

POLICY NOTE

THE SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS (REMOVAL FROM REGISTER AND DISSOLUTION) AMENDMENT REGULATIONS 2013

SSI 2013/362

The above instrument was made in exercise of the powers conferred by sections 64(d) and 103(2) of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). The instrument is subject to affirmative resolution procedure.

Policy Objectives

Chapter 7 of the 2005 Act introduced a framework for the creation, operation and regulation of a new legal form of incorporation for Scottish charities, namely the Scottish Charitable Incorporated Organisation (“SCIO”). Being a SCIO allows Scottish charities to enjoy the benefits of incorporation, notably there being no liability on members and there being a legal personality for the charity, without requiring them to become companies or industrial and provident societies. SCIOs are registered with and regulated by the Office of the Scottish Charity Regulator (“OSCR”).

Section 64 of the 2005 Act provides for the Scottish Ministers to make regulations on a range of matters related to the operation of SCIOs, and, specifically under section 64(d), the Scottish Ministers can make provision concerning the winding up, insolvency or dissolution of a SCIO. The Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2011 (“the 2011 Dissolution Regulations”) came into force on 1 April 2011 and set out the detailed requirements for the winding up and dissolution of solvent and insolvent SCIOs.

Section 10 of the 2005 Act sets out the circumstances when a body’s (including a SCIO’s) name may be considered to be objectionable. This provision ensures an applicant’s, charity’s or proposed SCIO’s name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.

Section 12 of the 2005 Act allows OSCR to direct a charity to change its name where it considers that the name is objectionable. It should be noted that a name is objectionable whether or not another charity (or any other body/person) contacts OSCR regarding it.

Where OSCR directs a charity to change its name, the charity must do so within the time period set out in the direction. If the charity does not comply with the direction, section 12(5) provides that OSCR must remove it from the Scottish Charity Register (“the Register”).

When charities that are not SCIOs are removed from the register they can continue to exist as a non-charitable legal entity. The position is different for SCIOs. The body corporate status of a SCIO is dependent on it being registered as a charity. It can have no separate legal existence if it is not a charity and would require to re-constitute itself as a different type of legal body if it wanted to continue to exist. Under section 55 of the 2005 Act when a SCIO is removed from the Register and is, no longer a charity, it therefore ceases to be a SCIO and ceases to exist.

Because of this, the policy intention behind the 2005 Act and subsequent 2011 Dissolution Regulations was that a bespoke dissolution framework in the 2011 Dissolution Regulations would ensure that the affairs of a SCIO would always be wound up prior to it being removed from the Register. No other exit route from the Register would be available. So essentially, a SCIO would always have to apply to OSCR to be dissolved before it could be removed from the Register.

Additionally, in order to ensure that the interest of beneficiaries, (potential) creditors and other third parties are protected, under the 2011 Dissolution Regulations the SCIO must satisfy certain conditions prior to seeking dissolution and removal from the Register, and must publicise this. The conditions include ensuring that all outstanding debts and liabilities are to be transferred and that any surplus assets are to be transferred to another body (or bodies) with charitable purposes the same as or as closely resembling those set out in the SCIO's constitution.

This policy intention is achieved in regulations 3 and 4 of the 2011 Dissolution Regulations for SCIOs which voluntarily seek dissolution and removal and for SCIOs which fail the charity test.

However, the 2011 Dissolution Regulations omitted to address the position of a SCIO which has failed to change its name in accordance with section 12 of the 2005 Act. Section 12 enables OSCR to remove the SCIO from the Register where it has failed to comply with a direction to change its name. The requirement to remove the SCIO in that section does not allow for the SCIO to be dissolved first. Therefore, there is no protection for interested third parties or surplus assets.

This instrument will amend the 2011 Dissolution Regulations to disapply the simple requirement on OSCR to remove a SCIO from the Register under section 12(5) of the 2005 Act and instead provide that, where a SCIO does not comply with a direction under section 12(2) or (3) to change its name, OSCR must direct the SCIO to make an application to OSCR to be dissolved and removed from the Register in accordance with regulation 3 or 4 of the 2011 Dissolution Regulations.

In the event that the SCIO does not apply for dissolution as directed, the amendments in this instrument have the effect that OSCR must apply to the Court of Session to deal with the SCIO appropriately. The amendments made by the instrument also allow OSCR to revoke or vary any directions given to a SCIO as regards change of its name and the powers of OSCR are to be subject to the review and appeal mechanisms set out in Chapter 10 of Part 1 of the 2005 Act.

The amendment to the 2011 Dissolution Regulations applies to any directions issued by OSCR on or after 6th January 2013, when this instrument comes into force. To date OSCR has issued only one direction under section 12 which was not complied with. That case brought to light the omission in the 2011 Dissolution Regulations. In the absence of provision in the 2011 Dissolution Regulations about dissolution of the SCIO before removal, OSCR sought from the SCIO details of its current assets and liabilities, but the SCIO failed to respond. OSCR considers it unlikely that the SCIO has undertaken any activities or has any assets. As a result, in August 2013 OSCR removed the SCIO from the Register in accordance with its obligation to remove under section 12.

It is not expected that OSCR will issue any further directions under section 12 until after this instrument is in force.

Consultation

Given that the proposed changes will provide the necessary framework to achieve the original policy intention of the 2011 Dissolution Regulations, a full public consultation has not been undertaken. OSCR has been fully consulted and is supportive of this instrument.

Financial Effects

There will be costs to OSCR associated with processing applications and monitoring compliance but these were always included in the assumptions and estimates of its running costs, in accordance with the original policy intention of the 2011 Dissolution Regulations and were to be met within existing budgets.

Scottish Government Local Governance and Communities Directorate
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