

Agreement

between

The Scottish Ministers

and

[insert name of participating developer]

Help to Buy (Scotland) Affordable New Build Scheme Participation Agreement



Table of Contents

1.	Definitions and interpretation	1
2.	Commencement and Duration	12
3.	Equity Funding – Agreed Conditions	12
4.	Payment and Repayment	13
5.	Warranties and Undertakings	14
6.	Provider Obligations	14
7.	Administration of Individual Transactions	16
8.	Administering Agent	18
9.	State Aid	18
10.	Variations	18
11.	Provider Default	18
12.	Monitoring, Reviews and Reporting	19
13.	Provider’s records and accounting	19
14.	Information and Confidentiality	20
15.	Open Book	25
16.	Value Added Tax	25
17.	Dispute Resolution	25
18.	No Agency	26
19.	Assignment and Sub-Contracting	26
20.	Entire Agreement	26
21.	Notices	27
22.	Severability	27
23.	Cumulative Rights and Enforcement	27
24.	Waiver	27
25.	Public Relations and Publicity	28
26.	Data Protection	28
27.	Co-operation	31
28.	Governing Law	32
29.	No fetter on statutory functions	32
30.	Survival of this Agreement	32

Schedule Part 1 -
Warranties

Help to Buy (Scotland) Affordable New Build Scheme Participation Agreement

between

1. The Scottish Ministers in terms of the Scotland Act 1998 as amended by the Scotland Act 2012 (the “Scottish Ministers”); and
2. [] (registration number []) whose registered office is at [] (the “Provider”).

Background

- A The Scottish Ministers have agreed pursuant to the Help to Buy (Scotland) Affordable New Build Scheme to make funds available to assist Eligible Purchasers to purchase Eligible Dwellings in Scotland for their own occupation.
- B The Provider has registered with the Scottish Ministers in order to promote and facilitate access to the Help to Buy (Scotland) Affordable New Build Scheme product among potential purchasers in relation to its Eligible Dwellings.
- C The parties have entered into this Agreement for the purposes of the Provider’s participation in, and Scottish Ministers’ effective management of, the Help to Buy (Scotland) Affordable New Build Scheme.

1 Definitions and interpretation

1.1 Definitions

In this Agreement where the context so admits:-

“**Administering Agent**” means such person or party who will administer individual purchase transactions for and on behalf of the Scottish Ministers in terms of the Help to Buy (Scotland) Affordable New Build Scheme as the Scottish Ministers shall from time to time notify the Provider in writing;

“**Administrative Procedures**” means the administrative procedures and guidance provided by Scottish Ministers from time to time to Administering Agents on the operation and administration of the Help to Buy (Scotland) Affordable New Build Scheme;

“**Advertising Requirements**” means: (a) such form of wording together with warnings, examples and APR illustrations as the Scottish Ministers may from time to time provide to the Provider for the purposes of inclusion within any advertisement relating to the Help to Buy (Scotland) Affordable New Build Scheme; and (b) all other requirements of the Consumer Credit (Advertisements) Regulations 2004 and 2010 so far as the same are applicable to this Agreement;

“Agreement” means this Agreement (including its Schedule);

“Application Form” means an application form submitted by the Eligible Purchaser to the Administering Agent providing details of the Eligible Dwelling in such form as the Scottish Ministers may prescribe from time to time;

“Approved Lender” means the lender providing mortgage finance to the Eligible Purchaser (secured by a prior ranking standard security) and who is: (a) a Qualifying Lender; and (b) aware of the terms of the Help to Buy (Scotland) Affordable New Build Scheme and who has confirmed that it will provide prior loans to Eligible Purchasers participating in the Help to Buy (Scotland) Affordable New Build Scheme;

“Authority to Proceed” means the letter of that name issued by the Administering Agent to the Eligible Purchaser and copied to the Eligible Purchaser’s solicitor and to the Provider, confirming the details of the Eligible Purchaser’s intended purchase of an Eligible Dwelling and the level of Equity Funding to be provided in support thereof, in the form set out in the Administrative Procedures or such other form as the Scottish Ministers may from time to time reasonably require;

“Business Day” means any day other than a Saturday, Sunday or a statutory Bank Holiday in Scotland or any day between 24 December and 3 January (inclusive);

“Confidential Information” means in respect of the Scottish Ministers all information relating to the Scottish Ministers or the existence or terms of this Agreement or any Shared Equity Documentation in respect of which the Provider becomes aware in its capacity as a party to this Agreement or which is received by the Provider in relation to this Agreement or any Shared Equity Documentation from either the Scottish Ministers or any of its advisors or from any third party if the information was obtained by that third party directly or indirectly from the Scottish Ministers or any of its advisors in whatever form in either case (including information given orally and any document electronic file or other means of recording or representing information which includes derives or is copied from such information) and in the case of the Provider means such specific information as the Provider shall have identified to the Scottish Ministers in writing prior to the date hereof as confidential information for the purposes of this Agreement;

“Consents” means and includes any necessary approval, authorisation, consent, exemption, licence, permit, permission or registration by or from any governmental or other authority, the local planning authority, adjoining landowners or any other person required to undertake the works and deliver the Dwellings;

“Contribution Percentage” means the percentage of the Full Purchase Price specified as such in the relevant Authority to Proceed and being calculated as follows:

Scottish Ministers Contribution	x 100
Full Purchase Price	

PROVIDED THAT in no case shall the Contribution Percentage exceed 15% (fifteen per cent)

“Dispute Resolution Procedure” means the procedure set out in Condition 17;

“DPA” means the Data Protection Act 1998;

“Dwelling” means any unit identified by the Provider as potentially eligible for funding in accordance with the terms of this Agreement;

“EI(S)R” means the Environmental Information (Scotland) Regulations 2004, and any subordinate legislation made under these regulations from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner in relation to such legislation;

“EI(S)R Exception” means any applicable exemption to EI(S)R;

“Eligible Dwelling” means a Dwelling which immediately prior to the purchase of which by an Eligible Purchaser: (a) is fit for occupation as a residential dwelling in accordance with the requirements of the NHBC or equivalent requirements; (b) has the benefit of an NHBC guarantee or similar warranty by a reputable insurance company as agreed by the Scottish Ministers; (c) complies with all relevant statutory and/or planning requirements, including current building regulations in force at the date of Practical Completion; (d) has a Market Value below the applicable Maximum Limit; (e) has reached Practical Completion on or before the Longstop Date; (f) is not provided as affordable housing in satisfaction of a Planning Agreement or other Planning Permission; (g) does not have the benefit of grant or public subsidy (other than the Equity Funding); and (h) since Practical Completion has not already been occupied as a dwellinghouse.

“Eligible Purchaser” means a person: (a) who satisfies the eligibility criteria issued from time to time by the Scottish Ministers in relation to the Help to Buy (Scotland) Affordable New Build Scheme; (b) who has been approved as eligible by the Administering Agent; (c) who is taking out a home purchase loan from an Approved Lender, to be secured by the granting of a first ranking standard security in favour of an Approved Lender over title to the Eligible Dwelling; (d) who is not connected with the Provider (save where the Scottish Ministers confirms in writing that any such person qualifies as an Eligible Purchaser); and (e) who does not (or will not at the point of purchase of the Eligible Dwelling) possess an interest in any other dwelling.

“Equity Funding” means the amount payable by the Scottish Ministers on a unit-by-unit basis, which shall be set as the equivalent of the Scottish Ministers Contribution in respect of each Eligible Dwelling;

“Exempted Information” means any Information that is designated as falling or potentially falling within the FOISA Exemptions or the EI(S)R Exceptions;

“FA 2004” means the Finance Act 2004;

“FOISA” means the Freedom of Information (Scotland) Act 2002, and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation;

“FOISA Exemption” means any applicable exemption to FOISA;

“Full Purchase Price” means the full purchase price of any Eligible Dwelling which would be payable to the Provider by any purchaser but for the provision to a purchaser of Equity Funding pursuant to the Shared Equity Documentation (such price being equal in the case of a disposal to an Eligible Purchaser to the Reduced Purchase Price plus the Scottish Ministers Contribution) and which may not exceed the applicable Maximum Limit;

“Good Industry Practice” means that degree of skill, care, prudence and foresight and operating practice which would reasonably and ordinarily be expected from time to time of a skilled and experienced contractor (engaged in the same type of undertaking as that of the Provider or any of its subcontractors) under the same or similar circumstances;

“Good and Marketable Title” means in respect of the Eligible Dwelling a good and marketable heritable title, either recorded in the Register of Sasines or registered in the Land Register of Scotland;

“Group Company” means any company which is: (a) a subsidiary or holding company of the Provider; or (b) a subsidiary of the Provider’s holding company; where subsidiary and holding company shall have the meanings ascribed thereto in Section 1159 of the Companies Act 2006;

