

REPUBLIC OF VANUATU

BILL FOR THE FOUNDATION (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Foundation Act No. 38 of 2009 to give effect to Vanuatu's FATF Action Plan to meet FATF Recommendations* and to strengthen regulatory controls to protect the financial sector from abuse by criminals. A brief explanation of the key amendments is set out below.

Market entry fit and proper criteria, including source of funds

Amendments have been made to require the Commission to carry out fit and proper checks when a foundation is first registered (point of entry). The new fit and proper criteria will apply widely to "key persons" of the foundation, namely, any founder, counsellor, secretary or guardian of a foundation, and any beneficial owner of a key person.

New supporting definitions are added, including for beneficial owner, which is broad and intended to look beyond the corporate veil, including chains of control and ownership, direct or indirect.

In assessing fit and proper criteria, the Commission must consider whether a key person and a beneficial owner:

- has been convicted of an offence or is subject to any criminal proceedings; and
- is listed on a financial sanctions list of the United Nations or another country; and
- meets any other fit and proper criteria prescribed in the regulations.

The source of the initial assets to be transferred to the foundation has been added as additional entry point criteria.

Existing foundations have 6 months in which to comply with the new entry provisions.

On-going disclosure provisions

After being registered, foundations must continue to meet fit and proper checks on an on-going basis. A foundation must update the Commission within 14 days of any relevant changes occurring, including any transfer of assets exceeding VT 1 million or its equivalent in foreign currency to the foundation (in addition to the initial assets) and the Commission can require information from the foundations on its own initiative. Non-compliance by foundations with the new entry and on-going requirements is a criminal offence, and penalty levels have been increased to meet FATF standards.

Non-compliance is also a new ground for dissolving a foundation together with contravening the Anti-Money Laundering and Counter Terrorism Financing Act No. 13 of 2014 (AML/CTF Act).

Monitoring provisions

The amendments provide the Commission with new powers to collect information and documents relating to a foundation, and to conduct on-site inspections of the foundation's business premises. A failure to comply with a request for information or documents, obstruction of on-site inspections or providing false or misleading information are criminal offences. Amendments also allow the Commission to gather information from a variety of domestic government sources as well as foreign government agencies.

Disclosure of information

Amendments have been made to allow for the disclosure of confidential information by the Commission to domestic and foreign agencies for a broad range of purposes. These purposes include supervision under the AML/CTF Act, investigating or enforcing certain serious offences and foreign tax evasion offences, and investigating or taking action under the Proceeds of Crime Act [CAP 284].

*The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering and counter-terrorist financing standard.

Other Changes

Similar changes have been made in relation to the continuance of overseas foundations.

Minister of Finance and Economic Management



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FOUNDATION (AMENDMENT)
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BILL FOR THE FOUNDATION (AMENDMENT) ACT NO. OF 2017

An Act to amend the Foundation Act No. 38 of 2009 and for related purposes.

Be it enacted by the President and Parliament as follows-

1 Amendments

The Foundation Act No. 38 of 2009 is amended as set out in the Schedule, and any other item in the Schedule has effect according to its terms.

2 Commencement

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

SCHEDULE

AMENDMENTS OF FOUNDATION ACT NO. 38 OF 2009

1 Section 2

Insert in their correct alphabetical positions:

“**beneficial owner** has the same meaning given by section 4A;

domestic regulatory authority means a body or agency established by or under a law of Vanuatu that:

- (a) grants or issues under that law or any other law licences, permits, certificates, registrations or other equivalent permissions; and
- (b) performs any other regulatory function related to a matter referred to in paragraph (a), including developing, monitoring or enforcing compliance with standards or obligations prescribed by or under that law or any other law;

Financial Intelligence Unit means the Financial Intelligence Unit established under section 4 of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014;

foreign government agency means:

- (a) a body or agency established by or under a law of a foreign country; or
- (b) an arm, ministry, department or instrumentality of the government of a foreign country; or
- (c) a body or agency of a foreign country set up by administrative act for governmental purposes;

foreign serious offence means:

- (a) an offence against a law of another country that, if the relevant act or omission had occurred in Vanuatu, would be an offence against the laws of Vanuatu, for which the maximum penalty is imprisonment for at least 12 months; or
- (b) an offence prescribed by the Regulations;

foreign tax evasion offence means conduct that:

- (a) amounts to an offence against a law of a foreign country; and
- (b) relates to a breach of a duty relating to a tax imposed under the law of the foreign country (whether or not that tax is imposed under a law of Vanuatu); and
- (c) would be regarded by the courts of Vanuatu as an offence of fraudulent evasion of tax for which the maximum penalty is imprisonment for at least 12 months, had the conduct occurred in Vanuatu;

key person means a founder, councillor, secretary or guardian of a foundation;

law enforcement agency means:

