



Consultation Paper

# Proposed statutory statements of procedure in respect of the Bank of England's supervision of financial market infrastructures

September 2013





BANK OF ENGLAND

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The Bank of England invites comments on this consultation paper. Comments should reach the Bank by 30 September 2013.

Comments may be sent by email to [FMIFeedback@bankofengland.co.uk](mailto:FMIFeedback@bankofengland.co.uk).

Alternatively, please send comments in writing to:

FMI Feedback  
Market Infrastructure Division  
Bank of England  
Threadneedle Street  
London EC2R 8AH

The Bank may make responses to this consultation public unless the respondent requests otherwise. A standard confidentiality statement in an e-mail message will not be regarded as a request for non-disclosure. If the Bank receives a request under the Freedom of Information Act 2000, the Bank may consult respondents who had requested confidentiality. Any decision the Bank makes not to disclose a response is reviewable by the Information Commissioner and the Information Rights Tribunal.

Copies of this consultation paper are available to download from the Bank's website at [www.bankofengland.co.uk](http://www.bankofengland.co.uk).



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## Overview

### Statutory statements of procedure

Under the Financial Services and Markets Act 2000 (FSMA), as amended by the Financial Services Act 2012,<sup>(1)</sup> responsibility for the supervision of Recognised Clearing Houses (RCHs) has transferred to the Bank of England ('the Bank') from the Financial Services Authority. This transfer took effect on 1 April 2013.

The Bank is required by FSMA to publish certain statements of procedure relating to decisions resulting in statutory notices and publishing details of these statutory notices. This consultation paper sets out the Bank's approach to these matters. The Bank invites comments on the proposed procedures set out in the appendices:

- (i) a proposed statement of procedure on the decision-making framework for giving warning notices and decision notices to RCHs and qualifying parent undertakings; and
- (ii) a proposed procedure on the publication of such statutory notice decisions.

### The Bank's approach to supervision and enforcement

The Bank's overall approach to the supervision of financial market infrastructures (FМИs), including its approach to the use of formal powers for enforcement purposes, is set out in *The Bank of England's approach to the supervision of financial market infrastructures* ('the Supervisory Approach paper').<sup>(2)</sup> The procedures set out in this consultation paper should be read alongside the Supervisory Approach paper.

### Next steps

The appendices contain drafts of the proposed statements of procedure. The Bank will have regard to representations made in response to this consultation paper and will in due course issue final versions of each statement, together with an account of the representations made and the Bank's responses.

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(1) All references in this document to FSMA are to that Act as amended by the Financial Services Act 2012 and applied to the Bank in respect of RCHs by Schedule 17A.

(2) [www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf](http://www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf).

# 1 Decision-making framework for giving warning notices and decision notices in the course of the Bank's supervision of recognised clearing houses

## Introduction

1.1 This section outlines the Bank's proposed decision-making framework for giving warning notices and decision notices to recognised clearing houses (RCHs) and qualifying parent undertakings (QPUs).<sup>(1)</sup> The procedure will be used when the Bank is considering imposing a penalty or public censure on an RCH or a QPU. A proposed statement of procedure is attached in Appendix 1.

1.2 FSMA requires the Bank to follow a formal decision-making process in respect of any decisions that give rise to an obligation under FSMA for the Bank to give a notice and to invite representations on it from the subject of the notice.<sup>(2)</sup> This statutory obligation to give a notice arises only where the Bank is minded to impose a penalty or public censure on an RCH or on the QPU of a UK RCH.

## The proposed decision-making process

1.3 In the Bank's paper outlining its approach to the supervision of financial market infrastructures, the Bank noted that its internal process will be designed to ensure that supervisory team experts have the guidance and advice of senior Bank officials, including from other areas of the Bank.<sup>(3)</sup>

1.4 The Bank has established a multi-tier structure for decision-making. Decisions will be made at different levels of seniority in the Bank depending on their impact and will involve representatives from across the Bank.

