Sanctions Guidelines

A Consultation Paper

March 2019
Invitation to comment

Under the Financial Reporting Council (Amendment) Ordinance 2019, the Financial Reporting Council (FRC) must not impose a pecuniary penalty unless it has published, in the Gazette and in any other manner it considers appropriate, guidelines to indicate the way in which it exercises the power to impose the penalty and it has had regard to the guidelines so published in imposing such penalty.

The FRC would like to seek your views on the proposed Sanctions Guidelines which also include guidelines on how the FRC would exercise the power to impose a pecuniary penalty.

How to respond

Please send your response by 17th April 2019 by one of the following means:

By mail to: Financial Reporting Council
29th Floor, High Block
Queensway Government Offices
66 Queensway
Hong Kong

By fax to: (852) 2810 6320

By email to: reform@frc.org.hk

Representative groups

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or may be disclosed. If you want the information that you provide to be treated as confidential or you do not wish your response to be published, please make this clear in your response. If you send an e-mail response which includes an automatically generated notice stating that the content is to be treated as confidential, you should make it clear in the body of your message whether or not you wish your comments to be treated as confidential.

Acknowledgement of response

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

Questions about this consultation

Any questions about the issues raised in this consultation document should be directed to Ms Florence Wong, Senior Director - Investigation & Compliance at the above email address.
Our invitation

The FRC invites comments on the proposed Sanctions Guidelines, particularly on the questions set out below. Comments are most helpful if they:

(a) address the questions as stated;
(b) indicate the specific paragraph(s) of the proposed Sanctions Guidelines to which they relate;
(c) contain a clear rationale; and
(d) include any alternative the FRC should consider, if applicable.

The FRC is requesting comment only on matters addressed in this set of proposed Sanctions Guidelines.

List of questions for consultation

1. Do you agree with the FRC’s objectives of imposing sanctions as set out in paragraph 10? If not, please state the particular objective(s) that you do not agree with and the reasons for your disagreement.

2. Do you agree with the FRC’s approach to determining sanctions summarised in paragraph 19? If not, please explain any alternative you would propose and the reasons therefor.

3. Have we included the sorts of factors (paragraphs 21 to 24) in the Sanctions Guidelines that you would expect the FRC to consider in assessing the nature and seriousness of the misconduct and determining the sanctions to be imposed? Are there any other factors you believe the FRC should take into account when determining the sanctions to be imposed?

4. Do you agree that the sanctions, including a pecuniary penalty, to be imposed by the FRC should act as an effective deterrent and be proportionate to the misconduct and have regard to all the circumstances of the case, including the financial resources of the regulated persons? If not, what would you propose? Please explain your rationale.

5. Do you agree with the factors set out in paragraphs 37 to 43 that the FRC will normally take into consideration when determining the amount of a pecuniary penalty? If not, please explain any alternatives that you would propose and the reasons therefor.

6. Do you have any other comments on the Sanctions Guidelines that would help the FRC as an independent auditor regulator to protect the investing public and the public interest?
SANCTIONS GUIDELINES

Introduction

1. This document provides guidance for the Financial Reporting Council (FRC) when considering the imposition of sanctions on regulated persons (i.e. public interest entity (PIE) auditors and registered responsible persons of a registered PIE auditor), under the Financial Reporting Council Ordinance (Cap 588) (FRCO). Part 3B of the FRCO contains provisions relating to disciplinary matters regarding PIE auditors and registered responsible persons. Section 37H requires the FRC to have regard to these guidelines which indicate the manner in which the FRC will exercise its powers to impose a pecuniary penalty on (I) a PIE auditor under section 37D(3)(b)(iv), or (II) a registered responsible persons of a registered PIE auditor under section 37E(3)(b)(iii).

2. Although expressed as guidance for the FRC, this guidance will also be relevant to others discharging their respective responsibilities under the FRCO.

3. Terms defined in the FRCO shall have the same meaning in this guidance.

4. This policy has been approved by the FRC.

5. This document is intended to:

   (a) promote proportionality, clarity, consistency and transparency in decision-making;

   (b) ensure that all parties are aware from the outset of the approach which might be taken when determining what sanction to impose.

6. Nothing in the guidance is intended to be inconsistent with the FRCO and the FRC must proceed in accordance with the FRCO and the overriding requirements of natural justice.

