

# REPUBLIC OF VANUATU

## MUTUAL FUNDS ACT NO. 38 OF 2005

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# REPUBLIC OF VANUATU

Assent: 30/12/2005

Commencement: 05/06/2006

## *MUTUAL FUNDS ACT NO. 38 OF 2005*

To provide for the registration and regulation of mutual funds.

Be it enacted by the President and Parliament as follows:

### **PART 1 –PRELIMINARY**

#### **1 Interpretation**

(1) In this Act, unless the contrary intention appears:

**administrator**, for a mutual fund, has the meaning given by section 2.

**Commission** means the Vanuatu Financial Services Commission.

**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.

**Court** means the Supreme Court.

**equity interest** means a share, trust unit or partnership interest that:

- (a) carries an entitlement to participate in the profits or gains of the company, unit trust or partnership; and
- (b) is redeemable or repurchasable at the option of the investor.

**foreign mutual fund** means a mutual fund that is constituted outside Vanuatu and operates in Vanuatu.

**general partner** means a general partner within the meaning of the *Partnerships Act* [CAP. 92].

**investor**, for a mutual fund, means the legal holder of record representing an equity interest in the mutual fund, but does not include a promoter or operator.

**licensed mutual fund** means a mutual fund that holds a licence issued under section 6.

**Minister** means the Minister responsible for finance.

**mutual fund** means a company, a unit trust or a partnership that issues equity interests, the purpose or effect of which is the pooling of investors' funds with the aim of spreading investment risks and enabling investors in the mutual fund to receive profits or gains from the acquisition, holding, management or disposal of investments, but does not include a bank, an insurer within the meaning of the Insurance Act No 54 of 2005 or a trustee.

**mutual fund administration**, for a mutual fund, has the meaning given by section 2.

**operator**, for a mutual fund, means:

- (a) if the mutual fund is a unit trust - the trustee of that trust; or
- (b) if the mutual fund is a partnership, a general partner in that partnership; or
- (c) if the mutual fund is a company, a director of that company.

**partnership** means a partnership constituted under the laws of Vanuatu or another country.

**promoter**, for a mutual fund, means any person whether within or outside Vanuatu who causes the preparation or distribution of a prospectus for the mutual fund or proposed mutual fund, but does not include a legal practitioner, accountant or other professional adviser acting for or on behalf of that person.

**prospectus**, for a mutual fund, means a document, or series of documents, on the basis of which:

- (a) equity interests in the mutual fund are offered for sale; or
- (b) persons are invited to subscribe for, or purchase equity interests in, the mutual fund;

but does not include any other advertisement, letter or other communication used in connection with the offer or invitation if, before accepting the offer or invitation, the prospective investor is given the opportunity to consider a prospectus containing information necessary to enable a prospective investor in a mutual fund to make an informed decision whether or not to subscribe for or purchase the equity interest.

**record** means any means by which information may be stored.

**share** includes an interest in a mutual fund partnership and a unit in a mutual fund unit trust.

**unit trust** means a trust established by a trustee that for valuable consideration issues trust units to enable the participation of unitholders in profits or gains arising from the acquisition, holding, management, or disposal of investments by the trustee.

(2) An expression used in this Act that is used in the *Companies Act [CAP. 191]* has the same meaning given to it under the *Companies Act [CAP 191]*.

## **2 Administration of mutual funds**

(1) A mutual fund administrator must be:

- (a) a company incorporated in Vanuatu; or
- (b) a foreign company incorporated outside Vanuatu and registered under Part IX of the *Companies Act [CAP. 191]*; or
- (c) a limited partnership within the meaning of the *Partnerships Act [CAP. 92]*; or
- (d) a partnership constituted for the sole purpose of undertaking the administration of mutual funds.

(2) A person administers a mutual fund if the person:

- (a) manages the mutual fund; or
- (b) controls all or substantially all of the assets of the mutual fund; or
- (c) provides general administrative services for the mutual fund; or
- (d) provides the principal office of the mutual fund in Vanuatu; or
- (e) provides an operator to the mutual fund.

(3) A person does not administer a mutual fund if the person:

- (a) provides a registered office to the mutual fund where the usual corporate, secretarial and related services are provided; or
- (b) files returns and pays fees under the *Companies Act [CAP 191]*; or
- (c) carries out activities as a general partner of a partnership that is a mutual fund.

