Key Impacts of SVB/Signature Receiverships on Fund Finance Transactions

March 13, 2023

It has been a chaotic 72 hours, with changing facts, breaking news and unexpected developments. The market turmoil has kept us scrambling to figure out how best to get deals closed, to keep money moving and to meet our clients' urgent needs. Below is a discussion of a few of the key things we have learned over the past few days, and our thoughts as to how they are relevant to the functioning of the U.S. Fund Finance market. A more detailed legal analysis is included in our **Clients & Friends Memo**. We continue to be available to answer questions and to do whatever else is needed to help our clients navigate these challenging events.

Factual Background

On March 10, 2023, the California Department of Financial Protection appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver for Silicon Valley Bank ("SVB"). The FDIC created the Deposit Insurance National Bank of Santa Clara ("DINB"), and immediately transferred to DINB all insured deposits of SVB. The FDIC subsequently announced that it was transferring all deposits, both insured and uninsured, and substantially all assets of SVB to a newly created, full-service FDIC-operated "bridge bank" (the "SVB Bridge Bank").

Also on March 10, 2023, the Bank of England − acting with the UK's banking regulator, the Prudential Regulation Authority (the "PRA") − announced that "absent any meaningful further information" it intended to apply to Court to place Silicon Valley Bank UK Limited ("SVBUK") into a Bank Insolvency Procedure under the Banking Act 2009, effectively shutting it down. On March 13, 2023, HSBC UK Bank Plc acquired SVBUK. SVBUK continues to be a PRA authorized bank, all services function as normal and customers can contact SVBUK through their usual channels.

On March 12, 2023, the New York State Department of Financial Services appointed the FDIC as receiver for Signature Bank ("Signature" and, together with SVB, the "Failed Banks"). The FDIC created Signature Bridge Bank, N.A. ("Signature Bridge Bank" and, together with the SVB Bridge Bank, the "Bridge Banks"), and immediately transferred all the deposits and substantially all of the assets of Signature to Signature Bridge Bank.

On March 12, 2023, on the recommendation from the Boards of the FDIC and the Federal Reserve, the FDIC approved "systemic risk exceptions" ("SRE") for SVB and Signature. Treasury Secretary Yellen, after consulting with President Biden, per the statutory requirements for an SRE, agreed to grant an SRE for the first time since 2008. The SRE allows for a resolution that fully protects all depositors, and is not limited to insured deposits (which previously were limited to $250,000 per depositor).

All depositors of SVB and Signature will be made whole. Shareholders and certain unsecured debtholders will not be protected. The FDIC announcement emphasized that no losses will be borne by taxpayers, and any losses to the Deposit Insurance Fund will be recovered by a special assessment on banks, as required by law. Specifically, the SRE system provides that each insured depository institution that receives protection from the FDIC will be assessed a surcharge to cover the deposit amounts that were not actually insured as of the time SVB/Signature failed.

Appointment of the FDIC as Receiver

The Federal Deposit Insurance Act (the "FDIA") governs the receivership of financial institutions whose deposits are insured by the FDIC. The FDIC is appointed receiver in order to liquidate or wind up the affairs of a failed insured depository institution. Upon the appointment of the FDIC as receiver of a failed institution, the FDIC steps into the shoes of the institution. By operation of law, the FDIC as receiver succeeds to "all rights, titles, powers, and privileges of the failed institution with respect to the institution and the assets of the institution." As part of its receivership powers, the FDIC may organize either a new depository institution, or a bridge depository institution.

Bridge Depository Institutions

A bridge depository institution or "bridge bank" is a full-service national bank chartered by the Office of the Comptroller of the Currency and controlled by the FDIC. The creation of a bridge bank allows the FDIC to rapidly take over a failed institution while giving it time to determine how best to sell the failed institution's assets and business to one or more buyers. We note that in certain provisions of the FDIA, a bridge bank should not be considered an entity subject to receivership. The FDIA does not explicitly provide that the bridge bank enjoys the rights and privileges of the receivership; therefore, neither the general receivership powers nor the stay (discussed below) should be relevant to contracts that have moved to the bridge bank.

Once a bridge bank has been chartered, the FDIC, as receiver, may transfer any assets and liabilities of the failed institution in default to the bridge bank. The FDIC notices for both Signature Bridge Bank and SVB Bridge Bank state that "substantially all" assets of Signature and SVB have been transferred to the respective bridge banks. However, it remains to be seen what assets, if any, were not transferred to the bridge banks and may remain in the FDIC receiverships.

Congress has stated that in order to prevent unnecessary hardship or losses to the customers of any failed institution for which a bridge bank is established, the FDIC should (i) continue to honor commitments made by the failed institution to creditworthy customers, and (ii) not interrupt or terminate adequately secured loans which are transferred to a bridge bank and are being repaid by the debtor in accordance with the terms of the loan instrument.

Creditors' Rights Under a FDIC Receivership

For assets and agreements that have not been transferred to the bridge bank, and remain in FDIC receivership (if any), the below restrictions apply.

90-Day Stay. The FDIA includes a temporary stay of certain actions against a failed institution or its property. During the 90-day period beginning on the date that the FDIC is appointed as receiver, no party may exercise any right or power to terminate, accelerate, or declare a default under any contract to which the failed institution is a party, or to obtain possession of or exercise control over any property of the failed institution, or affect any contractual rights of the failed institution.

Invalidation of Ipso Facto Provisions. The FDIC as receiver has the ability to enforce contracts, notwithstanding contractual provisions providing for termination, default, acceleration or exercise of rights upon insolvency or appointment of or the exercise of rights or powers by or receiver.

