

**SERVICE AGREEMENT**  
**BETWEEN**  
**NHS COMMISSIONING BOARD**  
**AND**  
**SUPPLY CHAIN COORDINATION LIMITED**

**THIS SERVICE AGREEMENT** is made on

30 September 2021

**1. INTRODUCTION AND PARTIES**

1.1 This Agreement is the amended form of the novated Original Services Agreement (as defined in clause 2.6 below) with effect from 1 October 2021 between:

1.1.1 **NHS Commissioning Board**, of Skipton House, 80 London Road, London, United Kingdom, SE1 6LH (known as "**NHS England**" or "**NHSE**"); and

1.1.2 **Supply Chain Coordination Limited**, a company registered in England and Wales with registered number 10881715 which has its registered office at Skipton House, 80 London Road, London, United Kingdom, SE1 6LH ("**SCCL**"),

each a "**party**" and together the "**parties**".

**2. BACKGROUND AND PURPOSE**

*Initial incorporation of SCCL*

2.1 SCCL was formed by the Secretary of State for Health and Social Care (the "**SoS**") exercising his powers under section 223(1) of the National Health Services Act 2006 ("**NHS Act**"), which provides that the SoS may form, or participate in forming, companies to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under the NHS Act.

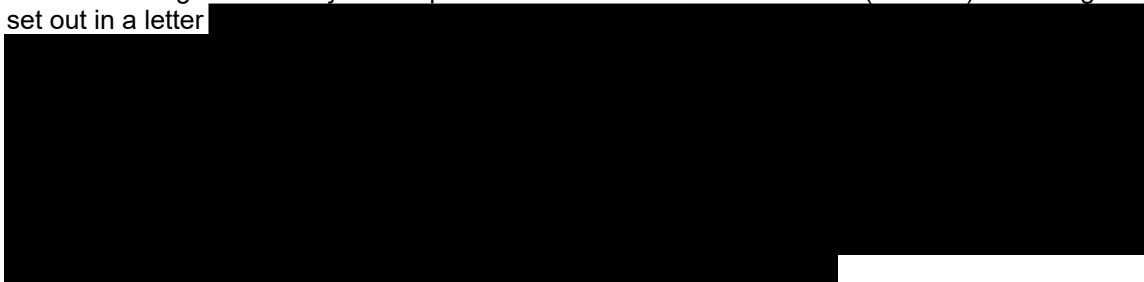
2.2 SCCL was established by the SoS on 25 July 2017 as a wholly-owned private company limited by shares under the Companies Act 2006 with the intention that it should function as the in-house management function of the NHS Supply Chain and administer a new operating model for the procurement of medical consumables apart from medicines (the "**Future Operating Model**" or "**FOM**") introduced under the Procurement Transformation Programme ("**PTP**").

2.3 The SoS was the sole shareholder of SCCL and exercised supervisory control as a shareholder and through Board representatives pursuant to its Articles of Association.

2.4 By a letter to the Chief Executive Officer of SCCL dated 28 March 2019, the SoS used the statutory powers vested in him by virtue of section 223(1) of the NHS Act to entrust certain public service duties connected with the administration of the FOM for the NHS Supply Chain. That letter (referred to as the "**original Act of Entrustment**") set out the public service objectives entrusted to SCCL along with the supervisory controls and compensation mechanisms for the purpose of Article 106(2) TFEU and Article 4 of the EU Commission's Decision 2012/21/EU. It is intended to have binding legal effect, for a term of 10 years, in assigning and defining the scope and operational conditions of the public service obligations conferred upon SCCL in the general economic interest.

2.5 Pursuant to section 223(2) of the NHS Act, the SoS may, with a view to securing or facilitating the provision by companies of facilities or services to persons or bodies falling within section 223(1), invest in the companies (whether by acquiring assets, securities or rights or otherwise), or provide loans and guarantees and make other kinds of financial provision to or in respect of them, or both.