“Help to Buy (Scotland) Affordable New Build Scheme” means the Scottish Government affordable home ownership initiative of the same name which is intended to operate across the whole of Scotland as described in the Help to Buy Affordable New Build (Scotland) Scheme guidance published by the Scottish Ministers from time to time;

“Incentives” means any inducement or incentive provided to Eligible Purchasers of Eligible Dwellings over and above the standard specification for such dwellings (including without limitation any subsidies, services, cash-backs, white goods, additional fixtures and fittings or enhanced specifications);

“Information”: (a) in relation to FOISA has the meaning given under section 73 of FOISA; and (b) in relation to EI(S)R has the meaning given under the definition of “environmental information” in section 2 of EI(S)R;

“Information Commissioner” has the meaning set out in Section 6 of the DPA 1998;

“Insolvency Event” means the occurrence of any of the following in relation to the Provider; (a) it is unable or admits an inability to pay its debts as they fall due, suspends making payments on any of its debts or, by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors with a view to rescheduling any of its indebtedness; (b) the value of its assets is less than its liabilities (taking into account contingent and prospective liabilities); (c) a moratorium is declared in respect of any indebtedness; (d) any corporate action, legal proceedings or other procedure or step is taken in relation to: (i) the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) other than a solvent liquidation or reorganisation on terms previously approved by the Scottish Ministers (such approval not to be unreasonably withheld or delayed); (ii) a composition, compromise, assignment or arrangement with any of its creditors; (iii) the appointment of a liquidator (other than in respect of a solvent liquidation) on terms previously approved by the Scottish Ministers (such approval not to be unreasonably withheld or delayed), receiver, administrative receiver, administrator, compulsory manager or other similar officer in respect of the Provider; (iv) enforcement of any Security over any assets of the Provider; or (v) any analogous procedure or step is taken in any jurisdiction, other than any winding-up petition which is frivolous or vexatious and is discharged, stayed or dismissed within ten (10) Business Days of commencement; or (e) any expropriation, attachment, sequestration, distress or execution affects any asset or assets of the Provider;

“Intellectual Property Rights” shall include without limitation all rights to, and any interests in, any patents, designs, trademarks, copyright, know-how, trade secrets and any other proprietary rights or forms of intellectual property (protectable by registration or not) in respect of any technology, concept, idea, data, program or other software (including source and object codes), specification, plan, drawing, schedule, minutes, correspondence, scheme, formula, programme, design, system, process logo, mark, style, or other matter or thing, existing or conceived, used, developed or produced by any person;

“Legislation” means: (a) any Act of Parliament or Act of the Scottish Parliament; (b) any subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978; (c) any exercise of the Royal Prerogative; and (d) any enforceable community right within the meaning of Section 2 of the European Communities Act 1972; in each case to the extent that the same has effect in Scotland;

“Longstop Date” means 31st March 2019 or, in the event that Scottish Ministers (at their sole discretion) decide to extend the Help to Buy (Scotland) Affordable

New Build Scheme beyond that date, such later date as the parties may agree in writing;

“Losses” means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses) and charges whether arising under statute, contract or at common law, or in connection with judgments, proceedings, internal costs or demands suffered or incurred by the Scottish Ministers including interest at 2% (two per cent) above the base rate from time to time of the Royal Bank of Scotland plc such interest to run from the date upon which the Losses are incurred until the date upon which the Scottish Ministers receives full reimbursement of its Losses;

“Market Value” means the best price reasonably obtainable in the open market for each Eligible Dwelling (disregarding the existence of this Agreement and the Shared Equity Documentation) as confirmed by the valuation report obtained by the Qualifying Lender (or as stated in the mortgage offer where the valuation report is not available) in relation to an individual purchase of an Eligible Dwelling;

“Material Adverse Effect” means any present or future event or circumstances which could, in the reasonable opinion of the Scottish Ministers: (a) materially impair the ability of the Provider to perform and comply with its obligations under this Agreement; (b) have a material adverse effect on the business, assets or financial condition of the Provider; or (c) have a material adverse effect on the validity or enforceability of, or the effectiveness of any rights or remedies of the Scottish Ministers under this Agreement or any Shared Equity Documentation;

“Maximum Limit” means the amount set by the Scottish Ministers from time to time and which at the date of execution of this Agreement by the Scottish Ministers is:

For an Eligible Dwelling the anticipated completion date (as set out in the relevant Authority to Proceed) for the sale of which occurs in Year 1, £230,000 (Two hundred and thirty thousand pounds);

For an Eligible Dwelling the anticipated completion date (as set out in the relevant Authority to Proceed) for the sale of which occurs in Year 2, £200,000 (Two hundred thousand pounds); and

For an Eligible Dwelling the anticipated completion date (as set out in the relevant Authority to Proceed) for the sale of which occurs in Year 3, £200,000 (one hundred and seventy five thousand pounds);

“NHBC” means the National House Builders' Council;

“Open Book” means the declaration of all price components including profit margins, central office overheads, site overheads, preliminaries, contingencies and the cost of all materials, goods, equipment, work and services with all and any books of accounts, correspondence, agreements, orders, invoices, receipts and other documents available for inspection;

“Permitted Incentives” means Incentives to a value equal to those which would be made available to any purchaser of the relevant Eligible Dwelling whether or not they are an Eligible Purchaser participating in the Help to Buy (Scotland) Affordable New Build Scheme PROVIDED THAT: (a) the value of such Incentives shall not be such that the existence or absence thereof would affect the Market Value of the Eligible Dwellings; (b) the value of such Incentives shall not in any event exceed 5% (five per cent) of the Full Purchase Price of the Eligible Dwelling; and (c) such Incentives comply with the requirements of the Council of Mortgage Lenders and which for the avoidance of doubt shall be disclosed on the Council of Mortgage Lenders' disclosure of incentives form;

“Personal Data” has the meaning ascribed to it in the DPA;

“Planning Agreement” means an agreement in respect of and affecting any Dwelling made pursuant to Section 75 of the Town and Country Planning (Scotland) Act 1997 or an agreement with any competent authority or body relating to roads, water, drainage or other services;

“Planning Permission” means the grant of detailed planning permission either by the local planning authority or the Scottish Ministers;

“Postponed Security” means the second-ranking standard security to be granted by an Eligible Purchaser in favour of the Scottish Ministers over title to the Dwelling;

“Practical Completion” means the Dwelling has been completed in accordance with the terms of the relevant building contract and is fit for occupation as a residential dwelling in accordance with NHBC or equivalent requirements current at the date of inspection, subject only to the existence of minor defects and/or minor omissions at the time of inspection which are capable of being made good or carried out without materially interfering with the beneficial use and enjoyment of the Dwelling and which would be reasonable to include in a snagging list;

“Prescribed Rate” means 2% (two per cent) above the base lending rate of the Royal Bank of Scotland plc from time to time;

“Process/Processed/Processing” has the meaning ascribed to the term in Section 1, Part 1 of the DPA;

“Prohibited Act” means: (a) offering, giving or agreeing to give to any servant of the Scottish Ministers any gift or consideration of any kind as an inducement or reward: (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement; or (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement; (b) entering into this Agreement or any other agreement with the Scottish Ministers relative to this Agreement in connection with which commission has been paid or has been agreed to be paid by the Provider or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment thereof have been disclosed in writing to the Scottish Ministers;

(c) committing any offence: (i) under Legislation creating offences in respect of fraudulent acts; (ii) at common law in respect of fraudulent acts in relation to this Agreement; or (iii) under the Prevention of Corruption Acts 1889-1916; or (d) defrauding or attempting to defraud or conspiring to defraud the Scottish Ministers;

“Provider Default” means: (a) the Provider or where applicable any subcontractor, employee, officer or agent commits a Prohibited Act (in respect of which the Waiver Condition has not been satisfied); (b) an Insolvency Event occurs in respect of the Provider and/or the Provider ceases trading; (c) the Provider experiences a change in its financial or commercial circumstances which in the opinion of the Scottish Ministers would have a Material Adverse Effect; (d) the Scottish Ministers becomes aware of any breach of the Warranties or inaccuracy in any representation made by the Provider in respect of this Agreement; (e) the Provider fails to comply with the Advertising Requirements; (f) the Provider commits a breach of this Agreement which, in the reasonable opinion of the Scottish Ministers, will have (either alone or in aggregate with any previous breaches) a Material Adverse Effect; (g) any senior employee, executive, board member or partner (as applicable) of the Provider is convicted of dishonesty; (h) an Eligible Dwelling has not been completed to the Required Standards; or (i) the Scottish Ministers becomes aware of any changes in any of the information provided at any time by or on behalf of the Provider to the Scottish Ministers which the Scottish Ministers acting in its absolute discretion considers to have a Material Adverse Effect.

