



# CUMMINGS PEPPERDINE ON S.166 AND THE SKILLED PERSON'S REPORT

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### **WHAT DO I DO IF THE FCA SENDS ME A S.166 NOTICE?**

Call us. We can help in so many ways, right from the very start.

## 1. WHAT IS SECTION 166?

Section.166 is a section in the Financial Services and Markets Act (FSMA) that allows the FCA to send firms a written notice asking for specific documentation to be provided for assessment and review.

The FCA's decision to serve this notice is commonly 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 concerning a regulatory return.

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The information which the FCA requests will be sent to it by a skilled person in a skilled person's report.

It's important to remember that while s.166 action is a powerful tool for the FCA to use, is only one of the many information-gathering and investigation powers which the FCA uses across all regulatory sectors and all regulatory purposes.

## 2. CAN A FIRM TO BE ITS OWN SKILLED PERSON?

Yes, it can, but this is rare. It is far more common for the skilled person to be external to the firm. While the appointment of the skilled person is generally made by the firm and the FCA together, the FCA can appoint either an authorised person or another person altogether to provide a skilled persons report. The FCA considers many factors in deciding whether the firm can undertake the report.

The FCA takes into account a number of factors in deciding whether the firm can undertake the report. These factors include:

- whether the FCA is confident that, based on the firm's systems and records, the firm will be able to provide the required;
- whether the FCA is confident that the firm is willing and able to produce an objective report; and
- whether the subject matter of the report involves actual or potential misconduct, and it would be inappropriate for the regulator to rely on the firm itself to enquire into the matter.

However, it is more common for the FCA to ask for an entity to be appointed as the skilled person and complete the skilled person's report and the FCA has extensive powers over both who should be appointed as a skilled person and the reasons for which the reports are required. Where possible, the FCA will try to involve the skilled person at an early stage.

## 3. WHO CAN BE A SKILLED PERSON?

Whether it is the firm itself or an external party, a skilled person must appear to the FCA to have the skills needed to make a report on the matter concerned. If the appointment is made by the firm, their nominee must be approved by the regulator.

However the appointment is made, the precise skill of the person who will write and submit the report is key.

The skilled person can include accountants, solicitors, actuaries, IT specialists and compliance consultants. Some of the issues considered in the nomination, approval or appointment of a skilled person are:

- the skilled person's ability to complete the report within the desired time frame;
- the skills necessary to make a report on the matter concerned;
- any specialised knowledge which the skilled person has about the firm, its business, or the matter on which to be reported;
- any professional sensitivities or potential conflicts of interest that the skilled person may have; and
- any professional or commercial relationship, for example a conflict of interest, which may affect the skilled person's ability to give a sufficiently detached and objective.

## 4. WHAT IS IN THE SKILLED PERSON'S REPORT?

The content of a report will be largely dictated by the notice issued by the FCA. However, there are certain points which the skilled person must bear in mind. The report is likely to be needed for diagnostic purposes, monitoring purposes, to identify, assess and measure risks to the FCA's regulatory objectives and to verify information provided to the FCA.

The report should help the FCA to find out more about a specific concern which it has and help

the FCA to determine whether the firm needs to take steps to mitigate any risks or whether there may have been a breach of a regulatory requirement.

There may be a remedial element to the report, for example the design of a remedial action plan and its implementation.

## 5. WHO PAYS FOR THE SKILLED PERSON'S REPORT?

This falls to the firm. A skilled person's report can be expensive, and this may in part be due to the need for the skilled person to ensure that the report will stand up to scrutiny and thus is evidence-based. This is needed as it is not uncommon for enforcement action to follow a s.166 process.

The FCA does take cost implications into account when considering the appointment of a skilled person.

## 6. DOES THE SKILLED PERSON TALK TO THE FCA WHILE THE REPORT IS BEING DRAFTED?

Yes. In fact, under SUP of the FCA Handbook, the skilled person may be required to do so.

During and after the course of its appointment the skilled person must tell the FCA if it reasonably believes that the firm has or may have breached a relevant requirement and the breach may be of material significance to the appropriate regulator in determining whether to take regulatory action.

Not only that, but the skilled person must send the FCA information it has obtained which might be of material significance to the FCA in determining whether the firm satisfies and will continue to satisfy the threshold conditions.

In addition, the skilled person must notify the FCA if it finds evidence that would suggest that the firm is no longer fit and proper and/or that it may not be, or may cease to be, a going concern.

## 7. WHAT HAPPENS AFTER THE REPORT HAS BEEN COMPLETED?

The FCA may decide that it wants to hold a meeting with the firm and the skilled person to discuss the final report. However, it may also decide that it will discuss the report only with the skilled person.

## 8. WHAT ABOUT INVOLVING MY LAWYER?

Any person who has provided services to the firm concerning a matter which falls inside the remit of the report is under a duty to provide the skilled person with all such assistance as it may reasonably require.

This duty falls upon the firm's lawyers as well, although of course legal privileged applies.

## 9. WHAT DO I DO IF THE FCA SENDS ME A S.166 NOTICE?

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#### **Cummings Pepperdine LLP - August 2021**

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