- 2.6 To this end, the SoS agreed to provide (or procure) payment to SCCL of compensation for services relating to NHS Healthcare to be performed by SCCL in the public interest (the “**Fees**”). The terms of such funding of SCCL by the Department of Health and Social Care (“**DHSC**”) were originally set out in a letter

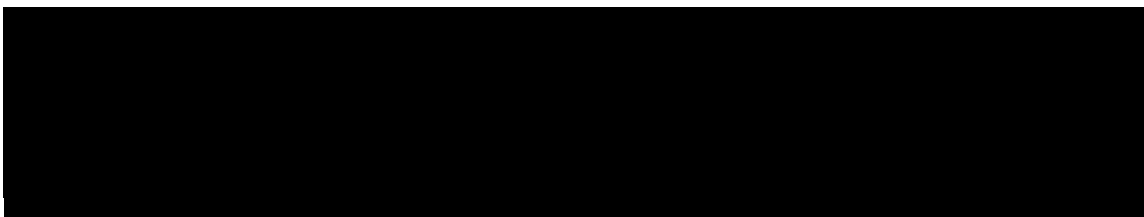


- 2.7 With effect from 1 April 2019, SCCL became the principal administrator of the NHS Supply Chain. The Original Services Agreement, which incorporated by reference the Act of Entrustment and the Funding Letter, formed part of the entrustment framework, which set out the terms and conditions under which SCCL should deliver the services that it has been entrusted with by the SoS in respect of administering the FOM.

*Subsequent changes to SCCL ownership*

- 2.8 The SoS remained the sole shareholder of SCCL until 30 September 2021 whereupon he transferred his entire shareholding in SCCL (100% of its share capital) to NHSE with effect from 1 October 2021.
- 2.9 NHSE has the same powers as those vested in the SoS under section 223(1) of the NHS Act, including those referred to in clauses 2.4 and 2.5 above. Accordingly, NHSE is empowered to participate in SCCL for the purpose of SCCL providing facilities or services to persons or bodies exercising functions, or otherwise providing services, for the purposes of section 223 of the NHS Act.
- 2.10 The revised arrangements underpinning the transfer of ownership of SCCL from the SoS to NHSE were reflected in a letter from the SoS in favour of SCCL, dated 30 September 2021, which set out the consequential changes for the entrustment arrangements resulting from the change in ownership and corporate governance (the “**Addendum to the Act of Entrustment**” or “**Addendum**”) and in a Memorandum of Understanding between the SoS/DHSC and NHSE dated 30 September 2021 (the “**MOU**”).
- 2.11 In the Addendum and MOU the SoS has authorised NHSE, under sections 2A and 12 of the NHS Act 2006, to make necessary arrangements with SCCL, including as part of the revised corporate governance arrangements and this Agreement, for the supply and distribution of personal protective equipment (“**PPE**”) and intensive care unit (“**ICU**”) consumables via the NHS Supply Chain to healthcare, social care and other recipients in order to protect the public from disease and to treat and prevent the transmission of the Covid-19 virus (“**public health functions**”). Those changes are also reflected in the revised Articles of Association for SCCL, which will take effect from the passing of a shareholder’s resolution from NHSE directing SCCL’s Board to enact the amended Articles of Association as soon as possible after 1 October 2021.

- 2.12



NHSE shall have discretion to resolve these matters in the way it sees most appropriate in line with the key objectives set out in the Act of Entrustment, the Addendum and the terms of this Agreement and the MoU.

- 2.13 On 1 October 2021, the Original Services Agreement was novated from the SoS to NHSE, under a novation agreement 30 September 2021 between the SoS, SCCL and NHSE.
- 2.14 With effect from 1 October 2021, the terms of the Original Services Agreement and the Funding Letter have been amended by the terms of this Agreement. It forms part of the modified entrustment framework which comprises the original Act of Entrustment, the Addendum, the MOU, the amended Articles of Association and this Agreement.

