

“Whistleblowing” – draft code of practice published

1 BACKGROUND

On 8 December 2004, the first code of practice under the Pensions Act 2004 was published for consultation by the Department for Work and Pensions: “Whistleblowing” – Reporting breaches of the law.

The draft code “covers the duty to report significant breaches of the law relating to occupational and personal pension schemes (including stakeholder schemes)” to the Pensions Regulator (TPR). Crucially, from April 2005, the responsibility for reporting breaches will apply to a significantly expanded group, including trustees, scheme managers, administrators, professional advisers and employers.

The draft code will be issued by TPR in accordance with its new powers under the Pensions Act 2004. A number of questions are put forward in the draft code for comment by respondents before 7 January 2005.

2 CURRENT WHISTLEBLOWING REQUIREMENTS

Under the Pensions Act 1995, statutory whistleblowers (i.e. scheme actuaries and auditors appointed by trustees) are required to report certain breaches of pensions law to the Occupational Pensions Regulatory Authority (Opra). Similarly, voluntary whistleblowers (such as scheme trustees, administrators and other professional advisers) have the power to report such breaches.

In October 2003, Opra published Note 1 setting out a new “traffic light” system for reporting breaches by statutory whistleblowers. This was followed in May of this year by similar guidance for voluntary whistleblowers (Opra Note 6).

Continued

"Whistleblowing" – draft code of practice published

3 THE DRAFT CODE

When deciding whether to report a breach, the code advises whistleblowers to make two key judgements:

- is there reasonable cause to believe there has been a breach of the law?
- if so, is it likely to be of material significance to TPR?

Like Opra Notes 1 and 6, the draft code then adopts the traffic light system to provide guidance on what breaches need to be reported.

- **"RED" reporting scenarios**

Red breaches are "materially significant" and need to be reported to TPR. Examples include "matters indicating possible dishonesty or misuse of assets or contributions" or breaches which attract a criminal penalty. Interestingly, an employer may need to report trustees if it "has concerns over [their] investment policy decision[s]" following a change to the scheme's Statement of Investment Principles.

- **"GREEN" reporting scenarios**

Green breaches are not "materially significant" and so do not have to be reported. But the draft code makes clear that they should be recorded (indeed, the draft code also emphasises the need for potential whistleblowers to have "effective arrangements in place" to enable them to meet their reporting duties). An example of a green breach would be "isolated or unintended administrative lapses in an otherwise well run scheme".

- **"AMBER" reporting scenarios**

Amber breaches are the grey areas and the draft code suggests that the "reporter...take[s] into account the context of the breach" in deciding whether it is materially significant and consequently needs reporting. Several green breaches which "effectively stem from the same cause" may well fall into this category.

Continued

"Whistleblowing" – draft code of practice published

4 EFFECT OF CODES OF PRACTICE

Codes of practice published by TPR are not legally binding and there is no penalty for failure to comply (although a failure to report a breach where there is a requirement to do so may lead to civil penalties). However, codes of practice must be taken into account by TPR, a court or a tribunal (and also the Pensions Ombudsman) "if they are relevant to what is being decided".

This means that it will not be necessary for all provisions under codes of practice to be followed slavishly "in every circumstance". But any alternative approach must satisfy the underlying legal requirements.