

# JUDICIAL ORDERS - IMPLICATIONS OF NON-COMPLIANCE

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ICAJ) AML/CFT Webinar**

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# JUDICIAL ORDERS

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# INVESTIGATIVE TOOLS



The Proceeds of Crime Act, Terrorism Prevention Act and Financial Investigations Division Act all provide judicial orders to assist law enforcement with investigations, namely:

POCA	TPA	FID Act
Customer Information Order	Examination and Production Order	Production and Inspection Order
Disclosure Order	-	-
Account Monitoring Order	Monitoring Order	Account Monitoring Order
Restraint Order	Restraint Order	Restraint Order
Search Warrant	Search Warrant	Search Warrant

# INVESTIGATIVE TOOLS

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- The search and seizure warrant also appears in all 3 statutes



PAB/CAJ AML/CFT Forum May 2021

GUIDANCE FOR A RISK-BASED APPROACH

# ACCOUNTING PROFESSION



JUNE 2019



# FATF JUNE 2019 GUIDANCE – RISK BASED REG 22

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- *Vulnerabilities of accounting services*
- 22. Some of the functions performed by accountants that are the most susceptible to the potential launderer include:
  - a) Financial and tax advice – criminals may pose as individuals seeking financial or tax advice to place assets out of reach in order to avoid future liabilities.
  - b) Company and trust formation – criminals may attempt to confuse or disguise the links between the proceeds of a crime and the perpetrator through the formation of corporate vehicles or other complex legal arrangements (trusts,

# FATF JUNE 2019 GUIDANCE – RISK BASED REG 22

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- for example).
- c) Buying or selling of property – criminals may use property transfers to serve as either the cover for transfers of illegal funds (layering stage) or else the final investment of these proceeds after their having passed through the laundering process (integration stage).

# FATF JUNE 2019 GUIDANCE – RISK BASED REG 22

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- D) Performing financial transactions – criminals may use accountants to carry out or facilitate various financial operations on their behalf (e.g. cash deposits or withdrawals on accounts, retail foreign exchange operations, issuing and cashing cheques, purchase and sale of stock, sending and receiving international funds transfers, etc.).
- E) Gaining introductions to financial institutions- criminals may use accountants as introducers or intermediaries. This can occur both ways as criminals may use financial institutions to gain introductions to accountants as well.



# JUDICIAL ORDERS

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- Once served, financial institutions must ensure the information requested in the Order is accurately provided within the timelines specified therein

# OFFENCES & PENALTIES FOR NON-COMPLIANCE

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**“If you think  
compliance is  
expensive –  
try non-compliance.”**

*Former U.S. Deputy Attorney General Paul McNulty*



# Failure to Meet Regulatory Requirements

Failing to meet these regulatory obligations constitutes an offence for which the sanction, upon conviction in the Parish Court, is a **fine not exceeding JMD \$3,000,000.**



# OFFENCES – MONEY LAUNDERING



**Money Laundering Penalty  
S 98 (1)  
(Secs 92 or 93 Breaches)**

**Parish Court**

**Circuit Court**

**Individual  
≤ J\$3 million fine  
≤ 5 years imprisonment  
or both**

**Body Corporate  
≤ J\$ 5 million  
fine**

**Individual  
A fine or ≤ 20 years  
imprisonment  
or both**

**Body Corporate  
A fine**

# OFFENCE BY NOMINATED OFFICER - FAILURE TO DISCLOSE



**Failure to make a  
Required Disclosure  
Under S 98 (2)  
(File STR - Sec 95 Breach)**

**Parish Court**

**Individual  
≤ J\$1 million fine  
≤ 1 year imprisonment or both**

**Circuit Court**

**Individual  
A fine  
≤ 10 years imprisonment or both**



# FAILURE TO DISCLOSE

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- *“Here was a case where a solicitor received £70,000 in cash in the space of a month. He became concerned about the matter in October 1998. The money had been put in part into fictitious names. He did not seek advice immediately in October 1998 but only sought it in April 1999. Clearly for the six months from October 1998 to April 1999 he was courting a risk that his suspicions were reportable.*

## FAILURE TO DISCLOSE

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- *Thereafter he can perhaps claim some benefit for acting under legal advice. He was not, as we have said, entirely co-operative with the authorities at his initial arrest. We have set out the circumstances advanced to excuse that. Money laundering is, of course, a very serious matter and breaches of the legislation by professional people cannot be overlooked. We agree with the learned judge about that.*





