

March 11, 2023

## Ongoing Developments at Silicon Valley Bank

As we continue to work with clients regarding the Federal Deposit Insurance Corporation placing Silicon Valley Bank (SVB) into receivership, please see below for a list of high level frequently asked questions surrounding the current situation. Please note that this list covers general topics related to rapidly changing circumstances. The below should not be construed as legal advice as it does not consider the particular facts of any unique situation or specific documentation relating thereto. To the extent that you have a particular circumstance on which you require advice, we encourage you to reach out to your Ropes & Gray contacts to discuss the particular facts, circumstances and documentation relating thereto.

### 1. Does company have any deposits at SVB, and if so, what is the amount of exposure?

- a. FDIC's Electronic Deposit Insurance Estimator may be helpful in determining insurance coverage of deposit accounts (<https://edie.fdic.gov/calculator.html>)
  - i. What is the amount of applicable FDIC insurance?
    1. The standard insurance amount is \$250,000 per depositor, per insured bank, for each ownership category. This includes principal and accrued interest and applies to all depositors of an insured bank. Deposits maintained in different categories of legal ownership at the same bank can be separately insured. Therefore, it is possible to have deposits of more than \$250,000 at one insured bank and still be fully insured.
      - a. Ownership Categories (general rules, with some exceptions as noted below):
        - i. Single Accounts (owned by one person) - \$250,000 per owner
        - ii. Joint Accounts (owned by two or more persons) - \$250,000 per co-owner
        - iii. Certain Retirement Accounts (includes IRAs) - \$250,000 per owner
        - iv. Revocable Trust Accounts - \$250,000 per owner per unique beneficiary
        - v. Corporation, Partnership and Unincorporated Association Accounts - \$250,000 per corporation, partnership or unincorporated association
        - vi. Irrevocable Trust Accounts - \$250,000 for the noncontingent interest of each unique beneficiary
        - vii. Employee Benefit Plan Accounts - \$250,000 for the noncontingent interest of each plan participant
        - viii. Government Accounts - \$250,000 per official custodian (more coverage available subject to specific conditions)

**2. When and how might I be able to access deposits at SVB?**

- a. Per FDIC guidance, all insured depositors are expected to have full access to their **insured** deposits no later than Monday morning, March 13, 2023 (at the moment it is unclear the mechanic by which the funds may be accessed, whether it be direct access to a successor account or a paper check)
- b. FDIC expects to pay depositors an advance dividend on uninsured deposits within the next week (the amount of such advance and mechanics for accessing such amount remain to be determined)
- c. Depositors will receive a receivership certificate for the remaining amount of their uninsured funds and, as the FDIC sells the receivership assets, future dividends may be made in respect of uninsured deposits

**3. Does company have sufficient liquidity (assuming no access to SVB deposits or lines of credit) to fund key near-term operations, in particular payroll and other trust fund obligations, but also obligations that may be mission critical to the business?**

a. General Overview:

- i. Federal and state wage payment laws generally view wages as sacrosanct because employees need to be paid wages in a timely manner in order to meet the daily obligations of life.
- ii. However, federal and state wage payments laws generally do not contemplate the extraordinary issues at play here.

b. Risks:

- i. Failure to timely pay wages can result in penalties under federal and state law, which in some cases can be significant. Penalties typically increase if the failure is deemed “willful” or “intentional.” If the delay is short, the overall risk of liability may be mitigated.
- ii. Late payment also creates a risk of claims for promissory estoppel or detrimental reliance from employees who are counting on wages to pay their own expenses and experience losses (e.g., interest penalties on bills) as a result of the delay in payment.
- iii. Under federal law, and the laws of a number of states, individuals (including officers and directors) can be held personally liable for failure to timely pay wages and subject to civil and criminal penalties. However, such individual penalties also typically require a showing of “willfulness” or prior and repeated violations.
- iv. From an employee-relations perspective, failure to make payroll could have a material detrimental impact on employee morale, recruiting and trust.

c. Recommendations:

- i. In light of the potential risks, consider all available alternatives to avoid a payroll delay. If these efforts are successful there will be no delay in payment. But even if unsuccessful, these efforts will help to create a record that can be used to dispute any claim that the delay was “willful” or “intentional.” To the extent feasible, such efforts should be documented (e.g., board meetings with minutes) to ensure record is clear and easily established.

