred to other brokerage accounts?

A: Securities account are not insured by the FDIC, but the SPIC (Securities Investor Protection Corporation), which is funded by the securities broker dealer industry, provides limited coverage. Parties seeking to transfer securities to other brokerage accounts should be able to do so now that the bridge banks are fully operational.

Question 13: Are there insider trading implications relating to the failure of SVB and Signature Bank? Have the regulators' guarantee of depositors' funds rendered such concerns moot?

A: Notwithstanding the guarantees relating to full insurance of depositors' funds, federal regulators have indicated that they are investigating insider trading relating to the Failed Banks.

Question 14: What is the effect of HSBC's purchase of SVB UK Limited?

A: HSBC's acquisition only affects loans booked in the United Kingdom and deposits of the UK subsidiary.

Question 15: How will any amounts realized from the liquidation of the Failed Banks be distributed to pay claims?

A: In accordance with U.S. Federal law, allowed claims will be paid in the following order of priority:

1. Secured creditors
2. FDIC's administrative expenses
3. Depositors
4. Unsecured Creditors
5. Subordinated Debt
6. Stockholders

Question 16: If a Failed Bank offered credit cards, can credit card customers expect cards to continue to function?

A: As was the case with SVB and Signature Bank, immediately after a bank closure, credit cards may not function. Upon transfer to a bridge bank or acquiring bank, such services are generally reinstated. According to press releases, Silicon Valley Bridge Bank is still fully operating and honoring its agreements, including existing credit card agreements.

Question 17: What are best practices for smaller firms selecting a new bank after a bank failure?

A: It is advisable to read financial news and any financial statements or press releases that a prospective bank prepares for its investors. For banks that are publicly-traded, this includes the bank's annual 10-K or quarterly 10-Q filing. The "Management Discussion and Analysis" included in the 10-K contains a detailed analysis of the banks' financial statements and operations. It is also important to consider the bank's rates, account options, reputation, and historical track record within your industry to determine whether it is a good fit.

Question 18: How can depositors maximize FDIC insurance coverage for large-dollar deposits?

A: For depositors seeking access to FDIC insurance coverage for their large-dollar deposits, IntraFi Network, LLC ("IntraFi") maintains a network of banks that participate in its "reciprocal deposit" programs, which are known as "CDARS" (Certificate of Deposit Account Registry Service) and "ICS" (Insured Cash Sweep). Under these reciprocal deposit programs, member banks make deposits on behalf of their customers up to the FDIC-insured amount at other member banks and accept such deposits from other member banks. This allows customers to increase the

amount of FDIC insurance coverage for their large-dollar deposits by spreading funds across FDIC-insured accounts at multiple banks while requiring customers to maintain a banking relationship with only a single member bank. Using these services, a depositor may insure up $50 million in CDARS (the service for time deposits) or $150 million in ICS (the service for liquid assets such as checking or money market accounts).

IntraFI limits membership to its network and removes member banks as needed as part of its diligence and continued oversight of member banks. To be eligible to be a member of IntraFi, a bank must be:

(i) "well-capitalized" pursuant to FDIC regulations and guidelines;
(ii) free of enforcement actions, which IntraFi verifies by monitoring public releases made public by regulatory agencies; and
(iii) "well-rated," which IntraFi determines conducting monitoring and oversight activities with member banks on a quarterly basis.

IntraFi's website includes a list of member banks, which one can search by name or state/territory, which is available at https://www.intrafinetworkdeposits.com/find-intrafi-network-deposits/. According to IntraFi, participating banks are currently accepting new large deposit customers for its reciprocal deposit services.

Question 19: Are repurchase sweep accounts treated as deposits or off-balance sheet items for purposes of FDIC insurance coverage in the event of a bank failure?

A: This is a fact-sensitive analysis. However, below is a summary of the conditions required for a sweep arrangement to be treated as an off-balance sheet item rather than a deposit, as well as the effect of a properly executed and an improperly executed sweep arrangement.

- First, the repurchase sweep arrangement must be *properly executed*. As of the as of the depository institution's normal end-of-day, the sweep customer *either* (i) becomes the legal owner of identified assets (typically government securities) subject to a repurchase agreement *or* (b) obtains a perfected security interest in those assets. To determine if a sweep arrangement is properly executed, the FDIC generally considers the following three elements:

  (i) The particular security in which the customer has an interest has been identified, and this identity is indicated in a daily confirmation statement (e.g., including a CUSIP, the issuer, maturity date, coupon rate, par amount and market value).

