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By post and by email

19 September 2012

Dear Sirs

Financial Reporting Council - Disciplinary Schemes Proposed Changes Consultation Paper

Deloitte is pleased to provide a response to the FRC's Consultation Paper on proposed changes to the Accountancy and Actuarial Disciplinary Schemes ("the Schemes").

Deloitte is a Member Firm of the Institute of Chartered Accountants in England & Wales (ICAEW). The majority of our partners and employees are members of the various participants. Accordingly, the firm and many of our people are subject to the jurisdiction of the Schemes.

As we have stated in response to previous consultations, we agree that a strong and robust disciplinary process is fundamental for maintaining public confidence in the UK accountancy and actuarial professions and for enhancing the quality of public reporting. We support proposals that are designed to improve the efficiency, effectiveness, proportionality and fairness of that disciplinary process. Whilst we believe that some of the proposed amendments to the Schemes achieve these objectives, and therefore receive our support, we are concerned that some of the proposed amendments detract from and undermine these objectives.

Further, over the past decade we have experienced both the FRC (formerly AADB) disciplinary process as well as its predecessor, the Joint Disciplinary Scheme (JDS). We have drawn on that experience to identify aspects of the Schemes which we believe would benefit from improvement in order to achieve these objectives of increased efficiency, effectiveness, proportionality and fairness.

Our principal concerns with the proposed amended Schemes, and our suggestions as to how the Schemes may be improved, are set out below.[1]

[1] We have based our comments on the proposed amended Accountancy Scheme. There are a few differences between the Accountancy Scheme and the Actuarial Scheme, but none of particular relevance to our comments and suggestions. We would suggest that changes made to the Accountancy Scheme should also be reflected in the Actuarial Scheme.

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1. Oversight, accountability and the separation of powers[2]

We note and welcome the enhanced role of the Conduct Committee (CC) and the introduction of the Case Management Committee (CMC). We consider that it is important that there is a clear and fair division of responsibilities and separation of powers at all stages of the investigation and disciplinary process. Equally we believe that there should be mechanisms in place to provide the necessary checks and balances on the exercise of powers, with clear accountability for all decisions taken at every stage of the process.

However, we do not believe that the roles of the CC, even as enhanced, and the CMC are sufficiently wide to provide the necessary effective oversight and accountability of the Executive Counsel (EC).

We suggest that the appropriate separation of powers and division of responsibilities should be as follows:

a) Conduct Committee – overall oversight of the investigation process, with specific responsibility for key decision making throughout the investigation process, specifically to include:

   (1) Determining whether to investigate a matter;

   (2) Determining the scope of any investigation;

   (3) Deciding whether to apply for an interim order;

   (4) Approval of any proposed settlement; and

   (5) Determining whether to refer a complaint to the Tribunal and, if so, the scope of that complaint.

b) Case Management Committee – responsible for all procedural matters throughout the course of an investigation, specifically to include:

   (1) Determining directions, such as a timetable and scope of disclosure, for the investigation process (in the absence of agreement between the EC and the Member / Member Firm under investigation); and

   (2) Monitoring / holding to account the EC in relation to his conduct of the investigation.

c) Executive Counsel – responsible for:

   (1) The investigation of complaints in accordance with the scope as determined by the CC,

   (2) Reporting and updating the CMC on the progression of investigations;

[2] We consider that our comments in this regard would principally affect the following sections of the Scheme: 3(1), 4(3), 6(6), 6(10), 6(11), 6(21), 7(1).

(3) Considering settlement opportunities;

(4) The delivery of a final report to the CC with a conclusion as to whether, in the EC's opinion, there is a realistic prospect that a Tribunal will make an adverse finding; and

(5) The prosecution of complaints before the Tribunal as referred to the Tribunal by the CC.

In order to give effect to the above proposed separation of powers, the respective roles of the CC and CMC will need to be enhanced. In particular:

a) ***Oversight and accountability during the investigation process***

The CC is the body which decides whether an investigation should be instigated and if it so decides, will instruct the EC accordingly. However, thereafter, under the proposed amended Scheme, neither the CC nor CMC has any real say in the conduct of the investigation and cannot control it so as to ensure it remains proportionate and progresses expeditiously. We would, therefore, suggest that the EC be obliged to report periodically (say, at least every three months) to the CMC (who, as we have suggested above, would be responsible for all procedural matters) on the progress of each matter under investigation.

