

July 2013

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# Guidance on the delivery of Formal Complaints

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# Guidance on the delivery of Formal Complaints

## Introduction

- 1 This Guidance is issued by the Conduct Committee (“the Committee”) of the Financial Reporting Council (“FRC”) under paragraph 3(1)(ii) of the Accountancy Scheme (“Scheme”). This paragraph of the Scheme empowers the Conduct Committee to provide the Executive Counsel with guidance concerning the exercise of his duties under the Scheme, who shall have regard to such guidance.
- 2 This document provides guidance for the Executive Counsel in relation to the tests which he must consider before the delivery of a Formal Complaint to the Conduct Committee in accordance with paragraph 7(11) of the Scheme. It is intended to be neither legally binding nor exhaustive, but Executive Counsel must have regard to the Guidance, and formulate reasons for his decision to deliver the Formal Complaint which will be provided to the Committee.

## Summary

- 3 By virtue of paragraph 7(11) of the Scheme, the Executive Counsel must deliver to the Committee a Formal Complaint against a Member or Member Firm liable to disciplinary proceedings under paragraph 5(3) of the Scheme if, having conducted such investigation as he thinks necessary and having reviewed any written representations submitted by the Member or Member Firm, he considers that two tests are satisfied, namely that:
  - that there is a realistic prospect that a Disciplinary Tribunal will make an Adverse Finding against a Member or Member Firm (the “evidential test”); and
  - that a hearing is desirable in the public interest (the “public interest test”).

An Adverse Finding is defined in paragraph 2(1) of the Scheme as:

“a finding by a Disciplinary Tribunal that a Member or Member Firm has committed Misconduct, or has failed to comply with any of his or its obligations under paragraphs 14(1) or 14(2).”

- 4 Both tests must be satisfied before the duty to deliver a Formal Complaint arises. Paragraph 7(14) of the Scheme makes clear that if the Executive Counsel considers that either test is not satisfied, he cannot deliver a Formal Complaint but should inform the Conduct Committee of his decision, together with the reasons for that decision.
- 5 Every case is different and must be assessed on its own facts and merits. The assessment must be careful, fair, independent, impartial and objective. It must exclude personal views about disability, gender identity, race, religion or belief, political views, sex and sexual orientation. There must be no improper or undue influence from any source.
- 6 The Executive Counsel shall have regard to the views expressed by the Group of the Case Management Committee appointed in accordance with paragraph 7(5) of the Scheme, and in particular the factors that it advises he should consider when deciding whether to proceed with the Formal Complaint.

## **The evidential test**

- 7** The Executive Counsel's task is to make an informed assessment, based on the information before him, about the likely outcome of a Formal Complaint before a Disciplinary Tribunal properly directed on law and fact. He must decide whether it is more likely than not that an Adverse Finding will be made against a Member or Member Firm. This is a substantively different decision from that applied later by a Disciplinary Tribunal, if a Formal Complaint is delivered. Its task is to decide whether the Formal Complaint is made out applying the civil standard of proof (balance of probabilities) laid down in paragraph 12 of the Scheme to the evidence as it then emerges.
- 8** In undertaking that task, the Executive Counsel should make an objective evaluation of all the information available to him, including that about any defence or explanation which might be put forward and in particular any representations received for the purposes of paragraph 7(10) of the Scheme. He should also:
- Consider the standard of proof to be applied before the Disciplinary Tribunal by virtue of paragraph 12 of the Scheme.
  - Consider any conviction or finding made by, or admission made before, another prosecuting authority, regulatory or adjudicatory body in this or another jurisdiction, having particular regard to paragraph 16 of the Scheme.
  - Consider the strength, relevance and reliability of the evidence (on both sides). Paragraph 9(6) of the Scheme permits a Disciplinary Tribunal to take into account any evidence, whether or not such evidence would be admissible in a court. However, the relevance and reliability (and, therefore, the weight) of evidence may be undermined, for example, by the refusal of a witness to testify or by doubts about the witness's credibility/accuracy or by doubts about the quality/authenticity of documentary evidence.
  - Consider the formulation of the Formal Complaint. The extent to which the evidential test is met will depend on the acts and/or omissions alleged in the Formal Complaint. The Executive Counsel should be satisfied that there is a realistic prospect of an Adverse Finding in relation to each allegation against each Member or Member Firm. The Executive Counsel will need to consider whether omitting a particular element, episode or state of mind might enable the Formal Complaint to meet the evidential test when it otherwise would not. The Executive Counsel should not feel bound to allege either everything that could conceivably be asserted or nothing that could conceivably be resisted: see further paragraph 15 below, regarding the Executive Counsel's discretion to focus the Formal Complaint on certain allegations.
- 9** The Executive Counsel, having carried out reasonable investigations, should not normally seek to resolve any substantial conflicts of evidence (factual or expert) which remain.

## **The public interest test**

- 10** If the evidential test is not satisfied, the public interest test should not and cannot be considered; no matter how important and/or serious the facts and/or issues may appear. But if the evidential test is satisfied, the Executive Counsel must go on to consider whether a hearing is desirable in the public interest.

