

Q&A for Customers and Counterparties of Silicon Valley Bank UK Limited

March 12, 2023

SVBUK is a separate legal entity¹ from the SVB Financial Group and is regulated in the United Kingdom.

At 11:45pm on 10 March 2023, the Bank of England issued a [statement](#), which indicated that “absent any meaningful further information” it intended to apply to the court to place SVBUK into “a Bank Insolvency Procedure”. A corresponding statement on SVBUK’s [website](#) states that the intention was to put SVBUK “into insolvency from Sunday evening”.

What’s the latest?

The situation is a developing one.

In an [update](#) published in the morning of 12 March 2023, HM Treasury issued a statement that “the government is treating [the insolvency of SVBUK] as a high priority, with discussions between the Governor of the Bank of England, the Prime Minister and the Chancellor taking place over the weekend. The government is working at pace on a solution to avoid or minimise damage to some of our most promising companies in the UK and we will bring forward immediate plans to ensure the short term operational and cashflow needs of Silicon Valley Bank UK customers are able to be met.”

Notably, HM Treasury is reported to have been in talks with members of the tech industry, which would be particularly affected by SVBUK’s failure.² It has invited startups affected by SVBUK to send information in confidence to EST@HMTreasury.gov.uk with the subject line ‘SVB UK’. Please include: (a) Name of firm; (b) Approximate deposit at SVBUK; (c)

Please feel free to reach out to any of the following individuals or any of your Cleary contacts for more information regarding the SVBUK process.

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¹ Note that even if the contracts refer to the former UK branch, the assets and liabilities, including the loans and deposits of Silicon Valley Bank (UK Branch), were transferred to SVBUK on 31 July 2022 under Part VII of the Financial Services and Markets Act 2000.

² 140 UK tech companies have [written](#) to the Chancellor to ask for support following the collapse of SVBUK.



Approximate monthly cash ‘burn’; and (d) if you bank only with SVBUK or other UK banks.³

The following Q&As consider the position if the Bank of England proceeds as indicated with the bank insolvency procedure (“BIP”).

What will be the outcome of a BIP?

Depositors of SVBUK who are eligible for compensation by the Financial Services Compensation Scheme (the “FSCS”), which is the UK’s deposit insurance scheme, should see either: (a) the transfer of their eligible deposit accounts to another financial institution; or (b) compensation from the FSCS up to a limit of £85,000 per depositor (not per account) or up to £170,000 for joint accounts. FSCS-eligible depositors are broadly non-financial services firms, excluding certain other categories.

Whether option (a) or (b) is pursued would be based on the recommendation of the Bank of England, Financial Conduct Authority, Prudential Regulation Authority and the FSCS.

If your account is transferred under option (a) you should be able to access your accounts within a reasonable timescale following the transfer, allowing you to switch to another bank if you would like. You may wish to diversify your banking relationships going forward.

Once this process is completed, the process of liquidation would continue in much the same way as a normal winding-up with the liquidator calling a meeting of creditors, realising SVBUK’s assets and distributing the proceeds to creditors.

As the BIP processes could take some time to be completed, customers will need to consider any additional near-term funding needs that may arise if money is tied up at SVBUK and any disclosure or other obligations owed to investors, lenders and other stakeholders.

If I am not fully compensated by the FSCS, and my deposit account is not transferred, where would I rank?

FSCS-eligible depositors and the FSCS itself (the FSCS takes over a depositor’s claim, where it has paid compensation) are “super-preferred” in bank insolvency. This is meaningful in this context and means that the FSCS has a higher position in the insolvency creditor hierarchy to recover from the insolvency ahead of other unsecured creditors.

In the worst case scenario, deposits from individuals and “small and medium-sized enterprises”⁴ that exceed the protected amount would be unsecured claims but they are preferred to other unsecured liabilities, including deposits that are not eligible for FSCS coverage (although they rank behind the “super-preferred” protected deposits).

Other claims that rank ahead of depositors are secured creditors with a fixed charge over SVBUK’s assets. There does not appear to be fixed or floating charges filed with the UK Companies House. We note, however, that

³ See [Twitterpage](#) of Innovate Finance.

⁴ As defined with regard to the annual turnover criterion (broadly, a threshold of EUR 50 million) referred to in Article 2(1) of the Annex to Commission recommendation 2003/361/EC.

charges constituting “financial collateral arrangements” under the Financial Collateral (No 2) Regulations 2003 (“FCARs”) may not have been registered as these are exempted from the mandatory filing system.