- (a) the Vanuatu Police Force; or
- (b) the Office of the Public Prosecutor; or
- (c) the department responsible for customs and inland revenue; or
- (d) the department responsible for immigration; or
- (e) such other persons prescribed for the purposes of this definition;

Sanctions Secretariat means the Sanctions Secretariat established under section 17 of the United Nations Financial Sanctions Act No. 6 of 2017;”

2 After section 4

Insert in Part 1

“4A Meaning of beneficial owner

- (1) A **beneficial owner** of a key person is a natural person who ultimately controls the key person.
- (2) For the purpose of subsection (1), **control** means exercising influence, authority or power over the key person, and includes circumstances where the key person is acting as a nominee or proxy on behalf of another person or entity.

- (3) For the avoidance of doubt, if a key person is acting as a nominee or proxy on behalf of a legal person or legal arrangement, the natural person who ultimately controls the key person is the natural person who:
- (a) has a legal entitlement to 25% or more of the legal person or legal arrangement by way of ownership of shares or otherwise, including ownership exercised through a chain of ownership; or
 - (b) otherwise exercises control, directly or indirectly, over the legal person or legal arrangement.”

3 After subparagraph 6(2)(d)(i)

Insert

- “(ia) the details of each key person; and
- (ib) the details of any beneficial owner of a key person; and”

4 Subparagraph 6(2)(d)(ii)

After “assets”, insert “and the source of those assets”

5 Subparagraph 6(2)(d)(iii)

Repeal the subparagraph.

6 After paragraph 6(2)(f)

Delete “.”, substitute “; and

- (g) have with it any other information as may be required by the Commission.”

7 Subsection 7(1)

Repeal the subsection, substitute

- “(1) The Commission must not register a foundation unless it is satisfied:
- (a) that the application for registration and the foundation’s charter comply with this Act; and
 - (b) of the source of the initial assets to be transferred to the foundation; and
 - (c) that the key persons and the beneficial owners are fit and proper persons.

- (1A) In assessing whether or not a key person or beneficial owner is fit and proper, the Commission must take into consideration the following matters:
- (a) whether the key person or beneficial owner has been convicted of an offence or is subject to any criminal proceedings; and
 - (b) whether the key person or beneficial owner is listed on:
 - (i) a United Nations Financial Sanctions list; or
 - (ii) a financial sanctions list under the United Nations Financial Sanctions Act No. of 2017; or
 - (iii) a financial sanctions list under a law of any jurisdiction; and
 - (c) any other fit and proper criteria prescribed by the Regulations.”

8 Subsection 11(2)

- (a) Delete “Commissioner”, substitute “Commission”;

(b) Delete “Commissioner’s”, substitute “Commission’s”;

9 Subsection 12(8)

Delete “VT1,000,000”, substitute “VT125 million”

10 After paragraph 17(2)(b)

Insert

“(ba) to the Commission under section 29A or 29B; and”

11 Subsections 19(4) and 25(3)

Delete “VT1 million”, substitute “VT125 million”

12 Part 7 (Heading)

Repeal the heading, substitute

“PART 7 MONITORING AND INVESTIGATION OF FOUNDATIONS”

13 After section 29

Insert in Part 7

“29A Commission may require information and documents

- (1) Subject to subsection (2), the Commission may, by notice in writing to a foundation, require the foundation to provide the Commission with information or documents, or both, specified in the notice within the period set out in the notice.
- (2) The information or documents must relate to:
 - (a) the foundation’s integrity, competence, financial standing or organisation; or
 - (b) the foundation’s compliance with this Act or the Regulations.
- (3) If the foundation:
 - (a) refuses or fails to give the Commission the information or documents required by the Commission; or
 - (b) knowingly or recklessly gives the Commission information or documents that are false or misleading,

the foundation commits an offence punishable upon conviction by a fine not exceeding VT 75 million.

29B On-site inspections

- (1) The Commission may conduct on-site inspections at the business premises occupied by a foundation at any time during normal business hours.
- (2) The Commission may for the purposes of subsection (1):
 - (a) enter the business premises of the foundation during ordinary business hours; and
 - (b) inspect and take copies of any books, accounts and documents of the foundation that relate to:
 - (i) the foundation’s integrity, competence, financial standing or organisation; or
 - (ii) the foundation’s compliance with this Act or the Regulations.