Right to Disaffirm or Repudiate Contracts. The FDIC has the ability to disaffirm or repudiate contracts and leases to which a failed institution is a party if (i) the receiver, in its discretion, determines a contract or lease to be burdensome and (ii) disaffirmance or repudiation is determined by the receiver, in its discretion, to promote orderly administration of the failed institution's affairs.

Key Considerations for Lenders in the Fund Finance Market

Impact of the 90-Day Stay. As a result of the 90-Day Stay, parties may not terminate loan agreements with the Failed Banks or exercise "defaulting lender" or similar rights and remedies against them solely as a result of the occurrence of receivership. However, upon transfer of the loans to the Bridge Banks, the Bridge Banks should be responsible for performance of the Failed Banks' obligations thereunder.

The FDIC has announced that "substantially all" assets have now been transferred to the Bridge Banks. However, a detailed list of transferred assets has not been provided, and it is unclear what assets may have been left behind in the Failed Banks. Upon transfer of a subscription facility to a Bridge Bank, the Bridge Bank should be responsible for the performance of its obligations thereunder. A failure by a Bridge Bank to perform its obligations should thus be subject to the consequences of such non-performance as detailed in the relevant loan documents. Consequently, it should be permissible to deliver a "defaulting lender" notice and to implement resulting remedies under the loan documentation in the event of a failure to perform by a Bridge Bank.

Given the lack of certainty around the status of asset transfers, some market participants have elected to deliver notices specifying that a Failed Bank, due to its receivership, meets the definition of a defaulting lender under the loan documentation. Such notices have referenced the FDIA stay and noted that while no remedies are being exercised under the loan documentation as a result of the receivership, the parties will look to the corresponding Bridge Bank to perform the obligations of the Failed Bank, and if allowed in the particular deal will seek assurance of performance by the Bridge Bank.

The Failed Banks may, but are not required to, fund new loans. During the stay period, and prior to the transfer of loans to the Bridge Banks, the FDIC will determine whether the Failed Banks will perform their obligations under existing loans, including the obligation to fund new borrowings when requested under revolving facilities. Under most multi-lender loan facilities, a failure by one lender to fund its portion of a requested borrowing does not excuse other lenders from their obligations to fund their ratable portions of requested borrowings, provided that other lenders will not be required to fund aggregate amounts in excess of their loan commitments. Upon confirmation of transfer of a loan to a Bridge Bank, we expect that the Bridge Bank should be responsible for funding new loans. We encourage borrowers

and agents to maintain communication with their bank contacts (most of whom are now employees of the Bridge Bank) for their loan transactions in connection with any expected or pending borrowing requests.

Scheduled payment obligations to SVB and Signature should still be made. Scheduled payments of fees, interest and principal due and owing to SVB and Signature under loan agreements should still be made. Except as otherwise instructed, payments should be made to the ordinary payment account, which (in the case of a loan that has been transferred to a Bridge Bank) should result in the payment being automatically forwarded to the relevant Bridge Bank. Anecdotally, we have heard that rejected payments and failed wire transfers that occurred on Friday have (at least in some instances) since been resolved. Prior to sending payments, we urge clients to reach out to their bank contacts to reconfirm wire instructions and ability to receive payment.

Parties should continue to act in accordance with the terms of the loan documents. This would seem to be an obvious point, but in working to come up with creative solutions to address unique challenges that may arise in the context of a particular facility, parties should be mindful that the receiverships do not create rights to take action that is otherwise prohibited by the terms of the loan documents and do not give rise to remedies that are not otherwise available. When it comes to termination or assignment of a loan commitment, lien releases, direction of borrowings or loan payments, permitted debt, permitted liens or replacement of agents or lenders, for example, parties should continue to check the terms of their loan documentation and obtain the appropriate executed documents or assurances, as applicable, from the relevant Bridge Bank. In entering into new agreements, amendments, waivers or releases with the Bridge Banks, parties should take care to verify the capacity and authority of the signatories.

Market participants continue to evaluate options with respect to collateral accounts. For some fund finance transactions, one of the Failed Banks acted as the account bank for the account to which capital contributions are paid and has entered into a triparty account control agreement under which it has agreed to take instructions from the lenders in specified circumstances. Lenders and borrowers are proactively discussing options in relation to such accounts. In some cases, the corresponding Bridge Bank may no longer qualify as an “eligible institution” or similar requirement under the loan documents, which may trigger an obligation of the borrower to replace such Bridge Bank as the deposit bank or risk a default under the loan documents. To the extent parties agree that capital contributions should be directed to new accounts at different account banks, the parties should make adjustments to their security agreements and UCC filings, and enter into new control agreements as quickly as possible. In the meantime, parties should take steps to ensure that capital contribution proceeds are segregated from non-collateral proceeds and are not commingled in the same accounts as non-collateral cash so that they continue to be identifiable as proceeds of the collateral for the loan facility.

***

These are quickly evolving facts and circumstances. The Cadwalader team will continue to provide updated insights on these important issues as they continue to arise. We have a market-leading team of restructuring experts, partners with non-bank lender relationships, and a practice in bank capital management, all in addition to our extensive fund finance transactional expertise. Let us know if we can help.

Note: These are general views only, and are not intended as, and should not be construed as, legal advice. Each individual person or entity’s circumstances are different and would need to be taken into account in providing actual legal counsel. Please do not hesitate to contact any of the Cadwalader attorneys listed for advice tailored to your facts and circumstances.