



March 16, 2023

Navigating the Business Landscape After Silicon Valley Bank and Signature Bank

Key Questions and Answers for Companies, Founders, Executives and Investors

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NOTE: The information contained in the following alert is up-to-date as of March 15, 2023. News and events are evolving, so check the websites for the FDIC and the applicable banks for updates and announcements.

Start-up, emerging, middle market and other companies and their founders, executives, and investors, are facing heightened demands in the wake of recent developments involving Silicon Valley Bank (SVB) and Signature Bank. You can navigate the situation and be well-positioned for continued growth and success by considering the suggestions below.

We banked with Silicon Valley Bank or Signature Bank. How can we get our funds?

- All funds, including those above Federal Deposit Insurance Corporation (FDIC) insurance limits, were transferred to Silicon Valley Bridge Bank, N.A. and Signature Bridge Bank, N.A., respectively, and depositors have full access to their money beginning March 13, 2023
- You may continue to use the same online banking access, checks and/or ATM/debit cards to access your funds

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What are the applicable FDIC insurance limits generally?

- The FDIC exercised its authority under the systemic risk exception to cover uninsured deposits at Silicon Valley Bank and Signature Bank, but has not otherwise modified the FDIC insurance thresholds
- Deposits are insured up to at least \$250,000 per depositor, per FDIC-insured bank, per ownership category
- Legal entities with independent operations are generally entitled to \$250,000 in FDIC-insurance per FDIC-insured bank
- Bank customers do not need to purchase deposit insurance; it is automatic for any deposit account opened at an FDIC-insured bank
- Funds swept into money market funds on an overnight basis are not treated as deposits of the bank, are not subject to FDIC insurance, and the FDIC will honor the banks obligation to convert the money market funds back into cash the next day
- Banks may also offer a multibank sweep vehicle, often via IntraFi's ICS or CDARS program, which allows balances in excess of the \$250,000 amount to be transferred to other banks to take advantage of each bank's \$250,000 FDIC insurance limit
- [FDIC Link to Are My Deposit Accounts Insured by the FDIC](#)
- [FDIC's Electronic Deposit Insurance Estimator](#)

We have venture debt or another form of loan from Silicon Valley Bank or Signature Bank. Do we need to continue to make payments? Are the terms of the facility or any security interest modified? Can we continue to draw on a line of credit? Is a letter of credit issued by one of those banks still valid?

- Payment obligations continue, and the terms of any arrangements are unchanged
- The FDIC can repudiate contracts under certain circumstances, and so it may not honor advances or letters of credit
- The FDIC's general policy is that its role as receiver generally precludes continuing the lending operations of a failed bank
- The FDIC will consider advancing funds if it determines that the advance is in the best interest of the receivership
- Upon receiving a funding request, the FDIC may: make all or a portion of the requested loan advance, undertake discussions to reach a mutually satisfactory agreement to restructure the loan, or exercise its statutory right as receiver to repudiate its funding obligations with respect to the loan
- Accordingly, letter of credit counterparties may not view Silicon Valley Bank-issued or Signature Bank-issued letters of credit as creditworthy in the current circumstances, and it may be beneficial to take proactive steps to make alternate arrangements where possible
- However, [Silicon Valley Bridge Bank has indicated](#) that it will honor all commitments to advance under existing credit agreements
- As receiver, the FDIC is looking to maximize recovery and will likely sell the assets of the banks in receivership, either individually or collectively to a successor institution.
- Consult your Nelson Mullins attorneys on your loan to review your agreement and discuss options

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What about any warrants issued to such institutions?

- Warrants issued to a bank in receivership should remain valid and outstanding with no change impacting the cap table
- As receiver, the FDIC is looking to maximize recovery and will likely sell the assets of the banks in receivership, either individually or collectively to a successor institution.
- Consult with your Nelson Mullins corporate counsel, as regulators may issue further guidance

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Can we leave our current bank or at least diversify our deposits across financial institutions?

- Examine banking relationships and review loan agreements and lines of credit for restrictions and covenants that may require you to maintain primary banking relationship or certain deposit accounts (e.g., your receivables) at the lender
- Look into ICS or CDARS programs at network banks, which provide FDIC insurance coverage for certain business deposits of \$250,000 or more
- New bank relationships require "Know Your Customer" processing, which requires lead time that could be even more protracted in the current climate
- An international company considering cash repatriation will want to consider tax implications

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Payroll is coming due. Can we delay payments to employees? What should our company do if it is tight on cash?

Labor and wage payment laws and regulations impose requirements on when employers must pay employees

- Under the Federal Fair Labor Standards Act, employers must pay non-exempt employees for hours worked and exempt employees for their regularly weekly rate of pay on regularly scheduled pay days for the covered pay period
- Where state law imposes higher standards regarding unpaid wages, minimum wage, and other wage payment obligations, consider furloughs or changes for future wages to avoid violations
- Failure to pay wages when due can subject U.S. employers to, among other things, fines and liquidated damages including double or treble damages, attorney fees (for litigation) and individual personal civil and, in some cases, criminal liability on owners and executives
- Employers remain obligated to deduct and remit payroll taxes from wages even when under stress caused by the insolvency of its bank
- Consult your Nelson Mullins employment counsel and corporate counsel for legal requirements and alternatives
- If company has employees or independent contractors outside the United States, consult local lawyer(s)

Assess payroll, legal and contractual requirements and alternatives

- Consult your Nelson Mullins employment, benefits and corporate counsel, and your board and key investors
- Identify other available funds to ensure that payroll requirements can be met and, if not, explore alternative sources of funding
- Request company owners, senior executives and board to consider pay cuts

- Consider measures ranging from furloughs of nonexempt employees to pay cuts and/or reductions in hours in compliance with labor and employment laws, and clearly communicate changes to employees
- Consider use of retention/stay bonuses
- If an employee decides to leave or a decision is made to let an employee go, consider separation agreement issues and limits on use of non-compete, non-solicitation, non-disclosure, non-disparagement and appropriate release terms in specific context, including in light of existing employee agreements
- Confirm and comply with prior employee documentation, including employment agreements, offer letters, employee handbooks and policies, IP assignment terms, confidentiality terms, and option or other equity terms
- Consider governance and contractual requirements with respect to changes in compensation, bonus plans, etc.
- Take control and communicate with employees as appropriate, to manage the situation and help allay fears and risk of departures and to enhance productivity

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What are our options for payments owed to lenders, landlords, suppliers, vendors and other creditors?

