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## **Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers (Banking Insolvency Ordinance, BIO-FINMA)**

of 30 August 2012 (Status as of 1 January 2015)

**Please note:** this translation does not yet include the amendments of 01.01.2016

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*The Swiss Financial Market Supervisory Authority FINMA,*

based on Article 28 paragraph 2 and Article 34 paragraph 3 of the Banking Act of 8 November 1934<sup>1</sup> (BankA),

Article 36a of the Stock Exchange Act of 24 March 1995<sup>2</sup> (SESTA),

and Article 42 of the Mortgage Bond Act of 25 June 1930<sup>3</sup> (MBA)

*decrees:*

### **Chapter 1: General Provisions**

#### **Art. 1**            Object

This Ordinance defines restructuring proceedings and bankruptcy proceedings under Articles 28-37g BankA.

#### **Art. 2**            Scope of application

<sup>1</sup> This Ordinance applies to the following, referred to below as banking institutions and persons:

- a. banks under the BankA;
- b. securities dealers under the SESTA;
- c. central mortgage bond institutions under the MBA.

<sup>2</sup> The provisions on bank restructuring (Arts. 40-57) do not apply to individuals and legal entities operating without the requisite licence. FINMA may declare them applicable where there is sufficient public interest.

AS 2012 5573

<sup>1</sup> SR 952.0

<sup>2</sup> SR 954.1

<sup>3</sup> SR 211.423.4

**Art. 3** Universality

<sup>1</sup> If bankruptcy proceedings or restructuring proceedings are opened, they cover all realisable assets in a bank's possession at the time in question, regardless of whether they are located in Switzerland or abroad.

<sup>2</sup> All Swiss and foreign creditors of the bank and its foreign branches are equally entitled to participate in bankruptcy proceedings or restructuring proceedings opened in Switzerland and enjoy the same privileges.

<sup>3</sup> The assets of a branch of a foreign bank operating in Switzerland include all assets in Switzerland and abroad that are constituted by parties acting on behalf of that branch.

**Art. 4** Public notices and communications

<sup>1</sup> Public notices are published in the Swiss Official Gazette of Commerce and on the FINMA website.

<sup>2</sup> Communications are sent directly to creditors whose name and address are known. If it simplifies the proceedings, FINMA may require creditors domiciled or residing abroad to appoint an authorised person for service in Switzerland. For reasons of urgency or to simplify the procedure, direct communications may be dispensed with.

<sup>3</sup> With regard to deadlines and the legal consequences associated with a public notice, publication in the Swiss Official Gazette of Commerce is the deciding factor.

**Art. 5** Inspection of documents

<sup>1</sup> Any person making a credible claim that their financial interests are directly affected by the restructuring or the bankruptcy is entitled to inspect documents relating to the restructuring or the bankruptcy, although professional confidentiality in accordance with Article 47 BankA and Article 43 SESTA must be observed wherever possible.

<sup>2</sup> The right to inspect documents may be restricted to specific stages of the proceedings, or it may be limited or refused where opposing interests take precedence.

<sup>3</sup> Any person granted the right to inspect documents may only use the information received through inspecting documents to protect their own immediate financial interests.

<sup>4</sup> The right to inspect documents may be made dependent on a declaration which states the information inspected may only be used to protect the individual's own immediate financial interests. In the event of any failure to comply, reference may be made in advance to the criminal penalties under Article 48 of the Financial Market Supervision Act of 22 June 2007<sup>4</sup> and Article 292 of the Swiss Criminal Code<sup>5</sup>.

<sup>4</sup> SR 956.1

<sup>5</sup> SR 311.0

<sup>5</sup> The restructuring agent or bankruptcy administrator and, following completion of the restructuring proceedings or bankruptcy proceedings, FINMA shall decide on the right to inspect documents.

**Art. 6**            Complaints to FINMA

<sup>1</sup> Any person whose interests are adversely affected by a decision, an act or an omission by a person who was entrusted with tasks in accordance with this Ordinance may make a complaint to FINMA.

<sup>2</sup> Any decisions made by these persons are not regarded as rulings and the complainants are not deemed to be parties within the meaning of the Federal Act of 20 December 1968<sup>6</sup> on Administrative Procedure (APA).

<sup>3</sup> FINMA shall assess the facts reported, take the necessary measures and issue a ruling if required.

**Art. 7**            Insolvency venue

<sup>1</sup> The insolvency venue is the location of the registered office of the bank or the Swiss branch of a foreign bank.

<sup>2</sup> If a bank has more than one registered office or a foreign bank has more than one Swiss branch, there will only be one insolvency venue. This venue shall be determined by FINMA.

<sup>3</sup> In the case of individuals, the insolvency venue is the person's business domicile at the time the bankruptcy proceedings or restructuring proceedings are opened.

**Art. 8**            Book claims and liabilities

The bank's claims and liabilities are deemed to be book claims and liabilities where the bank's books are kept properly and the bankruptcy liquidator is genuinely able to discern that the claim or liability exists and the extent to which they exist.

