

## Chapter 5

# Reports by skilled persons



5.3 Policy on the use of skilled persons

- 5.3.1

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The appointment of a *skilled person* to produce a report under section 166 of the *Act* (Reports by skilled persons) is one of the *FCA's* regulatory tools. The tool may be used:

  - (1) for diagnostic purposes, to identify, assess and measure risks;
  - (2) for monitoring purposes, to track the development of identified risks, wherever these arise;
  - (3) in the context of preventative action, to limit or reduce identified risks and so prevent them from crystallising or increasing; and
  - (4) for remedial action, to respond to risks when they have crystallised.
- 5.3.1A

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■ SUP 5 Annex 1 gives examples of circumstances in which the *FCA* may use the *skilled persons* tool.
- 5.3.2

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The decision by the *FCA* to require a report by a *skilled person* under section 166 of the *Act* (Reports by skilled persons) will normally be prompted by a specific requirement for information, analysis of information, assessment of a situation, expert advice or recommendations or by a decision to seek assurance in relation to a regulatory return. It may be part of the risk mitigation programme applicable to a *firm*, or the result of an event or development relating or relevant to a *firm*, prompted by a need for verification of information provided to the *FCA* or part of the *FCA's* regular monitoring of a *firm*.
- 5.3.2A

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The decision by the *FCA* to require the collection or updating of information by a *skilled person* under section 166A of the *Act* (Appointment of skilled person to collect and update information) will be prompted where the *FCA* considers there has been a breach of a requirement by a *firm* to collect, and keep up to date, information of a description specified in the *FCA's rules*.
- 5.3.3

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When making the decision to require a report by a *skilled person* under section 166 (Reports by skilled persons) or the collection or updating of information by a *skilled person* under section 166A (Appointment of skilled person to collect and update information) of the *Act*, the *FCA* will have regard, on a case-by-case basis, to all relevant factors. Those are likely to include:

  - (1) circumstances relating to the *firm*;

- (2) alternative tools available, including other statutory powers;
- (3) legal and procedural considerations;
- (4) the objectives of the *FCA's* enquiries;
- (5) cost considerations; and
- (6) considerations relating to the *FCA's* resources.

■ SUP 5.3.4 G to ■ SUP 5.3.10 G give further guidance on these listed factors.

#### **Circumstances relating to the firm**

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The *FCA* will have regard to circumstances relating to the *firm*, for example:

- (1) attitude of the *firm*: whether the *firm* is being cooperative;
- (2) history of similar issues: whether similar issues have arisen in the past and, if so, whether timely corrective action was taken;
- (3) quality of a *firm's* systems and records: whether the *FCA* has confidence that the *firm* has the ability to provide the required information;
- (4) objectivity: whether the *FCA* has confidence in the *firm's* willingness and ability to deliver an objective report;
- (5) conflicts of interest: whether the subject matter of the enquiries or the report involves actual or potential misconduct and it would be inappropriate for the *FCA* to rely on the *firm* itself to enquire into the matter; and
- (6) knowledge or expertise available to the *firm*: whether it would be appropriate to involve a third party with the required technical expertise.

#### **Alternative tools available, including other statutory powers**

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The *FCA* will have regard to alternative tools that may be available, including for example:

- (1) obtaining what is required without using specific statutory powers (for example, by a visit by staff of the *FCA* or a request for information on an informal basis);
- (2) requiring information from *firms* and others, including authorising an agent to require information, under section 165 of the *Act* (Power to require information);
- (3) appointing investigators to carry out general investigations under section 167 of the *Act* (Appointment of investigator in general cases) (see ■ EG 3 for the *FCA* policy on the use of this power); and
- (4) appointing investigators to carry out investigations in particular cases under section 168 of the *Act* (Appointment of investigator in specific cases) (see ■ EG 3 for the *FCA's* policy on the use of this power).

