



**GUIDELINES:
MATERIAL BREACHES**

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MATERIAL BREACHES

LEGISLATIVE REFERENCES: The Trust and Corporate Services Providers Act, 2017
 Section 3
 The Trust and Corporate Services Providers (Licensing and Operations) Regulations, 2022
 Regulation 15(3)

1 PURPOSE

1.01 The purpose of these guidelines is to identify breaches of the Trust and Corporate Services Providers Act, 2017 (the “TCSP Act”) and other relevant enactments which are considered material in keeping with Regulation 15(3) of the Trust and Corporate Services Providers (Licensing and Operations) Regulations, 2022 (the “TCSP Regulations”).

1.02 These guidelines apply to all auditors appointed by a licensee under the TCSP Act.

2 LEGISLATION

2.01 Under section 3 of the TCSP Act the under-listed have been specified as the objects of the legislation:

- (i) protect the interests of entities and service providers through the licensing and supervision of service providers;
- (ii) maintain high standards of conduct, ethics and competence in the provision of services;
- (iii) ensure that service providers adhere to modern, internationally acceptable standards of best practice;
- (iv) detect and prevent any illegal activity within the services sector and in particular, money laundering, the financing of terrorist activity, illegal drugs, illegal firearms and other weapons;
- (v) provide for the establishment of procedures and policies to be followed by service providers to enable service providers to –
 - know, identify and verify the identity of each client; and
 - exercise due diligence in the provision of services.

2.02 Regulation 15(3) of the TCSP Regulations stipulates that:

“An independent auditor appointed by a licensee under section 17(1) of the Act shall not be appointed for a term exceeding five years and shall report to the Commission any material breach committed by the licensee and any impairment to the licensee's ability to remain a going concern.”

3 BREACHES CONSIDERED MATERIAL

3.01 A licensee is expected to comply with all the requirements of the TCSP Act and the TCSP Regulations (the “TCSP Legislation”). It is recognized however, that the phrase “material breach” is not defined in the TCSP Legislation and also that some breaches of the TCSP Legislation are more egregious than others and may have more serious adverse implications for a licensee's clients and the TCSP industry as a whole.

3.02 In considering whether a breach is “material” the FSC will take into consideration the nature of the breach, the impact and extent of the breach, and the particular circumstances of the licensee. Aggravating factors such as identified in the underlisted non-exhaustive list will also be taken into account:

- (i) Deliberate or negligent contravention
- (ii) Potential or actual financial loss to clients
- (iii) Slow and/or inadequate response to the contravention identified
- (iv) Indications of lack of competence
- (v) Lack of or inadequate procedures or controls
- (vi) Increased risk of financial failure
- (vii) Repetition of the same breach or numerous breaches of different types that could indicate weak controls or poor compliance
- (viii) Increased AML/CFT risk
- (ix) Possible damage to the reputation of Jamaica

3.03 REPORTING DUTY OF THE APPOINTED AUDITOR

The independent auditor appointed by a licensee pursuant to section 17(1) of the TCSP Act is required to report to the FSC, any of the following breaches of the TCSP Legislation or any guidelines issued under section 46 of the TCSP Act which comes to the attention of the auditor when conducting an audit:

3.03.01 Business Not Conducted in a Prudent Manner

Pursuant to paragraph 2(3) of the Second Schedule of the TCSP Act and paragraph 2.01 of the Guideline RCTS-GUI2022/06-0009: Establishment of Internal Controls By Service Providers, a licensee is not conducting its business in a prudent manner unless it maintains adequate accounting and other record of its business and adequate systems of control of its business and records, and has developed policies and procedures pertaining to its obligations under the TCSP Act or any other enactment. In keeping with paragraph 3.01 of the Guideline RCTS-GUI2022/06-0012: Risk Assessment for Service Providers, a core element of the prudent management of a licensee's business is also an effective risk assessment that clearly demonstrates the licensee's understanding of the risks and vulnerabilities it may face during the course of conducting business.

The independent auditor should report to the FSC any failure of a licensee to comply with the foregoing.

3.03.02 Making False or Misleading Statement

Knowingly or recklessly making a false or misleading statement in respect of an application for the grant or renewal of a licence pursuant to section 26 of the TCSP Act.

