

# Update

## Newsflash March 2018

---

### **FINMA publishes temporary no-action letter with respect to the requirement for banks to amend their financial contracts**

**On 21 March 2018, FINMA in its regulatory guidance 01/2018 (the "Guidance") on implementing the requirement for amending financial contracts pursuant to Art. 12 para. 2bis of the Banking Ordinance in conjunction with Arts. 56 and 61a of the Bank Insolvency Ordinance-FINMA (BIO-FINMA) clarified its supervisory practice regarding the implementation of the stay regulation. The Guidance allows banks, for a period of up to nine months, to forego putting a trade stop in place vis-à-vis counterparties whose recognition of such stay right cannot be obtained in due time.**

---

#### **Power to stay termination of contracts under Art. 30a Banking Act**

In line with international standards, Art. 30a of the Banking Act entered into force on 1 January 2016 providing for a power of the Swiss Financial Market Supervisory Authority FINMA ("FINMA") to stay the termination of contracts for two business days in support of protective or reorganization measures ordered by the FINMA against a Swiss bank, where such (automatic) termination or (optional) termination by an exercise of termination rights (both a termination) is as per the terms of the relevant contract predicated upon the order of such measures.

This power of FINMA to stay termination of contracts applies to banks regulated under the Banking Act, but also to securities dealers regulated under the Stock Exchange Act (see

Art. 36a Stock Exchange Act) and to financial market infrastructures regulated under the Financial Market Infrastructure Act (see Art. 88 Financial Market Infrastructure Act).

#### **Obligation to have such stay recognized in contracts**

Pursuant to Art. 12 para. 2bis Banking Ordinance in conjunction with Arts. 56 and 61a BIO-FINMA banks may enter into new financial contracts or amend existing financial contracts which are governed by foreign law or a foreign jurisdiction only if the counterparty recognizes a stay on termination of contracts by FINMA in accordance with Article 30a Banking Act. The Guidance notes that the conclusion of a new transaction under an existing master agreement qualifies as an amendment brought to an existing agreement and is thus as such subject to the

obligation to have such stay recognized by counterparties.

### **Temporary no-action letter**

Given how time-consuming the task of updating the contracts has turned out to be in practice and in order to avoid significant impacts on the Swiss financial market triggered by trade stops and/or terminations of contracts, FINMA decided to allow for a period of up to nine months during which banks may refrain from implementing trade stops with the objective of becoming fully compliant with the stay obligation pursuant to Art. 12 para. 2bis Banking Ordinance in conjunction with Arts. 56 and 61a BIO-FINMA.

### **New timeframe for the implementation of Art. 12 para. 2bis Banking Ordinance**

#### **a) Contracts with domestic and foreign banks and securities dealers**

Pursuant to Art. 61a BIO-FINMA the requirement to contractually obtain the recognition of the stay pursuant to Art. 12 para. 2bis Banking Ordinance has to be met within 12 months, i.e. as of 1 April 2018, for contracts with domestic and foreign banks and securities dealers. Thanks to the period of a maximum of nine months announced by FINMA on 21 March 2018, the Swiss financial services industry may seek recognition of the stay under Art. 30a Banking Act until 1 January 2019 at the latest with respect to such contracts without having to implement a trade stop where no such recognition has been obtained before 1 April 2018.

#### **b) Contracts with other counterparties**

For contracts with all other counterparties, the deadline initially was 1 October 2018. With the

granting of the additional nine-month period, this deadline has been moved to 1 July 2019.

### **Obligations to inform and collaborate with FINMA**

Throughout the process of implementing the obligation under Art. 12 para. 2 bis Banking Ordinance financial institutions are required to amend contracts on an on-going basis and as quickly as possible, namely those entered into with professional counterparties and/or generating high trading volumes. In addition to allocating sufficient staff to the task, banks must be able to provide FINMA with a detailed set of measures put in place in view of achieving full compliance with the stay regulation and with updates on the progress made in meeting the requirements. In this respect banks may be asked to show that the progress made is sufficient. FINMA further expects banks to show readiness to and, if required, terminate a contractual relationship or implement a trade stop should a counterparty be strictly opposed to the contractual amendment in relation to the recognition of the stay right pursuant to Art. 30a Banking Act.

In sum, even though the period of up to nine months relieves the industry of some of the pressure with respect to the implementation of the requirement for amending financial contracts, in particular in view of the fast-approaching deadline of 1 April 2018 regarding the contracts with domestic and foreign banks and securities dealers, the Guidance at the same time firmly reaffirms the obligation as well as sets out the obligations of collaborating with FINMA fully in order to amend all relevant contracts.

**Please do not hesitate to contact us in case of any questions.**

**Legal Note:** The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

# Your contacts

---

## **Geneva / Lausanne**

François Rayroux  
francois.rayroux@lenzstaehelin.com  
Tel: +41 58 450 70 00

## **Zurich**

Patrick Hünerwadel  
patrick.hunerwadel@lenzstaehelin.com  
Tel: +41 58 450 80 00

# Our offices

---

## **Geneva**

Lenz & Staehelin  
Route de Chêne 30  
CH-1211 Genève 6  
Tel: +41 58 450 70 00  
Fax: +41 58 450 70 01

## **Zurich**

Lenz & Staehelin  
Brandschenkestrasse 24  
CH-8027 Zürich  
Tel: +41 58 450 80 00  
Fax: +41 58 450 80 01

## **Lausanne**

Lenz & Staehelin  
Avenue du Tribunal-Fédéral 34  
CH-1005 Lausanne  
Tel: +41 58 450 70 00  
Fax: +41 58 450 70 01

[www.lenzstaehelin.com](http://www.lenzstaehelin.com)