

Chapter 5

Reports by skilled persons

5.1 Application and purpose

Application

- 5.1.1** **R** (1) This chapter applies to every *firm*.
- (2) The *rules*, and the *guidance on rules* in ■ SUP 5.5 (Duties of firms), do not apply to a *UCITS qualifier*.
- 5.1.1A** **R** In respect of the *FCA's power* in section 166 of the *Act* (Reports by skilled persons), reference to a *firm* in ■ SUP 5.5.1 R, ■ SUP 5.5.5 R and ■ SUP 5.5.9 R includes a *recognised investment exchange*.
- 5.1.1B** **G** In respect of the *FCA's power* in section 166 of the *Act* (Reports by skilled persons), the *guidance* in this chapter applies to a *recognised investment exchange* in the same way as it applies to a *firm*.
- 5.1.1C** **D** ■ SUP 5.5.1R and ■ SUP 5.5.5R apply to *CBTL firms* in relation to their *CBTL business* as if a reference to *firm* in these *rules* were a reference to a *CBTL firm* and a reference to section 166 of the *Act* were a reference to section 166 of the *Act*, as applied by article 23(2)(b) of the *MCD Order*.
- 5.1.1D** **G** ■ SUP 5.5.1R and ■ SUP 5.5.5R apply to former *CBTL firms* in relation to their *CBTL business* as guidance and as if:
- (1) a reference to *firm* in those *rules* were a reference to a *CBTL firm*;
 - (2) section 166 of the *Act* were a reference to section 166 of the *Act* as applied by article 23(2)(b) of the *MCD Order*; and
 - (3) the word “must” were replaced by the word “should”.
- 5.1.1E** **G** The *guidance* in ■ SUP 5.2.1G, ■ SUP 5.3, ■ SUP 5.4 (except ■ SUP 5.4.1AG), and ■ SUP 5.5 (except ■ SUP 5.5.10G and ■ SUP 5.5.11G) applies to *CBTL firms* and former *CBTL firms* in relation to their *CBTL business* as if:
- (1) a reference to *firm* in that *guidance* included a *CBTL firm*;
 - (2) a reference to a section of the *Act* were a reference to that section as applied by article 23 of the *MCD Order* if applicable; and

- (3) a reference to the *FCA's* functions under the *Act* were a reference to the *FCA's* functions under Part 3 of the *MCD Order*.

5.1.2

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This chapter (other than the *rules*, and *guidance on rules*, in ■ SUP 5.5 (Duties of firms)) is also relevant to certain unauthorised *persons* within the scope of section 166 of the *Act* (Reports by skilled persons) (see ■ SUP 5.2.1 G).

5.1.2A

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- (1) This chapter also applies, as guidance, to a *designated bank*, *designated credit reference agency* or a *designated finance platform*:
- (a) in relation to its activities under the *Small and Medium Sized Business (Credit Information) Regulations* or in relation to its activities under the *Small and Medium Sized Business (Finance Platforms) Regulations*, as the case may be;
 - (b) as if, in relation to the activities in (a), references to “must” in ■ SUP 5 were read as “should”; and
 - (c) where it is not a *firm*, as if it were a *firm*.
- (2) Regulation 26 of the *Small and Medium Sized Business (Credit Information) Regulations* applies Part 11 of the *Act* which includes the provisions concerning skilled persons in relation to activities of a *designated bank* or a *designated credit reference agency* under those Regulations. Regulation 23 of the *Small and Medium Sized Business (Finance Platforms) Regulations* has the same effect in relation to a *designated bank* under those Regulations or a *designated finance platform*.
- (3) In relation to a *designated bank* or a *designated credit reference agency*, a reference in this chapter to the *regulatory system* includes the requirements applicable to such a *person* set out in the *Small and Medium Sized Business (Credit Information) Regulations*. In relation to a *designated finance platform* or a *designated bank*, a reference in this chapter to the *regulatory system* includes the requirements applicable to such a *person* set out in the *Small and Medium Sized Business (Finance Platforms) Regulations*.
- (4) The application of section 166 by regulation 26 of the *Small and Medium Sized Business (Credit Information) Regulations* or by regulation 23 of the *Small and Medium Sized Business (Finance Platforms) Regulations* does not include the *persons* set out in section 166(11). Therefore, any reference to those *persons* in this chapter does not apply in relation to a *designated bank*, *designated credit reference agency* or a *designated finance platform*.
- (5) In relation to an appointment under section 166A as applied by the *Small and Medium Sized Business (Credit Information) Regulations* or the *Small and Medium Sized Business (Finance Platforms) Regulations*, any reference in this chapter to a breach of rules concerning collecting and keeping up-to-date information is a reference to contravention of the requirement under regulation 24 of the *Small and Medium Sized Business (Credit Information) Regulations* or under regulation 23 of the *Small and Medium Sized Business (Finance Platforms) Regulations*, as the case may be.

