



**Regulations governing the conduct of Investigations under
Section 24 of the Companies (Auditing and Accounting) Act, 2003**

**Feedback Paper relating to submissions received
in response to Consultation Paper CP 1/08**

1. Introduction and overview

The Irish Auditing & Accounting Supervisory Authority ('the Authority') was established pursuant to the provisions of the Companies (Auditing and Accounting) Act, 2003 ('the Act'). As provided for by the Act¹, the Authority's functions include to:

- i. grant recognition to bodies of accountants for the purpose of section 187 of the Companies Act, 1990 (i.e. for audit purposes);
- ii. attach terms and conditions to the recognition of bodies of accountants;
- iii. approve, and require changes to, the constitution of each Prescribed Accountancy Body ('PAB'), including its investigation and disciplinary procedures and its standards²;
- iv. conduct, under section 23 of the Act, enquiries into whether a PAB has complied with its approved investigation and disciplinary procedures;
- v. undertake, under section 24 of the Act, investigations into possible breaches of the PABs' standards by a member/member firm;
- vi. supervise how each recognised accountancy body monitors its members; and
- vii. supervise the PABs' investigation and disciplinary procedures.

2. Interim Regulations governing investigations performed under section 24 of the Act

In the context of (v) above, and pursuant to section 28 of the Act, in September 2008 the Authority adopted and issued Interim Regulations governing the conduct of investigations under section 24. At that time the Authority also published a Consultation Paper³ for the purpose of seeking interested parties' views on the Interim Regulations and indicated that, upon completion of the consultation exercise, the Interim Regulations would be superseded by final Regulations.

3. Specific matters in respect of which interested parties' were sought

While the Consultation Paper emphasised that interested parties were welcome, and encouraged, to address any aspect of the Interim Regulations they considered appropriate, the Authority indicated that it was particularly interested to learn of contributors' views on the following specific questions:

- I. Do you consider that the Interim Regulations set out, and facilitate the implementation of, a fair and robust enforcement procedure, which by taking account of, *inter alia*, the principles of fair procedure and natural and constitutional justice, will result in the issuance of decisions that are just, reasonable and legally defensible?
- II. Do you consider that the Regulations as drafted achieve an appropriate balance between (i) protecting and promoting the public interest; (ii) ensuring that the subjects of investigations and other potentially affected parties are fully afforded their rights as regards procedural fairness; and (iii) sanctioning breaches of standards of the prescribed bodies?

¹ As amended

² There are nine PABs, viz, the:

- Association of Chartered Certified Accountants (ACCA);
- Association of International Accountants (AIA);
- Chartered Institute of Management Accountants (CIMA);
- Chartered Institute of Public Finance & Accountancy (CIPFA);
- Institute of Chartered Accountants in England & Wales (ICAEW);
- Institute of Chartered Accountants in Ireland (ICAI);
- Institute of Chartered Accountants of Scotland (ICAS);
- Institute of Certified Public Accountants in Ireland (ICPAI); and
- Institute of Incorporated Public Accountants (IIPA).

³ CP 1/08 – available at http://www.iaasa.eu/publications/CP_1-08.pdf

III. If not:

- i. Which aspect(s) of the Interim Regulations do you consider to be inconsistent with the foregoing objectives? Please support your response(s) with the reasoning underpinning your conclusion(s).
- ii. How would you propose that the issue(s) identified by you at (i) above might be addressed? In order that the Authority might derive maximum benefit from contributors' responses to this question, contributors are requested, to the extent practicable, to provide details of specific deletions, additions or amendments that they consider would serve to address the concerns identified.

IV. Do you consider the Authority's proposals regarding publication of decisions to be fair and reasonable? If not, please support your conclusions with your reasoning.

V. Do you consider that the factors currently listed as being among the considerations that an Investigation Committee would have regard to in determining the level of sanction(s) to impose are fair and reasonable? If not, please support your views with your reasoning.

VI. Do you consider that there are factors, other than those referred to at V above that should be added to the specific list of considerations included in the Regulations? If so, please support your suggestions with your reasoning.

3. Responses received

In response to the aforementioned Consultation Paper, a total of 8 submissions were received. Responses were received from the following:

1. Association of Chartered Certified Accountants (ACCA);
2. Association of International Accountants (AIA);
3. Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) / Consultative Committee of Accountancy Bodies (CCAB)⁴;
4. Chartered Institute of Management Accountants (CIMA);
5. Ernst & Young;
6. Institute of Chartered Accountants in England and Wales (ICAEW);
7. Chartered Accountants' Regulatory Board of the Institute of Chartered Accountants in Ireland (ICAI); and
8. Mr. Jimi O'Lorcain.

The Authority found the submissions received to be both constructive and helpful and wishes to thank those who contributed to this process.