“Provider Personnel” means all employees, agents, consultants and contractors of the Provider and/or of any sub-contractors;

“Qualifying Lender” means an institution authorised by the Financial Services Authority pursuant to the Financial Services and Markets Act 2000 to "enter into a regulated mortgage contract as lender" and "Qualifying Lenders" shall be construed accordingly;

“Ranking Agreement” means the ranking agreement to be entered into among the Scottish Ministers, an Eligible Purchaser and that Eligible Purchaser’s Qualifying Lender;

“Reduced Purchase Price” means the amount payable by an Eligible Purchaser in cash terms (excluding any mortgage fees of the relevant Qualifying Lender) for the purchase of an Eligible Dwelling after deducting the Scottish Ministers Contribution from the Full Purchase Price;

“Regulations” means the regulations from time to time issued by the Scottish Ministers in respect of the Help to Buy (Scotland) Affordable New Build Scheme;

“Regulatory Bodies” means those regulatory, statutory and other entities, committees and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate, or influence the matters dealt with in this Agreement or any other affairs of the Scottish Ministers and "Regulatory Body" shall be construed accordingly;

“Request for Information/RFI” shall have the meaning set out in FOISA or any request for information under EI(S)R which may relate to any Dwelling and/or Site, this Agreement any Postponed Security or any activities or business of the Scottish Ministers;

“Required Standards” means the requirements of this Agreement, Good Industry Practice, all Consents and Legislation;

“Schedule” means the schedule annexed to this Agreement;

“Scottish Information Commissioner” has the meaning set out in section 42 of FOISA;

“Scottish Ministers Contribution” means the Scottish Ministers' contribution in value per Eligible Dwelling (as specified in the relevant Authority to Proceed or as subsequently agreed with the Administering Agent) which shall be no more than 15% (fifteen per cent) of the Market Value of the Eligible Dwelling;

“Scottish Ministers Data” means:- (a) the data, text, drawings, diagrams, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, and which are (i) supplied to the Provider by or on behalf of the Scottish Ministers; or (ii) which the Provider is required to generate, process, store or transmit pursuant to this Agreement; or (b) any Personal Data for which the Scottish Ministers is the Data Controller;

“Security” means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect (such as sale or lease and leaseback, a blocked account, set-off or similar “flawed asset” arrangement);

“Senior Officer” means the employee of the Provider holding the title "Finance Director" or such other person with equivalent seniority notified in writing to the Scottish Ministers by the Provider;

“Shared Equity Agreement” means the agreement to be entered into between the Scottish Ministers and the Eligible Purchaser relative to the provision of funding by the Scottish Ministers to that Eligible Purchaser pursuant to the Help to Buy (Scotland) Affordable New Build Scheme;

“Shared Equity Documentation” means, together, the Shared Equity Agreement, Postponed Security and Ranking Agreement;

“Site” means the overall development site upon which the Dwelling is located;

“Solicitor Form 1” means an undertaking duly completed in favour of the Scottish Ministers by a solicitor acting on behalf of the Eligible Purchaser substantially in the form set out in the Standing Instructions or such other form as the Scottish Ministers may from time to time reasonably require;

“Standard Literature” means the explanatory and other documentation relating to the Help to Buy (Scotland) Affordable New Build Scheme from time to time supplied by the Scottish Ministers or the Administering Agent for provision to the Eligible Purchaser, the Approved Lender and the Eligible Purchaser's solicitors;

“Standing Instructions” means the instructions to the Eligible Purchaser's solicitor which will be issued by the Administering Agent, as the same may be amended by the Scottish Ministers from time to time;

“VAT” means Value Added Tax as presently charged under the Value Added Tax Act 1994 or any tax of a similar nature;

“Waiver Condition” means provision of satisfactory evidence by the Provider to the Scottish Ministers that the relevant Prohibited Act was committed by: (a) an employee acting independently of the Provider and such employee's employment is terminated within twenty (20) Business Days of the Scottish Ministers serving notice on the Provider of such Prohibited Act; or (b) a subcontractor (or any employee of a subcontractor not acting independently of the subcontractor) and the relevant subcontract is terminated within twenty (20) Business Days of the Scottish Ministers serving notice on the Provider of such Prohibited Act; or (c) an employee of a subcontractor acting independently of such subcontractor and such employee's employment is terminated within twenty (20) Business Days of the Scottish Ministers serving notice on the Provider of such Prohibited Act; or (d) any person not specified in parts (a), (b) or (c) and the Provider (or any subcontractor) has severed links with such person (whether his employment, appointment or any other link) within twenty (20) Business Days of the Scottish Ministers serving notice on the Provider of such Prohibited Act; where acting independently means not acting with the authority or knowledge of any one or more of the directors of the Provider or relevant subcontractor;

“Warranty” means any warranty set out in Part 1 of the Schedule;

“Year” shall mean the period commencing on 1st April in one calendar year and ending on 31st March in the immediately succeeding calendar year;

“Year 1” means the period between 1st April 2016 and 31st March 2017;

“Year 2” means the period between 1st April 2017 and 31st March 2018;

“Year 3” means the period between 1st April 2018 and 31st March 2019;

1.2 Interpretation

1.2.1 The masculine includes the feminine and vice versa.

1.2.2 The singular includes the plural and vice versa.

1.2.3 Any reference in this Agreement to any Condition, sub-condition, paragraph, schedule, appendix or section heading is, except where it is expressly stated to the contrary, a reference to such Condition, sub-

condition, paragraph, schedule, appendix or section heading of this Agreement.

- 1.2.4 Any reference to this Agreement or to any other document shall include (except where expressly stated otherwise) any variation, amendment or supplement to such document to the extent that such variation, amendment or supplement is not prohibited under the terms of this Agreement.
- 1.2.5 Any reference to any enactment, order, regulation or similar instrument shall (except where expressly stated otherwise) be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted.
- 1.2.6 A reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees.
- 1.2.7 Headings are for convenience of reference only.
- 1.2.8 A time of day shall be a reference to London time.
- 1.2.9 A party means a party to this Agreement.
- 1.2.10 The words includes or including are to be construed without limitation.
- 1.2.11 A deliberate act or omission of any person shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
- 1.2.12 In any case where the consent or approval of the Scottish Ministers (or any officer of the Scottish Ministers) is required or a notice is to be given by the Scottish Ministers, such consent or approval or notice shall only be validly given if it is in writing and signed by such person as may be specified by the Scottish Ministers by notice in writing to the Provider.
- 1.2.13 An obligation to do anything includes an obligation to procure its being done.
- 1.2.14 Any restriction includes an obligation not to permit infringement of the restriction.
- 1.2.15 When there are two or more persons affected by the obligations under this Agreement such obligations are to bind each such person jointly and severally.
- 1.2.16 Save where a contrary intention is shown, or where an express discretion is given by this Agreement, the Scottish Ministers shall act reasonably in exercising its rights hereunder.
- 1.2.17 If there is any ambiguity or conflict between the implied terms and the express terms of this Agreement then the express terms shall prevail.

1.2.18 No review comment or approval by the Scottish Ministers under the provisions of this Agreement shall operate to exclude or limit the Provider's obligations or liabilities under this Agreement save where the Scottish Ministers have confirmed the said review comment or approval in writing.

1.2.19 The Provider shall be responsible as against the Scottish Ministers for the acts or omissions of any of its subcontractors, officers, employees and agents as if they were the acts or omissions of the Provider.

1.2.20 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of any agreement or document nor the review of any document or course of action by or on behalf of the Scottish Ministers shall, unless otherwise expressly stated in this Agreement or agreed in writing by the Scottish Ministers, relieve the Provider of any of its obligations under this Agreement or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge nor confer impose or imply any liability or responsibility on or on behalf of the Scottish Ministers in respect of or in connection with the matter to or in relation to which such approval consent examination acknowledgement was given or review made.

2 Commencement and duration

2.1 This Agreement shall commence on the last date of execution hereof and shall continue (subject to earlier termination) until the Longstop Date.

3 Equity Funding – Agreed Conditions

3.1 The Scottish Ministers have agreed to make Equity Funding available to Eligible Purchasers on a unit-by-unit basis in part payment of their purchase of an Eligible Dwelling subject to and in accordance with the terms and conditions of this Agreement, the Shared Equity Documentation and the Administrative Procedures.

3.2 The Scottish Ministers shall, subject as hereinafter provided, make the Equity Funding available to the Eligible Purchaser in accordance with the terms of Condition 4.

3.3 The Provider undertakes to comply with all the obligations to be observed or otherwise complied with by it under this Agreement.

3.4 On the disposal of an Eligible Dwelling to an Eligible Purchaser under the Help to Buy (Scotland) Affordable New Build Scheme and upon the Eligible Purchaser entering into the Shared Equity Documentation:

3.4.1 the Scottish Ministers Contribution will be made available to the Eligible Purchaser on condition that it is to be paid to the Provider towards satisfaction of the Full Purchase Price; and

3.4.2 the Provider agrees to sell (or procure the sale of) the Eligible Dwelling to the Eligible Purchaser for the Full Purchase Price which shall be treated as satisfied by payment by the Eligible Purchaser of (a) the Reduced Purchase Price and (b) the Scottish Ministers Contribution.

