

Policy Statement

Financial penalties imposed by the Bank under the
Financial Services and Markets Act 2000 or under Part 5
of the Banking Act 2009

April 2013



BANK OF ENGLAND



Introduction

1. This statement of policy is issued by the Bank of England (the 'Bank') in respect of Recognised Clearing Houses (RCHs), Qualifying Parent Undertakings of UK RCHs (QPUs) and operators of recognised inter-bank payment systems.⁽¹⁾ It sets out the Bank's policy on the imposition and amount of penalties under sections 312F and 192K of the Financial Services and Markets Act 2000 (FSMA),⁽²⁾ and section 198(3) of the Banking Act 2009.

2. For the purposes of this policy, RCHs, QPUs and operators of recognised inter-bank payment systems are collectively referred to as the 'relevant bodies'.

3. Where this policy refers to a 'breach', this covers situations where an RCH has contravened a relevant requirement imposed on it;⁽³⁾ or a QPU has contravened a direction or information rule;⁽⁴⁾ or there has been a compliance failure⁽⁵⁾ by the operator of a recognised inter-bank payment system.

4. The Bank will apply the same penalties policy in respect of all relevant bodies. This does not imply that the same breach would necessarily result in the same financial penalty across those three classes of body.

5. In applying this policy, the Bank may have regard to the following general principles and considerations:

- (a) the desirability of upholding and encouraging high standards of behaviour that are consistent with the relevant bodies meeting and continuing to meet relevant regulatory requirements;
- (b) the desirability of demonstrating the benefits of such behaviour; and
- (c) the need to ensure that where disciplinary measures, including penalties, are imposed by the Bank:
 - (i) they properly reflect the seriousness of the breach of regulatory requirements;
 - (ii) they are proportionate to the breach; and
 - (iii) they are effective in deterring those who are subject to the relevant regulatory requirements from committing similar or other breaches.

6. Prior to imposing a penalty the Bank will provide a warning notice⁽⁶⁾ allowing an opportunity for the relevant body to make representations, and will consider any representations made.⁽⁷⁾

7. Where the Bank intends to impose a financial penalty, the relevant body may appeal to the Upper Tribunal.⁽⁸⁾

Policy concerning whether the Bank will impose a financial penalty

8. The Bank will consider the facts and circumstances of each case when determining whether to impose a financial penalty. Factors that may be relevant for this purpose include (but are not limited to):

- (a) the general principles and considerations set out in paragraph 5 above;
- (b) the impact or potential impact of the breach on financial stability;
- (c) the seriousness of the breach including:
 - (i) its impact on and any threat or potential threat it posed or continues to pose to the achievement of the Bank's objectives;
 - (ii) its duration or frequency;
 - (iii) whether it was deliberate or reckless;
 - (iv) whether it was a result of direct acts or omissions of the relevant body;
 - (v) whether the relevant body derived any economic benefits;
 - (vi) whether it reveals serious or systemic weaknesses or potential weaknesses in the relevant body's business model, financial strength, governance, risk or other management systems and/or internal controls relating to all or part of the relevant body's business; and
 - (vii) whether there is more than one issue which, considered individually, may not justify the imposition of a penalty but, when considered together, may do so;
- (d) the conduct of the relevant body after the breach was committed, including:
 - (i) how promptly, comprehensively and effectively the relevant body brought the breach to the attention of the Bank and/or other regulatory or law enforcement agencies;
 - (ii) the degree of co-operation the relevant body showed during the investigation of the breach by the Bank and/or by other regulatory or law enforcement agencies;

(1) See the requirements of s.312J and s.192N of the Financial Services and Markets Act 2000 (FSMA), as amended by the Financial Services Act 2012, in respect of RCHs and QPUs respectively, and s.198 of the Banking Act 2009 in respect of operators of payment systems.

(2) 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.

(3) See section 312F of FSMA.

(4) See section 192K(1) of FSMA.