By making the EC accountable to the CMC in this way, and by making the CMC responsible for setting the timetable, the CMC would be well placed to ensure that the conduct of the investigations by the EC remains proportionate, and the delays that have historically been a feature of the operation of the Scheme would likely be eliminated.

b) ***Oversight and accountability in respect of the decision to refer to the Tribunal***

Once an investigation is complete, it would currently appear to be the EC's decision, and not the CC's, as to whether a matter should be referred to a Tribunal for hearing. We say "appears" because whilst the Scheme does not in fact provide for a decision for referral to be made; in our experience that decision is made by the EC. Having decided to refer a matter to a Tribunal, the EC is obliged to provide a formal complaint to the CC, but there is no purpose to be served in doing so, because the CC appears powerless to intervene and challenge the EC's decision. We believe it is inappropriate for one individual, the EC, to investigate a matter and formulate complaints and then also to make the decision as to whether those complaints proceed to Tribunal[3]. This approach leads to a serious lack of transparency and accountability for what is a very significant decision which can have huge implications and consequences for the FRC as well as the relevant Member/Member Firm.

We believe that for the Scheme to be, and to be seen to be, fair and effective, the decision to refer complaints to a Tribunal should be made by reference to an objective and independent review of the outcome of the EC's investigation.

[3] By analogy, under the rules of the ICAEW, it is the Investigating Committee that is responsible for determining whether to pursue a complaint following an investigation, not the Investigating Officer.

Clearly the EC himself cannot objectively review his own work and, therefore, we would suggest cannot objectively determine whether a complaint should be referred to a Tribunal. In contrast, it seems to us that the CC can provide the necessary robust and objective challenge to the EC's conclusions. This would help to ensure that only appropriate complaints are referred to the Tribunal. Accordingly, we suggest that the Scheme be amended expressly to provide for the CC to be responsible for deciding whether a complaint should be referred to a Tribunal.

We believe that the above measures would provide for increased confidence in the efficiency, effectiveness, proportionality and fairness of the operation of the Scheme in the eyes of the Members / Member Firms, the FRC and the public.

2. Criterion for referral of a complaint to a Tribunal[4]

An investigation can only be launched if the CC is of the opinion that:

(1) "*the matter raises or appears to raise important issues affecting the public interest in the United Kingdom*" (the first criterion); and

(2) "*the matter needs to be investigated to determine whether there may have been Misconduct*" (the second criterion).[5]

However, once an investigation is launched, the first criterion is never reconsidered. In deciding whether to deliver a formal complaint, and, in effect to refer a matter to a Tribunal, the EC must be satisfied that there is:

(1) "*a realistic prospect that a Tribunal will make an adverse finding*"; and

(2) that "*a hearing is desirable in the public interest.*"

Whilst the first of these tests loosely maps across to the second criterion for investigation (i.e. has there been Misconduct), and seems to us to be perfectly sensible, the second of these tests is very different from the public interest test set out in the first criterion. Whether a hearing is "*desirable in the public interest*" does not depend upon the subject matter of the complaints and is not, therefore, the same as whether the "*matter raises or appears to raise important issues affecting the public interest in the United Kingdom*".

Whilst we agree that complaints should only proceed to Tribunal if it is "*desirable in the public interest*", we believe that the different public interest test as set out in the first criterion, namely whether the "*matter raises or appears to raise important issues affecting the public interest in the United Kingdom*" should also be reconsidered by the CC specifically in determining whether complaints should be referred to a Tribunal. Indeed, at that stage, when the investigation by the EC is complete, the CC will be well placed to evaluate whether that criterion is met.

[4] We consider that our comments in this regard would principally affect the following sections of the Scheme: 4(1), 4(3), 6(10), 6(11), 6(21).

[5] There is an alternative ground concerning potential failures to comply with certain obligations under the Scheme, but this is not relevant to our comments.

We would suggest that this approach is logical and ensures that only matters which do raise important issues affecting the public interest in the UK proceed to a Tribunal.

This approach, therefore, would lead to the CC needing to be satisfied that the following three criteria are met before referring complaints to a Tribunal:

(1) *Is there a realistic prospect that a Tribunal will make an adverse finding?*

The CC would primarily draw upon an objective review of the conclusions of the EC following his investigation, but should be satisfied that this criterion is met in relation to each and every element of the complaint. The CC should be at liberty, if it considers appropriate, to refer all, some or none of the complaints to the Tribunal.

(2) *Is a hearing desirable in the public interest?*

At present, the EC is charged with considering this test. However, we suggest that the CC is far better and more objectively placed to determine whether this criterion is satisfied.