## **PART 2 - MUTUAL FUNDS**

### **3 Mutual funds to be licensed**

- (1) The operator of a mutual fund must not permit a mutual fund to carry on or attempt to carry on business in or from within Vanuatu unless the fund is licensed under this Act.
- (2) A mutual fund carries on or attempts to carry on business in or from Vanuatu if:
  - (a) it is incorporated or established in Vanuatu; or
  - (b) regardless of its place of incorporation, its administration is carried on in Vanuatu.
- (3) A person who contravenes or fails to comply with subsection (1) is guilty of an offence punishable, on conviction, by a fine not exceeding VT 10 million or imprisonment for a period not exceeding 10 years, or both.

### **4 Application for a foreign mutual fund licence**

- (1) The administrator of a foreign mutual fund may apply to the Commission for a foreign mutual fund licence.
- (2) The application must be in the approved form and be accompanied with:
  - (a) details of where and when the mutual fund was constituted; and
  - (b) details of its licence or registration; and
  - (c) evidence that the licence or registration is in force; and
  - (d) written confirmation by the regulatory authority that issued the licence or registration that the fund is subject to regulation by the authority; and
  - (e) particulars of the qualifications and experience of each promoter of the fund; and
  - (f) the current prospectus or, if one has not been finally settled, the latest draft of the prospectus, and a summary of the prospectus.

### **5 Application for a general mutual fund licence**

- (1) A promoter of a general mutual fund may apply to the Commission for a general mutual fund licence.
- (2) The application must be in the approved form and be accompanied with:
  - (a) evidence that the operator:

- (i) has the experience and qualifications to undertake the duties and responsibilities of a licensed mutual fund; and
    - (ii) is of sound reputation; and
  - (b) a curriculum vitae for each operator or controller together with biographical details including proof of identity; and
  - (c) particulars of the mutual fund's management structure; and
  - (d) a copy of the management agreement; and
  - (e) a copy of the fund manager's authorisation; and
  - (f) a copy of the proposed prospectus; and
  - (g) a copy of the business plan for the next three years, giving details of anticipated assets and liabilities and a forecast of income; and
  - (h) details of the procedures that will be in place to ensure that the fund's investment policies are adhered to; and
  - (i) evidence that the mutual fund's investment policies include:
    - (i) adequate diversification of investments; and
    - (ii) restrictions on speculative investments; and
    - (iii) restrictions on the amount of capital that can be borrowed; and
    - (iv) requirements about the capacity of liquid assets to meet general liabilities; and
  - (j) a copy of the audited accounts for the past two years, if the applicant has been in existence for two years; and
  - (k) if the mutual fund is a company, a copy of the memorandum and articles of association and certificate of incorporation; and
  - (l) if the mutual fund is a partnership, a copy of the partnership agreement; and
  - (m) if the mutual fund is a unit trust, a copy of the trust deed.
- (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.

## **6 Issue of foreign and general mutual fund licences**

- (1) The Commission may issue a foreign mutual fund licence to the administrator of a foreign mutual fund if the Commission is satisfied that:
  - (a) the fund's promoter is of sound reputation; and
  - (b) the fund will have a mutual fund administrator in Vanuatu that will be providing an office in Vanuatu for the fund.
- (2) The Commission may issue a general mutual fund licence to the promoter of a general mutual fund if the Commission is satisfied that:
  - (a) each promoter of the fund is of sound reputation; and
  - (b) the fund will have a mutual fund administrator in Vanuatu that will be providing an office in Vanuatu for the fund; and
  - (c) the arrangements for the administration of the fund are otherwise satisfactory; and
  - (d) if the fund is a company:
    - (i) the fund must at least have two directors; and
    - (ii) the articles of association prohibit the issue of bearer shares.
- (3) A general mutual fund licence and a foreign mutual fund referred to under subsection (1) and (2) are to be issued for a period of 1 year from the date of the issue and may be renewed.
- (4) A foreign or general mutual fund licence is subject to the following conditions:
  - (a) that the fund's administrator will at all times keep an office in Vanuatu for the fund; and
  - (b) for a general mutual fund that is a company:
    - (i) the fund must at least have 2 directors; and
    - (ii) the articles of association prohibit the issue of bearer shares.

## **PART 3 - MUTUAL FUNDS ADMINISTRATION**

### **7 Mutual fund administrator to be licensed**

- (1) A person must not administer a mutual fund in or from within Vanuatu unless the person holds an administrator's licence.
- (2) A licensed mutual fund administrator must administer the mutual fund in accordance with the conditions of the licence.
- (3) A person who contravenes or fails to comply with subsection (1) or (2) is guilty of an offence punishable, on conviction, by a fine not exceeding VT 10 million or imprisonment for a period not exceeding 10 years, or both.

