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Common Questions Regarding Access to Funds After Failure of an FDIC-Insured Bank

March 11, 2023

Background

On Friday, March 10, 2023, Silicon Valley Bank (SVB) was closed by the California Department of Financial Protection and Innovation (DFPI). The Federal Deposit Insurance Corporation (FDIC) was named receiver and immediately created the Deposit Insurance National Bank of Santa Clara (DINB) to facilitate the resolution of SVB. Read the FDIC's official press release announcing the closing of the bank and the DFPI's press release. The FDIC also has established a resource page.

The bank's sudden failure means there are many questions about the ability to access accounts and funds held at the bank at the time it closed. Each bank customer experience may be different, and each bank customer should review its applicable account agreements and any available information regarding its balances in relevant accounts. The following is intended to provide a general overview of the treatment of assets in different types of accounts for informational purposes only; it does not constitute legal, business or financial advice. You should contact your lawyer, financial adviser or other professional advisers to advise you on your specific situation before you take any action, rather than relying on this alert.

Funds on deposit

Insured deposit amounts – Deposit accounts, including checking accounts, interest bearing savings accounts and money market accounts, also known as money market deposit accounts (MMDAs), are insured by the FDIC up to $250,000, per depositor, per insured bank, for each account ownership category. More information on the various account ownership categories for purposes of determining FDIC deposit insurance coverage is available. The FDIC press release states that insured depositors will have full access to their insured deposits (i.e., up to $250,000, per depositor, for each account in a different legal ownership category) through DINB no later than Monday morning, March 13, 2023. The FDIC press release also states that banking services will include online banking and other services and that SVB's official checks will continue to clear.

Uninsured deposit amounts – Uninsured deposits include deposits in excess of the standard deposit insurance amount of $250,000 (for deposit accounts that otherwise are covered by deposit insurance), as well as other deposits and account types that are not insured. The FDIC press release states that "[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 may be made to uninsured depositors." Average disposition times according to the FDIC are six to 12 months, but can be longer depending on factors including litigation and enforcement matters.

Funds in sweep programs

Many commercial banking customers participate in sweep programs that enable the customer to have excess cash in its main deposit accounts (e.g., checking accounts) "swept" to other accounts and used to purchase shares in money market mutual funds (MMMFs) and other similar investment securities. The nature of sweep programs vary. For example:

- Programs that establish a target balance amount for the customer's applicable deposit account and sweep cash in and out of the deposit account to maintain that target balance.
- Programs that establish, in addition to the target balance amount, a target investment return amount.
- Programs that sweep customer deposits held in deposit accounts with the bank for overnight purchases of securities and

then sell the securities in the morning, returning the funds to the customer's deposit accounts.

Regardless of the specifics of the sweep program, swept funds can generally be divided into two buckets.

First, swept funds are used by the bank to purchase, on behalf of the customer, external assets such as shares in a money market mutual fund (MMMF). Holdings of assets, such as MMMFs purchased through external investment fund management, should **not** constitute deposits and therefore are not expected to be subject to the resolution of funds on deposit as described above. Rather, for funds that are not deposits, the bank must disclose to the customer pursuant to 12 CFR § 360.8(e), in the applicable program agreement, the status such assets would have if the institution failed. Although it is yet to be seen, in general, such assets should belong to the bank's customer, even if the bank made the share purchases as agent of the customer and held such shares in the bank's name and on behalf of its customers.

Second, some swept funds are held by the bank in accounts (such as omnibus accounts) that may earn interest or other returns paid by the bank. These funds are generally **not** holdings of shares in an external asset such as an MMMF that belong to the customer. This "cash" remains in a deposit account and will likely constitute a deposit subject to the resolution of deposits as described above.

Customers that participate in a sweep program should be able to see information through their online banking portal, if it is available, regarding their holdings of assets such as MMMFs purchased through external investment fund management as well as their cash funds that remain deposits with the bank.

Claims process

As of the morning of March 11, 2023, the FDIC has not announced a clear process for uninsured depositors. FDIC guidance indicates that it will make clear whether there will be a claims process and what that will be, including whether it will use the information on file to reach out to depositors directly. However, there may be circumstances that require claim filings even where the FDIC is reaching out affirmatively. We expect more information in the coming days.

What next?

The order of priority for creditors of an insured depository financial institution is established by law. Payment priority is given to depositors over general unsecured creditors. Typically, after the FDIC recoups administrative costs and insured depositors are paid, customers with uninsured deposits are paid before any general unsecured creditors or equity shareholders. In SVB's case, there are reports of an existing loan owned to the Federal Home Loan Bank of San Francisco, which will be afforded "super lien" status and therefore will be resolved first.

More information should be available this coming week. In the meantime, the FDIC press release states that, with respect to customer deposits:

- Insured deposits up to $250,000 will be available through the DINB no later than Monday morning, March 13, 2023.
- Uninsured depositors will receive a distribution of a portion of their uninsured amount on deposit at some point this coming week. They will receive a receivership certificate for the remaining amount of their uninsured funds on deposit.

While some uncertainty exists given the circumstances, for external assets such as MMMFs purchased through the bank but held by the bank as agent for the customer, customers should retain ownership of those assets (subject to FDIC confirmation of customer ownership – for example, in the books and records reflecting the bank as custodian and agent of the assets on behalf of the customer), meaning that they will not be handled through the FDIC's distribution process for deposits. However, the timing of the availability of these assets is not certain at this time.

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Key Contacts

Matthew Bartus **San Francisco**	**mbartus@cooley.com** **+1 415 693 2056**
Adam Fleisher Washington, DC	afleisher@cooley.com +1 202 776 2027
Michelle L. Rogers Washington, DC	mrogers@cooley.com +1 202 776 2227
Peter H. Werner San Francisco	pwerner@cooley.com +1 415 693 2172

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