4. Feedback and final Regulations

This document sets out the main issues raised by respondents, with the Authority's responses following each point (set out in italicized typeface). Having considered respondents' views in detail and, where necessary having taken further legal advice, the Authority's Interim Regulations have been amended in certain respects. The resulting final Regulations have been adopted by the Authority with immediate effect. The final Regulations are available on the Authority's website at <http://www.iaasa.ie>

⁴ CCAB and CCAB-I submitted a joint response.

Principal issues raised by contributors and the Authority's responses thereto

5. General

A number of respondents suggested that the Interim Regulations should be reviewed by Senior Counsel with a view to ensuring, to the extent possible, that same are in compliance with Human Rights law.

The Authority can confirm that Senior Counsel conducted a detailed review of both the Interim and final Regulations, and in particular, from a human rights perspective. Moreover, where specific issues of a human rights nature were raised by respondents, legal advice was sought in advance of finalising the Regulations.

6. Initiation of investigations

A number of respondents observed that the Authority may only initiate an investigation under section 24 where it is, in the Authority's opinion, 'appropriate' or 'in the public interest' to do so and in that context suggested that, in order to manage public expectations, to provide greater clarity and to help protect the Authority from legal challenge, the Authority should:

- develop criteria for determining when it is in fact either appropriate or in the public interest to initiate an investigation; and
- include such criteria in the Regulations.

Further, the view was expressed that the initiation of investigations should only occur in exceptional circumstances.

Under the regulatory arrangements provided for by the Act, primary responsibility for investigating possible breaches of the PABs' standards resides with the PABs, with such investigations being performed under the Authority's supervision. Section 24 of the Act provides the Authority with the discretion to initiate an investigation directly - thereby setting aside the relevant PAB's investigation and disciplinary procedures - and, as such, each possible case will have to be assessed having regard to the particular circumstances. That being the case, the Authority is of the view that, while it may be possible to develop some high level considerations that might be of general application, it would not be appropriate to include specific criteria in the Regulations, as to do so could have the unintended, and inappropriate, consequence of limiting the scope of the section and, by extension, the intention of the legislature.

One respondent suggested that there needs to be greater clarity as to why, when and where (i.e. in the jurisdiction of the Republic of Ireland or also in other jurisdictions) the Authority would consider it necessary or otherwise appropriate to intervene in the PABs' disciplinary processes. The respondent concerned suggested that this would facilitate a greater understanding on the part of the PABs' members and the general public, plus more transparency of intent and procedure as well as clarity on some of the practical implications and applications of the Regulations.

As above, while the Authority sees some scope for the development of high level considerations that might be of general application, the express inclusion of specified criteria in the Regulations is considered inappropriate for the reasons outlined above. With specific reference to the possibility of initiating investigations into members of the PABs located in other jurisdictions, were such circumstances to present themselves, it is considered likely that the Authority would, as a statutory body that is a member of both the EGAOB⁵ and IFIAR⁶, consult with its relevant counterpart(s) before making such a decision.

⁵ European Group of Auditors' Oversight Bodies

⁶ International Forum of Independent Audit Regulators

7. Referral of complaints received by the Authority to the PABs

A number of respondents noted that, under the regulatory framework provided for by the Act, primary responsibility for the investigation of complaints regarding the PABs' members/member firms resides with the relevant PAB and, in that context, observed that the Interim Regulations are silent on this point. It was, accordingly, suggested that, in order to ensure that there is a general understanding that the primary responsibility for the investigation of complaints lies with the PABs, the introduction to the Regulations should clearly state that, in the first instance, complaints received by the Authority will be referred to the relevant PAB for investigation in accordance with its approved disciplinary procedures, unless certain specified conditions apply.

Existing Authority policy is fully reflective of the provisions of the Act in that it recognises that primary responsibility for the investigation of complaints and other indications of possible breaches of the PABs' standards lies with the PABs. Moreover, the practice whereby the Authority regularly refers complaints received to the relevant PABs is fully consistent with that policy.

Nevertheless, and for the same reasons are referred to above, i.e. the potential for the unintended limitation of the scope of the section, the Authority does not consider it appropriate to include specific conditions or criteria in the Regulations.

Legal advice has been received to the effect that it would be unnecessarily limiting to make it an inflexible rule that a possible breach must, in the first instance, be the subject matter of investigation by a PAB or to set out specific conditions that would have to be met before a matter would be investigated by the Authority without a prior investigation by a PAB.

That said, provision has been made in the Regulations making it clear that one of the matters that is to be considered by a Preliminary Investigation Committee, when determining whether it is appropriate or in the public interest that there should be a full investigation, is that of whether the possible breach ought to be referred to a PAB for investigation. (Regulation 4(7)).

