

# CHARITIES ACT 2011

## The Charities (Total Return) Regulations 2013

*Made 25 October 2013*

*Coming into force 1st January 2014*

In exercise of the powers conferred on it by section 104B of the Charities Act 2011 the Charity Commission for England and Wales makes the following regulations:

### Part 1 – General Provisions

1. These regulations may be cited as the Charities (Total Return) Regulations 2013 and come into force on 1st January 2014.

2. In these regulations:

“available endowment fund” has the same meaning as in section 104A(5) of the 2011 Act;

“the 2011 Act” means the Charities Act 2011;

“expendable endowment” means a capital fund which the trustees may convert into income;

“Index” means the Retail Prices Index or Consumer Prices Index or such other prices index published by The Office for National Statistics or any successor government ministry, department or agency as the trustees adopt for the purposes of regulation 5 and 8(2) below, having regard to the nature of the relevant fund and their duties set out in regulation 6(1) and (2) below;

“investment return” means the return from investments which represent the assets given to the charity on a trust for investment and includes:

- any interest receivable; plus
- any net rent and other income or gains derived from the use or exploitation of assets; plus
- any dividends; plus
- all forms of capital gain resulting on, or from, the disposal, redemption, or revaluation of investment assets (including the issue or repayment of share or loan capital); less
- any capital losses resulting on or from the disposal, redemption, or revaluation of investment assets;

“negative unapplied total return” arises where the unapplied total return carried forward is less than nil;

“relevant fund” has the same meaning as in section 104B(6) of the 2011 Act;

“relevant percentage” is:

- (a) for the purposes of regulation 5 the percentage equivalent to the rise in the Index as at the date on which the allocation is made from either (i) the date of the last occasion on which an amount from the unapplied total return was accumulated in the trust for investment or (ii) if there is no such occasion, the date of the valuation used for the purposes of the section 104A(2) resolution; and
- (b) for the purposes of regulation 8(2) the percentage equivalent to the rise in the Index as at the date the trustees revoke their section 104A(2) resolution from the date of the relevant section 104A(2) resolution;

“relevant value” is the value of the relevant fund having deducted from that value the value of any unapplied total return included within it;

“section 104A(2) resolution” means a resolution made pursuant to s104A(2) of the 2011 Act to adopt a total return approach to investment in relation to a fund or portion of a fund (including the returns from the investment of such fund or portion of it);

“total return” means the whole of the investment return received by a charity from a relevant fund, regardless of when it has arisen;

“total return approach to investment” means an approach to investment which gives trustees flexibility in the way they allocate the total return arising from the trust for investment between the trust for application and the trust for investment;

“trustees” means the charity trustees of a charity as defined in section 177 of the 2011 Act;

“trust for application” means the trust that attaches to charity property which the trustees have to apply for the purposes of the charity within a reasonable period of receipt;

“trust for investment” means the trust that is created when a gift to a charity is made on the condition that it should not be applied directly for the purposes of the charity, but instead should be invested to produce a return;

“unapplied total return” means that part of the total return which has not been allocated to either the trust for application or the trust for investment.

## **Part II – Adoption of a total return approach to investment**

3. (1) These regulations apply where the trustees of a charity with an available endowment fund make a section 104A(2) resolution.  
(2) The trustees shall identify and record, at the time when a section 104A(2) resolution is made,
  - (i) the value of the trust for investment as at a date on or before the date of the resolution,
  - (ii) the date of that valuation, and
  - (iii) any unapplied income from the trust for investment and any increase in the value of the trust for investment since the date of the valuation which together shall constitute the initial value of the charity’s unapplied total return.  
(3) The trustees may decide, at any time, and from time to time, subject to these regulations but otherwise at their discretion, what part of the unapplied total return should be held on the trust for application and, subject to regulation 5, what part of the unapplied total return should be accumulated as part of the trust for investment.  
(4) The unapplied total return which is not allocated to the trust for application nor accumulated in the trust for investment shall be dealt with in the same way as the trust for investment until it is so allocated or accumulated.
4. The trustees may, in exercising their powers in respect of a relevant fund, allocate part of the trust for investment to the trust for application subject to its recoupment on a pound for pound basis over a period to be reasonably determined by the trustees PROVIDED ALWAYS THAT the total amount so allocated shall at no time exceed 10% of the relevant value as at the date of the first such allocation which remains subject to recoupment. When exercising this power trustees should have regard to the duty set out in regulation 6 (2) below.
5. The trustees may, as part of the exercise of their powers in respect of a relevant fund accumulate in the trust for investment an amount from the unapplied total return the value of which does not exceed the relevant percentage of the relevant value as at either (i) the date of the last occasion on which an amount from the unapplied total return was accumulated in the trust for investment or (ii) if there is no such occasion, the date of the valuation used for the purposes of the section 104A(2) resolution.
6. The trustees shall comply with the following directions as to matters connected with, or arising out of, the exercise of their powers in relation to a relevant fund:
  - (1) When using those powers, and when discharging the duties set out in regulation 3 (2) and (4) and 6 (2) to (3) below, each of the trustees has a duty to exercise such care and skill as is reasonable in the circumstances, having regard in particular:
    - (a) to any special knowledge, or experience that he or she has or holds himself out as having, and

