

# **Guidance Note on Cooperation with the AFRC**

**Purpose of this document**

1. The Accounting and Financial Reporting Council (“**AFRC**”) is publishing this Guidance Note to explain and provide guidance on the AFRC’s approach to cooperation in investigations and disciplinary actions.
2. The approach to cooperation outlined in this Guidance Note is applicable to all regulatees of the AFRC (i.e. public interest entity (“**PIE**”) auditors, registered responsible persons of registered PIE auditors and professional persons (together referred to as “**Regulatees**”)).
3. The AFRC recognizes and values cooperation in its investigations and disciplinary actions as it assists the AFRC to achieve its regulatory objectives. Among other things, cooperation facilitates the early detection and prompt remediation of CPA misconduct or FR misconduct and fosters a culture of responsibility and self-improvement in Regulatees. It also facilitates the efficient use of the AFRC’s manpower and other resources in investigating and disciplining misconduct, and the timely conclusion of such matters will in return benefit the Regulatees concerned.
4. The AFRC takes cooperation into consideration when determining sanctions and may reduce the sanctions as appropriate in light of all the circumstances of the case.
5. This Guidance Note will not operate in criminal cases as the Department of Justice has the sole discretion over criminal prosecutions of offences under the Accounting and Financial Reporting Council Ordinance (Cap. 588) (“**AFRCO**”).

**Definitions**

6. In this document, the following terms have the meanings defined in the AFRCO as set out below (the definitions in the AFRCO shall prevail in case of any inconsistency):

Terms	Meanings defined in the AFRCO	Section under the AFRCO
practice unit	A practice unit means: <ul style="list-style-type: none"> <li>• a certified public accountant (practising) who practises accountancy on the accountant’s own account under the accountant’s own name as registered under section 22(2) of the</li> </ul>	2(1)

Terms	Meanings defined in the AFRCO	Section under the AFRCO
	Professional Accountants Ordinance (Cap. 50); <ul style="list-style-type: none"> <li>• a CPA firm; or</li> <li>• a corporate practice.</li> </ul>	
professional person	A professional person means: <ul style="list-style-type: none"> <li>• a certified public accountant; or</li> <li>• a practice unit.</li> </ul>	2(1)
PIE	A PIE means a listed corporation the listed securities of which comprise at least shares or stocks, or a listed collective investment scheme.	3(1)
PIE auditor	A PIE auditor means a registered or recognized PIE auditor.	3A
registered responsible person	A registered responsible person means any of the following individuals whose name is recorded in the PIE auditors register as a responsible person of a registered PIE auditor: <ul style="list-style-type: none"> <li>• an engagement partner;</li> <li>• an engagement quality control reviewer; or</li> <li>• a quality control system responsible person.</li> </ul>	2(1)

### Forms of cooperation

7. Cooperation in the AFRC's investigations and disciplinary process will be considered as a mitigating factor at the point of determining sanctions. In doing so, the AFRC will consider all the circumstances of a particular case.
8. Non-exhaustive examples of conduct which may constitute cooperation include:
  - (a) promptly and voluntarily self-reporting to the AFRC any facts and/or matters which may constitute an allegation of CPA misconduct or FR misconduct and making full disclosure of such facts and/or matters before the allegation comes to the attention of the AFRC. Self-reporting is generally more valuable the

earlier it is provided and will generally attract greater credit than cooperation with an investigation which has been prompted by someone or something else;

- (b) providing true and complete information regarding the CPA misconduct or FR misconduct, including:
  - (i) taking early and proactive steps to preserve and collect important evidence;
  - (ii) making full and frank disclosure of all relevant information;
  - (iii) promptly and voluntarily providing useful information or documentation to the AFRC that might not have been discovered absent that cooperation, or not specifically requested by the AFRC and beyond what is required pursuant to legal and regulatory reporting requirements;
  - (iv) conducting a timely, thorough, objective and competent internal investigation into the CPA misconduct or FR misconduct when it was discovered and sharing the outcomes of such internal investigation with the AFRC voluntarily and promptly;
  - (v) making timely arrangements to provide evidence and information;
  - (vi) providing useful intelligence; and
  - (vii) to the extent legally permissible, disclosing relevant documents located outside Hong Kong and facilitating the timely production of documents and witnesses from outside Hong Kong;
- (c) taking a proactive approach and devoting manpower and resources to assist the AFRC's investigation;
- (d) acceptance of liability, for instance:
  - (i) willingness to take responsibility for the CPA misconduct or FR misconduct;
  - (ii) accepting liability and proposed sanctions; and
  - (iii) taking a proactive and positive approach to bring the case to an early conclusion; and