### **8 Application for licence**

- (1) A company or a partnership may apply to the Commission for the grant of a mutual fund administrator's licence.
- (2) An application must be in the approved form and be accompanied with:
  - (a) for a company:
    - (i) details of each director's and manager's qualifications and experience in managing investments; and
    - (ii) evidence that each director and manager is a fit and proper person; and
    - (iii) evidence that the company's articles of association require at least 2 directors; and
  - (b) for a partnership:
    - (i) details of each general partner's qualifications and experience in managing investments; and
    - (ii) evidence that each general partner is a fit and proper person.

### **9 Issue of administrator's licence**

- (1) The Commission may issue an administrator's licence if the Commission is satisfied that the administrator:
  - (a) has sufficient knowledge and experience to be able to administer a mutual fund; and
  - (b) is a fit and proper person.

- (2) A licence remains in force for 1 year from the date of issue and may be renewed.

### **10 Conditions of mutual fund administrator's licence**

An administrator's licence is subject to the following conditions:

- (a) that the licensee must at all times act in good faith and in the interests of the investors in the mutual fund; and
- (b) for each mutual fund the licensee administers, the licensee must:
- (i) cause annual accounts to be prepared in accordance with generally accepted accounting principles and audited by an independent auditor; and
  - (ii) forward the accounts to the investors in the fund, and lodge a copy with the Commission, within 4 months of the end of the financial year to which they relate; and
  - (iii) if there is a change in the information in the mutual fund licence application form or in the business plan – give the Commission details of the change within 30 days of the change; and
  - (iv) ensure that each current prospectus for equity interests in the mutual fund at all times describes the equity interests accurately, and contains all other information necessary to enable a prospective investor in the mutual fund to make an informed decision about investing in the fund; and
  - (v) file each new or amended prospectus with the Commission within 21 days of its issue by the fund; and
  - (vi) keep records and prepare reports as required by this Act; and
- (c) for the administrator's business, the licensee must:
- (i) cause annual accounts to be prepared in accordance with generally accepted accounting principles and audited by an independent auditor; and
  - (ii) file the audited accounts with the Commission within 4 months of the end of the financial year to which they relate; and
  - (iii) carry on business in accordance with the information in its licence application; and
- (d) for a licensee that is a company – the licensee must at all times have at least 2 directors.

### **11 Duty to report**

- (1) A mutual fund administrator must notify the Commission in writing on:

- (a) any concerns it may have regarding the business capability, honesty, good character or conduct of an operator or manager of a mutual fund it administers, or the solvency of that operator or manager or of the mutual fund; and
  - (b) any change in the administration agreement between it and a mutual fund it administers; and
  - (c) the termination of an administration agreement.
- (2) The auditor of a mutual fund must notify the Commission, in writing, if the auditor becomes aware of circumstances likely to affect the solvency of the fund.
- (3) A notification under this section must:
- (a) be made in writing; and
  - (b) be given as soon as practicable after the administrator or auditor becomes aware of the matter.
- (4) An administrator or auditor of a mutual fund who fails to notify the Commission as required by this section is guilty of an offence punishable, on conviction, by a fine not exceeding VT 2 million or imprisonment for a period not exceeding 2 years, or both.

## **12 Duty to disclose beneficial interest**

A mutual fund administrator must disclose its ownership, beneficial interest and shareholdings in the fund it administers.

## **13 Restriction on transfer of interest**

- (1) A person must apply to the Commission for approval to:
- (a) transfer or otherwise deal with an interest in a mutual fund administrator;  
or
  - (b) appoint a new or additional director or manager of a mutual fund administrator;
- (2) The Commission may approve the transfer or dealing, or the appointment, if it is satisfied that the administration of the mutual fund will not be adversely affected.
- (3) A person who transfers or deals with an interest, or appoints a director or manager, without the Commission's approval is guilty of an offence punishable, on conviction, by a fine not exceeding VT 1 million.
- (4) A transfer, dealing or appointment referred to under subsection (1), made without the Commission's approval, is invalid.

**14 Mutual fund administrator's returns**

- (1) A mutual fund administrator must file the following returns with the Commission:
  - (a) a list of all mutual funds for which it acts, showing all changes that have occurred since the previous list was filed; and
  - (b) a certificate signed by a director or general partner of the administrator stating the best of his or her knowledge and belief that the administrator has conducted the fund's business properly and in compliance with this Act.
- (2) The list and certificate must be filed no later than the first day of March in each year.

