TENANT FARMING FORUM
(NFUS, RICS, SEBG, SRPBA, STFA, SAYFC)

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TENANT FARMING FORUM – Consultation on Agricultural Holdings
(Amendment) (Scotland) Bill

You are aware the Forum developed a package of measures that it recommended to
the Cabinet Secretary in 2009 and that after considering the package of measures, the
Scottish Government agreed to take forward the recommended changes to legislation.
The Forum welcomed The Public Services Reform (Agricultural Holdings) (Scotland)
Order 2011, now enacted, but was disappointed that two elements of the total package
for change as sought by the Forum were not included. The omissions were the
Forum’s proposal to widen the class of beneficiary who may succeed to a tenancy to
include a grandchild, and its proposal to amend the rent review provisions to prohibit
‘upward only’ and ‘landlord only’ initiated reviews. Both these measures had the
unanimous support of the Forum.

The Forum welcomes the Agricultural Holdings (Amendment) (Scotland) Bill which
seeks to extend the definition of “near relative” in the Agricultural Holdings
(Scotland) Act 1991 to include grandchildren and amend the rent review provisions in
the Agricultural Holdings (Scotland) Act 2003 in order to prohibit the inclusion of
rent review clauses in LDTs that provide for upward only or landlord only initiated
reviews. These amendments if adopted would result in all of the original package of
measures recommended to the Cabinet Secretary by the TFF being enacted.

The Tenant Farming Forum is committed to help promote a healthy farm tenanted sector in Scotland. Itsmembership comprises the National Farming Union of Scotland; the Royal Institution of Chartered Surveyors
in Scotland; the Scottish Estates Business Group; the Scottish Rural Property and Business Association;
the Scottish Tenant Farmers Association and the Scottish Association of Young Farmers Clubs. It has an
Independent Chairman, Professor Phil Thomas.
The Forum is aware that the Bill includes a further provision relating to VAT and rent reviews, which has been debated and agreed by the TFF and mirrors a recent amendment to English agricultural holdings legislation. The Forum welcomes the fact that this would clarify the situation on changes in rent arising from changes in VAT or by the exercise of a landlord of an option to tax. Such changes would not constitute a "variation of rent" such as would prevent either a landlord or tenant from seeking a determination from the Land Court on the rent for a period of three years.

In principle the Forum accepts the Agricultural Holdings (Amendment) (Scotland) Bill. However, the Forum has a number of technical changes that it believes are necessary to ensure that the Bill delivers on its objectives. These technical changes are detailed in Annex A.

For and On Behalf of the Members of the Forum,

Phil Thomas,
Chairman
I. The long title of the Bill should be amended to define its scope more accurately by inserting the words shown in italics:

"An Act of the Scottish Parliament to amend the law governing succession of near relatives to agricultural tenancies and the upward or landlord initiated only review or variation of rent and effect of VAT changes on determination of rent under such tenancies"

2. Clause 1 – Succession by near relatives. To ensure the wording in the Bill is more consistent with the wording of the 1991 Act the definition of “near relative” should be amended by inserting the words in italics:

“near relative in relation to a deceased tenant of an agricultural holding means a surviving spouse, surviving civil partner, child or grandchild of that tenant”

3. Clause 4 (1) – Transitional provisions. Neither this section nor the explanatory notes make it clear whether the provisions of Clause 1 will affect the transfer of leases where the tenant has died before this Bill comes into force. The TFF believe that it must be made clear whether the provisions of Clause 1 only apply to those situations where the tenant has died after the Bill becomes law or apply to those situations where the tenant has died before the Bill becomes law but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act.

4. The majority of TFF members believe that the provisions of Clause 1 should apply to situations where the tenant has died before the Bill comes into force but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act.

5. In the case of intestate succession there is a two stage process. Firstly the executors have to confirm to the lease and transfer it to a near relative (usually to avoid the possibility of an incontestable notice to quit being served) within one year of the tenant’s death. Secondly the near relative then has 21 days from date of transfer to notify the landlord that they have acquired the lease (or longer period if delay is due to an unavoidable cause). A tenant would in normal circumstances, assuming for example that service of notice was not delayed for an unavoidable cause, have died a maximum of one year prior to Section 1 coming into force and his or her executors would be able to transfer the lease to a grandchild of the deceased.

6. In the case of a bequest a legatee has 21 days from date of the tenant’s death to notify the landlord that he or she has accepted the bequest (or longer period if delay is due to an unavoidable cause).
7. The result of this proposal is that any notices under s11(2) and s12(1) of the 1991 Act received by a landlord from a legatee or an acquirer who is a grandchild of a deceased tenant after Clause 1 comes into force will be effective.

8. The position that the provisions of Clause 1 should apply where the tenant has died before the Bill comes into force but the legatee or acquirer of the lease has not yet given notice under s11(2) (bequest of a lease) or s12(1) (intestate succession to a lease) of the 1991 Act is not a unanimous view held by all the members of the TFF. An alternative view is that the provision of Clause 1 should only apply to those situations where the tenant has died after the Bill becomes law, thus avoiding retrospective legislation which gives rights to an individual tenant who has died before the legislation comes into force.

9. It could be viewed that there may be a potential disadvantage to those who have served notice and made a transfer on the basis of the law as it stood only to find that they could have made a more appropriate transfer had they waited.

10. Given that the likely very small number of relevant deaths in the narrow window (given the time limits referred to above) before Clause 1 will become law and given that the issue will wither away after those time limits have passed, the simplest approach would be for the change to apply to those situations where the tenant has died after the Bill becomes law. This would give clarity and certainty, and will avoid retrospective legislation. Any other position could cause difficulties in advising whether the successor to a deceased tenant should delay giving the appropriate notice. Any delay in giving notice could run the risk in missing the strict time limit.

11. There are two views being put forward by the forum on how Clause 4(1) should be applied. It is necessary that Clause 4(1) should be amended to make it clear what the transitional provisions mean, as the present wording of is not clear.