**Art. 9**            Coordination

FINMA and the restructuring agent or bankruptcy liquidator shall coordinate their actions as far as possible with authorities and governing bodies in Switzerland and abroad.

**Art. 10**          Recognition of foreign bankruptcy decrees and measures

<sup>1</sup> Where FINMA recognises a foreign bankruptcy decree or a foreign insolvency measure in accordance with Article 37g BankA, the provisions of this Ordinance apply to the assets located in Switzerland.

<sup>2</sup> Even if there are no reciprocal rights, FINMA may meet recognition requests where this is in the interests of the creditors affected.

<sup>3</sup> It shall determine one insolvency venue in Switzerland and the privileged creditors under Article 37g paragraph 4 BankA.

<sup>4</sup> It shall give public notice of the recognition and the circle of creditors.

## **Chapter 2: Bankruptcy**

### **Section 1: Procedure**

#### **Art. 11** Publication and notice to creditors

<sup>1</sup> FINMA shall inform the bank of the bankruptcy order and give public notice of it together with notice to creditors.

<sup>2</sup> Public notice shall be given of the following details in particular:

- a. the bank's name as well as its registered office and branches;
- b. the date and time of the opening of bankruptcy proceedings;
- c. the bankruptcy venue;
- d. the name and address of the bankruptcy liquidator;
- e. a notice to creditors and persons who have claims to assets held with the bank instructing them to register their claims, together with proof of the same, with the bankruptcy liquidator within a specific deadline;
- f. a reference to claims that qualify as registered under Article 26;
- g. a reference to the surrender and reporting obligations under Articles 17-19.

<sup>3</sup> The bankruptcy liquidator may provide known creditors with a copy of the notice.

#### **Art. 12** Appointing a bankruptcy liquidator

<sup>1</sup> FINMA shall issue a ruling appointing a bankruptcy liquidator unless it is to carry out the liquidator's duties itself.

<sup>2</sup> Where FINMA appoints a bankruptcy liquidator, it must ensure when making its choice that the liquidator has sufficient time and expertise to perform the mandate diligently, efficiently and effectively and is not subject to any conflict of interests that might compromise his or her ability to perform the mandate.

<sup>3</sup> It specifies the details of the task, in particular regarding the bankruptcy liquidator's costs, reporting and control.

#### **Art. 13** The bankruptcy liquidator's tasks and powers

The bankruptcy liquidator conducts the proceedings. In particular, he or she must

- a. create the technical and administrative conditions for conducting the bankruptcy;
- b. secure and realise the bankruptcy assets;

- c. put in place the executive management required for the bankruptcy proceedings;
- d. represent the bankruptcy assets and other authorities before the courts;
- e. ensure, in conjunction with the agency of the deposit protection scheme, that the deposits protected under Article 37*h* BankA are identified and paid out.

**Art. 14** Assembly of creditors

<sup>1</sup> If the bankruptcy liquidator deems it necessary to convene an assembly of creditors, he or she shall submit a request to this effect to FINMA. The latter shall stipulate the powers of the assembly of creditors as well as the quorum and voting majority requirements.

<sup>2</sup> All creditors are entitled to attend or be represented at the assembly. In cases of doubt, the bankruptcy liquidator decides on admission.

<sup>3</sup> The bankruptcy liquidator chairs the hearing and reports on the bank's assets and the progress of the proceedings.

<sup>4</sup> The creditors may pass resolutions by circular vote. Creditors who do not expressly reject the bankruptcy liquidator's proposal within the specified deadline are regarded as being in agreement with it.

**Art. 15** Committee of creditors

<sup>1</sup> FINMA decides, at the request of the bankruptcy liquidator, on the appointment, composition, tasks and powers of a committee of creditors.

<sup>2</sup> If the agency of the deposit protection scheme has paid out a substantial amount of privileged assets under Article 37*h* BankA, it must nominate a person to represent its interests on the committee of creditors.

<sup>3</sup> FINMA determines the chair, the voting procedure and the compensation of the individual members.

## **Section 2: Bankruptcy Assets**

**Art. 16** Inventory

<sup>1</sup> The bankruptcy liquidator draws up an inventory of the bankruptcy assets.

<sup>2</sup> The inventory is drawn up in accordance with Articles 221 to 229 of the Federal Act of 11 April 1889<sup>7</sup> on Debt Enforcement and Bankruptcy (DEBA), unless this Ordinance provides otherwise.

<sup>3</sup> The assets held in custody that are to be segregated under Article 37*d* BankA must be recorded in the inventory at their market value at the time the bankruptcy pro-

<sup>7</sup> SR 281.1

ceedings were opened. The inventory shall refer to any claims on the bank's part against depositors that conflict with segregation.

<sup>4</sup> The bankruptcy liquidator shall submit a request to FINMA for the measures required to secure the bankruptcy assets.

<sup>5</sup> He or she shall forward the inventory to the banker or a person selected by the bank's owners to act as the bank's agent. This person must confirm that the inventory is complete and correct. Their confirmation must be recorded in the inventory.

