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The following Notification is, by command of His Excellency the Governor-General, published for general information.

CLAUDINE HEAVEN, JP (MRS.)
Governor-General's Secretary and
Clerk to the Privy Council.

GOVERNMENT NOTICE

MISCELLANEOUS

GUIDELINES:

PROFESSIONAL INDEMNITY INSURANCE

- LEGISLATIVE REFERENCES : The Insurance Regulations 2001: Regulation 35(2)
- The Pensions (Superannuation Funds and Retirement Schemes) (Registration, Licensing and Reporting Regulations: Regulations 7(1)(c) and 7(2)
- The Trust and Corporate Services Providers Act, 2017: Sections 21(1); 21(2) and 46
- The Trust and Corporate Services Providers (Licensing and Operations) Regulations, 2022: Regulation 21
- The Securities (Licensing and Registration) Regulations, 1996: Regulation 2(1)(c)

1. BACKGROUND

- 1.01 The Financial Services Commission (the “FSC”) has established requirements for persons and entities (regulated entities) operating in the insurance, securities, private pensions as well as trust and corporate services providers industries (“regulated industries”) in respect of professional indemnity insurance (“PII”).
- 1.02 PII refers to insurance against legal liability towards third parties for injury, loss or damage, arising from a person’s own professional negligence, error or omission or that of his employees.
- 1.03 The use of PII is a universally accepted risk mitigation tool for providing protection to professional individuals and businesses.
- 1.04 The legislation governing the respective regulated industries outlines the minimum amount of coverage required to be maintained by regulated entities at all times.

2. OBJECTIVE

- 2.01 The objective of these guidelines is to set out the FSC’s expectations of regulated entities regarding the maintenance of PII.

3. LEGISLATIVE REQUIREMENTS

- 3.01 Pursuant to Regulation 35(2) of the Insurance Regulations every broker who is a sole proprietor, partnership or corporation, and every corporate agent are required to maintain PII in an amount of at least \$30 million in a form approved by the FSC in respect of any one occurrence.
- 3.02 A company that is licensed as an investment manager or administrator under the Pensions (Superannuation Funds and Retirement Schemes) Act is required under Regulations 7(1)(c) and 7(2) of the Pensions (Superannuation Funds and Retirement Schemes) (Registration, Licensing and Reporting) Regulations (“RLR”), 2006 to have PII which exceeds \$5 million.
- 3.03 Regulation 2(1)(c) of the Securities (Licensing and Registration) Regulations, 1996 as amended in 2014 requires individual securities dealers and investment advisers to have a net worth of at least \$10 million or acquire indemnity insurance for at least that amount.
- 3.04 Under section 21(1) of the Trust and Corporate Services Providers Act, 2017 (the “TCSP Act”) a service provider¹ is required to maintain PII of not less than the prescribed minimum to cover the risk of losses in respect of liabilities arising from the operation of the business. Regulations 3(1)(f) and 21 of the Trust and Corporate Services Providers (Licensing and Operations) Regulations, 2022 stipulate that the insurance coverage must be the aggregate of at least two times the annual gross income or projected gross income of the licensee and be submitted with an application for a licence.
- 3.05 These guidelines in respect of trust and corporate services providers are being issued pursuant to section 46 of the TCSP Act. Licensees under the TCSP Act should have regard to section 46(5) which provides that:

“A person who fails to comply with any guidelines issued pursuant to this section, commits an offence and is liable to summary conviction in a Parish Court to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one month”.

4. OBTAINING COVERAGE

- 4.01 While the various statutes do not explicitly stipulate the type of organizations that can provide PII, coverage may be sourced from insurance companies in Jamaica that are registered pursuant to the Insurance Act or from a reputable insurance company in another jurisdiction.
- 4.02 Each business is unique and as such, there is no single coverage amount that is suitable for all businesses. While there must be compliance with the minimum level of coverage prescribed under the statute, it is therefore the responsibility of the board and senior management to make arrangements for additional PII coverage that may be

¹A person who engages in the business of providing a corporate or a trust service.

commensurate with the business activities, business model and overall risk exposure and in compliance with the requirements of the applicable statutes.

- 4.03 In considering whether or not additional coverage will be required, a regulated entity may consider factors such as the types of services offered, the financial value of these services and the potential financial losses or damages that it may be exposed to as a result of the services offered.
- 4.04 Appropriate due diligence and research should be done on the potential providers of PII and associated costs/benefits before entering into contractual arrangements with a provider of PII.
- 4.05 A regulated entity should ensure that accurate information is provided to insurers when sourcing PII coverage as failure to do so may result in insurers avoiding liability under the policy. The entity must also ensure that the proposal for insurance is carefully reviewed before entering into a contractual arrangement.
- 4.06 Coverage should extend to liabilities that the regulated entity may incur in other jurisdictions in which it carries on business and to liabilities of its staff who performs functions in their own names in the course of carrying out their duties; for example as an officer in the capacity of a director.
- 4.07 Before entering into any contractual arrangement a regulated entity should carefully examine and review the PII policy documents to ensure that the language and terms contained therein are clear, accurate, complete and appropriate for the activities being undertaken by it. It must also ensure that adequate cover is provided for any claims for loss or damages that arise as a result of its acts or omissions and/or those acting on its behalf.
- 4.08 If there are uncertainties or ambiguities in the terms or language of the PII policy a regulated entity should seek written clarification and explanation from the provider of the PII coverage before sign-off.
- 4.09 A regulated entity may consider obtaining advice from experts, such as a legal practitioner, to scrutinize the draft PII policy before finalizing the policy contract. Where coverage is obtained from an overseas insurer care should be taken that the insurer is regulated and in good standing with its regulator.