3.03.03 Acting to the Detriment of Clients or the Public

Operating business in a manner that is detrimental to the public or the interest of clients of the service provider pursuant to section 22 of the TCSP Act. In determining whether a licensee has breached section 22 of the TCSP Act the auditor should have regard to whether:

- (i) the action of the licensee has impaired the interest of its clients;
- (ii) the licensee has published, caused, or permitted to be published, any advertisement which might damage the reputation of Jamaica in keeping with paragraphs 8.02 and 13.05 respectively of the Guideline RCTS-GUI2022/06-0013: Standard Of Conduct For Service Providers;
- (iii) the licensee is performing, has performed or has allowed others under its control to perform functions that pose a serious risk to the interests of clients or undermine confidence in the TCSP sector; and
- (iv) the licensee's actions (actual or proposed) have (or will) adversely impact the stability of the financial system of Jamaica.

3.03.04 Notices

Failure to provide the requisite notice and supporting documents, where applicable, regarding the following:

- (i) Change in the beneficial owners in keeping with section 12(1)(c)(iii) of the TCSP Act;
- (ii) Any action which a licensee proposes to take which would result in a material change in its capital adequacy or solvency in keeping with regulation 7(1)(b) of the TCSP Regulations;
- (iii) Any significant failure in the systems of internal control of the licensee (including those identified by an independent auditor under section 17 of the TCSP Act) in keeping with regulation 7(1)(c) of the TCSP Regulations;
- (iv) Outsourcing of services without notifying the FSC of the intention to do so, undertaking the relevant risk assessment and designing of a contingency plan per section 10 of the TCSP Regulations;
- (v) Location of records kept at a place, other than at the principal office of the service provider (provided that, that other place is in Jamaica) in keeping with section 16(1A) of the TCSP Act; and
- (vi) Legal and other proceedings pursuant to section 19 of the TCSP Act.

3.03.05 Prior Approval or Consent

Failure to obtain any prior approval or consent from the FSC as may be prescribed or specified by the FSC.

3.03.06 Records

- (i) Failure of the licensee to keep accurate and complete records for at least 7 years;
- (ii) Failure of the licensee to maintain an accurate and up-to-date Register of Beneficial Owners of the clients of the licensee containing the requisite information specified in regulation 9(1) of the TCSP Regulations in relation to each client;

- (iii) Failure of the licensee to update the Register of Beneficial Owners within three days where there is a change in the beneficial ownership of a client in keeping with regulation 9(2) of the TCSP Regulations;
- (iv) Where the licensed service provider is a company, a firm or a trust, that licensed service provider has failed to comply with section 16(1C) of the TCSP Act in keeping and maintaining an up-to-date register, in which the particulars stipulated in section 16(1C) are recorded;
- (v) Failure of a licensed service provider to take reasonable precautions to prevent falsification of records required to be kept by it under the TCSP Act and to facilitate the discovery of any falsification of any such records in accordance with section 16(2) of the TCSP Act and paragraph 2.14 of the Guideline RCTS-GUI2022/06-0011: Record Keeping of Service Providers; and
- (vi) Wilful destruction, alteration or concealment of documents relating to the business of the service provider or its clients in keeping with section 27 of the TCSP Act.

3.03.07 Trust Service Provider

- (i) Failure of a licensed service provider to keep adequate, accurate and current records in respect of the identity of a settlor, a trustee, a protector (if any), an enforcer, a beneficiary or class of beneficiaries and any other person who has ultimate effective control of a trust for which the licensee is providing trust services in keeping with section 16(1B) of the TCSP Act;
- (ii) Moneys, property and securities received or held by the licensee in a fiduciary capacity are not kept distinct and in separate accounts from the licensee's own moneys, property and securities and marked in the licensee's books for each particular trust in accordance with section 18(1) of the TCSP Act; and
- (iii) Failure to conduct periodic reconciliation of client accounts in keeping with paragraph 7.05 of the Guideline RCTS-GUI2022/06-0013: Standard Of Conduct For Service Providers.

3.03.08 Anti-Money Laundering/Counter Financing Terrorism/Counter Proliferation Financing ("AML/CFT/CPF")

- (i) Any breach of the statutory obligations outlined in the Proceeds of Crime Act, the Terrorism Prevention Act and/or the United Nations Security Council Resolutions Implementation Act and attendant regulations, including failure to adhere to the provisions relating to Beneficial Ownership under these laws and the TCSP legislation; and
- (ii) Any systematic failures of the licensee's AML/CFT/CPF internal controls.

Questions regarding this bulletin may be directed to the:

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