7. This guidance is a public document. Periodically, it will be reviewed and (where appropriate) revised in the light of experience. The guidance cannot deal with every single situation and exceptions will sometimes arise. The guidance should be considered alongside any principles emerging from cases decided under the FRCO. The FRC may have regard to sanctions imposed in other cases. It must, however, determine the sanction which it thinks appropriate on the facts and circumstances of the case before them and should not feel constrained by the sanctions imposed (or not imposed) in earlier cases to impose a sanction which it does not think appropriate.
Aims and Objectives of the Sanctions Guidelines

8. These guidelines have been developed to ensure that there is an effective system of sanctions to complement investigations and inspections.

9. Sanctions are intended to be effective, proportionate and dissuasive in respect of a misconduct as defined under sections 37A and 37B of the FRCO.

10. In determining the appropriate sanction, the FRC should have regard to the reasons for imposing sanctions for a misconduct in the context of the FRCO. Sanctions are imposed to achieve a number of purposes, namely:

(a) to deter regulated persons from committing misconduct relating to PIE audits;

(b) to protect the public from regulated persons whose conduct has fallen short of the relevant requirements set out in the FRCO;

(c) to maintain and promote public and market confidence in regulated persons and the quality of their audits;

(d) to declare and uphold proper standards of conduct amongst regulated persons and to maintain and enhance the quality and reliability of future audits.

11. The primary purpose of imposing sanctions for misconduct is not to punish, but to protect the public and the wider public interest.

12. This guidance has been developed to help the FRC achieve these objectives by imposing sanctions which:

(a) improve the behaviour or performance of the regulated persons concerned;

(b) are tailored to the facts of the particular case and take into account the nature of the misconduct and the circumstances of the regulated person concerned;

(c) are proportionate to the nature of the misconduct and the harm or potential harm caused;

(d) eliminate any financial gain or benefit derived as a result of the misconduct;

(e) deter misconduct by the regulated persons or others.

13. In connection with paragraph 12(a) above, the FRC should consider whether, and if so, to what extent, the sanctions proposed would be likely to lead to improvements in respect of the matters which gave rise to the proceedings and in the quality of work of the regulated persons concerned.
14. The FRC should also consider whether the sanction or combination of sanctions, financial and/or non-financial, achieve the objectives of the FRCO. There may be circumstances where the objectives can be achieved without a financial penalty.

Determination of Sanction

15. The FRC should consider the full circumstances of each case and the seriousness of the misconduct involved before determining which sanction or combination of sanctions to impose on the regulated person(s). This guidance considers those factors that may be relevant to the FRC’s consideration. The factors are not listed in any kind of hierarchy and it is for the FRC to decide on the weight to be allocated to each factor. The factors listed are not exhaustive; not all of the factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

16. In deciding which sanction or combination of sanctions to impose, the FRC should have regard to the principle of proportionality. In assessing proportionality, the FRC should consider whether a particular sanction is commensurate with the circumstances of the case, including the seriousness of the misconduct found and the circumstances of the regulated person(s) concerned.

17. The sanctions available to the FRC are set out in sections 37D and 37E of the FRCO and are reproduced below for convenience:

(a) for a person who is a PIE auditor—

(i) to revoke the person’s registration or recognition;

(ii) to suspend the person’s registration or recognition for a period of time, or until the occurrence of an event, that the FRC considers appropriate; and

(iii) to impose a condition on the person’s registration or recognition;

(b) for a person who is or was a PIE auditor—

(i) to reprimand the person publicly or privately;

(ii) to direct the person to carry out any remedial action specified by the FRC;

(iii) to prohibit the person from applying to be registered or recognized as a PIE auditor for a period of time, or until the occurrence of an event, that the FRC considers appropriate; and
(iv) subject to section 37H, to order the person to pay a pecuniary penalty, not exceeding the amount which is the greater of—

(A) $10,000,000; or

(B) 3 times the amount of the profit gained or loss avoided by the person as a result of the misconduct;

(c) for a person who is a registered responsible person of a registered PIE auditor—

to remove the person’s name from the list of registered responsible persons of the auditor, either—

(i) permanently; or

(ii) for a period of time, or until the occurrence of an event, that the FRC considers appropriate;

(d) for a person who is or was a registered responsible person of a registered PIE auditor—

(i) to reprimand the person publicly or privately;

(ii) to direct the person to carry out any remedial action specified by the FRC; and

(iii) subject to section 37H, to order the person to pay a pecuniary penalty, not exceeding the amount which is the greater of—

(A) $10,000,000; or

(B) 3 times the amount of the profit gained or loss avoided by the person as a result of the misconduct.