Purpose

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The purpose of this chapter is to give *guidance* on the *FCA's* use of the power in section 166 (Reports by skilled persons) and section 166A (Appointment of skilled person to collect and update information) of the *Act*. The purpose is also to make *rules* requiring a *firm* to give assistance to a *skilled person* and, where a *firm* is required to appoint a *skilled person*, to include certain provisions in its contract with a *skilled person*. These *rules* are designed to ensure that the *FCA* receives certain information from a *skilled person* and that a *skilled person* receives assistance from a *firm*.



5.2 The FCA's power

Who may be required to provide a report?

5.2.1

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Under section 166 of the *Act* (Reports by skilled persons), the *FCA* may, by giving a written notice, itself appoint a *skilled person* to provide it with a report, or require any of the following *persons* to provide it with a report by a *skilled person*:

- (1) a *firm*; or
- (2) any other *member* of the *firm's group*; or
- (3) a *partnership* of which the *firm* is a *member*; or
- (4) a *person* who has at any relevant time been a *person* falling within (1), (2) or (3);

but only if the *person* is, or was at the relevant time, carrying on a business.

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Under section 166A of the *Act* (Appointment of skilled person to collect and update information), the *FCA* may require a *firm* to appoint, or itself appoint, a *skilled person* to collect or update information.

5.3 Policy on the use of skilled persons

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

5.3.4

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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

5.3.6

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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.

5.3.9

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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.



5.4 Appointment and reporting process

Scope of report

- 5.4.1** G Where the *FCA* requires a report by a *skilled person* under section 166 of the *Act* (Reports by skilled persons), the *FCA* will send a notice in writing requiring the *person* in ■ SUP 5.2.1 G to provide a report by a *skilled person*, or notifying the *person* in ■ SUP 5.2.1 G in writing of the *FCA*'s appointment of a *skilled person* to provide a report, on any matter if it is reasonably required in connection with the exercise of its functions conferred by or under the *Act*. The *FCA* may require the report to be in whatever form it specifies in the notice.
- 5.4.1A** G Where the *FCA* requires the updating or collection of information by a *skilled person* under section 166A of the *Act* (Appointment of skilled person to collect and update information), the *FCA* will send a notice in writing requiring the *firm* to appoint a *skilled person*, or notifying the *firm* of the *FCA*'s appointment of a *skilled person*, to collect or update the relevant information.
- 5.4.2** G As part of the decision making process the *FCA* will normally contact the *person* in ■ SUP 5.2.1 G or in ■ SUP 5.2.2 G to discuss its needs before finalising its decision to require a report or the updating or collection of information by a *skilled person*. This will provide an opportunity for discussion about the appointment, whether an alternative means of obtaining the information would be better, what the scope of a report should be, who should be appointed, who should appoint, and the likely cost.
- 5.4.3** G The *FCA* will give written notification to the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G of the purpose of the report or collection or updating of information, its scope, the timetable for completion and any other relevant matters. The *FCA* will state the matters which the report is to contain, or the information which is to be collected or updated, as well as any requirements as to the report's format. For example, a report on controls may be required to address key risks, key controls and the control environment. The *FCA* attaches importance to there being a timetable for each report and to the *skilled person*, with the cooperation of the *person* in ■ SUP 5.2.1 G or the *firm* in ■ SUP 5.2.2 G, as relevant, keeping to that timetable.