### 3. DEFINITIONS AND INTERPRETATION

- 3.1 The following definitions and rules of interpretation apply in this Agreement:

#### Definitions

- 3.1.1 **"original Act of Entrustment"** shall have the meaning given to it in clause 2.4 and comprises the letter from the SoS to the Chief Executive Officer of SCCL dated 28 March 2019, entrusting certain public service duties connected with the administration of the FOM for a period of ten (10) years until 27 March 2029.
- 3.1.2 **"Addendum to the Act of Entrustment"** or **"Addendum"** shall have the meaning given in clause 2.10;
- 3.1.3 **"ADR Notice"** shall have the meaning given to it in clause 42.1.3(b);
- 3.1.4 **"Additional Gain-Share Payments"** means the amounts payable by SCCL to the Category Tower Service Providers over and above their respective payable Planned Gain-Share Payments and in accordance with the applicable mechanisms set out in the respective contracts between SCCL and the Category Tower Service Providers;
- 3.1.5 **"Agreement"** means this services agreement between NHSE and SCCL as dated above;
- 3.1.6 **"Affected Party"** shall have the meaning given to it in clause 33.2;
- 3.1.7 **"Annual Review"** means the 12 monthly review process provided for in part G of the original Act of Entrustment and referred to in part F of the Addendum;
- 3.1.8 **"Applicable Laws"** means all applicable laws, statutes, regulations and codes from time to time in force and as amended;
- 3.1.9 **"Board"** means the board of directors of SCCL;
- 3.1.10 **"Business Day"** means a day, other than a Saturday, Sunday or public holiday in England, when banks in London are open for business;
- 3.1.11 **"Category Tower Service Providers"** mean those service providers who provide a procurement and category management service pursuant to their respective contracts with SCCL;
- 3.1.12 **"Chargeable Activities"** means other revenue-producing activities that SCCL engages in as defined in clause 8.1 and/or as set out in Schedule 1 (Services and Chargeable Activities) and, in respect of which, SCCL makes available the supply arrangements under the NHS Supply Chain via the FOM to Chargeable Entities;
- 3.1.13 **"Chargeable Entities"** means organisations which do not provide NHS Healthcare, including:
- (a) NHS Customers when providing Non-NHS Healthcare,
  - (b) Social Health and Care Entities, and

(c) Private Healthcare Entities.

- 3.1.14 **"CEDR"** means the Centre for Effective Dispute Resolution;
- 3.1.15 **"Change Order"** shall have the meaning given in clause 13.1;
- 3.1.16 **"Control"** has the meaning given in section 1124 of the Corporation Tax Act 2010, and the expression "change of control" shall be construed accordingly;
- 3.1.17 **"Customer"** means:
- (a) a person or body which exercises functions, or otherwise provides services under the NHS Act; and/or
  - (b) a person or body not falling within (a) above, including a person or body exercising functions or otherwise providing services in relation to public health and/or social care not under the NHS Act,
- which may receive facilities or services from SCCL under section 223 of the NHS Act;
- 3.1.18 **"Data Protection Legislation"** means: the General Data Protection Regulations (Regulation (EU) 2016/679) (**"GDPR"**) and laws implementing or supplementing the GDPR; the GDPR as transposed into United Kingdom national law by operation of section 3 of the European Union (Withdrawal) Act 2018 and as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 (**"UK GDPR"**); the Data Protection Act 2018, the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 and other data protection or privacy legislation in force from time to time in the United Kingdom;
- 3.1.19 **"Deliverables"** means any reports, information and data produced by SCCL: (a) pursuant to any reporting obligations set out in this Agreement including but not limited to those in clause 12; or (b) for delivery to NHSE and concerning its obligations under clause 7;
- 3.1.20 **"Devolved NHS Healthcare"** means for the purpose of this Agreement, healthcare services and/or functions provided for the purposes of the NHS in Wales, Scotland and Northern Ireland which are taxpayer funded through the NHS in Wales, Scotland and Northern Ireland;
- 3.1.21 **"DHSC"** shall have the meaning given to it in clause 2.6;
- 3.1.22 **"DHSC Group Financial Consolidation Schedules"** means the standard financial reporting tool used by DHSC in order to consolidate the financial information of its arm's length bodies and DHSC-owned companies;
- 3.1.23 **"Dispute"** shall have the meaning given to it in clause 42.1;
- 3.1.24 **"Dispute Notice"** shall have the meaning given to it in clause 42.1.1;
- 3.1.25 **"Effective Date"** means 1 October 2021;
- 3.1.26 **"EIR"** shall have the meaning given to it in clause 23.5;
- 3.1.27 **"Fees"** shall have the meaning given to it in clause 2.6;
- 3.1.28 **"Force Majeure Event"** shall have the meaning given to it in clause 33.1;
- 3.1.29 **"FOIA"** shall have the meaning given to it in clause 23.5;