(3) *Does the matter raise or appear to raise important issues affecting the public interest in the United Kingdom*?

Again, the CC is better and more objectively placed to consider whether this criterion is satisfied, drawing upon the CC's broad collective market knowledge, experience and expertise.

As we see it, applying the three stage test above, there are four potential outcomes:

(1) The CC concludes that there is no realistic prospect that a Tribunal will make an adverse finding. In that situation there would be no further action taken and the matter would be at an end.

(2) The CC concludes that there is a realistic prospect that a Tribunal will make an adverse finding, but that a hearing is not desirable in the public interest (for example, if the Member in question was not fit to participate in a disciplinary hearing, or the only allegation in respect of which there was any prospect of an adverse finding relates to a minor, technical breach). In that situation there would be no further action taken and the matter would be at an end.

(3) The CC concludes that there is a realistic prospect that a Tribunal will make an adverse finding, that a hearing is desirable in the public interest, but the matter does not raise or appear to raise important issues affecting the public interest in the UK. In this situation the Scheme would simply need to provide (if, indeed, it is considered that this cannot currently be done under the Scheme) for the CC to direct that the matter be referred back to the relevant Participating Body, for further action as that Body considers appropriate. That action could include, for example, a referral to its own disciplinary Tribunal. This would be entirely consistent with the Scheme rules which provide for the suspension (but not termination) of investigations by Participants where the CC determines that a matter should

be investigated by the EC. All evidence collected by the EC and the EC's final report could then be passed to the Participating Body.

(4) The CC concludes that there is a realistic prospect that a Tribunal will make an adverse finding, that a hearing is desirable in the public interest, and the matter does raise or appear to raise important issues affecting the public interest in the UK. In that situation, the CC would determine the scope of the complaints and refer those complaints to the Tribunal.

This approach, we suggest, would ensure that the FRC's Tribunals only hear matters which raise issues affecting the public interest in the UK, consistent with the FRC's overriding responsibilities, also thereby ensuring a more efficient and effective use of the FRC's resources.

3. Early determination of matters without a full Tribunal hearing[6]

a) Settlement

We note and welcome the introduction of a procedure to facilitate the early resolution of matters through the medium of settlement and the motivation behind this proposal of saving time and costs. We comment further on these proposals in Appendix 1. In summary, though, in addition to our comments on the mechanics of the settlement process and how these would operate in practice, our primary observations are that:

(1) It is important that Members/Member Firms should have a reciprocal right to propose cases for settlement (at present it seems that only the EC would be entitled to propose cases for settlement), with a corresponding express duty on the EC to consider any such approach.

(2) It should be possible to settle part (as well as all) of a complaint, leaving the unsettled parts to proceed to Tribunal.

(3) It should also be possible to settle liability only, so that the Tribunal is only required to determine sanction, as well as settling both liability and sanction.
However, there is, we believe, a real barrier to achieving settlements. If a Member/Member Firm were to admit liability to an FRC complaint, that admission could be used against the Member/Member Firm in the context of any professional negligence claim which may be (or perhaps already is being) pursued against them. Unless and until all potential civil actions are resolved, there could well be a real reluctance and disincentive to settle the FRC complaints.

This issue has been grappled with by the SEC. Its solution is to enable "Neither-Admit-Nor-Deny Settlements". The SEC concluded that such settlements are sound public policy and serve the critical enforcement goals of accountability, deterrence and investor protection[7]. We would refer to the statement of the SEC's Director of Division of Enforcement before the Committee on Financial Services of the US House of Representatives on 17 May 2012 for further detail. http://www.sec.gov/news/testimony/2012/ts051712rk.htm.

[6] We consider that our comments in this regard would principally affect the following sections of the Scheme: 6(12), 6(13), 6(15), 6(16), 6(17), 6(18), 6(22), 7(8).
[7] As well as compensation to harmed investors, which is not part of the FRC's disciplinary regime.

We would support the introduction of such settlements, which would overcome the barrier and disincentive to settle. We believe that the FRC should give this proposal serious consideration, reflecting on the positive impact which this approach has delivered in the US.

b) Strike out

We consider that it is essential that the Tribunal be given express jurisdiction to strike-out cases prior to final hearing.

An FRC Tribunal has recently decided that (absent an abuse of process) it does not have jurisdiction under the Scheme to strike out a complaint, even if the Tribunal were to be of the view that the complaint was hopeless and there was no real prospect of it being proven by the EC at a full hearing[8]. As a consequence, under the current Scheme such complaints would have to be heard at a full (and unnecessary) hearing.