  (ii) The customer has "control" of the particular security (e.g., customer must be able to direct the disposition of the security in the event of default).

  (iii) There is no substitution of the security during the term of the repurchase agreement even if the agreement allows for substitution with the customer/buyer's consent (substitution will defeat proper execution because securities will not have been specifically identified).

- Second, the value of the securities must at least equal the dollar amount of funds swept from the customer's account.
- Third, the FDIC must not have elected to establish an "FDIC cutoff point" that is earlier than the institution's ordinary cutoff time for sweep arrangements (normally the end-of-day ledger balance of the deposit or other liability on the day of failure). Unless the FDIC has established a cutoff point, the FDIC will use the cutoff rules previously applied by the failed insured depository institution in establishing the end-of-day ledger balance for deposit insurance determination purposes.
- In a *properly executed* repo sweep arrangement, after failure, the distribution of swept funds invested in securities will depend on the nature of the transaction structured by the FDIC.
  - In a *purchase and assumption transaction*, the securities and the underlying repo arrangement will be transferred to an acquiring institution, which could include a bridge institution. Under this transaction structure,

the funds normally would be swept back into the customer's deposit account on the business day following failure, thus giving the customer full access to these funds at that point.

- In a *payoff of insured deposits*, the customer would receive a check or other payment from the FDIC to reacquire the customer's interest in the securities according to the FDIC normal procedures.

- If a repo sweep arrangement has been *improperly executed* (*i.e.,* where the sweep customer obtains neither an ownership interest nor a perfected security interest in the applicable securities), the FDIC will treat the swept funds as if they had not left the deposit account from which they originated.

If you need assistance with a fact-specific analysis of whether your sweep arrangements are being properly executed to obtain the full protection of swept funds*, please reach out to your Winston contact or any member of our Bank Receiverships Task Force*.

Lending FAQs

Question 1: If a loan portfolio remains in receivership, should borrowers expect a Failed Bank to honor borrowing requests (i.e., under a commitment letter) on existing performing loans? Or should borrowers expect that the bank will default on these requests until these loans are eventually sold?

A: The FDIC has the right to repudiate "burdensome" obligations of a failed bank within a reasonable period of time. Borrowers holding commitment letters should review any "alternative financing" type provisions in their credit/purchase agreements for their obligation in the event commitments are repudiated. Notwithstanding the FDIC's broad contractual repudiation rights under federal banking law, we understand that each of the Failed Banks is, in fact, lending on existing commitments. On Tuesday, March 14, 2023, one of the Bridge Banks published a letter from the FDIC confirming that all products and services offered by the Failed Bank would continue to be offered by the Bridge Banks, and that obligations of the Bridge Bank would be backed by the FDIC and the full faith and credit of the U.S. government. To the extent borrowers have not received direct instructions from either Bridge Bank with respect to their ongoing lending relationship we strongly recommend that any borrower affected by the two bank failures contact their pre-receivership bank contact for further information regarding such borrower's unfunded loan commitments.

Question 2: If a Failed Bank cannot or will not honor borrowing requests, will it have administrative capacity to process other ministerial items like LIBOR/SOFR elections, payoff letters, collateral releases etc.?

A: We understand that, in the short term, the Bridge Banks assume the obligations of the Failed Banks and will continue to observe operational requests; existing relationships with opposing counsel for things like payoff or administrative matters should remain in place. However, as noted above, the FDIC can repudiate ongoing "burdensome" obligations as it focuses on realizing on outstanding loans and recovering for other creditors. Accordingly, we strongly recommend that anyone affected by either bank failure contact the applicable Bridge Bank for further information regarding operational requests.

Question 3: Should a borrower continue to make payments to a Failed Bank on its loan facility?

A: Yes, per published FDIC guidance, borrowers should continue to make timely payments to a Failed Bank (see below if a Failed Bank is the Agent on a syndicated facility).

Question 4: Suppose the credit documentation provides the borrower with a consent right to any successor bank or agent in its facility; if a Failed Bank's loans are sold (rather than the whole enterprise), is there a federal override in the FDIC receivership process that would allow assignment without borrower consent, or would state law rights on the part of the borrower remain operative?