4 **Payment and repayment**

4.1 Calculation of Contributions

The Scottish Ministers shall contribute funding to an Eligible Purchaser of no more than 15% (fifteen per cent) of the Market Value of the Eligible Dwelling depending on the outcome of the eligibility and financial assessment of the Eligible Purchaser by the Administering Agent.

4.2 Pricing and Progress

4.2.1 The Provider shall dispose of all Eligible Dwellings at no more than Market Value. In determining the estimated Market Value for the purposes of marketing the Eligible Dwellings the Provider shall act in good faith and shall not make any distinction between dwellings being disposed of to Eligible Purchasers and dwellings being disposed of to other buyers.

4.2.2 In the case of the disposal of any Eligible Dwelling to an Eligible Purchaser the Provider shall procure:

4.2.2.1 that the Full Purchase Price is no more than the Market Value for that Eligible Dwelling;

4.2.2.2 that no Incentives are provided or allowed other than Permitted Incentives; and

4.2.2.3 that (unless required by the relevant Qualifying Lender) the Eligible Purchaser is not required to pay a reservation fee in excess of £500.

4.3 Repayment of Equity Funding

Notwithstanding any other term of this Agreement, the Scottish Ministers reserve the right (which right the Provider expressly acknowledges and agrees) to recover the Equity Funding or any part thereof on demand from the Provider in circumstances where:

4.3.1 Equity Funding has been overpaid;

4.3.2 Equity Funding or any part thereof has been wrongly paid on the basis of a misrepresentation or a Prohibited Act by or on behalf of the Provider; and

4.3.3 this Agreement is terminated save to the extent of any Equity Funding secured on an Eligible Dwelling pursuant to a Postponed Security;

together with interest which shall accrue at the Prescribed Rate from the date such Equity Funding (or relevant part) was paid until it is repaid in full.

4.4 Contracts with purchaser

The Provider hereby agrees that in the event it enters into any contract with an Eligible Purchaser for the purchase of a Dwelling using the Help to Buy (Scotland) Affordable New Build Scheme and, prior to completion of such transaction Equity Funding in relation to such transaction is withdrawn from the Eligible Purchaser by the Scottish Ministers then the Provider shall unconditionally release the Eligible Purchaser from such contract and return to them any deposit and/or reservation fee paid by that Eligible Purchaser.

5 Warranties and Undertakings

5.1 The Provider warrants to the Scottish Ministers in the terms of the Warranties, on the date of its execution of this Agreement and on each day the Provider completes the sale of a Dwelling to an Eligible Purchaser which has the benefit of Equity Funding.

5.2 Each of the Warranties shall be separate and independent and, save as expressly provided to the contrary, shall not be limited by reference to any of them or by any other provisions of this Agreement.

5.3 All warranties (including the Warranties), representations, undertakings, indemnities and other obligations made, given or undertaken by the Provider in this Agreement are cumulative and none shall be given a limited construction by reference to any other.

5.4 The Provider shall indemnify and keep indemnified the Scottish Ministers from and against any liabilities and Losses incurred by the Scottish Ministers as a result of any breach of any of the Warranties.

5.5 The Scottish Ministers will take all reasonable steps to mitigate any Losses incurred by them as a result of any breach of any of the Warranties.

6 Provider Obligations

6.1 Marketing

6.1.1 Prior to undertaking any marketing in respect of the Help to Buy (Scotland) Affordable New Build Scheme, the Provider shall ensure it is in a position to comply with the Advertising Requirements in respect of the Help to Buy (Scotland) Affordable New Build Scheme;

6.1.2 The Provider shall procure that:

- 6.1.2.1 all potential purchasers of Eligible Dwellings (who are introduced to it or who introduce themselves) are provided with the Standard Literature;
 - 6.1.2.2 no representations about the Help to Buy (Scotland) Affordable New Build Scheme or its suitability for Eligible Purchasers are made or permitted to be made by or on its behalf save as set out in the Standard Literature; and
 - 6.1.2.3 in no circumstances shall the Provider itself approve or determine or purport to approve or determine the eligibility of any potential purchaser for the Help to Buy (Scotland) Affordable New Build Scheme nor restrict any Eligible Purchaser's ability to consult an independent financial and/or legal advisor.
- 6.1.3 The Provider shall procure that any advertisement issued by or on its behalf which makes reference to the Help to Buy (Scotland) Affordable New Build Scheme or the assistance available from the Scottish Ministers shall comply with the Advertising Requirements;
- 6.1.4 The Provider shall procure that it takes its own legal advice in relation to complying with the Advertising Requirements;
- 6.1.5 In marketing and selling the Eligible Dwellings to Eligible Purchasers:
- 6.1.5.1 the Provider acknowledges that it will be responsible for site specific marketing of the Dwellings and for the avoidance of doubt the Administering Agent will not be responsible for marketing the Dwellings on the Provider's behalf; and
 - 6.1.5.2 the Provider shall use all reasonable endeavours to co-operate with the Administering Agent in relation to the disposal of the Eligible Dwellings to Eligible Purchasers;
- 6.1.6 The Provider will not permit an Eligible Purchaser to reserve any Dwelling more than nine (9) months prior to the anticipated date of completion of the disposal (or where this is not known, the anticipated date of Practical Completion).
- 6.2 Compliance with legislation
- The Provider shall ensure that in exercising its rights and performing its obligations under this Agreement and in selecting and appointing any subcontractor it shall at all times comply with:
- 6.2.1 all applicable Legislation and Regulations; and
 - 6.2.2 Good Industry Practice;

7 Administration of Individual Transactions

- 7.1 The Provider shall procure that all potential purchasers of Eligible Dwellings (who are introduced to it or who introduce themselves to the Provider) are notified of the availability of the Help to Buy (Scotland) Affordable New Build Scheme in respect of such Eligible Dwellings.
- 7.2 The Provider shall work with the potential purchaser in order to fully complete the Application Form and the Provider shall ensure that the completed form is supplied to the Administering Agent. The Provider shall ensure that the potential purchaser is notified of the contents of the declaration contained in the Application Form prior to signing the form, particularly in relation to the obligation to ensure that all information provided on the Application Form is accurate and true.
- 7.3 The Provider shall be entitled to require a potential purchaser to make a reservation of an Eligible Dwelling at the point of completing the Application Form provided that it is acknowledged that:
- 7.3.1 both the Provider and the potential purchaser shall be entitled to withdraw an Eligible Dwelling from a reservation to an Eligible Purchaser prior to conclusion of missives on the same terms as would be applied to any other buyer; and
 - 7.3.2 (if the Authority to Proceed is not issued within ten (10) Business Days of receipt of the fully completed Application Form by the Administering Agent or the Administering Agent confirms that an Authority to Proceed authorising the Eligible Purchaser to proceed with the purchase will not be issued) either the Provider or the potential purchaser shall be entitled to withdraw such Eligible Dwelling from the reservation and the Provider agrees to return any reservation fee (which shall be no greater than £500) to the potential purchaser.
- 7.4 The Scottish Ministers shall use reasonable endeavours to procure that the Administering Agent acts expeditiously when considering any duly completed Application Form from a proposed purchaser in respect of an Eligible Dwelling and the Administering Agent will provide written confirmation to the Provider and to the proposed purchaser whether such proposed purchaser qualifies to proceed to purchase the nominated Eligible Dwelling and if so shall issue the Authority to Proceed within five (5) Business Days of receipt of the Application Form containing the required property details stating or confirming:
- 7.4.1 whether such potential purchaser qualifies as an Eligible Purchaser;
 - 7.4.2 the Full Purchase Price;
 - 7.4.3 the Scottish Ministers Contribution and the Contribution Percentage;
 - 7.4.4 the Reduced Purchase Price; and

- 7.4.5 any additional cash monies that the Eligible Purchaser proposes or will be required by the Administering Agent or the relevant Qualifying Lender to use in the purchase.
- 7.5 The Scottish Ministers shall use reasonable endeavours to procure that at the same time as issuing of an Authority to Proceed, the Administering Agent shall issue to the Eligible Purchaser's solicitor the duly completed Standing Instructions.
- 7.6 Following receipt of a copy of the Authority to Proceed the Provider shall proceed to conclude missives for the sale of the relevant Eligible Dwelling to the Eligible Purchaser within no more than three (3) months after the date of the Authority to Proceed. The contract for sale:
- 7.6.1 shall be on terms that accord with the Authority to Proceed; and
- 7.6.2 shall stipulate an anticipated completion date for the disposal of the Eligible Dwelling which occurs no later than (a) nine (9) months after the date of the Authority to Proceed or (b) the Longstop Date (if earlier).
- 7.7 If conclusion of missives does not occur within three (3) months after the date of the Authority to Proceed the Authority to Proceed shall cease to have effect and the Provider shall notify the Administering Agent.
- 7.8 Following conclusion of missives for the sale of an Eligible Dwelling to an Eligible Purchaser the Provider shall forthwith provide to the Administering Agent written confirmation of:
- 7.8.1 the date of conclusion of missives; and
- 7.8.2 the proposed (or anticipated) date of completion of the disposal as provided for in the missives.
- 7.9 The Provider acknowledges that prior to conclusion of missives for the sale of an Eligible Dwelling to an Eligible Purchaser the Scottish Ministers or the Administering Agent may by notice in writing withdraw the Authority to Proceed or issue a revised Authority to Proceed in which case the initial Authority to Proceed for the Eligible Dwelling shall cease to have effect.
- 7.10 The Provider acknowledges that the Scottish Ministers may require the Eligible Purchaser's solicitor to provide the Administering Agent with evidence of the Eligible Purchaser's mortgage valuation and mortgage offer from an Approved Lender and to comply with other terms relating to the appointment of the Eligible Purchaser's solicitor before the Eligible Purchaser's solicitor is authorised to conclude missives for the acquisition of an Eligible Dwelling.
- 7.11 The Provider shall notify the Administering Agent forthwith upon it becoming aware that a sale of an Eligible Dwelling to an Eligible Purchaser is no longer proceeding and shall provide details of any reservation fee retained.