1.5 There will be two decision-making committees responsible for issuing statutory notices: the Financial Market Infrastructure (FMI) Board; and the FMI Review Committee. Not all members of these committees will take part in all decisions, for example there may be circumstances where a committee member will not take part because they are unavailable or unable to take part (eg by virtue of being involved in evidence-gathering).<sup>(4)</sup>

1.6 A single corporate group may contain both an entity that is an RCH or a recognised payment system supervised by the Bank and an entity that operates trading platforms (ie two 'recognised bodies'). There may be cases where a single entity (or recognised body) is supervised by both the Financial Conduct Authority (FCA) and by the Bank. In such cases, the Bank and FCA will co-operate as set out in the Memorandum of Understanding (MoU) between them.<sup>(5)</sup>

## Urgent cases

1.7 The Bank's decision-making committee procedures provide flexibility to accommodate urgent cases.

## Representations

1.8 The Bank recognises the importance of enabling those subject to proposed regulatory action to make representations as to the proposed action. Accordingly, the procedure makes provision for the recipient of a warning notice to make written or oral representations to the decision-making committee.

## The Tribunal

1.9 RCHs and QPUs have the right to seek a review by the Upper Tribunal of relevant statutory notice decisions made by the Bank.

(1) As required by section 395 of FSMA.

(2) In certain circumstances third parties may also receive the notice and make representations on it to the Bank.

(3) Supervisory Approach, page 11,

[www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf](http://www.bankofengland.co.uk/financialstability/Documents/fmi/fmisupervision.pdf).

(4) s395 of FSMA includes a requirement that the procedure is designed to ensure that the decision-maker, or at least one of the decision-makers, has not been directly involved in establishing the evidence on which the decision is based.

(5) Page 4: [www.bankofengland.co.uk/financialstability/Documents/fmi/mou.pdf](http://www.bankofengland.co.uk/financialstability/Documents/fmi/mou.pdf).

## 2 Procedure on publishing information about statutory notice decisions in the course of the Bank's supervision of recognised clearing houses

2.1 FSMA gives the Bank powers to publish information about statutory notice decisions given to an RCH or to the QPU of a UK RCH. The draft statement of procedure in Appendix 2 sets out the Bank's procedure on publishing information about warning notices and decision notices, as required under section 395 of FSMA.

2.2 There may be circumstances in which appropriate publicity would assist achievement of the Bank's supervisory goals, for example, by informing the financial services industry of behaviour on the part of the relevant body which the Bank considers to be unacceptable, and helping to prevent more widespread breaches of the Bank's requirements.

2.3 The material to be included when publishing matters to which a *warning* notice relates will ordinarily include: the identity of the RCH/QPU concerned; a brief summary of background facts; a statement that the Bank is considering taking regulatory action; and a statement making clear that the giving of a warning notice is not a final decision.

2.4 The material to be included when publishing a *decision* notice will generally include the relevant notice itself, potentially with a press release.

2.5 FSMA provides that the Bank may not publish material if it considers that to do so would be unfair to those concerned, or prejudicial to the safety and soundness of the relevant bodies or to financial stability.

## **Appendix 1: Proposed statement of procedure on the decision-making framework for giving warning and decision notices to recognised clearing houses and qualifying parent undertakings**

### **Introduction**

1. This statement of procedure is issued by the Bank of England (the 'Bank') in accordance with the requirements of section 395(5) of the Financial Services and Markets Act 2000 (FSMA),<sup>(1)</sup> which requires the Bank to issue a statement of its procedure in relation to the giving of statutory notice decisions. In this statement of procedure, 'statutory notice decisions' are those which give rise to an obligation to give a warning notice or a decision notice, as referred to in section 395(1)(b) of FSMA. This procedure relates to Recognised Clearing Houses (RCHs) and Qualifying Parent Undertakings of UK RCHs (QUPUs).

