

REPUBLIC OF VANUATU

BILL FOR THE FINANCIAL INSTITUTIONS (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Financial Institutions Act [CAP 254] 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 Reserve Bank to carry out fit and proper checks when a company is first licensed (point of entry) to carry on banking business in Vanuatu. The new fit and proper criteria will apply widely to "key persons" of an applicant for a licence, namely, the applicant's owners, controllers, beneficial owners, directors and managers. 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 Reserve Bank must consider whether a "key person":

- 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 funds for the capital of an applicant has 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 Reserve Bank within 14 days of any relevant changes occurring, including funding sources, and the Reserve Bank can require information from the licensees on his or her 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

Amendments have been made to allow the Reserve Bank 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 Reserve Bank 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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Arrangement of Sections

1	Amendments.....	2
2	Commencement.....	2

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An Act to amend the Financial Institutions Act [CAP 254], and for related purposes.

Be it enacted by the President and Parliament as follows-

1 Amendments

The Financial Institutions Act [CAP 254] 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 FINANCIAL INSTITUTIONS ACT [CAP 254]

1 Subsection 1(1)

Insert in their correct alphabetical positions

““beneficial owner” means a natural person who ultimately owns or ultimately controls an applicant for a licence or a licensee;

“confidential information” means information that is supplied to or obtained by the Reserve Bank 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;

“controller” of an applicant for a licence or a licensee means a person who exercises influence, authority or power over decisions about the applicant’s or licensee’s financial or operating policies, including as a result of, or by means of, a trust, agreement, arrangement, understanding or practice, and “control” has a corresponding meaning;

“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;

“guidelines” means guidelines made under section 21;

“key person” of an applicant for a licence or a licensee means a beneficial owner, owner, controller, director or manager of the applicant or licensee;

“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 applicant for a licence or a licensee means a person who has a legal entitlement of 25% or more of the applicant or licensee 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. 6 of 2017;”

2 Subsection 1(1) (definition of “manager”)

Repeal the definition, substitute

“ “manager” of an applicant for a licence or a licensee 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;”

3 At the end of section 1

Add

“(6) 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.”

4 Paragraph 6(2)(a)

- (a) Delete “VT 2,000,000”, substitute “VT 25 million”
- (b) Delete “2 years”, substitute “15 years”

5 Paragraph 6(2)(b)

Delete “VT 10,000,000”, substitute “VT 125 million”

6 Subsection 7(3)

Delete “VT 10,000,000”, substitute “VT 125 million”

7 Paragraph 9(2)(a)

- (a) Delete “VT 2,000,000”, substitute “VT 25 million”
- (b) Delete “2 years”, substitute “15 years”

8 Paragraph 9(2)(b)

Repeal the paragraph, substitute

- “(b) in any other case - by a fine not exceeding VT 10,000,000 or the value of the funds, whichever is the higher.”

9 After paragraph 11(1)(b)

Insert

“(ba) include the following information:

- (i) details of each key person of the applicant;
- (ii) details as required by the Reserve Bank on whether a beneficial owner of the applicant is a 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”

10 Paragraph 11(6)(a)

- (a) Delete “VT 2,000,000”, substitute “VT 15 million”
- (b) Delete “2 years”, substitute “5 years”

11 Paragraph 11(6)(b)

Delete “VT 6,000,000”, substitute “VT 75 million”

12 Paragraph 13(2)(d)

Repeal the paragraph, substitute

- “(d) each key person of the applicant is a fit and proper person; and
- (da) the source of funds used to pay the capital of the applicant is acceptable; and”

13 At the end of section 13

Add

- “(4) In deciding whether a key person of the applicant is a fit and proper person, the Reserve Bank 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 in the guidelines.”

14 Paragraph 14(2)(a)

Delete “subsection 13(2)”, substitute “subsections 13(2) and (4)”

15 Paragraph 17(1)(e)

Repeal the paragraph, substitute

- “(e) contravenes any of the conditions of its licence; or
- (ea) fails to comply with subsection 50(1), or provides information under subsection 50(1) that is not satisfactory to the Reserve Bank under subsection 50(4); or
- (eb) contravenes any other provision of this Act; or”

16 After subsection 17(1)

Insert

- “(1A) In addition to subsection (1), the Reserve Bank may revoke a licence if:
 - (a) 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

- (b) the fit and proper criteria are not met as required under this Act; or
- (c) the source of funds used to pay the capital of the licensee is not acceptable.”

17 After subsection 21(2A)

Insert

“(2AB) Without limiting subsection (2A), the Reserve Bank may formulate written guidelines setting out the criteria for determining whether a person is a fit and proper person.”

18 Subsection 27(3)

Delete “VT 500,000”, substitute “VT 75 million”

19 Subsection 41(3)

Delete “VT 1,000,000”, substitute “VT 125 million”

20 After paragraph 42(1)(b)

Insert

“(ba) the person has been convicted of:

- (i) an offence of money laundering under section 11 of the Proceeds of Crime Act [CAP 284]; or
- (ii) an offence of terrorism financing under section 6 of the Counter Terrorism and Transnational Organised Crime Act [CAP 313]; or
- (iii) an offence against the United Nations Financial Sanctions Act No. 6 of 2017; or

(bb) 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; or”

21 Subsection 42(3)

Delete “VT 5,000,000”, substitute “VT 75 million”

22 Subsection 42(4)

(a) Delete “VT 1,000,000”, substitute “VT 15 million”

(b) Delete “2 years”, substitute “5 years”

23 Paragraph 42A(1)(b)

Repeal the paragraph, substitute

“(b) does not meet any other fit and proper criteria in this Act or the guidelines.”

