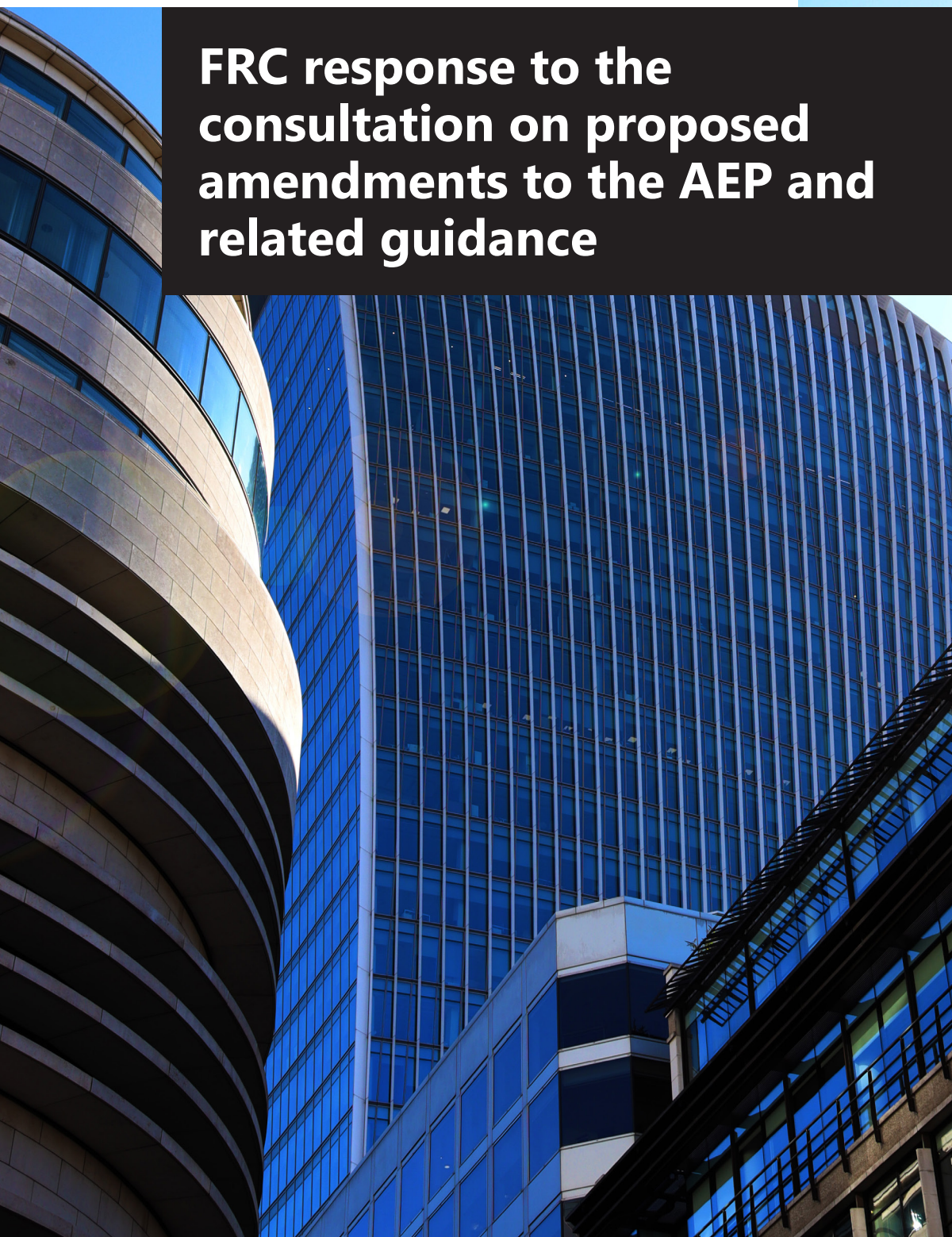




Financial Reporting Council

# The Audit Enforcement Procedure

**FRC response to the consultation on proposed amendments to the AEP and related guidance**



June 2023

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# Introduction

The FRC is the 'competent authority' for audit in the UK.<sup>1</sup>

As competent authority, the FRC is responsible (amongst other things) for investigations and imposing and enforcing sanctions (*Enforcement Action*) in respect of statutory auditors and statutory audit firms (*Statutory Auditors*).<sup>2</sup> The Audit Enforcement Procedure (*AEP*) was developed to implement the FRC's competent authority enforcement responsibilities. It first took effect on 17 June 2016 and, following a post-implementation review in 2021, took effect in an amended form on 5 January 2022.<sup>3</sup>

Where a question is raised as to whether a Statutory Auditor has breached a *Relevant Requirement* (as defined in the AEP), the FRC, through its Executive Counsel, may carry out *Enforcement Action* under the AEP.

The FRC has retained to itself responsibility for *Enforcement Action* in respect of the conduct by Statutory Auditors of audit work for public interest entities, AIM-listed companies with an average market capitalisation of over €200 million and Lloyds Syndicates. *Enforcement Action* relating to other categories of audit work has been delegated by the FRC to the Association of Chartered Certified Accountants, Chartered Accountants Ireland, the Institute of Chartered Accountants in England and Wales and the Institute of Chartered Accountants of Scotland under a series of delegation agreements available on the FRC website. The FRC may, however, reclaim and take over any such delegated *Enforcement Action*.

## Consultation document issued 3 April 2023

On 3 April 2023<sup>4</sup>, the FRC launched a consultation (*AEP Consultation*) on amendments it was proposing to make to the AEP. The *AEP Consultation* also set out, for illustration purposes, amended Guidance for the Case Examiner<sup>5</sup> and Hearings Guidance<sup>6</sup>. Through the consultation process, the FRC sought views on the amendments it was proposing to make to the AEP. In particular, the views of Statutory Auditors and regulatory bodies, including professional associations and advisers were sought.

The *AEP Consultation* explained that the main purpose of the proposals was to effect changes to the decision-making remit of the Board and the Case Examiner under Part 2 of the AEP (Initial Stages). It further explained that, under the current AEP, where the Case Examiner determines that information raises a question as to whether a Statutory Auditor has breached a *Relevant Requirement*, the Case Examiner has discretion – under Rule 5 of the AEP - to determine whether to take no further action, arrange constructive engagement or refer the matter to the Board.

<sup>1</sup> Regulation 2, Statutory Auditors and Third Country Auditors Regulations 2016 (as amended).

<sup>2</sup> Regulation 3(1)(l) and (m), Statutory Auditors and Third Country Auditors Regulations 2016 (as amended).

<sup>3</sup> <https://www.frc.org.uk/getattachment/26e687a9-05a1-47bd-861d-497b22678c24/FRC-Audit-Enforcement-Procedure>

<sup>4</sup> <https://www.frc.org.uk/getattachment/0aff3360-90cd-4304-882a-fb7b92369d85/-;.aspx>

<sup>5</sup> <https://www.frc.org.uk/getattachment/b48ec8d3-37d0-47b9-b358-04e33d4a9afb/Guidance-for-the-Case-Exam>

<sup>6</sup> <https://www.frc.org.uk/getattachment/bc584ef2-31cc-45a8-8852-4e5e1c47023a/Hearing-Guidance.pdf>

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Under the proposed amendments, the Board would be given the power (under a new Rule 5A) to issue guidance to the Case Examiner which the Case Examiner would be obliged to take into account before exercising their Rule 5 powers. The *AEP Consultation* also included, for illustration purposes, details of the guidance that the FRC's Board was proposing to give to the Case Examiner in reliance on the proposed new Rule 5A power. That guidance was proposed to be reflected in the Guidance for the Case Examiner and introduced a new concept of *Referral Case*, with an explanation of the concept and explained that the Case Examiner is to refer such cases to the Board. The cumulative effect of the proposed changes was to enhance the Board's ability to oversee and engage with the Case Examiner's activities.

The following amendments were also proposed to the AEP:

- a clarification that, where the Case Examiner refers a matter to the Executive Counsel under Rule 5(c), the Executive Counsel is to consider applying for an Interim Order; the Executive Counsel is not obliged to apply for an Interim Order; and
- an extension of the period within which the Board can reconsider certain decisions under AEP, Rule 134 (from 4 months to 6 months).

Additionally, the consultation document described and set out:

- proposed changes to the Guidance for the Case Examiner, including to reflect the above-mentioned changes to Part 2 of the AEP; and
- proposed changes to the Hearings Guidance to deal with the parameters of factual evidence under AEP, Rule 34.