Combination of Sanctions

18. Under section 37D or 37E of the FRCO, sanctions may be imposed singly or in combination. When imposing a combination, the FRC should assess, in the light of all the circumstances of the matter, the appropriateness of the proposed sanctions both individually and in combination. Set out below are some of the considerations that the FRC should have regard to when imposing sanctions in combination:

(a) a pecuniary penalty can be ordered in conjunction with any other sanction(s);
dependent upon the circumstances of the particular regulated person, it may be appropriate to order prohibition from applying to be a PIE auditor or become a registered responsible person of a PIE auditor.

**Summary of Approach to Determining Sanctions**

19. It follows, therefore, that the normal approach to determining the sanction to be imposed in a particular case should be to:

(a) assess the nature and seriousness, gravity and duration of the misconduct found and the degree of responsibility of the regulated person for the misconduct (paragraphs 21 to 24);

(b) identify the sanction or combination of sanctions that the FRC considers potentially appropriate having regard to the misconduct identified in (a) above (paragraphs 25 to 54);

(c) consider any relevant aggravating or mitigating circumstances and how those circumstances affect the level, nature or combination of sanctions under consideration (paragraphs 55 to 60);

(d) consider any further adjustment necessary to achieve the appropriate deterrent effect (see paragraphs 61 and 62);

(e) consider whether a discount for admissions or early disposal is appropriate (paragraphs 63 to 71); and

(f) decide which sanction(s) to order and the level/duration of the sanction(s) where appropriate.

20. The FRC should ensure that its decisions give reasons which indicate what view they have reached on the matters above and why.

**Undertaking the initial assessment of the potential sanctions to impose**

21. In assessing the nature and seriousness of the misconduct and in determining which sanction(s) might be appropriate, the FRC will normally consider the factors summarised in the next paragraph. This list is not exhaustive and not all factors will be applicable in a particular case. The FRC should also consider carefully whether there may be other factors, not listed, that are relevant. Having identified the factors that it regards as relevant, the FRC should decide the relative weight to ascribe to each relevant factor.
Factors which may be considered include:

(a) the nature, extent and importance of any standards or regulations breached;

(b) the gravity and the duration of the misconduct;

(c) the financial benefit derived or intended to be derived from the misconduct (the amounts of the profits gained or losses avoided by the regulated person(s), in so far as they can be determined). This may include any loss avoided or intended to be avoided where it is practicable to quantify this (for example, this could be quantified in appropriate cases by the fees received by the regulated person(s), or by performance related pay, bonuses, or share options received by the regulated person(s)). The FRC may also allocate an amount in respect of interest on the benefit obtained;

(d) whether the misconduct caused or risked the loss of significant sums of money (for example, this could be quantified in appropriate cases by reference to the reduction in market value or loss to creditors);

(e) the financial strength of the regulated person(s), for example as indicated by the total turnover of the responsible undertaking or the annual income of the responsible person, if that person is a natural person;

(f) whether the misconduct was intentional or unintentional;

(g) whether the misconduct was dishonest, deliberate or reckless (see paragraphs 52 to 54);

(h) whether the misconduct adversely affected, or potentially adversely affected, a significant number of people (such as the public, investors or other market users, consumers, clients, employees, pensioners or creditors);

(i) whether the misconduct was isolated, or repeated or ongoing;

(j) if repeated or ongoing, the length of time over which the misconduct occurred;

(k) whether similar misconduct has been identified previously;

(l) whether steps had been taken to address any similar misconduct previously identified;

(m) other previous misconduct by the regulated person(s);

(n) whether the regulated person(s) has failed to comply with any previous direction or order relevant to this misconduct;
whether it is likely that the same type of misconduct will recur;

whether the misconduct undermines the purpose or effectiveness of the FRCO;

whether the misconduct could harm investor, market and public confidence in the truth and fairness of the financial statements of PIEs;

whether the misconduct could undermine confidence in the standards of conduct in general of auditors or regulated persons;

in the case of a PIE auditor, the effectiveness of its relevant procedures, systems or internal controls and/or its implementation of any relevant Hong Kong Standards on Quality Control (or their equivalent);

in the case of a PIE auditor, when the PIE auditor’s senior management became aware of the misconduct and what action was taken at that point;

whether the regulated person(s) caused or encouraged other individuals to commit misconduct.

