

**Joint Industry Guidance on  
Selling a Company Owning Tenanted Land  
Subject to a  
Pre-emptive Right to Buy**

published jointly by the  
**National Farmers Union of Scotland  
Scottish Land and Estates  
Scottish Tenant Farmers Association**

in association with  
**The Scottish Government's Independent Adviser on Tenant Farming**

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## Introduction

Under current legislation the tenant of a secure 1991 Act tenancy may register an interest in acquiring the land comprised in his/her lease in the Register of Community Interests in Land (RCIL). Where the owner decides to sell the land in question s/he must give notice of that fact to the tenant, and the tenant then has a statutory pre-emptive right to buy (PRTB) the land at a price to be agreed between the two parties or by external valuation. This requirement for the tenant to register an interest will be removed when provisions in the Land Reform (Scotland) Act 2016 come into effect.

In certain circumstances, often for reasons of governance and/or where ownership is shared, and sometimes for the purpose of managing taxation, title to the land may be held in a limited company. If a majority of the shares in that company are subsequently sold this may have more or less the same effect as if title to the land had itself been transferred, but even if a tenant has registered an interest in acquiring the land such an event will not trigger a statutory PRTB.

The Agricultural Holdings Legislation Review Group (AHLRG) considered this issue in 2014, and they recommended that “further consideration should be given to ways to ensure the effectiveness of a secure 1991 Act tenant’s pre-emptive right to buy in circumstances where a company owns a farm tenanted on a secure 1991 Act tenancy, and a transfer of the interest in a holding can be effected through the transfer of some or all of the shares in the company rather than sale of the land”. The Scottish Government is considering the implications of this recommendation.

Notwithstanding that the statutory PRTB is not currently triggered by the transfer of shares as above, the industry bodies consider that guidance is required to ensure that tenants affected by this kind of transfer are fully consulted in advance of the sale so that any outstanding tenancy issues can be resolved. The guidance applies to situations where shares are being transferred in an arm’s length transfer, but not where the transfer is merely part of a company restructuring or family succession. The industry bodies also recommend, however, that it is generally good practice for landlords to notify tenants in every situation where a tenanted holding is to be sold, and not just where a PRTB applies.

## Core Principles

The guidance is underpinned by two core principles –

1. Ownership of tenanted land through a limited company should not be used as a device purely for the purpose of circumventing the will of Parliament in giving secure 1991 Act tenants a statutory PRTB.
2. Where tenanted land is held in a limited company for some other reason and a controlling interest in that company is then transferred to an unconnected party in an arm’s length transaction, the sellers should in advance of the sale consult fully with the tenants concerning (as a minimum) the following points –
  - i. Whether there may be an opportunity for tenants to purchase part or all of their farms if both parties can agree an appropriate financial settlement.
  - ii. Whether there may be an opportunity for tenants to restructure and/or give up part of their farms in return for compensation if both parties can agree an appropriate financial settlement.
  - iii. Whether all of the landlord’s and tenant’s obligations are fully up to date, and if not what actions are required by each party to address this prior to the sale.

- iv. Whether all of the tenants have an up to date agreed record of improvements, and if not what actions are required by each party to address this prior to the sale.

### **Basis of the Guidance**

The guidance is built on an assumption of reasonableness among all involved. It reflects existing legislation and applies specifically to secure 1991 Act tenancies where one or more tenants have registered an interest in the RCIL. It may, however, also have wider applications for other tenants and types of tenancy. It asks anyone selling a majority stake in a company that holds title to tenanted land to an unconnected third party in an arm's length transaction to abide by the guidance in the interest of maintaining good landlord/tenant relations and ensuring the tenant's support for the sale.

### **The Sale Process**

The guidance asks the owners of such a company to undertake the following process, each step of which is designed to ensure effective engagement and collaboration between the tenants and the owners of the company throughout the sale. The overriding aim is to ensure that a good relationship between landlord and tenants is maintained and transferred on to the new owner(s) of the company.

#### Step 1 – Notice of Intention to Sell

As soon as the decision to advertise the sale has been taken the owners should give notice of the potential sale to all tenants with an interest registered in the RCIL. The notice should give an indication of the timeframe and process which is likely to be involved in the sale. In particular the notice should state that the owners will be in touch with each tenant on an individual basis to discuss issues relating to their tenancy, including those highlighted in bullet points 2(i) to (iv) above.

