

REPUBLIC OF VANUATU

BILL FOR THE COMPANY AND TRUST SERVICES PROVIDERS (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Company and Trust Services Providers Act No. 8 of 2010 (the Principal Act) primarily to give effect to Vanuatu's FATF Action Plan to meet FATF Recommendations*. A brief explanation of the key amendments is set out below.

Market entry and ongoing fit and proper checks

Amendments have been made to require the Vanuatu Financial Services Commission (VFSC) to carry out fit and proper checks when a company and trust service provider is first licensed (point of entry). The new criteria apply widely to owners, controllers, beneficial owners, directors and managers of applicants. In particular, the new definition of beneficial owner is broad and intended to look beyond the corporate veil, including chains of control and ownership, direct or indirect. The source of funds for the capital of an applicant has been added as additional entry point criteria. Existing licence holders have 6 months in which to comply with the new entry requirements.

Licensees must continue to meet the fit and proper checks on an ongoing basis. Consequently, licence holders must update the VFSC within 14 days of any relevant changes occurring and the VFSC can require information on its own initiative. Non-compliance by licensees with the new entry and ongoing requirements is an offence.

Licensing

The powers of the Commission to cancel licences have been expanded, including a failure to comply with the fit and proper criteria and certain requirements under the Anti-Money Laundering and Counter-Terrorism Financing Act No 13 of 2014 (AML/CTF Act).

Beneficial ownership of trusts

New obligations have been imposed on licensees that provide trust services to obtain and maintain up to date basic and beneficial ownership information on trusts, including trustees, beneficiaries and any beneficial owner of a trust. Licensees that act as trustees must also disclose their status when opening accounts and conducting certain other activities on behalf of the trust with financial institutions and other AML/CTF reporting entities. Non-compliance by licensees is also an offence.

Power to obtain information and disclosure of information

Amendments have been made to allow the VFSC to gather information from a variety of sources, including government agencies in other countries. A key purpose of this is to enable the VFSC to be able to obtain and verify information on applicants and licensees, in

particular, the fit and proper criteria. Amendments have also been made to allow the VFSC to disclose information to domestic and foreign agencies for a broader range of purposes. These purposes include supervision under the AML/CTF Act, investigating or enforcing certain serious offences, and investigations or taking action under the Proceeds of Crime Act [CAP 284].

Supervisory coordination

The AML/CTF Act makes it clear that regulatory authorities conduct market entry fit and proper checks. The Vanuatu Financial Intelligence Unit will conduct fit and proper checks prior to registration as a reporting entity under the AML/CTF Act if a reporting entity is not regulated.

*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 (AML) and counter-terrorist financing (CTF) standard.

Minister of Finance and Economic Management



REPUBLIC OF VANUATU

**BILL FOR THE
COMPANY AND TRUST SERVICE PROVIDERS
(AMENDMENT) ACT NO. OF 2017**

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REPUBLIC OF VANUATU

BILL FOR THE COMPANY AND TRUST SERVICE PROVIDERS (AMENDMENT) ACT NO. OF 2017

An Act to amend the Company and Trust Service Provider Act No. 8 of 2010, and for related purposes.

Be it enacted by the President and Parliament as follows-

1 Amendment

The Company and Trust Service Provider Act No. 8 of 2010 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 COMPANY AND TRUST SERVICE PROVIDERS ACT NO. 8 OF 2010

1 Subsection 2(1)

Insert in their correct alphabetical positions

“**beneficial owner** means a natural person who ultimately owns or ultimately controls an entity;

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 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;

owner of an entity means a person who has a legal entitlement of 25% or more of the entity by way of ownership of shares or otherwise, and own and ownership have a corresponding meaning;

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. of 2017;”

2 Subsection 2(1)(definition of controller)

Repeal the definition, substitute

“**controller** has the meaning given by section 2A and **control** has a corresponding meaning;”

3 Subsection 2(1)(definition of manager of a licensee)

Repeal the definition, substitute

“**manager** of an applicant for a licence or a licensee (other than a director’s licence) means:

- (a) an individual who occupies the position of the chief executive officer (however described) of the applicant or licensee; or
- (b) an individual who under the immediate authority of the chief executive officer or a director of the applicant or licensee, exercises the management functions of the applicant or licensee;”

