

Staking: Guidance 08/2023

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The question of permanent availability became acute with staking. In proof-of-stake networks such as Ethereum after its transition in September 2022, holders who lock their tokens as collateral for the validation of transactions receive a reward, but the tokens are tied up for a period and may be reduced (slashed) if the validator misbehaves. A custodian that stakes client tokens might be thought to no longer keep them available at all times. In its Guidance 08/2023 of 20 December 2023 FINMA set out its assessment. It considered, subject to future case law or legislation, that staked tokens held in custody were to be segregated from the bankrupt estate and returned to the custody account clients, provided that the custodian had taken risk-mitigating measures, had informed clients appropriately about the risks and kept the tokens in readiness for the clients at all times. Under these conditions the custodian need not hold capital against the staked tokens.¹

FINMA identified three groups of risks: technical risks, such as malfunctions of the staking process or slashing for misconduct of the validator; counterparty risks, in particular where foreign providers were involved and the legal protection was unclear; and market risks, because tokens subject to a lock-up period cannot be sold quickly in a volatile market.² Commentators summarized FINMA's safe harbour as a combination of express client instructions, unambiguous attribution of the staked tokens to each client, transparent disclosure of the risks, operational controls and a resolution package that would allow a bankruptcy administrator to unwind the staking positions.³ FINMA emphasized that legal uncertainty remained the foundational issue until a court or the legislature clarified the position.

1 Guidance 01/2026: custody for portfolio managers and funds

On 12 January 2026 FINMA published Guidance 01/2026 on the custody of crypto-based assets by supervised institutions. It addresses banks, securities firms, portfolio managers and collective investment schemes. For individual portfolio management, FINMA expects the assets of each client to be held with a prudentially supervised entity, which can be a bank, a securities firm, a DLT trading facility or a foreign institution subject to equivalent supervision. The custodian must have adequate technical infrastructure and expertise. The assets must be segregated per client, stored securely and protected in the bankruptcy of the custodian, and where they are held abroad, the custodian must be subject to equivalent supervision and the foreign law must offer equivalent bankruptcy protection.⁴ For collective investment schemes the assets must be held by the Swiss custodian bank, which may delegate custody only to institutions subject to equivalent prudential supervision and bankruptcy protection. FINMA stated that supervised institutions remained fully responsible for compliant custody structures and that arrangements not meeting its expectations had to be revisited and, where necessary, adapted.⁵

The guidance has direct consequences for Lugano's independent asset managers, whose licensing under FinIA is described in Chapter E.III. A manager who buys bitcoin for an Italian client may not leave the tokens with an unregulated exchange or with a foreign platform whose insolvency law offers no protection. The manager must choose a custodian bank in Switzerland or a foreign custodian whose supervision and bankruptcy law it has examined and documented. A client who wishes to hold the private keys himself remains free to do so, but the manager cannot then manage those tokens under a discretionary mandate.

2 Notes

1. FINMA, "FINMA Guidance 08/2023 Staking", 20 December 2023, <https://www.finma.ch/en/news/2023/12/20231220-meldung-am-staking/> (staked assets "to be segregated from a bankrupt estate and returned to custody account customers" in FINMA's current assessment; held "in readiness for customers at all times"; risk mitigation and information; no capital requirements if the conditions are met). On the transition of Ethereum to proof of stake on 15 September 2022 see Wikipedia (used as a last resort), "Ethereum", <https://en.wikipedia.org/wiki/Ethereum>. ↩

2. FINMA, Guidance 08/2023 (above) (technical, counterparty and market risks; legal uncertainty until legislation or case law). ↩
3. Mondaq, custody and staking (above) (client instructions, attribution, risk disclosure, operational risk mitigation, "Digital Asset Resolution Package (DARP)"). ↩
4. MLL Legal, "New Regulatory Standards for the Custody of Cryptobased Assets: FINMA Guidance 01/2026", <https://www.mll-news.com/new-regulatory-standards-for-the-custody-of-cryptobased-assets-finma-guidance-01-2026/?lang=en> (publication 12 January 2026; custody with "prudentially supervised entities (banks, securities firms, DLT trading facilities, or foreign institutions subject to supervision equivalent to that in Switzerland)"; technical infrastructure; segregation per client; equivalent bankruptcy protection abroad). ↩
5. Bär & Karrer, "FINMA publishes Guidance 01/2026 on the custody of crypto-based assets", 13 January 2026, <https://www.baerkarrer.ch/en/publications/finma-publishes-guidance-01/2026-on-the-custody-of-crypto-based-assets> (addressees; delegation abroad only with equivalent supervision and bankruptcy protection; institutions "remain fully responsible"; arrangements to be "revisited and, where necessary, adapted"). See also MLL Legal (above) on Arts. 72 and 73 of the Collective Investment Schemes Act. ↩

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