

# **Frequently Asked Questions Related to a Bank Holding Company Bankruptcy**

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### What happens when the parent holding company (“HoldCo”) of an operating subsidiary bank (“Operating Bank”) that is subject to FDIC receivership files for chapter 11 bankruptcy relief?

- The filing of the bankruptcy petition creates an “estate” comprised of all the debtor’s legal or equitable interests in property as of the filing date.
- The bankruptcy court has jurisdiction over all the debtor’s assets, wherever located and by whomever held.
- The automatic stay—a broad statutory injunction prohibiting all actions (with certain exceptions) against the debtor or property of the estate relating to prepetition claims—goes into effect upon the filing of the bankruptcy petition. “Willful” violations of the automatic stay are punishable by sanctions for contempt of court.
- Under chapter 11, HoldCo may continue to operate its business, subject to court oversight, but cannot pay prepetition obligations without first obtaining court authority.
- HoldCo may fund its business using (i) unencumbered assets, (ii) encumbered assets with the consent of any existing secured lender or approval of the bankruptcy court, which will require that the existing secured lender be adequately protected, or (iii) new loans that are (a) treated as administrative expenses, (b) secured by unencumbered assets, (c) secured on a junior basis by encumbered assets, and/or (d) secured by encumbered assets on a senior/priority basis with the consent of any existing secured lender or the approval of the bankruptcy court, which will require that the existing secured lender be adequately protected.
- HoldCo may utilize the bankruptcy case to pursue a sale of all or substantially all of its assets to a buyer through either a section 363 sale process or pursuant to a chapter 11 plan.
- If HoldCo previously made any enforceable commitment to a federal depository institutions regulatory agency (like the FDIC) to maintain the capital of the Operating Bank, the FDIC may seek to enforce any outstanding capital commitment obligations in full, pursuant to section 365(o) of the Bankruptcy Code, which provides that a chapter 11 debtor is deemed to have assumed any commitment to a federal depository institutions regulatory agency to maintain the capital of an insured depository institution and is required to cure immediately any deficit related to such commitment.
- If HoldCo does not have the means to satisfy the capital maintenance obligations, the chapter 11 case would likely convert to a case under chapter 7 of the Bankruptcy Code, and the FDIC’s claim for breach of these obligations would be entitled to a ninth level of priority in distributions to unsecured creditors in the chapter 7 case.
- A dispute could also arise between the FDIC and HoldCo regarding ownership of any tax refunds issued to the consolidated group pursuant to a consolidated tax return, which may result in litigation over the terms of any tax sharing agreement between HoldCo and the Operating Bank.

### How does a HoldCo bankruptcy affect the FDIC receivership of the Operating Bank?

- The automatic stay does not prohibit a governmental unit’s enforcement of its police or regulatory powers against the debtor.
- The automatic stay also does not protect non-debtors; it will not prevent the FDIC from continuing its receivership of the Operating Bank.

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### How do creditors protect their rights in a chapter 11 case?

- Creditors have standing in a chapter 11 case to appear and be heard on any matter.
- An Official Creditors Committee is appointed by the Office of the United States Trustee to represent the interests of unsecured creditors.
- The United States Trustee supervises the administration of chapter 11 cases and has standing to be heard on any matter.

### How are funds distributed in a chapter 11 case?

- When the debtor files, every prepetition debt becomes a claim against the debtor's estate.
- Generally, creditors have a time period in which to submit claims against a debtor that is set by bankruptcy court overseeing the chapter 11 case.
- The debtor will review claims and can object to a claim it does not agree with. If the claim objection is not settled, in most instances the bankruptcy court will determine the validity, priority and/or amount of the claim (subject to appeal). Other parties in interest can also object to claims.
- The estate's value is distributed to creditors holding allowed claims according to the "priority" of their claims. The order of distribution is: "superpriority/priming" secured claims; secured claims; adequate protection claims; priority claims; unsecured claims; equity interests.
- The "absolute priority rule" requires that a plan pay a dissenting class in full before any class junior to the dissenting class receives any recovery.
- Recovery for general unsecured creditors and equity interests will depend on the value of, or the net recovered proceeds from the reorganization, sale or liquidation of any of HoldCo's assets and the amount of its secured obligations, administrative expenses, and priority claims.

### What is the timing of distributions?

- Generally, distributions are made after the confirmed chapter 11 plan goes effective. Confirmation of a chapter 11 plan requires approval of a disclosure statement containing information of a kind and detail reasonably practicable to allow an informed judgment about the plan, the solicitation of acceptances and rejections of the plan, and the satisfaction of numerous statutory elements (including, compliance with law, good faith, class acceptance or class cram-down, the consent of one impaired class of creditors if any class of creditors is impaired, feasibility of the plan, and adequate means of implementation).
- To the extent the plan contemplates a post-confirmation liquidating or litigating trust, distributions on interests in the trust may be made over several years, depending on the timing of the liquidation of assets or resolution of claims assigned to the trust.

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