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SCOTTISH STATUTORY INSTRUMENTS

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**2009 No. 28**

**CHARITIES**

**The Further and Higher Education (Scotland)  
Act 1992 Modification Order 2009**

*Made* - - - - *30th January 2009*

*Coming into force* - - *9th March 2009*

The Scottish Ministers make the following Order in exercise of the powers conferred by section 102(a) of the Charities and Trustee Investment (Scotland) Act 2005<sup>(1)</sup> and all other powers enabling them to do so.

In accordance with section 103(5) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

**Citation and commencement**

1. This Order may be cited as the Further and Higher Education (Scotland) Act 1992 Modification Order 2009 and comes into force on 9th March 2009.

**Modification of the Further and Higher Education (Scotland) Act 1992**

2. In section 18 (disposal of certain property) of the Further and Higher Education (Scotland) Act 1992<sup>(2)</sup>—

(a) for the words “the Secretary of State” where they first occur in subsection (5), substitute “such educational charity as the Scottish Ministers may direct,”; and

(b) after subsection (5) insert—

“(6) In this section, “educational charity” means a body entered in the Scottish Charity Register which has the advancement of education as one of its charitable purposes.”.

St Andrew’s House, Edinburgh  
30th January 2009

*FIONA HYSLOP*  
A member of the Scottish Executive

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(1) 2005 asp 10.

(2) 1992 c. 37 The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46).

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order modifies the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”) by amending subsection (5) of and inserting a new subsection (6) into section 18. Section 18(5) provides that where a board of management of a college of further education disposes of certain property that a portion of the proceeds or value of the consideration for the disposal should be paid to the Scottish Ministers.

Section 7(4)(a) of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”) provides that a body will not meet the charity test if its constitution allows it to distribute or otherwise apply any of its property for a purpose which is not a charitable purpose.

Consequently, where section 18(5) of the 1992 Act forms part of the constitution of a governing body of a college of further education, it will result in that body failing to meet the charity test.

Section 102(a) of the 2005 Act provides the power to the Scottish Ministers, by order to modify an enactment to prevent a body which is established by enactment from failing the charity test.

The modifications to section 18 of the 1992 Act made by this Order ensure that a college of further education can no longer be required to pay a portion of proceeds from a disposal of certain property to the Scottish Ministers. Any amount paid must now go to an educational charity directed by the Scottish Ministers. This is to ensure that a governing body of a college of further education does not fail the charity test by virtue of section 18(5) forming part of its constitution.