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Silicon Valley Bank and Signature Bank: Dealing with the FDIC Powers in Receivership and Bridge Bank Scenarios

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Speed read:

- Two banks, Silicon Valley Bank and Signature Bank, failed and were put into FDIC receiverships over the weekend
- The FDIC then formed two bridge banks and initially transferred all deposits, qualified financial contracts, and substantially all assets to each bridge bank
- After much market uncertainty regarding the status of contracts and other obligations held by the failed banks, on March 14, the FDIC clarified that all contracts were also transferred to the bridge banks
- The bridge bank regime under the FDIA is substantially different than the regime under an FDIC receivership, and this Alert highlights some guiding concepts in that respect

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On March 10, 2023, the California Department of Financial Protection and Innovation (**DFPI**) issued an order closing Silicon Valley Bank (**SVB**) and appointed the Federal Deposit Insurance Corporation (**FDIC**) as receiver. The DFPI's drastic intervention meant that all regulatory tools to prevent failure[1] were deemed inadequate or no longer timely in the face of the March 9 bank run on SVB.

Then, on March 12, 2023, the New York State Department of Financial Services (**NY DFS**) took possession of Signature Bank (**Signature Bank**) and appointed the FDIC as receiver.

Upon the DFPI's and the NY DFS's orders, the FDIC stepped into the banks' shoes and succeeded to all rights, powers and interests of the failed depository institutions, their officers, directors and shareholders, and acquired plenary power to administer their affairs.

The current situation has presented uncertainties for clients. This Alert addresses certain of them.

FDIC receiverships under the Federal Deposit Insurance Act (**FDIA**) are fundamentally different from any other insolvency proceeding. Unlike bankruptcy proceedings, in an FDIC receivership there are no creditors'

[1] E.g., supervision, examination, and enforcement; prompt corrective action powers, including secured credit through the Federal Reserve's discount window and other emergency lending facilities; financial assistance to troubled banks under Section 13(c) of the Federal Deposit Insurance Act. Federal Deposit Insurance Act (FDIA), 12 USC §§ 1811 et seq.

committees and no trustees. The FDIC's activities are not supervised by a court. Any claims against the failed institution must first be submitted to the FDIC for its own administrative determination, and only after the FDIC has considered the claim will the claimant be permitted to assert its claim before a court. Although the FDIC is given plenary power to *administer* the financial institution's affairs, the scope of the FDIC's role in a receivership is to act as the *liquidator*. Finally, unlike in a conservatorship, a receivership is typically used by the FDIC to effect the sale of the assets of the failed institution to a third party or to effect a liquidation.

After the FDIC was appointed as SVB's receiver, it created the Deposit Insurance National Bank of Santa Clara (**DINB**) and immediately transferred all insured deposits of SVB to the DINB.[2] Subsequently, the FDIC announced that it had "transferred all deposits—both insured and uninsured—and substantially all assets of the former [SVB] to a newly created, full-service FDIC-operated 'bridge bank' in an action designed to protect all depositors of [SVB]."[3]

Similarly, after being appointed as receiver for Signature Bank, the FDIC transferred all the deposits and substantially all assets of Signature Bank to Signature Bridge Bank, N.A. (**Signature Bridge Bank**), a full service bank that will be operated by the FDIC as it markets the institution to potential bidders.[4]

Under the FDIA, the FDIC has the authority to transfer the assets and liabilities to a third party or a bridge bank without any consent or approval. The move of the failed bank's customers to a new institution over the weekend is a step that the FDIC typically takes to ensure an orderly resolution while markets are closed.

Further, over the weekend, on March 12, 2023, with recommendations from the boards of the FDIC and the Federal Reserve, Treasury Secretary Yellen, after consultation with the President, approved parallel actions "to enable the FDIC to complete its resolutions of SVB and Signature Bank in a manner that fully protects all

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[2] Per the March 10, 2023 FDIC press release https://www.fdic.gov/news/press-releases/2023/pr23016.html, "[t]he FDIC will pay uninsured depositors an advance dividend within the next week. Uninsured depositors will receive a receivership certificate for the remaining amount of their uninsured funds. As the FDIC sells the assets of Silicon Valley Bank, future dividend payments [i.e., distributions] may be made to uninsured depositors." "The DINB will maintain Silicon Valley Bank's normal business hours. Banking activities will resume no later than Monday, March 13, 2023, including on-line banking and other services. Silicon Valley Bank's official checks will continue to clear." *Id.* The press release also stated that "[t]he FDIC as receiver will retain all the assets from Silicon Valley Bank for later disposition. Loan customers should continue to make their payments as usual."