4 At the end of section 2

Add

“(3) For the purpose of the definition of a beneficial owner, 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 After Section 2

Insert

“2A Meaning of controller

- (1) A person is a controller of an entity if the person exercises influence, authority or power over decisions about the entity’s financial or operating policies, including as a result of, or by means of, a trust, agreement, arrangement, understanding or practice.
- (2) Without limiting subsection (1), a controller of a company includes each of the following:
 - (a) a managing director of another company of which the company is a subsidiary;

- (b) a chief executive officer of another company of which the company is a subsidiary;
- (c) an indirect controller for the company;
- (d) a shareholder controller;
- (e) any other person who has significant powers with respect to the services provided by the company.”

6 Subparagraph 13(2)(d)(ii)

Repeal the subparagraph, substitute

- “(ii) details of the persons who own or control the applicant; and
- (iia) details of the beneficial owners of the applicant; and
- (iib) information as required by the Commission on whether a person mentioned in subparagraph (iia) is a beneficial owner, owner or controller 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 applicant; and”

7 Paragraph 14(2)(e)

Repeal the paragraph, substitute

- “(e) that each owner, beneficial owner, controller, director and manager of the applicant is a fit and proper person; and
- (ea) that the source of funds used to pay the capital of the applicant is acceptable; and”

8 After subsection 14(3)

Insert

“(3A) In deciding whether a person referred to in paragraph 2(e) 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. of 2017 or any law of any jurisdiction;
- (c) any fit and proper criteria in the Guidelines.”

9 After section 24

Insert

“24A Commission to approve certain changes

- (1) A licensee must give the Commission 14 days notice in writing of a change:
 - (a) in the licensee’s name or registered office address; or
 - (b) of a beneficial owner, owner, controller, director or manager of the licensee; or
 - (c) in the source of funds used to pay the capital of the licensee.
- (2) A licensee must not implement a change referred to in paragraph (1)(b) or (c) without first obtaining written agreement from the Commission.
- (3) The Commission must respond to a licensee’s notice within 14 days after the date of the notice, and:
 - (a) may agree in writing to the proposed change; or
 - (b) may refuse to agree to the proposed change; or
 - (c) if the Commission needs more time to complete its enquiries, must inform the licensee that it is withholding approval pending further enquiries.
- (4) The Commission must either agree to or refuse the change within 14 days after the date of its response under paragraph (3)(c).
- (5) The Commission may refuse to agree to a change only if:
 - (a) a person is not a fit and proper person having regard to the matters set out in section 14; or

- (b) for any other substantial reason, the Commission is of the view that the person should not be appointed or should not assume that position;
or
 - (c) the Commission is not satisfied that the source of funds used to pay the capital of the licensee is acceptable.
- (6) The Commission must give the licensee written reasons for the refusal.
- (7) A licensee may appeal to the Court against the Commission's refusal.
- (8) If a licensee fails to comply with subsection (1) or (2), the licensee 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) if the licensee is a body corporate - a fine not exceeding VT 125 million."

10 After section 25

Insert the following new Part

“PART 3A – BENEFICIAL OWNERSHIP OF TRUSTS

25A Application of Part

This Part applies to a licensee that provides a trust service in relation to a trust.

25B Obligation to obtain certain trust information

- (1) A licensee must obtain the following information:
- (a) the identity of the settlor of a trust in respect of which the licensee provides a trust service;
 - (b) the identity of each trustee of the trust;
 - (c) the identity of the protector of the trust;
 - (d) the identity of each beneficiary or class of beneficiaries of the trust;
 - (e) details of the beneficial owner of the trust;

- (f) details of any other person providing a professional service to the trust.
- (2) If a change to any of the information referred to in paragraph (1)(a), (b), (c), (d), (e) or (f) occurs, the licensee must update the information within 14 working days after the change occurs.
- (3) A licensee must retain the information referred to in subsections (1) and (2) for at least 6 years after the licensee ceases to provide trust services in relation to the trust.

