



FOUNDATIONS ACT 2011

FOUNDATIONS (WINDING UP) REGULATIONS 2011

Approved by Tynwald

2011

Coming into operation

1 January 2012

The Treasury makes these Regulations under section 61(1)(l) of the Foundations Act 2011¹ ("the Act").

1 Title

These are the Foundations (Winding up) Regulations 2011.

2 Commencement

If approved by Tynwald², these Regulations come into operation on 1 January 2012.

3 Application

- (1) These Regulations are subject to the Act (see, in particular, sections 16 and 17).
- (2) They apply if a foundation is to be wound up and dissolved.

Winding up under order of the High Court

4 Power of the High Court to order winding up

- (1) In addition to its powers under Part 5 of the Act, the High Court may, on application of a person with sufficient interest or a creditor, order that a foundation is to be wound up and dissolved.
- (2) Before making the order, the High Court must be satisfied that –
 - (a) it is not reasonably practicable for the foundation to carry on in pursuance of its objects;
 - (b) the foundation was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;
 - (c) it is, or is being conducted in a way that is, contrary to public policy or immoral;

¹ 2011 c. 17

² As required by section 61(5) of the Act

- (d) its terms are so uncertain that performance is impossible;
 - (e) the foundation is unable to pay its debts as they fall due;
 - (f) without limiting sub-paragraph (e), the following conditions are satisfied –
 - (i) the foundation is indebted to a creditor in a sum exceeding £10,000;
 - (ii) the creditor has served notice on the foundation demanding payment of the debt; and
 - (iii) the foundation does not, within 21 days immediately following the date of service of demand, pay the debt or give security for it to the creditor’s satisfaction;
 - (g) the affairs of the foundation are being conducted in such a way as to defraud creditors (of the foundation or any other person) or in an unlawful manner;
 - (h) the foundation has consistently defaulted in complying with its obligations under the Act; or
 - (i) it is just and equitable to wind up the foundation.
- (3) On making an order under paragraph (1), the High Court may make whatever other orders it thinks fit in respect of the winding up, including the appointment of a liquidator to wind up the foundation’s affairs, distribute its assets and apply to the Registrar for removal of the foundation from the register.

Provisions applying to all windings up

5 General provisions as to winding up

- (1) This regulation applies if a foundation is being wound up, whether or not pursuant to an order of the High Court under regulation 4.
- (2) The foundation is to be wound up by its council unless –
 - (a) a liquidator has been appointed by the High Court under regulation 4(2) or under paragraph (6); or
 - (b) the council appoints a liquidator to wind up the foundation.
- (3) From the commencement of the winding up, no member of the foundation council may, except in accordance with the provisions of regulation 7 (distribution of assets upon winding up), claim as a creditor of the foundation.
- (4) The winding up commences on the earlier of –
 - (a) the date of the occurrence of the event, expiry of period of time or exercise of right (as the case may be) upon which the foundation is required to be wound up under its foundation rules; or
 - (b) the date of the order of the High Court under regulation 4(1).
- (5) Within one month of the commencement of the winding up, the registered agent must notify the Registrar, in the published form and

accompanied by the published fee, that the foundation is being wound up.

- (6) At any time following the commencement of the winding up, the High Court may, on application of a person with sufficient interest or a creditor, make any order in relation to the winding up it thinks fit, including the appointment of a liquidator to wind up the foundation's affairs, distribute its assets and apply to the Registrar for removal of the foundation from the register.
- (7) Subject to paragraph (8), on the appointment of a liquidator all powers of the foundation council cease.
- (8) A liquidator appointed under paragraph (2)(b) may authorise the foundation council to continue to exercise specified powers.
- (9) A person who purports to exercise a power of the council at a time when the power has ceased commits an offence and is liable on summary conviction to a fine not exceeding £5,000.
- (10) From the commencement of the winding up, the foundation must cease to carry on any activities except to the extent necessary for its beneficial winding up.
- (11) If paragraph (9) is contravened, the foundation and each member of its council commits an offence and is liable on summary conviction to a fine not exceeding £5,000.
- (12) Expenses properly incurred in the winding up, including the liquidator's remuneration, are payable from the foundation's assets in priority to all other debts.
- (13) From the commencement of the winding up, the persons winding up the foundation's affairs, in the name of and for and on behalf of the foundation –
 - (a) may, to the extent necessary for the beneficial winding up, prosecute, defend or settle any civil or criminal action;
 - (b) must dispose of the foundation's property; and
 - (c) must, in accordance with the provisions of regulation 7 (distribution of assets upon winding up) –
 - (i) discharge the foundation's debts; and
 - (ii) distribute any remaining assets in accordance with the foundation rules.
- (14) As soon as the foundation's affairs are fully wound up –
 - (a) the persons who conducted the winding up must –
 - (i) prepare an account of the winding up, giving details of its conduct and the disposal of the foundation's property, and stating whether or not any state of affairs described in regulation 6 (personal liability for certain defaults) has come to their attention;

