

# FOUNDATIONS AMENDMENT BILL 2017

## SAMOA

### Explanatory Memorandum

#### **Objects and Reasons:**

The Bill seeks to amend the Foundations Act 2016 (“Principal Act”).

The objects of the Bill are:

- (a) to insert new definitions within the principal Act;
- (b) to ensure that, if a resident agent resigns, there must be a replacement resident agent appointed by the foundation or the registrar;
- (c) to remove the requirement for written confirmation of the Attorney General when a foundation is removed from the Register in Samoa because such a foundation decides to migrate out of Samoa to be registered elsewhere;
- (d) removes the need for the approval of the National Revenue Board with respect to fees to be prescribed by regulations;
- (e) to empower the Registrar to impose monetary sanctions by way of regulations for non-compliance with administrative provisions of the Principal Act;

- (f) to insert new provisions regarding provide detailed provisions for the striking-off of a foundation from the Register and for its restoration to the Register and the appointment of an appointed individual to replace a resident agent; and
- (g) to insert a whole new Part 11 to provide for situations and procedure for when foundations decide to merge together and the effects of such merger.

**Clauses:**

- Clause 1:** - provides for the short title and commencement date of the Bill.
- Clause 2:** - amends section 2 of the Principal Act to insert new terms to be defined, namely, definition for “Minister” and “person”.
- Clause 3:** - amends section 12 of the Principal Act to provide that if a resident agent resigns there need to be an immediate replacement.
- Clause 4:** - amends section 67 of the Principal Act by repealing section 67(2)(a) to remove the requirement that the Attorney General has to confirm that he or she has no objection to the removal of a foundation from the register.
- Clause 5:** - amends section 89 of the Principal Act to remove the approval by the National Revenue Board of fees prescribed by regulations.
- Clause 6:** - inserts new Part 7A in the Principal Act to provide for the merger of foundation.
- Clause 7:** - inserts new Part 8A which provides for striking off and restoration of foundations and appointment of an appointed individual instead of a resident agent in certain circumstances.

- Clause 8:** - inserts new section 90A in the Principal Act which authorises the Registrar to impose monetary sanctions by way of regulations for the non-compliance with administrative provisions of the Principal Act.
- Clause 9:** - makes general amendments to the whole Principal Act to substitute references to “registered agent” to “resident agent”.
- Clause 10:** - amends schedule 4 of the Principal Act to substitute “financial penalties” in clause 6(6)(c) with “monetary sanctions”.



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(Hon SILI Epa Tuioti)

**MINISTER OF FINANCE AND MINISTER RESPONSIBLE FOR  
SAMOA INTERNATIONAL FINANCE AUTHORITY**

## FOUNDATIONS AMENDMENT BILL 2017

### SAMOA

#### Arrangement of Provisions

1. Short title and commencement
  2. Section 2 amended
  3. Section 12 amended
  4. Section 67 repealed
  5. Section 89 amended
  6. New Part 7A inserted
  7. New Part 8A inserted
  8. New section 90A inserted
  9. General amendments
  10. Schedule 4 amended
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2017, No.

**A BILL INTITULED**

**AN ACT to amend the Foundations Act 2016 (“Principal Act”).**

**BE IT ENACTED** by the Legislative Assembly of Samoa in Parliament assembled as follows:

**1. Short title and commencement:**

- (1) This Act may be cited as the Foundations Amendment Act 2017.
- (2) This Act commences on the date of its assent by the Head of State.

**2. Section 2 amended:**

In section 2(1) of the Principal Act:

Insert in its correct alphabetical order the following definition:

““Minister” means Minister of Finance;

“person” has the same meaning as provided in the Acts Interpretation Act 2015 and includes a foundation;”.

**3. Section 12 amended:**

For section 12 of the Principal Act, substitute:

**“12. Resident agents:**

- (1) A foundation must have a resident agent.
- (2) A resident agent may request copies of:
  - (a) the records of the foundation; and
  - (b) any other documents or information necessary for the resident agent to comply with its fiduciary duties.

- (3) If a resident agency can properly demonstrate to the Registrar in writing that he or she:
- (a) has taken all steps to carry out his or her duty under subsection (2); and
  - (b) has been unsuccessful due to circumstances beyond his or her control,
- the resident agent is not liable for the default.
- (4) Apart from section 92(7) and clause 21(1) of Schedule 4 of this Act, a resident agent may resign by notice in writing to the Registrar and to the foundation, provided there is a replacement resident agent immediately appointed by the foundation or, failing the foundation, by the Registrar.”.