## Legal and procedural considerations

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The *FCA* will have regard to legal and procedural considerations including:

- (1) statutory powers: whether one of the other available statutory powers is more appropriate for the purpose than the power in section 166 (Reports by skilled persons) or section 166A (Appointment of skilled person to collect and update information) of the *Act*;
- (2) subsequent proceedings: whether it is desirable to obtain an authoritative and independent report for use in any subsequent proceedings; and
- (3) application of the *Handbook rules*: whether it is important that the relevant *rules* in the *Handbook* should apply, for example ■ SUP 5.5.1 R which obliges the *firm* to require and permit the *skilled person* to report specified matters to the *FCA*.

## The objectives of the *FCA's* enquiries

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The *FCA* will have regard to the objectives of its enquiries, and the relative effectiveness of its available powers to achieve those objectives. For example:

- (1) historic information or evidence: if the objectives are limited to gathering historic information, or evidence for determining whether enforcement action may be appropriate, the *FCA's* information gathering and investigation powers under sections 165 (Power to require information), 167 (Appointment of investigator in general cases) and 168 (Appointment of investigator in specific cases) of the *Act* are likely to be more appropriate than the power in section 166 (Reports by skilled persons) or section 166A (Appointment of skilled person to collect and update information) of the *Act*; and
- (2) expert analysis or recommendations: if the objectives include obtaining expert analysis or recommendations (or both) for diagnostic, monitoring, preventative or remedial purposes, the section 166 power (Reports by skilled persons) may be an appropriate power to use, instead of, or in conjunction with, the *FCA's* other available powers.

## Cost considerations

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In accordance with its general policy the *FCA* will have regard to the question of cost, which is particularly pertinent in relation to *skilled persons* because:

- (1) if the *FCA* uses the section 166 power (Reports by skilled persons) or the section 166A power (Appointment of skilled person to collect and update information), either the *firm* will appoint, and will have to pay for the services of, the *skilled person*, or the *FCA* will appoint, and will require under ■ FEES 3.2.7 R (zp) or ■ FEES 3.2.7 R (zq) that the relevant *firm* pays for the services of, the *skilled person*;
- (2) if the *FCA* uses its other information gathering and investigation powers, it will either authorise or appoint its own staff to undertake the information gathering or investigation (or both), or it will pay for

the services of external competent persons to do so; in either case the costs will be recovered under the *FCA's* general fee scheme.

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In having regard to the cost implications of using the section 166 power (Reports by skilled persons) or the section 166A power (Appointment of skilled person to collect and update information) alternative options (such as visits) or other powers, the *FCA* will take into account relevant factors, including:

- (1) whether the *firm* may derive some benefit from the work carried out and recommendations made by the *skilled person*, for instance a better understanding of its business and its risk profile, or the operation of its information systems, or improvements to its systems and controls;
- (2) whether the work to be carried out by the *skilled person* is work that should reasonably have been carried out by the *firm*, or by persons instructed by the *firm* on its own initiative; for instance a compliance review or the development of new systems;
- (3) whether the *firm's* record-keeping and management information systems are poor and:
  - (a) the required information and *documents* are not readily available; or
  - (b) an analysis of the required information cannot readily be performed without expert assistance;
- (4) whether the *firm* appears to have breached requirements or standards under the *regulatory system* or otherwise put the interests of consumers at risk, and it is unable or unwilling to review and remedy the matters of concern, or the *FCA* considers that it cannot rely on the *firm* to do so; and
- (5) the perceived probability and seriousness of possible breaches of regulatory requirements and the possible need for further action.

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Considerations relating to FCA resources

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The *FCA* will have regard to *FCA*-related considerations including:

- (1) *FCA* expertise: whether the *FCA* has the necessary expertise; and
- (2) *FCA* resources: whether the resources required to produce a report or to make enquiries or to appoint a *skilled person* itself are available within the *FCA*, or whether the exercise will be the best use of the *FCA's* resources at the time.