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Gibson Dunn Distressed Banks Resource Center

Client Alert | March 14, 2023

The rapid collapse of Silicon Valley Bank, Signature Bank and distress at others, continues to create uncertainty in the global economic economy. Customers and counterparties worldwide—including funds, portfolio companies, and individuals—are facing unique legal and operational challenges as a result. Companies are working to overcome disruptions in their daily business operations and to mitigate short- and long-term risks amidst the bank failures.

These bank failures present a highly fluid and complex situation. In addition, each customer account loan or other relationship is subject to specific contractual arrangements between the customer and the bank that should be individually reviewed. Gibson Dunn is equipped to provide strategic counsel and advise clients on how to best approach many of the key issues. We can assist in addressing specific questions, including by executing a comprehensive approach to guide clients.

Gibson Dunn has created a multidisciplinary task force to assist our clients. To provide real time and accurate information, we are closely monitoring the guidance issued by government finance and banking officials as well aggregating information collected from our cross sector of relationships. Please feel free to reach out to any of the individuals with whom you have an existing relationship at Gibson Dunn with questions or concerns. To receive our ongoing regular communications to our clients and friends addressing issues raised by the banking crises, as they arise, please contact us at feedback@gibsondunn.com.

Given the rapidly evolving circumstances, we have established a ***Distressed Banks Resource Center*** to provide resources and regular updates to our clients. The latest "***Atmosphere Situation Report"*** *and* ***"Depositor/Debtor Specific Issues Report***" are available at the **Resource Center** and included below for your convenience.

(A) Atmosphere Situation Report

Government Response (US): The Department of the Treasury, FDIC and Federal Reserve announced multiple actions on Sunday, March 12, 2023 including:

- Depositors of Silicon Valley Bank ("SVB") will be made whole and have access to their funds as of Monday, March 13, 2023, through establishment of a newly created "bridge bank," Silicon Valley Bank N.A. A bridge bank is a chartered national bank that operates under a board appointed by the FDIC. Former Fannie Mae head Tim Mayopoulos has been named the CEO of the bridge bank.
- Depositors of Signature Bank will also be made whole, with access to funds on March 13, 2023. The FDIC established a bridge bank, Signature Bridge Bank, N.A. for this purpose. The former CEO of Fifth Third, Greg Carmichael, has been named the CEO of the bridge bank.
- The FDIC issued a second update to its FAQ on Monday for SVB (fdic.gov/resources/resolutions/bank-failures/failed-bank-list/silicon-valley-faq.pdf)

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and for Signature Bank (www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/signature-ny-faq.html) with more specific details on how these bridge banks would operate. Among other things in the FAQs, the FDIC advises any borrower from either bank to continue making payments and direct any questions to the bridge bank or FDIC loan representatives. Language in a prior update to the FAQs was deleted relating to loan set-offs, presumably since all SVB and Signature Bank deposits have been guaranteed in full by the US Government.

- A Bank Term Funding Program ("BTFP") created by the Federal Reserve will provide loans of up to one year to banks, credit unions and other eligible depository institutions that pledge qualifying assets. Collateral will be valued at par. The Treasury will make up to $25 billion from the Exchange Stabilization Fund available to backstop the BFTP.
- Michael Barr, one of the architects of the Dodd-Frank Act, will lead a review of the supervision and regulation of SVB.

Market Updates:

- The SVB and Signature bridge banks were open and functioning on Monday, with staff at each bank returning communications. That said, it has been reported that SVB funding transfer completions were episodic, presumably due to the high volume of customer requests. Multiple users have reported long hold times and electronic bank interface delays amid heavy traffic.
- No buyer has been announced as of Monday afternoon for the U.S. portion of SVB or for Signature Bank. The Wall Street Journal reported Monday that with the absence of a buyer for SVB after an initial FDIC auction round closed on Sunday, the FDIC intends to re-launch a second auction under which the FDIC will have additional authority for flexibility in negotiating sale terms because SVB's failure now has been deemed a systemic threat to the financial system. The same report stated that none of the 'largest U.S. banks' submitted a bid in the initial auction. CNBC reported earlier on Monday that PNC had submitted an indication of interest to acquire SVB but was not proceeding. It is unknown whether other potential bidders existed in the first auction round. Separately, HSBC purchased Silicon Valley Bank UK Limited ("SVB UK"), the UK affiliate of SVB, for £1. All SVB UK deposits are backed by HSBC.
- While it will take time to evaluate the many events of last week, certain details are emerging. Reuters reports that SVB's Wednesday announcement of the sale of its available for sale (AFS) securities came after Moody's the prior week informed SVB of an impending credit downgrade. In turn, SVB then liquidated approximately $21 billion of AFS securities, resulting in a $1.8 billion loss. To offset that, SVB concurrently announced a $500 million investment from General Atlantic conditioned upon SVB first raising a planned $1.75 billion, which never came to fruition.

Capitol Hill Updates: House Financial Services Committee Chairman Patrick McHenry released a statement dubbing the failure as "the first Twitter fueled bank run." He called for calm. Ranking Member Maxine Waters has told the press that the Committee is working on a bipartisan basis to hold a hearing as soon as possible.

- Eighteen Democratic House members signed a letter to Treasury Secretary Yellen, FDIC Chair Martin Gruenberg, Federal Reserve Chair Jerome Powell, and Acting Comptroller Michael Hsu urging swift action to protect depositors, calling on Congress to increase the FDIC deposit insurance limit of $250,000, and clarifying that they did not believe regulators should bail out the bank's shareholders.
- Some House Democrats and Senators including Sens. Bernie Sanders and Elizabeth Warren already have started calling for substantial legislative reforms,

including reinstatement of some of the Dodd-Frank Act rules rolled back in 2018.

