

Guidance

on the

Delivery of Formal Complaints

Introduction

1. This guidance is made by the Board under paragraph 3(1)(iii) of the Accountancy Scheme ("Scheme") which:
 - empowers the Board to provide the Executive Counsel, amongst others, with guidance concerning the exercise of his duties under the Scheme; and
 - requires the Executive Counsel to have regard to any such guidance.
2. This guidance deals specifically with the Executive Counsel's duty under paragraph 6(9) of the Scheme to deliver to the Board a Formal Complaint against a Member or Member Firm liable to disciplinary proceedings pursuant to paragraph 4(3) of the Scheme, thereby triggering the appointment of a Disciplinary Tribunal under paragraphs 7(1)-(2) of the Scheme. It is intended to be neither legally binding nor exhaustive. But it must be taken into account by the Executive Counsel, who will formulate reasons for his decision and provide these to the Board.

Summary

3. By virtue of paragraph 6(9) of the Scheme, the Executive Counsel *must* deliver a Formal Complaint to the Board against a Member or Member Firm liable to disciplinary proceedings under paragraph 4(3) of the Scheme if, having conducted such investigation as he thinks necessary and having reviewed any written representations submitted by the Member or Member Firm, he considers that two tests are satisfied, namely:
 - that there is a realistic prospect that a Disciplinary Tribunal will make an Adverse Finding against a Member or Member Firm (the "evidential test"); and
 - that a hearing is desirable in the public interest (the "public interest test").

An Adverse Finding is defined in paragraph 2(1) of the Scheme as:

"a finding by a Disciplinary Tribunal that a Member or Member Firm has committed an act of misconduct, or has failed to comply with any of his or its obligations under paragraphs 12(1) or 12(2)."

4. Both tests must be satisfied before the duty to deliver a Formal Complaint arises. Paragraph 6(10) of the Scheme makes clear that if the Executive Counsel considers that either test is not satisfied, he *cannot* deliver a Formal Complaint.
5. Every case is different and must be assessed on its own facts and merits. The assessment must be careful, fair, independent, impartial and objective. It must exclude personal views about disability, gender identity, race, religion or belief, political views, sex and sexual orientation. There must be no improper or undue influence from any source.

The evidential test

6. The Executive Counsel's task is to make an informed *assessment*, based on the information then before him, about the likely outcome of a Formal Complaint before a Disciplinary Tribunal properly directed on law and fact. He must decide whether it is more likely than not that an Adverse Finding *will* be made against a Member or Member Firm. This is a substantively different decision from that applied later by a Disciplinary Tribunal, if a Formal Complaint is delivered. Its task is to decide whether the Formal Complaint *is* made out applying the civil standard of proof (balance of probabilities) laid down in paragraph 10 of the Scheme to the evidence as it then emerges.
7. In undertaking that task, the Executive Counsel should make an objective evaluation of all the information available to him, including that about any defence or explanation which might be put forward. He should also:
 - Consider the standard of proof to be applied before the Disciplinary Tribunal by virtue of paragraph 10 of the Scheme, namely the civil standard (balance of probabilities).
 - Consider any conviction or finding made by, or admission made before, another prosecuting authority, regulatory or adjudicatory body in this or another jurisdiction, having particular regard to paragraph 13 of the Scheme.
 - Consider the strength, relevance and reliability of the evidence (on both sides). Paragraph 7(5) of the Scheme permits a Disciplinary Tribunal to take into account any evidence, whether or not admissible in a court. However, the relevance and reliability (and, therefore, the weight) of evidence may be undermined, for example, by the refusal of a witness to testify or by doubts about the witness's credibility/accuracy or by doubts about the quality/authenticity of documentary evidence.
 - Consider the formulation of the Formal Complaint. The extent to which the evidential test is met will depend on the acts and/or omissions alleged in the Formal Complaint. The Executive Counsel will need to consider what it is

necessary/appropriate to allege. Refinement of the allegations (for example, to omit a particular element, episode or state of mind) might enable the Formal Complaint to meet the evidential test when it otherwise would not. The Executive Counsel should not feel bound to allege either everything that could conceivably be asserted or nothing that could conceivably be resisted: see further paragraph 14 below, regarding the Executive Counsel's power to focus the Formal Complaint on certain allegations.

8. The Executive Counsel, having carried out reasonable investigations, should not normally seek to resolve any substantial conflicts of evidence (factual or expert) which remain.