We consider that for the process to operate efficiently, effectively, proportionately and fairly, the Tribunal ought to have an express right to strike-out complaints (in whole or in part) where there is no real prospect of success.

4. Successor Liability[9]

We are concerned by the proposed extension of liability to Successor Member Firms. Where a Member Firm has ceased to exist, it would of course still be open to the FRC (where appropriate) to investigate individual Members (or former Members), but we cannot see that it would be in anyway appropriate or fair that a Member Firm other than the specific Member Firm suspected of misconduct, in the corporate form as it was at the time of the alleged misconduct, should face investigation and the imposition of sanctions under the Scheme.

Similarly, we do not agree with the proposal which seeks, in the context of payment of fines, to introduce the concept of joint and several liability for Successor Firms or "*Members of the Same Group*". We do not consider that it is appropriate that fines can be enforced against any party other than the actual Member Firm against whom sanctions have been imposed, or its partners at the relevant time (if a general partnership), even if that other party is associated in some way with the Member Firm.

We accept that if a Member Firm which was a Limited Liability Partnership (LLP) were to cease trading, then an issue may arise as to the enforceability of any monetary sanction, since the liability would rest with the LLP not its individual members (partners). It seems to us that if the cessation of trade has been due to either a corporate restructuring or a transfer of the business to another entity, the relevant Participating Body could make it a condition of registration of the new entity as a Member Firm that it will guarantee payment of monetary sanctions by FRC Tribunals against its predecessor.[10]

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[8] We do not agree with this decision as we believe that a Tribunal does have jurisdiction to strike out a complaint, but no right of appeal lies from that decision.

[9] We consider that our comments in this regard would principally affect the following sections of the Scheme: 1(4), 4(7), 11(1), 12(1), 12(2), 12(5).

[10] The Participants will face the same issue themselves in relation to their disciplinary sanctions, so this condition could also cover monetary sanctions imposed by the Participants.

5. Procedural matters

a) *Interim Orders*[11]

Our detailed comments on the proposal to introduce a power to grant interim orders are set out in Appendix 1. In summary, whilst we do not in principle object to the introduction of such a power, we do view it as a draconian sanction, and are concerned that it should not be widely deployed. As the proposals currently stand, it is not clear to us when it is envisaged that such an order might be appropriate, or that there are sufficient safeguards in place to control the exercise of this power and to guard against the risks that might arise should it ultimately turn out that the grant of such an order was not justified.

We would suggest that the Scheme should expressly provide that an interim order will only be made when the Tribunal is satisfied that there is a real possibility that, without an interim order being made, the relevant Member/Member Firm will misconduct himself/itself in the future and that the public interest will be damaged if the interim order is not made. In accordance with our proposals regarding the separation of powers and responsibilities, we also consider that it should be the CC, not the EC, who is ultimately responsible for deciding whether to apply for an interim order.

b) *Rules of evidence*[12]

Given the potentially serious consequences of the imposition of sanctions by the Tribunal, we consider that it is essential that clear and defined rules of evidence apply to proceedings before the Tribunal. At present the Scheme states that the Tribunal shall apply the rules of natural justice, but expressly states that the Tribunal "*may take into account any relevant evidence, whether or not such evidence would be admissible in a court*".

We believe that in the context of charges of professional misconduct, which have the potential to cause serious and permanent damage to a Member/Member Firm's reputation, and could result in the permanent loss of the right to practice and removal of a Member's livelihood, it is unacceptable and, arguably, contrary to natural justice that there are no rules regarding admissibility of the evidence to be adduced. We do not believe that it is proper for professional misconduct allegations to be determined on the basis of evidence which would not be admissible in a court of law. We can see no justification for the absence of applicable rules of evidence, and we cannot see how the FRC, Members/Member Firms or the public can have the requisite confidence in the fairness of the proceedings and in the outcome of those proceedings without such rules being in place. This argument is made stronger by the fact that, under the Scheme, there are very limited rights of appeal against a Tribunal's decision.

We would suggest, therefore, that court rules are adopted governing admissibility of evidence. Given that the Scheme expressly provides that the standard of proof to be applied by the Tribunal is the civil standard of proof, we suggest that the rules of evidence applicable to civil proceedings would be the most appropriate to adopt.