23. When considering a sanction to be imposed for a failure by a regulated person to comply with any of his or its obligations to co-operate with, and comply with directions of the FRC, the FRC should consider the reason(s) for and the significance of the failure to comply. Where the non-compliance is continuing, the FRC should consider whether to impose a pecuniary penalty that would promote compliance, such as a pecuniary penalty calculated on a daily or other periodic basis.

24. When determining the sanction to be imposed, the FRC will have due regard to the fact that sanctions have been, or may be, imposed by another regulator or other authority in respect of the misconduct or the events related to that misconduct to ensure that consideration is given to the need to be proportionate, where other sanctions may have addressed the purposes set out at paragraph 10 above.

25. The following sections provide guidance on the factors that the FRC may take into account when considering whether to impose a particular sanction, whether individually or in combination.

Reprimand

26. A private reprimand may be appropriate in cases where there is no significant risk of damage to the public interest, but the FRC wishes to make clear that the behaviour was unacceptable. This sanction may be used by the FRC alone, when other sanctions available are not considered to be proportionate to a finding of misconduct taking into consideration all the circumstances, for example significant mitigating circumstances.
This sanction may also be used in conjunction with other sanctions in the FRC’s absolute discretion. A private reprimand will not be disclosed to the public.

27. A public reprimand may be appropriate where the misconduct is of a serious nature. This sanction may be used alone or in conjunction with other sanctions in the FRC’s absolute discretion, e.g. the imposition of wider conditions.

Order to carry out remedial actions

28. The FRC may make an order requiring a regulated person(s) to take action to mitigate the effect or prevent the recurrence of the misconduct, where it considers, in its absolute discretion, that such an order would be justified.

29. An order to mitigate the effect of the misconduct is intended to be used where there are ongoing adverse effects of the conduct and specific, measurable, achievable and realistic steps can be identified which would or might mitigate these effects.

30. In addition, where there is a reason to believe there may be a risk of recurrence of the misconduct, the FRC may identify steps that could be ordered to prevent the recurrence or reduce the likelihood of recurrence of the misconduct and may order the regulated person(s) to take such steps.

31. Orders should specify time lines for compliance and may address mitigation. They may be made in conjunction with other sanctions.

Conditions

Introduction

32. The FRC may order a regulated person to comply with any direction that it considers, in its absolute discretion, appropriate. By way of example, and without limitation to the FRC’s general discretion, such direction may require a regulated person to undertake or implement education or training programmes, or to comply with particular requirements when practising (including restrictions on the nature of any work undertaken).

Imposing conditions

33. This sanction is intended to be used where the circumstances suggest that the public interest would be best served by requiring the regulated person to take particular actions with a view to:

(a) improving the professional competence of a particular regulated person;

(b) ensuring that partners or other personnel in a PIE auditor receive training in a particular area of practice;
ensuring that a PIE auditor implements organisational or administrative arrangements that would avoid a repetition of the misconduct;

preventing a regulated person from undertaking engagements that, based on the misconduct established, the regulated person is not competent to undertake (for example by directing the regulated person not to undertake audits of entities of a particular character — for example, a bank);

temporarily banning a PIE auditor from accepting new PIE clients.

34. The imposition of conditions will normally be accompanied by ancillary provisions that address such matters as:

(a) the date by which any conditions must be complied with;

(b) the period during which any limitation on a regulated person’s ability to undertake particular engagements shall remain in effect;

(c) the identity of any person or organisation responsible for overseeing compliance with the conditions.

Pecuniary penalties

Introduction

35. A pecuniary penalty may be ordered either alone or in combination with one or more other sanctions. Given that it will normally be in the public interest for any misconduct warranting the imposition of a pecuniary penalty to be accompanied by some degree of censure, the FRC should not impose a pecuniary penalty in isolation (i.e. without any other sanction) without satisfying itself that that is the appropriate course and providing reasons for that decision.