# FAILURE TO DISCLOSE

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- *This was clearly a case where a custodial sentence was warranted and, having regard to all the circumstances that we have endeavoured to outline, we do not think that the learned judge did anything other than give all credit that was called for. In our view, it cannot be said that this sentence [6 months] was in any way excessive. This appeal is therefore dismissed.”*
- Regina v Jonathan Michael Duff [2002] EWCA Crim 2117



# FAILURE TO DISCLOSE

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- *“Between March 2007 and April 2008 the police carried out an investigation into the business using two undercover officers, “Vinnie” and “Billy”, who purported to act as clients. Their transactions at the depositories were covertly recorded. Vinnie went to the Hampstead premises on twenty occasions between March 19, 2007 and April 26, 2008.*



# FAILURE TO DISCLOSE

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- *During that period he made a number of plainly suspicious currency conversions amounting in all to about £54,000 in cash using the bureau de change. He also rented a safe deposit box in which he stored large quantities of cash in very high denomination euro notes, which the prosecution said was itself suspicious or sufficient to arouse suspicion.*



# FAILURE TO DISCLOSE

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- *During the course of his dealings with the Hampstead depository Vinnie dealt directly with both Woolf and Swan. He was able to record on tape advice he had received from Swan about how much money he could change, and how often, in order to avoid the need for them to report him. In substance, Swan advised him how to launder money without being reported, even if his actions would otherwise have triggered a report. She also commented on the fact that it had been easier to conduct business without alerting the authorities before the troublesome new reporting regime was introduced.*

