

Policy Statement

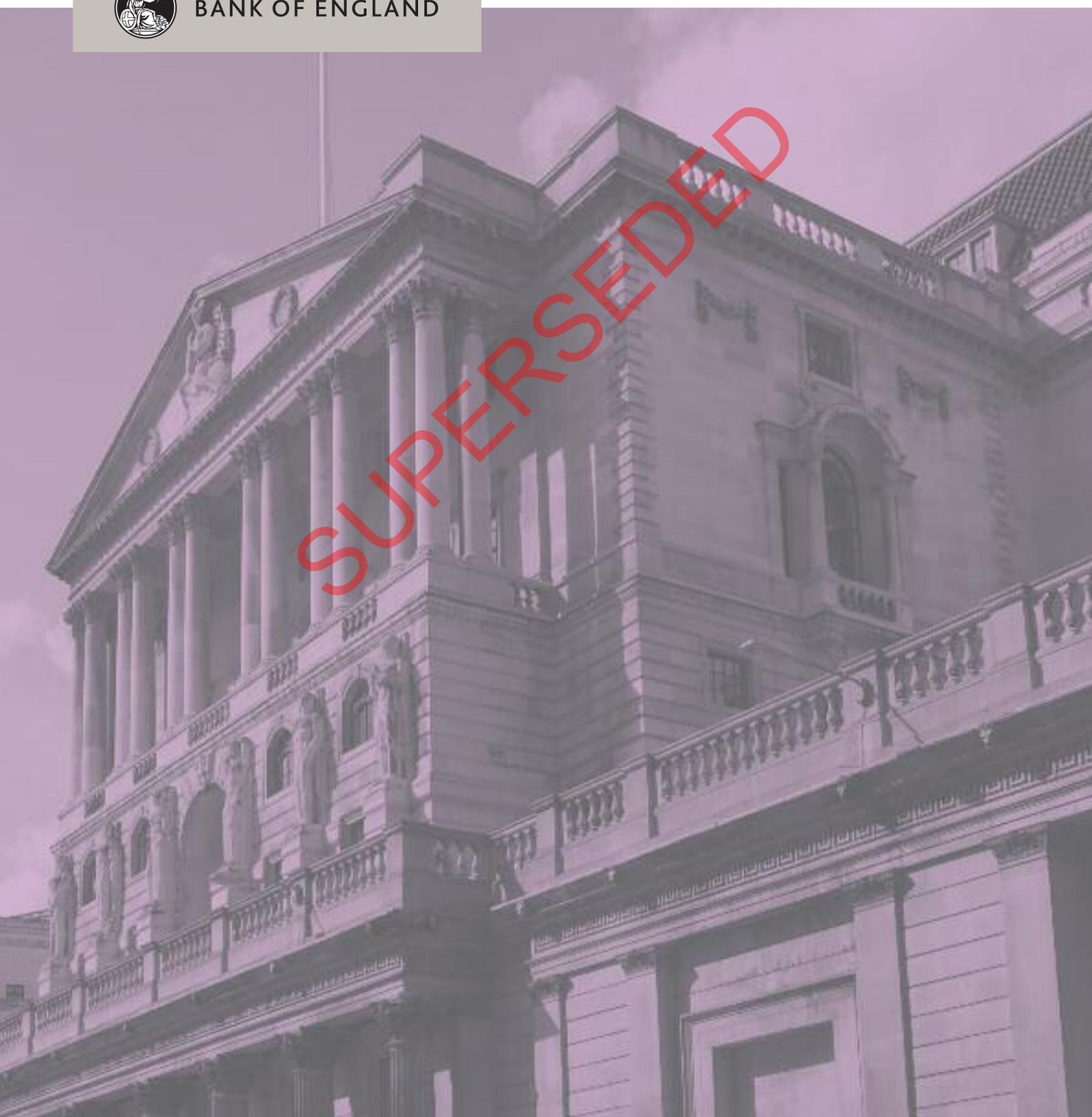
Statutory statements of procedure in respect of the Bank of England's supervision of financial market infrastructures

August 2018 (updating June 2014)



BANK OF ENGLAND

SUPERSEDED



Introduction

Statutory statements of procedure

This policy statement is issued by the Bank of England (the Bank) in respect of Recognised Clearing Houses (RCHs) and Qualifying Parent Undertakings of UK RCHs (QPU). It contains the statements of procedure relating to decisions resulting in statutory notices and publishing details of these statutory notices, as required by the Financial Services and Markets Act 2000 (FSMA).