A: State law should continue to be operative with respect to these restrictions on assignment, and the borrower would retain a consent right (subject to any limitations in the agreement).

Question 5: If a borrower maintained a balance in a deposit account at a Failed Bank, how does that interact with its outstanding loan balance?

A: We believe that the FDIC, as receiver, would respect the borrower's common law right to set off the amounts the borrower owes under the outstanding loan against the entire amount of the existing deposit account – both the insured and uninsured portions of the deposit account. The first prerequisite for the exercise of set off is mutuality of obligation, i.e., that the borrower and the depositor must be the same, including the capacity in which the borrower-depositors holds the loan and deposit account; e.g., an uninsured deposits held by a person in an individual may only be offset by debts that the person owes to the Failed Bank an individual capacity and not in the person's capacity as fiduciary, agent, trustee, shareholder, partner, or otherwise). Second, setoff must be permitted under the state laws applicable to the borrower and the Failed Bank. Accordingly, a party seeking to exercise a right of setoff would have to confirm whether such a right exists under applicable state law. Third, the deposit account used to secure the loan must not be a "special purpose" deposit account (i.e., funds held by the Failed Bank's trust department for safekeeping or funds that are otherwise segregated from the Failed Bank's general deposit account funds pursuant to a "special deposit" agreement or similar document.) If these three prerequisites are satisfied, it is our view that the FDIC would adhere to long-standing federal and state law permitting the amount of any uninsured deposits maintained at the Failed Bank to be set off against the outstanding principal and accrued but unpaid interest of the loan that the borrower owes to the Failed Bank.

Question 6: Are failed banks obliged to honor any outstanding secured obligations like letters of credit?

A: The FDIC is empowered to disaffirm or repudiate any contract if the FDIC determines, in its discretion, within a reasonable time following its appointment as receiver (may be up to 180 days), that (i) the performance would be burdensome and (ii) the repudiation will promote the orderly administration of the insured depository institution. For the purposes of this process, letter of credit obligations are treated as contractual obligations, and we would expect the FDIC to disaffirm or repudiate them (in response to a draw request from a beneficiary) if the FDIC deems the letter of credit to be "burdensome." We strongly recommend that anyone affected contact the applicable Bridge Bank for further information regarding their letter of credit obligations. Beneficiaries to standby letters of credit in particular should consider seeking a substitute letter of credit issuer.

Question 7: If a Failed Bank is a lender in an existing facility, the fact that the Failed Bank is under receivership should render it a "defaulting lender" under most credit facilities (alternatively, if a Failed Bank did not honor a borrowing request last week, or does not honor one made, that would usually have the same effect); are there any concerns that these rights are not enforceable given any federal override of state law per the FDIC receivership process?

A: The FDIC has the power to repudiate contracts that it deems burdensome, but our expectation is that market provisions with respect to defaulting lenders (i.e., fee suspension, voting suspension or forced assignment) will remain enforceable under relevant state law.

Question 8: What can borrowers expect if the FDIC sells their loan?

A: Holders of loans, including the FDIC, routinely sell performing and non-performing loans in the financial markets. If the FDIC sells your loan, either at or subsequent to the time your bank was closed, the FDIC and/or the new owner will send you a notice of the transaction, with payment mailing instructions. The sale does not affect the terms of your loan. The new owner of your loan:

- must comply with all state and federal laws with respect to the ownership and servicing of your loan, including the Fair Debt Collection Practices Act; and

- is entitled to collect all principal, interest, and other amounts owed.

Loans are negotiable instruments that are routinely sold in the financial markets. When a loan is sold, the borrower retains all the rights and obligations associated with the note. Borrowers should review the assignment provisions of their loan facility documentation to determine what, if any, rights they may have with respect to a lender assignment.

Question 9: Suppose a Failed Bank is an agent in an existing credit facility. Should a borrower expect that the bank will have the administrative capacity to continue in this role (sending notices, forwarding payments, monitoring collateral, etc.) during the period while it is administered by the FDIC, or should the borrower work together with its majority lenders to immediately replace the agent? What options does a borrower have to remove SVB or Signature Bank as agent under a credit facility?

