



ACCOUNTANCY AND ACTUARIAL DISCIPLINE BOARD

**THE REFERRAL OF FORMAL COMPLAINTS TO
DISCIPLINARY TRIBUNALS**

A CONSULTATION PAPER

JULY 2010

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1 Introduction

- 1.1 The Accountancy and Actuarial Discipline Board¹ (AADB) is the UK's independent, investigative and disciplinary body for accountants and actuaries. Its focus is on investigating cases which raise or appear to raise important issues affecting the public interest and, where appropriate, having disciplinary complaints heard by a tribunal.
- 1.2 The AADB is an operating body of the Financial Reporting Council (FRC). The FRC is the UK's independent regulator of the accountancy and actuarial professions in the UK and is responsible for promoting high quality corporate governance and reporting to foster investment.
- 1.3 The AADB's disciplinary scheme for the accountancy profession (the Accountancy Scheme) has been in effect since 13 May 2004. It was amended after a process of consultation with effect from 26 February 2010. Its disciplinary scheme for the actuarial profession (the Actuarial Scheme) has been in effect since 13 September 2007.
- 1.4 One of the key changes made to the Accountancy Scheme when it was amended relates to the test that is applied following an investigation and before a decision is taken to refer a formal complaint to a disciplinary tribunal.
- 1.5 The amended Accountancy Scheme provides for a two-part test and introduces for the first time a consideration of the public interest in proceeding with a formal complaint at this later stage of the process (a public interest test is and has always been applied when deciding whether or not to bring an investigation).
- 1.6 The Board indicated in its Feedback Statement published in October 2009, that it intends to issue guidance on the application of the test for deciding whether to refer a Formal Complaint for a disciplinary hearing. This paper sets out the AADB's proposal for such guidance, the policy underlying that proposal and seeks views on the proposed guidance. The proposed guidance can be found at Annex A.
- 1.7 This consultation is being conducted in line with the Code of Practice on Consultation issued by the Better Regulation Executive of the Department for Business, Innovation and Skills (BIS).

¹ Formerly the Accountancy Investigation and Discipline Board (AIDB)

- 1.8 A list of the organisations to whom this consultation paper has been sent is attached at Annex B. In addition, responses are encouraged from anyone with an interest in or views on the subject covered in this paper. Responses are sought by **22 October 2010**. Details of how to respond can be found in section five.

2 The Requirements of the Accountancy Scheme

- 2.1 The Accountancy Scheme applies to Members and Member Firms of the following bodies: the ICAEW, ACCA, CIMA, CIPFA, ICAS and ICAI. Members and Member Firms of those bodies in the UK are subject to the rules and regulations of the body of which they are a Member. Each body operates its own disciplinary arrangements to deal with complaints of unsatisfactory conduct by their Members and Member Firms.
- 2.2 Separate disciplinary arrangements exist for those cases which are considered to raise important issues affecting the public interest. These cases are dealt with by the AADB, which operates independently of the accountancy bodies.

The Test for Referral of Formal Complaints to Disciplinary Tribunals

- 2.3 The decision whether to bring a Formal Complaint against a Member or Member Firm rests with the Executive Counsel, who, following his investigation, and having considered the representations of that Member or Member Firm, applies a two-limb test before deciding whether or not to proceed with a Formal Complaint. This test is set out in paragraph 6(9) of the Accountancy Scheme, which states:

6(9) *If having reviewed any representations received for the purposes of paragraph 6(8) above, the Executive Counsel still considers:-*

- (i) *that there is a realistic prospect that a Tribunal will make an Adverse Finding against a Member or Member Firm; and*
- (ii) *that a hearing is desirable in the public interest,*

he shall deliver a Formal Complaint against the Member or Member Firm."

- 2.4 Broadly, therefore, there are two tests that have to be met, as follows:
- (a) an evidential test; and
 - (b) a public interest test.

2.5 The Board has no power under the Accountancy Scheme to overrule or to interfere with the Executive Counsel's decision. However, the Accountancy Scheme confers upon the Board the power to issue guidance to the Executive Counsel on the performance of his functions. Executive Counsel is required to have regard to any such guidance issued. The Board considers that issuing guidance on the way in which the test in paragraph 6(9) of the Accountancy Scheme will be applied by the Executive Counsel will provide further transparency in the AADB's processes as well as promoting consistency in the decision making process.