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),¹ 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 (QPUs).
2. For the purposes of this procedure, RCHs and QPUs 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 a tiered structure for decision-making. Decisions may be made at different levels of seniority in the Bank depending on their impact and may involve representatives from across the Bank. Decisions in contested enforcement cases will be made by the Enforcement Decision Making Committee (EDMC).²
5. This may involve decision-making committees, such as the Financial Market Infrastructure (FMI) Board or other committees, taking decisions such as issuing statutory notices. In urgent cases, as outlined below, decisions may be taken by individuals, rather than a committee. Wherever this statement refers to decision-making committees, the same points apply in respect of the decision-makers, as applicable.
6. The FMI Board members include Deputy Governors, Executive Directors and Directors from across the Bank, and meetings will ordinarily be chaired by the Deputy Governor for Financial Stability. Certain functions may be delegated to other committees of an appropriate level of seniority. These could include representatives from across the Bank. 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 by other means, including in writing, by email or by telephone.
8. Each decision-making committee will aim to reach a consensus on the decisions it is asked to consider. Where consensus cannot be achieved, the decision-making committee will vote, with the chairperson holding the casting vote.

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 procedure for the EDMC is set out in a separate document Procedures – The Enforcement Decision Making Committee, August 2018: www.bankofengland.co.uk/paper/2018/procedures-the-enforcement-decision-making-committee. In the case of any ambiguity, this Policy Statement will take precedence in respect of the Bank's supervision of financial market infrastructures.

2

9. To support effective decision-making, the Bank may divide FMIs into different categories for the purposes of allocating decision-making responsibilities. FMIs are currently divided for these purposes into two categories, 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.
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.¹
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 (for example by virtue of being involved in establishing the evidence).²

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 those consequences, a decision could be taken by individuals, for example, a decision which would ordinarily be taken by the FMI Board may be made by other means, such as by the Deputy Governor for Financial Stability with at least one other member of 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 itself that the action recommended is appropriate in the relevant circumstances; and
 - (iv) decide whether to give the notice and the terms of such notice.

1 Pages 3–5 of 'Financial Services and Markets Act 2000: Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority', March 2015: <https://www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/bank-pra-and-fca-supervision-of-markets-and-markets-infrastructure.pdf>.

2 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.

17. If the Bank decides to give a warning notice, it will ensure that the notice meets the requirements set out in FSMA.¹
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 representations, in writing, 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.

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 14 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.

4

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 representations at the meeting unless asked to do so by the decision-making committee.
32. If requested by the relevant decision-making committee, 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, discuss the matter with the relevant Bank staff without other relevant parties being present or otherwise having the opportunity to respond; and
 - (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.
34. If such exceptional circumstances arise, the decision-making committee will disclose such discussions with the recipient of the notice and permit them the opportunity to respond.

Procedure where no representations are received

35. 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.
36. 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.
37. 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

38. 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; and
 - (iii) decide whether to give the notice and the terms of any notice.
39. The same decision-making committee that gave the warning notice will ordinarily also decide whether to give a decision notice.

40. If giving a decision notice, the Bank will ensure that the notice meets the requirements set out in FSMA.¹
41. 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);
 - (ii) further explanation of any aspect of the Bank staff recommendation or accompanying papers;
 - (iii) information about the Bank's priorities and policies; or
 - (iv) legal advice.
42. 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.
43. The decision-making committee will make decisions based on all the relevant information available to them.

Procedure for decision notices

44. 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; and
 - (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.²
45. The Bank will make the appropriate arrangements for the distribution of the notice to all the relevant parties.
46. If the decision-making committee decides that the Bank should not give a decision notice, the Bank will notify the relevant parties in writing.

Further decision notice

47. 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.³ The Bank may only do this if the relevant body receiving the further decision notice gives its consent.⁴ 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;⁵
 - (ii) the decision-making committee will consider whether the action proposed in the further decision notice is appropriate in the circumstances;

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.

3 As set out in section 388(3) of FSMA.

4 As set out in section 388(4) of FSMA.

5 Either before or after obtaining the relevant body's consent.

- (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; and
- (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

48. 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.

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)¹ 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 (QPU). This statement of procedure outlines the Bank's procedure on publishing information about warning and decision notices, as required under section 395 of FSMA, and publishing information during Bank investigations.
2. For the purposes of this procedure, RCHs and QPUs 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 that 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;

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.

- (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 considers 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,¹ 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; and
 - (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:

¹ The categories of warning notice to which the power applies are set out in section 391(12B) of FSMA and includes those given under sections 192L and 312G.

8

- (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.
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,¹ 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 Upper 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.
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 Upper 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.

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.

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
24. Where the Bank revokes a decision notice that has been previously published, the Bank will make it clear on its website that it has been revoked.

SUPERSEDED