

REPUBLIC OF VANUATU

UNIT TRUSTS ACT NO. 36 OF 2005

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REPUBLIC OF VANUATU

Assent: 30/12/2005

Commencement: 05/06/2006

THE UNIT TRUSTS ACT NO. 36 OF 2005

An Act to provide for the registration and regulation of unit trusts.

Be it enacted by the President and Parliament as follows:

PART 1 – PRELIMINARY

1 Interpretation

(1) In this Act, unless the context requires otherwise:

Commission means the Vanuatu Financial Services Commission.

Court means the Supreme Court.

legal practitioner means a person entitled to practice as a legal practitioner in Vanuatu.

manager means the manager of a unit trust scheme.

Minister means the Minister responsible for finance.

mutual fund means a mutual fund registered under the *Mutual Funds Act No.38 of 2005*.

prospectus, for a unit trust scheme, means a document, or series of documents, on the basis of which:

- (a) units in the unit trust scheme are offered for sale; or
- (b) persons are invited to purchase units in the unit trust scheme;

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 unit trust scheme to make an informed decision whether or not to purchase units in the scheme.

registered means registered by the Commission.

trustee means the person holding the property of a unit trust scheme on trust for the participants in the scheme.

trust deed means a deed establishing a unit trust scheme.

unit, for a unit trust scheme, means an interest, however described, that may be acquired for consideration under the scheme.

unitholder means the holder of a unit in a unit trust scheme.

Unit Trust Fund means the fund comprising the income and other assets of a unit trust scheme;

unit trust scheme means a scheme established under a trust deed that provides facilities for the participation by a unitholder, as a beneficiary under the trust, in the income, profits and gains arising out of the acquisition, holding, management or disposal of securities or other property.

- (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]*.

PART 2 - REGISTRATION AND LICENSING

2 Registered unit trust scheme

- (1) A person must not set up or manage a unit trust scheme in or from Vanuatu unless:
 - (a) the scheme is registered by the Commission; and
 - (b) the manager of the scheme holds a licence under section 8; and
 - (c) the trustee is a licensed trust company under the *Trust Companies Act [CAP 69]*.
- (2) A person who contravenes or fails to comply with this section is guilty of an offence punishable, on conviction, by a fine not exceeding VT 10,000,000 or imprisonment for a period not exceeding 10 years, or both.

3 Promotion of unregistered scheme prohibited

- (1) A person must not promote an unregistered unit trust scheme in Vanuatu.
- (2) For the purposes of subsection (1), a person promotes a unit trust scheme by:
 - (a) issuing or causing to be issued an advertisement that:
 - (i) invites persons to take part in the scheme; or
 - (ii) contains information calculated to lead directly or indirectly to persons taking part, or offering to take part, in the scheme; or
 - (b) advising or procuring a person in Vanuatu to take part in the scheme.
- (3) A person who contravenes or fails to comply with this section 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 Managing or acting as trustee of scheme

- (1) A person must not manage a unit trust scheme unless the person holds a valid manager's licence.
- (2) A person must not act as trustee of a unit trust scheme unless the person is a licensed trust company under the *Trust Companies Act [CAP 69]*.
- (3) A person who contravenes or fails to comply with this section 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.

5 Application for a manager's licence

- (1) A person proposing to manage a unit trust scheme must apply to the Commissioner for a manager's licence.
- (2) The application must:
 - (a) be in the approved form and signed by the directors of the proposed manager; and
 - (b) be accompanied by:
 - (i) if the manager is a licensed manager under the *Insurance Act No. 54 of 2005* or the *Mutual Funds Act No. 38 of 2005* – evidence of that licence; and
 - (ii) for the directors of the proposed manager – evidence of their financial standing, qualifications, investment knowledge, and experience; and
 - (iii) a copy of the management agreement.

6 Application to register a unit trust scheme

- (1) A person who proposes to establish a unit trust scheme in Vanuatu must apply to the Commission to register the scheme.
- (2) The application must:
 - (a) be made by the manager or proposed manager of the scheme; and
 - (b) be in the approved form; and
 - (c) contain details of the trustee and manager of the unit trust scheme; and
 - (d) be accompanied by:
 - (i) a copy of the trust deed; and
 - (ii) a copy of the business plan; and
 - (iii) a copy of the prospectus.

7 Additional information

An applicant for a manager's licence or for the registration of a unit trust scheme must give the Commissioner any additional information the Commissioner may need to make a decision on the application.