**Art. 17** Surrender and reporting obligation

<sup>1</sup> The bank's debtors and persons who have taken possession of the bank's assets through a pledge or for any other reason must report to the bankruptcy liquidator within the deadline specified in Article 11 paragraph 2 letter e and release the assets to him or her.

<sup>2</sup> Claims for which the right to offset has been asserted must still be reported.

<sup>3</sup> Any existing pre-emptive right lapses in the event of an unjustifiable failure to report or surrender.

**Art. 18** Exceptions to the obligation to surrender

<sup>1</sup> Securities and other financial instruments serving as collateral need not be surrendered provided the legal conditions for the collateral recipient to take responsibility for their realisation are met.

<sup>2</sup> However, these assets must be reported, together with proof of the right to realise them, to the bankruptcy liquidator, who shall make a note of them in the inventory.

<sup>3</sup> The collateral recipient must agree a settlement with the bankruptcy liquidator over the proceeds from the realisation of these assets. Any surplus accrues to the bankruptcy assets.

**Art. 19** Exceptions to the obligation to report

FINMA may waive the requirement for debtors to be reported in respect of book claims.

**Art. 20** Segregation

<sup>1</sup> The bankruptcy liquidator checks the surrender of assets claimed by third parties.

<sup>2</sup> If he or she believes a surrender claim to be justified, the bankruptcy liquidator shall offer the creditors the opportunity to demand assignment of their right to object under Article 260 paras. 1 and 2 DEBA<sup>8</sup> and set a reasonable deadline for this purpose.

<sup>3</sup> If he or she believes a surrender claim to be unjustified, or if creditors have demanded assignment of their right to object, the bankruptcy liquidator shall set the

<sup>8</sup> SR 281.1

person making the claim a deadline for filing an action before the court at the bankruptcy venue. If the deadline is allowed to expire, the surrender claim is regarded as waived.

<sup>4</sup> In the case of assignment, the action must be filed against the assignee creditors. The bankruptcy liquidator shall provide the third party with the details of the assignee creditors when setting the deadline.

**Art. 21** Assets due, bankruptcy estate and contestation

<sup>1</sup> Claims falling due to the bankruptcy assets are collected by the bankruptcy liquidator, through debt enforcement if necessary.

<sup>2</sup> The bankruptcy liquidator shall check claims on the part of the bankruptcy assets for movable assets in the custody or co-custody of a third party or land entered in the Land Register in the name of a third party.

<sup>3</sup> He or she shall also check if legal transactions under Articles 285 to 292 DEBA<sup>9</sup> may be contested. The duration of any prior restructuring proceedings or any prior order for protective measures under Article 26 paragraph 1 letters e-h BankA are not taken into account in the deadlines under Articles 286 to 288 DEBA.

<sup>4</sup> If the bankruptcy liquidator intends to pursue a contested claim in accordance with paragraph 2 or 3 through the actions process, he or she shall obtain approval and appropriate instructions from FINMA.

<sup>5</sup> If the bankruptcy liquidator does not file a claim, he or she shall give the creditors the opportunity to demand assignment within the meaning of Article 260 paragraphs 1 and 2 DEBA or to realise the claims in question and any other entitlements under Article 31.

<sup>6</sup> If he or she gives the creditors the opportunity to demand assignment, he or she shall set them an appropriate deadline.

<sup>7</sup> Realisation in accordance with Article 31 is not permitted in the case of contested claims under paragraph 3 or responsibility claims under Article 39 BankA.

**Art. 22** Continuation of ongoing proceedings under civil and administrative law

<sup>1</sup> The bankruptcy liquidator shall assess claims on the part of the bankruptcy assets that are already the subject of proceedings under civil and administrative law at the time the bankruptcy proceedings are opened and submit a request to FINMA for the continuation of these proceedings.

<sup>2</sup> If FINMA rejects a request for continuation, the bankruptcy liquidator shall give the creditors the opportunity to demand assignment of their right to continue proceedings within the meaning of Article 260 paragraphs 1 and 2 DEBA<sup>10</sup> and set a reasonable deadline for this purpose.

<sup>9</sup> SR 281.1

<sup>10</sup> SR 281.1

**Art. 23** Discontinuation due to lack of assets

<sup>1</sup> If the bankruptcy assets are not sufficient to continue the bankruptcy proceedings, the bankruptcy liquidator shall submit a request to FINMA to discontinue the proceedings.

<sup>2</sup> FINMA shall continue the proceedings in exceptional cases, in particular where there is a special interest in doing so, even if the bankruptcy assets are not sufficient.

<sup>3</sup> If FINMA intends to discontinue proceedings, it shall give public notice of this fact, stating that it will continue them if a creditor can provide security for the costs of the proceedings not covered by the bankruptcy assets within a specified deadline. FINMA shall set the deadline as well as the type and amount of the security.

<sup>4</sup> If the required security is not provided within the deadline, all pledgees may demand realisation of the assets pledged in their favour by FINMA within a deadline specified by the latter. FINMA shall instruct a bankruptcy liquidator to proceed with the realisation.