**4. Section 67 repealed:**

Section 67(2)(a) of the Principal Act is repealed.

**5. Section 89 amended:**

In section 89(1)(b) of the Principal Act omit “subject to the approval of the National Revenue Board”.

**6. New Part 7A inserted:**

The Principal Act is amended by inserting after section 74, the following new Part:

**“PART 7A  
MERGER OF FOUNDATIONS**

**74A. Application:**

This Part applies to the merger of any two or more existing foundations, which may include any former foreign foundation which has migrated to and domiciled in Samoa, and the words “merge” and “merger” shall be construed accordingly and the

surviving entity following the merger, as the case may be, shall be referred to in this Part as “the surviving entity”.

**74B. Written plan of merger:**

- (1) Foundations that intend to participate in a merger, must together approve a written plan of merger and must include the following:
  - (a) the name of the resident agent of and the registered office of each foundation that is party to the proposed merger;
  - (b) the name of, resident agent of and registered office of the proposed surviving entity;
  - (c) the name and address of each member of the proposed surviving entity;
  - (d) the name and address of any person who is the proposed supervisory person of the proposed surviving entity;
  - (e) the name and address of any person who is the proposed guardian of the proposed surviving entity;
  - (f) the name and address of any founder or other person or persons who will be able to exercise reserved powers with regard to the proposed surviving entity;
  - (g) whether or not the purpose of the proposed surviving entity will include beneficiaries and; if so, whether any of those beneficiaries will be non-notifiable beneficiaries;

- (h) whether any beneficiary has been given an interest in the proposed surviving entity;
- (i) a summary of -
  - (i) the reasons for the merger;
  - (ii) the material terms and conditions of the proposed merger;
  - (iii) the manner and basis of converting the purpose of each foundation, which is party to the proposed merger, into the purpose of the proposed surviving entity, including any consideration payable in cash or otherwise for such conversion;
  - (iv) the manner and basis of merging or removal of any beneficiaries of those foundations, which are party to the proposed merger, and whether or not any such beneficiary has an interest in any of those foundations, including any consideration payable in cash or otherwise for such merger or removal; and
- (j) with reference to the charter and rules of each of the foundations, which is party to the proposed merger, the manner in which the merger is to be approved.

**74C. Application for a certificate of registration:**

- (1) When the plan in section 74D is approved by each of the foundations, which is party ("party foundation") to the proposed merger, the proposed resident agent for the surviving entity must apply to the Registrar for a certificate of registration.



- (2) An application for a certificate of registration must:
  - (a) be in the prescribed form; and
  - (b) include the following documents -
    - (i) a declaration of merger, in a form prescribed by regulations, signed by the resident agent for the proposed surviving entity and setting out the position upon the completion of the proposed merger and in that respect annexing to the declaration the following;
      - (ii) a copy of the plan referred to in section 74D;
      - (iii) the proposed charter and rules of the surviving entity; and
      - (iv) evidence in writing by each party foundation, that it consents in accordance with its charter and rules to the proposed merger as set out in the declaration and with a copy of the declaration annexed to such evidence; and
  - (c) include the prescribed fee.
- (3) The Registrar may issue a certificate of registration if he or she is satisfied that the applicant has complied with all requirements under subsection (2).
- (4) The Registrar may refuse to issue a certificate of registration if he or she is satisfied that the applicant has not complied with all requirements under subsection (2).

**74D. Registrar to register surviving entity:**

- (1) Once the Registrar is satisfied that all the requirements of this Part have been met, the Registrar must register the surviving entity under this Act, and in substitution for any prior registration, if applicable, in accordance with the provisions of clause 7 of Schedule 4 of the Act.

- (2) The Certificate of registration is conclusive evidence of the establishment of the surviving entity, upon the approved merger, and that it is duly registered as a foundation under this Act.

