DISCIPLINARY SCHEMES PROPOSED CHANGES A CONSULTATION PAPER

Comments from ACCA
September 2012

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GENERAL COMMENTS

ACCA welcomes the opportunity to respond to this consultation paper. Our response is directed at the Accountancy Scheme.

We agree that revisions to the Scheme are desirable so that cases can be dealt with more quickly and cost-effectively. We also believe it important that the revisions should have the effect of enhancing both public confidence and the confidence of the accountancy profession in the Scheme. Our comments are offered in the spirit of striking an appropriate balance between the interests of the various stakeholders in the Scheme.

ACCA would welcome the opportunity to discuss any aspect of this response in more detail with the FRC.

REQUESTS FOR SPECIFIC COMMENTS

1. Should the Schemes be amended as set out in paragraphs 3.3 to 3.11 above so as to enhance the independence of the disciplinary arrangements?

Yes, subject to the following comments.

Launching an investigation

a) We believe it is inappropriate to remove the FRC's obligation to consult with the relevant Participant before launching its own investigation. As the FRC has stated, it can add value to the process and lead to a more informed decision being made. In our view, a more appropriate solution to avoid any delay caused by consultation would be to retain the requirement to consult but add a qualifying paragraph that it can be overridden if it is necessary in the public interest. For example, if the FRC believes the matter is urgent, it could require the Participant to respond by a specific deadline failing which the FRC would be free to proceed without awaiting a response.

Amending the Scheme

b) We accept in principle that the removal of the requirement to obtain the consent of the Participants to any changes to the Scheme is appropriate in the public interest. However, given that the Participants are not required to participate in this particular Scheme, it will be in the FRC's interests to ensure as far as possible that the disciplinary arrangements under the Scheme are not unacceptable to the Participants. We set out below two areas of concern.

- In our view the method of apportioning the costs of the Scheme and of investigations should remain subject to the consent of the Participants.

- We note that the new provisions provide both for consultation with the Participants and an avenue for the independent resolution of disputes. We believe the latter is an essential component of the new provisions and that it should be enhanced by providing that the FRC should obtain the consent of the relevant Participant(s) to the identity of the

independent adjudicator to be appointed, such consent not to be unreasonably withheld.

2. Are the proposals to conclude cases without the need for a tribunal hearing appropriate (paragraphs 3.12 to 3.13 above)?

We are concerned that the proposals to introduce settlement of cases by consent do not give sufficient transparency to the process or the outcome such as to maintain public confidence. The risks of a lack of transparency in a settlement process were highlighted by the relatively recent experience of HMRC. Our concerns are as follows.

a) Executive Counsel seems to have the power to offer a settlement without any committee having first reviewed the matter to assess whether it would be appropriate to offer settlement. Although the consultation document (paragraph 3.15(ii)) states an intention that Executive Counsel should consult with the Case Management Committee before offering settlement, such a requirement does not appear to have been included in the Scheme amendments and we believe it should be.

b) It is noted that any agreed settlement must be approved by at least two Settlement Approvers selected from among the members of the Case Management Committee. However, it is not clear whether the members of the Case Management Committee are independent of the FRC. It is our view that any settlement should be approved by an independent committee or tribunal in order to maintain public confidence in the Scheme.

c) The provision for publication of settlements leaves it open to the Conduct Committee to publish the outcome in any manner it sees fit. In our view, the Scheme should require the details of settlements to be published in all but exceptional cases, such details to include an agreed statement of facts and admissions and the reasons for the agreed sanctions (particularly where they deviate from the relevant guideline sanction).

3. Do you agree with the role envisaged for the Case Management Committee (paragraph 3.15)?

Yes, save for the concerns expressed in 2(a) and 2(b) above.

4. Are the proposals to facilitate the timely completion of investigations and disciplinary proceedings appropriate (paragraphs 3.16 to 3.18 above)?

Yes, we welcome these provisions and believe they achieve their purpose.