The proposals are intended to ensure a clearer, more effective and more robust enforcement process, as described in the *AEP Consultation*.

## Consultation responses and next steps

The FRC invited feedback and comment on the proposals as set out in the *AEP Consultation*. Responses were invited by 5 May 2023. The four questions for consultation were:

1. Do you have any comments on the proposed changes to the AEP described above and set out in Appendix A? Please respond by reference to specific Rule numbers of the amended AEP.
2. Do you agree with the proposed amendments to the AEP? Please respond by reference to specific Rule numbers of the amended AEP.
3. Do you have any general comments on the amended AEP?
4. Do you have any other comments on the issues raised in this consultation?

The FRC received 12 consultation responses,<sup>7</sup> many of which were supportive of some or all of the proposed amendments. None of the proposed measures received universal opposition. The FRC

<sup>7</sup> For a list of the respondents, see Appendix A.

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carefully considered all submissions received in response to the *AEP Consultation* before finalising its policy approach, together with comments received on the Guidance. Having done so, the FRC has decided to give effect to the amendments to the AEP as proposed in the *AEP Consultation*. The FRC's Board also intends to give effect to the amended Guidance for the Case Examiner and Hearings Guidance in the form appended to the *AEP Consultation*.

A summary of the key points raised in the consultation responses, together with the FRC's position on those points, is set out in Appendix B to this feedback statement.

The amended AEP, Guidance to the Case Examiner and Hearings Guidance **will come into force on 30 June 2023**.

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## Appendix A – List of respondents

The FRC received twelve (12) responses to the consultation:

1. The Association of Chartered Certified Accountants;
2. The Institute of Chartered Accountants of Scotland;
3. BDO LLP;
4. Clyde & Co LLP;
5. DAC Beachcroft LLP;
6. Deloitte LLP;
7. Ernst & Young LLP;
8. Grant Thornton UK LLP;
9. KPMG LLP;
10. Mazars LLP;
11. PricewaterhouseCoopers LLP; and
12. Taylor Wessing LLP.

# Appendix B – Summary of responses and FRC response

## Amendments to the AEP

### Part 2 - Initial Stages

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
Rule 3	No amendments were proposed to Rule 3.	It would be helpful for Rule 3 and the Case Examiner Guidance to be expanded to make clear that the Case Examiner may make enquiries not only to enable a decision to be taken as to whether a question arises as to a breach of a <i>Relevant Requirement</i> , but also with a view to enabling a decision to be taken by the Case Examiner under Rule 5 of the AEP (or, if a <i>Referral Case</i> , the Conduct Committee).	Amendments to Rule 3 were not the subject of the consultation. Furthermore, the FRC considers that it is clear, when Part 2 of the AEP is read as a whole, that the Case Examiner’s enquiries are intended to facilitate the decision making envisaged in Part 2 of the AEP.  <b>Conclusion: no change to the position as proposed in the consultation.</b>
Rule 5	The consultation described the FRC’s proposals to amend Rule 5 of the AEP so that, where the Case Examiner determines that information raises a question as to whether a <i>Relevant Requirement</i> has been breached, they would be	<u>Support for the proposals</u>  A number of respondents were supportive of the proposed amendments to Rule 5, noting that the amendments: provide clarity of procedural matters; (in relation to the proposed changes to Rule 5(c)) add an additional layer of scrutiny to any decision to apply for an Interim Order; will	<u>Support for proposals</u>  The FRC welcomes the support expressed for the changes that were proposed in the consultation (including to Rule 5(c)) and the recognition of the anticipated benefits of increased Board oversight of, and engagement with, Case Examiner activities.



Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
	<p>required to decide on next steps (whether to take no further action, pursue constructive engagement or make a referral to the Board) after having taken due account of any relevant guidance issued to the Case Examiner by the FRC's Board<sup>8</sup>.</p> <p>The consultation also proposed to clarify Rule 5(c) so that, where the Case Examiner refers a matter to the Executive Counsel, it is clear that the Executive Counsel is to consider applying for an Interim Order; the intention is not that such a referral would oblige the Executive Counsel to apply for an Interim Order.</p>	<p>ensure that appropriate matters are referred to the Board for consideration; and aim to promote consistency and transparency by increasing oversight of decisions made by the Case Examiner.</p> <p><u>Status and significance of guidance</u></p> <p>It was stated that the Case Examiner already works to the guidance in place and it is implicit that those within the FRC to whom such guidance and policies apply should follow them. It was also suggested that the FRC should consider the status of all applicable guidance, so as to reduce the risk of uncertainty.</p> <p><u>Consequences of the making of referrals</u></p> <p>Concerns were raised that the amendments will have the effect of moving the Case Examiner's discretion to the Board, which – it was argued – may result in an increase in the number of matters being referred to the Board and</p>	<p><u>Status and significance of guidance</u></p> <p>The FRC notes and has considered the various comments that have been made concerning the status and significance of guidance issued by the Board. These are addressed further below.</p> <p><u>Consequences of the making of referrals</u></p> <p>The FRC notes the concerns expressed that the proposed <i>Referral Case</i> arrangements will result in delays, inefficiencies, more investigations and less constructive engagement. The FRC does not agree that the implementation of the proposed changes would be expected to lead to these outcomes. In particular, it notes that:</p> <ul style="list-style-type: none"> <li>the potential outcomes for all cases will remain as now – no further action; constructive engagement or investigation. The decision-maker for proposed <i>Referral Cases</i> may change, but the test to be applied will remain the same. It is not therefore anticipated that the proposed changes should lead to a marked increase in the number of cases that are referred for investigation.</li> </ul>

<sup>8</sup> The FRC's Board has delegated its functions under the AEP to the Conduct Committee. References in the table to the Board should therefore be read as including references to the Conduct Committee where appropriate.

