ACCOUNTANCY AND ACTUARIAL DISCIPLINE BOARD

SANCTIONS GUIDANCE TO TRIBUNALS

1. As a member of the Board's Tribunal Panel, I welcome the opportunity to comment on the proposed guidance on the sanctions which might be imposed in disciplinary cases. I found the consultation document comprehensive in its coverage of difficult and important issues, balanced in its assessment of the pros and cons of the various options and likely to result in a sanctions policy which will achieve the twin objectives of proportionality and deterrence.
2. I particularly welcome the flexibility built into the guidance in recognition of the fact that an appropriate sanction will depend on the circumstances of the particular case. " No two AADB cases are exactly alike. (para 5.2). Hence "the guidance is advisory rather than binding" and as the decision taker, "the Tribunal is entitled to depart from the guidance if it considers it appropriate" but should give reasons for doing so (para. 3.9).
3. At the same time the paper recognises the need for consistency in decision making by Tribunals and I believe the guidance will help achieve this whilst allowing for the flexibility needed to reach fair and reasonable decisions on the nature and level of sanctions necessary to reflect the varying degrees of misconduct in the public interest cases dealt with by the Board.
4. The following responses follow the paragraphs of the Consultation Paper in which comments are invited on specific proposals.

Para. 3.13

5. Yes, I fully agree with the objectives and approach set out in the Guidance. I also agree on the need for a clear operating framework reflecting the much wider and more socially and economically important context in which the accountancy profession operates today.

Para. 3.24

6. Again I agree with the conclusions underlying this proposal and also the need for disciplinary action to be taken in appropriate cases against both Member Firms and the individual Members involved.

Para. 4.8

7. Yes, the guidance covers the relevant factors which the Tribunal should consider in reaching its decision.

8. In response to Question 5, it is possible that in exceptional circumstances the Member Firm or the Member involved might have suffered financially from the circumstances surrounding the misconduct (as happened in the Langbar Pearson case) and the Tribunal should take account of this in appropriate cases. I accept that it might be a factor which would be covered by the mitigating personal factors (para 4.8 in the paper), but it would be preferable for the point to be made explicitly, perhaps along with a Member's serious ill-health.

Para. 4.22

9. Question 6. Agreed

Question 7. As the paper proposes, the adjustments should take account of any mitigating or aggravating factors, examples of which are set out in para.48 of the Draft Guidance. Adjustments to allow for deterrence, cooperation and admissions are also essential in the interests of fairness, efficient dispatch of public business and in reducing costs. The guidance gives helpful advice on all these matters.

Question 8. At first I was attracted to the mechanism based on a range of percentages of turnover with the appropriate percentage selected from that range based on a sliding scale to reflect the level of seriousness of the misconduct. On reflection, however, I believe the fine judgement required to determine the appropriate level of misconduct in cases which can vary considerably in kind and seriousness, together with the different weights which Tribunals might attach to relevant factors, coupled with the changing membership of Tribunals would be likely to put at risk the reasonable degree of consistency in determining sanctions which the guidance seeks to achieve. My preference is for an alternative mechanism based on a percentage starting point.

As between the two mechanisms set out in the guidance, I have a narrow preference for a starting point which will not usually be lower than x%, provided the percentage is set at a level which gives scope for significant adjustments to reflect, for example, full cooperation by the Member or Member Firm as well as admission of the Executive Counsel's complaint at the earliest opportunity. This "not usually lower than" formula would also produce a more appropriate percentage fine in cases where there were no compelling mitigating factors to justify reducing the percentage. In other words, the percentage fine would send out the message that proven misconduct would attract a minimum fine of x% of turnover unless exceptionally there were clear and significant mitigating circumstances or indeed an even higher percentage figure where aggravating factors were present.

It would appear, however, that much the same result could be obtained under the " will not usually exceed a maximum" formula, given that the Tribunal could under this approach take the view that the misconduct was so serious that the indicative maximum starting point should not apply and select instead a different and higher percentage starting point. On the other hand, in cases where there were no mitigating circumstances or they were not in the Tribunal's view sufficiently strong to merit any adjustment, the high percentage starting point which one would expect under this formula may produce a fine in an amount which could be seen as excessively punitive and disproportionate.

On balance, therefore, I believe that the "not usually lower than" approach sends a much clearer message about the size of the financial penalty which can normally be expected in cases of serious misconduct, with the clear possibility of even larger fines where warranted. By contrast the "will not usually exceed a maximum" formula carries, at least presentationally, the less attractive suggestion that in practice lower percentage fines will normally be imposed.

Question 9. This is the crucial issue for decision in designing an appropriate financial sanction. It would be helpful in fixing the indicative percentage to know if countries such as the United States or our major partner countries in the EU adopt such percentages in their regulations and if so what they are. The information in 5.10 is a rather limited comparison; and I am not sure that it is correct to say that " The scale of the fines that might result from the Board's proposals is not demonstrably harsher than fines imposed" by other authorities without knowing the level of the indicative percentage to be adopted in either of the two mechanisms in question. For example, an indicative percentage of "usually not lower than", say, 10% with upward adjustment for aggravating factors could well be significantly harsher than the equivalent sanction of other authorities.

I suggest the Board should also have regard to the level of penalties imposed by the participating accountancy bodies in cases within their remit. This would not be an appropriate level for the Board to adopt but it could provide a starting point to which an addition would be made to reflect the more serious cases of misconduct the Board have to deal with. The Board should also take account of any recommendations by the participating bodies as to the level of the indicative percentage, not necessarily with a view to accepting their proposals, but to enable the Board to decide on a figure which would be likely to produce a proportionate and deterrent penalty without risking a significant number of time consuming and expensive appeals.

Question 10. I fully agree that the question of costs is a separate issue and should not influence the amount of a fine.

Question 11. The guidance will also be helpful to Executive Counsel as well as Tribunals in considering Careforce Agreements. Presumably it will be for Executive Counsel in all cases to assist Tribunals by establishing the relevant amounts of turnover etc to which the percentage agreed by the Tribunal is to be applied, as well as relevant income, the value of assets etc in cases where the Tribunal is likely to conclude that a percentage of turnover/income is not an appropriate indicator of financial means for the purposes of determining an effective and fair fine. Finally, I agree that the proposal in the fourth sub-paragraph of paragraph 32 of the draft guidance is a necessary mechanism to ensure that the management or corporate structure of Member Firms does not act to restrict the size of a fine.

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