5. Should the Executive Counsel be able to seek an interim order against a member or member firm? If so, are the proposed provisions (paragraph 3.19) appropriate?

We believe that interim orders are a necessary addition to the Scheme, but in our view the new provisions do not sufficiently reflect the fact that an interim order is an extremely draconian measure, given that action is being taken to restrict a Member or Member Firm's activities or professional status before any Adverse Finding has been made. Our concerns are as follows.

a) The provisions include a general public interest test for granting an interim order. In our view, the test should be focused on public protection. The case law indicates that only in rare cases should other public interest considerations warrant the imposition of an interim order. We note that the Conduct Committee may issue guidance to the Tribunal which could incorporate such matters, but believe that the Scheme itself should reflect a focus on public protection (without excluding other public interest considerations).

b) The new provisions appear to enable the tribunal to impose an indefinite interim order. While the provisions ensure that it is subject to a review every six months, we consider that in order to bring the Scheme fully in line with the principles of the case law and the best practice operated by many regulators, the period of any interim order should be limited to a maximum of 18 months, which can be extended if Executive Counsel reapplies but would otherwise automatically expire.

6. Do you have any comments on the proposals to amend the investigation test (paragraphs 3.24 – 3.29)?

We agree that a 'reasonable grounds' test should be incorporated into the criteria for commencing an investigation, but note that such a test does not appear to have been included in the amended Scheme.

7. Do you have any other comments on the proposed Schemes or the points raised in this paper?

Yes, as set out below.

Liability to disciplinary action

a) In our view, the proposed new definition of Misconduct suffers the same defect as the current one, in that it encompasses all departures from standards, no matter how minor the breach. One of the key aims of the Scheme is to maintain public confidence in the accountancy profession (paragraph 1(2)), and the ambit of the scheme is limited to 'important issues affecting the public interest' (paragraph 4(1)). Therefore it would seem more appropriate for the definition of Misconduct to be limited to significant breaches only. We suggest the following amendments to the definition:

Misconduct means an act or omission or series of acts or omissions, by a Member or Member Firm in the course of his or its professional, business or financial activities (including as a partner, member, director, consultant, agent, or employee in or of any organisation or as an individual), which falls so far short of the standards reasonably to be expected of a Member or Member Firm that it has brought, or is likely to bring, discredit to the Member or Member Firm or to the accountancy profession.

For example, there may be a case which meets the criterion for investigation under paragraph 4(1) because there have been significant losses in respect of a public company. But if it becomes clear after investigation that the error which caused the loss was minor, while that may be a matter for the Member Firm's professional indemnity insurers, it ought not to be a matter for disciplinary action. We believe it is important to recognise the principle that liability in law does not automatically render a member liable to disciplinary action. (Similarly, a member may be liable to disciplinary action for a serious breach of standards notwithstanding that no or little monetary loss was suffered.)

If it is the FRC's intention not to take disciplinary action in relation to minor breaches, that should be reflected in the Scheme itself in our view.

Referral back to Participants

b) There appears to be no provision for the FRC to refer a matter back to a Participant if, after preliminary enquiries or investigation, it becomes clear that the matter would be more appropriately dealt with by the Participant either for reasons of public interest or efficient use of resources. We believe such a provision would enable the Scheme to operate more efficiently.

Remedial sanctions

c) As mentioned in our response to the consultation on Sanctions Guidance to Tribunals, we believe the Tribunal should have available to it a system of remedial sanctions which could be utilised instead of or in addition to traditional punitive sanctions. The public may not be fully protected if a Member or Member Firm is sanctioned for past conduct without an order being made for some sort of monitoring of their future conduct in relation to the type of act or omission which was the subject of the Adverse Finding. Further, remedial sanctions would provide more flexibility to the Tribunal in exercising its obligation to ensure that the sanctions it orders are proportionate. We note that the consultation document at paragraph 3.28 alludes to the possibility of such sanctions being incorporated into the Scheme.

TECH-CDR-1115

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