

Reporting Breaches of the Law

Updated 19 July 2007

In force from:	6 April 2005
Purpose of Code of Practice:	To help trustees and others to identify which breaches of the law should be reported to the Pensions Regulator and those which need not be reported
Applies to:	Occupational and personal pension schemes (including stakeholder schemes)
Imposes duties on:	<ul style="list-style-type: none"> • Trustees and their advisers and service providers (including those carrying out tasks such as administration or fund management) • Managers of Schemes not set up under trust • Employers sponsoring or participating in work-based pension schemes
Requirements:	To report breaches of the law that are likely to be of material significance to the Regulator
Maximum penalties for non-compliance:	Fines of up to £5,000 for individuals or £50,000 for corporate bodies

Introduction

The Pensions Act 2004 modified the “whistleblowing” requirements of the Pensions Act 1995 with effect from 6 April 2005. The Code of Practice “Reporting breaches of the law” sets out the Pensions Regulator’s interpretation of what needs to be done to comply with the legal requirements.

Who has a duty to report?

In relation to occupational pension schemes, the legal duty to report falls on:

- **Trustees** – The duty applies to each individually-appointed trustee. If the trustee is a corporate body, the duty falls on the trustee company.
- **Persons otherwise involved in the administration of a scheme** – This covers all those who provide services to the trustees that relate to administration and management. These include:
 - insurance companies and third party administrators;
 - an employer who provides staff to carry out administration tasks in-house (includes performing payroll and similar functions as well as carrying out or helping with direct administration); and
 - independent financial advisers and consultants who provide services relating to administration, such as record-keeping, or acting as an intermediary, receiving and forwarding scheme documents and other materials.
- **Participating employers** – This extends to insolvency practitioners who continue to employ scheme members. (For multi-employer schemes the duty falls on employers regardless of whether the breach relates to, or affects, their employees.)
- **“Professional advisers” appointed by the trustees** – This includes scheme actuaries, scheme auditors, legal advisers, fund managers and custodians of scheme assets. When a firm, rather than an individual, is appointed to provide services, the duty applies to the firm.

- **Persons otherwise involved in advising the trustees** – This applies to other firms (or individuals where the appointments are personal) providing advice to the trustees and includes:
 - independent financial advisers, pensions consultants and investments consultants;
 - actuaries and auditors engaged to provide advice to the trustees other than would cause them to be classed as “professional advisers”.

A reporter may have more than one role in relation to the scheme. In this case reporters are expected to apply their wider knowledge of the scheme in judging whether a matter is likely to be of material significance to the Regulator. Where appropriate, they are expected to report irrespective of the function they were performing when the breach was identified.

Systems and Training

Firms are expected to ensure their staff are adequately trained to a level commensurate with their roles. In particular, the staff of a firm appointed to provide advice or services that carries a reporting duty should be trained to recognise potentially reportable situations.

Firms should put adequate systems in place to ensure their staff are aware of their responsibilities and are familiar with reporting procedures.

Protection and confidentiality

The duty to report overrides any other duties a reporter may have, such as confidentiality, and any such duty is not breached by making a report. However, communications between a professional legal adviser and their client, or any person representing that client, do not have to be disclosed if the client is obtaining legal advice or if the discussion is in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings (i.e. “legal privilege” is not overruled).

The Employment Rights Act 1996 (ERA) provides protection for employees making a report. Where individuals employed by firms having a duty to report disagree with a decision not to report, they may have protection under the ERA if they make an individual report in good faith. (The Regulator expects these reports to be rare and confined to the most serious cases.)

If requested, the Regulator will seek to protect the identity of reporters, but this is not guaranteed. Even if the reporter’s name is not explicitly revealed, it may become apparent in the course of an investigation.

Requirement to make a report

The requirement to report breaches of the law arises when a person has reasonable cause to believe a duty that is:

- imposed by or by virtue of an enactment or rule of law (which includes trust and common law); and
- relevant to the administration of a scheme (in the widest sense)

has not been or is not being complied with, and the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions.

Not every breach has to be reported, as the Regulator’s intention is to take a risk-based approach.