- (ii) provide all members of the foundation council with a copy of the account; and
 - (iii) within a period of 7 days beginning on the date of completion of the winding up, file with the Registrar a notice of completion of the winding up in the published form and accompanied by the published fee;
- (b) the Registrar must, as soon as is reasonably practicable after such filing, amend the register to reflect that the foundation has been wound up; and
- (c) upon the Registrar so doing, the foundation's certificate of establishment ceases to be valid and the foundation is dissolved.
- (15) If paragraph (13)(a) is contravened, each person who conducted the winding up commits an offence and is liable on summary conviction to a fine not exceeding £5,000.
- (16) The persons conducting the winding up may seek the High Court's directions as to any matter arising in relation to the winding up, and upon such an application the High Court may order as it considers appropriate.

Provisions applying if foundation insolvent

6 Personal liability for certain defaults

- (1) Paragraph (2) applies if –
- (a) a foundation has been wound up and is unable to pay its debts; and
 - (b) a member of the foundation council has, in contravention of a provision of the Act, these Regulations or the foundation rules –
 - (i) contributed to the inability of the foundation to pay its debts;
 - (ii) materially misled a person as to, or has caused there to be substantial uncertainty as to, the foundation's assets or liabilities; or
 - (iii) substantially impeded the orderly winding up of the foundation's affairs.
- (2) Without limiting paragraph (4), the member of the foundation council responsible for the contravention commits an offence and is liable on summary conviction to a fine not exceeding £5,000.
- (3) In proceedings for an offence under paragraph (2), it is a defence for the person charged to show that that person took all reasonable precautions and exercised all due diligence to avoid committing the offence.
- (4) In circumstances where a member of the foundation council may be guilty of an offence under paragraph (2), the High Court may, on the application of a person with sufficient interest, a person conducting the winding up of the foundation or a creditor (as the case may be), declare that the member of the council responsible for the contravention is personally liable, without limitation, for some or all the debts of the foundation.

- (5) If the High Court makes a declaration under paragraph (4), it may –
 - (a) give any direction it thinks fit for the purpose of giving effect to the declaration; and
 - (b) direct that the liability of the person under the declaration is to be a charge on –
 - (i) any debt due from the foundation to the person (or any interest of the person in a debt due from the foundation); or
 - (ii) any interest (however remote) of the person in the foundation's assets.
- (6) To give effect to paragraph (5), the High Court may make further orders as it considers appropriate.
- (7) The High Court must not make a declaration under paragraph (4) in respect of a person if it considers that that person took all reasonable steps and exercised all due diligence to secure compliance by the foundation with the relevant provision.
- (8) Paragraphs (2) and (4) to (6) are without prejudice to any other penalty, remedy or proceedings, whether civil or criminal, in respect of the contravention.

Distribution of assets

7 Distribution of assets upon winding up

Upon the winding up of a foundation, the assets are to be distributed in the following order –

- (a) firstly, to creditors other than persons with sufficient interest, to the extent otherwise permitted by law, in satisfaction of the foundation's debts;
- (b) secondly, to persons with sufficient interest who are creditors, to the extent otherwise permitted by law, in satisfaction of the foundation debts; and
- (c) finally, in accordance with the foundation rules.

Made 16th November 2011

Hon W E Teare MHK
Minister for the Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for the winding up of foundations.

If a foundation is to be wound up upon the happening of an event, expiry of time or the exercise by a person of a right, the foundation rules must set out details (see sections 16 and 17 of the Foundations Act 2011).

Additionally, these Regulations enable a creditor of the foundation or a person with sufficient interest in it (see section 3 of the Act) to apply to the High Court for the foundation to be wound up in certain circumstances (see regulation 4).

The Regulations go on to make provisions for windings up generally, whether or not pursuant to a court order (see regulation 5). Unless a liquidator is appointed either by the High Court or the foundation council, the foundation council is responsible for the winding up.

If a foundation is insolvent, a member of the foundation council may be criminally liable if that person was responsible for the foundation contravening a provision of the Act, these Regulations or the foundation rules. The High Court may also order that such person be personally liable for the foundation's debts (see regulation 6).

These Regulations also make provision for the distribution of assets on winding up (see regulation 7).