A: Counterparties to contracts with SVB or Signature Bank are still bound by the terms of their , as Silicon Valley Bridge Bank and Signature Bridge Bank have assumed their contractual roles. Our expectation is that the bridge banks will continue to operate with respect to ministerial requests in the short term. Required lenders should mobilize promptly to remove and replace the applicable Failed Bank pursuant to the terms of the applicable credit agreement. Absent language to the contrary, a borrower may be able to amend their credit agreement to remove a Failed Bank as agent, request a secondary or substitute agent, or request that the bridge bank remove itself as agent.

Question 10: Should we expect interest/amortization payments made on a loan administered by a Failed Bank to be subject to the same recovery issues for the other banks in the syndicate as ordinary deposits, or are these amounts held in trust for the loan syndicate not subject to any eventual haircut/forwarded to the bank group?

A: There is no special protection for funds earmarked for lenders; to the extent a Failed Bank can accept these payments, they would be deposits for the purposes of the FDIC receivership, noting that the joint statement issued on the early evening of Sunday, March 12 by the U.S. Treasury, the Federal Reserve Board and the FDIC indicated that depositors of the Failed Banks will be fully protected. Borrowers/required lenders should move immediately to replace a Failed Bank. However, the new administrative agent should continue to direct payments to the applicable Failed Bank in its capacity as a lender, per the guidance above.

Question 11: If a Failed Bank is the agent and payment is made to agent on an outstanding borrowing and, for some reason, those funds do not make it from agent to all of the lenders, is borrower's payment obligation nonetheless satisfied?

A: Whether or not a bank has failed, a borrower's obligations to participants in a loan participation depend on the terms of the agreement or agreements governing the specific loan participation. Under a typical loan participation, in which participants are in privity with the lead lender and not the borrower, a borrower's obligation is satisfied upon payment to the lead lender, but borrowers should consult the specific terms of their credit agreements to determine whether they provide otherwise.

Question 12: How are decisions made with respect to day-to-operations at the Failed Banks? E.g., is it possible to renegotiate the terms of a loan or close on a new loan?

A: Silicon Valley Bridge Bank and Signature Bridge Bank, newly-formed bridge banks to which the Failed Banks' accounts and assets were transferred, are currently fully operational, and while the Failed Banks' senior management was removed, most other staff has remained in place. Parties seeking to renegotiate or close on new loans reach out to the parties who were their contacts at the Failed Banks to inquire as to the ability to renegotiate loans or close on new loans.

Question 13: Will the uncalled fee still be assessed on a delayed draw term loan or subscription line?

A: Unless repudiated by the FDIC, the terms of contracts with Failed Banks are still in effect through the operation of their bridge banks, including any provisions relating to uncalled fees. According to the Transfer Agreement between the FDIC and Silicon Valley Bridge Bank, the bridge bank has 30 days to notify depositors through a mailing if it plans to alter fee structures.

Question 14: What is the status of cash amounts pledged as collateral under a letter of credit facility?

A: Cash pledged as collateral is generally treated as a deposit unless it is specifically held in a "special purpose" deposit account that does not become part of the receivership estate. If cash pledge as collateral is held in a

general account, however, the collateral may nevertheless be subject a borrower's rights of setoff against its outstanding loan obligation.

Restructuring FAQs

Question 1: Can a Failed Bank file for bankruptcy?

A: No. Banks are not eligible to file for bankruptcy. They are closed by their federal or state chartering authority and placed into a receivership administered by the FDIC, which is what has happened to each Failed Bank.

Question 2: Have there been bankruptcy filings related to bank receivership actions?

A: Typically, the holding company of the bank will file for bankruptcy. In the case of SVB, SVB was a subsidiary of a bank holding company, SVB Financial Group, Inc., a Delaware corporation ("SVB Financial"). Unlike a bank, a bank holding company is eligible to file a bankruptcy. SVB Financial filed for bankruptcy on March 17, 2023 in the Bankruptcy Court for the Southern District of New York (the "Court"). The bankruptcy judge presiding over the case is Judge Martin Glenn.

Question 3: What is the impact of SVB Financial's bankruptcy?