- (3) The foundation must cooperate fully with the Commission by:
- (a) giving the Commission all the information, and making available the documents it requires; and
 - (b) if necessary, giving the Commission appropriate workspace and reasonable access to office services, during the inspection.
- (4) If a person intentionally obstructs the Commission in the exercise of the Commission's powers under this section, the person commits an offence punishable upon conviction by:
- (a) in the case of a natural person - a fine not exceeding VT 15 million or imprisonment not exceeding 5 years, or both; or
 - (b) in the case of a body corporate - a fine not exceeding VT 75 million.
- (5) In this section, a reference to the Commission includes a person appointed by the Commission in writing as an inspector under subsection 30(1).
- (6) An inspector must produce written evidence of his or her appointment if required to do so while carrying out on-site inspections.

29C Commission may request information and documents from government agencies

For the purpose of performing a function or exercising a power under this Act, the Commission may request information or documents, or both, from any or all of the following:

- (a) the Financial Intelligence Unit;
- (b) a supervisor within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014;
- (c) the Sanctions Secretariat;
- (d) a law enforcement agency;
- (e) a domestic regulatory authority;

- (f) a foreign government agency that carries out functions corresponding or similar to the functions carried out by a body or agency referred to in paragraph (a), (b), (c), (d) or (e).”

14 Paragraph 30(1)(d)

Delete “.”, substitute “; or

- (e) the foundation has not complied with this Act.

15 Subsection 31(5)

- (a) Delete “VT1,000,000”, substitute “VT15 million”
(b) Delete “1 year”, substitute “5 years”

16 Subsection 32(5)

- (a) Delete “one year”, substitute “5 years”
(b) Delete “VT1,000,000”, substitute “VT15 million”

17 After Part 7

Insert

“PART 7A SHARING OF INFORMATION

34A Meaning of confidential information

For the purposes of this Part, **confidential information** is information supplied to or obtained by the Commission in the performance of the Commission’s functions or the exercise of the Commission’s powers under this Act, but does not include information that:

- (a) can be disclosed under any provision of this Act; or
(b) is already in the public domain; or
(c) consists of aggregate data from which no information about a specific person or business can be identified.

34B Disclosure of confidential information

- (1) The Commission may disclose confidential information if the disclosure:
(a) is required or authorised by the Court; or
(b) is made for the purpose of performing a function or exercising a power under this Act; or

- (c) is made to the Financial Intelligence Unit for the purpose of performing a function or exercising a power under the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014; or
 - (d) is made to a supervisor within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014 for the purpose of performing a function or exercising a power under that Act; or
 - (e) is made to a law enforcement agency for the purpose of investigating or prosecuting an offence against a law of Vanuatu for which the maximum penalty is a fine of at least VT 1 million or imprisonment for at least 12 months; or
 - (f) is made to a law enforcement agency for the purpose of investigating or taking action under the Proceeds of Crime Act [CAP 284]; or
 - (g) is made to a domestic regulatory authority for the purpose of carrying out its regulatory functions; or
 - (h) is made to the Sanctions Secretariat for the purpose of performing a function or exercising a power under the United Nations Financial Sanctions Act No. of 2017; or
 - (i) is made to a foreign government agency in accordance with section 34E.
- (2) A person who contravenes subsection (1) commits an offence punishable upon conviction by a fine not exceeding VT 75 million.

34C Disclosure to foreign government agency

The Commission may disclose confidential information to a foreign government agency if:

- (a) the Commission is satisfied that the disclosure is for the purpose of:
 - (i) performing a function or exercising a power under the foreign government agency's own regulatory legislation, including investigating a breach of that legislation; or

- (ii) performing a function or exercising a power under the foreign jurisdiction's anti-money laundering and counter-terrorism financing regulation and supervision laws; or
 - (iii) performing a function or exercising a power under the foreign jurisdiction's financial sanctions laws; or
 - (iv) investigating or prosecuting a foreign serious offence or a foreign tax evasion offence; or
 - (v) investigating or taking action under the foreign jurisdiction's proceeds of crime laws; and
- (b) the Commission is satisfied that:
- (i) the information will be used for a proper regulatory, supervisory or law enforcement purpose; and
 - (ii) the agency is subject to adequate restrictions on further disclosure.”

18 Paragraph 35(1)(a)

Repeal the paragraph, substitute

- “(a) the foundation is able to meet the requirements for establishment under this Act; and”

19 After subparagraph 35(2)(d)(i)

Insert

- “(ia) the details of each key person; and
- (ib) the details of any beneficial owner of a key person; and
- (ic) the details of the source of the initial assets transferred to the foundation; and”

20 Subparagraph 35(2)(d)(iv)

Repeal the subparagraph.

