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Dear Madam

Consultation Paper: Disciplinary Schemes Proposed Changes

We welcome the opportunity to comment on the above consultation. BDO is an award winning UK member firm of BDO International, the world's fifth largest accountancy network, with more than 1,000 offices in more than 100 countries.

General Comments

On a general level, we welcome proposed changes to the current disciplinary scheme. The desire to provide a more time controlled, less expensive and stream-lined process (with, nonetheless, appropriate checks and balances in place) is most appreciated.

That said, and as you will see from our detailed comments set out below, we consider that there are some additional changes which the FRC could consider making which will hopefully make the process even more stream-lined and which will encourage the profession to fully participate in a number of your suggestions.

Specific Comments

We address below the specific questions raised in the consultation.

Q1 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?

Paragraphs 3.3 to 3.11 of the consultation paper set out changes designed to increase the independence of the FRC. In particular, they remove (in a number of instances) the need to consult with the relevant professional bodies.

We appreciate the need for the FRC to be an independent regulatory body and, critically, to be seen to be independent by the wider public. On this basis, we agree with the proposals that the FRC should be free to instigate preliminary enquiries before launching an investigation and amend the scheme rules without recourse to another entity.

We have concerns regarding the FRC's proposal to launch investigations and extend the scope of investigations without recourse to the professional bodies, however. The primary motivation for this appears to be to reduce the time it takes to launch an investigation and we note that the

FRC considers that the current consultation process can add up to 3 months to the process (paragraph 3.4 of the consultation paper).

In our view, the consultation is a helpful part of the process. For instance, it may be the case that a professional body has already investigated a matter which the FRC proposes to investigate and can provide valuable input as to the conclusions which they had reached. For example, the professional body may have decided not to pursue the matter on account of various mitigating factors. If these were shared with the FRC, a similar conclusion may also be reached by the FRC thus avoiding the need to publicly open an investigation into a member or member firm unnecessarily (with the reputational consequences this undoubtedly brings). This should also avoid the FRC carrying out preliminary enquiries into a matter or launching an investigation unnecessarily (thus incurring time and costs) and forcing the member or member firm to respond, effectively, to a double investigation, in circumstances where this is not warranted.

Accordingly, in our view, the consultations with professional bodies should still take place. The argument that the independence of the disciplinary arrangements will be enhanced by removing the requirement to consult is spurious. The FRC's subsequent decision as to whether or not to launch an investigation is entirely their own. The only difference is that after consultation it will be a better informed decision. Consultation is clearly sensible bearing in mind the serious nature of disciplinary investigations. We consider that this is time well spent. It will hopefully ensure that public investigations are not brought without due consideration of all relevant material. If the process is taking too long, the FRC should work with the professional bodies to explore how the process can be improved.

Q2 Are the proposals to conclude cases without the need for a tribunal hearing appropriate (paragraphs 3.12 to 3.13 above)?

The consultation paper proposes a mechanism that would allow cases to be concluded without the need for a public hearing before the Disciplinary Tribunal.

We consider this would be a useful addition to the disciplinary process and the procedure for settlement (including the involvement of two settlement approvers) seems to us to be appropriate. However, we note that the early resolution process can only be raised by Executive Counsel. We consider that it would also be useful if a member or member firm was at least able to raise the prospect of settlement discussions with Executive Counsel, albeit that we appreciate that the ultimate decision to pursue such discussions would rest with Executive Counsel.

That said, bearing this in mind, the Scheme (and profession generally) would benefit from greater clarity about how Executive Counsel's discretion in connection with settlement should be exercised. For instance, will it not be exercised if the matter is of particular public interest? Will it be used to force settlement where Executive Counsel feels on weak ground? Further, will there be costs sanctions in the event a member firm refuses to settle?

Our further concern with the proposal to encourage early resolution of matters is that there may, in fact, be very little take-up of this offer by members and member firms on account of the manner in which investigations are publicised. Given that the FRC announces investigations into members and member firms from the outset, many members and member firms may already be facing significant reputational damage from a very early point and, for this reason alone, may wish to see the process through to a tribunal hearing. However, higher percentage reductions in penalties may encourage early settlement.

We appreciate that other regulators (for example, the FSA) have early settlement processes in place and, we understand, many parties do seek to settle with these regulators at an earlier stage. The difference, however, may be that FSA investigations are not made public from the outset; only the final decision notices are publicised. The FRC may wish to consider a similar approach. We appreciate that the FRC needs to be seen to be investigating matters of public interest and obtaining results. However, in our view, this could still be achieved by simply publicising settlements, as and when they are finalised. In this event, we anticipate that there would be more appetite for settlements from the profession which would, in turn, save time and costs on all sides.

Q3 Do you agree with the role envisaged for the Case Management Committee (paragraph 3.15?)

The role envisaged for the Case Management Committee ("CMC") is to assist with individual disciplinary cases and, in particular, to oversee and provide guidance to Executive Counsel.

Given the serious nature of a disciplinary investigation, we consider the involvement of appointed members of the CMC to oversee the investigation and act as a check and balance for Executive Counsel's decisions is very sensible. Otherwise, the decision whether or not to bring an investigation, and decisions regarding the conduct of that investigation, may rest with only one individual who will, inevitably, bring his or her own prejudices and biases to the matter. Whilst we anticipate that this consultation process may increase the time it takes to decide whether or not to deliver a Formal Complaint, this is, in our view, a risk worth taking.

