

Chapter 13

Reports by skilled persons

13.5 Duties of critical third parties

Contract with the skilled person

13.5.1

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When a *critical third party* appoints a *skilled person*, the *critical third party* must, in a contract with that *person*:

- (1) require and permit the *skilled person* during and after the course of their appointment:
 - (a) to cooperate with the *regulators* in connection with the discharge of their *oversight functions*; and
 - (b) to communicate to the *regulators* information on, or the *skilled person's* opinion on, matters of which they have, or had, become aware in their capacity as a *skilled person* reporting on the *critical third party* in the following circumstances:
 - (i) the *skilled person* reasonably believes that the information on, or their opinion on, matters for which they were appointed may be of material significance to the *regulators* in determining whether the *critical third party* concerned complies with and will continue to comply with the *CTP duties*; or
 - (ii) the *skilled person* reasonably believes that the *critical third party* 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 *critical third party* by the *regulator* that has required such report, collection or updating within the time specified by the *regulator*; and
- (3) waive any contractual or other duty of confidentiality owed by the *skilled person* to the *critical third party* which might limit the provision of information or opinion by that *skilled person* to the *regulators* in accordance with (1) or (2).

13.5.2

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A *critical third party* must ensure that the contract it makes with the *skilled person* under **CTPS 13.5.1R** requires and permits the *skilled person* to provide the following to the *regulators* if requested to do so:

- (1) interim reports;
- (2) source data, *documents* and working papers;
- (3) copies of any draft reports given to the *critical third party*; 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).

13.5.3 **R** A *critical third party* must ensure that the contract required by **■ CTPS 13.5.1R** is:

- (1) governed by the laws of a part of the *UK*;
- (2) in writing, and:
 - (a) expressly provides that the *regulators* have a right to enforce the provisions included in the contract under **■ CTPS 13.5.1R**, **■ CTPS 13.5.2R** and **■ CTPS 13.5.3R(2)(b)** to **■ (d)**;
 - (b) expressly provides that, in proceedings brought by the *regulators* 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, expressly provides that the *regulators* are not, in exercising the right in (a), to be treated as a party to, or bound by, the arbitration agreement; and
 - (d) expressly provides that the provisions included in the contract under **■ CTPS 13.5.1R**, **■ CTPS 13.5.2R** and **■ CTPS 13.5.3R(2)** are irrevocable and may not be varied or rescinded without the *regulators'* consent; and
- (3) not varied or rescinded in such a way as to extinguish or alter the provisions referred to in (2)(d).

13.5.4 **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 **■ CTPS 13.5.1R** against the *skilled person*.

13.5.5 **R** If a *critical third party* appoints a *skilled person*, that *critical third party* must give the *regulators* sufficient and timely information about the cost of the *skilled person's* report or collection or updating of information, including both an initial estimate of the cost as well as the cost of the completed report, collection or updating of information.

13.5.6 **G** If the *FCA* considers it appropriate, it may request the *critical third party* to give it a copy of the draft contract required by **■ CTPS 13.5.1R** before it is made with the *skilled person*. The *FCA* will inform the *critical third party* of any matters that it considers require further clarification or discussion before the contract is finalised.

13.5.7 **G** The *FCA* expects a *skilled person* to clarify or discuss any matters that are raised by the *FCA* regarding a contract before it is finalised.

Responsibility for delivery

13.5.8 **R** When a *critical third party* appoints a *skilled person*, a *critical third party* must take reasonable steps to ensure that the *skilled person* delivers a report or collects or updates information in accordance with the terms of the *skilled person's* appointment.

Assisting the skilled person

13.5.9 **R** A *critical third party* must provide all reasonable assistance to a *skilled person* appointed to provide a report under section 166 (Reports by skilled persons) of the *Act* or to collect or update information under section 166A (Appointment of skilled person to collect and update information) of the *Act* (as applied by section 312P of the *Act*) and take reasonable steps to ensure that its *employees* and agents also provide all reasonable assistance to that *skilled person*.

13.5.10 **G** Reasonable assistance in **■ CTPS 13.5.9R** should include:

- (1) access at all reasonable business hours for the *skilled person* to the *critical third party'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 their duties; and
- (3) permitting a *skilled person* to obtain such information directly from the *critical third party's* auditor as they reasonably consider necessary or desirable for the proper performance of their duties.

Assistance to skilled persons from others

13.5.11 **G** In respect of the appointment of a *skilled person* under section 166 (Reports by skilled persons) of the *Act*, section 166(7) (as applied by section 312P (Information gathering and investigations) 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 **■ CTPS 13.2.1G**.

13.5.12 **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) (as applied by section 312P (Information gathering and investigations) of the *Act*), 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.