A: SVB Financial has assets that include its subsidiaries: (i) SVB Capital, the venture capital arm, that manages over $9.5 billion in assets for investors; (ii) SVB Securities LLC (formerly known as SVB Leerink and SVB Investment Services Inc., which are part of the investment banking arm of SVB Financial Group; and (iii) SVB. In 2022, SVB Capital reported losses of approximately $180 million. In 2022, SVB Securities reported losses of approximately $95 million. At the preliminary "First Day Hearing" held in the SVB Financial's bankruptcy case on March 21, 2023, counsel for SVB Financial stated that there had been discussions between representatives of SVB Financial, SVB Bridge Bank, and the FDIC about permitting SVB Financial to have access to the books and records.

Question 4: What is the interaction between the FDIC and SVB Financial's bankruptcy?

A: Based on our experience in other bank holding company bankruptcies, we expect there to be disputes between the FDIC as receiver and the creditors of SVB Financial. The leadership of SVB and SVB Financial overlap. One issue that may arise is who has the right to file claims against directors and officers. Reports are that significant sales of SVB Financials' stock were made by the CEO immediately before the announcement of the receivership, and that significant bonuses were awarded to various executives. These activities and others will be subject to investigation in the bankruptcy and the receivership. In addition, press reports published March 14, 2023, state that the United States Department of Justice and the United States Securities and Exchange Commission had opened separate investigations into the failure of SVB. The FDIC in its capacity as receiver has the right to pursue causes of action, including for breach of fiduciary duty and for fraudulent transfer. And either SVB Financial, as a debtor in bankruptcy, or its creditors will also have that right. In addition, it is likely that SVB Financial and SVB will each claim they are a creditor of the other.

Another issue will be who owns the books and records of SVB and SVB Financial. The FDIC, as receiver, has the right to all records of SVB, but that overlaps with the rights of SVB Financial. In other bank holding company bankruptcy cases, there have been significant disputes as to the right to review and possess documents, including who controls the attorney-client privilege. The offices of SVB Financial and SVB are largely combined, further complicating the control of books and records.

A further issue is the likely dispute between certain creditors of SVB Financial and SVB. In other bank holding company bankruptcy cases, there have been significant disputes between the bondholders of the bank and the bondholders of the holding company, particularly with respect to disputes involving transfers of funds between accounts of the bank and the bank holding company. We have also seen issues regarding transfers of the funds of the bank holding company held at the bank to another financial institution immediately before the receivership.

Question 5: If SVB Financial files for bankruptcy, how does that affect the receivership action?

A: The receivership will continue. Once the assets of SVB are liquidated and distributions are made, any remaining assets will be dividended up to the SVB Financial estate in the bankruptcy case. The remaining assets could include property, causes of action, net operating losses and others. They will be liquidated for the benefit of the creditors of SVB Financial. However, given the likelihood of less than par recoveries on loans and investments made by SVB in technology start-ups, it is unlikely there will be any cash distributions from SVB to SVB Financial.

Question 6: How will the bankruptcy of SVB Financial affect its subsidiaries?

A: The bankruptcy of a parent company does not put its subsidiaries into bankruptcy or automatically affect the operations of its subsidiaries. Presently, SVB Securities and SVB Capital's funds and general partner entities will continue to operate notwithstanding SVB Financial's bankruptcy filing.

Question 7: What is likely to happen during SVB Financial's bankruptcy?

A: SVB Financial is seeking relief in a "Chapter 11" bankruptcy. A debtor in a Chapter 11 case may "reorganize" (which may including a debt restructuring and/or corporate restructuring) and/or liquidate of some or all of its assets to pay creditors' claims. At present, SVB Financial has not specified which course it will take, but in a statement regarding its bankruptcy filing, SVB Financial has indicated that it "intends to use the court-supervised process to evaluate strategic alternatives for SVB Capital, SVB Securities and the Company's other assets and investments."

In the immediate term, SVB Financial must file "first day motions" with the Bankruptcy Court seeking authorization to, among other things, to continue its operations of in the ordinary course of business. Judge Glenn held the "First Day Hearing," at which the Court will address these first day motions, on March 21, 2023. We anticipate in the coming weeks that the United States Trustee will appoint an official committee of unsecured creditors ("UCC").

Question 8: What should I do in light of SVB Financial's bankruptcy?

