

PROPERTY FACTORS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT

Part 1 – Registration of Property Factors

4. The main effects of Part 1 of the Act are to:
 - require the Scottish Ministers to prepare and maintain a public register of all property factors;
 - make it an offence for a property factor to operate without being registered;
 - provide for other effects of a property factor being refused registration or removed from the register;
 - require a property factor to provide certain information when applying to be registered and to make that information publicly available on the register;
 - make it an offence to knowingly fail to provide required information or to provide false information in respect of an application to be registered;
 - require the Scottish Ministers to consider whether a property factor is a fit and proper person to be registered as a property factor;
 - allow the Scottish Ministers to refuse to register a property factor and also to remove a property factor from the register;
 - require a property factor to inform the Scottish Ministers of any changes in most of the information they were required to provide when they applied to be registered which occur after they are registered;
 - to make it an offence for a registered property factor to fail, without reasonable excuse, to inform the Scottish Ministers of any changes in the information they were required to provide when they applied to be registered;
 - allow a property factor to apply for a court order requiring the Scottish Ministers to enter the property factor in the register in circumstances where their application was refused or they were removed from the register, and to permit the sheriff's decision to be appealed to the sheriff principal on a point of law;
 - require registered property factors to use a property factor registered number allocated by the Scottish Ministers;
 - require the Scottish Ministers to prepare a code of conduct as to minimum standards of practice expected of registered property factors;
 - require property factors to comply with the code of conduct; and
 - allow the Scottish Ministers to set fees to be paid by property factors in relation to applications for registration and changes in information.

Section 1 – Register of property factors

5. Subsection (1) places a duty on the Scottish Ministers to prepare and maintain a register of property factors. Subsection (2) requires that this register must be available for public inspection at all reasonable times.

Section 2 – Meaning of “property factor”

6. Subsection (1) defines property factor for the purposes of the Act. It establishes that there are four distinct groups covered by this definition. Firstly, a person who in the course of their business manages the common parts of land owned by two or more other persons and used to any extent for residential purposes. Secondly, a local authority or housing association which manages the common parts of land used to any extent for residential purposes and owned by two or more other persons (or by the local authority or housing association and one or more other person). Thirdly, a person who in the course of their business manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties – but only where the owners of the properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of the land. Finally, a local authority or housing association which manages or maintains land which is available for use by the owners of any two or more adjoining or neighbouring residential properties (or by the local authority or housing association and the owners any one or more residential properties) – but only where the owners of the properties are required by the terms of the title deeds relating to the properties to pay for the cost of the management or maintenance of the land.
7. This definition is subject to subsection (2), which excludes three categories of persons or associations from the definition of property factor. These are: (a) a person so far as managing or maintaining on behalf of the Crown land acquired by the Crown by virtue of prerogative rights to unclaimed or ownerless land; (b) owners’ associations established under the development management scheme (see sections 71 to 74 of the Title Conditions (Scotland) Act 2003), so far as managing or maintaining common parts or land under the scheme; and (c) a person so far as managing or maintaining common parts or land on behalf of a person who is a property factor in relation to those common parts or land. A person who falls within subsection (2) is only excluded from being a property factor to the extent provided for in that subsection. That is, if the person also falls within subsection (1) by virtue of managing or maintaining land other than that mentioned in subsection (2), the person is a property factor for the purposes of the Act in relation to that other land (but not in relation to the land mentioned in subsection (2)).
8. Subsection (3) allows the definition of “property factor” in subsection (1) and the exclusions from that definition established by subsection (2) to be modified by order made by the Scottish Ministers (and approved by the Scottish Parliament). So, for example, additional persons could be defined as a property factor for the purposes of the Act or one of the existing categories of person who is a property factor removed.

Section 3 – Application for registration

9. Subsection (1) states that a person who is a property factor or intends to become a property factor may apply to the Scottish Ministers for entry in the register. Although this does not require property factors to register, it should be read in conjunction with section 12(1), which makes it an offence to act as a property factor without being on the register.
10. Subsection (2) sets out the information that must be included in an application to the Scottish Ministers for entry in the register and allows the Scottish Ministers to specify (by regulations) additional information that must be provided.
11. Subsection (3)(a) requires the application to be signed by the “responsible person”. This term is defined in subsection (9) as the person making the application under

subsection (1) where they are a sole trader or, in any other case, the person specified in the application by virtue of subsection (2)(c) (that is, the most senior manager in the partnership, company or body who is (or is to be) directly concerned with the control or governance of the property factor).