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>for investigation, as well as delays to the process. One respondent noted that such an outcome would not improve audit quality in real time or maintain/enhance the attractiveness of the profession.</p> <p><u>Appropriate mechanism for making changes</u></p> <p>It was suggested that as the effect of the proposed changes to the Guidance for the Case Examiner are substantive and impact the operation of the AEP, the amendments should be effected through amendments to the AEP itself.</p>	<ul style="list-style-type: none"> <li>It is not anticipated that the <i>Referral Case</i> procedure will lead to delays or inefficiencies. In particular, it is noted that the Conduct Committee meets regularly throughout the year.</li> </ul> <p><u>Appropriate mechanism for making changes</u></p> <p>The FRC notes the suggestion that the changes proposed to the Guidance for the Case Examiner should be contained in the AEP itself. The FRC does not agree; the Board’s intention is to guide the Case Examiner as to what matters are to be referred to the Board; the Guidance for the Case Examiner is the appropriate place to do that. The proposed amended guidance reflects the Board’s desire to have greater oversight of the decisions to open investigations, pursue constructive engagement or to take no further action in respect of matters which are of higher public interest. It also supports the Case Examiner in making decisions in respect of such matters.</p> <p><b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rule 5. Having considered all responses to the consultation, the FRC is proposing to proceed with the changes to Rule 5</b></p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
			<b>as reflected in Appendix C to this feedback statement.</b>
Rule 5A	<p>The consultation described the FRC’s proposals for a new Rule 5A which would provide that, without prejudice to the Board’s power to issue guidance under Rule 167, the Board may, from time-to-time, issue guidance to the Case Examiner concerning the exercise of the Case Examiner’s Rule 5 powers. It was noted that the power is expected to enhance the Board’s ability to oversee Case Examiner activities and the referral of appropriate cases to the Board under Rule 5(d).</p>	<p><u>Support for proposals</u></p> <p>Several respondents were supportive of the new Rule 5A, including the provision of clear and detailed guidance and the additional oversight it would provide during the early stages of the AEP process.</p> <p>It was also noted that the reasons for the new proposed Rule 5A are not clear and that it may be unnecessary, as the Board already has the power to issue guidance and policies under Rule 167.</p> <p><u>Publishing and consulting on guidance</u></p> <p>A number of respondents considered that the guidance issued under Rules 5A and 167 should be made public and subject to formal consultation – and that provision should be made for this in the AEP. One respondent noted that if guidance is introduced without consultation, there is a risk that firms and individuals may be unfairly disadvantaged once guidance</p>	<p><u>Support for proposals</u></p> <p>The FRC welcomes the support expressed for the proposed new Rule 5A. Although it is recognised that, in view of the Board’s general power to issue guidance under Rule 167, the new Rule 5A is not strictly necessary, the FRC considers that having the specific and explicit provision for issuing guidance at Rule 5A is helpful and increases transparency.</p> <p><u>Publishing guidance</u></p> <p>It is intended that the proposed guidance – and any updates to it - will be published on the FRC’s website. Save in cases of urgency, the FRC expects to publish any material changes to guidance in advance.</p> <p><u>Scope of guidance</u></p> <p>It is not the Board’s current intention to issue guidance on a case specific basis; it is proposing to issue guidance that is of general application and to the Case Examiner (of which there is only one).</p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>takes effect. Another suggested that any guidance issued under Rule 5A which imposes mandatory obligations should be contained within the AEP, rather than in guidance.</p> <p>One respondent stated that the proposed powers under Rule 5A should only be exercised where there is a clear public interest imperative to do so to maintain public confidence in the proposed AEP (and the wider regulatory regime).</p> <p><u>Scope of guidance</u></p> <p>One respondent queried whether the guidance issued under Rule 5A is only on a case-by-case basis or has general application across cases.</p>	<p><u>Consulting on guidance</u></p> <p>The FRC notes the suggestion that the Board should consult on any changes to guidance going forward. There is no statutory requirement for the FRC to consult on the Guidance for the Case Examiner and the FRC does not consider it would be appropriate for it to commit to do so. However, the FRC recognises that there may be circumstances in which it would be appropriate for it to consult on proposed changes to guidance. This is something that the FRC keeps under review. Factors which will be relevant include, without limitation, the urgency, materiality and potential impact of the proposed changes.</p> <p><b>Conclusion: the FRC welcomes the support that respondents expressed for the new Rule 5A. Having considered all responses to the consultation, the FRC is proposing to proceed to introduce the new Rule 5A as reflected in Appendix C to this feedback statement.</b></p>
Rule 6	The consultation proposed that Rules 6 to 10 are amended so that, rather than requiring the Board to consider first whether to resolve the matter through	<p><u>Support for proposals</u></p> <p>Respondents were largely supportive of the proposed amendments to Rules 6 to 10, noting that they are sensible and clarify the existing powers of the Board.</p>	<p><u>Support for proposals</u></p> <p>The FRC welcomes the support expressed for the changes that were proposed to be made to Rules 6 to 10.</p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
	<p>constructive engagement (then whether there should be an investigation and finally no further action), the Board would determine which of the possible options available – constructive engagement, investigation or no further action – is the most appropriate, having regard to the facts of the case.</p>	<p><u>Status of constructive engagement</u></p> <p>A number of respondents expressed concern that the proposals would lead to fewer matters being referred to constructive engagement and more being referred to investigation. It was noted that such a result would have a negative impact on the audit profession and audit quality.</p> <p>One respondent noted that the FRC should not lose sight of the benefits of constructive engagement, which is at the heart of the FRC’s mission as an improvement regulator. A number of respondents reported positive experiences with constructive engagement.</p> <p><u>Board to have regard to guidance</u></p> <p>A respondent suggested that there should be explicit guidance to the Board about the appropriateness of constructive engagement in any given case to eliminate the risk of more matters being referred for investigation when</p>	<p><u>Status of constructive engagement</u></p> <p>The FRC’s position on this point is as described at Rule 5 above (Consequences of the making of referrals). The FRC does not consider that the proposed amendments would, in and of themselves, lead either to a reduction in decisions to pursue constructive engagement nor an increase in the opening of investigations. The changes are not intended in any way to diminish Constructive Engagement as a tool. Furthermore, no changes to the test for opening an investigation, pursuing Constructive Engagement or taking no further action are proposed. The existence of “good reason” for opening an investigation remains the threshold.</p> <p><u>Board to have regard to guidance</u></p> <p>With respect to the suggestion that the Board should have regard to guidance as to the appropriateness of constructive engagement, the Board is not proposing to issue guidance to itself. However, it will consider all relevant considerations in making its decisions. Those would be expected to include the issues to which the Case Examiner is to have regard (as set out at paragraphs 13 to 15 of the Guidance to the Case Examiner).</p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>constructive engagement would have been appropriate.</p> <p><u>Right to be notified of referral to Board and to make representations</u></p> <p>A number of respondents suggested that Statutory Auditors should receive notification of any decisions made by the Case Examiner with reasons and be provided with an opportunity to make representations (which could then be included within the papers to the Board) before a final decision is made to refer to investigation.</p> <p>Another respondent proposed that, where a matter is designated as a <i>Referral Case</i>, the relevant firm and individual member should be notified and that the AEP and Guidance should be amended to reflect this. It was also suggested that there should be direct provision for engagement between the Conduct Committee and firms/individuals, as there is with the Case Examiner.</p>	<p><u>Right to be notified of referral to Board and to make representations</u></p> <p>This was a point that was raised by a number of respondents to the FRC’s 2021 AEP consultation.</p> <p>The FRC has again considered whether there should be a formal process of representations to the Board regarding the opening of an investigation. It remains of the view that it is neither necessary nor appropriate to provide for a formal process of representations to the Board regarding the opening of an investigation.</p> <p><u>Transparency</u></p> <p>In respect of the suggestion that more information be shared at this stage, this was also a point that was raised by a number of respondents to the FRC’s 2021 AEP consultation.</p> <p>The FRC has considered the matter again. Its view remains the same. It notes that where an investigation is opened, the subjects of it will (under the AEP) receive a Rule 11 notice with the scope of the investigation and have an opportunity to engage with the FRC at an early stage of the investigation. Executive Counsel also provides additional</p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p><u>Transparency</u> A number of respondents advocated for more information as to which <i>Relevant Requirements</i> are said or are likely to have been breached and related matters being shared at this stage.</p> <p>It was also suggested that Rule 6 be amended to read “the Board shall determine whether, on balance, having considered all relevant factors, the matter should be referred for investigation”.</p>	<p>information concerning the initial areas of enquiry at a scoping meeting scheduled with the subjects of the investigation shortly after the opening of the investigation. The FRC considers it is neither necessary nor practicable to provide more specific information before the facts and issues of the investigation have been established.</p> <p><b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rules 6 to 10. Having considered all responses to the consultation, the FRC is proposing to proceed to amend Rule 6 as reflected in Appendix C to this feedback statement.</b></p>
Rule 7	Consequential amendments are proposed to Rule 7.	As noted above, respondents were largely supportive of the proposed amendments to Rules 6 to 10.	<b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rules 6 to 10. Having considered all responses to the consultation, the FRC is proposing to proceed to amend Rule 7 as reflected in Appendix C to this feedback statement.</b>
Rule 8	Consequential amendments are proposed to Rule 8.	As noted above, respondents were largely supportive of the proposed amendments to Rules 6 to 10.	The drafting points raised here have been considered. The FRC does not agree that any change needs to, nor should, be made to the drafting.

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>A respondent proposed that the word “consider” ought to be amended to “determine” and that “... or that no further action is to be taken in relation to the matter” be added to the end to ensure consistency with Rule 6.</p>	<p><b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rules 6 to 10. Having considered all responses to the consultation, the FRC is proposing to proceed to amend Rule 8 as reflected in Appendix C to this feedback statement.</b></p>
Rule 9	Consequential amendments are proposed to Rule 9.	<p>As noted above, respondents were largely supportive of the proposed amendments to Rules 6 to 10.</p> <p>It was queried whether the word “considers” in Rule 9 ought to be amended to “determines” to ensure consistency of terminology with the amendment proposed to Rule 6.</p> <p>A respondent also advanced that the requirement for the Board to determine whether “there is a good reason to investigate the matter” creates a presumption to investigate. As noted above, it was suggested that Rule 6 be amended to read “the Board shall determine whether, on balance, having considered all relevant factors, the matter should be referred for investigation”.</p>	<p>The drafting points raised here have been considered. The FRC does not agree that the changes proposed should be made or that the FRC’s proposed drafting creates a presumption in favour of investigation.</p> <p>The FRC also considers that Rule 9(c) is sufficiently clear in respect of referrals.</p> <p><b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rules 6 to 10. Having considered all responses to the consultation, the FRC is proposing to proceed to amend Rule 9 as reflected in Appendix C to this feedback statement.</b></p>



Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		One respondent suggested that the first sentence of Rule 9(c) should be replaced with <i>"refer the matter for investigation by an appropriate RSB"</i> to provide clarity over the referral process.	
Rule 10	The consequential deletion of Rule 10 was proposed.	As noted above, respondents were largely supportive of the proposed amendments to Rules 6 to 10.	<b>Conclusion: the FRC welcomes the support that respondents expressed for the proposed amendments to Rules 6 to 10. Having considered all responses to the consultation, the FRC is proposing to proceed to delete Rule 10 as reflected in Appendix C to this feedback statement.</b>

## Part 8: Reconsideration

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
Rules 131 - 134	<p>The consultation proposed that the time period during which a decision to pursue constructive engagement or no further action could be reconsidered should be extended from 4 to 6 months where the basis for the reconsideration is that the original decision was materially flawed.</p>	<p><u>Views for and against proposals</u></p> <p>A number of respondents supported the proposed extension of the reconsideration period. However, it was noted that the power of the Board should only be exercised to the extent that it is necessary to protect the public; to ensure fairness and proportionality; and where such an extension would be without prejudice to the rules of natural justice.</p> <p>Respondents commented that any reconsideration under Rule 131 should be dealt with in a timely manner but acknowledged that there may be some situations where the existing four (4) month period may not be sufficient time for a full reconsideration. The need for the extended six (6) month period would – some respondents noted – only likely to be required in a minority of matters and it should be considered an ‘exception’ and not the ‘norm’.</p>	<p><u>Views for and against proposals</u></p> <p>Some respondents supported the proposed extension of the reconsideration period. However, most did not and cited concerns in respect of the impact that such an extension would have on the relevant statutory auditors.</p> <p>The FRC remains of the view that the current 4-month period is too short a period to facilitate an effective reconsideration process by a non-executive body. It is also of the view that the proposed extension by 2 months is proportionate.</p> <p>Further, the FRC notes that, for the Board to make use of this power, it must appear to it that the original decision was materially flawed and that the reconsideration is necessary in the public interest or to prevent injustice. In practice our experience suggests that this is likely to arise in very few cases. The FRC is therefore satisfied that sufficient safeguards are built into the process and that it is appropriate to extend the reconsideration period.</p>

Rule	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>A number of respondents noted that there is a need for finality and certainty for respondents and advanced that the reconsideration period should not be extended. These respondents noted that the potential impact of such an extension on Statutory Auditors' wellbeing and finances needed to be considered. Some suggested that the extension may exacerbate stress and negatively impact the attractiveness of the audit professional as a whole.</p>	<p><b>Conclusion: the FRC welcomes the support this proposal received. However, it notes the points against the extension. Having considered all responses to the consultation, the FRC is proposing to amend Rule 134 so as to extend the time period for reconsideration under Rule 131(a)(i) from 4 months to 6 months as reflected (together with consequential amendments) in Appendix C to this feedback statement.</b></p>

## Amendments to the Guidance to the Case Examiner

### Introduction and determining whether a question arises

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
Paragraph 2	The consultation set out a proposed clarificatory amendment to paragraph 2 (Introduction) of the Guidance for the Case Examiner. This involved the deletion of the following text: <i>"Specifically, if the Case Examiner becomes aware of reviews or inspections undertaken by the Audit Quality Review team, they will not take any steps under the AEP unless the matter is formally referred to them by the AQR team."</i>	One respondent suggested some clarificatory amendments to make clear that reviews or inspections by the Audit Quality Review team must be concluded and a decision taken to refer the matter to the Case Examiner before any action is taken and to confirm that all information provided to the Case Examiner must be considered as part of the review process.	The FRC does not agree that the proposed 'clarifications' are appropriate.  <b>Conclusion: having considered all responses to the consultation, the FRC's Board is proposing to amend paragraph 2 of the Guidance for the Case Examiner as reflected in Appendix D to this feedback statement.</b>
Paragraph 10A	The FRC's Board proposed to amend the Guidance for the Case Examiner by introducing a new paragraph 10A which would require the Case Examiner to consider, where a matter raises a question of	<u>Support for status quo</u>  Several respondents raised concerns regarding the introduction of the concept of a <i>Referral Case</i> , with some suggesting that it is unnecessary and that the current process is sufficient.	<u>Support for status quo</u>  A number of respondents questioned the need to make changes to the existing arrangements between the Board and the Case Examiner and expressed confidence in, and satisfaction with, the existing arrangements.

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
	<p>breach of a <i>Relevant Requirement</i>, whether the matter is a <i>Referral Case</i>. The proposed new paragraph 10A includes guidance as to what is to be considered a <i>Referral Case</i> and provides that the Case Examiner is to refer such cases to the Board.</p> <p>The consultation explained that the proposed changes were expected to enhance the Board’s ability to oversee Case Examiner activities and the referral of appropriate cases to the Board. It also explained that, under the proposed changes, the Board would retain its powers to open investigations, direct the Case Examiner to pursue constructive engagement and to decide on no further action in respect of any matter that is referred to it. It was also explained that the proposals would, in addition, result in</p>	<p><u>Impact of changes</u></p> <p>It was also advanced that, as a significant number of cases which come before the Case Examiner will arguably exhibit one or more of the factors and require a referral, the amendments to the guidance will limit the Case Examiner’s discretion and increase the number of cases referred to the Board.</p> <p>A respondent noted that the Case Examiner, who is more familiar with the material and has the relevant expertise, is best qualified to make decisions, subject to the Board’s monitoring and supervision.</p> <p>One respondent suggested some amended wording so as to provide the Case Examiner with more discretion under the new arrangements.</p> <p>A number of respondents also noted that the new process would likely increase the amount of time it takes for matters to progress through the case examination stage and will require matters to be referred in circumstances where it is not necessary or appropriate. It was suggested</p>	<p>While the FRC welcomes stakeholders’ confidence in the arrangements as they currently operate, it remains of the view that the proposed amendments are important. They will enhance the Board’s ability to oversee and engage with Case Examiner activities and appropriate cases in the public interest.</p> <p><u>Impact of changes</u></p> <p>Respondents expressed concern that the proposals – if implemented – would result in:</p> <ol style="list-style-type: none"> <li>(1) an increased number of matters being referred to the Board;</li> <li>(2) matters being referred to the Board unnecessarily, including where there is no breach of a <i>Relevant Requirement</i>;</li> <li>(3) an increased number of matters being opened for investigation;</li> <li>(4) a corresponding reduction in matters being handled through constructive engagement;</li> <li>(5) the decision-maker (in this case the Board) being less able than the Case Examiner to determine that a matter is suited to constructive engagement; and</li> <li>(6) delays and inefficiencies.</li> </ol>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
	<p>the Board having greater prospective engagement with the Case Examiner across a wider range of matters, including those for which an investigation might not be appropriate.</p>	<p>that the factors (in particular (a) to (d)) should be removed or the FRC should provide further clarity and guidance, including examples of each factor.</p> <p>It was also suggested that if paragraph 10A is retained, the term <i>Referral Case</i> should be removed and the criteria used to guide the Case Examiner in deciding which cases should be referred to the Board under Rule 5(d) be set out simply as guidance to assist them in applying which matters fall within that category, without the need to overlay new definitions.</p> <p>It was suggested that the volume of investigations may be increased under the new procedure and that there is a risk that an inference could be drawn that the Conduct Committee is more inclined towards opening an investigation where the relevant factors exist. It was advanced that such a perception could be “quite damaging” as it might become a factor which audit firms take into account in the context of “de-risking” their audit portfolios or will act as a deterrent to those challenger firms who are currently</p>	<p>In response to the above points, the FRC notes:</p> <ol style="list-style-type: none"> <li>(1) an increased number of matters being referred to the Board is the intended outcome of the proposed changes – the FRC regards this as a positive change;</li> <li>(2) a matter is only capable of referral to the Board under Rule 5(d) if a question as to whether there has been a breach of a <i>Relevant Requirement</i> has been raised;</li> <li>(3) the potential outcomes for all cases will remain as now – no further action, constructive engagement or investigation. The decision-maker for <i>Referral Cases</i> may change, but the test to be applied will remain the same. It is not therefore anticipated that the proposed changes should lead to a marked increase in the number of cases that are referred for investigation.</li> <li>(4) the FRC does not consider that the proposed amendments would in and of themselves lead to a reduction in decisions to pursue constructive engagement. The changes are not intended in any way to diminish constructive engagement as a tool. Furthermore, no changes to the test for opening an investigation, pursuing constructive engagement or taking no further action are</li> </ol>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>considering whether or not to enter into the PIE audit market. To address this, it was proposed that the FRC should clarify in the guidance on opening investigations that the factors do not create such a presumption.</p> <p>Concerns were raised in respect of whether the proposed amendments to the guidance may impact the use of Constructive Engagement, including whether there may be shift away from the use of constructive engagement as an effective way of dealing with matters involving less serious breaches.</p> <p><u>Hierarchy of outcomes</u></p> <p>It was suggested by one respondent that guidance issued under Rule 5A should lean strongly in favour of Constructive Engagement as a default option in AEP matters, and investigations and disciplinary proceedings should be for exceptional cases.</p>	<p>proposed. The existence of “good reason” for opening an investigation remains the threshold;</p> <p>(5) the FRC is satisfied that the Board will have the requisite information, advice and expertise to make these decisions. Furthermore, the Case Examiner will remain central to the enquiry process and will be free to make recommendations to the Board in respect of <i>Referral Cases</i>;</p> <p>(6) it is not anticipated that the <i>Referral Case</i> procedure will lead to delays or inefficiencies. As noted above, the Conduct Committee meets regularly throughout the year, so no significant delays or inefficiencies are anticipated and any that there may be, will be outweighed by the benefits to be gained from the Board’s oversight of <i>Referral Cases</i>.</p> <p><u>Hierarchy of outcomes</u></p> <p>The FRC notes the suggestion that the guidance should favour constructive engagement over other potential outcomes. The FRC does not agree with that suggestion; it considers that matters should be decided on a case-by-case basis and that all options should be open to the decision-maker so</p>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p><u>Drafting of Rule 10A</u></p> <p>One respondent noted that the distinction between paragraphs 10A(i) and (ii) is unnecessary and apt to confuse. The same respondent also suggested that paragraph 10A is inconsistent with Rule 5 and the drafting should be amended so it is consistent with it.</p> <p><u>Scope of Referral Cases</u></p> <p>Respondents noted that the factors that are indicative of a matter being a <i>Referral Case</i> are broad and that the existence of some should not necessarily give rise to a requirement for the Case Examiner to refer a matter to the Board, especially when viewed in isolation.</p> <p><u>Post implementation review</u></p> <p>One respondent noted that it would be helpful for the FRC to conduct and publish a post-implementation review which addresses impacts of adopting the amendments in the AEP and Guidance to Case Examiner.</p>	<p>that they can make the most appropriate decision having regard to all relevant facts. The guidance does not favour any particular outcome.</p> <p><u>Drafting of Rule 10A</u></p> <p>The FRC has considered the drafting points raised in respect of Rule 10A. The FRC does not agree that the changes proposed should be made nor that paragraph 10A is inconsistent with Rule 5.</p> <p><u>Scope of Referral Cases</u></p> <p>The FRC acknowledges that the relevant factors are broad. This was intentional; the drafting captures the matters which are likely to be of interest to the Board. The factors are not hierarchical.</p> <p>In terms of the comments which imply that the presence of relevant factors ‘designates’ cases for investigation – that is a mischaracterisation of the position. The existence of relevant factors is relevant to whether the cases will be considered by the Board; they are not a predictor of outcomes.</p> <p>The FRC will keep the operation of the relevant factors for <i>Referral Cases</i> under review.</p>



Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
			<p><u>Post implementation review</u></p> <p>The FRC will keep under review the impact of the changes, including as to any delays, additional burdens and any variance in opening investigations.</p> <p><b>Conclusion: having considered all responses to the consultation, the FRC’s Board is proposing to proceed to introduce new paragraph 10A to the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b></p>
Paragraph 11	Consequential and minor amendments were proposed to paragraph 11.	One respondent noted that paragraphs 11 and 13 are duplicative, and only paragraph 11 is required.	<p>There is a degree of overlap between paragraphs 11 and 13. However, they are not wholly duplicative and the FRC is satisfied that no confusion is caused by any duplication that may exist.</p> <p><b>Conclusion: having considered responses to the consultation, the FRC’s Board is proposing to proceed to amend paragraph 11 to the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b></p>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
Paragraph 13A	Minor amendments were proposed to paragraph 13A.	One respondent noted that it would be helpful if clarity was provided on what breaches may be regarded as being at the "... lower end of the spectrum".	<p>The FRC does not consider that it would be appropriate to prescribe such matters; it will be dependent on all the circumstances of the case.</p> <p><b>Conclusion: having considered responses to the consultation, the FRC's Board is proposing to proceed to amend paragraph 13A to the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b></p>
Paragraph 16	Consequential amendment to paragraph 16.	n/a	<p><b>Conclusion: having considered responses to the consultation, the FRC's Board is proposing to proceed to amend paragraph 16 to the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b></p>
Paragraphs 19-22	Consequential and minor amendments were proposed to these paragraphs.	<p>Some respondents considered that the proposed amendments to paragraph 20 establish a 'hierarchy' and that the focus should be on improving audit quality via constructive engagement.</p> <p>One respondent raised concerns that the introduction in more cases of an additional stage in which the Case Examiner</p>	<p>The FRC notes that:</p> <ul style="list-style-type: none"> <li>the factors in paragraph 20 do not create a hierarchy – they set out the options that are available to the decision-maker; and</li> <li>the FRC is satisfied that the Board will have the requisite information, advice and expertise to understand the papers and reports that are</li> </ul>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>summarises the relevant information for a third party (the Board) introduces the risk that the third party will misunderstand or misinterpret issues and their significance, especially given the technical/specialist nature of some of the material involved.</p> <p>One respondent noted that if the FRC does not believe that the papers referenced in these paragraphs should be shared, the relevant firm should be informed of the reason that the Board has decided there is good reason to investigate, including details of the <i>Relevant Requirements</i> that the firm is considered to have breached.</p>	<p>submitted to it and – where appropriate – to make decisions based on them.</p> <p><b>Conclusion: having considered responses to the consultation, the FRC’s Board is proposing to proceed to amend the remaining paragraphs of the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b></p>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
Paragraphs 23-24A	Consequential and minor amendments were proposed to these paragraphs to reflect the relevant Reporting Requirements.	n/a	<b>Conclusion: having considered responses to the consultation, the FRC's Board is proposing to proceed to amend the remaining paragraphs of the Guidance for the Case Examiner as set out in the consultation and as reflected in Appendix D to this feedback statement.</b>

## Amendments to the Hearing Guidance

### Factual Evidence

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
Paragraph 5A	<p>The consultation set out the Board’s proposal to introduce a new paragraph 5A to the Hearings Guidance to clarify that factual evidence under Rule 34 of the AEP does not include witness statements where those statements are prepared or to be prepared by individuals who may give evidence in the matter.</p> <p>It was noted that the proposed additional guidance is intended to streamline the process, and avoid circumstances where evidence is required to be adduced earlier than it would be required in the litigation process under the AEP.</p>	<p><u>Views for and against proposals</u></p> <p>The majority of respondents were in agreement that witness statements which are in existence at the time the Allegation is served should be disclosed as part of the evidence bundle, particularly where Executive Counsel relies on the statement as a basis for the Allegation. It was noted that there is no basis for withholding such information and such information enables Respondents to address the case more promptly.</p> <p>One respondent stated that the disclosure obligation on the FRC at an early stage should be broadened to include documentary evidence which does not support the FRC’s case (so as to be consistent with the disclosure obligations on other regulators, such as the PRA and FCA).</p>	<p><u>Views for and against proposals</u></p> <p>The FRC agrees that in circumstances where a formal witness statement exists which is relied upon as a basis for an Allegation, it will be disclosed as part of the evidence bundle under Rule 34. However, the FRC remains entitled to obtain witness statements at a later stage in the litigation process and, if so, such witness statements will be served in accordance with the Tribunal timetable and case management directions.</p> <p>One respondent requested that the disclosure obligation should be broadened to include documentary evidence that does not support the FRC’s case. Any such material is dealt with in accordance with the ‘Guidance on disclosure of Unused Material under the Audit Enforcement Procedure’, January 2022.<sup>9</sup></p>