A: If you want to be active in the case you should retain counsel, have a notice of appearance filed and file a proof of claim. There will probably be an official committee of unsecured creditors formed ("UCC") and you may want to seek a seat on that committee. The UCC represents the interest of all unsecured creditors in real time in a bankruptcy case. At no cost to its members, the UCC is involved in all aspects of the bankruptcy proceedings and can have an important role in setting the direction of a bankruptcy case to achieve the best outcome for the unsecured creditor body. In addition, an ad hoc committee may also be formed. Any group of stakeholders in a bankruptcy case sharing a common interest can form an ad hoc committee to protect such interests. Participation in an ad hoc committee can be beneficial because that committee is heard with a joint voice and there is typically a sharing of fee and expenses.

Funds FAQs

Question 1: How should I discuss the situation at a Failed Bank with my current and prospective investors?

A: We would recommend responding to any questions from current investors with a communication to all investors. It is important that all investors receive the same information. While you can confirm any information that has been officially confirmed (e.g., the timeline for distribution of insured deposits), funds and their advisers should avoid adding any speculative information. If a fund has accounts or credit facilities at a Failed Bank or any other failed bank, this should be disclosed to current and prospective investors. As with current investors, all prospective investors should receive the same information about the situation. Please contact your Winston team to discuss any additional risk factors or PPM supplements that may be needed in light of recent events.

Question 2: What can I do if my portfolio companies are facing a cash crunch because their funds are not accessible?

A: We understand certain of our fund clients are setting up short-term loans to portfolio companies to help manage cash flow and ensure solvency until funds become available. A particular fund's ability to make such loans will depend on whether such activities are permitted under the Fund's LPA and other organizational documents,

including whether capital is available to make such loans. In addition, any such loans would likely constitute "non-qualifying investments" for purposes of the exemption to registration for venture capital fund advisers under the Investment Advisers Act of 1940. For that reason, any funds whose adviser relies on the venture capital adviser exemption should ensure that the making of such loans does not cause a fund to hold more than 20% of its aggregate capital contributions and uncalled capital commitments in non-qualifying investments.

Question 3: I would like to move funds to a new bank quickly and diversify my banking relationships. Can I set up one account for multiple clients?

A: Yes. Under the custody rule, a registered investment adviser may hold client funds with a qualified custodian (i) in a separate account for each client under that client's name or (ii) in accounts that contain only your clients' funds and securities, under the investment adviser's name as agent or trustee for the clients.

Question 4: We currently have a subscription facility at a Failed Bank. Will we be able to draw down on the subscription line?

A: Signature Bridge Bank, N.A. (opened to continue to administer the accounts of Signature Bank clients) published a press release on March 13, 2023, stating that it would continue to provide a full suite of loan, deposit, and banking services. Silicon Valley Bridge Bank, N.A. (opened to continue to administer the accounts of SVB clients) published a press release on March 14, 2023, stating that its would continue to provide a full suite of loan, deposit, and banking services. Because news regarding these receiverships is evolving, we recommend checking for daily updates/press releases from the FDIC, the FRB or successor banks concerning the treatment of subscription lines or similar lending commitments by successor banks. Given ongoing uncertainty, we recommend setting up a new subscription facility as soon as possible. Please contact Winston if you need introductions to subscription line providers or assistance negotiating the terms of such a facility.

Public Company FAQs

Question 1: What disclosures should public companies who have customer deposits, a line of credit or a credit facility at a Failed Bank be disclosing to public stockholders, when and on what form?

A: If material, public companies may want file a Form 8-K to avoid Regulation FD issue on selective disclosure as the company starts to answer questions. While there may only be an obligation to disclose later on a Form 10-K or 10-Q, if there is a material concentration of cash in these Failed Banks and/or if the company no longer has access to a line or credit or a credit facility at these Failed Banks, the company may want to file a Form 8-K because stakeholders will ask and/or speculate.

Longer Answer:

If a company has a material concentration of cash on deposit with a Failed Bank and/or if the company no longer has access to a line of credit or a credit facility provided by a Failed Bank that is material, the company may want to file a voluntary Item 8.01 of Form 8-K (or a Form 6-K if it is a foreign private issuer) to disclose the exposure and actual or potential liquidity risk to get ahead of questions or potential speculation about the company's exposure to a Failed Bank. Disclosures could include the company's total cash position, percentage represented by deposits at these Failed Banks, the drawn and undrawn amounts under any lines of credit or loans, and amounts of letters of credit supporting the company's obligations.