A written report of the matter must be given to the Regulator as soon as reasonably practicable.

The decision to report

When deciding whether to make a report, two key judgements are required:

- 1) Is there a reasonable cause to believe there has been a breach of law?
- 2) If so, does the reporter believe the breach is likely to be of material significance to the Pensions Regulator?

“*Reasonable cause to believe*” means more than just merely having a suspicion that cannot be sustained. Where the reporter does not know the facts or events around the suspected breach, it will usually be appropriate to check with the trustees, or with others who are in a position to confirm what has happened.

If the reporter is unclear about the relevant legal provision, they should clarify their understanding of the law to the extent necessary to form a view as to whether there has actually been a breach.

In establishing whether there is reasonable cause to believe a breach has occurred, it is not necessary for a reporter to gather all the evidence that the Regulator would require before taking action.

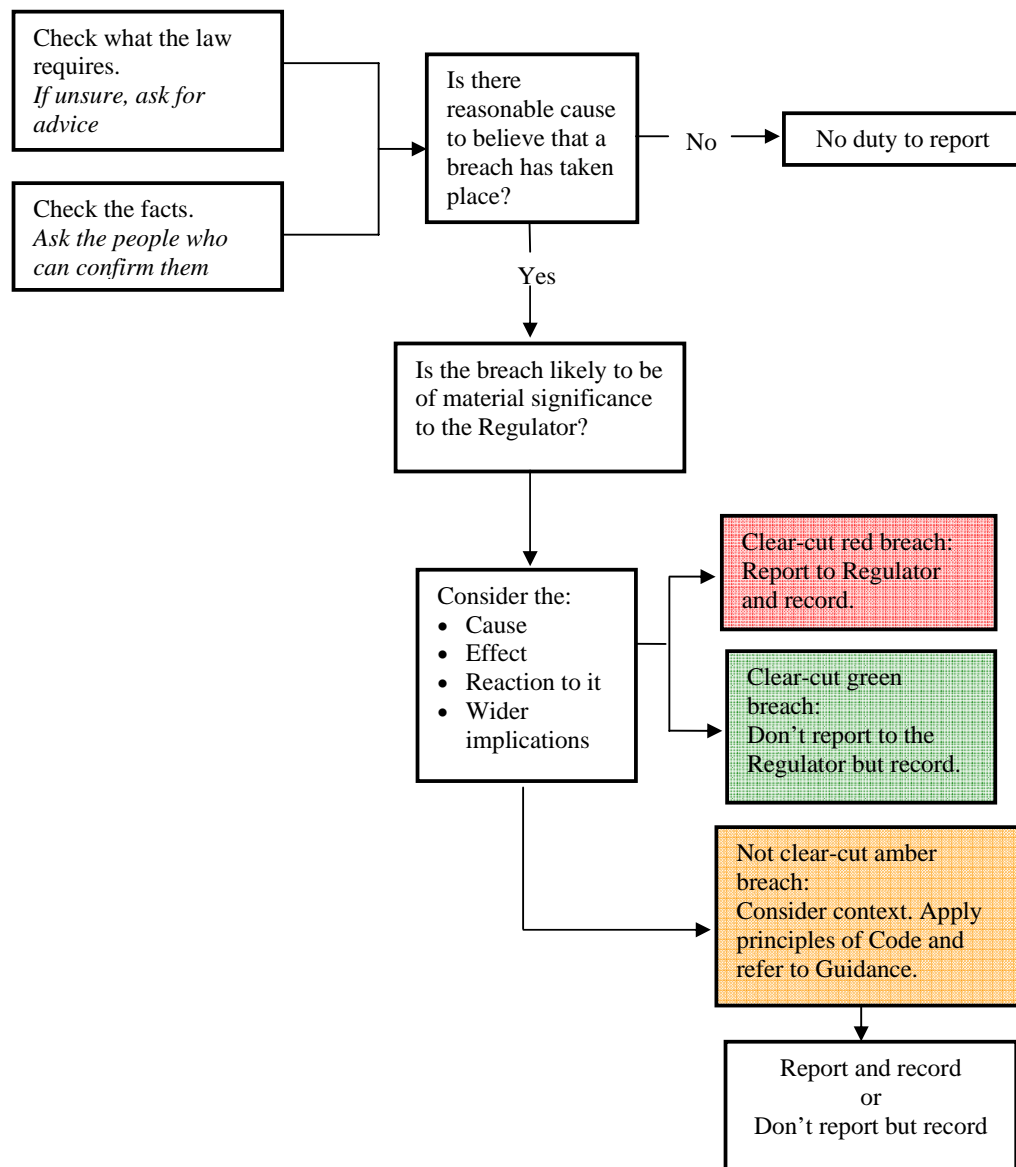
The steps taken to come to a decision of whether or not to report are summarised in Figure 1, which uses the Regulator’s “traffic light” framework (see below).