8. Extant disciplinary proceedings & double jeopardy

It was noted that the Interim Regulations are silent on whether: (i) the Authority will seek to institute an investigation in circumstances where a PAB has already commenced disciplinary proceedings; and (ii) whether the commencement of an investigation would automatically stay any PAB disciplinary proceedings already underway. It was also suggested that there is a clear double jeopardy risk and that it is critical that the position be addressed in the final Regulations.

Albeit that it might be unlikely to occur in practice, given that there is no preclusion from such a course of action contained in the Act, the Regulations permit the Authority to initiate an investigation in circumstances where a PAB has already commenced disciplinary proceedings. Additionally, legal advice has been received to the effect that the Regulations ought not entirely to exclude the possibility that an investigation could be initiated in circumstances where a matter has already been investigated by a PAB (e.g. where the PAB's process had been defective). That said, in recognition of this point, the Regulations now include a provision whereby the Preliminary Investigation Committee will take into account whether the possible breach has already been investigated, or is in the course of investigation by a PAB in determining whether there should be a full investigation (Regulation 4(7)).

Regarding an automatic stay on a PAB's disciplinary process on the commencement of an investigation, Section 28(4) of the Act, under which the Regulations are made, provides no such express power, and as such, inclusion in the Regulations would not be appropriate. The PABs' by-laws, however, generally include a provision whereby a disciplinary committee (howsoever called) can defer/stay proceedings where other investigations have been initiated.

It was further suggested that, in order to ensure that the risk of double jeopardy is minimised, where the PAB has concluded an investigation or where the preliminary stages have been completed, then the initiation of an investigation would always be wholly inappropriate.

This is not an opinion with which the Authority concurs as such a policy could have the effect of limiting the intention of the legislature. For example, if the PAB conducts a fundamentally flawed investigation under its disciplinary processes, then no valid decision can be said to emanate therefrom and, therefore, it may be argued that no double jeopardy can arise.

It was noted that there is no provision in the Interim Regulations for circumstances where a case is already being investigated by the UK based Accountancy & Actuarial Discipline Board (AADB). It was argued that this presents the same double jeopardy risks as noted above. In that context the view was expressed that the Authority and the AADB should establish protocols whereby cases would be discussed where there could be a possibility of both authorities having an interest in a case and setting out a process by which they would agree which authority was best placed to carry out the investigation.

As alluded to earlier in this document, were such circumstances to arise it is likely that the Authority would, as a statutory body that is a member of both the EGAOB⁷ and IFIAR⁸, consult with its relevant counterpart(s) before making such a decision.

In addition, in recognition of the point made, the Regulations now include a provision whereby a Preliminary Investigation Committee will take into account whether the possible breach has already been investigated, or is in the course of investigation by a PAB or another supervisory body in determining whether there should be a full investigation (Regulation 4(7)).

With the issuance of the final Regulations having now occurred, it is also the Authority's intention to seek to develop protocols with the AADB. This is not, however, a matter for the Regulations.

One respondent queried whether the Authority's investigation would replace, run alongside, or follow one which may already be being pursued by the PAB concerned.

It is envisaged that the Authority's investigation of the member/member firm would replace the PAB's investigation although the Act does not provide the Authority with the power to stay a PAB's disciplinary process. As referred to above, it is generally the case that the PABs' bye-laws include provision whereby a disciplinary committee (howsoever called) can defer/stay proceedings where other investigations have been initiated.

One respondent suggested that 'primacy of the PABs/RABs processes' should feature in the Regulations.

Under the regulatory framework provided for by the Act, it is clearly the case that primary responsibility for investigating possible breaches of the PABs' standards resides with the PABs. Given that both the Authority's policy and practice are reflective of this, the Authority sees no reason – legal or otherwise - to include a statement to this effect in the Regulations.

One respondent suggested that the Regulations should, in the context of commencing an investigation, address explicitly circumstances in which a PAB's process has already been completed.

Whether or not the Authority commences an investigation will be a matter to be decided on a case by case basis having regard to the facts of each case. The Act does not set down restrictions on when the Authority may or may not commence an investigation and, accordingly, in the Authority's view, neither should the Regulations.

⁷ European Group of Auditors' Oversight Bodies

⁸ International Forum of Independent Audit Regulators

9. Referral of complaints to the Authority by a PAB

It was suggested that the Regulations should provide for a procedure whereby the PABs could, or would have to, refer complaints to the Authority in a manner similar to that included in the AADB's Scheme⁹. It was suggested that, where the Complaints/Investigation Committee of the relevant PAB finds that a case is of Irish public concern, it should in the first instance refer this to the Authority and only commence an investigation if the Authority declines to investigate the matter directly.

Legal advice has been received on this point to the effect that this is not a matter which should properly be contained within the Regulations. However, there is nothing to preclude a PAB from adopting a policy whereby matters considered to be of a public concern nature would in the first instance be referred to the Authority for consideration.