In exceptional situations it is possible that confidentiality in relation to the sale may be a legitimate concern for the sellers and/or prospective purchasers. In such circumstances it may be reasonable to ask each of the tenants to enter into a formal confidentiality agreement, and to make this a pre-condition for participating further.

#### Step 2 – Initial Individual Discussions

Immediately following step 1 the owners should meet individually and in confidence with each of the tenants in order to discuss in detail the issues covered by bullet points 2(i) to (iv) above with respect to the specific circumstances of each tenant. There should also be an opportunity for any other issues to be considered that either party may wish to raise.

#### Step 3 – Formal Individual Proposals

Within 3 weeks of step 2 the owners should send a written proposal to each of the tenants. The proposals should reflect the discussions at step 2, and should be in as much detail as possible. Alternative options may be presented where appropriate. Each tenant should reply in writing within two weeks either accepting the proposal or seeking further discussions (step 4).

#### Step 4 – Further Individual Discussions

Where a proposal at step 3 has not been agreed within two weeks the owners should meet again with the tenant for further discussions. The aim should be to fully address and resolve any remaining areas of disagreement, and it will usually be helpful if the discussions are facilitated by a trusted and neutral

third party. With regard to bullet points 2(iii) and (iv) attention should be paid to relevant published guidance on improvements and obligations.

#### Step 5 – Revised Formal Individual Proposals

The outcome of step 4 will normally provide the basis for a revised agreement. The owners should therefore write immediately to the tenant setting out formally what is proposed. The tenant should reply within two weeks confirming agreement to the revised proposal or stating that it is not accepted.

#### Step 6 – Professional Mediation

Where full agreement has still not been reached at step 5 the two parties should give serious consideration to involving a professional mediator at shared cost. Where a decision to involve such a mediator is jointly taken, the two parties should then repeat steps 4 and 5 above. The timescale for doing this should not exceed a further four weeks unless by mutual agreement.

#### Step 7 – Consultation Completed

The parties should be aware that the owners have a legal right to proceed with the sale, even if agreement has not been reached on any issue raised as part of the process outlined above. Once the consultation with individual tenants has been completed as above, the owners should confirm in writing to the tenants that the process has come to an end and give an indication of the timeframe for the proposed sale.

#### **Maintaining a Record of Process**

The industry bodies are aware that under the terms of the Land Reform (Scotland) Act 2016 there will be established a position of Tenant Farming Commissioner with a remit to prepare codes of practice for the purpose of providing practical guidance to landlords and tenants of agricultural holdings and their agents. The industry bodies see their guidance on selling a company owning land subject to an interest registered in the RCIL as potentially providing a basis for such a code, and they are anxious that it operates in an equivalent manner.