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[11] We consider that our comments in this regard would principally affect the following sections of the Scheme: 13(1) to 13(12).
[12] We consider that our comments in this regard would principally affect the following sections of the Scheme: 7(6), 8(10)

We would also suggest that the Tribunal process would benefit significantly from the inclusion of defined disclosure obligations, in particular on the part of the EC. The EC can demand access to all relevant documents that are held by the relevant Member/Member Firm. However, the Scheme does not set out in sufficient detail and clarity the obligations on the part of the EC to disclose documentation. This has, in our experience, led to unnecessary disputes as to the EC's disclosure obligations. In our experience the EC approaches disclosure as if the proceedings involved a criminal prosecution. However, the proceedings are not criminal in nature and again, given that the standard of proof to be applied by the Tribunal is the civil standard of proof, we would suggest that the Scheme should provide for the EC to give standard disclosure, as defined in civil proceedings.

Responses to the Specific Questions

Our responses to the seven specific questions raised in the Consultation Paper are at Appendix 1 to this letter.

We would welcome the opportunity to discuss this response to the Consultation Paper in more detail. Should you have any comments or questions please do not hesitate to contact either Ian Joslin (ijoslin@deloitte.co.uk / 020 7007 0306) or David Barnes (djbarnes@deloitte.co.uk / 020 7303 2888).

Yours faithfully

Deloitte LLP

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Appendix 1 – Response to Questions[1]

1. Should the Schemes be amended so as to enhance the independence of the disciplinary arrangements?[2]

1.1. We agree that independence is an essential component of any disciplinary process and, as a general principle we welcome any amendments aimed at enhancing that independence.

1.2. However, we consider that the Conduct Committee (CC) should be required under the Scheme to establish, prior to instructing the Executive Counsel (EC) to investigate, whether the relevant Participant has commenced its own investigation. If it has not done so, we agree that there should be no further need to consult. However, where the Participant has already commenced its own investigation, we consider that the requirement to consult should remain, both at the outset of the process and, in some circumstances in relation to any changes in the scope of an investigation. The Participant may already have spent significant time investigating matters and gathering information, and so consultation between the FRC and that Participant is likely to be of great assistance to the FRC, both in assisting it to make an informed decision as to whether it should launch its own investigation, and potentially even throughout the course of any subsequent investigation.

1.3. It appears that the proposals to dispense with the requirement to consult with Participants are also motivated by concerns about delays, as well as by concerns about independence from the profession. Whilst we welcome efforts to streamline and speed-up the disciplinary process, we do not consider that consultation with a Participant that has already commenced its own investigation will unduly delay that process. If anything such consultation may shorten the amount of time taken by the FRC to decide whether to investigate a matter, and so will ultimately speed up the process.

1.4. With regard to changes to the scope of an investigation, we acknowledge the point highlighted in the Consultation Paper, which is that once an investigation has been ongoing for some time, the Participants may not have remained sufficiently informed to be able to provide any meaningful comment on proposed changes of scope. However, we consider that where a Participant had already commenced an investigation prior to the involvement of the FRC, the CC should, when considering amendments to the scope of an investigation be required to consult with that Participant in order to ascertain whether the proposed amendments are matters that were considered by it in its investigation and which are therefore matters upon which the Participant is sufficiently informed to be able to comment.

1.5. We do not otherwise object to the removal of the requirement to consult with the Participants (i.e. in circumstances where the FRC has initiated an investigation on its own initiative), but we do consider that it is important for there to continue to be close liaison between the Participants and the FRC, albeit on a more informal basis.

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[1] As with our covering letter, we have addressed the Accountancy Scheme rather than the Actuarial Scheme, although generally our comments are applicable to both Schemes.

[2] We consider that our comments in response to this question would principally require amendment to the following sections: 3(1), 5(8), 6(8), 6(9).

1.6. In our response to the Consultation Paper on Sanctions Guidance, we explained why we consider it appropriate that, if a Tribunal were to be considering a preclusion or exclusion order, it ought to seek representations from the relevant Participant.

2. Are the proposals to conclude cases without the need for a Tribunal hearing appropriate?[3]

2.1. We welcome the introduction of a mechanism to allow cases to be concluded without the need to progress to a final, public hearing before the Tribunal, and the motivation behind this of saving time and costs. We do, however, have a number of comments, and some concerns in relation to the proposed operation of the settlement mechanism, which we have addressed in our covering letter.

