



## What are Skilled Person Reports and when will the FCA require one?

The FCA has powers to require firms to provide a report from a 'skilled person'. In this month's briefing, we take a look at:

- what a Skilled Person Report is;
- in what circumstances the Regulators are likely to use them; and
- practical issues arising in dealing with Skilled Persons and their Reports.

### The power to require a Skilled Person Report

The FCA and PRA both have the power under s166 FSMA to require a firm to provide to them a report by a Skilled Person or themselves to commission such a report. In this briefing, reference is made only to the FCA for simplicity but the points will generally apply equally to both conduct and prudential regulators.

The Skilled Person Report is so named simply because FSMA requires that the person appointed to make the report has the necessary skills to make a report on the issue(s) in question.

Other than this, the powers are extremely wide: the FCA can require a report on any matter reasonably required in connection with the exercise of its functions. This makes the Skilled Person Report a powerful regulatory tool as well as a flexible one. The general trend over recent years has therefore been towards their more frequent use.

The provisions of the Enforcement Guide (see in particular ENF 3.4 and 3.5) specifically state that Skilled Person Reports can be used to "support both [the FCA's] supervisory and enforcement functions." SUP5 Annex 1 sets out examples of the use of Skilled Person Reports in a wide range of regulatory functions, from diagnostic, monitoring and prevention through to remedial.

### When are Skilled Persons Reports likely to be required?

S166 sits alongside the FCA's other information-gathering powers (see FSS#4: [http://www.burgess-salmon.com/practices/disputes\\_and\\_litigation/publications/financial\\_services\\_series\\_issue\\_4.pdf](http://www.burgess-salmon.com/practices/disputes_and_litigation/publications/financial_services_series_issue_4.pdf)).

There is no restriction on topics on which a Skilled Person Report can be required. Particular issues that firms may find are targeted

include: client money; treating customers fairly; systems and controls; and the accuracy of regulatory returns.

The main reason to require a Skilled Person Report is obviously where their expertise (accountant/actuary/compliance consultant/lawyer/IT specialist) is required.

The other situation where they are used is where the FCA lacks confidence that the firm or authorised person is able (or willing) to provide the information required. This can be for a number of reasons: *is the firm being co-operative? Is there a history of other similar issues arising? Are there doubts about the quality of the firm's records or its expertise or objectivity?*

### What does it involve?

After recent changes to FSMA, the Skilled Persons can either be appointed by the firm and approved by the FCA or appointed directly by the FCA.

**Costly:** it does not matter whether the FCA approves or appoints the Skilled Person. In either case, the firm bears the costs and it can be expensive.

**Intrusive:** Once a Skilled Person has been appointed, the firm is required to provide all reasonable assistance to them, this includes:

- allowing access to the firm's systems and records;
- providing explanations where required;
- allowing access to firms or individuals who are providing (or at any time have provided) similar services to the firm in relation to the subject matter of the Skilled Person Report.

#### Practical tip:

**Legal privilege** - whilst legal advisors will be required to cooperate with the Skilled Person, they cannot be required to deliver up legally privileged documents.

**Cost** - make sure that any concerns about the firm's ability to meet the costs of the report are made clear from the outset.

#### Difficult to control the impact:

- the contents of the report will be determined and drafted by the Skilled Person who is likely to be subject to their own independent legal and professional duties and standards.
- where the Skilled Person is appointed by the firm, the FCA will typically let the firm review and provide comments on the

report. In our experience, although the FCA will generally allow this opportunity, the likelihood of significantly altering the findings of the report is slim unless, for example, there is a clear error in the Skilled Person's methodology or understanding of the facts.

- a Skilled Person Report itself will not be a privileged document so it will be discloseable in any litigation in which it is relevant to the issues. In practice, this cannot be avoided.

### Scope, other options or simply making the best of it..?

As with most interactions with the FCA, it is important to try to engage with and manage the process, most crucially in relation to the scope of the report: *can this be narrowed? Is it possible to clarify or better define the matters on which the report is to be made?*

What other options might satisfy the FCA?

- (a) Can the information the FCA wants be obtained using its other powers?
- (b) Would the FCA be happy if the firm appointed its own advisors to investigate and report on the issue? This obviously still

carries costs but, if achievable, means that the firm should be in a position to play a closer role in the preparation of the report. However, Principle 11 and the duty to co-operate with the FCA must be borne in mind as must the credibility of the report made.

Can I ease the pain...?

- (a) One of the most common and most effective approaches for cost management purposes is likely to be to consider whether the work can be done in stages: with, for example, "phase 2 work" dependent on the outcome of the "phase 1 report".
- (b) Is there some work the firm has already had done (an auditor's report?) which the FCA can rely on?
- (c) Finally, commissioning by the firm of its own report in parallel with the Skilled Person Report may assist if the firm wishes subsequently to challenge all or part of the Skilled Person Report.

### Further practical information

This bulletin can only provide an overview. For further, more detailed information, the FCA has published a number of potentially helpful resources:

Resource	Further details	Hyperlink
FCA Skilled Person Reviews	Published 5 February 2014	<a href="http://www.fca.org.uk/about/what/regulating/how-we-supervise-firms/reports-by-skilled-persons">http://www.fca.org.uk/about/what/regulating/how-we-supervise-firms/reports-by-skilled-persons</a>
FCA Q3 13/14 Number of skilled person reports commissioned	Published 21 January 2014	<a href="http://www.fca.org.uk/your-fca/documents/fca-q3-1314">http://www.fca.org.uk/your-fca/documents/fca-q3-1314</a>
FCA Handbook	SUP 5 Reports by skilled persons (esp. SUP5 Annex1)	<a href="http://fshandbook.info/FS/html/handbook/SUP/5">http://fshandbook.info/FS/html/handbook/SUP/5</a> <a href="http://fshandbook.info/FS/html/FCA/SUP/5/Annex1">http://fshandbook.info/FS/html/FCA/SUP/5/Annex1</a>
The FCA Enforcement Guide	Most recent version at date of briefing 28 February 2014	<a href="http://media.fshandbook.info/Handbook/EG_FCA_20140228.pdf">http://media.fshandbook.info/Handbook/EG_FCA_20140228.pdf</a>

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