

Opra Update 7 – compromising employer debts

1 BACKGROUND

On 17 May 2004, Opra published new guidance to trustees of defined benefit (DB) pension schemes who are considering compromising an employer's debt.

Agreements to compromise the employer's debt have become increasingly commonplace since the High Court's approval of such an arrangement in *the Bradstock case* back in 2002.

Concerned at this growing trend and the possibility that some members may be getting a poor deal, Opra Update 7 "outlines important steps trustees must take" when facing this particular dilemma.

2 THE CURRENT LEGISLATION

Section 75 of the Pensions Act 1995 broadly provides that, if a DB scheme winds-up in deficit, a debt is due from the employer to the trustees. If a scheme winds up with a solvent employer, recent Regulations have increased the potential level of this debt to the amount required to buy all members' benefits out in full. An employer debt also arises if contributions due under a schedule of contributions remain unpaid.

However, although trustees are not obliged by the legislation to enforce a statutory debt, they may be in breach of their general fiduciary duties as trustees if they do not do so.

3 WHAT STEPS DOES OPRA EXPECT TRUSTEES TO TAKE?

Trustees thinking of compromising an employer debt will need to weigh up a number of competing factors, such as the members' interests and the likelihood of the employer's survival. As trustees should "negotiate the best settlement they can to protect members' interests", Opra will expect them to take certain key steps. These include:

- Taking appropriate advice – as well as actuarial and investment advice, Opra advocates that trustees seek specialist advice from an

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investigating accountant or insolvency expert to assess the employer's financial circumstances.

- Avoiding conflicts of interest – this may involve a “conflicted” trustee opting out of a decision or the trustees looking to an independent trustee for help.
- Looking at all available options – for example, deferring the winding-up of the scheme if the employer's financial outlook looks likely to improve or, in an on-going scheme, stopping (or exceptionally reducing or restricting) future benefit accrual.
- Being assertive in negotiations – Opra views trustees as “the champions of member rights” and so they should not simply accept the employer's assertions. Update 7 suggests that trustees will be “more effective in ... negotiations” if they obtain the right professional advice. Trustees should keep records to demonstrate what actions they have taken.
- Considering the possibility of obtaining “additional contributions from other employers in a group”.

4 DO COMPROMISES NEED TO BE REPORTED?

Opra wants to know about inappropriate compromises before they are entered into. Opra therefore regards compromise agreements relating to schemes in wind-up as “amber” reporting scenarios. This means that statutory whistleblowers (namely, the scheme actuary and auditor) will need to decide whether or not to make a report to Opra. Voluntary whistleblowers (such as scheme trustees) may also need to do likewise. Opra Notes 1 and 6 provide guidance on this.

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However, if outstanding contributions are to be compromised in an on-going scheme, Opra will require trustees to make a report in advance and to explain why the compromise is beneficial to members.

5 CONCLUSION

Opra says that it may appoint an independent trustee to deal with a compromise (or to consider the alternatives) where it does not believe that the scheme trustees "have the knowledge, ability or willingness to act in a proper manner". In addition, amendments being introduced under the Pensions Bill will potentially allow the new Pensions Regulator to undo any compromise agreements reached since 11 June 2003. In practice, therefore, it now seems likely that Opra (and ultimately the new Pensions Regulator) will need to be made aware of, and will become involved in, many compromises before they go ahead.