- The Biden administration has been providing briefings to Capitol Hill over the last several days. They provided a bipartisan, bicameral briefing Sunday evening and met with Senate Banking Committee Republicans (who said they had not received the invitation to the previous briefing) on Monday.
- Senate Majority Leader Chuck Schumer and House Minority Leader Hakeem Jeffries have said they plan to examine the Bank's failure. They did not say which congressional committees they would tap to lead that investigation.

SEC Response Update: Yesterday (March 12, 2023) SEC Chair Gary Gensler released the following statement, "In times of increased volatility and uncertainty, we at the SEC are particularly focused on monitoring for market stability and identifying and prosecuting any form of misconduct that might threaten investors, capital formation, or the markets more broadly. Without speaking to any individual entity or person, we will investigate and bring enforcement actions if we find violations of the federal securities laws." Gurbir Grewal, the SEC Director of Enforcement spoke today (Monday, March 13, 2023) at the annual Securities Industry and Financial Markets Association Conference but did not specifically address the bank failures; though he did note the SEC's focus on enhancing the public trust by focusing on the failures of those parties in gatekeeping functions.

(B) Depositor/Debtor Specific Issues Report

What Happens to Money in Deposit Accounts: Deposit accounts are cash accounts and may be labeled as an "operating account" or a "money market deposit account" (sometimes labeled as an "MMDA account"). Note that the money market deposit account is distinct from the Money Market Mutual Fund Accounts described below. The funds in deposit accounts will be fully paid, even for balances in excess of the standard $250,000 FDIC limit.

What Happens to Money in Cash Sweep Money Market Mutual Fund Accounts: Cash sweep accounts can be structured in a variety of ways. In the case of SVB, it appears that many of their customers are subject to one of their various cash sweep programs. For this category of accounts (the "SVB Cash Sweep Accounts"), the "cash sweep" program involves regular (usually daily or next day) cash sweeps from customer deposit accounts into an SVB 'Omnibus Account' which is then used to purchase money market mutual fund securities on behalf of the customers. Companies seeking return of these assets, whether in cash or in kind, may need to submit a proof of claim to the FDIC if it appears that the cash value of such assets are not readily available via the online portal. In addition, Companies desiring to liquidate securities in connection with such return should consider any potential negative tax implications.

What Happens to Money in 'Asset Management' Accounts: These are securities brokerage accounts advised by Silicon Asset Management (an affiliate of SVB) where the securities are physically held by US Bank as custodian and segregated by client name on the custodian's books. These accounts should not be part of the receivership or the bank estate. The custodian of these investment accounts may be contacted directly for more information on how to transfer those accounts from the SAM managed program to another advisor.

What Happens to Money in Intrafi/Promontory Interfinancial Network Accounts: Some SVB customers have an arrangement with Intrafi (formerly known as Promontory Interfinancial Network), where cash held in an SVB deposit account above the $250,000 FDIC insured limit is swept into a syndicate of other banks, each holding less than $250,000 of the customer's deposits. Cash deposits that were swept into syndicated banks through Intrafi should not be part of the receivership or the bank estate.

Can I Draw on Existing Credit and Loan Facilities?: On Friday, the FDIC suggested it would not be honoring drawdowns on loans and credit facilities loans with Silicon Valley

Bank, N.A. (i.e., the bridge bank). However, as of Monday we understand that at least some borrowers have been able to draw on lines of credit at SVB and Signature.

What is the Status of Wires Out of SVB that I Sent Before the Receivership Was in Place?: If you have a pending wire request out of SVB that has not yet been honored, the expectation is that those funds will be honored without further action by the directing party. At this time it does not appear necessary to terminate wires submitted last week but not processed before the receivership and reinitiate new requests.

What Will Happen to Deposits and External Wires Into SVB: External wires that arrive in your SVB account after Friday should be available through the bridge bank. Public statements from financial regulators suggest that 100% protection will apply so long as the bridge bank is accepting deposits.

What Are My Payment Obligations, If Any, on My SVB Loans?: The FDIC has instructed in their FAQs that Debtors to SVB continue to pay on their loans and remain subject to the loan terms. The FDIC appears to be operating the bridge bank in quasi-ordinary course without regard to the more limited receivership arrangements previously announced by the FDIC.

What Do I Do About Loan Defaults or Waiver? For loans with covenants requiring deposit accounts to be maintained at SVB, it is not expected that FDIC will enforce such covenants, but when those loans are sold, it is unknown what the loan acquirer may request of each borrower. For example, a buyer could request that borrower establish its accounts with the buyer or establish deposit account control agreements in connection with secured loans. In addition, as borrowers under loans with SVB consider withdrawing funds, care should be taken to review existing loan arrangements with SVB, as many of them require minimum levels of cash and cash equivalents to be maintained with SVB.

This document is for informational purposes only and does not, and is not intended to, constitute legal advice or create an attorney-client relationship. You should contact a Gibson Dunn attorney directly to see if they are able to provide legal advice with respect to a particular legal matter.

Gibson Dunn's multidisciplinary task force members are available to assist in addressing any questions you may have regarding these developments. If you wish to discuss any of the matters set out above, please contact the Gibson Dunn lawyer with whom you usually work, or any member of Gibson Dunn's Accounting Firm Advisory, Business Restructuring/Distressed Investing, Capital Markets, Derivatives, Financial Institutions, Global Financial Regulatory, Global Finance, Investment Funds, Private Equity, Public Policy, Real Estate, Securities Enforcement, Securities Litigation and Tax teams.

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