Whether a breach is “likely to be of material significance” depends on:

- a) The cause of the breach
- b) The effect of the breach
- c) The reaction to the breach
- d) The wider implications of the breach.

When reaching a decision to report, the reporter should consider these points together.

Figure 1: Deciding whether to report



The traffic light framework

The Regulator's Guidance sets out a traffic light framework to help reporters decide whether a breach is likely to be of material significance. It suggests examples of red, green and amber breach situations that provide benchmarks against which reporters can judge breaches they come across.

- Red breach situations are always of material significance and should be reported.
- Green breach situations are not of material significance and should not be reported.
- Amber breach situations are less clear cut; a reporter must take into account the context of the breach in order to decide whether it is of material significance and should be reported.

See Box 1 for details.

Box 1: Traffic light framework

Red breach situations – these should be reported

A breach is in the red category if:

- it was caused by dishonesty, poor scheme governance, poor advice or by a deliberate contravention of the law;
- its effect is significant;
- inadequate steps are being taken to put matters right; or
- it has wider implications.

Amber breach situations – consider context of the breach

A breach in this category does not fall obviously into the red or green classification. The decision whether or not to report will require 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. In this context, other previous reported or unreported breaches will be relevant in deciding whether a contributory cause of the breach is lack of adequate oversight or controls on the part of the trustees.

Green breach situations – these should not be reported

A breach is in the green category if:

- it was not caused by dishonesty, poor scheme governance, poor advice or by a deliberate contravention of the law;
- its effect is not significant;
- adequate steps are being taken to put matters right; and
- it does not have wider implications.

How soon should a report be made after a breach is identified?

If there is reasonable cause to believe a breach has occurred and it is of material significance, it must be reported as soon as reasonably practicable. What is reasonably practicable depends on the circumstances, while the time taken should reflect the seriousness of the suspected breach.

Where there is immediate risk to scheme assets, the payment of members' benefits, or where there is any indication of dishonesty, reporters are not expected to seek an explanation or to assess the effectiveness of proposed remedies, but only to make such immediate checks as are necessary. The more serious the potential breach and its consequences, the more urgently these necessary checks should be made.

For potential dishonesty, the reporter should avoid, where possible, checks that might alert those implicated.

In serious cases reporters should consider contacting the Regulator by the quickest means possible.

Identification of breaches

There is no requirement or expectation reporters should search for breaches.