In addition, companies with material exposure to a Failed Bank, as well as companies that wish to communicate that they do not have material exposure to a Failed Bank, may need file an Item 7.01 of Form 8-K to avoid Regulation FD issues with selective disclosure as they communicate with or answer questions from investors, analysts and other market participants. Companies with active shelf registration statements and those engaging in capital markets offerings will also need to consider updating their prospectus disclosures to reflect any material exposures to a Failed Bank, including in the risk factors section and the liquidity and capital resources disclosure in the MD&A section.

As companies take actions in response to the receiverships of a Failed Bank or are impacted by exposure to a Failed Bank, in addition to Items 7.01 and 8.01 of Form 8-K, they will need to consider other required Form 8-K disclosure obligations that may be triggered by such actions or impacts, including Item 1.01 (Entry into Material Definitive Agreement), Item 1.02 (Termination of a Material Definitive Agreement), Item 1.03 (Bankruptcy or Receivership), Item 2.02 (Results of Operations and Financial Condition), Item 2.03 (Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant), Item 2.04 (Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement), and Item 3.02 (Unregistered Sales of Equity Securities).

Digital Asset FAQs

Question 1: What is the impact of the collapse of SVB on the digital asset sector?

A: Presently, the most significant impact of the collapse of SVB on the digital asset sector is the depegging of USDC, a stablecoin issued by Circle. A stablecoin is a digital asset designed to be pegged to a fiat currency, and ordinarily is backed by a reserve of assets. While SVB did not bank many significant companies in the digital assets sector, a portion of the USDC cash reserves were held at SVB. USDC fell to 87 cents over the weekend, and major digital asset exchange Coinbase temporarily suspended conversions of USDC to U.S. dollars. Circle indicated that it intended to utilize company resources to "cover any shortfall." The value of USDC appears to be stabilizing, and Coinbase indicated that they intend to re-open conversions on Monday.

Employment Benefits and Executive Compensation FAQs

Question 1: How does the receivership of a bank affect qualified retirement benefits?

A: Qualified retirement plan assets are held in trust for the benefit of the participants. Even if a bank were to fail, its trust company is a separate legal entity and the trust company assets held for qualified retirement plans are separate and exempt from any claims filed against the bank itself. Thus, a bank failure should not directly affect a participant's retirement plan assets.

Question 2: What if a retirement plan invested in the stock of a bank that enters into receivership, are retirement plan assets protected?

A: Retirement plans that directly invested in bank stocks, through perhaps a self-directed brokerage account are not protected under ERISA from losses in the value of the bank stock, much like any other direct investment that incurs gains or losses. There have been several reports regarding large index funds that retirement plans utilize that do have exposure to a Failed Bank as part of their portfolio. While these index funds may have sizable positions of the bank stock, to date, no reports suggest that those holdings are a significant percentage of the overall index fund. Thus, losses attributable to these bank stocks should not have a material effect on the index funds overall performance. However, we recommend that plan committees inquire of their investment manager what level of exposure their plans have to bank stocks in particular.

Labor/Employment FAQs

Question 1: What should you do if your company is affected by the receivership of a Failed Bank and cannot make payroll on time?

A: If a company thinks that it may not be able to make payroll on its usual schedule, it should immediately consult employment counsel. For example, California has strict requirements that all wages due be paid within specified

timelines (i.e., biweekly or semimonthly for all hourly employees, and monthly for properly classified salaried exempt employees). The law does not provide for any exceptions for whether funds or banking resources are available.

Question 2: What should you do if your company cannot direct deposit wages to employees because of issues with a Failed Bank?

A: There are other lawful ways to provide payroll to employees other than direct deposit - including cash payments and live checks. But employers can run afoul of state law even when they provide live checks if those checks do not meet certain requirements. For example, California law requires all forms of wage payments to be cashed without a fee at an established place of business in the state, and the address of that business must be listed on the check or form of payment. It is also important to remember that California employers must provide itemized wage statements (containing specific information) to employees with their wages on each payroll.

Question 3: Can companies use pay cards for payroll?

A: While pay cards can seem attractive for businesses by saving money in comparison to paying by cash or live check, the problem is that these cards often impermissibly pass costs on to the employees who receive wages through these cards. Unless employees affirmatively agree to pay cards and there are no fees associated with using these pay cards, employers face potential liability for using them.

John Huang (YuandaWinston) also contributed to this briefing.

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