Ordering a pecuniary penalty

36. In order to determine whether a pecuniary penalty is appropriate the factors to be considered will normally include whether:

(a) deterrence can be achieved by a reprimand alone or other sanctions;

(b) the regulated person(s) has derived any financial gain or benefit (including avoidance of loss) as a result of the misconduct;

(c) the misconduct involved, caused or risked the loss of significant sums of money;

(d) a pecuniary penalty was ordered in similar previous cases.
Determining the amount of a pecuniary penalty

37. In cases where the FRC considers that a pecuniary penalty is appropriate, it should aim to impose a pecuniary penalty that:

(a) is proportionate to the misconduct and all the circumstances of the case;

(b) will act as an effective deterrent to future misconduct;

(c) will promote public confidence in the regulation of PIE audits and in the way in which misconduct is addressed.

38. In undertaking this assessment, the FRC will normally take into consideration:

(a) the nature, extent and importance of the standards or regulations breached;

(b) the seriousness of the misconduct;

(c) in the case of a PIE auditor, its size/financial resources and financial strength, for example as indicated by the total turnover of the PIE auditor and the effect of a pecuniary penalty on its practice;

(d) in the case of a registered responsible person, his financial resources and annual income and the effect of a pecuniary penalty on that individual and his future employment;

(e) the factors set out in paragraph 22; and

(f) the upper limit on the pecuniary penalty that can be imposed.

Practice units

39. In the majority of cases involving the imposition of a pecuniary penalty on a PIE auditor, the amount of revenue generated by the PIE auditor involved in the misconduct will be a factor to be taken into account when assessing the size of the pecuniary penalty which would be necessary, in the circumstances of the particular case, to act as a credible deterrent.

40. Where revenue is not an appropriate indicator of financial means, the FRC should seek an appropriate alternative measure. Other indicators of financial means include the level of profitability per partner, market share, the number of audit and non-audit clients and the respective size of those clients, and the number of partners and registered responsible persons.

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1 A partner in this context also includes directors in a corporate practice.
**Individuals**

41. Having assessed the seriousness of the misconduct involved when considering the amount of any pecuniary penalty, the FRC will have regard to the registered responsible person’s financial resources (including his income and assets) and employment prospects.

42. The remuneration of a registered responsible person is likely to be an appropriate starting point when considering the level of pecuniary penalty that would: (i) be appropriate to reflect the misconduct involved; and (ii) be necessary to act as a credible deterrent and which will serve to correct and prevent inadequate execution of an audit. The calculation of a registered responsible person’s financial resources should take account of his annual gross income together with any benefits he derives from his current employment, including any bonus, pension contribution, share options and share schemes, and/or distributions of profit. Employment includes both employment and self-employment as an adviser, employee, director, partner or contractor or in any other capacity.

43. Where the registered responsible person concerned is no longer in employment, for example because he has left the PIE auditor, the FRC will need to obtain information about the registered responsible person’s existing financial resources and future employment prospects.

**Other considerations**

44. When deciding the level of pecuniary penalty to impose, the FRC should consider a regulated person’s financial resources, establish whether there are any arrangements that would result in the pecuniary penalty or part thereof being paid or indemnified by insurers, or by a PIE auditor or employer. The existence of any such arrangements should not be a ground for increasing any pecuniary penalty beyond the level that would otherwise be considered appropriate.

45. Having arrived at a figure for the pecuniary penalty based on the nature and seriousness of the misconduct, the FRC should consider whether the amount of the pecuniary penalty should be adjusted:

   (a) to take account of any aggravating and mitigating factors (paragraphs 55 to 57);

   (b) to ensure the pecuniary penalty has the necessary deterrent effect (paragraphs 61 and 62);

   (c) to reflect any discount for admissions and/or early disposal (paragraphs 63 to 71); and/or

   (d) to avoid the likely effect of putting a regulated person in financial jeopardy. However, if a regulated person takes deliberate steps to create the false appearance that the pecuniary penalty will place it, him or her in financial
jeopardy, e.g. by transferring assets to third parties, this will be taken into account.

Revocation or suspension of PIE auditor’s registration or recognition and/or prohibition from applying as a registered or recognised PIE auditor

46. The ability to revoke the PIE auditor’s registration or recognition or remove the person’s name from the list of registered responsible persons of the PIE auditor permanently exists because certain misconduct is so serious and damaging to the wider public and market confidence in the standards of conduct of PIE auditors and the quality of PIE audits, that the above sanctions are the appropriate outcome in order to protect the public or otherwise safeguard the public interest.