- (e) taking prompt and timely remedial actions (i.e. voluntary, timely and meaningful actions designed to reduce the likelihood and risk that similar CPA misconduct or FR misconduct will recur, as well as actions to correct the CPA misconduct or FR misconduct), for instance:
    - (i) taking early and active steps to contain and remedy the CPA misconduct or FR misconduct (e.g. correcting any misleading statement or impression);
    - (ii) promptly and voluntarily modifying and improving the practice unit's or PIE auditor's quality controls or other internal policies and procedures to prevent recurrence of the CPA misconduct or FR misconduct. A practice unit's or PIE auditor's improvements in response to quality control criticisms or defects identified by the AFRC in its inspection process would not ordinarily constitute cooperation for the purpose of this Guidance Note;
    - (iii) re-assigning or limiting the activities of those individuals (which might include members of the audit team, as well as persons outside the audit team, including persons in the practice unit's or PIE auditor's management) responsible for the CPA misconduct or FR misconduct and, in appropriate cases, by disciplining the responsible individuals;
    - (iv) promptly notifying and cooperating with the entity (or audit committee thereof) for which the Regulatee performed services related to the CPA misconduct or FR misconduct, so that the entity (or audit committee thereof) can, if necessary, take steps to comply with relevant laws and regulations;
    - (v) proactively carrying out effective remediation to address the AFRC's concerns and prevent similar CPA misconduct or FR misconduct from arising in the future; and
    - (vi) establishing whether the CPA misconduct or FR misconduct adversely affected, or (if known) would have adversely affected, other persons and voluntarily and appropriately taking remedial actions to address any such adverse effects (such as by making compensation).
9. As Regulatees are expected to cooperate with the AFRC in all its regulatory processes, merely fulfilling statutory or regulatory obligations does not, in itself, constitute cooperation for the purpose of this Guidance Note. This includes, for instance, compliance with a CPA inspector's, a CPA investigator's, an FR

inspector's or an FR investigator's requirement issued pursuant to section 20ZZC(1), 20ZZJ(1), 21C(2), 21D(1) or (2), 25(1) or 26(1) or (2) of the AFRCO for producing documents, attending an interview or making a statutory declaration.

### **Assessing the degree of cooperation**

10. While the AFRC seeks to maintain consistency in its disciplinary actions, fairness and public interest require each case to be considered on its own facts. As such, the principles and assessment factors set out in this Guidance Note are neither exhaustive nor definitive.
11. The AFRC considers all relevant circumstances when assessing the degree of cooperation. The factors which the AFRC generally takes into account include:
  - (a) the nature and value of the cooperation provided, including:
    - (i) timeliness of the cooperation;
    - (ii) quality, extent, substance and reliability of the assistance or remedial actions;
    - (iii) truthfulness and completeness of any information provided;
    - (iv) usefulness of intelligence provided (e.g. whether the AFRC's investigation was initiated based on the intelligence provided); and
    - (v) amount of time, costs and resources saved by the AFRC as a result of the cooperation;
  - (b) the nature, seriousness and impact of the CPA misconduct or FR misconduct and the degree of cooperation relative to those matters; and
  - (c) the general conduct of the Regulatee concerned after the CPA misconduct or FR misconduct and other circumstances of the Regulatee.

### **Uncooperative conduct**

12. If the Regulatee concerned engages in uncooperative conduct with the intent or effect of impeding or prejudicing the AFRC's investigation or disciplinary process or fails to provide the level of cooperation reasonably expected of the Regulatee in the circumstances, the AFRC may take this into account as an aggravating factor when

determining the appropriate sanction. In doing so, the AFRC will consider all the circumstances of a particular case.

13. Non-exhaustive examples of uncooperative conduct include:
  - (a) delaying the self-reporting of the CPA misconduct or FR misconduct;
  - (b) withholding or concealing information relating to the CPA misconduct or FR misconduct;
  - (c) engaging in evasive conduct during the AFRC's investigation;
  - (d) intentionally and unnecessarily prolonging the AFRC's investigation;
  - (e) failing to comply, within the stipulated timeframe specified by the AFRC and without reasonable excuse, with requirements to produce the required information / documentation, attend interviews or make statutory declarations;
  - (f) lack of care in ensuring that information provided to the AFRC is accurate and complete;
  - (g) failing to provide adequate explanation of documents and information provided;
  - (h) failing to prepare properly for interviews (e.g. failing to review materials provided by the AFRC in advance);
  - (i) failing to conduct an adequate search for documents and information requested by the AFRC; and
  - (j) failing to take prompt and timely remedial actions.

### **Legal professional privilege**

14. The AFRC fully respects Regulatees' right to exercise legal professional privilege. The assertion of this right, such as a bona fide refusal to waive legal professional privilege attached to a document provided to the AFRC, will not be regarded as uncooperative conduct.
15. However, voluntary waiver of legal professional privilege over one or more documents, even on a limited basis, may assist the AFRC's investigation and will be taken into consideration when the AFRC assesses the degree of cooperation provided.

