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Our reference
AVH

Your reference

Dear Madam

FRC Consultation Paper - Disciplinary Schemes Proposed Changes

Thank you for the opportunity to respond to the FRC Consultation Paper on proposed changes to the Accountancy and Actuarial Disciplinary Schemes.

The accountants disputes team at Taylor Wessing LLP has extensive experience of acting for accountancy practitioners involved in disciplinary proceedings. Members of our team have acted on the Barings, Equitable Life, Mayflower, Cattles, Aero Inventory and Tanfield matters, amongst others.

We note that the FRC is also considering the scope of the disciplinary arrangements and will consult in relation to revised public interest guidelines. We agree that this would be helpful. We suggest, in that context, that the FRC might consider specifically the misconduct test and how that is best framed in order to identify the cases of misconduct which should properly be the subject of disciplinary proceedings. The current definition seems to us too wide in that it does not distinguish minor breach from those serious failings deserving of disciplinary action. A more focused test of "misconduct" would seem to us critical to the effective operation of the Scheme.

We set out our comments below on the specific questions raised in the Consultation Paper.

1. Should the Schemes be amended so as to enhance the independence of the disciplinary arrangements?

1.1 We agree that independence in the disciplinary process is essential: not only in the context of independence of the process from the profession; but also in the sense of

the independence of the investigative and prosecutorial functions from the decision making body.

1.2 We note the proposal to remove the requirement to consult with professional bodies before an investigation starts. This appears to be driven primarily by concerns about delay rather than independence.

1.3 We agree that it is important for there to be close liaison between the FRC and professional bodies, and that – as the Paper states - consultation with professional bodies can lead to better informed decisions as to which cases it is appropriate to take on.

1.4 We suggest therefore that, rather than removing the requirement for consultation with the professional bodies altogether, the FRC might propose a speedier and more streamlined consultation process so as to minimise the risks of delay.

2. Are the proposals to conclude cases without the need for a tribunal hearing appropriate?

2.1 We agree with the proposal for a mechanism to allow cases to be concluded without a public hearing before a disciplinary tribunal. We also broadly agree with the general principles set out in paragraph 3.13 of the Consultation Paper.

2.2 We are concerned, however, that the definition of Proposed Settlement Agreement in the draft revised Scheme provides that the agreement should contain "the particulars of fact and Misconduct admitted by the Member or Member Firms". We do not believe that it is appropriate for the Scheme to prescribe the content of settlement agreements.

2.3 It is implicit in this definition that the FRC envisages that it should be a pre-condition of any settlement that the Member or Member Firm makes formal admissions as to particular facts or alleged misconduct. Admissions may be appropriate in some instances, but not in others, and in our view the Scheme should be sufficiently flexible to provide for the circumstances of each particular case.

2.4 It is proposed that settlement agreements are published. If settlements require in all cases admissions of misconduct, we consider that much of the operational effectiveness of the settlement process could be lost. Member Firms may, for instance, feel unable to enter into a settlement at all in some cases because of the ramifications in terms of civil proceedings. Formal public admissions could open up a Member Firm to very significant civil exposure, and so act as a serious deterrent to any settlement dialogue.

2.5 It seems to us important, therefore, that the settlement mechanism is sufficiently flexible to allow for "no admissions" settlements in appropriate cases.

2.6 Further, we assume in any event that the Proposed Settlement Agreement would be a without prejudice document. We consider that this should be made clear in the definitions section in the Scheme.

3. Do you agree with the role envisaged for the Case Management Committee?

3.1 Broadly, yes.

4. Are the proposals to facilitate the timely completion of investigations and disciplinary proceedings appropriate?

4.1 The Consultation Paper notes at paragraph 3.17 that the time period between draft complaint and formal complaint is a valuable one. That reflects our experience. Draft complaints are the first occasion on which criticisms are levelled at the Member or Member Firm. Their consideration provides the opportunity for a constructive dialogue. It also appears to be the only realistic window for considering the settlement mechanism proposed in the Paper.

4.2 We agree that this process should not be a source of significant delay but, equally, it seems to us important that enough time is allowed for the process to be effective. Eight weeks is in fact a relatively short period compared to the very lengthy periods often absorbed by the investigation process.

