LEGAL ALERT

BANKING AND FINANCIAL INSTITUTIONS

KUTAKROCK

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Services

Banking

Impacts of Silicon Valley Bank Shut Down and FDIC Receivership

On Friday, March 10, 2023, the California Department of Financial Protection and Innovation shut down Silicon Valley Bank ("SVB") and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver. The FDIC created the Deposit Insurance National Bank of Santa Clara ("DINB") and immediately transferred all insured deposits of SVB to DINB (all of the other assets of SVB remain under receivership).[1] The FDIC announced on March 10 that insured depositors will have access to their insured amounts by Monday morning, March 13, 2023, and that uninsured depositors will be paid an advanced dividend next week and will receive a receivership certificate for their additional uninsured deposits (which is not a guarantee of full repayment). Future payments of remaining uninsured deposits will occur as the FDIC liquidates additional assets.

FDIC insurance covers certain deposit accounts in an amount of up to $250,000 per depositor for the aggregate of all deposits held by the depositor in each account ownership category. Uninsured deposits rank third in right of payment behind the FDIC in respect of its administrative expenses and the payment of insured deposits, ahead of all other creditors and shareholders. FDIC receiverships of insured banks are subject to a complex legal and regulatory regime under the Federal Deposit Insurance Act ("FDIA").

As the fallout continues over the collapse of SVB, companies are grappling with uncertainty and urgent questions. Companies are encouraged to consider the potential effects of the entry of a bank into receivership may have on their business.

Depositor Impacts

Depositors with SVB will face different concerns based on whether their deposits are insured or uninsured.

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[1] Where FDIC is unable to timely find a healthy bank to purchase a failing bank, another option is for FDIC to establish a new DINB in the same community as the bank in default. See 12 U.S.C. §1821(m). Upon the closure of the failed bank, FDIC transfers most or all of the failed bank's insured deposits to the DINB, providing depositors with uninterrupted service. The purpose of a DINB is to provide customers access to banking services in communities where banking options are limited. DINBs are operated temporarily, either until a purchasing bank is found or until customers have had time to establish relationships with other institutions. By statute, a DINB is authorized to operate for a maximum of two years. 12 U.S.C. §1821(m)(18). Although DINBs have been rarely utilized as a resolution structure, in 2009 the FDIC established a DINB upon the failure of New Frontier Bank in Greeley, Colorado. See FDIC Press Release, FDIC Creates a Deposit Insurance National Bank to Facilitate the Resolution of New Frontier Bank, Greeley, Colorado, (April 10, 2009) available at www.fdic.gov.

Insured Funds?

The FDIC insures checking accounts, savings accounts, money market deposit accounts, certificates of deposits, and cashier's checks for FDIC insured banks. The FDIC insurance limit for each SVB depositor is up to $250,000. Per the FDIC's press release regarding SVB, insured depositors should have access to their insured deposits no later than Monday morning, March 13, 2023. The insurance limit is determined on a depositor as opposed to an account basis. A depositor would include deposits owned by corporations, partnerships, and unincorporated associations, including for-profit and not-for-profit organizations. If persons manage multiple depositors, the corporation, partnership, or unincorporated association must be separately organized under state law and operate separately in order to qualify for multiplicity in FDIC coverage. There are additional rules for joint accounts, trust accounts, and employee benefit accounts.

Uninsured Funds?

Deposit amounts in excess of $250,000 are uninsured deposits. The FDIC has announced that it will pay uninsured depositors an "advanced dividend" within the next week, with potential additional dividend payments as the FDIC sells SVB's assets. After the payment of any initial advanced dividend, depositors may receive a receivership certificate for the remaining amount of a depositor's uninsured funds. Whether depositors will get all of their funds back will depend on how much there is to distribute after the sale of the assets by the FDIC. No indication is given of what percentage of the deposit amounts depositors may expect to see returned.

In other failed bank cases, the FDIC found a bank that agreed to assume all deposits of the failed bank, including uninsured deposits. This scenario remains a possibility with respect to the SVB situation. As per the recommendation of the FDIC, we encourage companies with accounts in excess of $250,000 to contact the FDIC toll-free at (866) 799-0959.[2]

Employer Impacts

Many of SVB's depositors kept their operating funds on deposit with SVB, including funds they intended to use to meet their payroll obligations. Uninsured funds are no longer immediately available to meet such expenses. If companies have payroll obligations that exceed the sum of their insured amount plus any deposits made after the appointment of the receivership, they should look to make alternative arrangements to facilitate such payments as the company may not have access to funds in excess of the insured amount plus receivables initiated after Friday. Note that labor requirements, which are governed by federal law and by a myriad of state and local laws, regulate the timing and form of wages.

[2] By statute, the insurance limit is $250,000 per legal entity customer/individual. A legal entity customer is defined as a legal entity that generally has a separate EIN number. The individual owners of the business are treated separately for FDIC insurance purposes. For instance, for a legal entity that had $1,000,000 of deposits held at SVB spread among a checking account ($400,000), savings account ($400,000), and CD ($200,000): (a) $250,000 is fully insured, is now at the DINB and should be available Monday and (b) $750,000 is the amount of the legal entity's unsecured claim with the receiver (the depositor would be given a receiver's certificate as proof of this claim and would receive payments as the assets of the bank are liquidated).

Banking and Financial Institutions
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Borrower Impacts

The FDIC has the power in a receivership to repudiate contracts in certain circumstances. The FDIC is not required, for example, to fund loans, guarantees, or otherwise extend credit in some situations, even when the borrower or beneficiary would otherwise have been entitled to performance in the absence of a receivership. These future or contingent funding obligations can take multiple forms, including pursuant to a commitment letter or, in the case of revolving credit facilities, delayed draw term loans and letters of credit, a loan agreement itself.

In typical receiverships, assets (loans) are generally transferred by sale to a successor bank which then administers the loan. It's unclear when, how and to whom the FDIC will sell the SVB loans - to one bank or multiple banks. Borrowers must continue making loan payments as they become due unless directed otherwise.

Some Good News

- Depositors should have access to the insured portion of their accounts available by the morning of Monday, March 13, 2023.
- Deposit amounts in excess of $250,000 are uninsured deposits. The FDIC has announced that it will pay uninsured depositors an "advanced dividend" within the next week, with potential additional dividend payments as the FDIC sells SVB's assets.

Information about the SVB receivership, how to file claims and links to the FDIC's claims portal can be found **here**.

If you have questions, please contact Bryan Handlos or Jeff Makovicka, listed on the left. You may also visit us at **www.KutakRock.com.**