## **PART 4 - SUPERVISION**

### **15 Powers of the Commission**

- (1) In the performance of its functions under this Act, the Commission may:
  - (a) at any reasonable time requests a mutual fund administrator or an officer designated by the mutual fund administrator to have access to the books, records, and other documents and financial records of a mutual fund administrator; and
  - (b) at any reasonable time request a mutual fund administrator, or an officer designated by the mutual fund administrator, for the information or explanation the Commission may reasonably require to enable the Commission to perform its functions under this Act; and
  - (c) direct a mutual fund administrator to have an immediate independent audit of the accounts of a mutual fund that it administers, as at the date specified by the Commission, and to file the accounts with the Commission within the reasonable time the Commission determines; and
  - (d) examine the affairs or business of a mutual fund administrator or another person carrying on, or who at any time since the coming into operation of this Act has carried on, the business of a mutual fund administrator, to ensure:
    - (i) that the mutual fund administrator is complying with this Act or the conditions of its licence; or
    - (ii) that the mutual fund administrator is of sound financial position and is carrying on its business in a satisfactory manner.
- (2) A request or direction under subsection (1) must:
  - (a) be made in writing; and
  - (b) state the time within which the request or direction must be complied with.
- (3) A person who refuses or fails to comply with a written request or direction is guilty of an offence punishable, on conviction, by a fine not exceeding VT 2 million or imprisonment for a period not exceeding 2 years, or both.

### **16 Search warrants**

If a magistrate is satisfied on information on oath given by the Commissioner that:

- (a) a mutual fund administrator refuses to comply with a request of the Commission made under section 15(1)(a) to have access to books, records or other documents; or
- (b) there are reasonable grounds for suspecting that an offence against this Part has been or is being committed and that evidence of the commission of the offence is to be found at the premises or in the vehicle, vessel or aircraft specified in the information;

the magistrate may grant a search warrant authorising the Commissioner, together with any other person named in the warrant, to enter and search the premises, vehicle, vessel or aircraft and to seize any books, records or other documents found in the premises, vehicle, vessel or aircraft that are relevant to the inquiry.

**17. Examination of affairs of mutual fund administrator**

- (1) The Commission must examine the affairs of a mutual fund administrator if the Commission has reasonable grounds for believing that a mutual fund administrator:
  - (a) has ceased to carry on the business for which it was licensed; or
  - (b) is carrying on business while insolvent; or
  - (c) has gone into liquidation, has been wound up or is otherwise dissolved; or
  - (d) has undertaken business other than that for which it was licensed; or
  - (e) has carried on business in contravention of the provisions of this Act or other Acts; or
  - (f) is carrying on business in contravention of any of the conditions of the licence; or
  - (g) is carrying on business in a manner which is likely to be detrimental to the interest of the public, its creditors or investors in a mutual fund; or
  - (h) is carrying on business in a manner which falsely represents its status or licence or which would be deemed as misrepresentation.
- (2) If the Commission examines the affairs of a mutual fund administrator under subsection (1), the Commission may:
  - (a) prohibit the mutual fund administrator from accepting any new inward investment in a mutual fund for a period specified by the Commission; and
  - (b) appoint (at the expense of the mutual fund administrator) another person to administer the fund in the best interests of the investors in the fund; and

- (c) direct the mutual fund administrator to provide the additional capital or guarantees or other financial support that the Commission considers necessary; and
- (d) direct the mutual fund administrator not to make investments of a specific class or of more than a specified percentage of the fund in any specified class; and
- (e) vary the conditions of the mutual fund administrator's licence and impose new conditions on the licence.

### **18 Court may make orders preserving assets**

- (1) If the Commission is examining the affairs of a mutual fund administrator under section 17, the Commission may apply to the Court for directions.
- (2) The Court may:
  - (a) make orders to protect the interest of:
    - (i) investors in, and creditors of, the mutual fund administered by the mutual fund administrator; and
    - (ii) the creditors of the mutual fund administrator; and
  - (b) order that the assets, books and other papers of the mutual fund and the mutual fund administrator be preserved, and not moved or otherwise disposed of.
- (3) The mutual fund administrator may at any time apply to the Court for the discharge of an order under this section and the Court may discharge, vary or confirm the order.

### **19 Revocation of licences**

- (1) The Commission may revoke a mutual fund's licence or an administrator's licence, whether as the result of taking action under section 15 or 17 or otherwise:
  - (a) if it appears necessary to do so to protect the interests of investors in the mutual fund; or
  - (b) if the Commission is satisfied that any of the circumstances in a paragraph of subsection 17(1) exists.
- (2) Before revoking a licence, the Commission must give the mutual fund administrator at least 21 days' notice in writing of the proposed revocation, and request the administrator to provide reasons why the licence should not be revoked.
- (3) The Commission must take into account any reasons given by the administrator.