- Consider contacting creditors to negotiate short-term credit and payment extensions in light of cash flow needs and credit risk issues
- Consider drawing existing and available lines of credit to shore up working capital position
- Consider strategically stretching out payments to certain other non-critical trade creditors
- Consider reaching out to investors for short-term liquidity or equity infusions
- Consult with your Nelson Mullins corporate counsel to understand rights and obligations, and develop a strategy and plan before communicating with creditors

How can we identify and secure alternative sources of funding?

- Focus on maintaining current payments to lifeblood sources
- Review existing financing documents in consultation with your Nelson Mullins corporate counsel and financial advisors to determine available alternatives and how best to structure other arrangements; keep existing intercreditor restrictions in mind and ask "what if" questions to anticipate intercreditor concerns that alternatives could introduce
- Consider reaching out to investors for short-term liquidity or equity infusions
- Consider straight loan or promissory note if the company is in a position to pay a fixed sum or interest, and evaluate valuation, dilution and cap table impacts if considering SAFE, convertible note, warrant, preferred or other equity
- Consider governance issues including necessary board and investor approvals, creditor consents, intercreditor and tax issues
- Consider selling non-core assets

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How do we obtain a line of credit in this environment?

- New bank relationships require "Know Your Customer" processing, which require lead time that could be even more protracted in the current climate

- New lines of credit require lead time for underwriting, credit approval and documentation and, if you have other debt facilities in place already, potential consent from existing lenders
- Consider expanding existing banking relationships to shorten potential lead times,

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What else should we take into account if we are considering bridge financing or other funding from our investors?

- In addition to above, consider SAFE, convertible note or a preferred stock round and extending any repayment terms
- Obtain interested party transaction approvals and addition to typical governance requirements such as board and investor approvals

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What are my company's reporting or disclosure obligations? What information should we share internally?

- Consult your Nelson Mullins corporate counsel and accounting advisors
- Your obligations depend in part on whether the company is public or private, accounting standards, securities laws, exchange rules, state corporate law, and your governance documents
- For a private company, managing the situation through open and informal communications with stakeholders may provide insight and useful information for financial and operational issues and reporting to the Board
- A public company affected by a bank shutdown or experiencing a liquidity challenge may have SEC disclosure obligations, and communications with stakeholders will be governed by securities laws
- Work with your Nelson Mullins corporate counsel to ensure that the board of directors receives and considers all material information related to business decisions and maintains appropriate records of any actions taken

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What should I keep in mind about board decision-making

- Consult with your Nelson Mullins corporate counsel about corporate approvals and fiduciary duties
- Maintain acute awareness of the possibility of self-dealing or even the appearance of self-dealing, and obtain appropriate approvals for any insider transactions, such as disinterested director or stockholder approval

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We are focused on conserving and managing cash. What should we be doing?

- Engage or hire experienced financial and accounting advisors (whether an outside consulting or other firm, or a fractional or full-time experienced finance employee or independent contractor)

- Consult with your Nelson Mullins corporate counsel about financial and other covenants in bank, credit and investor relationships, including notice and cross-default provisions
- Track financial position and obligations closely, with an eye on foot faults that could arise in the near, medium, and long-term horizon
- Challenge assumptions: long-term risks might suddenly become near-term ones.
- Focus on liquidity issues (cash position, cash flow and burn rate) and forecast for several months to meet obligations to creditors, considering limits on access to significant deposits or credit lines if a banking partner has closed and potential changes in the credit market more broadly
- Assess availability of alternative funding sources
- Update financial statements, plans and projections and underlying assumptions, and consult with board, advisors and key investors about appropriate adjustments
- Consult with advisors and partners on appropriate cash management, financial institution diversification and risk management strategies for your situation

How do we know if our business insurance is the right kind and amount to cover the risks our company and its directors and officers may face?

- Review existing insurance coverage in consultation with your Nelson Mullins corporate counsel and insurance brokers
- Determine whether losses from a bank closure are covered by business interruption or other insurance
- Review current D&O insurance coverage, including the applicable limits and periods of coverage

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Our company's insurance premium payment is coming due. Can we delay or defer payment if we are tight on cash?

- Insurance premiums should be paid when due, as failing to pay an insurance premium could cause the policy to lapse leaving it without coverage
- Consider contacting the insurance company to clarify any grace period or adjust any deductible
- Consult with an insurance broker and the board to evaluate whether there is a more affordable option. Review governance terms to see whether changes to insurance may require investor approval

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What if we may not meet our obligations after trying the above steps?

- Consult with your Nelson Mullins corporate, restructuring and bankruptcy counsel about specific duties, obligations and rights as well as to develop a plan

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- [The Failure of Silicon Valley Bank](#)
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 - [View PowerPoint](#)
- [The Vault](#)
- [FinTech Nostradamus](#)
- [SECurities in a SECond](#)

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