2. For the purposes of this draft procedure, RCHs and QUPUs are collectively referred to as the 'relevant bodies'.

### **The decision-making procedure**

3. Section 395 of FSMA requires the Bank to establish a decision-making procedure for statutory notice decisions that is designed to ensure, among other things, that at least one of the decision-makers has not been directly involved in establishing the evidence on which the decision is based.

4. The Bank has established a tiered structure for decision-making. Decisions will be made at different levels of seniority in the Bank depending on their impact and will involve representatives from across the Bank.

5. There will be two decision-making committees responsible for issuing statutory notices:

- (a) The Financial Market Infrastructure (FMI) Board
- (b) The Financial Market Infrastructure (FMI) Review Committee

6. The FMI Board members are part of the Bank's executive management structure, and meetings will ordinarily be chaired by the Deputy Governor for Financial Stability. The FMI Review Committee consists of representatives from various areas of the Bank and is ordinarily chaired by the Executive Director for Financial Stability. The involvement of a broad range of senior Bank staff in the decision-making process is intended to ensure that the decision-making committees benefit from experience and knowledge across the Bank when making statutory notice decisions.

7. The decision-making committees will usually meet in person but may, in appropriate cases, discuss cases in writing, by email or by telephone.

8. Each decision-making committee will aim to reach a consensus on the decisions they are asked to consider. Where consensus cannot be achieved, the decision-making committee will vote with the chairperson holding the casting vote.

9. To support effective decision-making the FMIs have been divided into two categories of impact, with category 1 FMIs including those which pose the greatest risks to financial stability in the event of disruption or failure, and category 2 capturing the remainder. The decision to issue statutory notices for category 1 FMIs will be taken by the FMI Board. The decision for category 2 FMIs will ordinarily be made by the FMI Review Committee.

10. A single corporate group may contain both an entity that is an RCH or recognised payment system supervised by the Bank and an entity that operates trading platforms that are recognised investment exchanges supervised by the Financial Conduct Authority (FCA) (ie two 'recognised bodies'). There may be cases where a single entity (or recognised body) is supervised by both the FCA and by the Bank. In such cases, the Bank and FCA will co-operate as set out in the Memorandum of Understanding (MoU) between them.<sup>(2)</sup>

11. In all cases, the decision-making committees will make decisions by applying the relevant statutory provisions, having regard to the relevant facts, the law and the Bank's priorities and policies.

12. The Bank will make appropriate records of statutory notice decisions, including records of meetings and the representations (if any) of the recipient(s) of the notice and materials considered by the decision-making committee.

### **Maintaining impartiality**

13. Not all committee members will take part in all decisions, for example there may be circumstances where a committee member will not take part because they are unavailable, or unable to take part (eg by virtue of being involved in evidence-gathering).<sup>(3)</sup>

### **Urgent cases**

14. If the consequences of not making a decision could be significant and it is not practicable to convene a meeting of the relevant committee within the necessary time period to avoid

(1) All references in this document to FSMA are to that Act as amended by the Financial Services Act 2012 and applied to the Bank in respect of RCHs by Schedule 17A.

(2) Pages 3–5: [www.bankofengland.co.uk/financialstability/Documents/fmi/mou.pdf](http://www.bankofengland.co.uk/financialstability/Documents/fmi/mou.pdf).

(3) FSMA includes a requirement that the procedure is designed to ensure that the decision-maker, or at least one of the decision-makers, has not been directly involved in establishing the evidence on which the decision is based.

those consequences, a decision for the FMI Board may be made by the Deputy Governor for Financial Stability with at least one other member of the FMI Board, and a decision for the FMI Review Committee may be made by the Executive Director for Financial Stability with at least one other member of the FMI Review Committee. Alternatively, an FMI Review Committee decision may be taken by the FMI Board.

## **Warning notices**

### **Approach of the decision-making committee**

15. If Bank staff consider that action requiring a warning notice is appropriate, they will recommend to the relevant decision-making committee that the notice be given.