<sup>9</sup> <https://www.frc.org.uk/getattachment/48f97c99-acaf-48d2-a324-047217bdac2c/Guidance-on-disclosure-of-Unused-Material.pdf>

Paragraph	Proposed Amendments	Summary of Consultation Responses	FRC response
		<p>Another respondent suggested that it should be made clear that any evidence relied upon needs to be fair, transparent and sufficient to enable readers to fully understand Allegations. It was noted that the FRC should make provision relating to subsequent service of witness-related evidence either as part of case management or specifically.</p> <p>Two respondents noted that the introduction of the new paragraph 5A appears inconsistent with the Executive Counsel’s duties under Rule 34 to serve on the Respondent any factual evidence on which they rely. It was noted that evidence should be made available to the Respondents and Tribunal at an early stage as a matter of fairness.</p> <p><u>Consulting on guidance</u></p> <p>It was also noted that the Hearings Guidance is more of a supplementary set of rules than guidance, and that changes to the Hearings Guidance should be subject to formal consultation.</p>	<p><u>Consulting on guidance</u></p> <p>The FRC notes the suggestion that the Board should consult on any changes to guidance going forward.</p> <p>There is no statutory requirement for the FRC to consult on the Hearings Guidance and the FRC does not consider it would be appropriate for it to commit to do so. However (and as noted above), the FRC recognises that there may be circumstances in which it would be appropriate for it to consult on proposed changes to guidance. This is something that the FRC keeps under review. Factors which will be relevant include, without limitation, the urgency, materiality and potential impact of the proposed changes.</p> <p><b>Conclusion: having considered responses to the consultation, the FRC’s Board is proposing to proceed to amend the Hearings Guidance as set out in the consultation and as reflected in Appendix E to this feedback statement.</b></p>

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## General comments

Subject	Respondents' comments	FRC response
Other comments	One respondent noted that it would welcome guidance on the application of certain concepts under AEP, Accountancy Scheme and Actuarial Scheme, including the terms " <i>reprimand</i> " and " <i>severe reprimand</i> ". The respondent also noted that further clarity on sanctions would be helpful and questioned whether naming individual auditors is appropriate.	These comments are outside the scope of the proposals that were put forward in the consultation.

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# Appendix C – Revised AEP

## Part 2 – Initial Stages

### Initial Action by Case Examiner

3. On receipt of information about a Statutory Auditor or Statutory Audit Firm, and in order to determine whether there is a question as to whether the Statutory Auditor or Statutory Audit Firm has breached a Relevant Requirement the Case Examiner may:
  - (a) give notice in writing to require any Statutory Auditor or Statutory Audit Firm to provide information and/or to create documents which relate to the Statutory Audit of, or the performance of Third Country Audit Functions in respect of, the annual accounts or the consolidated accounts of any audited person;
  - (b) request any specialist advice;
  - (c) request or receive from any other person any information which may be material to an investigation; and
  - (d) in relation to the Statutory Audit of a Public Interest Entity, give notice in writing to any person specified below requiring that person to provide information and documents:
    - (i) any person involved in the activities of a Statutory Auditor (including any person to whom a Statutory Auditor has outsourced such activities);
    - (ii) any Public Interest Entity;
    - (iii) any subsidiary or parent of a Public Interest Entity or any other subsidiary of a company of which a Public Interest Entity is a subsidiary; and
    - (iv) any person otherwise having a connection to a Statutory Auditor carrying out the Statutory Audit of the annual accounts or consolidated accounts of a Public Interest Entity.
4. Where the Case Examiner determines that the information about a Statutory Auditor or Statutory Audit Firm does not raise a question as to whether either has breached a Relevant Requirement, the Case Examiner shall take no further action.



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5. Where the Case Examiner determines that the information about a Statutory Auditor or Statutory Audit Firm raises a question as to whether either has breached a Relevant Requirement, the Case Examiner ~~may~~ shall, having taken due account of any guidance issued to the Case Examiner by the Board in accordance with Rule 5A, determine whether to:
- (a) take no further action;
  - (b) arrange Constructive Engagement with the Statutory Auditor or Statutory Audit Firm;
  - (c) refer the matter to Executive Counsel to ~~apply~~ consider making an application for an Interim Order to be made by a Tribunal; or
  - (d) refer the matter to the Board.
- 5A. Without prejudice to the Board's power to issue guidance under Rule 167, the Board may, from time to time, issue guidance to the Case Examiner under this Rule 5A concerning the matters which the Case Examiner should refer to the Board in accordance with Rule 5(d).

### ~~Decision to Investigate~~ **Board Decisions**

6. Where a matter is referred under Rule 5(d), the Board shall ~~consider~~ determine whether:
- (a) to direct the Case Examiner to attempt to resolve the matter through Constructive Engagement with the Statutory Auditor or Statutory Audit Firm;
  - (b) there is a good reason to investigate the matter; or
  - (c) no further action is to be taken in relation to the matter.
7. ~~Following Where, following~~ a direction under Rule 6(a), and if the Case Examiner is unable to resolve the matter to the Case Examiner's satisfaction, the Case Examiner shall return the matter to the Board.
8. Where ~~the Board has not made a direction under Rule 6, or~~ a matter has been returned to the Board ~~it~~ pursuant to Rule 7, the Board must consider whether there is a good reason to investigate the matter.
9. Where the Board considers that there is a good reason to investigate the matter in accordance with Rule 6(b) or Rule 8, it shall:
- (a) determine the scope of the investigation; and
- either
- (b) refer the matter for investigation by Executive Counsel; or
  - (c) direct whether the investigation should be delegated to the appropriate Recognised Supervisory Body. Where the Board has delegated the investigation to a Recognised Supervisory Body the Recognised Supervisory Body may, on behalf of the FRC, exercise the powers set out in Rule 14.

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10. ~~Where the Board considers that there is not a good reason to investigate the matter, it shall take no further action. [Not used].~~

## **Notice of Investigation**

11. Where the Board refers a matter for investigation, the Board shall send both Executive Counsel and the Respondent a Notice of Investigation (which will be copied to the Respondent's Recognised Supervisory Body) which shall state:
- (a) the scope of the investigation; and
  - (b) whether the investigation has been delegated to a Recognised Supervisory Body.

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## Part 8 – Reconsideration

131. Subject to Rule 134 the Board may reconsider any decision made in respect of Rules 5(a), 5(b), 6(a), and 6(c) ~~10~~ where it appears that:
- (a) either:
    - (i) the decision was materially flawed, for any reason, in whole or in part; or
    - (ii) significant and relevant new evidence which could not have been adduced previously has been received within three years of the decision under reconsideration;
  - and
  - (b) it is necessary in the public interest or to prevent injustice to reconsider the decision.
132. Where the Board decides to reconsider a decision, it shall provide the Respondent with any new relevant evidence or information and invite the Respondent to submit written representations regarding the reconsideration.
133. Where the Board reconsiders a decision it:
- (a) must take into account any representations made by the Respondent; and
  - (b) may:
    - (i) decide the original decision should stand;
    - (ii) substitute for all or part of the original decision any decision which the Decision Maker could have made under the Rule in question; or
    - (iii) where the Board was not the Decision Maker, remit the matter back to the Decision Maker for a fresh decision where the matter shall follow the same procedure under this AEP applicable to that Decision Maker.
134. Other than in respect of Rule 131(a)(ii), a reconsideration pursuant to Rule 131 must take place no later than ~~four~~ six months beginning from the date of the relevant decision. The Board shall notify the Respondent in writing, as soon as is reasonably practicable, of its decision in respect of reconsideration and the reasons for that decision.

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# Appendix D – Revised Guidance for the Case Examiner

## Introduction

1. The Case Examiner is required to undertake a number of initial actions at the beginning of a case under the Audit Enforcement Procedure (the AEP)<sup>1</sup>. Most importantly they are required under Rules 4 and 5 to determine whether the information raises a question as to whether a Statutory Auditor or Statutory Audit Firm has breached a Relevant Requirement.
2. For the avoidance of doubt, matters within the knowledge of the FRC do not automatically fall to be considered by the Case Examiner. ~~Specifically, if the Case Examiner becomes aware of reviews or inspections undertaken by the Audit Quality Review team, they will not take any steps under the AEP unless the matter is formally referred to them by the AQR team. However~~ Furthermore, information about a Statutory Auditor or Statutory Audit Firm may be received from many sources and can be passed to the Case Examiner from internal sources within the FRC as well as third party complaints or concerns being raised, and the Case Examiner may then consider these under the AEP.
3. [This paragraph has been deleted].
4. This document provides guidance as to the decisions and actions a Case Examiner must take when determining how information should be handled at the outset of a case. The purpose of this guidance is to ensure that consistent and proportionate decisions are taken, although it is recognised that every situation will have its own unique facts and circumstances.
5. This guidance will be referred to by the Case Examiner and may be helpful for anyone interested or involved in the AEP.
6. The Case Examiner's role includes ensuring that anyone wishing to provide information to the FRC is provided with clear information about the role and scope of the FRC's functions and ensuring that there are no barriers to relevant complaints being made or information being provided.

