

REPUBLIC OF VANUATU

BILL FOR THE UNIT TRUSTS (AMENDMENT) ACT NO. OF 2018

Explanatory Note

This Bill amends the Unit Trusts Act No. 36 of 2005.

Since being removed from the Financial Action Task Force (“the FATF”) Grey list, it is essential that Vanuatu makes the necessary amendments to strengthen the enforcement of its laws so that we remain on the FATF white list.

Given that a unit trust can be created by both citizens and non-citizens, the risks of money laundering, terrorist financing and financial loss is always high.

The current Act does not have any market entry due diligence checks requirements. This implies that there exists no way to identify whether or not a person in a managerial position within each unit trust is a fit and proper person to hold these positions. It is therefore difficult for the Vanuatu Financial Service Commission to implement this Act to the standard required by FATF standards.

The proposed amendments will require due diligence checks to be undertaken on managers and trustees of each unit trust to ensure that a person cannot be a manager or trustee of a unit trust in Vanuatu, unless that person is a fit and proper person. The amendments further set out the criteria for assessing who would be a fit and proper person which specifically excludes persons who have been convicted of a money laundering or terrorist financing offence in a foreign jurisdiction.

Furthermore, the current provisions of the Act makes reference to the Companies Act [CAP 191] which has been repealed and replaced by the Companies Act No.25 of 2012. There also exists within the Act reference to the Trust Companies Act [CAP 69] which has been repealed and replaced by the Company and Trust Services Providers Act No. 8 of 2010. With these wrong references it is difficult for the Vanuatu Financial Services Commission (“the VFSC”) to implement this Act when it still makes reference to other Acts that have already been repealed.

The proposed amendments will be correcting references to ‘Companies Act’ and ‘Trust Companies Act’ to assist VFSC in its implementation of this Act.

Lastly under the existing provisions of the Act, all suspected breaches of provisions under the Act are to be subject to prosecution. This has been affecting the proper and efficient administration of the Act due to the length of the judicial process which often delays the time taken to remedy suspected breaches of provisions under the Act.

The proposed amendments will introduce a penalty notice system which will empower the Commissioner to issue Penalty Notices on International Companies to deal with all suspected breaches in a fast and efficient manner. This will improve and facilitate Vanuatu Financial Service Commissions ongoing robust monitoring and supervision of International Companies in Vanuatu.

Minister of Finance and Economic Management



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An Act to amend the Unit Trusts Act No. 36 of 2005.

Be it enacted by the President and Parliament as follows-

1 Amendment

The Unit Trusts Act No. 36 of 2005 is amended as set out in the Schedule.

2 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF THE UNIT TRUSTS ACT NO. 36 OF 2005

1 Subsection 1(1)

Insert in their correct alphabetical positions:

“**applicant** means a person applying for registration of a unit trust;

beneficial owner means a natural person who ultimately owns or ultimately controls an applicant or unit trust;

key person of an applicant or unit trust means a beneficial owner, owner, trustee, director, manager or controller of the applicant or unit trust;”

2 References to “Companies Act [CAP. 191]”

Delete all reference to “Companies Act [CAP 191]” (wherever occurring), substitute “Companies Act No. 25 of 2012”

3 References to “Trust Companies Act [CAP 69]”

Delete all reference to “Trust Companies Act [CAP 69]” (wherever occurring), substitute “Company and Trust Services Providers Act No. 8 of 2010”

4 Paragraph 6(2)(d)

Repeal the paragraph, substitute

“(d) include the following:

- (i) details of each key person of the applicant;
- (ii) details as required by the Commission on whether a beneficial owner of the applicant is beneficial owner, owner or controller of an entity licensed or registered under a regulatory law of Vanuatu or a foreign jurisdiction;
- (iii) details of the source of funds used to pay the capital of the applicant; and

- (e) be accompanied by the prescribe fee; and
- (f) comply with section 7A; and
- (g) be accompanied by:
 - (i) a copy of the trust deed; and
 - (ii) a copy of the business plan; and
 - (iii) a copy of the prospectus.”