8 **Administering Agent**

8.1.1 The parties acknowledge that the Scottish Ministers have appointed the Administering Agent in relation to the administration of the Help to Buy (Scotland) Affordable New Build Scheme.

8.1.2 The Provider shall co-operate with and provide, as expeditiously as possible, assistance and all required information to the Administering Agent.

8.1.3 The Scottish Ministers shall use all reasonable endeavours to procure that the Administering Agent acts expeditiously and provides all reasonable assistance and co-operation to the Provider.

9 **State Aid**

If the Scottish Ministers are required pursuant to the Decision of the Commission of the European Communities published on 20 December 2011 in relation to public sector compensation granted to certain undertakings entrusted with the operation of services of general economic interest to recover any amount of overcompensation (as described in the Decision) the Scottish Ministers will be entitled to recover any such amount from the Provider.

10 **Variations**

Save to the extent expressly stated to the contrary, any addition, variation or amendment to this Agreement shall only be binding if made in writing and signed by a duly authorised representative of each party.

11 **Provider Default**

11.1 On or after the occurrence of any Provider Default, the Scottish Ministers shall be entitled by notice in writing and with immediate effect, to exercise any or all of the following rights and remedies:

11.1.1 to terminate this Agreement in full;

11.1.2 to suspend all further Equity Funding payments; or

11.1.3 to require repayment within 10 (ten) Business Days of any Equity Funding paid in whole or part (save to the extent secured on an Eligible Dwelling pursuant to the Shared Equity Documentation);

11.2 In relation to the exercise by the Scottish Ministers of its rights in Condition 11.1 the Provider shall pay on demand all the Scottish Ministers' losses incurred as a result of the Provider Default (whether or not this Agreement is terminated) including any costs incurred by the Scottish Ministers in investigating any Provider Default which has occurred.

12 **Monitoring, reviews and reporting**

12.1 The Scottish Ministers may call a meeting with the Provider to discuss any matter relating to this Agreement or the arrangements between the parties at any time provided that the Scottish Ministers:

12.1.1 give reasonable prior written notice of such meeting; and

12.1.2 include with the notice (or circulate within ten (10) Business Days of the notice) an agenda for such meeting.

12.2 The Scottish Ministers and the Provider shall use all reasonable endeavours to ensure that any representatives at any meeting held pursuant to this Condition 12 have the necessary authority and knowledge to deal with the items on the agenda for such meeting.

12.3 Subject to the prior approval of the other party (such approval not be unreasonably withheld) either party may request that additional persons attend a meeting to provide detailed or particular advice or information.

13 **Provider's records and accounting**

13.1 The Provider shall, as and when requested by the Scottish Ministers whether before or after the date of payment of the Equity Funding or any part thereof, make available on an Open Book basis and in a timely manner to the Scottish Ministers where required in connection with this Agreement or the Eligible Dwellings a copy of each of:

13.1.1 all data, materials, documents and accounts of any nature created, acquired or brought into existence in any manner whatsoever by or on behalf of the Provider for the purposes of this Agreement; and

13.1.2 all such data, materials, documents and accounts created, acquired or brought into existence by the Provider's officers, employees, agents or consultants relating to the Eligible Dwellings and which have been supplied to the Provider for the purposes of this Agreement.

13.2 The Provider shall at all times:

13.2.1 maintain a full record of particulars of all sale details (including valuations) and receipts received in respect of all Eligible Dwellings sold under the Help to Buy (Scotland) Affordable New Build Scheme;

13.2.2 when required to do so by the Scottish Ministers, provide a summary of any information referred to in Condition 13.2.1 as the Scottish Ministers may require to enable it to monitor the performance by the Provider of its obligations under this Agreement; and

13.2.3 provide such facilities as the Scottish Ministers may require for its representatives to visit any place where the records are held and examine the records maintained under this Condition.

- 13.3 Compliance with the above shall require the Provider to keep (and where appropriate shall procure that any subcontractor shall keep) separate books of account (from those relating to any business, activity or operation carried on by the Provider and/or subcontractor and which do not directly relate to any Eligible Dwelling) in accordance with good accountancy practice with respect to all the Eligible Dwellings showing in detail:
- 13.3.1 income (including sales receipts);
 - 13.3.2 valuations;
 - 13.3.3 the amount of the Scottish Ministers Contribution on each sale of an Eligible Dwelling;
 - 13.3.4 amount of Equity Funding received (and any repaid to the Scottish Ministers); and
 - 13.3.5 such other item as the Scottish Ministers may require to conduct (itself or through a third party) cost audits for verification of income, cost expenditure or estimated expenditure, for the purpose of any of the provisions of this Agreement;

and the Provider shall have (and procure that to the extent expressly agreed the subcontractors shall have) the books of account evidencing the items listed in this condition available for inspection by the Scottish Ministers (and any person appointed pursuant to the Dispute Resolution Procedure to determine a dispute or otherwise authorised by the Scottish Ministers) upon reasonable notice, and shall submit a report of these to the Scottish Ministers as and when requested.

- 13.4 On the expiry of this Agreement or (if earlier) upon termination thereof, the Provider shall if requested to do so deliver up to the Scottish Ministers all the data, materials, documents and accounts referred to in this Condition 13 which it has in its possession, custody or control and shall procure the handing over to the Scottish Ministers such data, materials, documents and accounts referred to in Condition 13.1.2 or as otherwise directed by the Scottish Ministers.
- 13.5 The Provider must for a period of 10 (ten) years from the date upon which it receives any Equity Funding retain all of the data, documents, materials and accounts referred to in this Condition 13 and the Provider may retain such data, documents, materials and accounts in electronic form only which may for the avoidance of doubt comprise copies where the originals have been supplied to the Scottish Ministers pursuant to Condition 13.4.

14 **Information and confidentiality**

14.1 Confidentiality

- 14.1.1 Each party recognises that under this Agreement it may receive Confidential Information belonging to the other.

- 14.1.2 Each party agrees to treat and to use all reasonable endeavours to procure that any relevant Group Company shall treat all Confidential Information belonging to the other as confidential and not to disclose such Confidential Information or any other confidential information relating to the Scottish Ministers arising or coming to its attention during the currency of this Agreement to any third party without the prior written consent of the other party and agrees not to use such Confidential Information for any purpose other than that for which it is supplied under this Agreement.
- 14.1.3 The obligations of confidence referred to in Condition 14.1.2 shall not apply to any Confidential Information which:
- 14.1.3.1 is in, or which comes into, the public domain otherwise than by reason of a breach of this Agreement or of any other duty of confidentiality relating to that information; or
 - 14.1.3.2 is obtained from a third party without that third party being under an obligation (express or implied) to keep the information confidential; or
 - 14.1.3.3 is lawfully in the possession of the other party before the date of this Agreement and in respect of which that party is not under an existing obligation of confidentiality; or
 - 14.1.3.4 is independently developed without access to the Confidential Information of the other party.
- 14.1.4 Each party will be permitted to disclose Confidential Information to the extent that it is required to do so:
- 14.1.4.1 to enable the disclosing party to perform its obligations under this Agreement or any Postponed Security; or
 - 14.1.4.2 by any applicable law or by a court, arbitral or administrative tribunal in the course of proceedings before it including without limitation any requirement for disclosure under FOISA or EI(S)R and the Provider acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and the Scottish Ministers may nevertheless be obliged to disclose such confidential information; or
 - 14.1.4.3 by any regulatory body (including any investment exchange) acting in the course of proceedings before it or acting in the course of its duties; or
 - 14.1.4.4 in order to give proper instructions to any professional advisor of that party who also has an obligation to keep any such Confidential Information confidential; or

14.1.4.5 to meet reasonable information requests from Approved Lenders (or the Approved Lenders' professional advisors or insurance advisors) to the extent that such disclosure is necessary to the performance of this Agreement.