**74E. Effect of certificate of registration:**

Once a certificate of registration has been issued for the surviving entity, the effect of such is:

- (a) the surviving entity, as far as it is consistent with its charter, has all the rights, privileges, immunities, powers and objects of each foundation, which participated in the merger;
- (b) the assets of each party foundation, immediately vests in, and become the assets of, the surviving entity;
- (c) the surviving entity is liable for all claims, debts, liabilities and other obligations of each foundation, which participated in the merger;
- (d) no conviction, judgment, ruling or order against a party foundation, or any of its members, is released or impaired by the merger, and is assumed by, and enforceable against, the surviving entity or the member, as the case may be, and in each case without further act or deed;
- (e) an existing cause of action or any other proceeding, pending at the time of the merger against a party foundation, or against any of its member, is not released, abated or discontinued and is assumed by, and may be continued, enforced or pursued against, the surviving entity or the member, as the case may be;

- (f) a ruling, an order or a judgment in favour of a constituent foundation may be enforced by the surviving Foundation, without further act or deed; and
- (g) an existing cause of action or any other proceeding, pending at the time of merger by a foundation, which participated in the merger, may be continued, enforced or pursued by the surviving entity.

**74F. Registrar’s power to strike off:**

The Registrar upon the issuance of a certificate of registration of the surviving entity, may strike off from the Register, each party foundation of the approved merger and which is not the surviving entity.”.

**7. New Part 8A inserted:**

A new Part 8A is inserted after section 76 of the Principal Act as follows:

**“PART 8A  
REGISTER STRIKE OFF AND RESTORATION**

**76A. Strike off and restoration:**

- (1) The Registrar may strike off from the Register a foundation in the following circumstances:
  - (a) sections 12(3) and 93(8) apply; or
  - (b) the foundation has failed to pay its prescribed annual renewal fees or penalties, as specified in regulations.
- (2) Where the Registrar intends to strike off a foundation from the Register under this section, the Registrar shall give notice of such intention to the foundation at its last known registered office in Samoa.

- (3) The Registrar must in writing notify a foundation that it is being struck off the Register for breaching subsection (1)(b), unless:
  - (a) a response is received within two (2) months of the notice; and
  - (b) the response provides reasons why the foundation should not be struck off from the Register.
- (4) The Registrar may in writing notify a foundation that it is being struck off the Register if sections 12(3) or 93(8) apply, unless:
  - (a) a response is received within one (1) month of the notice; and
  - (b) the response provides reasons why the foundation should not be struck off from the Register.
- (5) Despite a foundation being struck off the Register due to the lapse of time set out in subsections (3) and (4):
  - (a) the liabilities of the foundation, and the liabilities of any member or officer continues and enforceable as though the foundation had not been struck off; and
  - (b) it does not affect the ability of the foundation to be wound-up.
- (6) Where a foundation has been struck off the Register, the Registrar may restore the foundation to the Register if all of the following apply:
  - (a) an application is received from the foundation or of its resident agent or the appointed individual on its behalf, or of the guardian of the foundation or a creditor or liquidator of the foundation; and

- (b) if the Registrar is satisfied that due cause has been shown and that it would be just for the foundation to be restored to the Register; and
  - (c) payment of the prescribed fee and any outstanding fees and penalties has been made; and
  - (d) filing of such document or information as prescribed by regulations or the taking of such actions as the Registrar may direct.
- (7) A foundation restored to the Register, is treated as if it had never been struck off the Register.
- (8) If a resident agent, different from the resident agent at the time the foundation was struck off the Register:
- (a) makes the application for restoration to the Register under subsection (6); and
  - (b) provides a copy of the written consent of the foundation by resolution of the council specifying the reason for the change of resident agent,
- the Registrar may, treat the resident agent or appointed individual acting when the foundation was struck off the Register, to have resigned and replaced by the new resident agent.
- (9) Where costs, charges or fees or arrears, if any, are paid under subsection (6) in respect of a foundation which is being wound-up, such costs, charges, fees and arrears are considered to be costs of the winding-up.
- (10) Despite this section, where a foundation, or its resident agent or the appointed individual on its behalf, notifies the Registrar in writing that the foundation does not intend to pay the prescribed annual renewal fee on the date when it next becomes due and payable, the Registrar may on that date strike off the foundation from the Register without

having given to the foundation any notice of the Registrar's intention to do so and the striking off is taken to have been done under subsection (5).

**8. New section 90A inserted:**

After section 90 of the Principal Act insert:

**"90A. Registrar may impose monetary sanctions:**

Regulations may be made for monetary sanctions to be imposed by the Registrar for non-compliance with the provisions of this Act."

**9. General amendments:**

In the Principal Act, for "registered agent" wherever occurring, substitute "resident agent".

**10. Schedule 4 amended:**

In Schedule 4, clause 6(6)(c), for "financial penalties" substitute "monetary sanctions".

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