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LEGAL UPDATES AND NEWS

Considerations in the Wake of Second and Third Largest Bank Failures in U.S. History

In the immediate wake of the failures of Silicon Valley Bank, the second largest bank failure in U.S. history, and Signature Bank, the third largest bank failure in U.S. history, below are some steps and considerations when assessing your institution's reaction to the failures and related fallout. Notably, the failures of Silicon Valley Bank and Signature Bank were not generally related to their credit quality, but to their liquidity and business models. However different your institution may be from Silicon Valley Bank or Signature Bank, you should consider how these bank failures may impact your institution.

What is Next and What Steps Should a Financial Institution Take Right Now?

- **Internal Communications.** If you have not already, you should communicate talking points to your customer-facing banking team and to all employees and directors. As applicable, institutions should emphasize to their customers their strong liquidity position: *i.e.,* a strong capital position; cash and cash equivalents; borrowings capacity from the Federal Reserve and/or the FHLB, as applicable; and correspondent banking relationships. The communication could also address how you are different from Silicon Valley Bank and Signature Bank, FDIC insurance of accounts and any special programs in which you participate to enhance that FDIC deposit insurance coverage.

- **External Communications. Bank Customers** – You should consider an external communication aimed specifically at bank customers (deposit and loan customers) that addresses the items discussed above. These communications should also be posted on your website. **Non-Banking Constituents** – (e.g., stockholders, debtholders, vendors and other partners) – you may want to consider a more comprehensive release and/or Current Report on Form 8-K filing that addresses the above and goes further to include updated key financial measures regarding capital, liquidity, the amount of uninsured deposits and other factors that demonstrate your long- and short-term liquidity. Any public statements should be viewed through the lens of Regulation FD and other disclosure requirements. This type of release should be discussed and reviewed with counsel.

- **Insider Trading Window.** Should you permit trading in your securities if your Insider Trading Window is technically open? The answer will depend on several considerations: Is the company and its insiders in possession of material non-public information (such as a determination to participate in the FRB bank term funding program discussed below)? How will it be viewed (by the public, stockholders and banking regulators) if your insiders are selling? You should consider and discuss with counsel whether you should keep the insider window open on an unrestricted basis (i.e., open for sales as well as purchases).

- **Stock Repurchases.** Should the company be engaging in stock repurchases if it is in an open window period? The answer will depend on several considerations: Has the company already established a plan under Rule 10b5-1? Are the company and its insiders in possession of material non-public information? What are the relevant corporate state law limitations, including whether any repurchase would cause any impairment of the capital of the company? What are the tax and accounting implications of stock repurchases, including the recently enacted 1% excise tax on repurchases? How will it be viewed (by the public, stockholders and banking regulators) if the company is repurchasing stock during the current turbulent and uncertain environment? You should assess and discuss with counsel whether you should be engaging in company stock repurchases.

- **Liquidity Planning / FRB Bank Term Funding Program (BTFP).** You should consider your liquidity needs. On Sunday, March 12, 2023, the Treasury Department, Federal Reserve and FDIC jointly announced a new liquidity program: the Bank Term Funding Program (BTFP). Under the BTFP, institutions can pledge certain securities (*i.e.,* securities eligible for purchase by the Federal Reserve Banks in open market operations) for the par value of the securities at a borrowing rate of 10 basis points over the one-year overnight index swap rate. There are no fees associated with the advance. Any U.S. federally insured depository institution (including a bank, savings association, or credit union) is eligible to participate in the BTFP. The advances, which may have a term of up to one year, may be prepaid by the borrowing institution at any time (including for purposes of refinancing) without penalty.

  The Term Sheet for accessing the BTFP can be found here: https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20230312a1.pdf

  The definition of eligible collateral, as used in the BTFP, can be found under 12 CFR 201.108(b) here - CFR-2022-title12-vol2-sec201-108.pdf (govinfo.gov)

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