**11** In applying the public interest test the Executive Counsel should be especially mindful of four points:

- All cases covered by this guidance are necessarily public interest cases, that is, they raise or appear to raise important issues affecting the public interest. This is underscored by paragraphs 5(1) and 5(2) of the Scheme. Paragraph 5(1) echoes paragraph 24(2) of Schedule 10 of the Companies Act 2006. Paragraph 5(2) requires the Conduct Committee to consider, amongst other things, whether the matter appears to give rise to serious public concern or to damage public confidence in the UK accountancy profession as well as all the circumstances of the matter including its nature, extent, scale and gravity. The Executive Counsel is required to ask a slightly different question: whether a hearing (rather than an investigation) is “desirable in the public interest”. Following his investigation, he is likely to answer that question by reference to more information than was available to the Conduct Committee.
- A Formal Complaint satisfying the evidential test should usually be delivered to the Committee unless contrary public interest factors clearly outweigh those favouring delivery.
- There is an alternative means of disposal under the Scheme whereby the Executive Counsel may agree terms of a settlement, for consideration by Settlement Approvers in accordance with paragraph 8 of the Scheme. Entering into settlement discussions is at the sole discretion of the Executive Counsel, and, in considering whether this would be appropriate, he must have regard to the public interest. Where terms of a settlement cannot be agreed, or are not approved by Settlement Approvers, the Executive Counsel shall proceed to deliver the Formal Complaint in accordance with paragraph 7(11) of the Scheme.
- The application of the public interest test is not simply a matter of comparing the number of factors on each side. The Executive Counsel must carefully and fairly weigh each factor, and then make an overall assessment. No single factor or combination of factors is necessarily determinative.

**12** The following are examples of public interest factors favouring delivery of a Formal Complaint to the Conduct Committee:

- The gravity of the alleged misconduct and/or breach of obligation. It is likely that a hearing is desirable in the public interest where there is evidence that the alleged misconduct:
  - (a) involved acts of dishonesty or of a criminal nature, or otherwise casts doubt on the integrity of the Member or Member Firm;
  - (b) involved a failure to comply with a requirement to cooperate with the FRC pursuant to paragraphs 14(1) or 14(2) of the Scheme;
  - (c) was pre-meditated, repeated or systemic;
  - (d) involved abuse of a position of authority or trust;
  - (e) casts doubt on the objectivity of the Member or Member Firm;

(f) involved a non-trivial failure on the part of the Member or Member Firm to act with professional competence or due care, or otherwise involved action that could discredit the profession.

- The gravity of the actual or potential consequences of the alleged misconduct and/or breach of obligation.
- There is a real risk of repetition.
- Public confidence in:
  - the accounting profession;
  - financial reporting;
  - corporate governance; and/or
  - the Scheme.

could be undermined if the alleged misconduct and/or breach of obligation were not pursued before a Disciplinary Tribunal.

- The disciplinary record, before the FRC or otherwise, of the Member or Member Firm. The worse the record is, and the greater the similarity of the previous misconduct, the stronger the public interest will be in proceeding. Conversely, if the Member or Member Firm has already been excluded or had his/its licence or registration withdrawn and the new allegation is relatively minor, there may be little public interest in proceeding.
- There is a need to deter future misconduct and/or breach of obligation and to send a signal to the profession and the public, thereby protecting and promoting high professional standards.

**13** The following are examples of factors which indicate that a hearing may not be desirable in the public interest:

- The Member is very elderly or is (or was at the time of the alleged misconduct and/or breach of obligation) suffering serious physical or mental ill health and
  - no longer practises; and
  - is unlikely to resume practice.
- Even if the Formal Complaint is upheld, a Disciplinary Tribunal would probably impose no, or only a nominal or minimal, sanction (such as a token or small fine).
- The loss and harm, or potential loss and harm, were minor, and the misconduct was inadvertent.
- There has been long delay between the alleged misconduct and/or breach of obligation and the likely date of a hearing before a Disciplinary Tribunal, unless
  - the alleged misconduct and/or breach of obligation is serious; and/or

- there is good reason for the delay (such as it has been caused or contributed to by the Member or Member Firm or the alleged misconduct and/or breach of obligation has come to light only recently or the complexity of the investigation or the existence of other proceedings or investigations by another prosecuting authority, regulatory or adjudicatory body).

- 14** The two sets of examples described above in paragraphs 12 and 13 are illustrative, not exhaustive.
- 15** Paragraph 2(1) of the Scheme explains that a Formal Complaint can comprise one or more allegations (of misconduct and/or breach of obligation). The Executive Counsel is entitled to include certain allegations and to exclude others, even if all the allegations satisfy the evidential test. For example, he may include the most important allegations but exclude less important allegations which might be much more difficult or lengthy to prove or which might make the disciplinary proceedings unduly complicated and which are unlikely, if proved, to affect the overall sanction.

### **Review**

- 16** The decision to deliver a Formal Complaint to the Conduct Committee should be kept under review by the Executive Counsel. Review is a continuing process and must take account of any material change in circumstances.

### **Conclusion**

- 17** This guidance is both a public and an evolving document. Periodically, it will be reviewed and (where appropriate) revised in the light of experience.

**Issued by the Conduct Committee of the Financial Reporting Council  
July 2013**



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