8 Manager's licence

- (1) The Commission must issue a manager's licence if:
 - (a) the manager and trustee are independent of each other; and

- (b) the manager has sufficient investment knowledge and experience; and
 - (c) for a manager that is a body corporate – each director and manager of the proposed manager has sufficient investment knowledge and experience; and
 - (d) the manager’s assets exceed its liabilities.
- (2) In determining whether to issue a manager’s licence, the Commission is to have regard to the following matters:
- (a) whether the applicant, or a director or manager of the applicant, holds a manager’s licence under the *Insurance Act No. 54 of 2005* or the *Mutual Funds Act No.38 of 2005*; and
 - (b) the financial standing, investment capability and experience of the directors and managers.

9 Registration of unit trust scheme

The Commission may register a unit trust scheme if:

- (a) the scheme complies with the requirements of this Act on:
 - (i) the constitution and management of unit trust schemes; and
 - (ii) the powers and duties of the manager and the trustee; and
 - (iii) the rights and obligations of the unit holders in a unit trust scheme; and
- (b) the trustee is a licensed trust company under the *Trust Companies Act [CAP 69]*; and
- (c) the manager holds a valid licence under section 8; and
- (d) the Commission has been furnished with a copy of the trust deed and a certificate signed by a legal practitioner and attached to the trust deed to the effect that the contents of the deed comply with this Act.

PART 3 – UNIT TRUST ADMINISTRATION

10 Unit Trust Fund

- (1) The property comprised in the Unit Trust Fund is vested in the trustee and is to be managed by the manager under the supervision of the trustee and in accordance with the trust deed.
- (2) The accounts of a Unit Trust Fund must be audited by an auditor qualified under section 166 of the *Companies Act [CAP 191]*

11 The trust deed

- (1) A trust deed setting up a unit trust scheme must deal with the following matters:
 - (a) the general directions and limits as to how investments may be made out of the Fund;
 - (b) how units are created, issued and redeemed;
 - (c) the liquidation of units;
 - (d) the fees and commissions payable or chargeable under the scheme;
 - (e) the meetings of unit holders;
 - (f) the duration of the trust;
 - (g) the appointment and removal of the auditor;
 - (h) the audit of the accounts of the Unit Trust Fund;
 - (i) the audit of the accounts of the manager;
 - (j) the circulation of all audited statements of accounts to unit holders;
 - (k) the powers and limits of borrowing and lending by the manager.
- (2) In addition, the trust deed must provide that:
 - (a) a unitholder is entitled to redeem his or her units under the conditions and at the price determined in accordance with the scheme; and
 - (b) the trustee must cause to be distributed to the unit holders all income received from investments made out of the Unit Trust Fund, after deduction of the fees and expenses that are payable under the trust deed.

12 Qualifications of a trustee

- (1) A trustee must:
 - (a) be a licensed trust company; and
 - (b) subject to subsection (2), maintain the capital requirements of subsection 3(3) of the *Trust Companies Act [CAP 69]*; and
 - (c) maintain sufficient assets to meet its expenses and liabilities, including liabilities for the repayment of capital.
- (2) Subject to this Act, the *Trustee Act 1925* of the United Kingdom in its application in Vanuatu applies to a trustee.

13 Duties of the manager of a unit trust scheme

The manager of a unit trust scheme must:

- (a) keep an up to date register of unit holders; and
- (b) publish the buying and selling prices of all units at least on a monthly basis; and
- (c) invest the Unit Trust Fund in the way permitted under the trust deed, ensuring in all the circumstances that the interests of present and potential unit holders as well as of the Unit Trust Fund are protected; and
- (d) exercise due care and diligence in the discharge of its duties in respect of the scheme.

14 Liability of trustee and manager

A provision of the trust deed of a unit trust scheme that seeks to exempt the manager or the trustee of the scheme from liability for failure to exercise due care and diligence as specified in paragraph 13(d) and to otherwise comply with this Act is void.

15 Annual Report of a unit trust scheme

- (1) The manager of a unit trust scheme must file with the Commission an annual report for the scheme within 3 months of the closing of accounts in every year.
- (2) The annual report must include:
 - (a) the manager's investment report; and
 - (b) a statement of assets and liabilities; and
 - (c) a statement of income and distribution; and
 - (d) a copy of the audited accounts and the auditor's report under subsection 10(2); and
 - (e) details of the fees paid to the manager and trustee during the period covered by the report.
- (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 2 million or imprisonment for a period not exceeding 2 years, or both.