2.2. In addition, by analogy with the position as it applies to parties engaged in civil litigation, and in order to encourage use by Members/Member Firms of the settlement mechanism, we consider that in the event that a settlement is proposed but not ultimately approved, and the matter proceeds to final determination by the Tribunal, in determining any costs award, either against or in favour of a Member/Member Firm, the Tribunal should be expressly required to take into account previous attempts at settlement and how any offers made in the context of those settlement negotiations compare with the Tribunal's final decision.

2.3. We have also noted in our covering letter the desirability of introducing express jurisdiction for a Tribunal to strike-out unmeritorious complaints.

3. Do you agree with the role envisaged for the Case Management Committee?[4]

3.1. In general we are in agreement with the role of the Case Management Committee (CMC), as described in paragraph 3.15 of the Consultation Paper. We are, however, concerned that the current proposed amendments to the Scheme do not give full effect to this role, and instead appear to limit the role of the CMC to one of monitoring only. It is not clear to us that the CMC has been granted any express powers, and we therefore question whether it will be able to fulfil the role envisaged in the Consultation Paper.

3.2. In our covering letter we have explained why we believe that there needs to be a clear division of responsibilities between the CC, the CMC and the EC, and we have described the roles and responsibilities which we believe they should each have in order to provide the necessary degree of oversight and accountability, and to enable the disciplinary process to operate effectively, efficiently, proportionately and fairly.

4. Are the proposals to facilitate the timely completion of investigations and disciplinary proceedings appropriate?[5]

4.1. At present it can take years for a matter to come before the Tribunal. Given the potentially severe and career threatening implications of the imposition of sanctions by the Tribunal, not to mention the huge emotional burden and stress placed on individuals

[3] We consider that our comments in response to this question would principally require amendment to the following sections: 6(12), 6(13), 6(15), 6(16), 6(17), 6(18), 6(22), 7(8).
[4] We consider that our comments in response to this question would principally require amendment to the section 6(6)
[5] We consider that our comments in response to this question would principally require amendment to the following sections: 6(6), 6(10)

under investigation, we believe that it is essential, not least for the credibility of the disciplinary process, that cases are dealt with as expeditiously as possible. Members/Member Firms are also entitled to a degree of certainty, not only as to how allegations against them will be dealt with, but also as to the length of time it will take to complete that disciplinary process, and it is therefore important that Members/Member Firms are not left in a state of uncertainty for any longer than is necessary.

4.2. As we explained in our covering letter, we believe that the CMC should be responsible for setting directions governing the conduct of the investigation, which would include the time allowed for the parties (i.e. the relevant Member/Member Firm and the EC) to complete particular steps (although the parties should be at liberty to agree revised directions, subject to the CMC's oversight). This would largely mirror not only the approach taken in civil proceedings, where the Court sets the directions, although the parties are allowed an element of freedom to agree variations to those directions, but also in the Tribunal proceedings themselves. We have also suggested in our covering letter that the EC be obliged to report to the CMC every 3 months. We believe that these suggestions facilitate the CMC being able to exercise proper oversight of the investigation process and of the EC's conduct of the investigation, leading to a more timely, efficient and fair completion of investigations.

4.3. As regards the proposed time limit of 8 weeks for a Member/Member Firm to make representations in response to a draft complaint, we consider that this is too short a time, particularly when compared with the amount of time that the EC's investigation may have taken. The Consultation Paper envisages that this period between delivery of the draft complaint and the deadline for representations will be used by Members/Member Firms not only to consider and investigate the allegations against it and prepare any representations in response, but also to engage in any settlement discussions with the EC. It is of course important that Members/Member Firms should not be unduly restricted in considering the allegations against them, and they should be entitled to a realistic period of time within which to prepare any responses. Similarly, if the new settlement mechanism is to be effective, it is important that there is sufficient flexibility in the process to allow for settlement opportunities to be explored.

4.4. We would suggest extending the period from the current 8 weeks to 3 months (which is the amount of time that a party in civil litigation is granted to investigate and respond to a claim under the professional negligence pre-action protocol) although subject to the CMC's discretion to provide for a different period (which could be longer or shorter, depending on the circumstances). Whilst we note that the Scheme provides for Members / Member Firms to be able to request an extension of time, as presently drafted the EC has complete discretion as to whether to grant an extension. If possible, extensions should be a matter for agreement between the EC and the Member / Member Firm, but in the event of failure to agree, as we have said, we would suggest that the CMC be given the right and power to determine any requests for additional time.