10. Liability to disciplinary action

A number of respondents suggested that, in order to ensure comparable treatment – i.e. whether investigated under Section 24 or by the relevant PAB – the Regulations should make clear that a PAB member/member firm can only be liable for disciplinary action under Section 24 to the extent that the same act or default would render him/her/it liable to disciplinary action by the relevant PAB.

The Regulations have been amended to provide that the Authority may only impose a sanction on a member/member firm of a PAB where the breach of which s/he/it has been found guilty could lead to the imposition of the same sanction under the relevant PAB's processes (Regulation 11).

11. Rights of PAB members & investigation process

A number of respondents identified a range of PAB members' rights which, it was submitted, would be required to be expressly provided for in the Regulations in order to ensure compliance with applicable human rights law. These included the right to:

- be legally represented at all stages of the investigation, including at Preliminary Investigation Committee stage;
- see, and respond to, any and all documents and other material presented at any time to either the Preliminary or Investigation Committee;
- attend before, and be heard by, the Investigation committee;
- cross-examine any person at the Investigation Committee;
- know who their accuser is, to respond to any allegations made by their accuser(s) and to cross examine their accuser(s). It was further suggested that it would be wholly inappropriate that any party making a submission or in any way participating in the disciplinary proceedings should have a right of anonymity and that Interim Regulation 7(2) should be amended to make this clear;
- present witnesses; and
- a statement of reasons where the allegations are found not proven.

The Authority's views on the above are as follows:

- *The Regulations provide no obstacle to legal representation and, whilst there is no requirement to expressly provide that the member is entitled to same, Regulation 8(4) provides that, in the context of oral hearings, the Investigation Committee will, save as may be appropriate, permit the member concerned to be legally represented. PAB members are at all times free to seek legal advice and representation during the investigation process.*

⁹ Under the AADB Scheme, where the PAB determines that a case is of UK public concern it is obliged to refer the case to the AADB, which will then consider whether to investigate the matters itself or whether to refer the matter back to the PAB.

- *The Regulations now provide at Regulation 4(13) that the member is furnished with any relevant information and copies of all documentation relating to the statement of grounds upon which the preliminary investigation has been initiated. Regulation 5(4) provides that the member will be provided by the Investigation Committee with all documents and any other material that will be presented to the Investigation Committee.*
- *The Regulations now provide that, where an Investigation Committee is conducting an oral hearing (at its own behest or at the reasonable request of the member), such hearing will be conducted in accordance with rules of fair procedures and natural and constitutional justice. Regulation 8(4) provides that, in the context of oral hearings, the Investigation Committee will, save as may be appropriate, permit the member concerned to call and give evidence, to present information and submissions and to cross examine witnesses.*
- *The Regulations (at Regulation 4(4)) now provide that the Authority should not refer a matter to a Preliminary Investigation Committee on the basis of an anonymous complaint, save in exceptional cases.*
- *Regulation 8(4) sets out that the Investigation Committee will, save as may be appropriate, permit the member to call and give evidence and to present information and submissions in his or her behalf before an oral hearing of an Investigation Committee. This, the Authority considers, entitles a member to call witnesses.*
- *Regulation 10(4) now establishes that the decision of an Investigation Committee must be accompanied by reasons for its decision, including any decision where it has been found that there has not been a breach.*

One respondent queried whether there were any guidelines on duration of process, namely how long each stage of the investigation would take and whether there would be a defined notice period for public hearings.

As is typically the case with the PABs' own processes, no guidelines exist on the duration of process. Rather, the investigation stages would take as long as is necessary to complete the investigation and determination of the Committee(s). As regards notice periods for public hearings, no such prescribed notice period exist; this would be a matter for the individual Committee to determine.

One respondent noted that it is a fundamental principle that the processes envisaged in the Interim regulations be fair and that, in its view, the Interim Regulations do not always achieve this objective. By way of example, the respondent referred to the fact that the requirement to conduct investigations 'in accordance with rules of fair procedure and natural and constitutional justice' only appears in Interim Regulation 7(1) in respect of the Investigation Committee and suggested that no such restraint seemed to have been placed on the Preliminary Investigation Committee. The view was further expressed that it is not clear as to what these rules are and that, accordingly, they should be included in the Regulations for clarity and transparency.

Irish law, and delegated legislation such as the Authority's Section 24 Regulations, are required to be framed in accordance with the Irish Constitution, which itself recognises fair procedure and natural law. The final Regulations, as promulgated, are afforded, under Irish law, the presumption of constitutionality. Irish constitutional law is governed by the Irish Constitution – Bunreacht na h-Eireann 1937. This document enunciates various principles such as fair procedure and affords individuals constitutional rights. Whilst the Regulations do not expressly make reference to such requirements to be followed by a Preliminary Investigation Committee, it is implied that the Constitution affects the Regulations and, by extension, investigations undertaken by Preliminary Investigation Committees thereunder. Further, it must be remembered that, as the Preliminary Investigation Committee as envisaged by the Regulations, will be dealing with matters on a strictly written basis, the rules of natural and constitutional justice apply in a more attenuated form because the Preliminary Investigation Committee is not coming to any final conclusions.