16. The decision-making committee will:

- (i) consider whether the material on which the recommendation is based is adequate to support it; the decision-making committee may seek additional information or clarification of the recommendation;
- (ii) consider any responses from the FCA in accordance with the consultation arrangements specified in the MoU between the Bank and the FCA;
- (iii) satisfy themselves that the action recommended is appropriate in the relevant circumstances;
- (iv) decide whether to give the notice and the terms of such notice.

17. If the Bank decides to give a warning notice, it will ensure that the notice meets the requirements set out in FSMA.<sup>(1)</sup>

18. In response to a request from the relevant body, the Bank will allow the relevant body access to substantive communications between the decision-making committee and the Bank staff who made the relevant recommendation as required by section 394 of FSMA. This may include providing copies in electronic format.

19. If the Bank decides to take no further action and the Bank had previously informed the person concerned that it intended to recommend action, the Bank will communicate this promptly to the person concerned.

## **Procedure for representations**

20. A warning notice will specify a time period for making representation of no less than fourteen calendar days.

21. When giving the warning notice, the Bank will also specify a time period within which the recipient is required to indicate whether they wish to make oral representations.

22. The recipient of the warning notice may request an extension of the time allowed for making representations. Such a request must normally be made within fourteen days of the notice being given.

23. If a request for an extension is made, the decision-making committee will decide whether to allow an extension, and, if so, for how long. In reaching the decision the committee may take account of any relevant comments from Bank staff, as appropriate.

24. The Bank will notify in writing the relevant body of the decision on the granting or otherwise of an extension.

25. If the recipient of the warning notice indicates that they wish to make oral representations, the Bank will seek to arrange a date suitable to the recipient of the notice at which the decision-making committee will hear the representations. The Bank will call a meeting of the decision-making committee for this purpose.

26. The chair of the relevant meeting will ensure that the meeting is conducted so as to enable:

- (i) the recipient of the warning notice, or any third party who has the right to do so, to make representations;
- (ii) the decision-making committee to raise with those present any points or questions about the matter; and
- (iii) the person making representations to respond to points made by the decision-making committee.

27. The decision-making committee may ask the person making representations to limit their representations or response in length or to particular issues.

28. The person making representations may be represented through legal advisors if they wish.

29. The decision-making committee hearing the oral representations may ask the person making representations to provide additional information in writing after the meeting. If the decision-making committee does so, it will specify the time period within which that information may be provided.

30. During the hearing the decision-making committee may ask either the person making representations or Bank staff to comment on issues raised if they consider this necessary to improve understanding of the case.

31. Relevant Bank staff will attend the oral hearing for the person making representations but will not respond to any

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(1) See section 387 of FSMA: (1) A warning notice must: (a) state the action which the regulator giving the notice ('the regulator concerned') proposes to take; (b) be in writing; (c) give reasons for the proposed action; (d) state whether section 394 (access to FCA or PRA material) applies; and (e) if that section applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it. (2) A warning notice must specify a reasonable period (which may not be less than fourteen days) within which the person to whom it is given may make representations to the regulator concerned. (3) The regulator concerned may extend the period specified in the notice. (4) The regulator concerned must then decide, within a reasonable period, whether to give the person concerned a decision notice.

representations at the meeting unless asked to do so by the decision-making committee.

32. The relevant Bank staff may provide the decision-making committee with a written response to the oral representations no later than seven calendar days after the hearing.

33. Save in exceptional circumstances, while a matter is ongoing, the decision-making committee will not:

- (i) after the Bank has given a warning notice, meet with the Bank staff responsible for the case to discuss the case without other relevant parties being present or otherwise having the opportunity to respond;
- (ii) after having received any written response from the relevant Bank staff to the oral representations, discuss the matter with the relevant Bank staff without other relevant parties being present or otherwise having the opportunity to respond.

#### **Procedure where no representations are received**

34. If the Bank receives no response or representations within the period specified in the warning notice, the decision-making committee may regard as undisputed the matters in that notice, and a decision notice may be given accordingly.

35. A relevant body that has not previously made any response or representations to the Bank may nevertheless refer the Bank's decision to the Upper Tribunal.