## Initial checks

7. On receipt of information the Case Examiner should confirm whether the information relates to a Statutory Auditor and/or Statutory Audit Firm and concerns a matter within the scope of the FRC's retained regulatory activity.

<sup>1</sup> This Guidance adopts the definitions used in the AEP.

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## Determining whether a question arises

8. The Case Examiner has powers to make enquiries and obtain specialist advice (i.e. instruct experts) to help them determine whether information raises a question as to whether a Relevant Requirement has been breached. Where necessary the Case Examiner may seek legal advice. The enquiries and advice should be limited to assisting the Case Examiner with the determination of whether the information raises a question as to whether a Relevant Requirement has been breached.
9. The Case Examiner will have regard to the Relevant Requirements (as defined in the AEP) and will assess whether the information received raises a question of a breach of these requirements.
10. The Case Examiner may communicate with the potential Respondent (or their representatives) about the information received.
- 10A. Where the Case Examiner considers that information raises a question as to whether a Statutory Auditor or Statutory Audit Firm has breached a Relevant Requirement, the Case Examiner shall:
  - (i) if they determine to refer the matter to the Board in accordance with Rule 5(d), proceed to do so;
  - (ii) in circumstances where paragraph 10A(i) does not apply, and before deciding which course of action to adopt under Rule 5 of the AEP, determine whether the matter in respect of which the question of a breach is raised is a Referral Case (as defined in this paragraph). Where the Case Examiner determines that a matter is a Referral Case, they shall refer that matter to the Board in accordance with Rule 5(d) of the AEP.

The Case Examiner shall determine that a matter is a Referral Case if they consider that **a decision to take no further action or to pursue Constructive Engagement in respect of it may be contentious, high-profile or may risk undermining confidence in the FRC's (or the wider) regulatory regime.**

When determining whether a case is a Referral Case, the Case Examiner shall take account of all relevant factors including (without limitation) the following factors (the existence of any of which would be likely to indicate that a case is a Referral Case):

- (a) there has been a Grade 4 AQR referral in relation to the relevant audit;
- (b) the case relates to an audited entity in administration or which has been liquidated or is in insolvency proceedings;
- (c) there has been a complaint or referral from another UK or international regulator or a public authority (e.g. the FCA or the SFO) in relation to the case;
- (d) the case relates to an event which is high profile or has attracted or is likely to attract significant media or political attention or the attention of other regulators; and/or

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- (e) a decision to open an investigation or a decision to pursue Constructive Engagement would be 'finely balanced'.
11. In respect of cases ~~W~~where the Case Examiner considers that ~~the information raises~~ a question of ~~a breach is raised and the matter has not been referred to the Board under Rule 5(d) (including on the basis that it is a Referral Case), the Case Examiner has~~ ~~they have~~ discretion to seek ~~e~~Constructive ~~e~~Engagement with the Statutory Auditor or Statutory Audit Firm as a way of resolving the matter, ~~or to take no further action and close the matter.~~
12. Where the Case Examiner determines that the information does not raise a question as to whether there has been a breach of a Relevant Requirement, they shall (as provided in Rule 4 of the AEP) take no further action.

### Constructive ~~e~~Engagement

13. For cases where the Case Examiner considers that a question of breach is raised and the matter has not been referred to the Board under Rule 5(d) (including on the basis that it is a Referral Case), Constructive ~~e~~Engagement will be ~~entirely~~ at the discretion of the Case Examiner.
- 13A. ~~It~~ Constructive Engagement will be suitable for cases where there has been a minor, technical breach of the Relevant Requirements. Such cases will usually be at the ~~lowest~~ lower end of the spectrum of possible breaches.
14. Constructive ~~e~~Engagement may be appropriate where there is no real concern about harm to investor, market or public confidence in the statutory audit process and where there is no evidence of financial detriment to anyone.
15. Constructive ~~e~~Engagement is focused on ensuring that less serious breaches have been rectified and the risk of repetition has been adequately addressed. It may take any form, including written advice, warning letters or discussion or correspondence with the individual Statutory Auditor or Statutory Audit Firm aimed at ensuring that the possible breach is not repeated.

### Interim Orders

16. Under Rule 5(c) the Case Examiner has the power to refer a matter to Executive Counsel ~~who would then consider whether~~ to apply for an Interim Order to be made by a Tribunal. Interim Orders are orders which impose restrictions on the Respondent pending the outcome of the FRC's investigation or proceedings. An Interim Order can only be made by the Tribunal.
17. The procedure for Interim Orders is set out in Part 5 of the AEP. The Case Examiner's role is to conduct an early risk assessment to identify whether a case should be referred to Executive Counsel to apply for an Interim Order.
18. Factors which might indicate that a case should be referred for an Interim Order include:
- (a) suspected serious breaches of the Relevant Requirements;

- 
- (b) ongoing risk of harm to investor, market or public confidence in the truth and fairness of the financial reporting of an entity;
  - (c) ongoing risk of significant financial detriment or other harm for those reliant on the Statutory Auditor or Statutory Audit Firm's compliance with the Relevant Requirements.

This list is non-exhaustive and referral is at the discretion of the Case Examiner.

### Referral to Board

- 19. [This paragraph has been deleted].
- 20. The Case Examiner will prepare the papers which will go to the Board for its decision as to ~~investigation and delegation~~ whether:
  - (a) to direct the Case Examiner to attempt to resolve the matter through Constructive Engagement with the Statutory Auditor or Statutory Audit Firm;
  - (b) there is a good reason to investigate the matter; or
  - (c) no further action is to be taken in relation to the matter.
- 21. To assist the Board with its functions, ~~covering reports~~ papers to the Board should summarise the information, identify the possible breaches, ~~make recommendations as to no further action, Constructive Engagement, or investigation as the case may be and refer to the applicable test and guidance for investigation and may make recommendations as to investigation.~~
- 22. [This paragraph has been deleted].

### Reporting Requirements

- 23. The Case Examiner shall provide data to the Board and report those matters where they have, without referral to the Board ~~under Rule 5(d)~~:
  - (a) determined that the information about a Statutory Auditor or Statutory Audit Firm does not raise a question as to whether a Relevant Requirement has been breached; or
  - (b) ~~determined in respect of cases where a question as to whether a breach of a Relevant Requirement is raised, to take no further action or to resolved~~ the matter using ~~€~~Constructive ~~e~~Engagement.
- 24. The Board shall be entitled to request further details on a sampling basis of any such cases by way of oversight.

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24A. ~~The~~ Under Part 8 of the AEP (Reconsideration), the Board may reconsider a decision by the Case Examiner (or by the Board itself) to take no further action or to resolve a matter using eConstructive eEngagement.

**Issued by the Conduct Committee with effect from XX XXXX 2023**



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## Appendix E – Revised Hearing Guidance

### Procedure at first instance hearings before Tribunal

1. The Audit Enforcement Procedure (AEP) sets out the procedure for hearings before the Tribunal (Hearings) in Parts 4, 5, and 11.
2. [This paragraph has been deleted].
3. Notwithstanding this procedure, the Tribunal may allow the Parties to make additional submissions at any time.
4. [This paragraph has been deleted].
5. [This paragraph has been deleted].

### Factual Evidence

- 5A. Rule 34 of the AEP provides that within 56 days of receipt of notification of the appointment of the Tribunal, or such other period of time as may be agreed between the Parties, Executive Counsel shall serve on the Respondent and the Tribunal an Allegation, together with any factual evidence on which Executive Counsel relies. For the avoidance of doubt, factual evidence under Rule 34 does not include witness statements which have been prepared or are to be prepared for the purpose of that witness giving evidence as part of the hearing or other step in the matter.