One respondent noted that the Interim Regulations allow an oral hearing at the behest of the Investigation Committee or at the 'reasonable request of a member' and expressed the view that the Investigation Committee should always sit in public, with a readiness to hear requests for the hearing to be held, in part or in whole, privately and that it should be a right of the member to require an oral hearing, not just be allowed to request one.

The Investigation Committee will conduct its business in public, as provided under Regulation 8(2), unless the Investigation Committee excludes the public. In this regard however, attention must be paid to the provisions of Section 31 of the Act.

As regards oral hearings and the right of a member to require same, legal advice has been received and the Regulations remain as initially drafted, on the basis that there exists no absolute right, under Constitutional or Human Rights law, for a member to be granted an oral hearing merely on the basis that he or she requires one.

One respondent observed that Interim Regulation 4(5) is unclear as to what happens after the Preliminary Investigation Committee reports such facts and circumstances to the Authority.

Regulation 4 has been clarified to provide for a Preliminary Investigation Committee to act as appropriate when it forms the view that the matter before it is better dealt with by way of the 'exercise by the Authority of any of its other powers, or by way of recommendations or observations' (Regulation 4(9)).

One respondent noted that, while Interim Regulation 5(4) sets out some preliminary information that must be provided to the member subject to investigation, there appears to be no obligation on the part of the Investigation Committee to furnish the member with any information that comes to hand subsequently.

The Regulations now provide at Regulation 4(13) that the member be furnished with any relevant information and copies of all documentation relating to the statement of grounds upon which the preliminary investigation has been initiated. Regulation 5(4) provides that the member will be provided with all documents and any other material that will be presented to the Investigation Committee, provided that the Investigation Committee will be entitled subsequently to give notice of further documents to the member.

12. Participation of individuals not parties to the proceedings

A number of respondents noted that Interim Regulation 8(4) permits an Investigation Committee to allow any person with an interest in the proceedings to participate in an oral hearing and to present relevant information and submissions. It was submitted that this Interim Regulation does not accord with fair proceedings in that only the prosecution and the respondent member should be entitled to make submissions. The view was further expressed that any other person should be dealt with as a witness to be examined and cross examined by either side.

The Authority's view is that the Regulations should not restrict the participation of any individual in the process who may not be a witness and, as such, the Investigation Committee (Regulation 8(5)) may also consider any submissions made to it during the full investigation by any other person if it determines that such submissions are relevant. Such submissions are permissible under the investigative model envisaged by the Regulations.

13. Investigative model as envisaged by the Regulations

It was suggested by a number of respondents that the role of the Preliminary Investigation Committee is clearly to determine whether or not there is a *prima facie* case for the member to answer but that the role of the Investigation Committee is less clear in that there appears to be some cross-over of functions between the Preliminary Committee and the Investigation Committee. It was further suggested that it would appear that the Investigation Committee performs the dual functions of investigator and adjudicator and that this approach seems to give rise to a real risk of a biased opinion as the judge in any case must be, and be seen to be, impartial.

It was further suggested that the model established by the PABs' disciplinary procedures, i.e. where there is a clear distinction between the member, the investigator/prosecutor and the independent Tribunal, is the most appropriate one. It was opined that this approach ensures there is a clear separation between the investigation role and the adjudication role. It was suggested that, unless this apparent conflict of roles is addressed, there is a risk that the role of prosecutor and adjudicator will be confused with a resultant denial of rights for the member concerned and the possibility of successful judicial review proceedings.

Having taken legal advice, the Authority is of the view that the functions of the Preliminary and Investigations Committees are now more clearly laid out in the Regulations and that the investigative model as provided for by the Regulations is one that is both permissible under law and envisaged by the Act.

14. Terminology & interpretation of the Regulations

One respondent suggested that the Authority should explain in the Regulations what is meant by 'reasonable under the circumstances', as included in Interim Regulation 7(3) in the context of time limits for members to respond to charges/allegations.

The Authority is of the view that what is considered 'reasonable under the circumstances' shall be a matter to be determined by the Investigation Committee having regard to the circumstances of the case.

One respondent queried the meaning of 'supervisory action' in Interim Regulation 4(5) and noted that in certain circumstances the Preliminary Investigation Committee could determine that 'supervisory action' should be taken rather than a full investigation. It was noted that whilst the inclusion of the provision for supervisory action in relation to Section 23 enquiries is logical given the Authority's supervisory role *vis-à-vis* the PABs, it does not make sense in the context of a member/member firm, where the Authority does not have the same supervisory role. The view was, therefore, expressed that there is a need to clearly set out what 'supervisory action' means in this context.