5.4.4 **G** The written notification in **■ SUP 5.4.3 G** may be preceded or followed by a discussion of the *FCA's* requirements and the reasons for them. This may involve the *FCA* the *person* in **■ SUP 5.2.1 G** or in **■ SUP 5.2.2 G** and the person who has been, or is expected to be, appointed as the *skilled person*. The *FCA* recognises that there will normally be value in holding discussions involving the *skilled person* at this stage. These discussions may include others if appropriate.

5.4.5 **G** The *FCA* will wish to conduct the discussion with the *firm*, the *skilled person* and any others within a timescale appropriate to the circumstances of the case.

Appointment process

5.4.6 **G** Where the *skilled person* is appointed by the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G**, the *appropriate regulator* will normally seek to agree in advance with the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G** the *skilled person* who will make the report or collect or update the relevant information. The *Act* requires that such *skilled person* be nominated or approved by the *appropriate regulator*:

- (1) if the *appropriate regulator* decides to nominate the *skilled person* who is to make the report or collect or update the information, it will notify the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G** accordingly; and
- (2) alternatively, if the *appropriate regulator* is content to approve a *skilled person* selected by the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G**, it will notify the latter *person* of that fact.

The *appropriate regulator* may give the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G** a shortlist from which to choose.

5.4.7 **G** A *skilled person* must appear to the *FCA* to have the skills necessary to make a report on the matter concerned or collect or update the relevant information. A *skilled person* may be an accountant, lawyer, compliance consultant, *actuary* or *person* with relevant business, technical or technological skills.

5.4.8 **G** When considering whether to nominate, approve or appoint a *skilled person* to make a report or collect or update information, the *FCA* will have regard to the circumstances of the case, including whether the proposed *skilled person* appears to have:

- (1) the skills necessary to make a report on the matter concerned or collect or update the relevant information;
- (2) the ability to complete the report or collect or update the information within the time expected by the *FCA*;
- (3) any relevant specialised knowledge, for instance of the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G**, the type of business carried on by the *person* in **■ SUP 5.2.1 G** or **■ SUP 5.2.2 G**, or the matter to be reported on or information to be collected or updated;

- (4) any professional difficulty or potential conflict of interest in reviewing the matters to be reported on, or the information to be collected or updated, for instance because it may involve questions reflecting on the quality or reliability of work previously carried out by the proposed *skilled person*; and
- (5) enough detachment, bearing in mind the closeness of an existing professional or commercial relationship, to be able to collect or update the information or to give an objective opinion on matters such as:
 - (a) matters already reported on by the *skilled person* (for example, on the financial statements of the *person* in ■ SUP 5.2.1 G or in ■ SUP 5.2.2 G or in relation to their systems and controls); or
 - (b) matters that are likely to be contentious and may result in disciplinary or other enforcement action against the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G, its management, shareholders or *controllers*; or
 - (c) matters that the *skilled person* has been involved in, in another capacity (for example, when a *skilled person* has been involved in developing an information system it may not be appropriate for him to provide a subsequent opinion on the adequacy of the system).

5.4.9 G In appropriate circumstances, it may be cost effective for the *FCA* to nominate or approve the appointment of, or appoint itself, a *skilled person* who has previously acted for, or advised, the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G. For example, the *FCA* may nominate or approve the appointment of, or appoint, the auditor of a *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G to prepare a report or collect or update the information taking into account, where relevant, the considerations set out in ■ SUP 5.4.7 G.

Reporting process

5.4.10 G Where the *skilled person* is appointed by the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G, the *FCA* will normally require the *skilled person* to be appointed to report to the *FCA* through that *person*. In the normal course of events the *FCA* expects that the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G will be given the opportunity to provide written comments on the report or the collection of the relevant information prior to its submission to the *FCA*.

5.4.10A G Where the *skilled person* is to be appointed by the *FCA* itself, the *skilled person* will report directly to the *FCA*.