24 Subsection 42A(5)

Delete “VT 5,000,000”, substitute “VT 75 million”

25 Section 50

Repeal the section, substitute

“50 Reserve Bank to be given notice of certain matters

(1) If:

- (a) a licensee makes an alteration to its memorandum or articles of association; or
- (b) a licensee makes an alteration to any other instrument providing for its incorporation or establishment; or
- (c) a licensee makes a change to a key person of the licensee; or
- (d) there is a change in the circumstances of a key person of the licensee that may affect whether he or she meets fit and proper criteria; or
- (e) there is a change in the source of funds used to pay the capital of the licensee;

the licensee must immediately give to the Reserve Bank full particulars, in writing, of the alteration or change, verified by a statutory declaration made by a director of the licensee.

- (2) If a licensee fails to comply with subsection (1), the licensee commits an offence punishable upon conviction by a fine not exceeding VT 125 million.
- (3) If a licensee fails to comply with subsection (1), the Reserve Bank may by notice in writing to the licensee revoke the licensee’s licence under section 17.

- (4) If a licensee does provide the information as required under subsection (1), but the Reserve Bank is not satisfied:
- (a) that the key persons of the licensee are fit and proper persons to fulfil the responsibilities of their positions having regard to the matters referred to in subsection 13(4); or
 - (b) as to the source of funds used to pay the capital of the licensee;
- the Reserve Bank may by notice in writing to the licensee revoke the licensee's licence under section 17.
- (5) If an application is made to the Court under any law proposing a compromise or arrangement that involves a licensee, a director of the licensee must ensure that the Reserve Bank:
- (a) is served with a notice of any meeting ordered by the Court and a statement explaining the effect of the compromise or arrangement; and
 - (b) is eligible to attend and be allowed to participate in and give advice at any meeting of which such notice is given.

50A Licensee to obtain approval of Reserve Bank before entering certain agreements

- (1) A licensee must consult with, and obtain the written approval of, the Reserve Bank before entering into any agreement for:
- (a) the purchase or acquisition of the business of another licensee; or
 - (b) the purchase or acquisition of the business of a financial institution outside Vanuatu by a domestic licensee.
- (2) The grounds on which the Reserve Bank may withhold its approval under subsection (1) include restraint of trade, monopoly of business and adverse effect on the soundness of the financial system in Vanuatu.
- (3) A licensee that contravenes subsection (1) commits of an offence punishable on conviction by a fine not exceeding VT 125 million."

26 Subsection 51(5)

Delete "VT 1,000,000", substitute "VT 125 million"

27 Subsection 54(2)

- (a) Delete “VT 1,000,000”, substitute “VT 15 million”
- (b) Delete “one year”, substitute “5 years”

28 Section 55

Repeal the section, substitute

“55 Disclosure of confidential information

- (1) The Reserve Bank or a court appointed manager, an examiner, adviser or any other person appointed by the Reserve Bank under this Act 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 to 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. 6 of 2017; or

- (i) is made to a foreign government agency in accordance with section 55A.
- (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) for any other person - a fine not exceeding VT 75 million.

55A Disclosure of confidential information to foreign government agency

The Reserve Bank, or a court appointed manager, an examiner, adviser or any other person appointed by the Reserve Bank under this Act, may disclose confidential information about a licensee to a foreign government agency if:

- (a) the Reserve Bank 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 Reserve Bank, or the court appointed manager, examiner, adviser or other person appointed by the Reserve Bank under this Act, 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."

29 After section 57

Insert

“57A Reserve Bank may request information and documents

For the purpose of performing a function or exercising a power under this Act, the Reserve Bank 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).”

30 Subsections 58(3), (4), (5), (6) and (7)

Repeal the subsections, substitute

“(3) If a licensee:

- (a) fails to submit or delays the submission of any information required under subsection (1); or
- (b) submits any false or inaccurate information required under that subsection;

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

- (4) If a licensee is required under subsection (2) to submit an auditor’s certificate and the licensee fails to request the certificate from its auditor, the licensee commits an offence punishable upon conviction by a fine not exceeding VT 75 million.”

31 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 ; Financial Institutions Act [CAP 254].
- (2) The licensee must provide the Reserve Bank with the information required under subparagraphs 11(1)(ba)(i), (ii) and (iii) of the Financial Institutions Act [CAP 254] as amended by this Act ("the additional information") within 6 months after the commencement of this Act.
- (3) If the licensee does not provide the additional information as required under subsection (2), the Reserve Bank 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 Reserve Bank is not satisfied with the additional information having regard to the matters set out in paragraphs 13(2)(d) and (da) of the Financial Institutions Act [CAP 254] as amended by this Act, the Reserve Bank may by notice in writing to the licensee revoke the licensee's licence.
- (5) Subsections 17(2) to (5), and sections 18, 19 and 20 of the Financial Institutions Act [CAP 254] 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 Financial Institutions Act [CAP 254] as amended by this Act.