<sup>5</sup> In the case of legal entities, FINMA shall order the realisation of assets that are not subject to a demand for realisation from a pledgee within the specified deadline. Any proceeds remaining after the realisation costs and any encumbrances attached to individual assets are covered go to the federal government once the costs incurred by FINMA have been covered.

<sup>6</sup> Where bankruptcy proceedings against individuals are discontinued, the debt enforcement procedure is governed by Article 230 paragraphs 3 and 4 DEBA.<sup>11</sup>

**Section 3: Bankruptcy Liabilities****Art. 24** Groups of creditors

<sup>1</sup> Where a joint claim against the bank exists, the group shall be treated as a creditor in its own right, separate from its individual members.

<sup>2</sup> Solidary claims shall be attributed to the solidary creditors in equal shares, provided the bank has no setting-off right. The shares are treated as claims on the part of each individual solidary creditor.

**Art. 25** Privileged deposits

<sup>1</sup> Under Article 37a BankA privileged deposits are:

- a. client claims arising from banking or securities dealing operations that are booked or should be booked as liabilities from client deposits in the balance-sheet.
- b. medium-term notes booked as medium-term notes in the balance sheet that are deposited at the bank in the depositor's name.<sup>12</sup>

<sup>11</sup> SR 281.1



<sup>2</sup> Within the meaning of Article 37a BankA privileged deposits are not:

- a. bearer claims;
- b. medium-term notes that are not held at the bank;
- c. contractual and non-contractual compensation claims such as compensation claims for custody assets no longer at the bank's disposal in accordance with Article 37d BankA.

<sup>3</sup> Claims on the part of bank foundations under Article 5 paragraph 2 of the Ordinance of 13 November 1985<sup>13</sup> on Tax-deductible Contributions to Recognised Forms of Retirement Provision and on the part of vested benefits foundations under Article 19 paragraph 2 of the Vested Benefits Ordinance of 3 October 1994<sup>14</sup> qualify as deposits belonging to the individual pension fund members and policy holders. However, these claims shall be paid out to the respective bank foundation or vested benefits foundation.

#### **Art. 26** Verification of claims

<sup>1</sup> The bankruptcy liquidator shall verify the claims registered and those to be considered by law. He or she may make enquiries personally and ask the creditors to provide additional proof.

<sup>2</sup> The following claims shall be considered by law:

- a. land register claims, complete with accrued interest; and
- b. book claims under Article 8.

<sup>3</sup> The bankruptcy liquidator obtains a statement of claims that are not book claims from the banker or from a person selected by the bank's owners to act as the bank's agent.

#### **Art. 27** Schedule of claims

<sup>1</sup> The bankruptcy liquidator shall decide whether, to what extent and with what rank claims are recognised and shall draw up the schedule of claims.

<sup>2</sup> If the bankruptcy assets include land, he or she shall draw up a schedule of the encumbrances on that land such as rights of lien, easements, land charges and priority notices. This schedule shall form part of the schedule of claims.

<sup>3</sup> The bankruptcy liquidator may with FINMA's consent draw up a separate schedule of claims for claims secured by a registered pledge if systemic risks can only be restricted by doing so.

<sup>12</sup> Amended by No I of the FINMA Ordinance of 27 March 2014, in force since 1 Jan. 2015 (AS 2014 1309).

<sup>13</sup> SR 831.461.3

<sup>14</sup> SR 831.425

**Art. 28** Claims subject to proceedings under civil and administrative law

<sup>1</sup> Claims that are already the subject of proceedings under civil or administrative law at the time the bankruptcy proceedings are opened in Switzerland must initially be marked in the schedule of claims *pro memoria*.

<sup>2</sup> If the bankruptcy liquidator opts not to continue the proceedings under civil and administrative law, he or she shall give the creditors the opportunity to demand assignment in accordance with Article 260 paragraph 1 DEBA<sup>15</sup>.

<sup>3</sup> Unless proceedings under civil and administrative law are continued by the bankruptcy assets or by individual assignee creditors, the claim is deemed to be recognised, and the creditors no longer have any right to contest it via an action to contest the schedule of claims.

<sup>4</sup> Where proceedings are continued by individual assignee creditors, the amount by which the success of these proceedings reduces the subordinated creditors' share of the bankruptcy assets serves to satisfy the assignee creditors up to the full coverage of their collocated claims as well as the cost of the proceedings. Any surplus accrues to the bankruptcy assets.

**Art. 29** Inspection of the schedule of claims

<sup>1</sup> The creditors may inspect the schedule of claims under Article 5 for a period of at least 20 days.

<sup>2</sup> The bankruptcy liquidator shall give public notice of when and how the schedule of claims may be inspected.

<sup>3</sup> He or she may provide for inspection at the Bankruptcy Office in the bankruptcy venue.

<sup>4</sup> The bankruptcy liquidator shall inform every creditor whose claim was not collocated as registered or as a book or land register claim why the claim was rejected in full or in part.