14.1.5 The Provider shall ensure that all Confidential Information obtained from the Scottish Ministers under or in connection with this Agreement:-

14.1.5.1 is given only to such of its Group Companies, employees, professional advisors or consultants engaged to advise it in connection with this Agreement as is strictly necessary for the performance of this Agreement and only to the extent necessary for the performance of this Agreement;

14.1.5.2 is treated as confidential and not disclosed (without the Scottish Ministers' prior written approval) or used by any such staff or professional advisors or consultants otherwise than for the purposes of this Agreement;

14.1.5.3 where it is considered necessary in the opinion of the Scottish Ministers the Provider shall ensure that such staff, professional advisors or consultants sign a confidentiality undertaking before commencing work in connection with this Agreement.

14.1.6 Nothing in this Condition 14 shall prevent the Scottish Ministers:-

14.1.6.1 disclosing any Confidential Information for the purpose of any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Scottish Ministers has used its resources; or

14.1.6.2 disclosing any Confidential Information obtained from the Provider:-

14.1.6.2.1 to any department, office or agency of the Crown; or

14.1.6.2.2 to any person engaged in providing any services to the Scottish Ministers for any purpose relating to or ancillary to this Agreement or any person conducting an Office of Government Commerce gateway review;

14.1.6.3 provided that in disclosing information under Condition 14.1.6.2.1 or 14.1.6.2.2 the Scottish Ministers discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

14.1.7 Nothing in this Condition 14 shall prevent either party from using any techniques, ideas or know-how gained during the performance of the Agreement in the course of its normal business, to the extent that this

does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights.

14.2 Freedom of Information

14.2.1 The Provider acknowledges that the Scottish Ministers is subject to legal duties which may require the release of information under FOISA and/or EI(S)R and that the Scottish Ministers may be under an obligation to provide Information subject to a Request for Information.

14.2.2 The Scottish Ministers shall be responsible for determining in its absolute discretion whether:-

14.2.2.1 any Information is Exempted Information or remains Exempted Information; or

14.2.2.2 any Information is to be disclosed in response to a Request for Information;

and in no event shall the Provider respond directly to a Request for Information to which the Scottish Ministers is required to respond to, except to confirm receipt of the Request for Information and that the Request for Information has been passed to the Scottish Ministers unless otherwise expressly authorised to do so by the Scottish Ministers.

14.2.3 Subject to Condition 14.2.4 below, the Provider acknowledges that the Scottish Ministers may be obliged under FOISA or EI(S)R to disclose Information:-

14.2.3.1 without consulting the Provider or

14.2.3.2 following consultation with the Provider and having taken (or not taken, as the case may be) its views into account.

14.2.4 Without in any way limiting Conditions 14.2.2 and 14.2.3, in the event that the Scottish Ministers receives a Request for Information, the Scottish Ministers will, where appropriate, as soon as reasonably practicable notify the Provider.

14.2.5 The Provider will assist and co-operate with the Scottish Ministers as requested by the Scottish Ministers to enable the Scottish Ministers to comply with its disclosure requirements under FOISA and EI(S)R within the prescribed periods for compliance and in particular without limitation will (and shall procure that its Group Companies agents contractors and sub-contractors will), at their own cost:

14.2.5.1 transfer any Request for Information received by the Provider or any Group Company (as applicable) to the Scottish Ministers as soon as practicable after receipt and in any event within two Business Days of receiving a request for information;

14.2.5.2 provide all such assistance as may be required from time to time by the Scottish Ministers and supply such data or information as may be requested by the Scottish Ministers;

14.2.5.3 provide the Scottish Ministers with any data or information in its possession or power in the form that the Scottish Ministers requires within five Business Days (or such other period as the Scottish Ministers may specify) of the Scottish Ministers requesting that Information;

14.2.5.4 permit the Scottish Ministers to inspect any records as requested from time to time

14.2.6 Nothing in this Agreement will prevent the Scottish Ministers from complying with any valid order, decision, enforcement or practice recommendation notice issued to it by the Scottish Information Commissioner under FOISA and / or EI(S)R in relation to any Exempted Information.

14.2.7 The obligations in this Condition 14 will survive the expiry or termination of this Agreement and each Postponed Security for a period of 2 years or, in respect of any particular item of Confidential Information, until such earlier time as that item of Confidential Information reaches the public domain otherwise than by reason of a breach of this Agreement or of any other duty of confidentiality relating to that information.

14.3 Transparency

14.3.1 The parties acknowledge that, except for any information which is exempt from disclosure in terms of this Agreement, the Provider hereby consents for the Scottish Ministers to publish the Agreement to the general public in its entirety (but with any information which is exempt from disclosure in accordance with the provisions of the FOISA, redacted), including from time to time agreed changes to the Agreement.

14.3.2 The Scottish Ministers shall be responsible for determining in its absolute discretion whether any of the content of the Agreement is exempt from disclosure in accordance with the provisions of the FOISA either:

14.3.2.1 following consultation with the Provider and having taken (or not taken, as the case may be) its views into account; or

14.3.2.2 without consulting the Provider.

14.3.3 The Provider shall assist and cooperate with the Scottish Ministers to enable the Scottish Ministers to publish this Agreement.

15 **Open Book**

The Provider shall be responsible for proving the accuracy of any facts or figures referred to in this Agreement and the Provider shall prove (where requested to do so) the accuracy of any such facts or figures on an Open Book basis to the reasonable satisfaction of the Scottish Ministers.

16 **Value Added Tax**

16.1 The Parties understand and agree that the Equity Funding provided by the Scottish Ministers under this Agreement is not consideration for any supply for Value Added Tax (VAT) purposes whether by the Provider or otherwise.

16.2 If, notwithstanding the agreement and understanding of the Parties as set out in Condition 16.1 above, it is determined that the Equity Funding is consideration for a supply for VAT purposes, the Equity Funding shall be treated as inclusive of any VAT.

16.3 All sums or other consideration payable to or provided by a Provider to the Scottish Ministers at any time will be deemed to be exclusive of all VAT payable and where any such sums become payable or due or other consideration is provided, the relevant Provider will pay to the Scottish Ministers all the VAT payable upon the receipt of a valid VAT invoice.

17 **Dispute resolution**

17.1 All disputes and differences arising out of or in connection with this Agreement (a Dispute) shall be resolved pursuant to the terms of this Condition 17.

17.1.1 In the event that the Provider or the Scottish Ministers consider that a Dispute exists, such party shall serve a notice upon the other party (a Notice of Dispute) giving brief details of the Dispute and in the first instance the parties shall use their reasonable endeavours to resolve such Dispute amicably and in good faith and in accordance with this Condition 17.

17.1.2 Representatives of the parties shall meet within five (5) Business Days (or such other longer period not exceeding twenty (20) Business Days as the parties may agree) of receipt of a Notice of Dispute.

17.1.3 Where either no representatives of both parties are available to meet within the period set out in Condition 17.1.2 or the representatives fail to agree a unanimous resolution of the Dispute at such meeting, the Dispute shall be referred to the chief executive (or nominated deputies) of the Provider and Stephen Pathirana, Head of Housing Markets, Strategy and North Programmes (or nominated deputies) for and on behalf of Scottish Ministers (the Relevant Persons).

17.1.4 The Relevant Persons shall meet within ten (10) Business Days (or such other longer period not exceeding twenty (20) Business Days as the parties may agree) of such referral to attempt to resolve the Dispute.

Any unanimous resolution of the Relevant Persons shall be recorded in writing and signed by them and shall be final and binding unless the parties agree otherwise.

17.1.5 If the Dispute remains unresolved after ten (10) Business Days following referral to the Relevant Persons, such Dispute must be dealt with in accordance with Condition 17.2.

17.2 In the circumstances contemplated in Condition 17.1.5, the parties will attempt to settle the Dispute by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed by the parties, the mediator will be nominated by CEDR. The parties agree that:

17.2.1 to initiate the mediation a party must give notice in writing (ADR notice) to the other party to the Dispute requesting a mediation. A copy of the request should be sent to CEDR.

17.2.2 the mediation shall start not later than twenty eight (28) days after the date of the ADR notice; and

17.2.3 except where the right to issue proceedings would be prejudiced by a delay, no party may commence any court proceedings in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation.

18 **No agency**

18.1 Nothing in this Agreement or otherwise shall be held, implied or deemed to constitute a partnership, joint venture or other association or, save as expressly provided, the relationship of principal and agent between the parties.

18.2 The Provider shall at all times be independent and nothing in this Agreement shall be construed as creating the relationship of employer and employee between the Scottish Ministers and the Provider. Neither the Provider nor any of its employees shall at any time hold itself or themselves out to be an employee of the Scottish Ministers.