36. In exceptional circumstances, a person who has been sent a decision notice or against whom action, detailed in the warning notice, has taken effect, may show that they did not receive the warning notice or that they had reasonable grounds for not responding within the specified period. In these circumstances, if the Bank considers it appropriate, the decision-making committee may decide to revoke the decision notice and the matter may be considered afresh or, with the consent of the person to whom the notice relates, the decision-making committee may decide to give a further decision notice.

#### **Decision notices**

##### **Approach of the decision-making committee**

37. When determining whether to give a decision notice, the decision-making committee will:

- (i) review the material before them;
- (ii) consider any representations made (whether written, oral or both) and any comments by Bank staff in respect of those representations.

38. The same decision-making committee that gave the warning notice will ordinarily also decide whether to give a decision notice.

39. If giving a decision notice, the Bank will ensure that the notice meets the requirements set out in FSMA.<sup>(1)</sup>

40. If a decision-making committee considers it relevant to their consideration, they may ask Bank staff to explain or provide any or all of the following:

- (i) additional information about the matter (which may require the Bank staff to undertake further investigations); or
- (ii) further explanation of any aspect of the Bank staff recommendation or accompanying papers; or
- (iii) information about the Bank's priorities and policies; or
- (iv) legal advice.

41. The decision-making committee cannot require the affected party to attend Bank committees at which decisions giving rise to a notice are discussed, to provide documents or to give evidence.

42. The decision-making committee will make decisions based on all the relevant information available to them, which may include the views of the Bank staff where relevant, about the relative quality of any evidence.

##### **Procedure for decision notices**

43. If the decision-making committee decides that the Bank will give a decision notice, the Bank will:

- (i) include in the notice a brief summary of how it has dealt with the key representations made;
- (ii) make any other necessary decisions related to the statutory notice, including in relation to procedural matters relating to third parties and to disclosure of Bank material.<sup>(2)</sup>

44. The Bank will make the appropriate arrangements for the distribution of the notice to all the relevant parties.

45. If the decision-making committee decides that the Bank should not give a decision notice, the Bank will notify the relevant parties in writing.

(1) See section 388 of FSMA: (1) A decision notice must: (a) be in writing; (b) give the reasons of the regulator giving the notice ('the regulator concerned') for the decision to take the action to which the notice relates; (c) state whether section 394 applies; (d) if that section applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it; and (e) give an indication of (i) any right to have the matter referred to the Tribunal which is given by this Act; and (ii) the procedure on such a reference. (2) If the decision notice was preceded by a warning notice, the action to which the decision notice relates must be action under the same Part as the action proposed in the warning notice. (3) The regulator concerned may, before it takes the action to which a decision notice ('the original notice') relates, give the person concerned a further decision notice which relates to different action in respect of the same matter. (4) The regulator concerned may give a further decision notice as a result of subsection (3) only if the person to whom the original notice was given consents. (5) If the person to whom a decision notice is given under subsection (3) had the right to refer the matter to which the original decision notice related to the Tribunal, he has that right as respects the decision notice under subsection (3).  
(2) As set out in sections 392, 393 and 394 of FSMA.

## Further decision notice

46. Following the giving of a decision notice but before the Bank takes the action to which the decision notices relates, the Bank may give the relevant body concerned a further decision notice relating to a different action concerning the same matter.<sup>(1)</sup> The Bank may only do this if the relevant body receiving the further decision notice gives its consent.<sup>(2)</sup> In these circumstances the following procedure will apply:

- (i) Bank staff will recommend to the decision-making committee that a further decision notice be given;<sup>(3)</sup>
- (ii) the decision-making committee will consider whether the action proposed in the further decision notice is appropriate in the circumstances;
- (iii) if the decision-making committee decides that the proposed action is inappropriate, they will decide not to give the further decision notice. In this case the original decision notice will stand and the relevant body's rights in relation to that notice will be unaffected. If the consent of the relevant body to a further decision notice has already been obtained, the Bank will notify the relevant body of the decision not to give the further decision notice;

- (iv) if the decision-making committee decides that the action proposed is appropriate then, subject to the relevant body's consent being (or having been) obtained, the Bank will give the further decision notice;
- (v) a relevant body that had the right to refer the matter to the Upper Tribunal under the original decision notice will also have that right under the further decision notice. The time period within which the reference to the Upper Tribunal may be made will begin from the date on which the further decision notice is given.

