LENZ & STAEHELIN

The world's Swiss law firm

Update

Newsflash March 2019

Proposed amendments to Swiss Banking Act

On March 8, 2019, the Swiss Federal Council instructed the Federal Department of Finance to initiate the consultation process on proposed amendments to the Banking Act.

The proposed amendments aim at increasing the effectiveness, and legal basis, of certain bank resolution measures and related topics.

Interested parties can comment on the draft proposal until June 14, 2019.

Restructuring procedure for banks

Under current law, the general principles regarding the restructuring procedure applying to banks are set out in the Banking Act and details are governed by the FINMA Banking Insolvency Ordinance.

With a view to improving the legal basis, the Swiss Federal Council proposes to anchor certain key measures interfering with the rights of banks' shareholders and creditors (such as capital measures) in the Banking Act. Among others, the following topics are proposed to be addressed in more detail in the Banking Act:

› The content of the restructuring plan.

› The requirement that a restructuring plan needs to comply with the no-creditor-worse-off-than-in-liquidation-safe-guard test.

› The available capital measures, in particular the cancellation of existing equity and the write-down or conversion of debt into equity, including the order of such write-down or conversion by types of claims.

In line with international developments, the Federal Council proposes to replace the current discretion of FINMA to substitute the write-down order of debts with a more narrow discretion to exclude claims from the delivery of goods and services from bail-in generally (i.e. write-down and conversion) if this is required for the survival of the bank.

In addition, a legal basis is being proposed to provide some form of compensation to shareholders whose equity position would be wiped out in connection with a bail-in if this is warranted by the underlying valuation. The compensation could take the form of newly issued equity or (contingent) debt instruments.

› The consideration to the transferring bank in resolution in case of a partial transfer of banking services.

› The effectiveness of the restructuring plan.

Appeal procedure in bank insolvencies

It is proposed that the appeal procedure in bank insolvency proceedings become subject to a more detailed regime to eliminate uncertainties and deficiencies of the current regime.

Most importantly, it is proposed that appeals against a restructuring plan will not result in an amendment or unwind of the restructuring plan but can only be compensated financially through newly issued equity or (contingent) debt instruments. It is proposed that this rule be applicable to appeals generally, including, to appeals from the affected bank. Under the current regime, it only applies to appeals from creditors and shareholders.

In addition, creditors and shareholders shall have standing to challenge the final invoice and the distribution list.

Moreover, to ensure the efficiency of resolution and liquidation measures, appeals against protective measures, the initiation of restructuring proceedings and the opening of bankruptcy proceedings will no longer have a suspensive effect.

Mortgage Bond Act

An amendment to the Mortgage Bond Act aims at strengthening the Swiss mortgage bond system in the event of an insolvency or bankruptcy of a member bank.

The proposed amendment to Art. 40 Mortgage Bond Act would create a legal basis for an early intervention, whilst the new Art. 40a Mortgage Bond Act aims at strengthening the resilience of the mortgage bond system in the event of a bankruptcy of a member bank.

This is proposed to be achieved by a rule which orders the separation of the assets and liabilities related to a mortgage bond which survives the bankruptcy of a member bank. The separation is to be supervised by a FINMA appointed agent.

Cash deposit protection

Under the Banking Act, depositors benefit from two types of protection in a bank bankruptcy. First, deposits up to an amount of CHF 100,000 benefit from a ranking privilege (second class ahead of general unsecured and non-privileged creditors). Second, if immediately available liquidity at the level of the bankrupt bank are not sufficient to cover all privileged claims, the cash deposit protection scheme which is funded by the Swiss banking system, steps in to ensure that depositors will receive the privileged part of their deposits. It is proposed to improve this deposit protection scheme as follows:

- Payout deadlines: The proposal introduces 7-day payout deadlines for both the payment from the cash deposit protection scheme to the investigator or liquidator in bankruptcy and for the onward payment to the depositors. In order to comply with the second deadline, banks shall be required to take appropriate measures to ensure that depositors can be identified swiftly. Whilst, under the current regime, a speedy payout is also required, it has taken months in practice to make payments to affected depositors.

- Type of financing: One of the most significant changes to the cash deposit protection scheme concerns the type of financing. In line with international developments, the proposal now provides for an ex-ante obligation of banks to deposit easily realisable high-quality liquid securities or Swiss Francs in cash with a safe third-party custodian in the amount of half of their obligations to contribute to the deposit protection scheme. Alternatively, banks may grant cash loans in favour of the deposit insurance institution.

- Maximum obligation: Instead of a fixed maximum as under the present scheme, it is proposed to set the coverage threshold as a percentage (1.6%) of the total amount of the qualifying secured deposits, with a floor at CHF 6 billion.

Book-entry Securities Act

An amendment to the Swiss Federal Act on Book-Entry Securities introduces an obligation for all custodians of book-entry securities to keep their clients' holdings separate from their own holdings. Specifically, it is proposed that a Swiss custodian shall separate client holdings from its

own holdings in its books. Where the Swiss custodian holds the securities with a Swiss third party custodian (sub-custodian), it shall use separate accounts for client holdings and its own holdings at such sub-custodian. The same applies where a Swiss custodian wishes to use a foreign sub-custodian. Finally, any Swiss custodian must offer separate accounts for client and own holdings to its clients. Clients' holdings may be in the form of omnibus accounts.

In addition, the proposal sets out general information obligations of the custodian, in particular in the case of custody abroad a new statutory authorisation to transmit data in connection with the custody to a foreign custodian is proposed.

Debt Enforcement and Bankruptcy Act

Finally, the draft provides for an amendment of Art. 173b of the Swiss Federal Act on Debt Enforcement and Bankruptcy. The proposed revised rule stipulates that FINMA is only responsible for the bankruptcy of debtors which hold a license under any of the financial market statutes mentioned in Art. 1 of the Financial Market Supervision Act. Accordingly, debtors performing an activity which would require, but have not effectively applied for or received a license would no longer be subject to bankruptcy proceedings overseen by FINMA.

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

Your contacts

Geneva / Lausanne

Shelby R. du Pasquier
shelby.dupasquier@lenzstaehelin.com
Tel: +41 58 450 70 00

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

Olivier Stahler
olivier.stahler@lenzstaehelin.com
Tel: +41 58 450 70 00

Zurich

Roland Fischer
roland.fischer@lenzstaehelin.com
Tel: +41 58 450 80 00

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

Marcel Tranchet
marcel.tranchet@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 de Rhodanie 58
CH-1007 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com