47. The FRC may suspend the person’s registration or recognition or prohibit a person from applying to be registered or recognised as a PIE auditor or remove the person’s name from the list of registered responsible persons of the PIE auditor for a period of time if it considers that other orders and/or conditions and/or a pecuniary penalty are not sufficient to address the FRC’s concerns. These sanctions may be used if the FRC has serious concern about the competence and/or ability of the regulated person to comply with standards and regulations. They may also be used where the misconduct is so serious that it undermines public confidence in PIE auditors in general. The FRC must also be satisfied that the misconduct is capable of being rectified within a reasonable period of time; otherwise, the FRC may consider revocation of the person’s registration or recognition or remove the person’s name from the list of registered responsible persons of the PIE auditor permanently.

48. Prior to imposing an order to revoke the person’s registration or recognition or remove the person’s name from the list of registered responsible persons of the PIE auditor permanently, all other available sanctions should be considered to ensure that the revocation or removal is the most appropriate sanction (either on its own or in conjunction with another sanction or sanctions) and is proportionate taking into account all the circumstances of the case.

49. Where the misconduct is fundamentally incompatible with the role of a PIE auditor and allowing the regulated person to be a PIE auditor would be so damaging to the public, public interest and market confidence, revocation of registration or recognition/removal from the list of registered responsible persons of the PIE auditor permanently is likely to be the appropriate sanction. The factors set out in paragraphs 51 to 57 will normally be relevant considerations when considering whether to order revocation/prohibition.

50. Where a registered responsible person has been found to have been dishonest, the FRC may lodge a complaint to the relevant professional body for consideration of membership disqualification.
Other factors to be taken into account when determining the sanction to be imposed

51. In the course of this guidance reference has been made to various factors that the FRC should consider when determining the level of sanction to impose. The characteristics of those factors are discussed below.

Intent

52. Whether the FRC concludes that the misconduct was intentional will be a material factor when determining any sanction to be imposed.

53. Factors tending to show that the misconduct was intentional include where:

(a) the regulated person(s) involved or the PIE auditor’s senior management intended or foresaw that the likely or actual consequences of their actions or inaction would amount to a misconduct;

(b) the regulated person(s) involved or the PIE auditor’s senior management permitted the misconduct to continue notwithstanding that they knew that their actions breached the relevant rules, standards or procedures or the PIE auditor’s management or internal control systems;

(c) the regulated person(s) involved or the PIE auditor’s senior management was influenced to commit the misconduct by the belief that it would be difficult to detect;

(d) the regulated person(s) deliberately took decisions relating to the misconduct knowing that he was acting outside his field of competence;

(e) the regulated person(s) intended to benefit financially from the misconduct, either directly or indirectly;

(f) the regulated person(s) repeated the misconduct notwithstanding being aware that to do so would involve breaching the relevant rules, standards, or procedures.

Recklessness

54. The FRC may conclude that a regulated person(s) acted recklessly if the regulated person(s) or the PIE auditor’s senior management: (i) knew or ought to have known that a proposed course of action or inaction might involve a misconduct; and (ii) proceeded nevertheless.
**Aggravating and Mitigating Factors**

55. Having assessed the seriousness of the misconduct and reached a view on the sanction that would be appropriate, the FRC should consider whether to adjust that sanction to reflect any aggravating or mitigating factors that may exist (to the extent those factors have not already been taken into account in the FRC’s assessment of the seriousness of the misconduct).

56. Examples of events or behaviour that the FRC may conclude aggravated the misconduct, and so should be taken into account when deciding the sanction or combination of sanctions to be imposed, include where:

   (a) the regulated person failed to bring the misconduct to the attention of the FRC (or to the attention of another appropriate regulatory, disciplinary or enforcement authority) quickly, effectively or completely;

   (b) the regulated person failed to cooperate with, or hindered, the investigation of the misconduct by the FRC, or by another regulatory, disciplinary or enforcement authority (especially if the investigation was prejudiced or delayed thereby);

   (c) in the case of a PIE auditor, that PIE auditor’s senior management were aware of the misconduct, or that such misconduct was likely to occur, but failed to take steps to stop or otherwise prevent the misconduct;

