

**Foundations Program plc – in liquidation (“FPP”)  
FPA Limited – in liquidation (“FPA”)**

**Explanatory Note for Participants**

The documentation accompanying this note invites you to attend the initial meeting of creditors of FPA to be held on 19 January 2012 for the reasons set out below please note the Participants have not been invited to attend the meeting of creditors of FPP hence the attached material relates solely to the FPA meeting. The details of the FPA meeting are set out in full in the attached material but in summary the meeting is called pursuant to the Isle of Man Companies Act 1931 (the “Act”) to confirm or otherwise the appointment of the Joint Official Receivers (“JORs”) as liquidators and to consider whether to form a Committee of Inspection.

The JORs were appointed on the application of the Isle of Man regulator, the Financial Supervision Commission (the “FSC”) to wind up FPP and FPA. On the 23<sup>rd</sup> November 2011 the Court heard the FSC’s application and ordered the winding up of FPP and FPA and appointed the JORs nominated by the FSC.

As the following paragraphs will explain, as a result of the nature of the Foundations product the position of the Participants in relation to their legal status in the liquidations of FPA and FPP is currently unclear. This note sets out the preliminary conclusions that the JORs have reached for the purposes of the initial creditors’ meetings in an effort to assist the Participants and to enable Participants to consider the position that they may wish to take at the first meetings.

The term ‘Participant’ is not a legal status – it is a relationship arising out of the specific terms of the Foundations Program and the acceptance of the terms contained in the Offering Document. Accordingly, the relationship between the Participants and FPP/FPA has to be considered from first principles. On this basis there are potentially three classifications relevant to the liquidation process which may not be mutually exclusive – contributories, creditors or debtors.

**Contributories**

A Contributory is defined by Section 157 of the Act as follows:

**“Section 157 Definition of contributory**

The term ‘**contributory**’ means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory”.

Whilst to an extent the Participants have the “feel” of contributories because they stand to share in the profits and losses of the fund, they are not past and present members and are not liable under Section 156 of the Act to contribute to the assets of the company. On this basis, the JORs have concluded that the Participants are not contributories.

**Debtors**

Under paragraph 13.2 of the Offering Document a Participant who leaves the Program is liable to pay his share of losses to FPP. Failure to do so would permit FPA to realize the required sum from the assigned assets. Accordingly, in the first instance (assuming losses arise), the Participants are debtors of FPP. On this basis Participants have no right to attend the meeting of creditors of FPP.

**Creditors**

If Participants have discharged any debts due to FPP as required, FPP and FPA must take all reasonable steps to re-assign the Participants assets available for re-assignment (subject also to Lender Security). If on the other hand Participants do not discharge the debts due, FPP and/or FPA can encash all or any part of the assigned

assets (again subject to Lender Security) to effect the discharge of any debts due to FPP. In either of these circumstances, it is arguable that the Participants are contingent creditors of FPA. The contingency results essentially from the possibility that the present value of the assigned assets may not be sufficient to discharge all the debts due. The JORs take the preliminary view that the correct analysis is that Participants should be accorded the status of contingent creditors.

### **Meeting of creditors of FPA**

Rule 117 of the Winding up Rules 1934 states, *“a creditor shall not vote in respect of any un-liquidated or contingent debt, or any debt the value of which is not ascertained”*.

As explained above, the JORs have taken the preliminary view that the Participants are contingent creditors of FPA and as such pursuant to Rule 117 would be entitled to attend the creditors meeting but would not be entitled to vote at this first meeting.

The JORs have also considered whether there is sufficient certainty in the value of a potential Participant claim to satisfy the requirement for certainty in relation to Rule 117. On the basis of the information available to the JORs, there are three significant uncertainties.

- There is some evidence to suggest that inaccurate portfolio valuations may have resulted in erroneous allocations of Participation Points.
- The latest valuations of the policies held by FPP are not current.
- The amount of losses to be borne by the Participants is uncertain as the realizable value of the assets owned by FPP is uncertain.

As a result of these uncertainties, the JORs are satisfied that there is insufficient information to ascertain the value of the contingent debt.

As a result and to assist the Participants understanding, the JORs have taken the preliminary view that the Participants may attend, but are not entitled to vote at the first meeting of creditors of FPA.

### **Informal vote**

The JORs are very mindful that the Participants are the parties likely to suffer loss from the winding up of the FPP and FPA and the consequential realisation and termination of the fund. Accordingly, the JORs intend to conduct an informal vote of the Participants on each of the resolutions to be put to the meeting of FPA as set out in the notice. The results of the informal vote, either in person or by proxy, will be given to the Court when the JORs make their report following the completion of the first meetings.

### **Summary**

The JORs consider the Participants to be contingent creditors of FPA and to be eligible to attend and be heard at the first meeting of creditors. Further, the JORs consider that Rule 117 of the Winding up Rules applies to the potential votes of the Participants and as such the Participants are not eligible to vote for or against the resolutions to be put to the first meeting of creditors of FPA. The JORs intend to take an informal vote of the Participants (as contingent creditors of FPA) to ensure that the Court is made aware of their views. The JORs do not consider that the Participants have any status as creditors or contributories at the first meetings of FPP.

This note is not a definitive statement of the law. Participants should consider whether they need to take independent legal advice in respect of these issues. In any event, the Participants should complete and return the proof of debt (to the best of their ability) and the proxy form(s) as they think appropriate.

M Fayle    A P Shimmin

**Deemed Joint Official Receiver and Joint Provisional Liquidator  
Foundations Program plc in liquidation and FPA Limited in liquidation**