### Deliberations

6. At any stage when the Tribunal needs to deliberate, this must be undertaken in the absence of the Parties. A Convener may attend the Tribunal during their private deliberations.

### Convener

7. [This paragraph has been deleted].
8. The Convener will keep a record, or ensure a record is kept, of all decisions made by the Tribunal and the Appeal Tribunal and the reasons for them. Record of Hearing
9. The Tribunal, assisted by the Convener, must ensure all Hearings are recorded in writing or electronic form. Any Party to the proceedings must, on application to the Tribunal, be furnished with a transcript of the record of any part of the Hearing at which he was entitled to be present.
10. The only exception to the above provision is that the private deliberations of the Tribunal must not be recorded.

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## Witness Evidence

11. A party may not call a person to be a witness unless that party has provided to the other party a written statement of evidence provided by the witness (which includes an attestation and signature by the person making it) in accordance with Case Management Directions unless the Tribunal determines otherwise.<sup>1</sup>
12. The Chair or the Tribunal may refuse to allow a witness to give evidence or to give evidence on a particular matter if the Chair or the Tribunal is not satisfied that the witness is in a position to produce relevant testimony or is satisfied that all parts of the evidence that a witness is to provide, or to provide on a particular matter, should have been disclosed to the other party at an earlier stage of the proceedings.
13. The Tribunal may, upon the application of the Party calling a witness, direct any details which may identify that the witness shall not be revealed in public.<sup>2</sup>
14. Witnesses are required to take an oath, or to affirm, before they give their oral evidence.
15. In accordance with the Case Management Directions, a witness's statement shall stand as their evidence in chief.
16. Witnesses, other than the Respondent:
  - (a) will usually be examined by the Party calling them;
  - (b) may be cross examined;
  - (c) may then be re-examined by the Party calling them;
  - (d) may then be questioned by the Tribunal. Questions from the Tribunal should be concise, relevant and focused. It is not appropriate for Tribunal members to conduct "fishing expeditions" or to rehearse evidence without good reason;
  - (e) the Parties may then question the witness on matters arising out of the Tribunal's questions, with the Party calling the witness given the last opportunity to do so;
  - (f) any further questioning of a witness is to be at the discretion of the Tribunal.
17. The Tribunal may wish to give warnings to witnesses that they should not discuss the case with anyone during any breaks in their evidence and to remind witnesses that they are still under oath when the hearing resumes. This could also include an additional warning to witnesses, once their evidence has concluded, not to discuss their testimony with any witnesses who are still to be called.

<sup>1</sup> Rule 50 of the Audit Enforcement Procedure.

<sup>2</sup> Rule 54 of Audit Enforcement Procedure.

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## Special Measures<sup>3</sup>

18. Where the Chair and/or Tribunal consider that the quality of a witness's evidence is likely to be adversely affected, the Tribunal may adopt such measures as it considers necessary to receive evidence from the witness. This could include: a witness whose first language is not English; a witness with a physical disability who requires assistance to give evidence; a witness who complains of intimidation; a witness who is significantly impaired in relation to intelligence or social functioning; and any witness under the age of 18.
19. Measures adopted by the Tribunal may include, but are not limited to: the use of video links, the use of pre-recorded evidence as the evidence in chief of a witness, provided that the witness is present at the hearing for cross-examination and questioning; and use of interpreters (including signers and translators).

## Disruptive Behaviour

20. Rule 71 provides that the Tribunal may exclude any person whose conduct has disrupted or is likely to disrupt proceedings. The Tribunal may permit the person to return, if at all, subject to certain conditions.

## Non Attendance of a Witness

21. Where a witness refuses to attend or does not attend without having provided any prior warning of their non-attendance, the reasons for a witness's refusal or non-attendance may need to be investigated and the Tribunal may consider adjourning for a short time while enquiries are made.

## Respondent as a Witness

22. The Tribunal may not compel the Respondent to be a witness; the Respondent is entitled to rely on his privilege against self-incrimination. This does not undermine the FRC's power to require the Respondent to provide information in accordance with Schedule 2 of the Statutory Auditors and Third Country Auditors Regulations 2016.
23. Where the Respondent is a witness, they:
  - (a) will usually be examined by the person representing them or, if there is no such person, must be questioned by the Tribunal through the Chair;
  - (b) may then be cross examined;
  - (c) may then be re-examined by the person representing them (if any);<sup>3</sup> Rule 57 of the Audit Enforcement Procedure.
  - (d) may then be questioned, with leave of the Chair, by the Tribunal whether or not they are represented.

<sup>3</sup> Rule 57 of the Audit Enforcement Procedure.

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## Non Attendance of the Respondent<sup>4</sup>

24. Where the Respondent has failed to attend a Hearing, the Chair or Tribunal may continue in the Respondent's absence if:
- (a) it is satisfied that notification of the Hearing was properly given; and
  - (b) it is fair in all the circumstances to do so.
25. The Tribunal should demonstrate that it appreciates that the discretion to proceed in the Respondent's absence is to be exercised with a high degree of care and caution.<sup>5</sup>
26. Lord Bingham of Cornhill in the case of *R v Jones (Anthony Williams)*<sup>6</sup> stated that *"the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution"*. The same judgment provided a helpful list of factors that should be considered before proceeding in the absence of the person.

*"Whilst the list was not exhaustive, it provided an invaluable guide. The Court of Appeal had said that in exercising the discretion, fairness to the Defendant was of prime importance, but fairness to the prosecution should also be taken into account. The judge should have regard to all the circumstance, including:*

- (a) The nature and circumstances of the Defendant's behaviour in absencing himself from the trial or disrupting it, and in particular whether the behaviour was voluntary and so plainly waived the right to be present;*
- (b) whether the adjournment would resolve the matter;*
- (c) the likely length of such an adjournment;*
- (d) whether the Defendant, though absent, wished to be represented or had waived his right to representation;*
- (e) whether the Defendant's representatives were able to receive instructions from him and the extent to which they could present his defence [...];*
- (f) the extent of the disadvantage to the Defendant in not being able to present his account of events;*
- (g) the risk of the jury [i.e. the Committee] reaching an improper conclusion about the absence of the Defendant;*
- (h) the general public interest that a trial should take place within a reasonable time;*
- (i) the effect of the delay on the memories of witnesses;*
- (j) where there was more than one defendant, and not all had absconded, the undesirability of having separate trials."*

<sup>4</sup> Rule 68 of the Audit Enforcement Procedure.

<sup>5</sup> *Raheem v Nursing and Midwifery Council* [2010] EWHC 2549; *Adeogba v GMC* [2014] EWHC 3872 (Admin).

<sup>6</sup> [2002] UKHL 5.

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27. The Respondent (who is an individual) may claim ill health as a reason for their non-attendance. The Respondent has the right to be present when the case is put against them and it is wrong for a Tribunal, in the face of unchallenged medical evidence submitted by the Respondent that he/she is not fit to attend a hearing, to proceed in their absence.<sup>7</sup> However, the mere fact that a Respondent claims illness does not, of itself, require an adjournment of proceedings.<sup>8</sup>
28. [This paragraph has been deleted].

## Unrepresented Respondents

29. It should have been identified at an early stage of the proceedings, through agreed Case Management Directions and/or a Case Management Hearing, that a Respondent is or is likely to be unrepresented. It is possible that a case involving an unrepresented Respondent may have more directions than usual to ensure effective case management.
30. The Tribunal should not make assumptions about the merits of the case on the basis that the Respondent has not obtained representation.
31. It may be necessary to provide further explanation on the procedure of a Hearing than in other cases. However, the Tribunal should be mindful of its responsibility to act fairly and judicially to both parties and the possible inadvertent appearance of bias in its communications to the parties.
32. The Tribunal should communicate clearly and avoid legal jargon or abbreviations.
33. [This paragraph has been deleted].
34. [This paragraph has been deleted].
35. [This paragraph has been deleted].
36. [This paragraph has been deleted].
37. [This paragraph has been deleted].
38. [This paragraph has been deleted].
39. [This paragraph has been deleted].
40. [This paragraph has been deleted].
41. [This paragraph has been deleted].
42. [This paragraph has been deleted].

**Issued by the Conduct Committee with effect from XX XXXX 2023**

<sup>7</sup> *Brabazon-Denning v UKCC* [2001] 1HRLR 6.

<sup>8</sup> *Yusuf v RPSGB* [2009] EWHC 867.



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