3 The Public Interest

- 3.1 The statutory provisions relating to the investigation and discipline of public interest cases (currently set out in Schedule 10 of the Companies Act 2006) require members and member firms of recognised supervisory bodies (RSBs), i.e. the accountancy bodies whose members are entitled to conduct statutory audits, to participate in arrangements for the carrying out of investigations into *“public interest cases arising in connection with statutory audit functions by members of the body.”*
- 3.2 *“Public Interest Cases”* is defined in the Companies Act 2006 to mean:

“Matters which raise or appear to raise important issues affecting the public interest.”
- 3.3 The requirements of the Companies Act relate only to investigations into statutory audit matters. However, the Accountancy Scheme applies to all public interest cases involving members or member firms of the accountancy bodies who participate, regardless of the capacity in which they were working at the time of the events which gave rise to the conduct in question.
- 3.4 The test in paragraph 6(9) of the Accountancy Scheme reflects the requirement in Schedule 10 of the Companies Act 2006 that the arrangements for independent investigation for disciplinary purposes of public interest cases must provide *“for the holding of disciplinary hearings relating to members of the body which appear to be desirable following the conclusion of such investigation.”*
- 3.5 The Board considers that the introduction of a public interest or ‘desirability’ consideration at the time of deciding whether to refer a Formal Complaint is in keeping with the intention of the legislation.

4 The Referral of Formal Complaints to Disciplinary Tribunals

4.1 The Board's proposals for 'Guidance on the Delivery of Formal Complaints to Disciplinary Tribunals' ("the Guidance") have been developed taking particular account of the absence of any alternative means of disposal under the Accountancy Scheme other than a disciplinary hearing.

4.2 After considering a range of issues relevant to the Guidance, the Board reached the following views:

- i. that where the evidential ('realistic prospect') test is met, a case should normally go forward to a disciplinary hearing unless it is clearly not in the public interest for it to do so, as this would amount to abandoning a viable case without a full, public airing of the matter and without any further action being taken against the Member or Member Firm concerned;
- ii. that the presence of a single or a combination of factors contrary to proceeding with a Formal Complaint should not automatically result in a case being abandoned;
- iii. that where contrary factors are present, these must be weighed against those factors favouring delivery of a Formal Complaint to arrive at an overall assessment;
- iv. that a Member should not be able to avoid a disciplinary hearing on health grounds except in very limited circumstances;
- v. that a Member or Member Firm should not be able to avoid a disciplinary hearing solely by virtue of co-operating with the investigation, particularly since they are required under the Accountancy Scheme to co-operate. Co-operation may, however, be relevant to sanction and any costs awards made against a Member or Member Firm;
- vi. that the Guidance must be sufficiently clear and flexible to be applicable in a wide range of different circumstances; and
- vii. that the Guidance will be kept under regular review in the light of experience and revised as the Board considers appropriate.

4.3 The Board would welcome views on the following questions:

1. **Have we included the sorts of factors you would expect to see included in deciding whether a hearing is desirable in the public interest?**
2. **Are there any other factors you believe the Executive Counsel should consider when deciding whether to refer a Formal Complaint?**
3. **Do you have any other comments about the structure or content of the proposed Guidance?**

5 Invitation to Comment

How to respond

Please send your response by **22 October 2010** to:

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Financial Reporting Council
5th Floor, Aldwych House
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London WC2B 4HN

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This consultation paper is available online at <http://www.frc.org.uk/aadb>.

Publication of response

The Board will publish a response to this consultation later in 2010.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

In line with the FRC's policy regarding the publication of responses to consultations, all responses to this consultation will be published on the AADB's website unless the respondent specifically requests otherwise. A standard confidentiality statement in an email message will not be regarded as a request for non disclosure. We do not edit personal information (such as telephone numbers or email addresses) from submissions prior to publication; therefore only information that you wish to be published should be submitted. We aim to publish responses within 10 days of receipt.

Acknowledgement of Response

An acknowledgement will be sent to any individual or organisation submitting a response to this consultation.

Questions

Any questions about the issues raised in this consultation document should be directed to **Anna Colban, Secretary to the Board**, at the above email address.

Annex A

Guidance on the delivery of Formal Complaints to Disciplinary Tribunals (via the Board)

Introduction

1. This guidance is made by the Board under paragraph 3(1)(iii) of the Accountancy Scheme (“Scheme”) which:
 - empowers the Board to provide the Executive Counsel, amongst others, with guidance concerning the exercise of his duties under the Scheme; and
 - requires the Executive Counsel to have regard to any such guidance.
2. This guidance deals specifically with the Executive Counsel’s duty under paragraph 6(9) of the Scheme to deliver to the Board a Formal Complaint against a Member or Member Firm liable to disciplinary proceedings pursuant to paragraph 4(3) of the Scheme, thereby triggering the appointment of a Disciplinary Tribunal under paragraphs 7(1)-(2) of the Scheme. It is intended to be neither legally binding nor exhaustive. But it must be taken into account by the Executive Counsel, who will formulate reasons for his decision.

Summary

3. By virtue of paragraph 6(9) of the Scheme, the Executive Counsel *must* deliver a Formal Complaint to the Board against a Member or Member Firm liable to disciplinary proceedings under paragraph 4(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 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 an act of misconduct, or has failed to comply with any of his or its obligations under paragraphs 12(1) or 12(2).”