The expenses and fees of the liquidators will also have priority over preferential and unsecured creditors in recovering from SVBUK in its insolvency.

Broadly speaking, the BIP would rank claims in the following order:

1. Holders of fixed charges.
2. Expenses of the insolvent estate (*e.g.*, expenses of the liquidator and expenses from the activities of the bank itself).
3. Preferential creditors. This covers a broad range of categories ranging from contributions to occupational and state pension schemes to tax debt and can be split into two further categories:
 - a. Ordinary preferential debts (super-senior preferential debts). This would include debts owed to the FSCS (taking the place of all protected depositors for amounts up to £85,000).
 - b. Secondary preferential debts which rank equally among themselves after the existing categories of ordinary preferential debts. This would include certain deposits owned to depositors that are not otherwise protected by the FSCS (broadly speaking, depositors that are individuals and micro, small and medium-sized businesses for amounts in excess of £85,000).
4. “Prescribed part” carved out from the realisation of the floating charge (if any) for unsecured creditors. The prescribed part is calculated as a percentage of the value of the company's property which is subject to floating charges, with 50% of the first £10,000 of net floating charge realisations plus 20% of anything after that, subject to a cap of the amount payable to those entitled of £800,000 where the first ranking floating charge is created on or after 6 April 2020 (£600,000 where it was created before then).
5. Holders of floating charges (after deduction of the “prescribed part” per above, unless they are covered by the FCARs in which case they are exempted from deduction of the prescribed part).
6. Unsecured creditors and non-preferential creditors.
7. Statutory interest, non-provable claims and subordinated creditors
8. Shareholders.

Are there stays? Are the “48 hour stays” relevant?

The BIP would be deemed to have commenced at the date of the Bank of England’s application to the court for the BIP.

Once the BIP commences, it will not be possible to commence or continue with “any action or proceeding” (*i.e.*, litigation) against the bank without the leave of the court.

In addition, any disposition of the bank's property made after the commencement of the BIP will be void, unless the court otherwise orders. However, collateral arrangements with SVBUK which constitute "financial collateral arrangements", as well as contractual termination and netting rights that amount to "close-out netting provisions", under the FCARs, are safe-harboured from this rule.

The temporary stays (on payments, enforcement of security and exercise of termination rights) that apply in a bank resolution context are not relevant.

What would be my set-off rights?

Prior to SVBUK entering into insolvency, contractual set-off and other close-out rights can be exercised if those rights are triggered under the terms of the contract.

Once the BIP commences, set-off will be available (indeed automatic) subject to insolvency rules. These require requires an account to be taken of the sums due in respect of the "mutual dealings" between SVBUK and the creditor, and the respective totals to be set off, so that only the balance may be claimed by the BIP liquidator or proved for by the creditor.

For FSCS eligible-depositors insolvency set-off will only apply to the amount over and above the £85,000 compensation limit threshold.

Insolvency rules would generally override inconsistent contractual provisions. However, the safe harbour under the FCARs generally also protects provisions qualifying as close-out netting provisions for the purposes of the FCARs, in this context, so that they should normally take effect in accordance with their terms.

What about client money/asset protection?

Any cash held by SVBUK for customers would likely be held as banker and not as trustee. On the other hand non-cash assets held by SVBUK as custodian (for example in the context of a security financial collateral arrangement without rights of rehypothecation) should not form part of the insolvency estate of SVBUK.

Can I get my money out now before any further announcement from the Bank of England?

It would appear unlikely in practice. The Bank of England statement notes that SVBUK "will stop making payments or accepting deposits".

What does it mean for me if I have a loan from SVBUK?

You should carefully review and consult with your legal advisors if necessary as to the documentation in place governing your loan from SVBUK. In light of the Bank of England statement, SVBUK is unlikely to make any further disbursements under any credit lines. To the extent you owe any amounts under a loan with SVBUK, you will still have an obligation to make those payments. As noted above, any amounts you owe SVBUK may be mandatorily set off against any unsecured claim you have against SVBUK in excess of the FSCS-protected deposit amounts.

If your loan documentation is based on the Loan Market Association form of facilities agreement, there may be "Defaulting Lender" provisions which could disapply SVBUK's voting rights and its right to receive a

commitment fee in respect of any committed but undisbursed amounts. Moreover, if you have entered into syndicated facilities and SVBUK is the agent under those facilities, the Loan Market Association form of facilities agreement contains provisions allowing the agent to be replaced. This may be necessary to ensure the smooth operation of the facilities as the agent is responsible for processing payments and acting on behalf of the other lenders in certain circumstances; functions which may be disrupted given SVBUK's insolvency.