**Art. 30** Actions to contest the schedule of claims

<sup>1</sup> Actions to contest the schedule of claims are governed by Article 250 DEBA.<sup>16</sup>

<sup>2</sup> The deadline for actions runs from the point when the schedule of claims may first be inspected.

**Section 4: Realisation****Art. 31** Type of realisation

<sup>1</sup> The bankruptcy liquidator shall decide on the type and timing of realisation and shall carry it out.

<sup>15</sup> SR 281.1

<sup>16</sup> SR 281.1

<sup>2</sup> Pledged assets may not be realised by means other than a public auction except with the pledgees' consent.

- <sup>3</sup> Assets may be realised without delay if they
- a. are subject to rapid depreciation;
  - b. generate unreasonably high administrative costs;
  - c. are traded on a representative market; or
  - d. are of insignificant value.

**Art. 32** Public auction

<sup>1</sup> Public auctions are held in accordance with Articles 257-259 DEBA<sup>17</sup> unless this Ordinance specifies otherwise.

<sup>2</sup> The bankruptcy liquidator shall conduct the auction. He or she may set a reserve price for the first auction in the terms and conditions.

<sup>3</sup> He or she shall give public notice that the terms and conditions may be inspected. He or she may provide for inspection at the Bankruptcy or Debt Enforcement Office at the bankruptcy venue.

**Art. 33** Assignment of legal claims

<sup>1</sup> In the certificate of assignment pertaining to a legal claim on the part of the bankruptcy assets within the meaning of Article 260 DEBA<sup>18</sup>, the bankruptcy liquidator shall specify the deadline within which the assignee creditors must assert their claim before the court. If the deadline is allowed to expire, the assignment lapses.

<sup>2</sup> The assignee creditors shall report without delay the outcome of their assertion to the bankruptcy liquidator and, following completion of the bankruptcy proceedings, to FINMA.

<sup>3</sup> Where no creditor demands assignment or the deadline expires without the claim being asserted, the bankruptcy liquidator and, following completion of the bankruptcy proceedings, FINMA shall decide on any further realisation of the legal claims in question.

**Art. 34** Contestation of realisation actions

<sup>1</sup> The bankruptcy liquidator shall periodically draw up a realisation plan containing information on the bankruptcy assets awaiting realisation and the nature of their realisation.

<sup>2</sup> Realisation actions that may proceed without delay in accordance with Article 31 need not be included in the realisation plan.

<sup>3</sup> The assignment of legal claims under Article 33 does not constitute a realisation action.

<sup>17</sup> SR 281.1

<sup>18</sup> SR 281.1

<sup>4</sup> The bankruptcy liquidator forwards the realisation plan to the creditors and sets them a deadline within which they may demand a contestable ruling from FINMA on individual realisation actions contained therein.

## Section 5: Distribution

### Art. 35 Bankruptcy liabilities

The following liabilities are covered first from the bankruptcy assets in the order listed:

- a. liabilities under Article 37 BankA and under Article 43 of this Ordinance;
- b. liabilities incurred by the bankruptcy assets during the proceedings;
- c. all costs incurred through the opening and conduct of the bankruptcy proceedings;
- d. liabilities towards a third-party custodian under Article 17 paragraph 3 of the Book Entry Securities Act of 3 October 2008<sup>19</sup>.

### Art. 36 Distribution

<sup>1</sup> The bankruptcy liquidator may provide for provisional distributions. He or she shall draw up a provisional distribution list for this purpose and forward it to FINMA for approval.

<sup>2</sup> If all assets have been realised and all processes relating to the calculation of assets and liabilities have been completed, the bankruptcy liquidator shall draw up the final distribution list as well as the final accounts and forward these to FINMA for approval. The proceedings conducted by individual creditors under Article 260 DEBA<sup>20</sup> may be disregarded.

<sup>3</sup> Once the distribution list has been approved, the bankruptcy liquidator shall pay out to the creditors.

<sup>4</sup> No payout is made for claims

- a. whose existence or amount has not been definitively established;
- b. whose beneficiaries are not definitively known;
- c. that are partially covered by collateral outside Switzerland or under Article 18 that has not been realised; or
- d. that are likely to be partially covered by a pending settlement in foreign foreclosure proceedings connected to the bank bankruptcy.

<sup>5</sup> If a separate schedule of claims is drawn up in accordance with Article 27 paragraph 3, the bankruptcy liquidator may with FINMA's consent carry out the distri-

<sup>19</sup> SR 957.1

<sup>20</sup> SR 281.1

bution once this Ordinance has entered into force, and independently of the entry into force of the schedule of claims regarding the remaining claims.

**Art. 37** Certificate of loss

<sup>1</sup> Creditors may demand a certificate of loss under Article 265 DEBA<sup>21</sup> for the amount of their claim that remains outstanding from the bankruptcy liquidator and, following completion of the bankruptcy proceedings, from FINMA against payment of a flat fee.

<sup>2</sup> The bankruptcy liquidator shall inform the creditors of this option when paying out their share.