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?[6]

5.1. The imposition of an Interim Order is a draconian step and its use should be very tightly controlled. We acknowledge that in some exceptional circumstances an Interim Order may not only be appropriate but also necessary and so we do not in principle object to the introduction of such a power. We have commented further on this issue in our covering letter.

5.2. In addition to those comments, we are also concerned that at present the decision whether to apply for an Interim Order lies solely with the EC, without any reference to the CC. This is a further example of the need for oversight, to which we have referred in our covering letter. At present the EC is also not required to specify the grounds upon which he has decided that it is appropriate to apply for an Interim Order, nor does the Scheme specify any particular factors that should be considered when deciding whether to apply for an Interim Order. We consider that the Scheme should be amended to provide further guidance on the risk factors to be considered, including the question of proportionality, i.e. would the imposition of an Interim Order be proportionate to the risk posed by the Member/Member Firm. We have also suggested that, given the significance of a decision to seek an Interim Order, this should be a decision which is reserved to the CC, having reviewed the recommendations of the EC.

5.3. We are concerned that there is a real risk that this measure might be used inappropriately. It is currently proposed that an Interim Order could be granted on an expedited process without a full hearing of the evidence, and therefore without the safeguards of a full hearing. This is, we consider, unsatisfactory and further consideration should be given to this proposal.

5.4. In general it appears to us that this is a sanction that could be applied swiftly, but would then potentially remain in place for the many years that it might take for the matter to reach a final Tribunal hearing, the outcome of which, and the final sanctions imposed upon the Member/Member Firm, may be far less severe than the Interim Order. Whilst we are not in principle opposed to the introduction of a power to grant such Interim Orders, we do consider that further consideration needs to be given to the current proposals surrounding Interim Orders, and in particular the safeguards. We welcome the introduction of regular 6 month reviews of any Interim Order. We would make two further suggestions in relation to the review of Interim Orders:

a. First, upon granting an Interim Order, the Tribunal should be required to consider whether more regular reviews are appropriate in the particular circumstances of the case and, if so, prescribe whatever review period it considers appropriate (which should not exceed 6 months).
b. Secondly, if complaints are referred to the Tribunal in circumstances where an Interim order had been made during the investigation stage, a hearing of the Tribunal should be convened as soon as reasonably practicable in order for the Tribunal to review the Interim Order.

[6] We consider that our comments in response to this question would principally require amendment to the section 13.

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

6.1. We agree with the proposals to amend the investigation test and also agree with the suggestion that the two criteria could be reversed in order to emphasis the link between suspected misconduct and the public interest.

6.2. However, as we have explained in our covering letter, the public interest test which needs to be satisfied in order for an investigation to be instigated is not revisited before a decision is made to refer complaints to the Tribunal. We believe it should be reconsidered.

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

7.1. We have made a number of comments in our covering letter regarding the effectiveness, efficiency, proportionality and fairness of the Scheme. In addition, we would make the following points:

a) Definition of Misconduct[7]

7.2. A key intention and purpose behind the existence of a disciplinary scheme for professionals is ultimately to improve the way in which members of the profession conduct themselves as they go about their day to day business, and to uphold proper standards of conduct. If such professionals, or their firms, conduct themselves improperly or inappropriately, then we agree that they should be sanctioned.

7.3. We do not, however, think that this is the same as punishing individuals or firms for individual mistakes which do not suggest incompetence, dishonesty or systemic failure. We believe that punishing such individual mistakes or errors is unlikely to assist in improving the conduct of the profession. Essentially, we would suggest that for disciplinary liability to arise, the professional would have conducted himself in a manner which is unbecoming of a person in that profession.

7.4. We refer by way of example to the test for misconduct applied by the ICAEW, which refers to acts or conduct which "discredit" the individual / the profession and the Joint Disciplinary Scheme (JDS), where the relevant test was whether the Member / Member Firm fell significantly below the standard to be expected of a Member / Member Firm. We also understand that in other professions misconduct is defined by reference to concepts such as "gross negligence".

7.5. We therefore question whether the current definition of Misconduct ought to be amended, to change the emphasis to how a Member / Member Firm conducts itself and also to ensure that only serious cases of misconduct are subject to scrutiny under the Scheme. It is also important that misconduct is determined by reference to the public interest, since the authority of the FRC to act is based upon acting in the public interest. It seems to us that it is clearly in the public interest that only serious matters of misconduct are subject to scrutiny under the Scheme, and that the limited time and resources of the FRC are not diverted to investigating other, less serious matters.

[7] We consider that our comments in response to this question would principally require amendment to section 2(1).

