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# **Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Firms<sup>1</sup> (FINMA Banking Insolvency Ordinance, BIO-FINMA)**

of 30 August 2012 (Status as of 1 January 2021)

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*The Swiss Financial Market Supervisory Authority (FINMA),  
based on Articles 28 paragraph 2 and 34 paragraph 3 of the Banking Act of  
8 November 1934<sup>2</sup> (BankA),  
Article 67 of the Financial Institutions Act of 15 June 2018<sup>3</sup> (FinIA),  
and Article 42 of the Mortgage Bond Act of 25 June 1930<sup>4</sup> (MBA),<sup>5</sup>  
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> In this Ordinance, banks are:<sup>6</sup>

- a.    banks under the BankA;
- b.<sup>7</sup>   securities firms and fund management companies under the FinIA;
- c.    central mortgage bond institutions under the MBA.

AS **2012 5573**

<sup>1</sup> Term in accordance with Annex No 3 of the FINMA O of 4 Nov. 2020 on Financial Institutions, in force since 1 Jan. 2021 (AS **2020 5327**). This amendment has been made throughout the text.

<sup>2</sup> SR **952.0**

<sup>3</sup> SR **954.1**

<sup>4</sup> SR **211.423.4**

<sup>5</sup> Amended by Annex No 3 of the FINMA O of 4 Nov. 2020 on Financial Institutions, in force since 1 Jan. 2021 (AS **2020 5327**).

<sup>6</sup> Amended by Annex No 3 of the FINMA O of 4 Nov. 2020 on Financial Institutions, in force since 1 Jan. 2021 (AS **2020 5327**).

<sup>7</sup> Amended by Annex No 3 of the FINMA O of 4 Nov. 2020 on Financial Institutions, in force since 1 Jan. 2021 (AS **2020 5327**).

<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.

### **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 69 FinIA must be observed wherever possible.<sup>8</sup>

<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

<sup>8</sup> Amended by Annex No 3 of the FINMA O of 4 Nov. 2020 on Financial Institutions, in force since 1 Jan. 2021 (AS 2020 5327).

be made in advance to the criminal penalties under Article 48 of the Financial Market Supervision Act of 22 June 2007<sup>9</sup> and Article 292 of the Swiss Criminal Code<sup>10</sup>.

<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>11</sup> on Administrative Procedure.

<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.

<sup>9</sup> SR 956.1

<sup>10</sup> SR 311.0

<sup>11</sup> SR 172.021

**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 37h 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 37h 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.