(5) Section 196 of the Banking Act 2009 defines as a 'compliance failure' a failure to: (a) comply with a code of practice under s189 (codes of practice); (b) comply with a requirement under s190 (system rules); (c) comply with a direction under s191 (directions); or (d) ensure compliance with a requirement under s195 (independent report).

(6) In accordance with section 201 of the Banking Act 2009 or sections 192L or 312G of FSMA.

(7) The minimum period for representations is 21 days under the Banking Act 2009 and 14 days under FSMA.

(8) Under the provisions of section 202 of the Banking Act 2009, or sections 192L(7) or 312H(4) of FSMA.

- (iii) the nature, extent and effectiveness or likely effectiveness of any remedial action the relevant body has taken, will take or is in the course of taking in respect of the breach and how promptly it was or will be taken;
 - (iv) the likelihood that the same or a similar type of breach (whether on the part of the relevant body in question or other relevant bodies that are subject to the relevant regulatory requirements) will recur if a penalty is not imposed (or other appropriate enforcement action is not taken) by the Bank and/or other regulatory or law enforcement agencies;
 - (v) whether the relevant body has complied with any requests or requirements of the Bank and/or other regulatory or law enforcement agencies relating or relevant to their behaviour, including as to any remedial action; and
 - (vi) the nature and extent of any false, incomplete or inaccurate information given by the relevant body and whether the information has or appears to have been given in an attempt knowingly or recklessly to mislead the Bank and/or other regulatory or law enforcement agencies;
- (e) the previous disciplinary and/or supervisory record of the relevant body including:
- (i) any previous enforcement or other regulatory action by the Bank or other regulators, including any predecessor regulators, that resulted in an adverse finding against the relevant body;
 - (ii) any warnings given to the relevant body by the Bank or other regulators, including any predecessor regulators;
 - (iii) any previous agreement or undertaking by the relevant body to the Bank or other regulators, including any predecessor regulators, to act or behave or refrain from acting or behaving in a particular way and their compliance with that undertaking; and
 - (iv) the general supervisory record of the relevant body or specific aspects of its record relevant to the matter in question;
- (f) relevant materials provided by the Bank and/or any predecessor regulators, which were in force at the time of the behaviour in question;⁽¹⁾
- (g) whether other sanctions, or no sanction, may be more appropriate to the achievement of the Bank's objectives;
- (h) any relevant action by other domestic and/or international regulatory authorities or law enforcement agencies (including whether, if such agencies are taking or proposing to take relevant action in respect of the behaviour in question, it is necessary or desirable for the Bank also to take its own separate action). In appropriate cases, the Bank in conjunction with the Financial Conduct Authority (FCA), Prudential Regulation Authority (PRA) and/or other regulatory or law enforcement agencies will determine whether any joint or co-ordinated investigation and enforcement or other legal action is required.

Qualifying Parent Undertakings: additional factors

9. Under section 192K(1) of FSMA, where the Bank is satisfied that a relevant body that is or has been a QPU has contravened:

- (a) a requirement arising from a direction given to that body by the Bank under section 192C of FSMA; or
- (b) rules made by the Bank under section 192J of FSMA;

the Bank may, under sections 192K(2) and (3) of FSMA, impose on that QPU a penalty of such amount as it considers appropriate or, instead of imposing a penalty, publish a statement censuring the QPU.

10. In addition to the factors set out in paragraph 8 above, additional considerations may be relevant when the Bank is deciding whether to take action to impose a financial penalty on a QPU. These include:

- (a) where a QPU has contravened a requirement arising from a direction given to it by the Bank under section 192C of FSMA, the nature of any acts or omissions of the QPU that gave rise to that direction and the Bank's determination of their material adverse effects or potential effects;
- (b) the role or influence of the QPU in determining, directing or affecting the affairs of the RCH, or, where relevant to the RCH, any other company within the group⁽²⁾ of companies of which they form part, or the group of companies as a whole (including but not limited to their risk profile and resilience);
- (c) the effect or potential effect of the contravention on the QPU, the RCH, or where relevant to the RCH, any other company within the group of companies of which they form part, or the group of companies as a whole.