7.6. It seems to us that this is an area that would benefit from further, specific consultation, and we would welcome the opportunity to comment in further detail on this issue.

b) Sanctions

7.7. *We note that the FRC considers that there is merit in broadening the range of sanctions.* We commented on this issue in our response to the recent consultation paper on sanctions guidance.

c) Costs

7.8. We have a number of comments in relation to some of the costs provisions of the Scheme:

Sections 7(8) and 7(10) of the Scheme

We do not agree with the proposal that settlement discussions / proposals or offers should be disregarded for the purposes of determining the costs to be paid by a Member/Member Firm, and we do not consider that the Tribunal's discretion to determine costs should be restricted in any way. By analogy with the position as it applies to parties engaged in civil litigation, we consider that the Tribunal should be able to consider any settlement offers made, and how these compare with the Tribunal's final decision eg, if an early offer made by a Member/Member Firm has 'beaten' the Tribunal's final decision, then it may be appropriate for this to be reflected in any costs award. We also consider that this would encourage use of the settlement mechanism. We do not consider that there is any justification for deleting the clarification that following an admission there is no risk in respect of costs which have arisen from the date of that admission.

Sections 8(12), 8(13) and 9(8) of the Scheme

We are concerned that removal of section 8(12) removes an important mechanism for holding the FRC to account for prosecuting cases which are without merit, and we consider that the power for the Tribunal to order the FRC to pay the legal costs of a Member/Member Firm following a successful application to allow an appeal should remain. Similary, in respect of the new section 13(12), which provides a right of appeal against an Interim Order, we consider that should such a appeal be allowed, the FRC should be required to pay the costs of the Member / Member Firm.

d) Miscellaneous procedural matters

Finally, there are also a number of miscellaneous procedural provisions in relation to which we wish to comment:

Section 3(1)(v) of the Scheme

We do not believe that it is appropriate for the exercise of some of the powers of the CC to be delegated to a single person, the Chairman. We consider that the CC as a whole should actively engage in the investigation of disciplinary cases. This proposed amendment would mean that potentially important decisions such as the scope of an investigation and publication of information could be taken by a single person without

consultation with others and without any apparent checks on the exercise of those powers. We would not though object to the delegation of purely administrative powers and functions to the Chairman.

Section 4.5 of the Scheme

We do not consider that it can ever be appropriate for a Member/Member Firm to be investigated and made subject of a disciplinary process in respect of alleged misconduct that took place prior to becoming a Member/Member Firm. Indeed, it is difficult to see how such a Member/Member Firm could ever be found liable, because they cannot be judged by reference to standards which did not apply to them at the time of the alleged misconduct. If there are concerns as to the conduct of an individual or firm prior to becoming a Member/Member Firm, those concerns are best dealt with by the relevant Participant at the time of application for membership.

Sections 7.5 and 8.9 of the Scheme

We have no objection to the introduction of these provisions (ability to make admissions), however we consider that the current proposed wording might be interpreted that the decision to make an admission at the invitation of the Tribunal or EC is in some way not "voluntary". We suggest it would be better to read:

> *"A Member, or Member Firm may, voluntarily, either at his or its own instigation, or at the invitation of the Disciplinary Tribunal..."*

Section 12.1 of the Scheme

In principle we have no objection to the inclusion of an obligation on Member Firms to seek to ensure the co-operation of its employees. However we do not consider that this is appropriate in relation to former employees. In such instances, assuming that the former employee is still a Member, the FRC will have jurisdiction to either investigate that Member or obtain his evidence by compulsion, and there is therefore no need for an obligation on the Member Firm to secure a former employee's co-operation.

Section 12.2 of the Scheme

We consider that the time for compliance with requests for documents / inspection should continue to be calculated from the date of service of the notice, not from the date of the notice itself, as there may be a delay between issue of the notice and service of this on the Member / Member Firm. In those circumstances the Member / Member Firm would be prejudiced by an act (i.e the delay in service) over which it had no control.

Section 17.2 of the Scheme

In principle we have no objection to the introduction of an obligation of confidentiality on a Member / Member Firm, however the obligation of confidentiality should apply equally to the FRC and all related entities / bodies.

Section 17.3 of the Scheme

In order to allow Member Firms to conduct defences, it is essential that this section be amended to allow for disclosure to other necessary parties, in particular experts and factual witnesses, and any other engaged advisors. Again we consider that the proposed obligation of confidentiality should apply equally to the FRC and all related entities / bodies acting on its behalf.