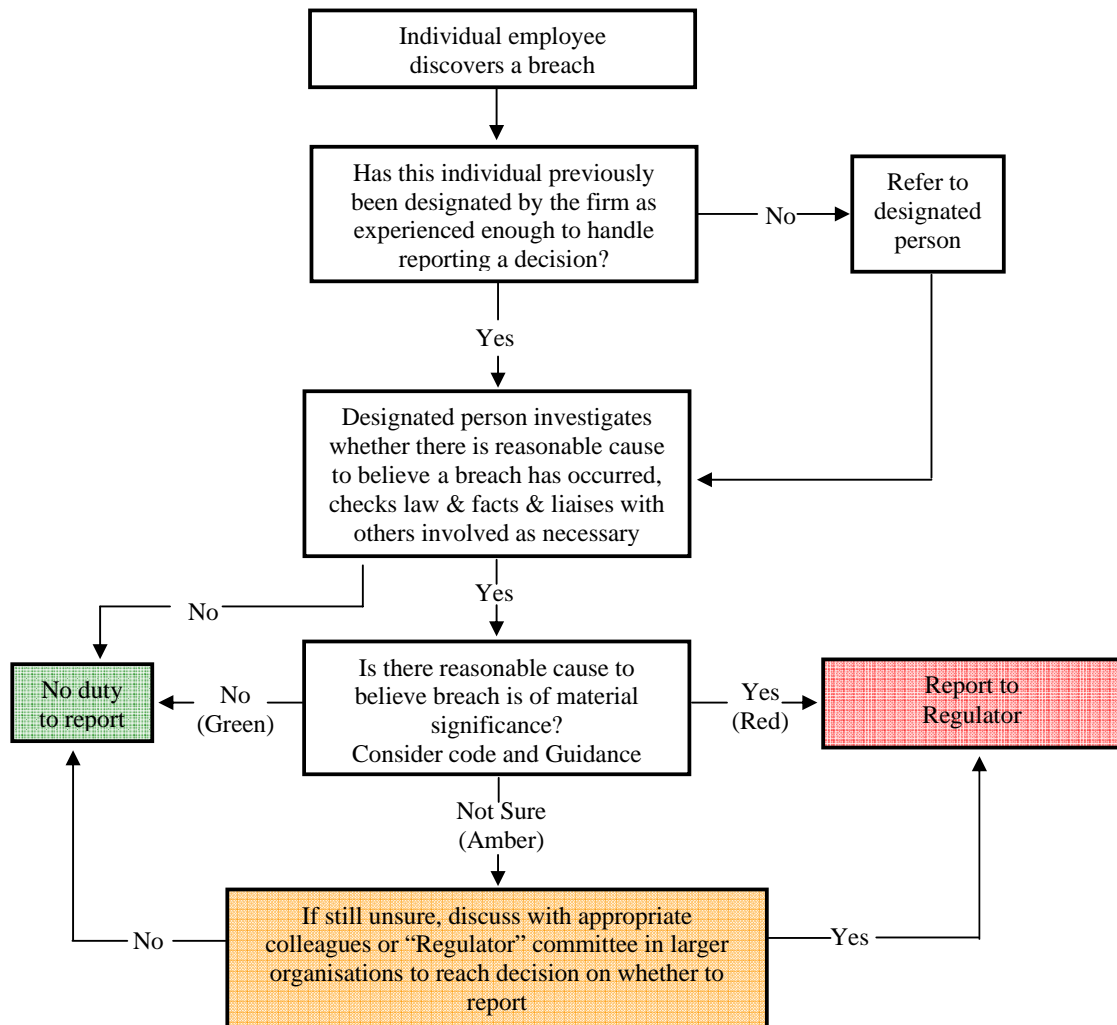
Reporters should be alert to breaches relevant to the services they are providing in relation to the scheme. However, there are some breaches all reporters should be alert to, in particular any dishonest behaviour.

All reporters should have effective arrangements in place to identify breaches that occur in areas relating to their functions. This should enable them to evaluate and if appropriate report any breaches of which they become aware.

If possible breaches are identified that do not relate to their functions, reporters should still follow the usual steps and consider reporting. If in doubt, reporters should seek input from others having the necessary expertise.

All reporters should establish a procedure for evaluating matters quickly to determine whether a breach has occurred and, if it has, whether it is likely to be of material significance to the Regulator. The nature of the arrangements is a matter for the reporter and should be conducive both to staff raising concerns and to the objective consideration of those concerns. A possible process is set out in Figure 2.

Figure 2: Example of procedure for determining whether a breach has occurred



Collective reporting

The Regulator accepts that often trustees, together with one or more of their advisers or other groups, may wish to make a collective report.

Where the trustee is not a corporate body, the duty to report falls on the individual trustees rather than on the board of trustees. If a consensus cannot be reached, or if there is insufficient time to agree a collective approach, the individuals will be expected to report.

Duplicate reporting

The requirement to report applies to all those subject to the reporting duty who become aware of a breach; it is not automatically discharged by another party reporting the breach.