19 **Assignment and sub-contracting**

19.1 The Scottish Ministers will be entitled to transfer or assign all or part of this Agreement.

19.2 The Provider will not be entitled to transfer or assign all or part of this Agreement.

20 **Entire agreement**

20.1 This Agreement and the conditions herein contained together with the Schedule and Annexes constitute the entire agreement between the parties and may only be varied or modified in writing by agreement duly executed on behalf of the parties.

20.2 The Provider hereby acknowledges that save as set out or referred to in the Agreement there are and have been no representations made by or on behalf of the Scottish Ministers of whatsoever nature on the faith of which the Provider is entering into this Agreement.

21 **Notices**

21.1 Any notice to be given hereunder shall be in writing and shall be sufficiently served if delivered by hand and receipted for by the recipient, sent by facsimile (but not by electronic mail) or sent by the Recorded Delivery Service addressed in the case of either party to the other party's registered office as set out at the beginning of this Agreement or to such other addresses or to any fax numbers as either party may from time to time notify to the other in writing provided that such other address is within (Scotland).

21.2 Any notice shall be deemed to be given by the sender and received by the recipient:

21.2.1 if delivered by hand, when delivered to the recipient;

21.2.2 if delivered by the Recorded Delivery Service, three (3) Business Days after delivery including the date of postage;

21.2.3 if delivered by facsimile transmission, upon production by the sender's equipment of a transmission report indicating that the fax was sent to the fax number of the recipient in full without error provided that a confirmation copy is delivered by hand within forty-eight (48) hours of delivery of the facsimile transmission;

provided that if the delivery or receipt is on a day which is not a Business Day or is after 4.00pm it is to be regarded as received at 9.00am on the following Business Day.

22 **Severability**

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall to that extent be omitted from this Agreement and shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

23 **Cumulative rights and enforcement**

Any rights and remedies provided for in this Agreement whether in favour of the Scottish Ministers or the Provider are cumulative and in addition to any further rights or remedies which may otherwise be available to those parties.

24 **Waiver**

24.1 The failure of any party at any one time to enforce any provision of this Agreement in no way affects its right thereafter to require complete performance by the other party, nor may the waiver of any breach or any provision be taken

or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

- 24.2 Where in this Agreement any obligation of a party is to be performed within a specified time that obligation shall be deemed to continue after that time if the party fails to comply with that obligation within the time.
- 24.3 Any waiver or release of any right or remedy of either party must be specifically granted in writing signed by that party and shall:
- 24.3.1 be confined to the specific circumstances in which it is given;
 - 24.3.2 not affect any other enforcement of the same or any other right; and
 - 24.3.3 (unless it is expressed to be irrevocable) be revocable at any time in writing.

25 **Public relations and publicity**

The Provider shall ensure that the Scottish Ministers' requirements from time to time in relation to public relations and publicity as notified to the Provider from time to time or otherwise as included in the Regulations are observed and implemented in respect of each Eligible Dwelling.

26 **Data Protection**

- 26.1 For the purposes of this Condition "Personal Data", "Data Processor", "Data Subject", "Data Controller" and "Processing" shall have the meanings ascribed to them in the Data Protection Act 1998 (the "DPA") as amended or re-enacted from time to time.
- 26.2 The Provider warrants and represents that it has obtained all necessary registrations, notifications and consents required by the DPA to process Personal Data for the purposes of performing its obligations under this Agreement.
- 26.3 The Provider undertakes that to the extent that the Provider and/or any of its employees receives, has access to and/or is required to process Personal Data on behalf of the Scottish Ministers (the "Scottish Ministers' Personal Data") for the purpose of performing its obligations under this Agreement, it will at all times comply with the provisions of the DPA for the time being in force, including without limitation the Data Protection Principles set out in Schedule 1 of the DPA. In particular, the Provider agrees to comply with the requirements and obligations imposed on the Data Controller in the Seventh Data Protection Principle set out in the DPA namely:
- 26.3.1 the Provider shall at all material times have in place and maintain appropriate technical and organisational security measures designed to safeguard against accidental or unlawful destruction, accidental loss, alteration, unauthorised or unlawful disclosure of or access to the Scottish Ministers' Personal Data and any person it authorises to have

access to any the Scottish Ministers' Personal Data will respect and maintain the confidentiality and security of the Scottish Ministers' Personal Data. This includes the obligation to comply with any records management, operational and/or information security policies operated by the Scottish Ministers, when performing its obligations under this Agreement, on the Scottish Ministers' premises and/or accessing their manual and/or automated information systems. These measures shall be appropriate to the harm which might result from any unauthorised Processing, accidental loss, destruction or damage to the Personal Data which is to be protected;

26.3.2 the Provider shall only process Personal Data for and on behalf of the Scottish Ministers for the purpose of performing its obligations under this Agreement, or as is required by Legislation or any Regulatory Body, and where necessary only on written instructions from the Scottish Ministers to ensure compliance with the DPA;

26.3.3 the Provider shall allow the Scottish Ministers to audit the Provider's compliance with the requirements of this Clause 26 on reasonable notice and/or, at the Scottish Ministers' request, provide the Scottish Ministers with evidence of the Provider's compliance with the obligations within this Clause 26.

26.4 The Provider undertakes not to disclose or transfer any of the Scottish Ministers' Personal Data to any third party without the prior written consent of the Scottish Ministers save that without prejudice to Clause 26.3 the Provider shall be entitled to disclose the Scottish Ministers' Personal Data to employees to whom such disclosure is reasonably necessary in order for the Provider to perform its obligations under this Agreement, or to the extent required under a court order.

26.5 The Provider shall:

26.5.1 take reasonable steps to ensure the reliability of any Provider Personnel who have access to the Personal Data;

26.5.2 ensure that all Provider Personnel required to access the Personal Data are informed of the confidential nature of the Personal Data and comply with the obligations set out in this Clause 26;

26.5.3 ensure that none of Provider Personnel publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Scottish Ministers;

26.5.4 provide a written description of the technical and organisational methods employed by the Provider for processing Personal Data (within the timescales required by the Scottish Ministers); and

26.5.5 not Process Personal Data outside the European Economic Area without the prior written consent of the Scottish Ministers and, where the Scottish Ministers consents to a transfer, to comply with:

26.5.5.1 the obligations of a Data Controller under the Eighth Data Protection Principle set out in Schedule 1 of the Data Protection Act 1998 by providing an adequate level of protection to any Personal Data that is transferred; and

26.5.5.2 any reasonable instructions notified to it by the Scottish Ministers.

26.6 The Provider agrees to use all reasonable efforts to assist the Scottish Ministers to comply with such obligations as are imposed on the Scottish Ministers by the DPA. For the avoidance of doubt, this includes the obligation to:

26.6.1 provide to the Scottish Ministers such access as may be reasonably required from time to time to all Personal Data stored or processed in performing its obligations under this Agreement, in order to enable the Scottish Ministers to meet its obligations to respond to access requests from Data Subjects under the DPA;

26.6.2 provide the Scottish Ministers with reasonable assistance in complying with any request for information served on the Scottish Ministers under Section 7 of the DPA;

26.6.3 notify the Scottish Ministers (within five Working Days) about the receipt of any such request received by the Provider under Section 7 of the DPA or complaint or request relating to the Scottish Ministers' obligations under the DPA and not disclose or release any information (including the Scottish Ministers' Personal Data) in response to such a request or complaint without first consulting with the Scottish Ministers, where the information sought relates to the Scottish Ministers, its employees, agents and/or its business operations;

26.6.4 provide the Scottish Ministers with full co-operation and assistance in relation to any complaint or request made, including by:

26.6.4.1 providing the Scottish Ministers with full details of the complaint or request;

26.6.4.2 complying with a data access request within the relevant timescales set out in the DPA and in accordance with the Scottish Ministers' instructions;

26.6.4.3 providing the Scottish Ministers with any Personal Data it holds in relation to a Data Subject (within the timescales required by the Scottish Ministers); and

26.6.4.4 providing the Scottish Ministers with any information requested by the Scottish Ministers.

26.7 The Provider shall comply at all times with the DPA and shall not perform its obligations under this Agreement in such a way as to cause the Scottish Ministers to breach any of its applicable obligations under the DPA.

- 26.8 The Provider shall indemnify the Scottish Ministers against all claims and proceedings and all liability, losses, costs and expenses incurred in connection therewith by the Scottish Ministers as a result of the Provider's destruction of and/or damage to any of the Scottish Ministers' Personal Data processed by the Provider, its employees, agents, or any breach of or other failure to comply with the obligations in the DPA and/or this Clause 26 by the Provider, its employees, agents or sub-contractors.
- 26.9 The Provider shall appoint and identify an individual within its organisation authorised to respond to enquiries from the Scottish Ministers concerning the Provider's Processing of the Scottish Ministers' Personal Data and will deal with all enquiries from the Scottish Ministers relating to such Personal Data promptly, including those from the Information Commissioner and will to the extent reasonably necessary co-operate with and assist in ensuring compliance with any Data Subject rights of data access, correction, blocking, suppression or deletion relating to the Scottish Ministers' Personal Data and in the defence or management of any enforcement action or assessment by the Information Commissioner or any other competent authority in relation thereto.
- 26.10 The Provider undertakes to include obligations no less onerous than those set out in this Condition 26, in all contractual arrangements with agents engaged by the Provider in performing its obligations under this Agreement.