4.3 We suggest that three months (absent special factors) would be a more appropriate guideline time period. That would mirror the time periods for a response under the Professional Negligence Pre-action Protocol, as provided for under the Civil Procedure Rules. It would, in the ordinary course, give the Member and Member Firm a proper opportunity to consider the issues raised, take appropriate advice and respond accordingly. In very complex cases of course, more than three months may be appropriate.

5. Should the Executive Counsel be able to seek an Interim Order against a Member or Member Firm? If so, are the proposed provisions appropriate?

5.1 We note that Interim Orders would be reserved for the most exceptional cases. We are concerned as to what those exceptional cases might be.

5.2 An Interim Order would have very severe – and possibly irreparable – consequences on the practice of a Member or Member Firm; but it is a sanction which it is suggested would be imposed on an expedited basis without full evidence before the Tribunal. We note that there is no indication of what remedies might be available to a Member or Member Firm in the event that it is subsequently found that an Interim Order should never have been made.

5.3 We question therefore when an Interim Order would be appropriate. While we would not rule out Interim Orders altogether, we should be grateful if the FRC would identify the circumstances in which it envisages that the imposition of such a measure might be necessary.

6. Do you have any comments on the proposals to amend the investigation test?

6.1 We agree with the proposed amendments in this respect.

6.2 We also agree with the suggestion at paragraph 3.27 of the Consultation Paper that the order of the two criteria should be reversed so as to underline the need for there to be a link between the suspected misconduct and the public interest.

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

There appear to be a significant number of proposed changes to the Schemes to which no reference is made in the Consultation Paper. Our further comments on those proposals are as follows:

Jurisdiction

7.1 It is proposed that paragraph 4(5) of the Scheme, which sets out the territorial remit of the FRC, should be deleted. We do not understand why that it is necessary or appropriate.

7.2 It is not clear to us which cases the FRC might wish to investigate which do not fall within what seems to us an already very broad definition. We should be grateful for clarification from the FRC as to the rationale for this proposal.

Costs

7.3 Paragraphs 7(8)(ii) and 7(10) of the revised draft Scheme relate to the Disciplinary Tribunal's discretion to award costs against or (in limited circumstances) to a Member or Member Firm. It is proposed that in both cases the Disciplinary Tribunal shall have no regard to any settlement discussions or proposals or offers.

7.4 We do not consider that the Disciplinary Tribunal's discretion on costs should be fettered in this way. An appropriate settlement offer could be proposed by a Member or Member Firm at the start of the case, which then reflects the Tribunal's ultimate decision (or is less advantageous to the Member or Member Firm than the decision). In that case, the fact that that offer was rejected by the Executive Counsel is a matter which we suggest should properly be taken into account in the Tribunal's discretion on costs.

7.5 Such an approach, which mirrors that taken in civil proceedings (Civil Procedure Rules Part 36, *Calderbank* offers and so on), would also seem to us to encourage Members and Member Firms to make realistic proposals for the resolution of a case at an early stage.

7.6 We do not suggest that the Scheme should provide for detailed and prescriptive rules as to the costs consequences of early settlement offers. We do not, however, consider that the Scheme should be revised to ensure that they are ignored for costs purposes.

Responsibility for fines

7.7 Paragraph 11(1)(ii)(c) of the Scheme appears to be aimed at ensuring that "Members of the Same Group" as the Member Firm are jointly liable for the payment of fines imposed by the Tribunal.

7.8 It does not seem to us right as a matter of principle that fines should be payable by any party other than the Member Firm itself or its partners at the relevant time. Putting aside issues of enforcement, fines should not be payable in any event by an entity or person different from that censured under the Scheme, whether that other entity or person is associated with the Member Firm in question or not.

7.9 Further, the definition of "Member of the Same Group" is in our view much too wide in any event. "Associate" as defined in section 1260 of the Companies Act 2006, for example, encompasses not only employees of partners in a partnership, but also associates of a partner, namely their spouse, civil partner or minor child or stepchild. We assume that this was not the intention of the proposed wording.

7.10 We therefore consider that the proposed paragraph 11(1)(ii)(c) should be deleted.

Should you have any queries on the matters raised in this letter, please contact Andrew Howell (020 7300 7134) or Julian Randall (020 7300 4720).

Yours faithfully

Taylor Wessing LLP.

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