5.4.11 G The *FCA* may enter into a dialogue with the *skilled person*, and is ready to discuss matters relevant to the report or the collection or updating of the relevant information with that *person*, during the preparation of the report or the collection or updating of the relevant information. Such discussions may involve or be through the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G.

- 5.4.12** **G** The *FCA* will normally specify a time limit within which it expects the *skilled person* to deliver the report or collect or update the relevant information. Where the *skilled person* is appointed by the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G, the *skilled person* should, in complying with its contractual duty under ■ SUP 5.5.1 R, take reasonable steps to achieve delivery by that time. If the *skilled person* becomes aware that the report may not be delivered, or collection or updating of the relevant information may not be, on time, the *skilled person* should inform the *FCA* and the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G as soon as possible. Where the *skilled person* is appointed by the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G, if the *skilled person* becomes aware that there may be difficulties delivering the report or collecting or updating the relevant information within cost estimates, the *skilled person* will no doubt wish to advise the *firm*.
- 5.4.13** **G** The *FCA* may meet with the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G and the *skilled person* together to discuss the final report. The *FCA* may also wish to discuss the final report with the *skilled person* present but without the *person* in ■ SUP 5.2.1 G or ■ SUP 5.2.2 G.

5.5 Duties of firms

Contract with the skilled person

5.5.1

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When a *firm* appoints a *skilled person* to provide a report under section 166 (Reports by skilled persons) or collect or update information under section 166A (Appointment of skilled person to collect and update information) of the *Act*, the *firm* must, in a contract with the *skilled person*:

- (1) require and permit the *skilled person* during and after the course of his appointment:
 - (a) to cooperate with the *FCA* in the discharge of its functions under the *Act* in relation to the *firm*; and
 - (b) to communicate to the *FCA* information on, or the *skilled person's* opinion on, matters of which the *skilled person* has, or had, become aware in the capacity of *skilled person* reporting on the *firm* in the following circumstances:
 - (i) the *skilled person* reasonably believes that, as regards the *firm* concerned (A) there is or has been, or may be or may have been, a contravention of any relevant *requirement* that applies to the *firm* concerned; and (B) that the contravention may be of material significance to the *FCA* in determining whether to exercise, in relation to the *firm* concerned, any functions conferred on the *FCA* by or under any provision of the *Act* other than Part VI (Official Listing); or
 - (ii) the *skilled person* reasonably believes that the information on, or the *skilled person's* opinion on, those matters may be of material significance to the *FCA* in determining whether the *firm* concerned satisfies and will continue to satisfy the threshold conditions; or
 - (iii) the *skilled person* reasonably believes that *firm* is not, may not be or may cease to be a going concern;
- (2) require the *skilled person* to prepare a report or collect or update information, as notified to the *firm* by the *FCA*, within the time specified by the *FCA*; and
- (3) waive any duty of confidentiality owed by the *skilled person* to the *firm* which might limit the provision of information or opinion by that *skilled person* to the *FCA* in accordance with (1) or (2). (See also ■ SUP 5.5.13 G and ■ SUP 5.6)