12. Under subsection (3)(b), the application must also be accompanied by a fee. Subsection (4) gives the Scottish Ministers the power to prescribe (by regulations) the level of the fee. In addition, regulations may prescribe how fees are arrived at and cases in which no fee is payable. Subsection (5) makes clear that, while fees under this section and section 7 (which relates to the provision of updated information) may be set at a level that allows the Scottish Ministers to recoup the costs of exercising their functions under Part 1 of the Act, they may not be set beyond that cost-recovery level.
13. Subsection (6) makes it an offence to provide false information in an application or to fail to provide information required by subsection (2). The penalty for such an offence is a fine not exceeding level 3 on the standard scale (subsection (7)).
14. Under subsection (2)(d), an application for registration as a property factor must include, in addition to information on the responsible person, information on any other person who is (or is to be) “directly concerned with the control or governance of the property factor”. Subsection (8) stipulates that this includes any person who owns 25% or more of the equity in a business which is a property factor.

Section 4 – Registration

15. This section provides for applications to be determined by the Scottish Ministers by either entering the person making the application in the register or refusing to so enter them.
16. Subsection (2) is concerned with circumstances where the Scottish Ministers are considering refusing to enter a person into the register. It requires the Scottish Ministers to give the responsible person notice that refusal of registration is under consideration and ensures that the person who made the application for registration has an opportunity to make representations to them. Under subsection (3), the notice under subsection (2) must be accompanied by a statement of the Scottish Ministers’ reasons for proposing to refuse to enter the person in the register.
17. Subsection (4) requires the Scottish Ministers to enter the person in the register if, having considered the application and taken account of any representations made under subsection (2), they are satisfied that the relevant conditions specified in either paragraph (a) or paragraph (b) have been met.
18. Paragraph (a) relates to cases where the person has not previously been registered as a property factor. In such cases, the only condition for entry in the register is that the Scottish Ministers are satisfied that the person is a fit and proper person to be a property factor. Section 5 provides more detail on particular information that must be considered by the Scottish Ministers in making this judgement.
19. Paragraph (b) is concerned with cases involving persons who are or have previously been registered as a property factor. In such circumstances, the Scottish Ministers must be satisfied that the person is a fit and proper person to be a property factor. In addition, though, the person must have demonstrated compliance with: section 13(3) (which relates to the use of property factor registered numbers); the property factor code of conduct (see section 14); and any property factor enforcement order made against the person by a homeowner housing committee (see sections 19 and 20).
20. Subsection (5) provides that where Scottish Ministers are not satisfied as described in subsection (4)(a) or, as the case may be, (4)(b), they must refuse to enter the person into the register.

21. Subsection (6) requires that an entry in the register under subsection (4) must include the information included in the application by virtue of section 3(2)(a) to (f).
22. Subsection (7)(a) requires that, where the Scottish Ministers have made an entry in the register under subsection (4), the entry must be removed on the expiry of the period of 3 years beginning with the day on which the entry is made. The effect of this is that property factors must apply for re-registration every 3 years. If an application for re-registration is still under consideration when the 3 year period expires, subsection (7) (b) provides that the property factor remains registered until the application is finally determined. Subsection (8) provides additional information on what constitutes final determination of an application for re-registration.