Regulation 4 has been clarified to provide for a Preliminary Investigation Committee to act as appropriate when it forms the view that the matter under investigation is better dealt with by way of the 'exercise by the Authority of any of its other powers, or by way of recommendations or observations' (Regulation 4(9)).

One respondent, on a point of clarification, suggested that the words 'of the Authority' be added after the words 'Chief Executive' in Interim Regulation 3(2) and after the word 'Secretary' in Interim Regulation 3(11).

Regulation 3 has been amended to include the suggested phraseology.

One respondent queried how a 'possible' breach as outlined in Regulation 4(7) would be defined and whether it meant an 'alleged' breach.

'Possible' breach means any indication of a potential breach of a PAB's standards. The terminology is that which is used in the Act.

One respondent suggested that terminology from the criminal law ought not to be used in the Regulations. Thus, for example, the word 'charges' in Interim Regulation 7(3) should be replaced with 'allegations' as used in Interim Regulation 10(1). The same respondent suggested that the use of the word 'established' in Interim Regulation 10 seems unclear and suggested replacing it with 'proved'.

These Regulations have been amended accordingly.

One respondent suggested that clarity is needed around the interpretation of the term 'standards'. While noting that the Act defines 'standards' as '*...the rules, regulations, and standards that a prescribed accountancy body applies to its members and, to which, by virtue of their membership, they are obliged to adhere*', the respondent observed that many other obligations of members of

PABs arise not from membership but from licenses granted to them by relevant PABs, for example, audit registration or investment business authorisation. The respondent suggested that it is inappropriate to include such requirements within the definition of 'standards'. It was further noted that, in the case of a number of the PABs, it is normal that any instances of non-compliance with such requirements are dealt with as regulatory matters rather than through disciplinary action and asserted that, for breaches of standards to result in disciplinary action under the relevant rules of PABs, there must be an element of misconduct.

Section 24(7) of the Act expressly states that the Authority has the right to impose any sanction that would have been available to the PAB if it finds that a member has 'committed a breach of the prescribed accountancy body's standards'. The Section does not state that sanctions shall only apply in cases where misconduct has been found to be proven.

15. Involvement of Authority staff in section 24 proceedings

One respondent noted that Regulation 3(2) prohibits the Chief Executive of the Authority from being a member of a Section 24 Committee and suggested that the same prohibition should be clearly extended to all of the Authority's staff.

Whilst it was the intention that Authority staff would not be members of Section 24 Committees, Regulation 3(2) has been amended to reflect the respondent's suggestion.

16. Section 24 Committee membership

It was noted by a number of respondents that, under the Interim Regulations, members of the Authority's Board can be appointed as members of Section 24 Committees and can also be appointed as the Chairpersons of such Committees and/or be in the majority. It was suggested that this presents the risk of accusations of bias being made against the Authority (i.e. on the basis that, as it has been a decision of Authority to initiate an investigation in the first instance, it could be argued that, in order to avoid criticism, it is the interest of the Authority to always find a *prima facie* case and decide that a full investigation is warranted). The respondent further suggested that this risk could be further exacerbated were a Board member to be appointed as Chairperson of a Committee or if Board members were in the majority on a Committee.

One respondent suggested that there may be a human rights issue with the presence of any directors of the Authority on Committees and that, as a consequence, the provision whereby Board members may be members of Committees should be reconsidered.

It was suggested variously that the Interim Regulations be amended to: -

- i. prohibit members of the Board from acting as the Chairman of any Section 24 Committee;
- ii. require that any Section 24 Committee comprise at least 4 members, with no more than 2 members being members of the Board; and
- iii. provide for the independent Chairman to have the casting vote.

As a general point, Section 27(1)(a) of the Act expressly envisages directors of the Authority sitting on Section 24 Committees. Nevertheless, in recognition of the above views, Regulation 3(3) now provides that each Section 24 Committee shall number at least 3 persons, with no more than one half of the members being directors of the Authority. Further, members of the Committee who are not directors shall be chosen from a panel of independent persons.

Specifically in response to the above points:

- i. *there is no provision in the Act, or otherwise, precluding members of the Board from acting as Chairman of a Section 24 Committee. As such, it would not, in the Authority's view, be appropriate that such a prohibition be contained in the Regulations;*

- ii. *for administrative and logistical reasons, it is not considered prudent to stipulate that a Section 24 Committee should, in all cases, comprise at least 4 persons;*
- iii. *Regulation 3(5) provides that, in the event of an equality of votes on a Section 24 Committee, the Chairperson shall have a second or casting vote.*

17. Panel of independent persons

A number of respondents expressed the view that the Authority should consider establishing a panel of independent persons to sit on Section 24 Committees with Authority directors (or, as referred to above, to replace Authority directors as members of such Committees).