**Art. 38** Depositing

<sup>1</sup> Subject to the rules on dormant assets, FINMA shall issue the necessary instructions for depositing the shares not yet paid out as well as the segregated custody assets not yet surrendered.

<sup>2</sup> Deposited assets that become free or are not withdrawn after 10 years shall be realised and distributed in accordance with Article 39 unless special legislation provides otherwise.

**Art. 39** Assets discovered after the fact

<sup>1</sup> If assets or other legal claims that have not previously been included in the bankruptcy assets are discovered within 10 years of the bankruptcy proceedings being completed, FINMA shall appoint a bankruptcy liquidator to restart the bankruptcy proceedings without further formalities.

<sup>2</sup> Assets discovered after the fact or legal claims shall be distributed to creditors who suffered a loss and for whom the bankruptcy liquidator has the details needed to make the payout. The bankruptcy liquidator may ask creditors to provide up-to-date details, stating that these are required in connection with their claim. He or she shall set a reasonable deadline for this purpose.

<sup>3</sup> Where it is clear that the costs incurred through restarting the bankruptcy proceedings will not be covered or will only be marginally exceeded by the expected proceeds from realising the assets discovered after the fact, FINMA may refrain from restarting the proceedings. In such cases, it shall pass the assets discovered after the fact to the federal government.

<sup>21</sup> SR 281.1

## Chapter 3: Restructuring

### Section 1: Procedure

#### Art. 40 Prerequisites

<sup>1</sup> The prospect of restructuring the bank or continuing individual banking services is justified if, at the time of the decision, there is sufficient evidence that:

- a. the creditors are likely to fare better from the restructuring than from the bankruptcy; and
- b. the restructuring plan is feasible in terms of time and scope.

<sup>2</sup> There is no automatic entitlement to opening restructuring proceedings.

#### Art. 41 Opening

<sup>1</sup> FINMA opens the restructuring proceedings with a ruling.

<sup>2</sup> It shall give public notice of the opening immediately.

<sup>3</sup> In its opening ruling, it shall specify whether existing protective measures under Article 26 BankA are to be maintained or altered, or replaced by new ones.

<sup>4</sup> When it opens the restructuring proceedings, it may also already approve the restructuring plan.

#### Art. 42 Restructuring agent

<sup>1</sup> FINMA shall issue a ruling appointing a restructuring agent, unless it is to carry out these duties itself.

<sup>2</sup> Where FINMA appoints a restructuring agent, it must ensure when making its choice that the agent has sufficient time and expertise to carry out the mandate diligently, efficiently and effectively and is not subject to any conflict of interests that might compromise its ability to perform the mandate.

<sup>3</sup> It shall determine the restructuring agent's powers and whether he or she is authorised to act in place of the bank's governing bodies. During the duration of the restructuring proceedings, he or she may in particular make commitments pertaining to the restructuring to be honoured by the bank.

<sup>4</sup> FINMA shall specify the details of the task, in particular with regard to the restructuring agent's costs, reporting and control.

#### Art. 43 Liabilities during the restructuring proceedings

During the restructuring proceedings, liabilities into which the bank enters with the restructuring agent's consent shall, in the event that restructuring fails, be satisfied before all other claims in the ensuing bankruptcy proceedings.

**Art. 44** Restructuring plan

<sup>1</sup> The restructuring plan shall set out the basic elements of the restructuring, the bank's future capital structure and business model after the restructuring, and explains how it fulfils the conditions for approval under Article 31 paragraph 1 BankA.

<sup>2</sup> The restructuring plan shall also provide information on the following elements:

- a. future compliance with the licensing requirements;
- b. the bank's assets and liabilities;
- c. the bank's future organisation and management and, if the bank is part of a banking group or a banking conglomerate, the future organisation of the group or conglomerate;
- d. whether and how the restructuring plan affects the rights of the bank's creditors as well as the owners;
- e. whether the bank's right to contest legal acts and assert civil responsibility claims under Article 32 BankA are excluded;
- f. which current members of the bank's governing bodies are to retain responsibility for its management, and why this is in the interests of the bank, its creditors and its owners;
- g. the severance settlements for departing members of governing bodies;
- h. those transactions which require an entry in the Commercial Register or in the Land Register; and
- h. the provisions in Sections 3 and 4 of this Chapter which are to be applied to a specific restructuring case.

<sup>3</sup> FINMA may request that the restructuring plan provide information on additional elements.

**Section 2: Approval of the Restructuring Plan****Art. 45** Approval

<sup>1</sup> FINMA shall approve the restructuring plan with a ruling if the conditions stipulated in the BankA and this Ordinance are met.

<sup>2</sup> It shall give public notice of the approval and the basic features of the restructuring plan, stating how the affected creditors and owners can inspect the plan.

<sup>2</sup> If the restructuring plan orders the transfer of land, the granting of *in rem* rights and obligations over land or changes in the share capital, these orders shall have direct effect with the approval of the restructuring plan. The required entries in the Land Register, the Commercial Register or in any other register shall be made as soon as possible.