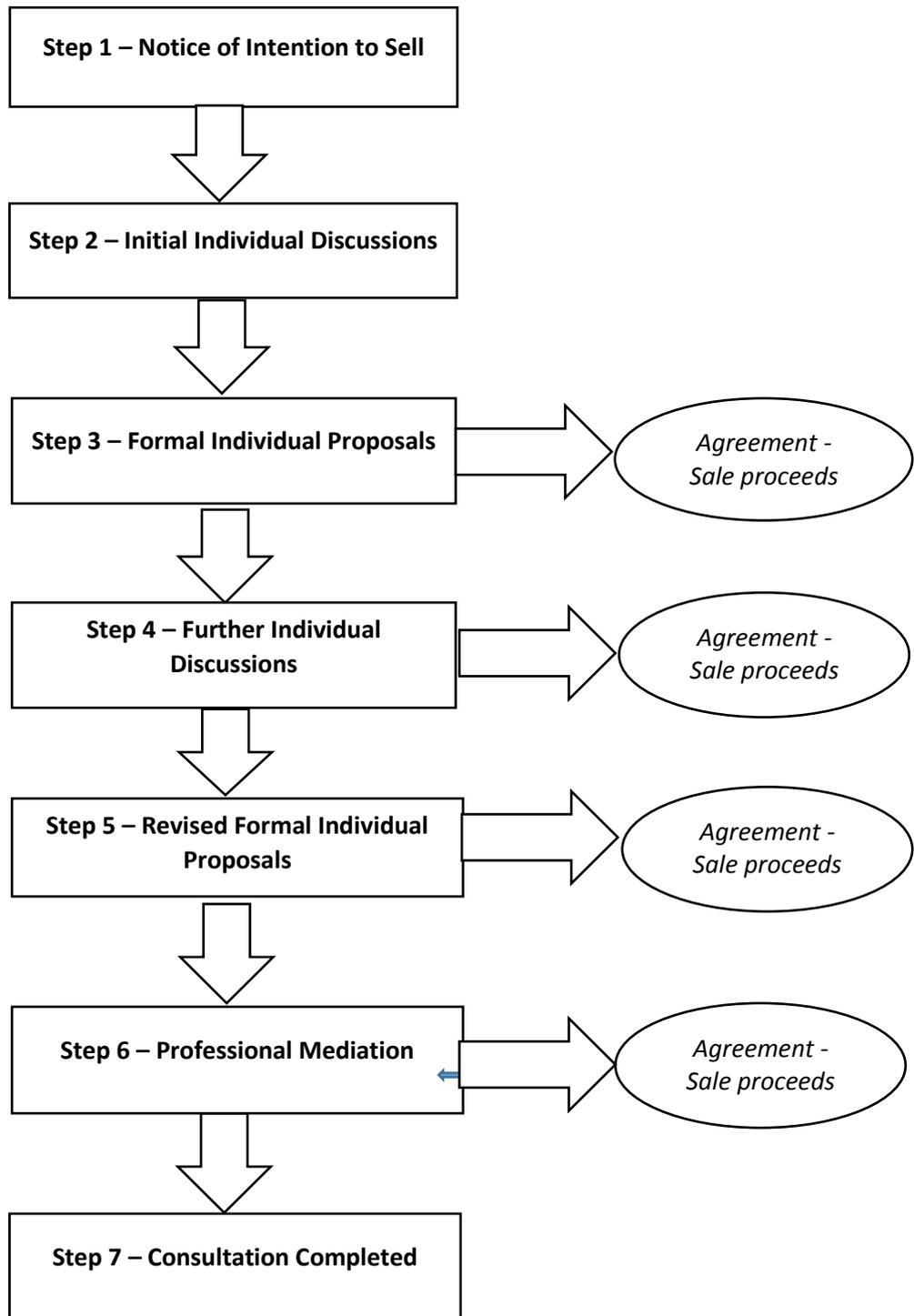
All owners, tenants and professional intermediaries are therefore asked, while following this guidance, to maintain a concise written record of key dates and associated notes for stages 1 – 7, and to be willing on request and in confidence to make this record available to the Scottish Government's Independent Adviser on Tenant Farming should the industry bodies collectively ask him to do so. A pro-forma Record of Procedure is given in appendix B.

#### **In Summary**

The guidance sets out a simple process to be followed by company owners and tenants in the event that a controlling interest is to be sold in a company that owns land subject to a secure 1991 Act tenancy where an interest has been registered in the RCIL and the sale is to an unconnected third party in an arm's length transaction. Its purpose is to protect the owner's right to sell his/her property for a fair price while at the same time ensuring that there is first a thorough consultation with the tenants so that the sale can proceed on a supportive basis. The guidance is based on current legislation.

Statutory arrangements continue to apply. Landlords' and tenants' statutory rights are unaffected. The guidance seeks simply to provide robust encouragement and an effective framework in order to minimise any risk to the industry that may arise from conflict relating to PRTB in these circumstances.

**Appendix A – Flow Chart Showing Consultation Procedure**



## **Appendix B – Pro-Forma Record of Procedure**

### Step 1 – Notice of Intention to Sell

- Date?
- Copy on File?

### Step 2 - Initial Individual Discussions

- Dates?
- Outcomes?

### Step 3 – Formal Individual Proposals

- Dates?
- Copies on file?
- Outcomes?

### Step 4 – Further Individual Discussions

- Dates?
- Outcomes?

### Step 5 – Further Formal Individual Proposals

- Dates?
- Copies on file?
- Outcomes?

### Step 6 – Professional Mediation

- Dates?
- Outcomes?

### Step 7 – Consultation Completed

- Date?
- Copy of confirmation on file?