- 5.5.2 **G** In complying with the contractual duty in ■ SUP 5.5.1 R (1) the *FCA* expects that a *skilled person* appointed by a *firm* under section 166 (Reports by skilled persons) or section 166A (Appointment of skilled person to collect and update information) of the *Act* will cooperate with the *FCA* by, amongst other things, providing information or documentation about the planning and progress of the report and its findings and conclusions, if requested to do so. A *firm* should therefore ensure that the contract it makes with the *skilled person* requires and permits the *skilled person* to provide the following to the *FCA* if requested to do so:
- (1) interim reports;
 - (2) source data, *documents* and working papers;
 - (3) copies of any draft reports given to the *firm*; and
 - (4) specific information about the planning and progress of the work to be undertaken (which may include project plans, progress reports including percentage of work completed, details of time spent, costs to date, and details of any significant findings and conclusions).
- 5.5.3 **G** If the *FCA* is considering asking for the information specified in ■ SUP 5.5.2 G it will take into consideration the cost of the *skilled person* complying with the request, and the benefit that the *FCA* may derive from the information. For example, in most cases, the *FCA* will not need to request a *skilled person* to give it source data, *documents* and working papers. However, the *FCA* may do so when it reasonably believes that this information will be relevant to any investigation it may be conducting, or any action it may need to consider taking against the *firm*.
- 5.5.4 **G** In complying with the contractual duty in ■ SUP 5.5.1 R, the *FCA* expects that, in the case of substantial or complex reports, the *skilled person* will give a periodic update on progress and issues to allow for a re-focusing of the report if necessary. The channel of communication would normally be directly between the *skilled person* and the *FCA*. However, the *FCA* would also expect *firms* normally to be informed about the passage of information, and the *skilled person* would usually be expected to keep the *firm* informed of any communication between the *skilled person* and the *FCA*.
- 5.5.5 **R** A *firm* must ensure that the contract required by ■ SUP 5.5.1 R:
- (1) is governed by the laws of a part of the *United Kingdom*;
 - (2) expressly:
 - (a) provides that the *FCA* has a right to enforce the provisions included in the contract under ■ SUP 5.5.1 R and ■ SUP 5.5.5 R (2);
 - (b) provides that, in proceedings brought by the *FCA* for the enforcement of those provisions, the *skilled person* is not to have available by way of defence, set-off or counterclaim any matter that is not relevant to those provisions;
 - (c) (if the contract includes an arbitration agreement) provides that the *FCA* is not, in exercising the right in (a), to be treated as a party to, or bound by, the arbitration agreement; and

(d) provides that the provisions included in the contract under ■ SUP 5.5.1 R and ■ SUP 5.5.5 R (2) are irrevocable and may not be varied or rescinded without the *FCA's* consent; and

(3) is not varied or rescinded in such a way as to extinguish or alter the provisions referred to in (2)(d).

5.5.6 **G** The Contracts (Rights of Third Parties) Act 1999, or Scots common law, enables the *FCA* to enforce the rights conferred on it under the contract required by ■ SUP 5.5.1 R against the *skilled person*.

5.5.7 **G** If the *FCA* considers it appropriate, it may request the *firm* to give it a copy of the draft contract required by ■ SUP 5.5.1 R before it is made with the *skilled person*. The *FCA* will inform the *firm* of any matters that it considers require further clarification or discussion before the contract is finalised.

5.5.8 **G** The *FCA* expects the *firm*, including where applicable in complying with *Principle 11*, to give the *FCA* information about the cost of the *skilled persons* report. This may include both an initial estimate of the cost as well as the cost of the completed report. This information is required to help inform the *FCA's* decision making in the choice of regulatory tools. Information about the number and cost of reports by *skilled persons* will be published by the *FCA*.

Assisting the skilled person

5.5.9 **R** A *firm* must provide all reasonable assistance to any *skilled person* appointed to provide a report under section 166 (Reports by skilled persons) or to collect or update information under section 166A (Appointment of skilled person to collect and update information) of the *Act*.

5.5.10 **G** In providing reasonable assistance under ■ SUP 5.5.9 R, a *firm* should take reasonable steps to ensure that, when reasonably required by the *skilled person*, each of its *appointed representatives* or, where applicable, *tiered agents* waives any duty of confidentiality and provides reasonable assistance as though ■ SUP 5.5.1 R (3) and ■ SUP 5.5.9 R applied directly to the *appointed representative* or *tiered agent*.

5.5.11 **G** Reasonable *assistance* in ■ SUP 5.5.9 R should include:

(1) access at all reasonable business hours for the *skilled person* to the *firm's* accounting and other records in whatever form;

- (2) providing such information and explanations as the *skilled person* reasonably considers necessary or desirable for the performance of his duties; and
- (3) permitting a *skilled person* to obtain such information directly from the *firm's* auditor as he reasonably considers necessary or desirable for the proper performance of his duties.

