

REPUBLIC OF VANUATU

BILL FOR THE MUTUAL FUNDS (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Mutual Funds Act No. 38 of 2005 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 licence is first issued for a mutual fund (point of entry). The new fit and proper criteria will apply as follows to different categories of licences under the Act:

- For general and foreign mutual funds licences, to each administrator, promoter, operator and equity controller, as well as to their beneficial owners;
- For a mutual fund administrator's licence, in the case of a company, to each director and manager, and any person with a controlling interest in the company, and the beneficial owners of the company and in the case of a partnership, to each partner, and the beneficial owners of the partnership.

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 person referred to above:

- 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 equity of the mutual fund and, in the case of an administrator's license, the source of funds of the company or partnership have been added as additional entry point criteria.

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

On-going disclosure provisions

Licensees must continue to meet fit and proper checks on an on-going basis. Licence holders must update the Commission within 14 days of any relevant changes occurring, including

equity and funding sources, and the Commission can require information from the licensees on its own initiative. Non-compliance by licensees 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 suspension or revocation of licences together with contravening the Anti-Money Laundering and Counter Terrorism Financing Act No. 13 of 2014 (AML/CTF Act).

Monitoring provisions

The amendments 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 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.

Minister of Finance and Economic Management



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An Act to amend the Mutual Funds Act No. 38 of 2005, and for related purposes.

Be it enacted by the President and Parliament as follows-

1 Amendments

The Mutual Funds Act No. 38 of 2005 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 MUTUAL FUNDS ACT NO. 38 OF 2005

1 Subsection 1(1)

Insert in their correct alphabetical positions:

“**beneficial owner** has the meaning given by section 1A;

confidential information means information that is supplied to or obtained by the Commission in the performance of its functions or the exercise of its 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;

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;

equity controller, for a mutual fund, means a person who holds or is likely to hold more than 10% of the equity interests in the fund;

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;

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;

licence means a licence issued under section 6 or 9;

licensee means the holder of a licence;

regulatory law means a law that provides for:

- (a) the grant or issue of licences, permits, certificates, registrations or other equivalent permissions; and
- (b) other regulatory functions related to a matter referred to in paragraph (a), including monitoring or enforcing compliance with standards or obligations prescribed by that law;

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

2 Subsection 1(1) (definition of controller)

Repeal the definition.

3 Subsection 1(1) (definition of licensed mutual fund)

Repeal the definition.

4 After section 1

Insert

“1A Meaning of beneficial owner

- (1) A beneficial owner of a person or entity is a natural person who ultimately owns or ultimately controls the person or entity.
- (2) For the purpose of this section, **control** means to exercise influence, authority or power over decisions about the financial or operating policies of a person or entity, including as a result of, or by means of, a trust, agreement, arrangement, understanding or practice.
- (3) For the purpose of this section, **own** means having a legal entitlement of 25% or more of a person or entity by way of ownership of shares or otherwise, and “ownership” has a corresponding meaning.
- (4) For the purpose of this section, **ultimately owns** and **ultimately controls** include circumstances where ownership or control is exercised:
 - (a) through a chain of ownership; or
 - (b) by a means of indirect control that may not have legal or equitable force, or be based on legal or equitable rights.”

5 Paragraph 4(2)(e)

Repeal the paragraph, substitute

- “(e) details of each administrator and promoter of the mutual fund; and
- (ea) details of each beneficial owner of each administrator and promoter of the mutual fund; and
- (eb) details as required by the Commission on whether a beneficial owner referred to in paragraph (ea) is a beneficial owner of an entity licensed or registered under a regulatory law of Vanuatu or a foreign jurisdiction; and
- (ec) details as required by the Commission on the source of equity of the mutual fund; and”

6 Section 4

Add at the end

- “(3) The Commission may require the applicant to supply further information and documents to enable the Commission to determine whether a licence should be granted.”