27 **Co-operation**

- 27.1 Each party undertakes to co-operate in good faith with the other to facilitate the proper performance of this Agreement and in particular will (subject to Condition 27.2):

27.1.1 use all reasonable endeavours to avoid unnecessary disputes and claims against the other party;

27.1.2 not interfere with the rights of the other party (nor its employees, agents, representatives, contractors or subcontractors) in performing its obligations under this Agreement nor in any other way hinder or prevent the other party (nor its employees, agents, representatives, contractors or subcontractors) from performing those obligations provided that this provision shall not prevent either party from exercising its express rights under this Agreement or any other agreement in relation to the Dwellings.

- 27.2 Nothing in Condition 27.1 shall:

27.2.1 interfere with the right of each of the parties to arrange its affairs in whatever manner it considers fit in order to perform its obligations under this Agreement and in connection with the Dwellings in the manner in which it considers to be the most effective and efficient; or

27.2.2 relieve either party from any obligation contained in this Agreement.

27.3 Without prejudice to the generality of the foregoing the Provider shall co-operate fully and in a timely manner with any reasonable request from time to time:

27.3.1 of any auditor (whether internal or external) of the Scottish Ministers to provide documents, or to procure the provision of documents, relating to the Dwellings, and to provide, or to procure the provision of, any oral or written explanation relating to the same; and/or

27.3.2 of the Scottish Ministers where the Scottish Ministers is required under any legislation to provide any document relating to the Dwellings to any person.

27.4 The Provider will not, and will use all reasonable endeavours to procure that its suppliers and sub-contractors will not, knowingly do or omit to anything in relation to the Help to Buy (Scotland) Affordable New Build Scheme, the Dwellings or in the course of their other activities that may bring the standing of the Scottish Ministers into disrepute or attract adverse publicity for the Scottish Ministers.

27.5 No Party will publish any statement, orally or in writing, relating to the other Party which might damage that other Party's reputation or that of any of its officers or employees.

28 **Governing law**

This Agreement shall be governed by and construed in accordance with the laws of Scotland and subject to the provisions of Condition 17 the parties irrevocably submit to the exclusive jurisdiction of the Scottish courts.

29 **No fetter on statutory functions**

Notwithstanding anything apparently or impliedly to the contrary in this Agreement or any of the deeds and documents referred to herein, in carrying out its statutory duties or functions the discretion of the Scottish Ministers shall not be fettered, constrained or otherwise unlawfully affected by the terms of this Agreement or any such other deed or document.

30 **Survival of this agreement**

30.1 Insofar as any of the rights and powers of the Scottish Ministers provided for in this Agreement shall or may be exercised or exercisable after the termination or expiry of this Agreement the provisions of this Agreement conferring such rights and powers shall survive and remain in full force and effect notwithstanding such termination or expiry.

30.2 Insofar as any of the obligations of the Provider provided for in this Agreement remain to be discharged after the termination or expiry of this Agreement the provisions of this Agreement shall survive and remain in full force and effect notwithstanding such termination or expiry: IN WITNESS WHEREOF these

presents typewritten on this and the 32 preceding pages together with the schedule annexed hereto are executed by the parties as follows:-

Subscribed for and on behalf of the said [Insert full name of Provider]

By (Authorised Signatory)

At

On

Before the following witness:-

.....Name

.....Address

.....

Subscribed for and on behalf of the said THE SCOTTISH MINISTERS



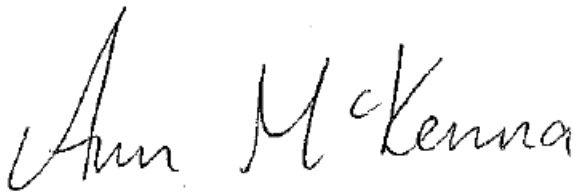
By (Authorised Signatory)

Stephen Pathirana

At Victoria Quay, Edinburgh, EH6 6QQ

On October 2017

Before the following witness:-



Ann McKenna
Atlantic Quay, 150 Broomielaw, Glasgow, G2 8LU

This is the Schedule referred to in the foregoing Agreement between The Scottish Ministers and []

Part 1 Warranties

31 Due incorporation and vires

31.1 The Provider is duly incorporated under the laws of either Scotland or England and Wales and has the corporate power to own its assets and to carry on the business which it conducts or proposes to conduct.

31.2 The Provider:

31.2.1 has the power to enter into and to exercise its rights and perform its obligations under the foregoing Agreement; and

31.2.2 has taken all necessary action to authorise the execution by it of and the performance by it of its obligations under the foregoing Agreement.

31.3 The Provider is not subject and will not prior to any payment of Equity Funding become subject to any other obligation, compliance with which will or is likely to, have a Material Adverse Effect on the ability of the Provider to perform its obligations under the foregoing Agreement.

32 Enforcement and validity of obligations

32.1 The Provider's obligations under the foregoing Agreement constitute its legal, valid and binding obligations, enforceable in accordance with its terms.

32.2 The execution, delivery and performance by the Provider of the foregoing Agreement do not:

32.2.1 insofar as it is aware contravene any applicable law or Directive or any judgement, order or decree of any court having jurisdiction over it;

32.2.2 conflict with, or result in any breach of any of the terms of, or constitute a default under, any agreement or other instrument to which it is a party or any licence or other authorisation to which it is subject or by which it or any of its property is bound; or

32.2.3 contravene or conflict with its constitution.

32.3 So far as the Provider is aware, it is not in breach of or in default under any agreement to which it is a party or which is binding on it or any of its assets in a manner which has affected or could affect its ability to perform its obligations under the foregoing Agreement.

- 32.4 There will not be in existence any other agreements or documents replacing or relating to the foregoing Agreement which would materially affect its interpretation or application.
- 32.5 All consents required by the Provider in connection with the execution, delivery, issue, validity or enforceability of the foregoing Agreement have been obtained and have not been withdrawn.

33 **No litigation**

To the best of the Provider's knowledge, no claim is presently being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of the knowledge of the Provider, pending or threatened against the Provider or any of its assets which will or might have a Material Adverse Effect on the ability of the Provider to perform its obligations under the foregoing Agreement.

34 **Information Provided to the Scottish Ministers**

- 34.1 All information supplied by or on behalf of the Provider to the Scottish Ministers or their agents or employees in connection with the Provider's proposal in respect of the provision of the Help to Buy (Scotland) Affordable New Build Scheme by the Provider or in the course of the subsequent negotiations was at the time of submission and as far as the Provider was aware (or ought to have been aware) having made all reasonable and proper enquiries true, complete and accurate in all respects;
- 34.2 The Provider has informed the Scottish Ministers of any material change that has occurred since the date of submission of which the Provider is aware (or ought to be aware) having made all reasonable and proper enquiries which would render the information referred to in paragraphs 4.1 and/or 4.4 untrue, incomplete or inaccurate in any material respect; and
- 34.3 The Provider is not aware of any material facts or circumstances which have not been disclosed to the Scottish Ministers and which might, if disclosed would materially and adversely affect the decision of anyone considering whether or not to contract with the Provider.
- 34.4 All information submitted to the Scottish Ministers during the course of the foregoing Agreement is as far as the Provider is aware (or ought to be aware) having made all reasonable and proper enquiries complete and accurate in all respects.

35 **Provider Defaults**

- 35.1 To the best of the Provider's knowledge, no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Provider threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator or similar officer in relation to

any of its assets or revenues and without limitation no Insolvency Event has occurred in relation to the Provider.

35.2 In entering into the foregoing Agreement the Provider has not committed any Prohibited Act.

35.3 Without prejudice to paragraphs 5.1 and 5.2 above, no Provider Default has occurred or is continuing.

36 **Third party rights and intervening events**

36.1 No person having any charge or other form of security over the property or any other assets of the Provider has enforced or given notice of its intention to enforce such security.

36.2 The Provider is not aware, after due enquiry, of anything which materially threatens the success or successful completion of the intention or purpose of the foregoing Agreement.

37 **Land Ownership**

In relation to each Eligible Dwelling identified by the Provider for the future receipt of the Help to Buy (Scotland) Affordable New Build Scheme Equity Funding, either the Provider or one of its Group Companies (a) has, or (b) will have prior to any drawdown of Equity Funding in respect of that Eligible Dwelling, or (c) can procure pursuant to binding contractual arrangements with the proprietor of the Eligible Dwelling, a Good and Marketable Title to such Eligible Dwelling.

38 **Consumer Code for Home Builders**

The Provider has adopted and complied with (and shall continue to adopt and comply with) the Consumer Code for Home Builders in respect of each Eligible Dwelling and its sale to an Eligible Purchaser, including in relation to after-sale matters.