5. **G** Section 166(7) of the Act (as applied by article 23(2)(b) of the *MCD Order*) imposes, in appropriate circumstances, a duty on *CBTL firms* to give the *skilled person* all such assistance as the *skilled person* may reasonably require. Where this duty applies to a *CBTL firm*, the *FCA* expects the *CBTL firm* to:

- (1) take reasonable steps to ensure that, when reasonably required by the *skilled person*, each of its *appointed representatives* waives any duty of confidentiality;
- (2) take reasonable steps to ensure that, when reasonably required by the *skilled person*, each of its *appointed representatives* complies with any duty under section 166(7) applicable to it, or provides assistance to the *skilled person* as though that duty applied directly to it;
- (3) allow the *skilled person* access at all reasonable business hours to the *CBTL firm's* accounting and other records in whatever form;
- (4) provide such information and explanations as the *skilled person* reasonably considers necessary or desirable for the performance of his duties; and
- (5) permit the *skilled person* to obtain such information directly from the *CBTL firm's* auditor as he reasonably considers necessary or desirable for the proper performance of his duties.

Responsibility for delivery

5.5.12 **G** When a *firm* appoints a *skilled person* to provide a report under section 166 (Reports by skilled persons) or collect or update information under section 166A (Appointment of skilled person to collect and update information) of the *Act*, a *firm* is expected, including where applicable in complying with *Principle 11*, to take reasonable steps to ensure that a *skilled person* delivers a report or collects or updates information in accordance with the terms of his appointment.

Assistance to skilled persons from others

5.5.13 **G** In respect of the appointment of a *skilled person* under section 166 of the *Act* (Reports by skilled persons), section 166(7) of the *Act* imposes a duty on certain *persons* to give assistance to a *skilled person*. The *persons* on whom this duty is imposed are those who are providing, or have at any time provided, services to any *person* falling within ■ SUP 5.2.1 G. They include suppliers under *material outsourcing arrangements*.

5.5.14 **G** In respect of the appointment of a *skilled person* under section 166A (Appointment of skilled person to collect and update information) of the

Act, under section 166A(5) a *skilled person* may require any *person* to provide all such assistance as the *skilled person* may reasonably require to collect or update the information in question.



5.6 Confidential information and privilege

Confidential information

5.6.1 **G** Within the legal constraints that apply, the *FCA* may pass on to a *skilled person* any information which it considers relevant to the *skilled person's* function. A *skilled person*, being a primary recipient under section 348 of the *Act* (Restrictions on disclosure of confidential information by Authority etc.), is bound by the confidentiality provisions in Part XXIII of the *Act* (Public record, disclosure of information and cooperation) as regards confidential information received from the *FCA* or directly from a *firm* or other *person*. A *skilled person* may not pass on confidential information without lawful authority, for example, where an exception applies under the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (SI 2001/2188) or with the consent of the *person* from whom that information was received and (if different) to whom the information relates. The *FCA* will indicate to a *skilled person* if there is any matter which cannot be discussed with the *person* in ■ SUP 5.2.1 G.

Banking confidentiality and legal privilege

5.6.2 **G** The *limitations* in the following sections of the *Act* are relevant to this chapter:

- (1) section 175(5) (Information and documents: supplemental provisions) under which a person may be required under Part XI of the *Act* (Information Gathering and Investigations) to disclose information or produce a document subject to banking confidentiality (with exceptions); and
- (2) section 413 (Protected items), under which no *person* may be required to produce, disclose or allow the inspection of *protected items*.

5.6.3 **G** In respect of the appointment of a *skilled person* under section 166A (Appointment of skilled person to collect and update information) of the *Act*, a contractual or other requirement imposed on a *person* to keep any information confidential will not apply if:

- (1) the information is or may be relevant to anything required to be done as part of the *skilled person's* appointment under section 166A (Appointment of skilled person to collect and update information) of the *Act*;

- (2) a *firm* or a *skilled person* requests or requires the *person* to provide the information for the purpose of securing that those things are done; and
- (3) the *FCA* has approved the making of the request or the imposition of the requirement before it is made or imposed.