## **The AFRC's approach to cooperation**

16. The AFRC takes into account the cooperation provided by Regulatees and all relevant circumstances when determining the appropriate disciplinary response.
17. Among other things, the AFRC may enter into an agreement with a PIE auditor or registered responsible person pursuant to section 37I(1) of the AFRCO ("**section 37I(1) Agreement**") or with a professional person pursuant to section 37I(1A) of the AFRCO ("**section 37I(1A) Agreement**") to resolve concerns in relation to which the AFRC is contemplating whether to impose a disciplinary sanction, provided that the AFRC considers it appropriate to do so in the interest of the investing public or in the public interest. In exercising this discretion, the AFRC will consider the nature and degree of cooperation provided by the Regulatee concerned.
18. A Regulatee may approach the AFRC for discussions with a view to resolving the AFRC's concerns at any time from the detection of the CPA misconduct or FR misconduct up to the issuance of the Decision Notice. Such discussions are normally conducted on a "without prejudice" basis. Whether and, if so, at what stage the AFRC is willing to consider resolution discussions depends on the circumstances of each case. As a general principle, the AFRC is more willing to enter into a section 37I(1) Agreement or section 37I(1A) Agreement if extensive and valuable cooperation is demonstrated by the Regulatee in the ways described in paragraphs 8 and 15 above, and in particular, self-reporting.
19. Given the need for credible deterrence and public accountability, the AFRC considers that, as a general principle, it would not be in the public interest for disciplinary actions to be resolved in private (i.e. without publicity) or on a "no admission of liability" basis. Accordingly, offers to resolve disciplinary actions on such terms are unlikely to be acceptable to the AFRC or regarded as cooperation.
20. While cooperation is a factor to be taken into account, each case turns on its own facts. The AFRC's willingness to resolve disciplinary actions with a Regulatee under a section 37I(1) Agreement or section 37I(1A) Agreement based on a particular set of facts does not mean that the AFRC will consider it appropriate to do so if the circumstances are different.

## **Recognition for cooperation**

21. In recognition of the benefits of early disposals of disciplinary matters, the AFRC may recognize cooperation by reducing the sanctions imposed. Cooperation is one of the mitigating factors in determining the appropriate sanction and the AFRC will consider all the circumstances of a case when assessing the degree of cooperation.



22. Without prejudice to the above, to encourage early cooperation and resolution of cases through reaching a section 37I(1) Agreement or section 37I(1A) Agreement, the AFRC has divided its disciplinary process into three stages:
- (a) **Stage 1** – from the detection of the CPA misconduct or FR misconduct by the Regulatee up to before the issuance of a Notice of Proposed Disciplinary Action (“**NPDA**”);
  - (b) **Stage 2** – from the issuance of an NPDA up to the deadline for the Regulatee to make representations in response to the NPDA; and
  - (c) **Stage 3** – from the day after the deadline for making representations up to the issuance of a Decision Notice.
23. As a general principle:
- (a) where a Regulatee cooperates with the AFRC and a section 37I(1) Agreement or section 37I(1A) Agreement is reached in Stage 1, the AFRC may reduce the sanction(s) by up to 30%;
  - (b) where a Regulatee cooperates with the AFRC and a section 37I(1) Agreement or section 37I(1A) Agreement is reached in Stage 2, or if the Regulatee accepts the AFRC’s findings and proposed sanctions in the NPDA in Stage 2, the AFRC may reduce the sanction(s) by up to 20%; and
  - (c) where a Regulatee cooperates with the AFRC and section 37I(1) Agreement or section 37I(1A) Agreement is reached in Stage 3, or if the Regulatee accepts the AFRC’s findings and proposed sanctions in the NPDA in Stage 3, the AFRC may reduce the sanction(s) by up to 10%.
24. However, if the Regulatee has derived any illegitimate financial benefits or has illegitimately avoided any losses, the AFRC will generally take steps to ensure that no illegitimate gain is retained. Accordingly, no discount will generally be applied to the amount of any pecuniary penalty that equates to the removal of any such benefit gained or loss avoided.
25. For the avoidance of doubt, the discounts in sanction referred to in paragraph 23 above represent the maximum discount that the AFRC will generally render at each stage. Notwithstanding the early resolution of the matter, the discount rendered to a Regulatee may be reduced if, for example, the Regulatee had previously engaged in uncooperative conduct.

## **Enhancing transparency of the AFRC's cooperation policy**

26. To enhance the transparency of the disciplinary process, the AFRC seeks to provide an appropriate level of disclosure regarding cooperation.
27. Where the AFRC takes into account the cooperation provided by a Regulatee in determining the appropriate disciplinary sanctions, the AFRC will generally:
  - (a) in the course of resolution discussions, if the AFRC considers it appropriate to impose a reduced sanction, inform the Regulatee of what the original sanction would have been and the final sanction imposed after taking cooperation into account; and
  - (b) at the conclusion of the disciplinary action, state in the relevant Decision Notice, Statement of Disciplinary Action and/or press release that the Regulatee cooperated with the AFRC and provide a general description of the cooperation provided.

## **Disclaimer**

28. The provisions in this Guidance Note are guiding principles only. They do not in any way limit the discretion of the AFRC to evaluate each case on its own facts and circumstances. They do not confer any right or create any legitimate expectation on any person to:
  - (a) be informed of the progress and findings of any AFRC investigation;
  - (b) be informed of the AFRC's preliminary assessment of any potential disciplinary action prior to the issuance of the NPDA;
  - (c) resolve a matter pursuant to section 37I(1) or 37I(1A) of the AFRCO; or
  - (d) receive any reduction in the proposed sanctions.
29. In the event of any inconsistency between this document and the AFRCO, the AFRCO shall prevail.