**Art. 46** Rejection by creditors

<sup>1</sup> Where the restructuring plan provides for an intervention into creditors' rights, FINMA sets the creditors a deadline at the latest with the approval of the restructuring plan within which they can reject it. The deadline is of at least ten working days. The transfer of liabilities and contractual relationships and the change of debtor involved do not infringe upon the rights of the creditors.

<sup>2</sup> Creditors wishing to reject the plan must do so in writing. They must give their name and address as well as the amount of their claim at the time of opening the restructuring proceedings, and the reasons for it. The rejection letter must be sent to the restructuring agent.

**Section 3: Corporate Actions****Art. 47** General provisions

<sup>1</sup> If the restructuring plan allows corporate actions in accordance with this Section, it is necessary to ensure that:

- a. the creditors' interests take precedence over the interests of the owners and the hierarchy of creditors is respected;
- b. the provisions of the Swiss Code of Obligations<sup>22</sup> apply *mutatis mutandis*.

<sup>2</sup> Where granting pre-emption rights may endanger the restructuring, they may be denied to the owners.

**Art. 48** Principles for converting debt capital into equity capital

<sup>1</sup> If the restructuring plan provides for the conversion of debt capital into equity capital then:

- a. sufficient debt capital must be converted into equity capital to ensure that the bank holds the required capital to continue its business activities after the restructuring is completed;
- b. share capital must be completely written down before converting debt capital into equity capital;
- c. debt capital may be converted into equity capital only if the debt instruments issued by the bank which are part of additional core capital or supplementary capital have already been converted into equity capital, in particular contingent convertible bonds;
- d. the following order of rank shall be observed when converting debt capital into equity capital where claims of the next rank are only converted if the conversion of claims of the previous rank does not suffice to meet the capital adequacy requirements in accordance with letter a:
  1. subordinated claims without capital adequacy eligibility,

<sup>22</sup> SR 220



2. other claims not excluded from the conversion, with the exception of deposits, and
3. deposits, in so far as they are not privileged.

**Art. 49** Convertibility of claims

<sup>1</sup> All debt capital may be converted into equity capital. The following are excluded:

- a. privileged claims in classes 1 and 2 according to Article 219 paragraph 4 DEBA<sup>23</sup> and Article 37a paragraph 1-5 BankA to the extent that they are classed as preferential;
- b. secured claims to the extent that they are secured and offsettable claims to the extent that they are offsettable, if the creditor can credibly demonstrate the existence, amount and fact that the claim is object of a relevant agreement, or this is evident from the bank's books.

**Art. 50** Reduction in claims

In addition to or instead of converting debt capital into equity capital, FINMA may order a partial or full reduction in claims. Article 48 letters a-c and Article 49 apply equally.

## **Section 4: Continuation of Certain Banking Services**

**Art. 51** Continuation of banking services

<sup>1</sup> Where the restructuring plan provides for individual banking services or groups of services to be continued and for certain bank assets or contractual relationships to be transferred to another legal entity, including a bridge bank, it must in particular:

- a. name the legal entity or entities to which such banking services and assets are to be transferred;
- b. describe the assets, liabilities and contractual relationships to be transferred and the compensation to be provided for them;
- c. describe the banking services that are to be continued and transferred;
- d. list the corporate actions undertaken and, where banking services are to be transferred to a bridge bank, describe how assets and liabilities will be shared between the bank and the bridge bank;
- e. stipulate an obligation on the bank's part to take any action necessary to ensure that all of the assets and objects to be transferred, including in particular those located abroad or subject to foreign law, can be transferred to the other legal entity;

<sup>23</sup> SR 281.1

- f. explain whether compensation is to be paid, how such compensation is to be calculated and whether a maximum compensation amount is to be imposed;
- g. explain whether systems and applications will be used jointly by the bank and the other legal entity and, if banking services are to be continued by a bridge bank, how the latter will be guaranteed access to payment transaction and financial market infrastructure and how it will be able to use this;
- h. describe how to preserve the legal and economic connections between assets, liabilities and contractual relationships, thereby ensuring that only the following can be transferred:
  1. all claims and liabilities on the bank's part vis-à-vis a counterparty or several counterparties that can be offset, in particular those that are subject to a netting agreement;
  2. secured claims and liabilities together with their collateral; and
  3. structured financing arrangements or comparable capital market agreements to which the bank is a party, together with all rights and obligations pertaining to them.

<sup>2</sup> As soon as the approved restructuring plan is enforceable, or in the case of a systemically important bank once the restructuring plan has been approved, all transferred assets or contractual relationships, together with all rights and obligations pertaining to them at the time of the approval of the restructuring plan, pass to the new legal entity or entities.

**Art. 52** Bridge bank

<sup>1</sup> The bridge bank serves to ensure the temporary continuation of individual banking services transferred to it.

<sup>2</sup> FINMA shall grant the bridge bank a licence with a fixed term of two years. It may deviate from the licensing requirements when granting it. The licence may be extended.