Section 5 – Section 4: considerations

23. Subsection (1) requires the Scottish Ministers to have regard to any material falling within subsections (2) to (4) when considering under section 4(4) whether a person is a fit and proper person to be a property factor. They may also take other information into account in considering this matter.
24. Material falls within subsection (2) if it shows that any person who is (or is to be) directly concerned with the control or governance of the property factor has been convicted of an offence involving fraud or other dishonesty, violence or drugs; practised unlawful discrimination on grounds of any protected characteristics in Part 2 of the Equality Act 2010; or contravened any provision of the law relating to tenements, property or debt.
25. Material falls within subsection (3) if it shows the extent to which any other property factor with which the person (or any other person who is, or is to be, directly concerned with the control or governance of the property factor) is or has previously been involved demonstrates or demonstrated compliance with the property factor code of conduct (see section 14) and any property factor enforcement order made against that other property factor by a homeowner housing committee (see sections 19 and 20).
26. Material falls within subsection (4) if it shows that a person who is (or has previously been) registered as a property factor has failed to pay any charges imposed by virtue of section 26 (recovery of costs from property factors in relation to applications referred to the homeowner housing committee and property factor enforcement orders).
27. As in section 3, references in this section to persons who are directly concerned in the control or governance of a property factor include reference to any person who owns 25% or more of the equity in a business which is a property factor.

Section 6 – Notification of registration, refusal to register or removal

28. Under section 6, where the Scottish Ministers enter a person in the register under section 4(4), refuse to enter a person in the register under section 4(5) or remove an entry under section 4(7), they must, as soon as practicable after doing so, give notice of the fact to the responsible person. This enables the person to consider, in the case of a refusal, whether they wish to make an appeal under section 11.

Section 7 – Duty of responsible person to provide information

29. Subsection (2) requires the responsible person for any registered property factor to notify the Scottish Ministers of any changes in the information supplied under section 3(2)(a) to (d) in connection with the original application for registration. It also requires the responsible person to notify the Scottish Ministers of any changes in any information supplied under this subsection.
30. Subsection (3) requires all registered property factors to provide the Scottish Ministers with an annual notice giving details of all properties or land in relation to which the property factor has acted as property factor in the year to which the notice relates (or

confirming that there has been no change in this information since the last notice under this subsection or, where the property factor only became registered during the year, in the information supplied under section 3(2)(e)).

31. Subsection (4) requires that any notice under subsection (2) or (3) must be accompanied by such fee as the Scottish Ministers may determine. Subsection (5) gives the Scottish Ministers the power to prescribe those fees by regulations (subject to not setting fees at a level that produces income greater than that needed for cost-recovery – see section 3(5)). In addition, regulations may prescribe how the fees are to be arrived at and cases in which no fee is payable.
32. Subsection (6) makes failure to comply with subsection (2) or (3) an offence, while subsection (7) makes it an offence to provide false information in a notice required under those subsections. In each case, the penalty for the offence is a fine not exceeding level 3 on the standard scale (subsection (8)).

Section 8 – Removal from register

33. Subsection (1) gives the Scottish Ministers the power to remove a property factor from the register if subsection (2) or (3) applies – that is, if the property factor is no longer a fit and proper person to be a property factor or if the property factor has failed to comply with section 13(3) (which relates to the use of property factor registered numbers), the property factor code of conduct (see section 14) or any property factor enforcement order made against them by a homeowner housing committee (see sections 19 and 20).
34. Subsection (4) is concerned with circumstances in which the Scottish Ministers are considering removing the person from the register under subsection (1). It requires the Scottish Ministers to give the responsible person notice that removal from the register is under consideration and allows the property factor an opportunity to make representations to them. Under subsection (5), notice under subsection (4) must be accompanied by a written statement of the Scottish Ministers' reasons for proposing to remove person in the register.
35. Subsection (6) prohibits the Scottish Ministers from removing the property factor from the register unless they are satisfied, having taken into account any representations made under subsection (4)(b), that subsection (2) or (3) applies.
36. Where the Scottish Ministers decide to remove a property factor from the register under subsection (1), subsection (7) requires the Scottish Ministers to notify the responsible person of this fact as soon as is practicable. They must also give notice of the date of removal, which must be at least 21 days after the date notice of removal is given under this subsection. This gives the property factor time to make an appeal against the removal under section 11. If such an appeal is made, the property factor may, despite having been removed from the register, continue to operate as a property factor without committing an offence under section 12(1) until such time as the appeal is concluded.
37. Subsection (7) also requires the Scottish Ministers to give public notice of the date on which the property factor will be removed from the register (see section 15(3) for further details of how public notice is given).

Section 9 – Effect of refusal to enter in register or removal from register (and Section 10 – Section 9: interpretation etc.)