[3] *See* https://www.fdic.gov/news/press-releases/2023/pr23019.html. The FDIC further announced "Depositors will have full access to their money beginning this morning, when Silicon Valley Bridge Bank, N.A., the bridge bank, opens and resumes normal banking hours and activities, including online banking. Depositors and borrowers will automatically become customers of Silicon Valley Bridge Bank, N.A. and will have customer service and access to their funds by ATM, debit cards, and writing checks in the same manner as before. Silicon Valley Bank's official checks will continue to clear. Loan customers should continue making loan payments as usual" and that all Qualified Financial Contracts of SVB also had been transferred to the bridge bank. Id. While a DINB is similar to a bridge bank, its operations are more limited.

[4] FDIC Press Release March 12, 2023, at https://content.govdelivery.com/accounts/USFDIC/bulletins/34e45ee.

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depositors, *both insured and uninsured*."[5] Therefore, the two bridge banks now should be able to provide to their customers access to both insured and uninsured deposits.

From the FDIC's perspective, the two banks are not entirely similarly situated. In December 2022, SVB filed its IDI Resolution Plan with the FDIC. Signature Bank, however, was not subject to requirements to file a resolution plan. We should expect that, in the case of SVB, the FDIC's next steps will be informed by the SVB IDI Resolution Plan and the information provided in the public and confidential sections (which is quite detailed).[6]

At this stage the FDIC has been actively pursuing a transaction where it will transfer assets and liabilities to another healthy institution. An alternative is for the FDIC to continue to operate the failed institutions by continuing to use its bridge bank authority.

On March 14, 2023, the FDIC announced that all contracts with the failed banks were transferred to the bridge banks. Such FDIC Financial Institution Letter (FIL-10-2023 March 14, 2023)[7] provides much needed clarification to the effect that "All contracts entered into with banks before they failed, and their counterparties were transferred into the bridge bank by the FDIC as receiver. Accordingly, vendors and counterparties with contracts with the bridge bank are legally obligated to continue to perform under the contracts, and the bridge is obligated to and has the full ability to make timely payments to vendors and counterparties and otherwise perform its obligations under the contract."[8]

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[5] *See* Press Release, at https://www.federalreserve.gov/newsevents/pressreleases/monetary20230312a.htm (emphasis added). This decision came after some initial uncertainty as to whether deposits in excess of insured limit levels would be left unprotected (as the FDIC's initial press release on Friday, March 10, 2023 had suggested that uninsured depositors would be issued receivership certificates entitling them to claims on liquidation proceeds in the receivership, with no guarantee of satisfaction in full). See FDIC Press Release March 10, 2023, at https://www.fdic.gov/news/press-releases/2023/pr23016.html.

[6] In December 2022, SVB Financial (SVB's top-level parent financial holding company, of which SVB is the principal subsidiary) filed its first-ever IDI Resolution Plan with respect to SVB after SVB passed the threshold of $100 billion under management in 2021. Until that time, SVB had been exempt from such detailed regulatory capital reporting requirements that are conducted to assess whether such banks have sufficient capital to withstand a crisis.
An IDI Resolution Plan is intended to guide the FDIC, as receiver, in the event of resolution of the bank that is a covered insured depository institution (CIDI), and to efficiently resolve the CIDI under Sections 11 and 13 of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1821 and 1823, in a manner that (a) ensures that depositors receive access to their insured deposits within one business day of the CIDI's failure (two business days if the failure occurs on a day other than Friday), (b) maximizes net present value return from the sale or disposition of its assets, and (c) minimizes the amount of any loss realized by the creditors in the resolution.
On the basis of these requirements, it is fair to assume that the FDIC is, through the SVB IDI Resolution Plan, in possession of extensive information regarding SVB and its operations.

[7] https://www.fdic.gov/news/financial-institution-letters/2023/fil23010.html#

[8] *Id.*

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This Financial Institution Letter confirms the actions taken by the FDIC relying on the authority provided under the FDIA.[9] It is also consistent with the spirit of the FDIA where it provides that "[i]t is the intent of the Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured depository institution in default with respect to which a bridge depository institution is chartered, especially creditworthy farmers, small businesses, and households, the [FDIC] should -- (i) continue to honor commitments made by the depository institution in default to creditworthy customers, and (ii) not interrupt or terminate adequately secured loans which are transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument."[10]

The FDIC's transition of the two banks' assets and contracts into the respective bridge banks carries important connotations and implications under the FDIA. The bridge bank regime under the FDIA is substantially different from an FDIC receivership. The creation of a bridge bank is intended to allow continued normal operations while the FDIC effectively markets the institution to third parties.

