

Opra Note 6 - new traffic light system for voluntary whistleblowers

1 BACKGROUND

On 12 May 2004, Opra issued a revised Opra Note 6 which offers guidance to non-statutory (or voluntary) whistleblowers on reporting breaches to Opra. This follows the publication of a reworked Opra Note 1, Opra's guidance for statutory whistleblowers (i.e. the scheme actuaries and auditors), in October 2003. Like Opra Note 1, the revised Opra Note 6 sets out a new "traffic light" system for reporting breaches.

Under section 48(4) of the Pensions Act 1995, voluntary whistleblowers (such as scheme trustees, administrators and other professional advisers) have the power to report breaches of the law relating to an occupational pension scheme to Opra. The impetus behind the new system is to help voluntary whistleblowers understand when they should exercise this power.

2 HOW WILL THE NEW "TRAFFIC LIGHT" SYSTEM WORK?

Given this background, it is not surprising that the look, feel and language of Opra Note 6 are similar to the updated Opra Note 1. In summary, the new "traffic light" system will require voluntary whistleblowers to divide breaches into the following three categories.

2.1 "Red" breaches

Red breaches are of material significance to Opra "because of the significant risks they can pose to members' interests". Opra will expect such breaches to be reported. With this in mind, Opra also anticipate trustees having arrangements in place with their professional advisers and administrators to ensure that, if there is a problem, trustees know about it as soon as possible.

Continued

Opra Note 6 - new traffic light system for voluntary whistleblowers

Examples of red breaches include:

- matters “indicating possible dishonesty or misuse of assets or contributions”;
- breaches which attract criminal liability;
- trustees omitting to appoint a replacement scheme actuary or auditor “on a timely basis”; and
- where a defined benefit scheme begins winding-up, the trustees failing to review investment policy.

2.2 “Green” breaches

Green breaches are those which “do not normally, on their own, imply or pose a significant immediate or potential risk to members’ interests” and therefore, do not need to be reported to Opra. Examples include “isolated or unintended administrative lapses in an otherwise well run scheme...which are corrected in a timely manner”. Minor errors relating to the payment of contributions or members’ benefits could come within this definition. Of course, such errors could still constitute maladministration in the eyes of the Pensions Ombudsman.

2.3 “Amber” breaches

As with Opra Note 1, the definition of “amber breaches” focuses on the “risk that many breaches pose to the security of scheme assets or members’ benefits”.

A collection of “green” breaches may amount to an amber breach if together they suggest that Opra should intervene in a scheme. Non-compliance with other requirements such as contracting-out, preservation, indexation and equal treatment legislation is also potentially caught.

Continued

Opra Note 6 - new traffic light system for voluntary whistleblowers

Amber breaches are likely to present the most difficulty for voluntary whistleblowers, who will need to weigh up carefully whether or not to make a report. Therefore, Opra Note 6 stresses the need for voluntary whistleblowers to set amber breaches in context and consider factors such as:

- the scheme's history;
- the trustees' "skills and knowledge";
- "the nature and circumstances of the breach"; and
- Opra's "published view of similar breaches".

3 CONCLUSION

Opra is clearly keen to cut down on the number of reports it receives relating to relatively minor breaches so that it can concentrate resources on tackling the more serious ones. This emphasis is likely to continue once Opra is subsumed by the new Pensions Regulator (whose job will involve not only protecting members' interests, but curtailing calls on the pension protection fund).