

# alert

## **“WHISTLEBLOWING” – THE DUTY TO REPORT BREACHES**

### **1 BACKGROUND**

Viewed by the Pensions Regulator (TPR) as a “vital part of the regulatory framework”, the new “whistleblowing” requirements under the Pensions Act 2004 (PA 2004) came into force on 6 April 2005. The provisions of PA 2004 are supplemented by a TPR code of practice and supporting guidance (published this week).

The whistleblowing duty covers the duty to report material breaches of the law relating to occupational and personal pension schemes (including stakeholder schemes) in writing to TPR. Crucially, from 6 April 2005, the responsibility for reporting breaches falls upon a significantly expanded group, including trustees, scheme managers, administrators, certain professional advisers (including lawyers) and employers (reporters)<sup>1</sup>. It is therefore essential that all reporters have a procedure in place for dealing with this new responsibility.

### **2 THE SCOPE OF THE DUTY**

Given that the whistleblowing duty is designed to help TPR to fulfil its regulatory responsibilities, the duty is deliberately framed in broad terms and is intended to override “any other duties a reporter may have such as confidentiality”<sup>2</sup>. It encompasses breaches of any legislation or rule of law “relevant to the administration of a scheme”. This includes pensions law, trust law and relevant court decisions. TPR also takes an extensive view of “administration” for this purpose, regarding it as comprising issues such as funding and investment and “anything which could potentially affect members’ benefits”.

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<sup>1</sup> Under the Pensions Act 1995, the compulsory whistleblowers were limited to the scheme actuary and scheme auditor

<sup>2</sup> The duty of legal advisers to report breaches is subject to considerations of legal privilege

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When deciding whether to report a breach, reporters will need to make two key judgements:

- **Is there reasonable cause to believe there has been a breach of the law?** – this means more than "merely having a suspicion that cannot be substantiated" but the code is clear that there is no requirement or expectation for reporters to "search for breaches". The emphasis is on the need to be "alert" and to carry out checks when appropriate.
- **If so, is it likely to be of material significance to TPR?** - the code identifies four factors which together will help identify whether this is the case: (i) the cause of the breach; (ii) the effect of the breach; (iii) the reaction to the breach; and (iv) the wider implications of the breach.

Not every breach will need to be reported. The supporting guidance<sup>3</sup> is designed to complement the code of practice and gives "examples of hypothetical breach situations". Like its predecessor, Opra, TPR is adopting a traffic light system in the guidance to help set a benchmark against which reporters can consider breaches they come across (see paragraph 3 below).

### **3 THE TRAFFIC LIGHT SYSTEM**

Set out in the supporting guidance to the code, the traffic light system is designed to help potential reporters reach a decision on whether they need to report a breach to TPR.

- **"RED" breach situations**

Red breaches are always "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. Persistent administration failures such as poor record keeping could also amount to a red breach. In addition, a failure by trustees of defined benefit schemes

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<sup>3</sup> The code makes clear that the supporting guidance is illustrative and needs to be read in conjunction with the code

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“to review their investment policy in the light of significant changes to the circumstances of their scheme” (for example, following a bulk transfer or on the commencement of winding-up) would also count as a red breach.

- **“GREEN” breach situations**

Green breaches are not materially significant and so do not have to be reported (but they should still be recorded – see paragraph 4 below). An example of a green breach would be occasional administrative lapses “in an otherwise well-run scheme”.

- **“AMBER” breach situations**

Amber breaches are the grey areas with the decision whether or not to report requiring a “balanced judgement based on the breach’s cause, its effect, the reaction of trustees and others to it and any wider implications it may have”. Examples include several green breaches within a short period “effectively stemming from a single cause”. Another possible example is where benefits for some scheme members have been calculated incorrectly.

## **4 REPORTING (AND RECORDING) PROCEDURE**

TPR expects all potential reporters to have procedures in place (and for staff to have adequate training) to enable them to identify, evaluate and report relevant breaches. Where a report is not made records should still be retained as past breaches may help to inform future reporting decisions (for example, by changing a future “green” breach to an “amber” breach).

Where a scheme has individual trustees (as opposed to a trustee company in place) the reporting responsibility rests with each individual trustee. Although TPR accepts that trustees (often with their advisers) will wish to make a collective report, TPR is keen to ensure that this does not slow the reporting process down. It will therefore still expect a report “if there is insufficient time to agree a collective approach”.

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The code also recognises the potential for duplicate reports because a reporter's duty "is not automatically discharged by another party reporting the breach". Concerned that the ultimate cost of duplicate reports will be borne by scheme members or employers, having received a report, TPR will issue an acknowledgement to the original reporter. If the trustees were not responsible for the original report, copies of that document together with the acknowledgement should be passed to them. In turn, the trustees can then forward this information to other would-be reporters.

But any reporters with additional information will still need to report.

### **5 TIMING OF REPORTS**

PA 2004 requires reports to be made "as soon as reasonably practicable". In practice, this should be assessed by reference to the particular breach in question, having carried out any necessary checks<sup>4</sup>. For example, the more serious the breach (such as fraud) the greater the threat to members and the more urgent the need to report (an almost instant report would probably be required here).

### **6 FAILURE TO REPORT**

Codes of practice published by TPR are not legally binding and there is no penalty for failure to comply as such (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) whenever relevant "to what is being decided".

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<sup>4</sup> In potential cases of dishonesty, the code warns reporters against carrying out checks "which might alert those implicated"

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## **7 CONCLUSION**

The code of practice and supporting guidance make compulsive reading for any potential reporters. Copies of both documents, together with a standard format for reporting, can be found on TPR's website at:

<http://www.thepensionsregulator.gov.uk/>

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