One respondent suggested that if the independent members are chosen on a case by case basis there is a risk that it will offend the human rights principle that all tribunals should be independent. It was suggested that, where *ad hoc* appointments are made, there is a greater danger that the Committee will fail to present the appearance of independence (i.e. because, if a person is selected on a once-off basis, s/he is more likely to be influenced (however subconsciously) by the circumstances of his/her appointment and by his/her perception of the expectations of his/her appointer than where a long term appointment is made with security of tenure).

Notwithstanding its absolute discretion to populate Committees in whatever manner it considers most appropriate (within the parameters laid down by the Act and Regulations), the Authority has previously put in place a panel of persons interested in being appointed to Section 23 and/or Section 24 Committees and this panel has recently been updated. Moreover, Regulation 3(3) now provides that each Section 24 Committee shall number at least 3 persons, with no more than one half of the members being directors of the Authority. Further, members of the Committee who are not directors shall be chosen from the panel of independent persons.

With reference to the specific point made regarding one off versus long term appointments, it is important to bear in mind that, as a public body, the Authority is obliged to comply with public procurement requirements, which govern, inter alia, the procurement of professional services.

18. Chairpersons of Section 24 Committees

It was suggested by one respondent that there should be a requirement for one of the members of the Committee, preferably the Chairperson, to be a member of the legal profession with appropriate experience. Another respondent went further and recommended that the Chairperson of a Section 24 Committee should be legally qualified and should be appointed not by the Chairperson of the Authority, but rather by the Board as a whole.

The Authority does not consider that it would be appropriate to insert a requirement that Committee Chairpersons must be members of the legal profession. This view has been arrived at having regard to the fact that such a provision would lead to a limiting of the Authority's statutory discretion to appoint Committees as it sees fit. In arriving at this view, the Authority was also mindful of the provisions of Regulation 6, which provide for the appointment of legal advisors to Committees.

Having considered respondents' views and having taken further legal advice as appropriate, the Authority considers it appropriate to retain the approach taken in the Interim Regulations, i.e. whereby Board members may Chair a Committee and Committee Chairpersons will be appointed by the Authority Chairperson.

19. PAB members' membership of Committees & conflicts of interest

One respondent did not see the logic of Interim Regulation 3(10), which precludes a member of the same PAB as the member/member firm under investigation from being a member of a Section 24 Committee charged with investigating the matter and did not believe that independence would be compromised by being a member of the relevant PAB.

The Authority does not share this view and considers it appropriate to retain the aforementioned provisions.

One respondent suggested that a safeguard should be provided which ensures that, where a member of the Board, (or the organisation that nominated him/her to the Board), is the complainant, the relevant Board member should be excluded from all elements of the Section 24 process relating to that complaint.

The Authority is satisfied that this concern is adequately dealt with by Regulation 3(7), which deals with conflicts of interest.

20. Imposition of sanctions

A number of respondents suggested that sanctions should only apply where there has been a finding of misconduct.

This is dealt with in section 14 above.

21. Settlement agreements

One respondent noted that Interim Regulation 15 allows for a settlement agreement to be entered into by the Authority and the member at any time prior to the conclusion of the investigation. Whilst understanding and supporting the Authority in its desire to have the power to settle minor matters without a full hearing, the respondent suggested that the Interim Regulations raise a number of important questions which would need to be addressed in the final Regulations. These, it was suggested, are:

- the proposed terms of settlement agreements; and
- the manner in which a settlement agreement can be published.

The proposed terms of any settlement agreement will depend on the lawful agreement reached between the parties, consequent to negotiation and are likely to vary from time to time and having regard to the particular circumstances. It would not, therefore, in the Authority's view be prudent, appropriate or practicable to enshrine the terms of settlement agreements in the Regulations.

The Regulations provide for publication, at Regulation 15(4), with such publication subject to the provisions of Section 31 of the Act. Regarding the manner in which publication may take place, viz., in which publication/media outlet, this shall be a matter for the Authority to determine and is not, therefore, considered appropriate for insertion into the Regulations.

22. Publication of decisions

One respondent noted the following:

- i. Interim Regulation 14 provides for the Authority to publish its decision subject to the provisions of Section 31(3)(a) of the Act and suggested that the decision should only be published once the entire process has been exhausted, including any appeal. It was further suggested that the Regulations include a clear provision that, should the matter be subject to appeal, there would be no publication of the decision until after the appeal is concluded. Further, if the decision has been notified to the complainant, then s/he should be informed that the information is strictly confidential until such time as any appeal is concluded;
- ii. a further matter which should be taken into consideration is the right of any third party to confidentiality. Any third party should not be exposed to having its reputation damaged in any way by the publication of any decision against a member of member firm.