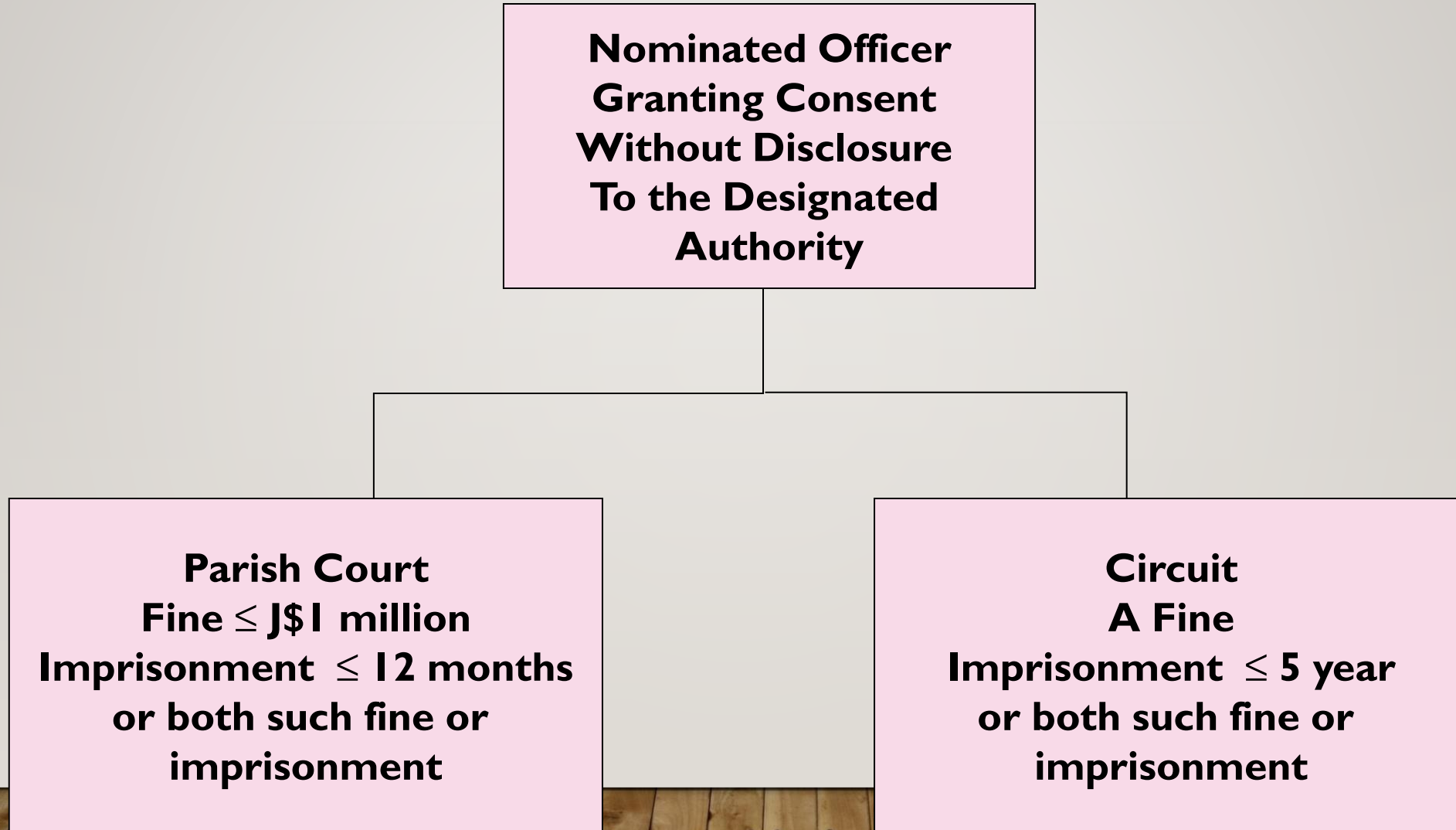


# FAILURE TO DISCLOSE

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- Reg v Jacqueline Swan [2012] 1 Cr.App. Rep. (S) 90
- Sentenced to 12 months, reduced to 9 months on appeal

# OFFENCE BY NOMINATED OFFICER - CONSENT



# OFFENCES - TIPPING OFF



## Employee obligations

**Katy has satisfied her statutory obligation by disclosing her suspicions to the Nominated Officer.**

No – you must never inform a client they are under investigation.

The client keeps calling to find out why his account is suspended. Can I tell him that the compliance team are investigating please?



# OFFENCES - TIPPING OFF

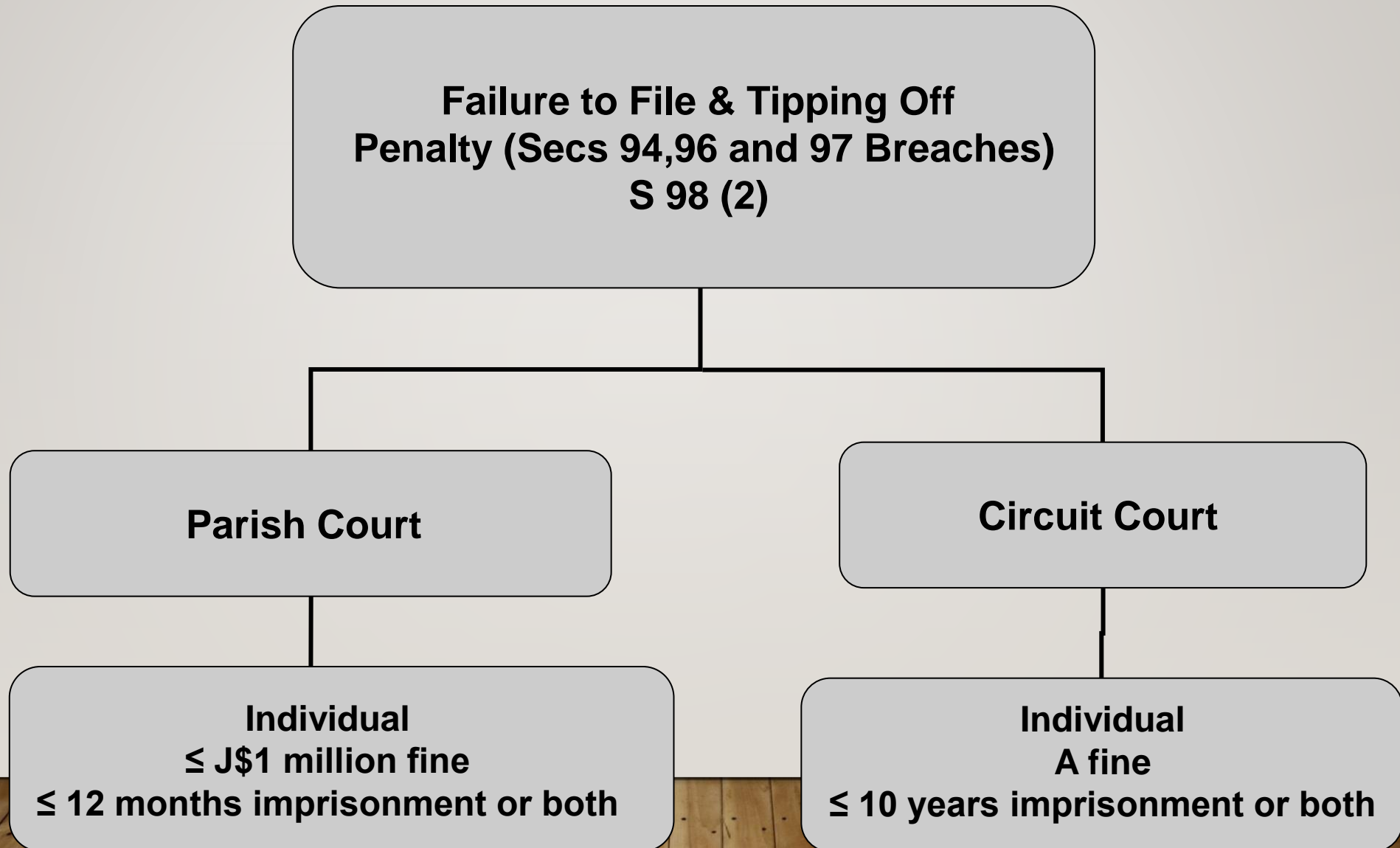
- A “tipping off” offence occurs where a person, knowing or believing an authorized or protected disclosure has been made:
  - makes a disclosure which is likely to prejudice any investigation regarding the authorized or protected disclosure (Sec 97 (a)); or
  - discloses information, knowing or having reasonable grounds to believe the enforcing authority is acting or proposing to act in connection with a money laundering investigation, to another person (Sec 97 (b)).