4. Both tests must be satisfied before the duty to deliver a Formal Complaint arises. Paragraph 6(10) of the Scheme makes clear that if the Executive Counsel considers that either test is not satisfied, he *cannot* deliver a Formal Complaint.
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 ethnic or national origin, disability, gender, religious beliefs, political views or sexual orientation. There must be no improper or undue pressure from any source.

The evidential test

6. The Executive Counsel’s task is to make an informed *prediction*, based on the information then before him, about the fate 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. In other words, there must be a better than evens prospect of success to justify disciplinary proceedings. This is a substantively different test 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 10 of the Scheme to the evidence as it then emerges.
7. 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. He should also:
 - Consider the standard of proof to be applied before the Disciplinary Tribunal by virtue of paragraph 10 of the Scheme, namely the civil standard (balance of probabilities).
 - Consider any conviction or finding made by, or admission made before, another prosecuting authority, regulatory or adjudicatory body in this or another jurisdiction in relation to the same or allied facts, having particular regard to paragraph 13 of the Scheme.
 - Consider the admissibility, relevance and reliability of the evidence (on both sides). Paragraph 7(5) of the Scheme permits a Disciplinary Tribunal to take into account any evidence, whether or not 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 will need to consider what it is necessary/appropriate to allege. Refinement of the allegations (for example, to omit 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 14 below, regarding the Executive Counsel's power to focus the Formal Complaint on certain allegations.
8. 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

9. 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.
10. In applying the public interest test the Executive Counsel should be especially mindful of five points.
- All cases covered by this guidance are necessarily public interest cases as defined in paragraph 24(2) of Schedule 10 of the Companies Act 2006, that is: they raise or appear to raise important issues affecting the public interest. This is underscored by paragraphs 4(1) and 4(2) of the Scheme. Paragraph 4(1) echoes paragraph 24(2) of Schedule 10 of the Companies Act 2006. Paragraph 4(2) requires the Board 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.
 - A Formal Complaint satisfying the evidential test should usually be delivered to the Board unless contrary public interest factors clearly outweigh those favouring delivery.

- There are no alternative means of disposal open to the Board under the Scheme (resulting in an otherwise viable case being abandoned without any further action against the Member or Member Firm). Therefore, the Executive Counsel should proceed with caution before halting a Formal Complaint which satisfies the evidential test.
- The public interest test involves more subjectivity than the evidential test. Reasonable people can disagree on whether, and the extent to which, certain factors promote or undermine the public interest, and on the weight/importance of those factors.
- 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.

11. The following are examples of public interest factors favouring delivery of a Formal Complaint to the Board.

- The gravity of the alleged misconduct and/or breach of obligation. A referral is likely to be needed 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 AADB pursuant to paragraphs 12(1) or 12(2) of the Scheme;
 - c. was pre-meditated, repeated or systematic;
 - 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
 - g. involved action that could discredit the profession.

Those examples are set out for illustrative purposes only and do not amount to an exhaustive list of circumstances in which a referral is likely to be needed.

- 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 Board or otherwise, of the Member or Member Firm. The worse the record is (and the greater the similarity between the current allegation and the previous misconduct and/or breach of obligation), the stronger will be the public interest 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 send a signal to the profession/public, thereby protecting and promoting high professional standards.

12. The following are examples of contrary factors.

- 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.
- The Member Firm has ceased trading and is unlikely to resume trading, unless it continues to trade under a different name.
- 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.
- Inordinate and prejudicial 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).

13. The two sets of examples described above in paragraphs 11 and 12 are illustrative, not exhaustive.
14. 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 has power to include the most important allegations but to 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

15. The decision to deliver a Formal Complaint to the Board 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

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

Annex B

List of Consultees

Copies of this consultation paper are being sent to:

Administrative Justice & Tribunals Council
Association of British Insurers
Association of Chartered Certified Accountants
Association of Regulatory and Disciplinary Lawyers
Actuarial Profession
FRC's Actuarial User Committee
Bar Council
Baker Tilly
Barlow Lyde & Gilbert
BDO Stoy Hayward
Chartered Accountants Regulatory Board in Ireland
Chartered Institute of Management Accountants
Chartered Institute of Public Finance and Accountancy
Confederation of British Industry
Consultative Committee of Accountancy Bodies
Deloitte & Touche
Department for Business, Innovation and Skills
Ernst & Young
Financial Services Authority
Grant Thornton
Her Majesty's Treasury
Herbert Smith
The Hundred Group of Finance Directors
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants in Ireland
Institute of Chartered Accountants of Scotland
Institute of Directors
KPMG
Law Society
Mayer Brown
Members of AADB Tribunal Panel
National Consumer Council
PricewaterhouseCoopers
Reynolds Porter Chamberlain
Serious Fraud Office
Simmons & Simmons
Standard Chartered
The Pensions Regulator



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