## Discontinuance of Bank actions

47. Bank staff responsible for recommending action to the relevant decision-making committee will continue to assess the appropriateness of the proposed action in light of any new information or representations they receive and any material change in the facts or circumstances relating to a particular matter. As a result the Bank may decide to give a notice of discontinuance to a person to whom a warning notice or a decision notice has been given.

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<sup>(1)</sup> As set out in section 388(3) of FSMA.

<sup>(2)</sup> As set out in section 388(4) of FSMA.

<sup>(3)</sup> Either before or after obtaining the relevant body's consent.

## Appendix 2: Proposed statement of procedure on publishing information about statutory notices given to recognised clearing houses and qualifying parent undertakings

### Introduction

1. The Financial Services and Markets Act 2000 (FSMA)<sup>(1)</sup> gives the Bank of England (the 'Bank') powers to publish the statutory notice decisions it has given to Recognised Clearing Houses (RCHs) and Qualifying Parent Undertakings of UK RCHs (QPUs). This draft statement of procedure outlines the Bank's proposed procedure on publishing information about warning and decision notices, as required under section 395 of FSMA.

2. For the purposes of this draft procedure, RCHs and QPUUs are collectively referred to as the 'relevant bodies'.

3. Appropriate publicity may assist achievement of the Bank's supervisory goals, for example, by informing the financial services industry of behaviour on the part of the relevant body which the Bank considers to be unacceptable, and helping to prevent more widespread breaches of the Bank's requirements.

### Publicity during Bank investigations

4. Unless and until the Bank has decided whether to give a warning notice, the Bank will not ordinarily make public:

- (a) the fact that it is or is not investigating a relevant body and/or matter, with a view to issuing a warning notice;
- (b) details of the matter under such an investigation; or
- (c) any of the findings or conclusions of such an investigation.

5. The Bank may, however, publicly announce an investigation if it considers that doing so would, in its view, be likely to:

- (a) advance its supervisory goals;
- (b) assist the investigation, for example by bringing forward witnesses; or
- (c) deter more widespread breaches of its requirements.

6. In determining whether to make a public announcement, the Bank will also consider any potential prejudice, risk of unfairness and/or disproportionate damage that it believes may be caused to any relevant bodies that are, or that are likely to be, a subject of the investigation, and/or to any third parties.

7. In circumstances where the existence of a Bank investigation has entered the public domain, and:

- (a) the Bank subsequently concludes that no further action is warranted; or
- (b) the action the Bank proposes to take is materially different from that which previously entered the public domain,

it may, either on its own initiative, or at the request of the subject of the investigation, publicise that fact.

### Publication of information about warning notices

8. The general position under section 391 of FSMA is that neither the Bank nor the person to whom a warning notice is given or copied may publish the notice, or any details concerning it. However in relation to certain categories of warning notice,<sup>(2)</sup> section 391 of FSMA does permit the Bank, after consulting the person to which a warning notice is given or copied, to publicise such information as it considers appropriate about the matter to which the notice relates.

9. The Bank will consider a number of factors in determining whether it is appropriate to exercise its discretion to publish, including the extent to which publicity would in its view be likely to:

- (a) advance its supervisory goals;
- (b) enhance financial stability;
- (c) provide a signal to relevant bodies as to the types of behaviour it considers to be unacceptable; and
- (d) prevent more widespread breaches of its requirements.

10. In accordance with section 391 of FSMA, the Bank will not publish information if in its opinion publication would be:

- (a) unfair to the persons concerned;
- (b) prejudicial to the safety and soundness of relevant bodies;
- (c) detrimental to the stability of the UK financial system.