- ii. Payroll providers often require funding in advance of the actual legally required pay date. Employers should consult the terms of their payroll vendor contract to determine whether there is any contractual leverage to delay payroll funding. Although outside payroll vendors often impose seemingly inflexible deadlines, these deadlines are rarely driven by any legal consideration and may have some give in extraordinary circumstances.
  - iii. If delay is unavoidable, provide affected employees with as much advance notice as possible in order to mitigate promissory estoppel and detrimental reliance claims and manage employee morale concerns.
  - iv. If the company is left with a choice between paying employees or using the funds for other purposes, these are the types of circumstances that can clearly give rise to the liability described above – i.e., the company has a choice where to allocate funds and chooses not to make payroll. If your company is in that dilemma, it would be prudent to discuss with legal counsel before making any decision not to pay wages.
4. **Does company have any lines of credit (revolver, factoring, etc.) or any other loan outstanding with SVB?**
- a. Are there any specific issues that may give rise to events of default, covenant breaches, etc.?  
    - i. Please reach out to your contact at Ropes for specific analysis of the applicable documents on a case-by-case basis
  - b. Will SVB letters of credit be honored by counterparties?  
    - i. Unsettled question at the moment, but it is possible that LC counterparties will not view SVB issued letters of credit as creditworthy in the current circumstances and it may be beneficial to take proactive steps to make alternate arrangements where possible.
  - c. How do communications with Borrowers continue during FDIC interim servicing?  
    - i. Until the FDIC sells your loan, it undertakes the associated servicing responsibilities previously held by the failed bank.
    - ii. 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.
  - d. In what circumstances may the FDIC be able to help in obtaining a lien release?  
    - i. If the lien holder is a bank or savings and loan that failed and has been placed into FDIC Receivership.
    - ii. If the lien holder is an active or recently dissolved Subsidiary of a failed bank or savings and loan.
    - iii. If the loan was paid off to the bank or savings and loan before the Institution failed.
    - iv. If the loan was paid off to the FDIC after the bank or savings and loan failed.
    - v. See <https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/lien/> for instructions to request lien release.

- e. Lines of Credit
  - i. When the FDIC is appointed receiver, it immediately begins analyzing loans that require special attention, such as unfunded and partially funded lines of credit, and construction and development loans.
  - ii. The role of receiver generally precludes continuing the lending operations of a failed bank; however, the FDIC will consider advancing funds if it determines an advance is in the best interest of the receivership, such as to protect or enhance collateral, or to ensure maximum recovery to the receivership.
  - iii. In very limited circumstances, the FDIC will consider emergency funding needs required to ensure the short term viability of a borrower, to protect or enhance collateral value, or for public safety.
  
- f. Requests for additional borrowings:
  - i. If you submit a request for additional funding, the FDIC will conduct a thorough analysis to determine the best course of action for the receivership. The FDIC uses information contained in the failed bank's loan files to the extent it is available and considered reliable.
  - ii. Based on its analysis, the FDIC may:
    - 1. Make all or a portion of the requested loan advance, as justified by the analysis. If funds are advanced for a construction project, the FDIC may require use of a third party escrow firm to control disbursements.
    - 2. Undertake discussions with you to reach a mutually satisfactory agreement to restructure or modify the loan and funding commitment.
    - 3. Exercise its statutory right as receiver to repudiate its funding obligations with respect to the loan if it determines that these obligations are burdensome to the receivership and that repudiation would promote the orderly administration of the receivership.
  - iii. What to expect if the FDIC sells your loan:
    - 1. Holders of loans, including the FDIC, routinely sell performing and non-performing loans in the financial markets.
    - 2. If the FDIC sells your loan, the FDIC and/or the new owner will send you a notice of the transaction, with payment mailing instructions.
    - 3. The sale does not affect the terms of your loan. The new owner of your loan:
      - a. 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,
      - b. Is entitled to collect all principal, interest, and other amounts owed, and
      - c. Assumes the receiver's obligations and commitments.

g. Issues specific to fund lines of credit:

i. Many sub line agreements with SVB require funds to call capital into an account held at SVB. Although borrowers under such agreements will understandably not want to call capital into SVB accounts while the current situation persists, it is important to be aware that calling capital into an account at another bank may breach the terms of their credit agreement.

1. Such a breach may:

- a. Give SVB (or any applicable successor) the right to accelerate any outstanding loans under the line, or
- b. Give rise to a cross-default whereby, if one fund defaults under its sub line with SVB, an event of default (and thus potential acceleration) may occur under all other loans that SVB may have provided to (i) the sponsor's other funds, (ii) the management company and/or (iii) general partner entities.
- c. **Key Takeaway:** Before calling capital into a non-SVB account, borrowers under such lines of credit would be advised to review the terms of their SVB credit agreements with financing counsel.

5. **Does company have a non-SVB loan for which the applicable payment instructions direct payments of principal, interest or fees to an SVB account?**

a. Prior to making any payments to an SVB account (ideally well in advance of such payments becoming due and payable) reach out to agent to confirm whether there are new payment instructions.

6. Note that companies **should be on high alert for fraud** relating to requests to change bank accounts from portfolio companies and investors. There will almost surely be phishing attempts around this because many people will need to change accounts and will be reaching out. **Please verify all requested changes of authorized persons and bank account details by \*PHONE\* with the authorized person on the account.**