38. Subsection (1) of section 9 establishes that subsection (2) applies where a person who is operating as a property factor when the Act first comes into force is refused entry in the register under section 4(5) or where a property factor is removed from the register under section 8(1). Other cases of refusal under section 4(5) are not covered here as a person setting up business as a property factor after the Act comes into force should not be operating as a property factor prior to being registered, so the actions available under

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section 9(2) should not be relevant. The refusal of an application for re-registration is instead dealt with by reference to removal from the register under section 4(7).

39. **Section 9(2)** also applies where a property factor is removed from the register under section 4(7). In this case, though, “removed” needs to be read with section 10(1). This reading makes clear that a property factor is not removed from the register if their removed entry is replaced by a new entry following a successful application for re-registration. So removal from the register under section 4(7) only leads to the application of section 9(2) where a re-registration application is refused or where no such application is made.
40. Subsection (2) of section 9 provides for four separate effects to arise from the circumstances listed in subsection (1). The first is that no costs incurred by the property factor in respect of work instructed after the relevant date are recoverable (section 9(2)(a)) and the second is that no charge imposed by the property factor which relates to a period after the relevant date is recoverable (section 9(2)(b)). The third effect is that homeowners become entitled (after the relevant date) to appoint a new property factor (or to decide to manage their properties without appointing a property factor) (section 9(2)(c)). In acting under section 9(2)(c), homeowners must act in accordance with procedures specified in their title deeds, or as the case may be, the Tenement Management Scheme (within the meaning of the Tenements (Scotland) Act 2004). The final effect is that the property factor is prohibited from lodging a notice of potential liability under the Tenements (Scotland) Act 2004 in respect of work instructed after the relevant date. (A notice of potential liability is a notice that can be registered against a property, which has the effect of making certain future owners of the property liable for the costs of maintenance or work to the property that was carried out before they owned it.)
41. The effects provided for in section 9(2) apply only after the “relevant date”, which is defined in section 10(2)(a). Where a person who is operating as a property factor when the Act comes into force is refused entry in the register or a property factor is removed from the register under section 8(1), the “relevant date” is the day after the day on which the period within which any appeal under section 11(2) may be made expires (without such an appeal being made) or any such appeal is concluded (without the appeal being successful – as there is no need for section 9(2) to apply if the appeal is successful). Section 10(3) provides additional information on when an appeal is to be regarded as “concluded”. The effect of all of this is that, in these cases, section 9(2) only applies once all of the avenues of appeal provided by the Act have been exhausted – and only if any such appeal has been unsuccessful.
42. Where the removal from the register follows an unsuccessful application for re-registration, the “relevant date” is the day after the day on which the property factor’s entry in the register is removed under section 4(7). In this case, the property factor’s existing registration will already have been extended (if necessary) under section 4(7)(b) until all avenues of appeal have been exhausted, so further delay is unnecessary. If, on the other hand, all appeals are concluded before the property factor’s original 3 year registration expires, then section 9(2) does not apply until the expiry of the original registration period. This is also what happens if no application for re-registration is made.
43. **Section 9(3)** requires the Scottish Ministers to give public notice of the refusal or removal mentioned in section 9(1) and of the relevant date and the effect of section 9(2) (again, see section 15(3) for further details of how public notice is given).
44. In addition to the effects provided for in section 9(2), of course, the circumstances mentioned in section 9(1) may, if the property factor continues to act as such after the refusal or removal, lead to the property factor committing an offence under section 12(1).