To ensure that the CMC are not simply presented with Executive Counsel's views and can form their own independent view on a matter, we also suggest that it might be sensible for the CMC to be empowered to request to review certain key pieces of evidence, which they consider to be appropriate (on a case by case basis). This may include key documents or certain sections of interview transcripts (some of which may have been highlighted in Executive Counsel's presentation of the matter). The general right to request such information could be incorporated into the scheme rules at Paragraph 6.

To further assist the designated members of the CMC with supporting Executive Counsel, we also suggest that the members of the CMC who are appointed to consider a particular investigation should have a broad mix of experience. It may be helpful, for instance, for one of them to have the appropriate technical expertise (i.e. if the investigation relates to an audit retainer, some previous audit experience at a senior level might be appropriate). Again, this could be incorporated into the scheme rules.

Finally, we note that some powers of the CMC are capable of being delegated to the Chairman. This includes decisions regarding the scope of the investigation and whether or not the decision should be published. In our view, delegation of such serious powers and decisions undermines the checks and balances afforded by the involvement of the CMC (and referred to above).

Q4 Are the proposals to facilitate the timely completion of investigations and disciplinary proceedings appropriate (paragraphs 3.16 to 3.18 above)?

We appreciate the FRC's recognition that the progress of a disciplinary investigation has, historically, taken a long time. We welcome the proposal that this process could be more effectively timetabled and time capped.

However, we are concerned with the FRC's suggestion that a member or member firm should respond to the FRC's allegations within 8 weeks. Whilst we note that this period can be extended at the discretion of Executive Counsel, we consider that the primary period should be longer.

When a member or member firm is facing a civil action from their clients, the pre-action protocol allows the professional 3 months in which to investigate it. Even then, if the matter is particularly complex, a longer period can be agreed between the parties. We consider that a similar length of time should be provided for at Paragraph 6(10).

This is particularly so, given it could be 6 months or more since the member or member firm was first notified that the FRC was launching an investigation.

In addition, we suggest that it would be helpful if the investigation process conducted by Executive Counsel could also be more timetabled. We appreciate that each case will be different, but perhaps Paragraph 6(10) of the scheme rules could allow for a timetable to be agreed between Executive Counsel and the member or member firm under investigation at the outset. It would also be helpful if Executive Counsel could periodically report on progress of an investigation to the member or member firm, say on a 3 monthly basis.

Q5 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?

The consultation paper proposes that Executive Counsel should be able to seek an interim order in the narrowest of circumstances. We note that the only order likely to be made is the suspension of a member's licence or a member firm's licence and that it will be possible to obtain an interim order at any stage between launching an investigation and the Tribunal's decision.

Given the serious consequences likely to arise from an interim order, we are concerned that it may not be appropriate to take such a step at an early stage and, in particular, when Executive Counsel is still deciding whether to deliver a Formal Complaint. At this stage Executive Counsel will, inevitably, have little information regarding the matter and yet, pursuant to section 13, he will have the power to suspend an individual's licence or even a firm's licence. We consider that this power should only arise once a Formal Complaint has been delivered (by which time matters will have been thoroughly investigated and the member or member firm will have been given an opportunity to respond to the allegations).

As for the procedure for obtaining an interim order, there is currently no provision for the member or member firm to oppose the application (there is simply a right of appeal once an interim order has been made). We consider that a member or member firm should have the right to make representations at the hearing during which the Tribunal will consider whether or not make the order, particularly given the potential serious effect of the order. Once the order has been made, to a certain extent the damage has been already been done.

Q6 Do you have any comments on the proposals to amend the investigation test (paragraphs 3.24-3.29)?

The consultation paper proposes a modification to the investigation test so that investigations should only be commenced where there are reasonable grounds for suspecting that misconduct has occurred.

We agree that this modification would be helpful, particularly given that the criteria for assessing "reasonable grounds for suspecting" are set out in statute and common law.

We also note that "Misconduct" has now been defined, which is helpful. We consider, however, that this definition is very wide and would appear to encompass any breach of accountancy standards, however small, or any activity which falls below ordinary professional standards. Indeed, "Misconduct" is stated to mean "any 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... which falls short of the standards reasonably to be expected of a Member or Member Firm".

Whilst we appreciate that the investigation test is a two limb test, such that the FRC will only investigate where there is misconduct and the matter raises important issues affecting public interest, we still consider that the definition of "Misconduct" is nonetheless too widely drafted. We suggest that it could be narrowed to include only acts or omissions which are of a sufficiently serious nature or which have the potential to cause serious consequences.

Q7 Do you have any other comments on the proposed Scheme or the points raised in this paper?

Following a review of the amended scheme rules, we note that a member's or member firm's right to claim costs from the FRC, following a successful appeal, has been removed (Paragraph 8). We are surprised by this. It seems to us that a member or member firm should be able to recover costs if they ultimately succeed on appeal. This is a useful check and balance to ensure that the CMC and Executive Counsel do not bring (and pursue) unnecessary, speculative investigations or fail to prepare their case appropriately. We would like to see this clause reintroduced.

Further, we note that the rules relating to disclosure of information have changed (Paragraph 17). In particular, a member or member firm is not allowed to disclose information relating to the investigation to any other party without Executive Counsel's agreement. There are certain other regulatory bodies (both in the UK and overseas) that have strict confidentiality requirements which they impose on members. To assist members and member firms with dealing with all regulatory bodies appropriately, we would ask that this paragraph is amended, at paragraph 17(3), to carve out "save where confidentiality is required by law, Court order or another regulatory body)".

If you have any queries in relation to our above response, please contact Iain Lowson on 020 7893 3623.

Yours faithfully

BDO LLP

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