5 At the end of section 6

Add

- “(3) If the applicant is a body corporate, the application must include the following details:
- (a) the name of the body corporate;
 - (b) proof of incorporation of the body corporate;
 - (c) the registered business address of the body corporate.
- (4) If the applicant is a natural person, the application must also be accompanied by:
- (a) a notarised copy of the passport of the applicant; and
 - (b) a certified copy of the police clearance for the applicant with a certified translation where necessary.
- (5) The application must also include such other information as may be required by the Commission.”

6 Section 9

Repeal the section, substitute

“9 Registration of unit trust scheme

- (1) Subject to subsection (2), the Commission may register a unit trust scheme if:
- (a) the scheme complies with the requirements of this Act on:
 - (i) the constitution and management of unit trust schemes; and
 - (ii) the powers and duties of the manager and the trustee; and
 - (iii) the rights and obligations of the unit holders in a unit trust scheme; and
 - (b) the trustee is a licensed trust company under the Company and Trust Services Providers Act No. 8 of 2010; and
 - (c) the manager holds a valid licence under section 8; and
 - (d) the Commission has been furnished with a copy of the trust deed and a certificate signed by a legal practitioner and attached to the trust deed to the effect that the contents of the deed comply with this Act.
- (2) The Commission may register a unit trust scheme if:
- (a) the application for the registration complies with section 6; and
 - (b) the Commission is:
 - (i) satisfied that each key person of the applicant is a fit and proper person; and
 - (ii) satisfied of the source of funds used to pay the capital of the applicant.
- (3) In deciding whether a key person of the applicant is a fit and proper person, the Commission must have regard to:
- (a) whether the person has been convicted of an offence or is subject to any criminal proceedings; and

- (b) whether the person is listed on a United Nations Financial Sanctions list, a financial sanctions list under the United Nations Financial Sanctions Act No. 6 of 2017 or a financial sanctions list under the law of any jurisdiction; and
- (c) any other fit and proper criteria prescribed by the Regulations.

9A Removal of a beneficial owner, owner, trustee, manager or controller of a unit trust

- (1) The Commission may direct in writing a unit trust to remove a person who is a beneficial owner, owner, trustee, director, manager or controller of the unit trust if the Commission is satisfied that the person does not meet any other fit and proper criteria in this Act or the guidelines.
- (2) Before directing the unit trust to remove a person, the Commission must give written notice to:
 - (a) the person; and
 - (b) the unit trust;giving each of them a reasonable opportunity to make submissions on the matter.
- (3) A direction takes effect on the day specified in it, which must be at least 7 days after it is made.
- (4) If the Commission directs a unit trust to remove a person, the Commission must give a copy of the direction to the person and the unit trust,
- (5) If the unit trust fails to comply with the direction under this section, the unit trust is guilty of an offence punishable on conviction by a fine not exceeding VT75 million.”

7 After section 28

Insert

“28A Penalty Notice

- (1) The Commissioner may serve a penalty notice on a person if it appears to the Commissioner that the person has committed an offence under any provision of this Act.
- (2) A penalty notice may be served personally or by post.
- (3) The Minister may by Order prescribe penalties which a person is required to pay under this section, which must not exceed:
 - (a) VT 200,000 for an individual; or
 - (b) VT 1 million for a body corporate;within 30 days after the date on which the notice was served.
- (4) If the amount of penalty referred to in subsection (3) is paid, that person is not liable to any further proceedings for the alleged offence.
- (5) Payment made under this section is not to be regarded as an admission of liability for the purpose of, nor in any way affect or prejudice, any proceeding arising out of the same occurrence.
- (6) The Commissioner may publish a penalty notice issued to a person in such manner as the Commission determines.
- (7) If a penalty notice has been served on a person, a prosecution in respect of the alleged offence may only be commenced if the penalty remains unpaid 30 days after the penalty was due, and the Court may take account of any unpaid penalty when imposing a penalty in respect of the offence.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (9) For the purposes of this section, **Commissioner** means the Commissioner of the Vanuatu Financial Services Commission appointed under section 9 of the Vanuatu Financial Services Commission Act [CAP 229].”