Annex

Q&As about the BIP process

What is the BIP?

The BIP is a special insolvency procedure which was introduced to provide an alternative to both normal insolvency and bank resolution for the orderly winding up of a failed bank. Its principal aim is to ensure that, where a bank fails, depositors who are eligible claimants under the terms of the FSCS are paid out promptly.

Why isn't a bridge bank or other resolution process being used (like in the US)?

The Bank of England can only exercise a "stabilisation power" (resolution) if, among other things, this course of action is necessary in the public interest and this would better meet certain objectives, such as ensuring the continuity of critical functions, than insolvency proceedings. It appears that the Bank of England has preferred insolvency to resolution in this case because, according to its statement, "SVBUK has a limited presence in the UK and no critical functions supporting the financial system".

What procedure would the Bank of England have to follow for placing SVBUK into the BIP?

The Bank of England⁵ may make an application to the court for a BIP order. Assuming that SVBUK has FSCS-eligible depositors, the court may only grant the Bank of England's application if it is satisfied that (i) SVBUK is unable or is likely to become unable to pay its debts; or (ii) winding up its affairs would be "fair" (broadly equivalent to the "just and equitable" concept of UK insolvency law).

In general, the BIP order would be treated as having taken effect at the point when the application for the order was made.

What would SVBUK's liquidators' objectives and options?

A BIP liquidator has two objectives under the legislation:

- "Objective 1" - work with the FSCS to ensure that either: (a) the relevant accounts of eligible depositors are transferred to another financial institution; or (b) payments are made to eligible depositors.
- "Objective 2" - wind up the affairs of the bank in the interests of creditors as a whole.

Objective 1 takes precedence over Objective 2. The following aspects are notable:

- *Initial Liquidation Committee*: As regards the options in relation to the Objective 1, an initial "liquidation committee", made up of the Bank of England, the Prudential Regulation Authority, Financial Conduct Authority and the FSCS, must advise the BIP liquidator as to whether to pursue options (a) or (b).

⁵ Or the Prudential Regulation Authority or the Secretary of State. Alternatively, the Secretary of State may apply for a bank insolvency order if the bank has eligible depositors and on the ground "that the winding up of a bank would be in the public interest",

- *Transfer of Accounts:* Where the BIP liquidator agrees a deal for a bulk transfer of eligible depositor accounts to another financial institution (*i.e.*, option (a) is achieved), the terms of the deal may provide for contractual or legislative restrictions or consent requirements in respect of the transfer to be overridden. As a safeguard for depositors, however, the BIP liquidator must seek to ensure that depositors will be able to access their accounts within a reasonable timescale following the transfer.
- *Role of FSCS:* For the purpose of co-operating in the pursuit of Objective 1, the FSCS may make or arrange for payments to or in respect of eligible depositors (rather than such compensation payments being funded from the assets of the failed bank); or may make money available to facilitate a transfer of accounts so that depositors have continued access to their funds and banking services generally.

What role can creditors have?

Once Objective 1 has been achieved, the BIP liquidator is obliged to call a meeting of creditors. At that meeting the creditors may elect new members to the liquidation committee.

At this stage, the representatives from the Bank of England, Financial Conduct Authority and the Prudential Regulation Authority will be obliged to stand down from the committee. However, the FSCS (as it will be a significant creditor in the insolvency having taken over the claims of the eligible depositors) will have the option to retain its presence.⁶

The committee can require the BIP liquidator to report to them on matters relating generally to the winding up of a company and the liquidator may take certain actions only with the committee's approval.

In what way will the BIP come to an end?

Once all the assets of the bank have been realised, the proceeds distributed to creditors and all the necessary formalities have been completed, the bank would normally be dissolved.

However, it is possible that the bank could be rescued through administration or a company voluntary arrangement, subject to certain conditions - a key proviso being that either all eligible depositors have received their compensation or that arrangements have been made with the FSCS with regard to any outstanding payments.

⁶ There are also certain ongoing entitlements of the Prudential Regulation Authority, the Financial Conduct Authority and the Bank of England: for instance they will be able to attend future meetings of the liquidation committee and may participate in legal proceedings relating to the BIP.