The public interest test

9. If the evidential test is not satisfied, the public interest test should not and cannot be considered; no matter how important and/or serious the facts and/or issues may appear. But if the evidential test is satisfied, the Executive Counsel must go on to consider whether a hearing is desirable in the public interest.
10. In applying the public interest test the Executive Counsel should be especially mindful of four points.
 - All cases covered by this guidance are necessarily public interest cases, that is: they raise or appear to raise important issues affecting the public interest. This is underscored by paragraphs 4(1) and 4(2) of the Scheme. Paragraph 4(1) echoes paragraph 24(2) of Schedule 10 of the Companies Act 2006. Paragraph 4(2) requires the Board to consider, amongst other things, whether the matter appears to give rise to serious public concern or to damage public confidence in the UK accountancy profession as well as all the circumstances of the matter including its nature, extent, scale and gravity. The Executive Counsel is required to ask a slightly different question: whether a hearing (rather than an investigation) is "desirable in the public interest". Thanks to his investigation, he is likely to answer that question by reference to more information than was available to the Board.
 - A Formal Complaint satisfying the evidential test should usually be delivered to the Board unless contrary public interest factors clearly outweigh those favouring delivery.
 - There are no alternative means of disposal open to the Board under the Scheme (resulting in an otherwise viable case being abandoned without any further action against the Member or Member Firm). Therefore, the Executive Counsel should proceed with caution before halting a Formal Complaint which satisfies the evidential test.

- The application of the public interest test is not simply a matter of comparing the *number* of factors on each side. The Executive Counsel must carefully and fairly weigh each factor, and then make an overall assessment. No single factor or combination of factors is necessarily determinative.

11. The following are examples of public interest factors favouring delivery of a Formal Complaint to the Board.

- The gravity of the alleged misconduct and/or breach of obligation. Delivery is likely to be needed where there is evidence that the alleged misconduct:
 - a) Involved acts of dishonesty or of a criminal nature or otherwise casts doubt on the integrity of the Member or Member Firm;
 - b) involved a failure to comply with a requirement to cooperate with the AADB pursuant to paragraphs 12(1) or 12(2) of the Scheme;
 - c) was pre-meditated, repeated or systemic;
 - d) involved abuse of a position of authority or trust;
 - e) casts doubt on the objectivity of the Member or Member Firm;
 - f) involved a non-trivial failure on the part of the Member or Member Firm to act with professional competence or due care or otherwise involved action that could discredit the profession.
- The gravity of the actual or potential consequences of the alleged misconduct and/or breach of obligation.
- There is a real risk of repetition.
- Public confidence in:
 - the accounting profession;
 - financial reporting;
 - corporate governance; and/or
 - the Scheme
- could be undermined if the alleged misconduct and/or breach of obligation were not pursued before a Disciplinary Tribunal.
- The disciplinary record, before the Board or otherwise, of the Member or Member Firm. The worse the record is (and the greater the similarity

between the current allegation and the previous misconduct and/or breach of obligation), the stronger will be the public interest in proceeding.

Conversely, if the Member or Member Firm has already been excluded or had his/its licence or registration withdrawn and the new allegation is relatively minor, there may be little public interest in proceeding .

- There is a need to deter future misconduct and/or breach of obligation and send a signal to the profession/public, thereby protecting and promoting high professional standards.

12. The following are examples of contrary factors.

- The Member is very elderly or is (or was at the time of the alleged misconduct and/or breach of obligation) suffering serious physical or mental ill health and:
 - no longer practises; and
 - is unlikely to resume practice.
- Even if the Formal Complaint is upheld, a Disciplinary Tribunal would probably impose no, or only a nominal or minimal, sanction (such as a token or small fine).
- The loss and harm or potential loss and harm were minor and the misconduct was inadvertent.
- Inordinate and prejudicial delay such that a fair trial would not be possible between the alleged misconduct and/or breach of obligation and the likely date of a hearing before a Disciplinary Tribunal unless:
 - the alleged misconduct and/or breach of obligation is serious; and/or
 - there is good reason for the delay (such as it has been caused or contributed to by the Member or Member Firm or the alleged misconduct and/or breach of obligation has come to light only recently or the complexity of the investigation or the existence of other proceedings or investigations by another prosecuting authority, regulatory or adjudicatory body).

13. The two sets of examples described above in paragraphs 11 and 12 are illustrative, not exhaustive.

14. Paragraph 2(1) of the Scheme explains that a Formal Complaint can comprise one or more allegations (of misconduct and/or breach of obligation). The Executive

Counsel is entitled to include certain allegations and to exclude others, even if all the allegations satisfy the evidential test. For example, he has power to include the most important allegations but to exclude less important allegations which might be much more difficult or lengthy to prove or which might make the disciplinary proceedings unduly complicated and which are unlikely, if proved, to affect the overall sanction.

Review

15. The decision to deliver a Formal Complaint to the Board should be kept under review by the Executive Counsel. Review is a continuing process and must take account of any material change in circumstances.

Conclusion

16. This guidance is both a public and an evolving document. Periodically, it will be reviewed and (where appropriate) revised in the light of experience.

Issued by the Board

31 March 2011