Policy concerning the appropriate amount of a financial penalty

11. The amount of any financial penalty imposed by the Bank will be calculated in accordance with the following five-step approach:

- (a) Step 1: where relevant, the disgorgement of any economic benefits derived from the breach;
- (b) Step 2: in addition to any disgorgement under step 1, the determination of a figure which properly reflects:
 - (i) the seriousness of the breach; and
 - (ii) the financial strength of the relevant body;

(1) The Bank may have regard to any relevant materials provided by it, and/or by any predecessor regulators, whether issued publicly or bilaterally, for example, where this helps to illustrate ways in which a relevant entity can comply (or could at the relevant time have complied) with relevant regulatory requirements, or the standards expected of the entity.

(2) As defined in section 421 of FSMA.

- (c) Step 3: where appropriate, an adjustment to the figure determined under step 2 to take account of any aggravating, mitigating or other relevant circumstances;
- (d) Step 4: where appropriate, an upwards adjustment to the figure determined following steps 2 and 3, to ensure that the penalty has an appropriate and effective deterrent effect on the body in question and on other relevant bodies;
- (e) Step 5: if applicable, an adjustment based on any serious financial hardship that the Bank considers payment of the penalty would cause to the relevant body.

12. These steps will be considered in all cases, although the detail of the application of one or more of them may differ, depending on the circumstances of the case.

13. The Bank will aim to ensure that the overall penalty arrived at using its five-step approach is appropriate and proportionate to the relevant breach. The Bank may decrease the level of the penalty that would otherwise be determined following steps 2 and 3 if it considers that it is disproportionately high having regard to the seriousness, scale or effect of the breach.

Step 1 — disgorgement

14. Where relevant, and where it is practicable to ascertain and quantify them, the Bank will seek to deprive the relevant body of any economic benefits derived from or attributable to the breach, including any profit made or loss avoided. The Bank may also calculate and add interest on such benefits.⁽¹⁾

Step 2 — the seriousness of the breach

15. In addition to any figure in respect of disgorgement established under step 1, the Bank will determine at step 2 a figure which properly reflects:

- (a) the seriousness of the breach by the relevant body, including any threat or potential threat it posed or continues to pose to the advancement of the Bank's objectives; and
- (b) a suitable indicator of the financial strength of the relevant body.

16. When assessing the seriousness of the breach, the factors to which the Bank may have regard may include, as appropriate:

- (a) the effect or potential effect of the breach on the achievement of the Bank's objectives;
- (b) the duration or frequency of the breach in relation to the nature of the requirement contravened;
- (c) whether the breach was deliberate or reckless;
- (d) whether the relevant body against whom action is to be taken is an individual;⁽²⁾

- (e) whether the breach forms part of a pattern of non-compliant behaviour;
- (f) whether the breach reveals serious or systemic weaknesses or potential weaknesses in the relevant body's business model, financial strength, governance, risk or other management systems and internal controls relating to all or part of its business.

Step 3 — adjustment for any aggravating, mitigating or other relevant factors

17. The Bank may increase or decrease the amount of the penalty determined at step 2 (excluding any amount to be disgorged pursuant to step 1) to take into account any factors which may aggravate or mitigate the breach, or other factors which may be relevant to the breach or the appropriate level of penalty in respect of it. Factors that may aggravate or mitigate the breach include:

- (a) the conduct of the relevant body in bringing (or failing to bring) promptly, effectively and comprehensively to the Bank's attention (or, where relevant, the attention of other regulatory or law enforcement agencies) the full facts, circumstances and implications or potential implications of the breach;
- (b) the nature, timeliness and adequacy of the relevant body's response to any supervisory interventions by the Bank and any remedial actions proposed or required by Bank supervisors;
- (c) the degree of co-operation the relevant body showed during the investigation of the breach by the Bank (or, where relevant, any other regulatory or law enforcement agencies) and the impact of this on the Bank's ability to conclude its enforcement process promptly and efficiently;
- (d) the extent of any attempt to conceal the breach or impede the Bank's investigation;
- (e) whether the relevant body's senior management was aware of the breach and, if so, the nature and extent of their involvement in it and the timeliness, adequacy and effectiveness of any steps taken by them to address it or the consequences of it;
- (f) the previous disciplinary record and general supervisory history of the relevant body, both in respect of the Bank's requirements and, where relevant, those of any other regulatory or law enforcement agencies, including the reporting or non-reporting of concerns in relation to the issue giving rise to the breach in question;
- (g) the nature and impact or likely impact of any compliance or training policy or programme or other remedial steps taken by the relevant body since the breach was identified to address steps and reduce the likelihood and impact of

(1) The Bank will determine on a case-by-case basis whether any interest should be added and, if so, the interest rate that should apply and the period for which interest should be calculated. In determining an interest rate, the Bank may have regard to the rates applied by the civil courts or other regulatory authorities.

(2) See s192N(2)(c) of FSMA.

- future breaches (including whether these were taken on the relevant body's own initiative or at the request of the Bank or other regulatory or law enforcement agencies);
- (h) the extent to which the breach was caused by parties⁽¹⁾ or circumstances beyond the control of the relevant body.

18. Other relevant factors may include action taken against the relevant body by other domestic and/or international regulatory authorities or law enforcement agencies relevant to the breach of the Bank's regulatory requirements. This may include any penalties or fines or other disciplinary measures imposed by those agencies.

Step 4 — adjustment for deterrence

19. If the Bank considers that the penalty determined following steps 2 and 3 is insufficient effectively to deter the relevant body that committed the breach, or others who are subject to the Bank's regulatory requirements, from committing similar or other breaches, it may increase the penalty at step 4 by making an appropriate deterrence adjustment.

20. The circumstances in which the Bank may make a deterrence adjustment to the penalty include:

- (a) where the Bank considers the value of the penalty is too small in relation to the breach to achieve effective deterrence;
- (b) where previous action by the Bank, PRA, FCA and/or any predecessor regulators in respect of the same or a similar breach has failed to improve or sufficiently improve relevant industry standards of behaviour;
- (c) where the Bank considers it likely that, in the absence of a deterrence adjustment, the same or a similar breach will be committed in the future by the relevant body or by other members of the regulated community more widely.

Step 5 — application of any applicable reductions serious financial hardship

21. Where a relevant body claims that payment of a penalty determined by the Bank will cause them serious financial hardship (the onus is on the relevant body to satisfy the Bank that this would be the case), in exceptional circumstances the Bank may reduce the amount of the penalty.

22. Where the Bank agrees in principle to consider a relevant body's representations as to serious financial hardship, the relevant body must:

- (a) promptly provide to the Bank relevant, comprehensive and verifiable evidence that payment of the penalty will cause them serious financial hardship; and
- (b) co-operate fully with the Bank and promptly, transparently and comprehensively comply with any requests by it for further information or evidence concerning their financial position or other relevant circumstances.

23. In assessing whether the penalty would cause the firm serious financial hardship the factors which the Bank may have regard to include:

- (a) the relevant body's financial strength and viability; and
- (b) any impact that payment of the penalty would or would be likely to have on the relevant body's ability to meet and continue to meet the Bank's regulatory requirements and standards.

24. The Bank will consider agreeing to defer the due date for payment of the penalty or accepting payment by instalments where, for example, the relevant body requires a reasonable time to raise funds to enable the totality of the penalty to be paid within a reasonable period.

(1) It is the responsibility of the RCH or recognised payment system to manage the risk arising from any outsourced activities.