5. COVERAGE FOR ENTITIES WITH MULTIPLE LICENCES/REGISTRATION

A regulated entity that carries on more than one regulated business or activity should determine the scope of its PII cover, taking into account the legislative requirements. Applicants who are applying for a licence in more than one regulated industry or capacity should also note that the amount of coverage specified in the applicable legislation applies to each licence or registration. For example, an entity that intends to operate as an administrator and investment manager under the RLR is required to have coverage that exceeds \$5 million for each capacity.

6. ADEQUACY OF PII COVERAGE

- 6.01 The board and senior management of each regulated entity must ensure that there is continuing compliance with legislative requirements relating to PII.
- 6.02 The PII should be periodically reviewed and assessed to ensure that the coverage and terms of the contract remain adequate and appropriate and in compliance with the applicable legislation, especially in light of any changes in the regulated entity's business model, business activities, and regulatory and business environment.
- 6.03 A regulated entity should conduct a comprehensive risk assessment to assist it in determining the adequacy of its PII coverage. Consideration should be given to whether or not the PII coverage satisfactorily provides for potential losses related to a cyber-crime and any need to procure specific cyber-crime related insurance under a separate insurance arrangement. At a minimum, consideration should be given to the following non-exhaustive list of factors:
 - Number and type of clients;
 - Nature and volume of transacted business;
 - Number of employees;
 - Potential for multiple claims;
 - Any impending or past legal actions or losses suffered;
 - Proposed insurer's conditions of coverage;
 - Worst-case loss scenario per client.
- 6.04 Having regard to the statutory requirements, additional coverage may be required as a business decision to address a reasonable estimate of potential losses.
- 6.05 The review and assessment of the PII coverage should be documented, including how the determination of the adequacy of the PII insurance coverage has been made. This documentation must be available for inspection by the FSC which may require submission of a justification of the coverage secured.
- 6.06 With the prevalence of cyber-crimes, licensees and registrants should carefully assess whether the scope of their existing PII policy provides robust protections against cyber-attacks and sufficiently provide for losses or damages incurred from the loss of data/fraudulent activity related to a cyber-crime. Consideration may need to be given to obtaining specific cyber-crime related insurance which is separate from the PII arrangements.

7. POLICIES AND PROCEDURES

- 7.01 A regulated entity should have documented policies and procedures which should be reviewed at suitable intervals by an independent function such as an internal audit.
- 7.02 The policies and procedures should be approved by the board or other governing body of the licensee/registrant.
- 7.03 The approved policies and procedures should be available for inspection by the FSC.
- 7.04 The policies and procedures should address matters relating but not limited to the following:
- 7.04.1 Obtaining and renewing PII coverage;
 - 7.04.2 Continued compliance with legislative requirements and the terms of any PII contract;
 - 7.04.3 Periodic assessment of the adequacy of the coverage;
 - 7.04.4 Reporting to the board/governing body and the FSC.

8. POLICY LIMITATIONS AND EXCLUSIONS

- 8.01 In cases where limitations and exclusions are imposed in a PII policy, the regulated entity must ensure that coverage remains adequate.
- 8.02 Where there are any gaps in coverage licensees should maintain such financial resources as may be prescribed in the applicable legislation.

9. PII INSURANCE POLICY DOCUMENT

- 9.01 A licensee should ensure that the insurer issues to it annually an insurance policy document or certificate of insurance upon payment of the relevant insurance premium.
- 9.02 The insurance policy document or certificate of insurance should specify the amount of insurance coverage provided, the expiration date, and any exclusions and/or limitations.
- 9.03 The FSC may, at any time, by notice in writing request a copy of the current insurance policy document or certificate of insurance or evidence that the licensee has access to PII insurance cover or other appropriate arrangements to cover risks.

10. BLANKET POLICIES

- 10.01 Where a Blanket Policy is used, the name(s) of the regulated entity or entities (“entities”), and the applicable coverage for each must be clearly stipulated in the policy.
- 10.02 In the case where a regulated entity is licensed/registered in more than one capacity, the coverage applicable to each capacity must be specifically stated in the policy. For example, if a regulated entity is licensed as a pensions administrator, investment manager, and corporate service provider, the PII policy should clearly stipulate all three capacities and the associated coverage for each capacity.
- 10.03 A regulated entity should give fourteen days prior written notice to the FSC where it intends to use a blanket policy to satisfy PII requirements.

11. GROUP COVERAGE

- 11.01 A regulated entity should give fourteen days prior written notice to the FSC where it intends to use a group policy to satisfy PII requirements.
- 11.02 The name of the regulated entity should be specifically stated in the group policy; otherwise, the regulated entity should obtain written confirmation that the entity is covered under the policy.
- 11.03 In cases where a regulated entity is covered under a group arrangement, it should satisfy itself that the limit of indemnity related to its business is sufficient and that it has access to the minimum level of indemnity, including any allowable excess or deductible.

Questions regarding these guidelines may be directed to the:

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The Financial Services Commission
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