The Authority's specific response is as follows:

- i. Regulation 14 has been amended to the effect that publication shall not take place until the process, including an appeal, has been exhausted;*
- ii. the Authority has noted this consideration and it is anticipated that Committees would consider it prudent to take appropriate legal advice regarding same as and when the need arises. However, this is not a considered to be a matter appropriate for inclusion in the Regulations.*

Another respondent advocated that publication of decisions should be mandatory in all cases, rather than optional and suggested that the members' names can be removed from the published notices if necessary.

The Authority is restricted by the provisions of Section 31 of the Act, which may not permit mandatory publication of decisions in all cases. The Regulations provide a framework for the publication of decisions within the parameters of section 31 of the Act.

23. Role of the legal adviser

One respondent noted in the Interim Regulations that the legal adviser appeared to be part adviser and part prosecutor and suggested that that it could, therefore, be argued that, as the legal adviser is acting a prosecutor, s/he could not give unbiased advice to the Investigation Committee.

In response to this point, Regulation 6 has been clarified to outline the circumstances where legal advisers may be retained, and for which purpose.

24. Costs

Several respondents noted that Interim Regulation 10(2)(b) allows the Investigation Committee to require a member to pay its costs if an adverse finding is made against him/her and that certain PABs allow their Disciplinary Tribunals, at the Tribunals' discretion and up to prescribed maxima, to award costs to a member where there has been no adverse finding against him/her. It was suggested that, in order to ensure fairness, equivalent provisions should be included in the Regulations which would give the member the right to apply for costs to the Investigation Committee should s/he successfully rebut any allegations made against him/her.

The Act does not provide for costs being awarded in members' favour and, therefore, to include provision for same in the Regulations would not, in the Authority's view, be appropriate.

One respondent queried whether a formal cost-sharing agreement was required to be put in place for any public interest related investigations and sought to ascertain the liabilities and risks that might arise in this regard.

In accordance with the Act's provisions, the costs of investigations undertaken under section 24 can only be met from the Authority's Reserve Fund, which is funded in accordance with the provisions of section 15 of the Act.

25. Investigation of members who are not PAB members

One respondent suggested that the Authority should be empowered to investigate any person or entity operating in the State offering their services as an accountant, accountancy services, accountancy consultancy, taxation services, taxation consultancy or as a taxation expert.

The Authority has jurisdiction under the Act only over members and member firms of the PABs. Therefore, the Authority has no statutory jurisdiction over individuals holding themselves out as 'accountants' in circumstances where such individuals are not members of the PABs. The Regulations are reflective of the Act in this regard.

26. Restriction of persons who are not PAB members from practicing

One respondent suggested that any person or body, not a member of one of the nine PABs and describing themselves or providing services in the nature of accountants, Chartered accountants, accountancy services or accountancy and/or taxation consultants to the public for a fee should be restricted from undertaking such services or practices unless they are under the supervision of an accountant who is an accredited member of one of the nine PABs and a recognised fully qualified accountant.

It was also suggested, *inter alia*, that all accountants operating for clients whose accounts are under the jurisdiction of the State issue a declaration to their clients annually that they are accredited and a fully paid up member of one of the PABs and deemed approved to carry out accountancy services in the State.

This suggestion is outside the scope of the current consultation and outside the scope of Section 24 of the 2003 Act.

27. Transcripts

One respondent queried whether transcripts of investigations would be made available to the PAB whose member/member firm is under investigation.

As it is members of PABs, and not PABs themselves, who are under investigation under the Section 24 process, it is not envisaged that PABs would be furnished with transcripts. Regulation 19 deals with the issue of transcripts and in which circumstances they will be provided.

28. Jurisdiction

One respondent queried the '*public interest*' aspect of Interim Regulation 4(1) concerning the appointment of a Preliminary Investigation Committee and whether that public interest was restricted to the Republic of Ireland.

As the Act is silent on this point, the Regulations do not seek to limit the scope of the Act.

Another respondent noted that it is unclear from both the legislation and the Interim Regulations as to the jurisdictional scope of the Authority's remit under section 24 and queried, for example, as to whether this extends to '*breaches of standards*' that have taken place in the United Kingdom where quite possibly the same issue may come within the remit of the AADB whose remit extends to cases arising in a UK context only.

The jurisdiction of the Section 24 Regulations governs any breach of a standard by a member/member firm of the PABs. The Act does not limit the Authority's jurisdiction and, accordingly, nor, in the Authority's view, should the Regulations.

**IRISH AUDITING & ACCOUNTING SUPERVISORY AUTHORITY
9 SEPTEMBER, 2009**