25C Disclosure of status as trustee

- (1) A licensee acting as a trustee must disclose its status as a trustee to a reporting entity before or at the time the licensee:
 - (a) opens an account with the reporting entity; or
 - (b) engages the services of the reporting entity; or
 - (c) enters into a business relationship with the reporting entity; or
 - (d) conducts with the reporting entity an occasional transaction that exceeds the prescribed threshold under section 27 or 28 of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014; or
 - (e) otherwise engages with the reporting entity as prescribed by the regulations.
- (2) In this section, “account”, “reporting entity” and “business relationship” have the same meaning as in the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014.

25D Offence

If a licensee fails to comply with subsection 25B(1), (2) or (3) or subsection 25C(1), the licensee 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) if the licensee is a body corporate - a fine not exceeding VT 125 million.

25E Commission may require certain information or documents relating to a trust

- (1) Subject to subsection (2), the Commission may, by notice in writing to a licensee, require the licensee 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 be information or documents that:
 - (a) are required to be kept by the licensee under this Act; and
 - (b) relate to a trust in respect of which the licensee provides a trust service.

(3) If a licensee:

- (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 licensee commits an offence punishable upon conviction by the penalty referred to in subsection (4).

(4) The penalty is:

- (a) if the licensee is a natural person - a fine not exceeding VT 15 million or imprisonment not exceeding 5 years, or both; or
- (b) if the licensee is a body corporate - a fine not exceeding VT 75 million.

(5) To avoid doubt, this section does not limit section 32.”

11 Subsection 28(1) and (2)

Repeal the subsections, substitute

“(1) If it appears to the Commission, having regard to the Guidelines, that a person is not a fit and proper person:

- (a) to be appointed as director or manager of a licensee; or

(b) to become an owner, beneficial owner or controller of a licensee;

the Commission may give a written direction that the person must not be appointed as director or manager, or must not become an owner, beneficial owner or controller.

- (2) If it appears to the Commission, having regard to the Guidelines, that a person who is a director, manager, owner, beneficial owner or controller of a licensee is not a fit and proper person to continue in that position, the Commission may give a written direction that the person must not continue as director, manager, owner, beneficial owner or controller.”

12 Subsection 30(7)

Repeal the subsection, substitute

“(7) A person who fails to comply with a direction after receiving a notice under subsection (1) commits an offence punishable upon conviction by:

- (a) if the licensee is a natural person - a fine not exceeding VT 15 million or imprisonment not exceeding 5 years, or both; or
- (b) if the licensee is a body corporate - a fine not exceeding VT 75 million.”

13 After section 32

Insert

“32A Commission may request information and documents

For the purpose of discharging a duty, 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 32(3)(b)

Delete “incorrect”, substitute “false”

15 Section 35

After “section”, insert “25E,”

16 Subparagraph 37(1)(a)(iii)

Repeal the subparagraph, substitute

- “(iii) an owner, beneficial owner, controller, director or manager of the licensee is a not fit and proper person to fulfil the responsibilities of his or her position; or”

17 After subparagraph 37(1)(b)(i)

Insert

- “(ia) has contravened 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;
- (ib) in the case of a licensee that is a registered agent under the International Companies Act [CAP 222] - has failed to comply with its obligations as a registered agent under section 35 of that Act; or”

18 After paragraph 43(3)(c)

Insert

- “(ca) the disclosure is made to the Financial Intelligence Unit; or
- (cb) the disclosure is made to a supervisor within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014 for the purposes of discharging a duty, performing a function or exercising a power under that Act; or
- (cc) the disclosure 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

- (cd) the disclosure is made to a law enforcement agency for the purpose of investigating or taking action under the Proceeds of Crime Act [CAP 284]; or
- (ce) the disclosure is made to a domestic regulatory authority for the purpose of carrying out its regulatory functions; or
- (cf) the disclosure is made to the Sanctions Secretariat for the purpose of carrying out its functions under the United Nations Financial Sanctions Act No. of 2017; or ”

19 Paragraph 43(3)(d)

Repeal the paragraph, substitute

- “(d) the disclosure is made to a foreign government agency in accordance with section 44; or”