5.6.4

G A *firm* may provide information that would otherwise be subject to a contractual or other requirement to keep it in confidence if it is provided for the purposes of anything required to be done in respect of the *skilled person's* collection or updating of information under section 166A (Appointment of skilled person to collect and update information) of the *Act*.

Non-exhaustive list of examples of when the FCA may use the skilled person tool (This Annex belongs to SUP 5.3.1AG)

Toolkit purpose	Purpose for use of tool	Examples of reasons for use of tool
Diagnostic	<ul style="list-style-type: none"> • To find out more about a concern (e.g. the result of a visit, risk assessment, or notification) and determine whether action is needed to mitigate a risk to the <i>regulatory objectives</i> or to determine whether there may have been a breach of a <i>rule</i> or of a <i>threshold condition</i> or, in the case of an <i>RIE</i>, failure to meet the recognised requirements. • To assess the implications of, and <i>firm's*</i> response to, a change of circumstances e.g. <ul style="list-style-type: none"> - proposed entry into new business area; - new control structure; - merger or take-over; - new IT system; or - launch of an E-Commerce venture. 	<ul style="list-style-type: none"> • Concern about effectiveness of the <i>firm's*</i> internal audit department. • Concern about reliability of submitted financial returns. • Inability of a <i>firm*</i> to quantify its current financial position. • Assessment of consequences of incomplete customer files. • Concern about quality of systems and controls. • Indication of financial crime or <i>money laundering</i>. • Concern about a <i>firm's*</i> controller. • Assessment of control structure when a <i>bank</i> (specialising in consumer lending) diversifies into commercial lending.
Diagnostic/monitoring	<ul style="list-style-type: none"> • To verify information provided to the <i>FCA</i>. 	<ul style="list-style-type: none"> • Verification of a specific return to give the <i>FCA</i> assurance of the quality of information provided.
	<ul style="list-style-type: none"> • To collect information required by but not provided to the <i>FCA</i> by the <i>firm*</i>. • To update information previously provided to the <i>FCA</i> but not kept up to date by the <i>firm*</i>. 	<ul style="list-style-type: none"> • Failure by a <i>firm*</i> to provide or keep up to date information required by the <i>FCA</i>.
Monitoring	<ul style="list-style-type: none"> • To review systems and controls • To complement baseline monitoring 	<ul style="list-style-type: none"> • Assessment of systems and controls in <i>firms*</i> where identified as a risk mitigation priority. • In-depth review of part of a <i>firm*</i> which is material to the <i>firm's</i> risk profile but of which the <i>FCA</i> does not consider it has an adequate, up-to-date understanding.
Preventative	<ul style="list-style-type: none"> • To gather and analyse information on an identified risk and develop recommendations for resolution. 	<p>Review of identified control weaknesses over <i>client money</i> to obtain recommendations to ensure compliance with the relevant <i>rules</i>.</p>

Toolkit purpose	Purpose for use of tool	Examples of reasons for use of tool
Remedial	<ul style="list-style-type: none"> • To assist in the design of a customer redress programme. • To assist in the design of a remedial action plan. • To oversee and report on remedial action plan. 	<ul style="list-style-type: none"> • Where possible, the FCA has identified possible losses from failure to reconcile assets or from mis-posting of transactions to the general ledger. • To report on quality of work undertaken and adherence to milestones in the action plan.

* or, where applicable, the other persons in SUP 5.2.1 G.

Non-exhaustive list of examples of when the FCA may itself appoint a *skilled person* rather than require a *firm* to do so

Toolkit purpose	Purpose for use of tool	Examples of reasons for use of tool
Diagnostic/ monitoring/ preventative/ remedial	(any of the above)	<ul style="list-style-type: none"> • To provide a report or information that is urgently required. • To assert a greater degree of control over the appointment and oversight of the <i>skilled person</i> due to the sensitive nature of the matter concerned. • To assert a greater degree of control over the appointment and oversight of the <i>skilled person</i> in circumstances where more than one <i>firm</i>* is the subject of the same report or information required.