

The Audit Enforcement Procedure: Consultation on proposed amendments

A consultation issued by the Financial Reporting Council

Comments from ACCA

7 October 2021

Ref: TECH-CDR-1981

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Further information about ACCA's comments on the matters discussed here can be requested from:

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GENERAL COMMENTS

ACCA welcomes the opportunity to comment on The Audit Enforcement Procedure Consultation on Proposed Amendments (**Consultation Document**) and the proposed form of Audit Enforcement Procedure (**Proposed AEP**) (together the **Documentation**) issued by the Financial Reporting Council (**FRC**) on 22 July 2021.

We have endeavoured to provide a thoughtful and constructive response. In preparing our response, we have reviewed the Documentation and considered FRC's Audit Enforcement Procedure (Effective 1 January 2021 (Re-issued 30 March 2021)) (**Current AEP**). ACCA is grateful for the synopsis of the proposed amendments to the Current AEP (**Proposed Amendments**), however we note that it is not exhaustive. ACCA has sought to identify the Proposed Amendments that have not been highlighted and where it has been able to do so has commented to the extent considered appropriate. ACCA is conscious of the benefits of consultation and would respectfully request that any future consultations include comparison documentation to enable those providing feedback to easily identify the proposed changes.

AREAS FOR SPECIFIC COMMENT

**Question 1: Do you have any comments on the changes to the AEP set out above?
Please respond by reference to specific rule numbers of the amended AEP.**

ACCA is generally supportive of the proposed changes to the Current AEP. However, we have identified some areas of concern and these are highlighted below. We have no further comments to make in respect of proposed amendments to the other Rules.

Rule 3

ACCA notes the FRC's intention to clarify the powers of the Case Examiner and welcomes FRC's intended outcome.

Rules 5 and 10

ACCA welcomes the addition of Rules 5(a) and 10 which make it clear that a possible outcome of the Initial Action is that no further action be taken against the Statutory Auditor and/or Statutory Audit Firm. Whilst ACCA considers that such an outcome is implicit in the Current

AEP, we believe that this provides reassurance to the public that the FRC's enforcement process is fair and not unduly weighted against the Respondent.

Rules 12 and 13

ACCA is supportive of Proposed Amendments which seek to facilitate the proper investigation of suspected breaches of Relevant Requirements, particularly where they act to protect the public interest in a way that is proportionate and efficient.

However, ACCA considers that it is important that the powers provided to the Executive Counsel under Rules 12 and 13 are exercised only to the extent that it is fair and proportionate to do so and without prejudice to natural justice. This is particularly the case where Respondents are joined to a case.

Rules 16 and 17

ACCA welcomes the clarity provided in relation to the content of the report to be prepared by Executive Counsel. We consider that this will act to create a standardised and consistent approach. However, we are also conscious of ensuring that Guidance (as defined in our response to Question 3) is clear, particularly in determining what constitutes evidence that must be referred to in the report.

Rules 19, 20 and 23 to 28

ACCA is supportive of the introduction of an Independent Reviewer at this stage of the enforcement process. However, we note that at both Rules 23 and 29(b) reference is made to the Respondent's response being to the "satisfaction of the Executive Counsel" which appears to provide the Executive Counsel with unfettered discretion at what is essentially the "gateway" to the independent review. Rule 28(a) also appears to provide Executive Counsel with similar discretion.

We are concerned that this discretion could have unintended consequences and suggest that there be an explicit requirement upon the Executive Counsel to act reasonably and in the interests of natural justice when exercising discretion.

ACCA is also conscious that the Guidance provided both to Executive Counsel and to the Independent Reviewer will be key to ensuring a fair and transparent outcome that protects the public interest in a proportionate manner.

Rule 52

ACCA considers that the reference in Rule 52 to a “finding or court approved statement of fact” is potentially unclear particularly when applied to legal frameworks outside the United Kingdom. ACCA suggests that FRC defines this term and/or provides Guidance to ensure that this terminology reflects its intended scope.

Rules 75-78

ACCA is content with the Proposed Amendments to these rules.