# OFFENCES - TIPPING OFF

- There are exceptions to the offence provided in the law where:
  - the person did not know that the disclosure would have prejudiced the investigation;
  - the disclosure was made in carrying out his functions under POCA
  - the disclosure was made to a lawyer for the purpose of obtaining legal advice
  - the disclosure was made to the competent authority (Bank of Jamaica)

# FAILURE TO FILE & TIPPING OFF PENALTY



# CHALLENGES – TIPPING OFF

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- **Governor & Company of the Bank of Scotland v A Ltd, B & C** [2001] EWCA Civ 52
- A Ltd was introduced to the Bank by a respectable 3<sup>rd</sup> party. In 1999 it opened £ and \$ accounts and then transferred substantial sums of money into them. Bank became alarmed and after conducting its due diligence tests, became aware that A Ltd was under investigation as also one “T”.

# TIPPING OFF

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- Bank faced a dilemma. If it paid out the monies held in the account, it could be liable to 3<sup>rd</sup> parties as a constructive trustee. If it refused to pay out the monies, it could be sued and would be unable to defend itself as it could not reveal to the parties what it was told by the police (tipping off).

# TIPPING OFF

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- In an effort to advise itself, Bank sought directions from the Court and secured a most unusual remedy – an injunction against itself to prevent payment out of the account
- In the end the Court was unable to sustain that order as per Lord Woolf CJ observed: “*while it may not be politic to freeze an account, a bank always has the power to do so...*” para 15

# TIPPING OFF

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- The order for injunction served no useful purpose
- The approach of the police in this instance in not allowing disclosure of the information made the bank's position "very difficult"
- Bank's position quite understandable in seeking directions, from the Court

# TIPPING OFF

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- The provisions can be very difficult to comply with, particularly in small island states where people know each other
- The compliance standards are no different for us – in fact, they are effectively higher as we are considered higher risk

# TIPPING OFF

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- At the same time, the Courts recognize the challenges posed by the legislation and want to see greater sensitivity on the part of law enforcement towards assisting the regulated sector to comply
- *“The tipping off legislation which was the source of the problem with which this appeal deals, gave extensive powers to the police. Properly used, they were beneficial. Misused they could create unintended*



# TIPPING OFF

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- *consequences. It is of the greatest importance that the use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely or unnecessarily because of the police's powers."*
- Bank of Scotland v A (ibid)

# OFFENCES - JUDICIAL ORDERS

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Generally, penalties for failure to comply with the investigative orders are fines and/or imprisonment

Judicial Order	Parish Court	Circuit Court
Disclosure Order	<b>Individual:</b> Fine up to \$1M or 1 year imprisonment or both	N/A
Customer Information Order	<b>Regulated entity:</b> Fine up to \$1M	N/A

# RELEVANT GUIDANCE

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- In 2018 - Bank of Jamaica (BOJ) updated the Guidance - **Guidance Notes on The Prevention Of Money Laundering and Countering The Financing of Terrorism, Proliferation And Managing Related Risks**

# WHAT CONDUCT IN THE GUIDANCE NOTES MAY RESULT IN THE APPLICATION OF SANCTIONS?

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- The Guidance sets out certain compliance imperatives:
- (a) Risk Based Framework (b) Know Your Customer Requirements (c) Customer Due Diligence (d) Nominated Officer Regime (e) Compliance Monitoring (f) Board Responsibility and Employee Integrity and Awareness and Transaction Monitoring and Reporting and (g) Record Keeping
- Failure to comply with these specific provisions above may result in criminal and regulatory sanctions



THANK YOU  
FOR YOUR TIME AND  
ATTENTION

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