However, once aware of a particular breach, the Regulator does not regard that breach as being of material significance for the purpose of making further reports under the requirement to report breaches of the law. An exception is where another reporter has additional or different information about that breach or the circumstances relating to it.

The person coming across the breach should make the report. The Regulator will send an acknowledgement to the reporter. The report (if not previously sent) and the acknowledgement should be sent by the reporter to the trustees.

The trustees will be able to copy the original report and its acknowledgement to anyone else who they consider may also be likely to come across the breach.

This arrangement is not intended to replace dialogue between trustees or managers and their advisers or service providers. When notified of a breach, trustees may want to discuss matters with these groups. They will want to determine the best way to get things put right and may also want to discuss whether or not a report is needed. Indeed, trustees should require their advisers to alert them when things appear to be going wrong (except where there is a suspicion of dishonesty or other serious wrongdoing by the trustees) and should ensure they are kept informed about matters affecting their scheme.

Making a report

Reports must be submitted in writing. Reporters should wherever practicable use the standard form available on the Regulator's website – www.thepensionsregulator.gov.uk

Reports can be sent by post or electronically, including by email or by fax.

Urgent reports should be marked as such, and attention should be drawn to matters considered particularly serious by the reporter. A written report can be preceded by a telephone call if appropriate.

A reporter should ensure they receive an acknowledgement in respect of any report they send. Only when an acknowledgement of receipt is received by the reporter can they be confident the Regulator has received their report.

Follow up

The Regulator will acknowledge all reports within five working days of receipt.

A reporter will not generally be kept informed of the steps the Regulator takes in response to a report of a breach, because there are restrictions on the information it can disclose. Further information or reports of further breaches should, however, be provided by the reporter, if this may assist the Regulator in exercising its functions. The Regulator may in any case make contact to request further information.

Failure to report

Failure to comply with a duty to report breaches of the law without "reasonable excuse" is a civil offence.

To decide whether the reporter has a 'reasonable excuse' for not reporting as required, or for reporting a breach later than the Regulator would have expected, the Regulator will look at:

- the legislation, case law, the "Reporting breaches of the law" Code of Practice and any guidance issued by the Regulator;
- the role of the reporter in relation to the scheme;
- the training provided to the individual or staff, and the level of knowledge it would be reasonable to expect that individual or those staff to have;

- the procedures put in place to identify and evaluate breaches and whether these procedures had been followed;
- the seriousness of the breach and therefore how important it was to report it without delay;
- any reasons for the delay in reporting;
- any other relevant considerations relating to the case in question.

A reporter who, without reasonable excuse, fails to comply with a duty to report a breach may be fined up to £5,000 in the case of an individual and £50,000 for corporate bodies.

The Regulator may, in addition, where it considers it appropriate to do so, make a complaint to the reporter's professional or other governing body.

The Regulator's response to a report

When the Regulator receives a report of a breach it has discretion over whether to take action and, if so, what action to take.

The measures the Regulator can take include:

- assisting or instructing trustees and others to achieve compliance;
- providing education or guidance;
- appointing trustees to help run the scheme;
- removing trustees from office;
- freezing the scheme;
- imposing special measures where the scheme-specific funding requirements are not complied with (e.g. issuing a direction as to the method and assumptions to be used to calculate the scheme's "technical provisions" or imposing a schedule of contributions);
- ordering that the scheme's funding position be restored to the level before a breach or other detrimental event occurred; and
- imposing fines where appropriate.

Comments

The duty to report breaches of the law extends much wider under the provisions of the 2004 Pensions Act than it did when first introduced in 1997 by the 1995 Pensions Act. Trustees, in particular, now have a duty to report whereas previously the duty fell primarily on the Scheme Actuary and the Scheme Auditor.

The new system is more risk-based than that introduced in 1997 and requires less form-filling, which is welcome. However, it does require trustees to ensure procedures are in place to enable them to identify breaches.

To be able to identify breaches when they come across them, trustees need to be familiar with the laws that apply to pension schemes. This, of course, is central to the Trustee Knowledge & Understanding (TKU) requirements, also introduced by the 2004 Pensions Act (see our [In Focus](#)).