Part 5

We note that several Proposed Amendments clarify and detail the procedure to be adopted for Interim Order proceedings and we are broadly supportive of them. However, we are concerned by the inclusion of Executive Counsel’s power to apply for an Interim Order without notice to the Respondent. We are particularly concerned by the lack of a framework setting out the circumstances in which it may be appropriate to use this power, which, if included in the Proposed AEP, ACCA considers should be exceptional. Furthermore, there is no articulation of the basis that a Tribunal should permit an application without notice to be heard. Whilst we acknowledge that Rule 91 provides for an Interim Order Review Hearing to be convened within three days of the date of the Interim Order Hearing (without notice), it is not clear in what circumstances an Interim Order Hearing without notice can be justified.

Part 6

ACCA welcomes the inclusion of an Independent Reviewer at this stage of the enforcement procedure. However, in line with our comments in relation to Rules 19, 20 and 23 to 28, we are concerned that the unfettered discretion of the Executive Counsel (eg at Rules 103 and 110) may act to undermine the role of an Independent Reviewer (ie that an independent review provides objectivity and mitigates the risk that the public would perceive a lack of rigour (contrary to the public interest) or, alternatively, a lack of fairness towards the respondent, who may prefer to proceed to an open hearing, rather than undergoing pressure to accept a Decision Notice at the various stages).

Rules 112 and 113

ACCA is supportive of the inclusion of a right of appeal for FRC. However, in order to maintain public confidence in the Proposed AEP, we consider that it should only be exercised where there is a clear public interest imperative.

Rule 136(d)

ACCA notes the Proposed Amendment to the sanctions which prohibits the carrying out of Statutory Audits and/or signing audit reports and which now permits the permanent prohibition (as opposed to a maximum period of three years under the Current AEP).

ACCA is concerned that the circumstances in which this sanction may be appropriate are not articulated in the Proposed AEP and considers the Guidance to be an important tool in ensuring that any such sanction acts to protect the public interest in a proportionate manner.

Rules 146-149

In the interests of fairness and transparency, ACCA considers that FRC should notify all Respondents when a case against one of them is closed.

Rules 165-166

ACCA does not understand why the permissions afforded to the FRC by Rule 166 are not also afforded to any other recipient of that information who may need to disclose it for the same purposes.

Question 2: Do you agree with the proposed amendments to the AEP? Please respond by reference to specific Rule numbers of the amended AEP.

ACCA is broadly supportive of the Proposed Amendments as we consider that, in the main, they provide additional clarity to the Current AEP. In particular, we are supportive of the addition of independent reviews, as we consider that such reviews are important to ensure objectivity of decision making and to mitigate the risk that the public perceive a lack of rigour (contrary to the public interest) or, alternatively, a lack of fairness towards the Respondent.

Where ACCA disagrees with any aspect of the Proposed Amendments, we have sought to articulate this in our response to Question 1.

Question 3: Do you have any general comments on the amended AEP?*Context*

ACCA notes that the FRC clarifies the intended scope of the Proposed AEP in paragraphs 2 and 3 of the Introduction of the Consultation Document. We consider that this provides useful context to readers of the Proposed AEP who may not be familiar with FRC's approach to enforcement and, in particular, its delegation of enforcement action for certain categories of statutory audit. ACCA suggests that similar context should be added to the Proposed AEP in order to aid understanding and interpretation.

Associated Guidance Documentation (Guidance)

ACCA also notes that there is no reference within the Proposed AEP to Guidance which we assume FRC will also amend, and which we consider to be key to the successful implementation of the Proposed Amendments. Whilst many of the Proposed Amendments have been included for clarification, in some circumstances they could be construed as widening FRC's powers, and the Guidance will be key to ensuring that they are implemented in a way which protects the public interest in a proportionate, fair and transparent manner.

Please note sight of such amended Guidance may have influenced our response to this consultation.

Publicity

ACCA understands the importance of transparency and the role that publicity has in protecting the public interest, and it notes the limited circumstances in which proceedings and other matters are kept confidential.

We are concerned that there may be a small number of other scenarios in which the ability to hold proceedings in private and withhold publicity may be appropriate. This includes where evidence relates to sensitive matters including health and other matters where the negative impact upon the individual is greater than the public interest benefit derived from publicity.

Drafting Considerations

ACCA has identified instances where the cross referencing within the document may not be as intended including:

- Rule 26: should “Rule 25(a)(ii)” read “Rule 25(a)”?
- Rules 28(a), 29(a) and 30: should “Rule 21” also reference “Rule 22” and vice versa?
- Rule 38: should this include reference “pursuant to Rule 34” for clarity?