   (d) the regulated person involved or the PIE auditor’s senior management sought to conceal the misconduct or reduce the risk that the misconduct would be discovered;

   (e) no remedial steps have been taken since the misconduct was identified, either on the regulated person’s or PIE auditor’s own initiative or as directed by the FRC or another regulatory authority;

   (f) the misconduct involved an abuse of a position of trust;

   (g) the misconduct was repeated and/or occurred over an extended period of time;

   (h) the misconduct was committed with a view to profit (or avoidance of loss);

   (i) the regulated person facilitated wrongdoing by a third party or collusion with a client;

   (j) the regulated person was acting without the necessary authorisations, licences or registrations;
(k) the regulated person has a poor disciplinary record (for example, where a finding of misconduct has previously been handed down against the regulated person by the FRC or another disciplinary or regulatory body). The more serious and/or similar the previous misconduct, the greater the aggravating factor. The fact that a sanction has previously been imposed will not automatically be regarded as a significant aggravating factor. Much will depend on the degree of similarity, the time that has elapsed since the earlier sanction was imposed, the changes that have taken place since then, and the response (or lack of it) to any previous finding or sanction imposed;

(l) the FRC (or another disciplinary or regulatory body) has previously brought to the regulated person’s attention, including by way of a private advice or warning, issues similar or related to the conduct that gave rise to the finding of misconduct in respect of which the sanction is to be imposed;

(m) similar misconduct has been identified previously;

(n) the regulated person has failed to comply with any previous direction or order relevant to this misconduct;

(o) in the case of an individual, if that individual held a senior position and/or supervisory responsibilities.

57. Examples of events or behaviour that the FRC may conclude mitigate the misconduct, and so should be taken into account when deciding the sanction or combination of sanctions to be imposed, include where:

(a) the regulated person brought the misconduct to the attention of the FRC (or to the attention of another appropriate regulatory, disciplinary or enforcement authorities) quickly, effectively and completely²;

(b) the regulated person provided an exceptional level of cooperation during the investigation of the misconduct by the FRC, or another appropriate regulatory, disciplinary or enforcement authority;

(c) in the case of a PIE auditor, that PIE auditor’s senior management were aware of the misconduct or that such misconduct was likely to occur, and took appropriate steps to try to stop or prevent the misconduct;

(d) appropriate remedial steps were taken once the misconduct was identified, irrespective of whether such steps were taken on the regulated person’s own

² Self-reporting breaches to the relevant regulatory, disciplinary or enforcement authorities will attract greater credit than co-operation with an investigation which has been prompted by someone or something else.
initiative or that of the FRC or another regulatory authority;

(e) the regulated person was deliberately misled by a third party;

(f) the misconduct was an isolated event that is most unlikely to be repeated;

(g) the regulated person did not gain any profit or benefit beyond the fee chargeable from the misconduct;

(h) the regulated person was subject to duress;

(i) the regulated person has a good compliance history and disciplinary record;

(j) in the case of an individual, that individual held a junior position;

(k) in the case of an individual, personal mitigating circumstances;

(l) the regulated person has demonstrated contrition and/or apologised for the misconduct.

Cooperation

58. A regulated person is expected to cooperate with the FRC in any regulatory activities including inquiries, investigations or sanctions procedures. In order for cooperation to be considered as a mitigating factor at the point of determining appropriate sanction it will therefore be necessary for the regulated person(s) to have provided an exceptional level of cooperation. Non-exhaustive examples of conduct which may constitute such cooperation include:

(a) self-reporting to the FRC and/or bringing to the attention of the FRC any facts and/or matters which may constitute an allegation of a misconduct; and

(b) volunteering information or documentation not specifically requested but which the regulated person nevertheless considers may assist the investigation.

59. Conversely, a failure to provide the level of cooperation required will be considered as an aggravating factor at the point of determining appropriate sanction. Non-exhaustive examples of such failures would include:

(a) incomplete provision of documents and information in response to requirements and requests;

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3 Examples include establishing whether the regulated person’s client or others have suffered loss and voluntarily compensating them; correcting any misleading statement or impression; taking disciplinary action against staff involved, if appropriate; and taking steps to prevent similar misconduct from arising in the future.
(b) failure to provide adequate explanation of information provided;

(c) failure to comply with deadlines specified in requirements under the FRCO or other written requests;

(d) failure to prepare properly for interviews conducted under the FRCO (including failure to review material provided by the FRC’s staff in advance of such interviews); and

(e) failure to conduct an adequate search for documents and information.

