

Fund Finance Friday



FDIC Instructs Parties to Comply with Transaction Documents

March 14, 2023

We have been fielding questions since Friday from counterparties to SVB and Signature asking whether they should continue to perform under their fund finance deal documents. Syndicate banks where SVB or Signature Bank are the agent have inquired whether they should continue to fund in response to borrower draw requests and, if so, whether they should fund to the agent as required under their credit agreement or if they should figure out a way to fund to the fund borrower(s) directly. Fund borrowers have also been wondering whether to make typical payments to these parties.

The Cadwalader fund finance team joined with an interdisciplinary team made up of our Cadwalader colleagues whose expertise ranges from bank and financial services regulation to insolvency to litigation in order to advise our clients as the situation has unfolded. Based on the collective views of our attorneys, it has consistently been our advice that, in light of the formation of the respective SVB and Signature bridge banks noted below, all parties should continue to follow their deal documents and act in accordance with the terms of their individual transaction. Failure to do so risks action by counterparties under the deal documents as well as potential action by the FDIC under the FDIA. This means that syndicate banks and borrowers should respond to funding requests in the ordinary course, and borrowers and any other party with payment obligations to SVB or Signature should continue to fulfill those obligations as directed by their transaction documents.

As we mentioned in yesterday's *Fund Finance Friday* "**Special Alert**," scheduled payment obligations to SVB and Signature should continue to be made. We have encouraged clients to reach out to their bank contacts to confirm wire instructions and the ability to receive payment prior to releasing any wires. Likewise, we mentioned that parties should continue to act in accordance with the terms of their deal documents. We work with some of the smartest and most nimble minds in the business, but this is not the time to find a workaround from your deal documents. Instead, parties should follow the procedures outlined in their credit agreement for performing under their transaction documents.

The **FDIC weighed in** on this matter today and confirmed our advice that financial institutions are required to meet their contractual obligations with the bridge banks. They have noted that the FDIC established two bridge banks, Silicon Valley Bridge Bank, N.A. and Signature Bridge Bank, N.A., to assume the deposits and obligations of two failing banks. The FDIC stated: "[a]ll contracts that SVB and Signature entered into before the bridge banks were established have been transferred into the respective bridge bank by the FDIC as receiver." This being the case, the FDIC has indicated that counterparties with contracts with each bank – which are now with the respective bridge bank – "are legally obligated to continue to perform under the contracts, and the bridge bank is obligated to and has the full ability to make timely payments to vendors and counterparties and otherwise perform its obligations under the contract." The FDIC further noted that failure to meet these obligations may result in legal action by the U.S. government.

Please visit our "**Financial Markets Resource Center**" for additional information.