Importantly, under the FDIA the bridge bank "shall not be considered to be a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding."[11]

However, the fact that the positions transitioned through an FDIC receivership (albeit for a short period) triggers certain considerations.

> ***Ipso facto* clauses.** Although the bridge bank regime under the FDIA contemplates no restrictions against the enforcement of *ipso facto* provisions,[12] counterparties should consider that *ipso facto* clauses contained in agreements continue to be unenforceable against the FDIC if such enforcement is predicated upon the (brief period of) pendency of the FDIC receivership[13] (*i.e.*, before the agreements were transferred to the bridge bank). This means that counterparties would be prohibited from

[9] Cf. FDIA, Section 11(n)(1)(B) ("Upon the granting of a charter to a bridge depository institution, the bridge depository institution *may*--… (ii) assume such other liabilities (including liabilities associated with any trust business) of such insured depository institution or institutions that is or are in default or in danger of default as the Corporation *may, in its discretion*, determine to be appropriate; … (iv) perform any other temporary function which the Corporation *may, in its discretion*, prescribe in accordance with this Act.") (emphasis provided).

[10] FDIA, Section 11(n)(3)(B).

[11] FDIA, Section 11(e)(10)(C).

[12] *Ipso facto* clauses contained in agreements are unenforceable against the FDIC during the FDIC receivership. FDIA, Section 11(e)(13)(A). This means that counterparties in an FDIC receivership are prohibited from accelerating, terminating or otherwise exercising any rights under any contract against the failed financial institutions solely as a result of the appointment of the FDIC as receiver. Exceptions to this rule apply in the case of qualified financial contracts (QFCs) that are not transferred by 5:00pm of the next business day after the start of the receivership and D&Os' liability insurance contracts or depository institution bonds.

[13] FDIA, Section 11(e)(13)(A).

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accelerating, terminating or otherwise exercising any rights under any contract against the failed financial institutions *solely as a result of the appointment of the FDIC as receiver*.

Right to seek judicial stay of litigations, but no *automatic* stay. Under the FDIA, the bridge bank has the right to request the stay of judicial actions to which the bridge bank becomes a party for up to 45 days.[14] However, and contrary to the FDIC receivership (where a 90-day stay applies to all rights to terminate, accelerate or declare a default under any contract, or to obtain possession of or exercise control over any property of the failed institution or affect any contractual right of the failed institution without the FDIC's consent),[15] there is no automatic stay applicable during the bridge bank phase.

Invalidity of certain agreements against the bridge bank's interests. The bridge bank is given the powers to assess the invalidity of arrangements that can "diminish or defeat the right, title or interest of a bridge depository institution", in cases where: agreements were not in writing, not executed contemporaneously with the transfer of the asset, not fully approved (with evidence of such approval), and not carried on the institution's official record.[16] This means, for example, that an otherwise enforceable and perfected security interest in certain assets, where the agreement fails to satisfy one of the above requirements, could be unenforceable against the bridge bank. There are exceptions for certain arrangements: deposits, bankruptcy estate funds under section 345(b)(2) of the Bankruptcy Code, extensions of credit from a Federal reserve bank or Federal home loan bank, and QFCs.

Defaults. The FDIC has the power to determine, in its discretion, in what cases and circumstances the bridge bank is in default.[17] Despite the ambiguity about the extent of such power, the bridge bank regime should not prevent counterparties from calling and enforcing events of default and remedies against the bridge bank.

Otherwise, the purpose of the bridge bank is to be able to carry on business as usual.

The FDIC Financial Institution Letter provides welcome clarifications to the industry. That said, events continue to evolve rapidly, with substantial consequences for the legal treatment of parties' rights, obligations and relationships, and we will continue to monitor them as they evolve. If you have any questions on any of the foregoing or other related topics, please contact one of the authors listed above or a member of the Haynes Boone Banking Task Force which was created to help clients address the fallout from the recent bank shutdowns by state and federal regulators.

[14] FDIA, Section 11(n)(4)(H).

[15] FDIA, Section 11(e)(13)(C).

[16] FDIA, Section 11(n)(4)(I).

[17] FDIA, Section 11(n)(2)(C) provides that "[a] bridge depository institution shall be treated as an insured depository institution in default at such times and for such purposes as the Corporation may, in its discretion, determine."

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