60. It is important to recognise that the examples at paragraphs 58 and 59 above are merely illustrative and that the FRC will consider the overall level of cooperation provided during the course of the investigation and disciplinary process at the point of determining sanction.

Adjustment for deterrence

61. If the FRC considers that the sanction or combination of sanctions arrived at, after making any adjustment to reflect any aggravating and mitigating factors, is insufficient to deter the regulated person who committed the misconduct, or other regulated persons, from committing further or similar misconduct, the FRC may adjust the sanction(s) to ensure that the intended deterrent effect will be achieved. The FRC should have regard to the need to impose effective, proportionate and dissuasive sanctions in respect of regulated persons.

62. Examples of the circumstances where the FRC may consider it appropriate to make such an adjustment include where the FRC considers that:

(a) the regulated person already has a disciplinary record for misconduct of a similar nature;

(b) sanctions imposed or agreed previously in respect of similar misconduct have failed to achieve an improvement in the relevant standards of regulated persons;

(c) there is a risk of similar misconduct in the future, whether by the regulated person, or by other regulated persons, in the absence of a sufficient deterrent;

(d) the sanction is too small to meet the objective of credible deterrence.
Discount for Admissions and Early Disposal

Admissions

63. Where regulated persons admit some or all of the facts of a case, it is appropriate that any pecuniary penalty and/or other sanction that might otherwise be imposed should be adjusted to reflect the extent, significance and timing of those admissions.

64. However, no discount should be applied to the amount of any pecuniary penalty that equates to the disgorgement of any benefit gained or loss avoided.

Acceptance of orders

65. The Discipline Department will set out the findings and proposed sanctions in writing, and give the regulated person a reasonable opportunity to comment and indicate its agreement or otherwise on the proposed sanctions. In recognition of the benefits of early disposal of matters, where the regulated person accepts the proposed sanctions, it is appropriate to adjust the amount of any pecuniary penalty and/or other sanction that might otherwise have been imposed.

66. Normally, it will be inappropriate to reduce the period during which a regulated person is to be prohibited to reflect early disposal or resolution because the primary purpose of such a sanction is to protect the public. Therefore, any adjustment will generally apply only to any pecuniary penalty to be imposed.

67. In general, a larger adjustment will be appropriate if the regulated person admits substantially all the findings or does so at an early stage of the case. If the regulated person is prepared to admit some but not all of the findings, the discount applicable will depend on the extent and significance of the admissions as well as the stage at which those admissions were made. The exercise of any discount is within the discretion of the FRC.

Partial Admissions

68. A regulated person may make partial admissions to the findings set out by the Discipline Department. Such admissions may relate to factual matters and as to whether the facts amount to a misconduct.

69. In the absence of early disposal, such admissions will still necessitate the matter proceeding through the disciplinary procedure. However, partial admissions may assist to reduce the disputed issues and achieve savings of time in the process.

70. Where the parties agree, the FRC will be informed of any partial admissions and will adjudicate on the remaining disputed allegations.
71. Partial admissions may be relevant to the factors considered at the point the FRC determines sanction but there is no formal adjustment of sanction to be applied in cases where there has not been early disposal. Nevertheless, where the regulated person agrees the facts and liability but not the level of pecuniary penalty or the appropriate discount, the FRC should allow such discount as is thought appropriate having regard to all the circumstances and in particular the time when that was agreed.

**Disclosure of Sanction**

72. Under section 37K, where the FRC imposes sanctions other than a private reprimand on a regulated person, it must disclose to the public the following:

(a) the material facts relating to the case;

(b) its decision to impose a sanction, and the reasons for the decision; and

(c) the sanction imposed.

73. The disclosure may only be made after:

(a) the expiry of the period for lodging an application for review to the Tribunal in relation to the FRC’s decision; or

(b) if such application is lodged, the review has been disposed of.

74. The FRC must not make the above disclosure if the disclosure may adversely affect any criminal proceedings before a court or magistrate or if the disclosure, in the FRC’s opinion, is not in the interest of the investing public or in the public interest.