Section 11 – Appeal against refusal to register or removal from register

45. Subsection (2) provides a right of appeal in the cases mentioned in subsection (1). These are where a person's application for entry in the register of property factors is refused under section 4(5) or where a property factor is removed from the register under section 8(1). It is not necessary to provide for an appeal against removal under section 4(7) – the reference to refusal under section 4(5) covers unsuccessful applications for re-registration.
46. An appeal under subsection (2) must be made not later than 21 days after the day on which the responsible person receives notice of the refusal or removal (under section 15(1), such receipt is deemed to occur, if the notice was sent by post by recorded delivery, on the next working day after posting). Subsection (8) provides that an appeal under subsection (2) is to be made by summary application to the sheriff. Subsection (3) gives the parties (that is, the property factor and the Scottish Ministers) a right to be heard before the appeal is determined.
47. Subsection (3) also enables the court to require the Scottish Ministers to register the applicant if it considers it reasonable to do so, having regard to the factors in subsection (4). Those factors are the same as those which the Scottish Ministers consider when deciding whether to grant or refuse an application, that is, whether the person is a fit and proper person to be a property factor and, in addition (if the person is or has previously been registered), whether the person complied with section 13(3) (use of property factor registered numbers), the property factor code of conduct (see section 14) and any property factor enforcement order made against the person by a homeowner housing committee (see sections 19 and 20). The court is required to give reasons for its decision under subsection (3) in writing (subsection (6)).
48. Subsection (9) provides that the decision of a sheriff under subsection (3) may be appealed to the sheriff principal, but only on a point of law. Under subsection (10) such an appeal must be made not later than 21 days after the day on which the decision appealed against is made. Subsection (11) provides that the decision of the sheriff principal is final.

Section 12 – Offence of operating as a property factor without registration

49. Subsection (1) makes it an offence for a person to operate as a property factor without being registered.
50. There are two exceptions: the first (subsection (2)) is that the offence is not committed by a person who is operating as a property factor when the Act first comes into force while their application for registration is under consideration (and subsection (8) makes clear that an application remains under consideration until all avenues of appeal under the Act have been exhausted). The second (subsection (3)) is that the offence is not committed by a property factor who is removed from the register under section 8(1) until all avenues of appeal provided by the Act have been exhausted.
51. It is a defence to show that there was a reasonable excuse for acting as a property factor without being registered (subsection 4)).
52. Subsection (5) stipulates that a person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months or to both.
53. Subsection (6) makes additional provision in relation to cases where the offence is committed by a body corporate or Scottish partnership or other unincorporated association, to the effect that relevant individuals (as defined in subsection (7)), as well as the body corporate or partnership or association, are guilty of the offence in certain circumstances.

Section 13 – Property factor registered numbers

54. Subsection (1) requires the Scottish Ministers to allocate a number to each registered property factor. Under subsection (2), it is up to the Scottish Ministers to determine the form of this “property factor registered number” (for example, whether it is a sequence of numbers or a combination of numbers and letters).
55. Registered property factors must take reasonable steps to ensure that their property factor registered number is included in documents sent to a homeowner and in other material of a type specified by the Scottish Ministers by order (subsection (3)).
56. Any person who uses a number purporting to be a property factor registered number without being a registered property factor (and without reasonable excuse) commits an offence. The penalty for this offence is a fine not exceeding level 3 on the standard scale (subsection (6)). By virtue of subsection (5), the offence is not committed by a property factor who has been removed from the register under section 8(1) until such time as all avenues of appeal provided by the Act against such removal have been exhausted.

Section 14 – Code of conduct

57. Subsection (1) requires the Scottish Ministers from time to time to prepare a property factor code of conduct setting out the minimum standards of practice expected of registered property factors.
58. Under subsection (2), the Scottish Ministers must publish a draft code of conduct for consultation. They are also required to consider any representations made to them about the draft and may amend the draft accordingly.
59. The code must then be laid before the Scottish Parliament, published and brought into force on such day as is appointed by the Scottish Ministers by order approved by the Scottish Parliament (subsections (3) and (4)).
60. Subsection (5) requires all registered property factors to ensure they comply with the property factor code of conduct for the time being in force.

Section 15 – Service of notices etc.

61. Subsection (1) provides that notices to be given to the responsible person (defined in section 3(9)) should be directed to the address specified by virtue of section 3(2)(a) and either sent by recorded delivery post or personally served by a sheriff officer. If sent by recorded delivery post, a notice is treated as having been delivered on the next working day after the day it is sent unless the contrary is proven (subsection (2)).
62. Subsection (3) provides that public notice (as required by section 8(7) and 9(3)) is given by publishing a notice in one or more newspapers circulating in the locality where the property factor involved operates and by sending a copy of that notice to each local authority in whose area the property factor operates.