21 Paragraph 35(2)(g)

Delete “.”, substitute “; and

- (h) have with it any other information as may be required by the Commission.”

22 Subsection 37(1)

Repeal the subsection, substitute

- “(1) The Commission must not issue a certificate of continuance for an overseas foundation unless it is satisfied:
- (a) the foundation complies with sections 35 and 36; and
 - (b) of the source of the initial assets to be transferred to the foundation; and
 - (c) that key persons and any beneficial owners are fit and proper persons.
- (1A) In assessing whether or not a key person or a beneficial owner is fit and proper, the Commission must take into consideration the following matters:
- (a) whether the person has been convicted of an offence or is subject to criminal proceedings; and
 - (b) whether the person is listed on a United Nations Financial Sanctions list, or a financial sanctions list under the United Nations Financial Sanctions Act No. 6 of 2017 or a financial sanctions list under a law of any jurisdiction; and
 - (c) any other fit and proper criteria prescribed by the Regulations.”

23 Subsection 43(1)

Repeal the subsection, substitute

- “(1) Subject to subsections (2) and (3), the Commission may dissolve a foundation if:
- (a) the foundation fails to:
 - (i) file its annual return; or
 - (ii) pay the prescribed annual fees within the time specified by this Act; or
 - (iii) comply with any other provision of this Act; or

- (b) the foundation has contravened a provision of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014 and that contravention has resulted in the use of an enforcement measure under Part 10AA of that Act.”

24 Paragraph 48(1)(f)

After “nature”, insert “, source”

25 Paragraph 48(1)(j)

Delete “.”, substitute “; and

- (k) up to date information on the name and address of each councillor, and the name and address of the guardian, once appointed.”

26 Section 49 (heading)

Repeal the heading, substitute

“49 Amendment of charter and certain other changes”

27 At the end of section 49

Add

“(5) A foundation must also give the Commission written notice of:

- (a) a change of, or addition of, a beneficial owner; or
- (b) a change in the circumstances of a key person or beneficial owner that may affect whether he or she is fit and proper; or
- (c) any transfer of assets exceeding VT 1 million or its equivalent in foreign currency to the foundation, in addition to the initial assets,

within 14 days after the change occurs.

- (6) If a foundation fails to comply with subsection (4) or (5), the foundation commits an offence punishable upon conviction by a fine not exceeding VT 125 million.
- (7) If a foundation fails to comply with subsection (4) or (5), the Commission may dissolve the foundation in accordance with paragraph 43(1)(c).
- (8) If a foundation does provide the information as required under subsection (4) or (5), but the Commission is not satisfied:

- (a) that the key persons or any beneficial owners are fit and proper persons having regard to the matters referred to in subsection 7(1A); or
- (b) as to the source of any transfer of assets exceeding VT 1 million or its equivalent in foreign currency to the foundation, in addition to the initial assets,

the Commission may dissolve the foundation in accordance with paragraph 43(1)(c).”

28 After section 55

Insert

“55A Indemnity from liability etc.

The Commissioner, and any inspector appointed under section 30 and any other person authorised by the Commissioner or the Commission, is not subject to any civil or criminal liability, action, claim or demand for anything done or omitted to be done in good faith under or for the purposes of this Act.”

29 Transitional

- (1) This provision applies to a foundation if, immediately before the commencement of this Act, the foundation was registered under the Foundation Act No. 38 of 2009.
- (2) The foundation must provide the Commission with the information required under subparagraphs 6(2)(d)(ia), 6(2)(d)(ib) and 6(2)(d)(ii) of the Foundation Act No. 38 of 2009 as amended by this Act (“**the additional information**”) within 6 months after the commencement of this Act.
- (3) If the foundation does not provide the additional information as required under subsection (2), the Commission may by notice in writing to the foundation dissolve that foundation.
- (4) If the foundation does provide the additional information as required under subsection (2), but the Commission is not satisfied with the additional information having regard to the matters set out in paragraphs 7(1)(b) and (c) of the Foundation Act No. 38 of 2009 as amended by this Act, the Commission may by notice in writing to the foundation dissolve that foundation.
- (5) Subsections 43(2) and (3) of the Foundation Act No. 38 of 2009 as amended by this Act apply to dissolving a foundation.

SCHEDULE
AMENDMENTS OF FOUNDATION ACT NO. 38 OF 2009

- (6) A term or expression used in this item has the same meaning as in the Foundation Act No. 38 of 2009 as amended by this Act.