

Chapter 5

Reports by skilled persons

5.5 Duties of firms

Contract with the skilled person

5.5.1

R

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, *tied 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 *tied 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.