### Publication of decision notices

11. Section 391 of FSMA requires the Bank to publish — in such manner as it considers appropriate — such information as it considers appropriate about the matters to which a decision notice relates.

12. However, section 391 of FSMA provides that the Bank may not publish information concerning a decision notice if in the Bank's opinion publication would be:

- (a) unfair to the persons concerned;
- (b) prejudicial to the safety and soundness of relevant bodies; or
- (c) detrimental to the stability of the UK financial system.

(1) All references in this document to FSMA are to that Act as amended by the Financial Services Act 2012 and applied to the Bank in respect of RCHs by Schedule 17A.

(2) The categories of warning notice to which the power applies are set out in section 391(1ZB) of FSMA and include sections 192L and 312G.

13. The Bank will consider the circumstances of each case, but, subject to paragraph 12 above, will ordinarily publicise enforcement action when a matter has led to the giving of a decision notice.

### Making representations on issues of publicity

14. Where it proposes to publish details of a warning or decision notice, the Bank will consider any representations made to it (whether as a result of the formal requirement to consult under section 391(1)(c) of FSMA or otherwise) by the subject of the notice and any person to whom the notice is copied.

15. Such representations should ordinarily be made in writing,<sup>(1)</sup> and should contain information — with reference to the provisions in section 391 of FSMA — as to why it would not be appropriate for the Bank to publish details of the relevant notice.

16. The Bank will not ordinarily decide against publication solely because it is claimed that:

- (a) publication could have a negative impact on a relevant body's reputation; or
- (b) a relevant body will apply (or is likely to apply) for some or all of the matter to be dealt with in private when they refer it to the Tribunal.

### Who will take decisions on publicity?

17. FSMA section 395(2)(c) requires that the Bank's decision-making in relation to publicising that a warning notice has been given should follow a procedure which is, as far as possible, the same as that applicable to the decision to give the warning notice.<sup>(2)</sup>

18. The decision to publicise that a warning notice has been given must not, however, be taken only by a person who first proposed the decision to publish.

19. In relation to warning or decision notices, any decision concerning publicity may be taken either by the same decision-making committee that took the decision to give the notice itself or by a different decision-making committee. The decision-maker must, however, be different from the person proposing publication.

### What form will publicity take?

20. Information made public in relation to a warning notice will ordinarily include:

- (a) the identity of the body to which the matter relates;
- (b) a brief summary of the facts giving rise to the decision to take regulatory action against the relevant body; and
- (c) a statement making clear that the giving of a warning notice is not a final decision, and that if, following representations, the Bank decides to give a decision notice, the subject of the notice has the option to refer the matter to the Tribunal to have the matter considered afresh.

21. Information made public in relation to a decision notice will generally include the relevant notice itself, potentially with a press release.

### Reviewing whether continuing publicity remains appropriate

22. Where it has published details of a warning or decision notice, the Bank will on request review those details and any related press releases that are published on its website to determine whether — at the time of the request — continued publication is appropriate, or whether they should be removed or amended.

23. In determining whether continued publicity remains appropriate, the Bank will in particular take into account:

- (a) whether it has continuing concerns in respect of the relevant body;
- (b) the seriousness of the concerns;
- (c) the nature of the action taken by the Bank and the nature of any sanction imposed on the relevant body;
- (d) the extent to which the publication continues adequately to set out the Bank's position and/or expectations regarding behaviour in a particular area;
- (e) public interest in the case (both at the time of publication and subsequently);
- (f) whether continued publication is necessary for the purposes of deterrence and/or advancing the Bank's supervisory goals;
- (g) how much time has passed since publication; and
- (h) any representations made by the relevant body on the continuing impact on them of the publication.

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(1) If a person wishing to make representations to the Bank on any of the matters set out in this section is unable to provide representations in writing, the Bank may allow representations to be made in person or by some other suitable means.

(2) See Appendix 1 of this paper for the Bank's proposed procedure on giving warning and decision notices.