(b) if he or she acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) The trustees shall only exercise their powers in relation to a relevant fund in such a way as not to prejudice the ability of the charity to further its purposes now and in the future.

(3)(a) Before using their powers in relation to a relevant fund, trustees must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the duty expressed in regulation 6 (2), the power ought to be used.

(b) the exception is that the trustees need not obtain such advice if they reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so.

(c) proper advice is the advice of a person who is reasonably believed by the trustees to be qualified to give it by his or her ability in and practical experience of investment and matters relevant to the proper use of the power conferred by regulations 3 to 5

(4) The trustees shall in their annual report for each financial year:

(a) state the policy adopted by the trustees for making the identification required by regulation 3 (2) above, and state the date from which the analysis required by that sub-clause was performed if different from the date when the charity was established.

(b) give an explanation of the consideration and policies relevant to the trustees' determination in that financial year of:

(i) the allocation of the charity's unapplied total return between the trust for application and the trust for investment;

(ii) any allocation of part of the permanent endowment to the relevant trust for application under the power in regulation 4 above.

(c) identify the person(s) (if any) who provided the advice referred to in (3) above.

(d) if the trustees of the charity concerned are not, or may not be, required to prepare an annual report, the information required by this sub-clause should be provided in the notes to the charity's accounts in the relevant financial year.

7. (1) This regulation applies where the Charity Commission for England and Wales has, prior to the commencement of section 104A(2) of the 2011 Act, conferred on the trustees of a charity a power enabling them to decide which part of the unapplied total return from the assets of the charity given to it on trust for investment should be held on trust for application for the purposes of the charity by way of an order under section 26 of the Charities Act 1993 or section 105 of the 2011 Act.

(2) Where the trustees make a section 104A(2) resolution, they may take these regulations as discharging that order subject to the continued payment of any amounts agreed to be repaid by way of recoupment.

### **Part III – revocation of a section 104A(2) resolution**

8. (1) This clause applies where the trustees who have made a section 104A(2) resolution, wish to revoke that resolution.

(2) Where there is a negative unapplied total return, before revoking a section 104A(2) resolution, the trustees shall make provision for an amount equivalent to the negative unapplied total return, together with such amount (not exceeding the relevant percentage of the relevant value) that the trustees consider to be appropriate, to be paid to the relevant fund over such period as the trustees consider reasonable provided that such a period shall not exceed 10 years.

(3) In other circumstances, before revoking a section 104A(2) resolution, the trustees shall consider what part of the unapplied total return should be allocated to the trust for investment provided that the amount allocated shall not increase the value of the trust for investment over its value as at the date the total return approach was adopted by more than the relevant percentage.

(4) The remainder of the unapplied total return remaining after giving effect to any decision of the trustees under (3) shall be dealt with as expendable endowment.

9. **Review**

(1) Before the end of the review period, the Charity Commission for England and Wales must—

- (a) carry out a review of these regulations,
- (b) set out the conclusions of the review in a report, and
- (c) publish the report.

(2) The report must in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by these regulations,
- (b) assess the extent to which those objectives are achieved, and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(3) "Review period" means the period of five years beginning with the day on which these regulations come into force.

## **EXPLANATORY NOTE**

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

The Charities (Total Return) Regulations 2013 (“the Regulations”) which come into force on 1st January 2014 set out the requirements for trustees wishing to exercise the power to invest on a total return basis set out in section 104A of the Charities Act 2011.

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The Regulations are made under section 104B of the Charities Act 2011 and set out the actions trustees who exercise the power in section 104A may take.

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The seal of the Commission was affixed hereto by order of the Commission on 25 October 2013

Sealing number: 568/1314

Sam/07-05

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