20 Section 44

Repeal the section substitute

“44 Disclosure to foreign government agency

- (1) In this section, **regulatory information** means information about a licensee and the licensee’s compliance with this Act.
- (2) This section applies despite confidentiality requirements in section 43.
- (3) The Commission may disclose information about a licensee to a foreign government agency in the manner set out in this section.
- (4) The Commission may disclose regulatory information to a foreign government agency of a country if:
 - (a) the Government of Vanuatu has entered into an agreement with the government of the country about exchanging regulatory information; and
 - (b) the Commission is satisfied, on information supplied by the agency, that the agency is subject to adequate legal restrictions on further disclosure; and
 - (c) the Commission has received a request for the information from the agency; and

- (d) the Commission is satisfied, on information supplied by the agency, that the information sought is within the terms of the agreement; and
 - (e) the disclosure is in accordance with the agreement.
- (5) The Commission may disclose information about a licensee to a foreign government agency of a country with whom the Government of Vanuatu has no agreement on exchanging information if:
- (a) the Commission is satisfied that the disclosure is for the purpose of:
 - (i) discharging a duty, performing a function or exercising a power under the foreign government agency's own regulatory legislation (if any), including investigating a breach of that legislation; or
 - (ii) discharging a duty, 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) discharging a duty, 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.
- (6) In deciding whether to disclose information under subsection (5), the Commission may take into consideration whether:

- (a) the foreign government agency has agreed to assist the Commission with the costs of supplying the information; and
- (b) the foreign government agency has provided, or would provide, similar assistance to the Commission; and
- (c) it is in the interests of Vanuatu as a reputable financial centre to disclose the information.”

21 After Section 55

Insert

“55A Indemnity from liability etc.

A person 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.”

22 Transitional provisions for certain licensee information

- (1) This provision applies to a licensee if:
 - (a) the licensee’s licence was in force immediately before the commencement of this Act; and
 - (b) the licensee has not provided the Commission with the information required under section 13 of the Company and Trust Service Provider Act No. 8 of 2010 as amended by this Act (“**additional information**”).
- (2) The licensee must provide the Commission with the additional information within 6 months after the commencement of this Act.
- (3) If a licensee does not provide the additional information as required under subsection (2), the Commission may by notice in writing to the licensee cancel the licensee’s licence.
- (4) If a 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 section 14 of the Company and Trust Service Provider Act No. 8 of 2010 as amended by this Act, the Commission may by notice in writing to the licensee cancel the licensee’s licence.

- (5) Before cancelling a licence under subsection (3) or (4), the Commission must give written notice to the licensee that it proposes to cancel the licence and the reasons for the cancellation.
- (6) The licensee may within 14 days after receiving a notice under subsection (5) give the Commission written reasons why the licence should not be cancelled.
- (7) The Commission may cancel a licensee's licence:
 - (a) if the licensee does not give the Commission reasons under subsection (6); or
 - (b) having taken in to account the licensee's reasons, the Commission is of the opinion that the licensee has failed to show good cause why the licence should not be cancelled.
- (8) A term or expression used in this item has the same meaning as in the Company and Trust Service Provider Act No. 8 of as amended by this Act.

23 Transitional provisions for trust information

- (1) This provision applies to a licensee that provides a trust service in relation to a trust if:
 - (a) the licensee's licence was in force immediately before the commencement of this Act; and
 - (b) the licensee has not obtained the information required under section 25B of the Company and Trust Service Provider Act No. 8 of 2010 as amended by this Act ("additional trust information").
- (2) The licensee must obtain the additional trust information within 6 months after the commencement of this Act.
- (3) If a licensee does not obtain the additional trust information as required under subsection (2), the Commission may by notice in writing to the licensee cancel the licensee's licence.
- (4) Before cancelling a licence under subsection (3), the Commission must give written notice to the licensee that it proposes to cancel the licence and the reasons for the cancellation.

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- (5) The licensee may within 14 days after receiving a notice under subsection (4) give the Commission written reasons why the licence should not be cancelled.
- (6) The Commission may cancel a licensee's licence:
- (a) if the licensee does not give the Commission reasons under subsection (5); or
 - (b) having taken in to account the licensee's reasons, the Commission is of the opinion that the licensee has failed to show good cause why the licence should not be cancelled.
- (7) A term or expression used in this item has the same meaning as in the Company and Trust Service Provider Act No. 8 of as amended by this Act.”