7 Paragraphs 5(2)(a)

Repeal the paragraph, substitute

- “(a) details of each operator, equity controller and promoter of the mutual fund; and
- (aa) details of each beneficial owner of each operator, equity controller and promoter of the mutual fund; and
- (ab) details as required by the Commission on whether a beneficial owner referred to in paragraph (aa) is a beneficial owner of an entity licensed or registered under a regulatory law of Vanuatu or a foreign jurisdiction; and
- (ac) details as required by the Commission on the source of equity of the mutual fund; and”

8 Paragraph 5(2)(b)

After “or” insert “equity”

9 Paragraph 6(1)(a)

Repeal the paragraph, substitute

- “(a) each administrator and promoter of the mutual fund is a fit and proper person; and

- (aa) each beneficial owner of each administrator and promoter of the mutual fund is a fit and proper person; and
- (ab) the source of equity of the mutual fund is acceptable; and”

10 Paragraph 6(2)(a)

Repeal the paragraph, substitute

- “(a) each operator, equity controller and promoter of the mutual fund is a fit and proper person; and
- (aa) each beneficial owner of each operator, equity controller and promoter of the mutual fund is a fit and proper person; and
- (ab) the source of equity of the mutual fund is acceptable; and”

11 After subsection 6(2)

Insert

- “(2A) In deciding under paragraphs (1)(a), (1)(aa), (2)(a) and (2)(aa), whether a person 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 a law of any jurisdiction; and
 - (c) any other fit and proper criteria as prescribed by the Regulations.”

12 Subparagraph 8(2)(a)(ii)

Repeal the subparagraph, substitute

- “(ii) details of each director and manager of the company, and each person with a controlling interest in the company; and
- (ia) details of each beneficial owner of the company; and
- (iib) details as required by the Commission on whether a beneficial owner of the company is a beneficial owner of an entity licensed or registered under a regulatory law of Vanuatu or a foreign jurisdiction; and
- (iic) details of the source of funds used to pay the capital of the company; and”

13 Subparagraph 8(2)(b)(ii)

Repeal the subparagraph, substitute

- “(ii) details of each general partner of the partnership; and
- (iii) details of each beneficial owner of the partnership; and
- (iv) details as required by the Commission on whether a beneficial owner of the partnership is a beneficial owner of an entity licensed or registered under a regulatory law of Vanuatu or a foreign jurisdiction; and
- (v) details of the source of funds used to pay the capital of the partnership.”

14 At the end of section 8

Add

- “(3) For the purposes of subparagraph (2)(a)(ii), a person has a controlling interest in a company if the person:
 - (a) has a legal entitlement to 25% or more of the shares in the company, or
 - (b) otherwise exercises influence, authority or power over the company’s financial or operating policies.
- (4) The Commission may require the applicant to supply further information and documents to enable the Commission to determine whether a licence should be granted.”

15 Subsection 9(1)

Delete “the administrator”

16 Paragraph 9(1)(a)

Delete “has”, substitute “the administrator has”

17 Paragraph 9(1)(b)

Repeal the paragraph, substitute

- “(b) each person referred to in subparagraph 8(2)(a)(ii), 8(2)(a)(iia), 8(2)(b)(ii) or 8(2)(b)(iii) is a fit and proper person; and
- (c) the source of funds used to pay the capital of the company or partnership is acceptable.”

18 After subsection 9(1)

Insert

- “(1A) In deciding under paragraph (1)(b) whether a person 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 a law of any jurisdiction; and
 - (c) any other fit and proper criteria as prescribed by the Regulations.”

19 After section 10

Insert

“10A Administrator to give notice of certain changes to Commission

- (1) The administrator of a mutual fund must give the Commission written notice of a change:
- (a) to a person referred to in:
 - (i) paragraph 4(2)(e) or (ea); or
 - (ii) paragraph 5(2)(a) or (aa); or
 - (iii) subparagraph 8(2)(a)(ii) or (iia); or
 - (iv) subparagraph 8(2)(b)(ii) or (iii); or
 - (b) in the circumstances of a person referred to in paragraph (a), that may affect whether the person meets fit and proper criteria; or
 - (c) to the source of equity of the mutual fund; or
 - (d) to the source of funds used to pay the capital of the administrator,
- within 14 days after the change occurs.

- (2) If an administrator fails to comply with subsection (1), the administrator commits an offence punishable upon conviction by:
- (a) if the licensee is a natural person - a fine not exceeding VT 25 million or imprisonment not exceeding 15 years, or both; or
 - (b) in any other case - a fine not exceeding VT 125 million.
- (3) If an administrator fails to comply with subsection (1), the Commission may by notice in writing to the administrator suspend or revoke the administrator's licence under section 19.
- (4) If an administrator does provide the information as required under subsection (1), but the Commission is not satisfied:
- (a) that a person referred to in subparagraph (1)(a)(i), (ii), (iii) or (iv) is a fit and proper person having regard to the matters set out in subsection 6(2A) or 9(1A); or
 - (b) as to the source of equity of the mutual fund; or
 - (c) as to the source of funds used to pay the capital of the administrator,

the Commission may by notice in writing to the administrator suspend or revoke the administrator's licence under section 19."