## **PART 5 - MISCELLANEOUS**

### **20 Register**

The Commission must maintain a Register of mutual funds and mutual fund administrators licensed under this Act.

### **21 Appeal to Supreme Court**

A person aggrieved by a decision of the Commission under this Act may appeal to the Supreme Court against the decision.

### **22 Licence to be displayed**

The holder of a licence issued under this Act must ensure that the licence is prominently displayed on the premises where the licensee's business is being carried on.

### **23 Confidentiality**

The Commission or another person performing duties under this Act must not disclose any information about an application made under this Act or about the affairs of a mutual fund administrator that he or she has acquired in the performance of his or her duties under this Act, except:

- (a) for the purpose of performing his or her functions under this Act; or
- (b) when lawfully required to do so by a court or another law of Vanuatu.

### **24 Disclosure of information to overseas regulatory authority**

- (1) To assist an overseas regulatory authority that has requested information in connection with inquiries being carried out by it, the Commission may disclose to the regulatory authority information that the Commission has acquired in connection with the performance of its duties under this Act that the Commission considers appropriate.
- (2) The Commission must not disclose information to the authority unless it is satisfied that:
  - (a) the information requested by the authority is for the purposes of its regulatory functions; and
  - (b) the information requested is not related directly or indirectly to the imposition, calculation and collection of taxes or the enforcement of exchange control regulations; and
  - (c) the authority is subject to adequate legal restrictions on further disclosures.
- (3) In this section, **overseas regulatory authority** means an authority in a country outside Vanuatu that exercises a function corresponding to the functions of the Commission under this Act or the *Vanuatu Financial Services Commission Act No. 35 1993*.

## **25 Disclosure of information to Financial Intelligence Unit**

- (1) If the Commission has reasonable grounds for believing that money in a mutual fund is involved in a money laundering offence or a financing of terrorism offence, the Commission may disclose the information to the Financial Intelligence Unit.
- (2) In this section, **Financial Intelligence Unit, money laundering offence and financing of terrorism offence** each has the same meaning given to it as under the *Financial Transactions Reporting Act No. 33 of 2000 and the Counter Terrorism and Transnational Organised Crime Act No. 29 of 2005*.

## **26 Restriction on use of certain words and titles**

- (1) A person who does not hold a licence under this Act must not in the course of his or her business use a word that implies the carrying on of a business as a mutual fund or a mutual fund administrator.
- (2) A person who contravenes or fails to comply with subsection (1) is guilty of an offence punishable, on conviction, by a fine not exceeding VT 2 million or imprisonment for a period not exceeding 2 years, or both.
- (3) The Commission may refuse to issue a mutual fund licence to an applicant in a name that:
  - (a) is identical to the name of a company, firm, business or other entity, whether or not within Vanuatu, or so nearly resembles the name of a company, firm, business or entity as to be likely to deceive; or
  - (b) is likely to suggest, falsely, the patronage of or connection with some person or authority, whether within Vanuatu or elsewhere; or
  - (c) is likely to suggest, falsely, that the fund has a special status in relation to or derived from Government.
- (4) If a mutual fund is carrying on business in or from within Vanuatu in a name that the Commission would have refused because of subsection (3), the Commission may direct the mutual fund to change its name to a name that is not mentioned in subsection (3).
- (5) A person who refuses or fails to comply with a direction under subsection (4) is guilty of an offence punishable, on conviction, by a fine not exceeding VT 1 million or imprisonment for a period not exceeding 1 year, or both.

## **27 Offences**

A person who in compliance or purported compliance with this Act makes a representation that he or she knows to be false or does not believe to be true commits an offence punishable on conviction by a fine not exceeding VT 1 million or imprisonment for a period not exceeding 1 year, or both.

## **28 Fees**

The following fees are payable under this Act:

- (a) for a foreign mutual fund licence or a general mutual fund licence – USD1,000; and
- (b) for a mutual fund administrator’s licence – USD1,000; and
- (c) for the annual renewal of a mutual fund licence – USD1,000; and
- (d) for the annual renewal of a mutual fund administrator’s licence – USD1,000.

## **29 Regulations**

The Minister may make regulations prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be provided for the carrying out or giving effect to this Act.

## **30 Commencement**

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