16 Publication of scheme particulars

- (1) The manager of a unit trust scheme that sells units within Vanuatu must publish the following information ("***scheme particulars***") about the scheme annually:
 - (a) the identity of the trustee and manager; and
 - (b) where the trust deed is held; and
 - (c) the number of units in the scheme, and the price per unit.

(2) The manager is liable to any person who has become or agreed to become a participant in the scheme and suffered loss as a result of any untrue or misleading statement in the scheme particulars or the omission from them of any material information.

(3) Subsection (2) does not affect any other liability that a person may incur.

17 Proposed alteration of unit trust scheme and replacement of manager and trustee

(1) A unit trust scheme must not be altered, and the trustee or manager of a unit trust scheme must not be replaced, without the written approval of the Commission.

(2) The manager of a unit trust scheme must give written notice to the Commission if it proposes to:

(a) alter the unit trust scheme; or

(b) replace the trustee of the scheme.

(3) The trustee of a unit trust scheme must give written notice to the Commission if it proposes to replace the manager of the scheme.

(4) A notice under subsection (2) or (3), must be given at least 21 days before the alteration or replacement is made.

(5) The Commission must not approve an alteration or a replacement under subsection (1) unless:

(a) for an alteration to the unit trust scheme:

(i) the manager gives the Commission a certificate signed by a legal practitioner that the trust deed as altered will comply with this Act; or

(ii) the Commission is satisfied that the trust deed as altered will comply with this Act; and

(b) for a replacement of trustee or manager - the Commission is satisfied that the new trustee or manager satisfies the requirements of this Act.

(6) The Commission may require the trustee or manager to produce sufficient information to the Commission to enable the Commission to be satisfied with any of the matters mentioned in subsection (5).

PART 4 - SUPERVISION

18 Powers of the Commission

- (1) In the performance of its functions under this Act, the Commission may:
 - (a) at any reasonable time request the manager or an officer designated by the manager, to have access to the books, records, and other documents and financial records of the manager of a unit trust scheme; and
 - (b) at any reasonable time request the manager, or an officer designated by the manager, for the information or explanation the Commission may reasonably require to enable the Commission to perform its functions under this Act; and
 - (c) direct the manager of a unit trust scheme to have an immediate independent audit performed of the scheme's accounts, 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 the manager of a unit trust scheme or another person carrying on, or who at any time since the coming into operation of this Act has carried on, the business of managing unit trusts, to ensure:
 - (i) that the manager is complying with this Act or the conditions of its licence; or
 - (ii) that the manager 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.

19 Search warrants

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

- (a) the manager of a unit trust scheme refuses to comply with a request of the Commission made under paragraph 18(a) to have access to books, records or other documents; or

- (b) there are reasonable grounds for suspecting that an offence under 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.

20 Examination of manager's affairs

- (1) The Commission must examine the affairs of the manager of a unit trust scheme if the Commission has reasonable grounds for believing that the manager:
- (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 is licensed at the time; or
 - (e) has carried on business in contravention of the provisions of this Act or another law; or
 - (f) is carrying on business in contravention of any of the conditions subject to which the licence was granted or has had imposed upon it; or
 - (g) is carrying on business in a manner which is likely to be detrimental to the interest of the public, its creditors or unit holders; 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 manager under subsection (1), the Commission may:
- (a) require the manager to cease the issue or redemption, or both the issue and redemption, of units under the scheme for a period specified by the Commission; and
 - (b) appoint (at the manager's expense) another person to manage the unit trust scheme in the best interests of the unit holders; and
 - (c) direct the manager to provide the additional capital or guarantees or other financial support that the Commission considers necessary; and
 - (d) direct the manager not to make investments of a specific class or of more than a specified percentage of the fund in any specified class.