## Chapter 4: Protecting Systems and Financial Market Infrastructure

**Art. 53** Instructions from members of a payment or securities settlement system

Instructions from members of a payment or securities settlement system under Article 27 paragraph 2 BankA include the following in particular:

- a. instructions that directly affect the settlement of payments or securities transactions; or
- b. providing the financing or collateral required under the system's rules.

**Art. 54** Binding nature of instructions in payment or securities settlement systems

<sup>1</sup> The following measures may restrict the legally binding nature of an instruction within the meaning of Article 27 paragraph 2 BankA:

- a. the opening of bankruptcy proceedings under Articles 33-37g BankA; and
- b. protective measures under Article 26 paragraph 1 letters f-h BankA.

<sup>2</sup> In its ruling, FINMA shall expressly order the time from when the measures under paragraph 1 apply.

**Art. 55** Netting agreements

<sup>1</sup> Netting agreements under Article 27 paragraph 3 BankA include the following in particular:

- a. netting provisions in bilateral agreements or in framework agreements;
- b. offsetting and netting provisions as well as default agreements of payment and securities settlement systems under Article 27 paragraph 1 BankA.

## **Chapter 5: Stay on Early Termination Rights**

**Art. 56** Financial contracts

<sup>1</sup> Financial contracts within the meaning of this Chapter are:

- a. the following contracts relating to securities and book-entry securities: contracts for buying, selling, repurchasing, and lending securities and book-entry securities and trading with options on securities and book-entry securities irrespective of whether it is done individually, in groups or as indices;
- b. the following contracts relating to commodities: contracts for buying and selling commodities with future delivery and for options trading on commodities or commodity deliveries;
- c. the following contracts relating to futures and forwards: contracts for buying, selling or transferring goods, services, rights or interest yields at a certain price set in advance and at a future date;
- d. the following contracts relating to swaps: contracts for foreign exchange, currency, precious metals, credit as well as securities and book-entry securities, commodities and their indices; and
- e. all other contracts with an effect equivalent to those specified under letters a-d.

<sup>2</sup> The contracts listed in paragraph 1 in the form of master agreements are also deemed to be financial contracts.

**Art. 57** Stay

<sup>1</sup> If financial contracts are transferred in full or in part to another legal entity during the transfer of banking services, FINMA may put a stay on the termination of contracts and the exercising of rights to terminate such contracts.

<sup>2</sup> A stay may only be ordered for financial contracts whose termination or right of termination are linked to the restructuring measures or protective measures ordered by the authorities.

<sup>3</sup> A stay may only be imposed for a maximum of 48 hours. FINMA shall expressly specify the start and end of the stay.

<sup>4</sup> A stay does not apply if:

- a. the conduct of the bank involved in the restructuring proceedings either before, during or after the stay provides a different cause for termination or right of termination;
- b. the conduct of the legal entity which takes over the financial contracts in full or in part, following the transfer, provides a different cause independent of the transfer for the termination or right of termination.

<sup>5</sup> The counterparty of the bank involved in the restructuring proceedings may exercise the right vis-à-vis the bank to terminate the contract:

- a. immediately after the stay has expired; and
- b. as soon as he or she has been informed that his/her financial contract was not transferred.

**Chapter 6: Completion of Proceedings****Art. 58** Concluding report

<sup>1</sup> The bankruptcy liquidator or the restructuring agent shall report to FINMA, summarising the progress of the bankruptcy proceedings or the restructuring proceedings.

<sup>2</sup> The bankruptcy liquidator's concluding report shall also contain the following information:

- a. details of the completion of all processes relating to the calculation of the assets and liabilities;
- b. details of the status of the legal claims assigned to creditors under Article 260<sup>24</sup> DEBA; and
- c. a list of the shares not yet paid out as well as the segregated custody assets not yet surrendered, complete with an explanation as to why no payout or surrender has been possible to date.

<sup>24</sup> SR 281.1

<sup>3</sup> FINMA shall give public notice that the bankruptcy proceedings or the restructuring proceedings have been completed.

**Art. 59** Document archiving

<sup>1</sup> FINMA shall determine how the insolvency and business documentation is to be archived following completion of the bankruptcy proceedings or the restructuring proceedings.

<sup>2</sup> The insolvency documentation and the remaining business documentation shall be destroyed on FINMA's instructions 10 years after completion of the bankruptcy proceedings or the restructuring proceedings.

<sup>3</sup> Any special legislation providing otherwise for the archiving of individual documents applies notwithstanding.

## **Chapter 7: Final Provisions**

**Art. 60** Repeal and amendment of prior legislation

<sup>1</sup> The FINMA Bankruptcy Ordinance of 30 June 2005<sup>25</sup> is repealed.

<sup>2</sup> ...<sup>26</sup>

**Art. 61** Transitional provisions

The provisions of this Ordinance apply to proceedings pending in court when this Ordinance comes into force.

**Art. 62** Commencement

This Ordinance comes into force on 1 November 2012.

<sup>25</sup> [AS 2005 3539, 2008 5613, 2009 1769]

<sup>26</sup> The amendment may be consulted under AS 2012 5573.