20 Subsection 11(4)

Repeal the subsection, substitute

- "(4) If an administrator or auditor of a mutual fund fails to comply with this section, the administrator or auditor commits an offence punishable upon conviction by:
- (a) if the administrator or auditor is a natural person - a fine not exceeding VT 25 million or imprisonment not exceeding 15 years, or both; or
 - (b) in any other case - a fine not exceeding VT 125 million."

21 Subsection 13(3)

Repeal the subsection, substitute

- “(3) If a person transfers or deals with an interest, or appoints a director or manager, without the Commission’s approval, the person commits an offence punishable upon conviction by:
- (a) if the person is a natural person - a fine not exceeding VT 25 million or imprisonment not exceeding 15 years, or both; or
 - (b) in any other case - a fine not exceeding VT 125 million.”

22 After section 18

Insert

“18A Commission may request information and documents

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).”

23 Section 19 (heading)

Delete the heading, substitute “Suspension and revocation of licences”

24 Subsection 19(1)

After “may”, insert “suspend or”

25 After paragraph 19(1)(a)

Insert

- “(aa) if the licensee 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; or

- (ab) if the fit and proper criteria are not met as required under this Act or Regulations; or
- (ac) if the Commission is not satisfied of the source of equity of the mutual fund; or
- (ad) if the Commission is not satisfied of the source of funds used to pay the capital of the administrator; or
- (ae) if an administrator fails to comply with subsection 10A(1), or provides information under subsection 10A(1) that is not satisfactory to the Commission under subsection 10A(4); or”

26 Subsection 19(2)

- (a) After “ Before”, insert “suspending or”
- (b) After “proposed”, insert “suspension or”
- (c) After “be”, insert “suspended or”

27 Sections 23, 24 and 25

Repeal the sections, substitute

“23 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 24.
- (2) A person who contravenes subsection (1) commits an offence punishable upon conviction by:
- (a) for an individual-a fine not exceeding VT 15 million or imprisonment for a term not exceeding 5 years, or both; and
 - (b) in any other case - a fine not exceeding VT 75 million.

24 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.

25 Indemnity from liability

No person is 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.”

28 Section 27

Repeal the section, substitute

“27 Offences

If a person in compliance or purported compliance with this Act makes a representation that the person knows to be false or does not believe to be true, the person commits an offence punishable upon conviction by:

- (a) for an individual-a fine not exceeding VT 15 million or imprisonment for a term not exceeding 5 years, or both; and
- (b) in any other case - a fine not exceeding VT 75 million.”

29 Transitional provision for certain licensee information

- (1) This provision applies to a licensee if, immediately before the commencement of this Act, the licensee's licence was in force under the Mutual Funds Act No. 38 of 2005.
- (2) Within 6 months after the commencement of this Act, the licensee must provide the Commission with the information for licensee's licence required under:
 - (a) paragraph 4(2)(e), (ea), (eb) and (ec); or

- (b) paragraph 5(2)(a), (aa), (ab) and (ac); or
- (c) subparagraph 8(2)(a)(ii), (iia), (iib) and (iic); or
- (d) subparagraph 8(2)(b)(ii), (iii), (iv) and (v),

of the Mutual Funds Act No. 38 of 2005 as amended by this Act (“**the additional information**”).

- (3) If the licensee does not provide the additional information as required under subsection (2), the Commission may by notice in writing to the licensee revoke the licensee’s licence.
- (4) If the licensee 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 6(2)(a), (aa) and (ab), or paragraphs 9(1)(b) and (c), of the Mutual Funds Act No. 38 of 2005 as amended by this Act, the Commission may by notice in writing to the licensee revoke the licensee’s licence.
- (5) Subsections 19(2) and (3) of the Mutual Funds Act No. 38 of 2005 as amended by this Act apply to a revocation.
- (6) A term or expression used in this item has the same meaning as in the Mutual Funds Act No. 38 of 2005 as amended by this Act.