21 Cancellation of registration of unit trust scheme

- (1) The Commission may cancel the registration of a unit trust scheme if:
 - (a) any of the requirements for registering the scheme are no longer satisfied; or
 - (b) it is undesirable in the interests of the unit holders or potential unit holders that the scheme should continue; or
 - (c) the manager or the trustee has contravened or failed to comply with a provision of this Act; or
 - (d) the manager or the trustee has given false, inaccurate or misleading information to the Commission; or
 - (e) the manager or the trustee has asked the Commission to cancel the registration of the scheme.
- (2) For the purposes of paragraph (2)(b), the Commission may take into account any matter relating to:
 - (a) the scheme; or
 - (b) the manager or trustee of the scheme; or
 - (c) a director or controller of the manager or trustee; or
 - (d) a person employed by or associated with the manager or trustee in connection with the scheme.
- (3) The Commission must give the manager and trustee of the scheme at least 28 days written notice that it proposes to cancel the scheme registration.
- (4) The notice must:
 - (a) set out the grounds on which the Commission proposes to cancel the scheme's registration; and
 - (b) state that the manager and trustee have 28 days from the date of the notice to state why the scheme's registration should not be cancelled.
- (5) The Commissioner must take any representations from the manager and trustee into account when deciding whether or not to cancel the registration.

22 Suspension and winding up

- (1) The Commission may, for any of the reasons specified in subsection 21(1), issue a suspension notice requiring the manager to cease the issue or redemption, or both the issue and redemption, of units under the scheme.

- (2) A suspension notice remains in force for one month or a shorter period stated in the notice, and cannot be renewed.
- (3) The Court may, for any of the reasons specified in subsection 21(1), order that:
 - (a) the manager of a unit trust scheme cease the issue or redemption, or both the issue and redemption, of units under the scheme on a date specified in the direction until a later date specified in that or another direction; or
 - (b) the manager and trustee of a unit trust scheme wind the scheme up by the date specified in the order.

23 Injunction

- (1) The Court may, on an application by the Commission:
 - (a) grant an injunction restraining the contravention of any provision of this Act if there is reasonable likelihood that a person will contravene or repeat the contravention of the provision; and
 - (b) make an order:
 - (i) requiring that person or another person who appears to the Court to have been knowingly concerned in the contravention to take the steps the Court may direct to remedy it; and
 - (ii) requiring the person to give the Court, accounts or other information required to assist the Court to determine what profits have accrued and to determine how any amounts are to be paid or distributed; and
 - (iii) requiring the accounts or information to be verified as the Court directs.
- (2) The Court may make an order under paragraph (1)(b) if it is satisfied that:
 - (a) the profits have accrued to a person as a result of his or her contravention of a provision of this Act; or
 - (b) an investor in the scheme has suffered loss or been otherwise adversely affected as a result of that contravention.

24 Restitution order

- (1) The Court may, on an application made under section 23, also order the person concerned to pay into Court, or appoint a receiver to recover from the person, an amount that appears to the Court to be just, having regard to the facts of the case.
- (2) An amount paid into Court by or recovered from a person because of an order under subsection (1) must be paid out to persons who have suffered loss or have been adversely affected, as set out in subsection 23(2)(b).

- (3) Nothing in this section or section 23 affects the right of a person other than the Commission to bring proceedings about the matters to which this section or section 23 applies.

25 Applications to Court

- (1) In any of the circumstances stated in subsection 20(1), the Commission may apply to the Court:
- (a) for an order removing the manager or trustee of the unit trust scheme, or both of them, and replacing either or both of them by a person or persons nominated by the Commission and appearing to the Commission to satisfy the requirements of this Act; and
 - (b) if it appears to the Commission that no person, or no suitable person, satisfying those requirements is available, for an order removing the manager or trustee, or both of them, and appointing a receiver to wind up the scheme.
- (2) On an application under this section, the Court may make any order it thinks fit and, on the application of the Commission, may rescind an order made under paragraph 1(b) and substitute an order of the kind mentioned in paragraph (1)(a).
- (3) Subsection (2) does not apply to a receiver appointed by an order made under paragraph 1(b).

PART 5 - MISCELLANEOUS

26 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 that in a country outside Vanuatu exercises a function corresponding to the functions of the Commission under this Act or the *Financial Services Commission Act No.35 of 1993*.

27 Disclosure of information to the Financial Intelligence Unit

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

28 Offences

A person who contravenes or fails to comply with a provision of this Act for which no penalty is expressed is guilty of an offence punishable, on conviction, by a fine not exceeding VT 1,000,000.

29 Fees

The following fees are payable under this Act:

- (a) for registration of a unit trust scheme – USD1,000; and
- (b) for a manager's licence – USD1,000; and

- (c) for the annual renewal of registration – USD1,000; and
- (d) for the annual renewal of a manager’s licence – USD1,000.

30 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.

31 Commencement

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