- 3.1.30 **"Funding Letter"** shall have the meaning given to it in clause 2.6, which, with effect from 1 October 2021, has been superseded by the terms of this Agreement;
- 3.1.31 **"Future Operating Model"** or **"FOM"** shall have the meanings given in clause 2.2;
- 3.1.32 **"Good Industry Practice"** means the exercise of that degree of skill, care, diligence, prudence, foresight and judgment which would reasonably be expected from a skilled, experienced and market leading operator engaged in the provision of services similar to the Services and this shall include taking active steps to and introducing protective measures to mitigate the risk of a security and/or confidentiality breach in relation to this Agreement
- 3.1.33 **"Intellectual Property Rights"** mean patents, inventions, designs, copyright and related rights, database rights, know-how, trade secrets, trademarks and related goodwill, trade names (whether registered or unregistered) and proprietary rights in domain names;
- 3.1.34 **"KPI"** means the key performance indicators used by NHSE to evaluate SCCL's delivery of the Services, as set out Schedule 2 to this Agreement;
- 3.1.35 **"margin"** means the additional price element payable in respect of Chargeable Activities by Chargeable Entities, which is the price difference over and above the cost at which SCCL purchases such goods and services and represents the costs incurred by SCCL including its overheads in sourcing and purchasing goods and services for onward supply on the NHS Supply Chain. For the avoidance of doubt, save where expressly stated to the contrary in this Agreement, SCCL shall not add a margin in respect of the supply of goods and services to NHS Customers for use by them in providing NHS Healthcare;
- 3.1.36 **"Material Breach"** means any breach (including an anticipatory breach):
- (a) that is serious in the widest sense of having a serious effect on the benefit which the NHS would otherwise derive from a substantial portion of this Agreement over any three-month period during the Term (and in deciding whether any breach is material no regard shall be had to whether it occurs by some accident, mishap, mistake or misunderstanding); or
  - (b) of any of the obligations set out in clauses 15, 17, 18, 20, 23 and 24;
- 3.1.37 **"Monthly Finance Meeting"** means the regular meetings between SCCL, NHSE Company Management and NHSE Finance, the focus of discussion being the financial management of SCCL and its general performance in line with the KPIs;
- 3.1.38 **"MOU"** has the meaning given to it in clause 2.10;
- 3.1.39 **"NHS"** means the comprehensive health service continued under section 1(1) of the NHS Act except, for the purpose of this Agreement, the part of it that is provided pursuant of the public health functions (within the meaning of that Act) of the SoS or local authorities;
- 3.1.40 **"NHS Act"** shall have the meaning given to it in clause 2.1;
- 3.1.41 **"NHS Constitution"** means the document published by DHSC that sets out the objectives of the National Health Service, the rights and responsibilities of the various parties involved in healthcare within the National Health Service, and the guiding principles which govern the service;
- 3.1.42 **"NHSE Company Management"** means the team within NHSE with responsibility for the management of SCCL;

- 3.1.43 **"NHS Customer"** means a Customer which is a person or body exercising functions, or otherwise providing services under the NHS Act;
- 3.1.44 **"NHS England"** (or **"NHSE"**) means the executive non-departmental public body whose legal name is the NHS Commissioning Board and which is accountable to the DHSC and oversees the budget planning, delivery and day-to-day operation of the commissioning side of the NHS in England as set out in the Health and Social Care Act 2012;
- 3.1.45 **"NHSE Finance"** means the team within NHSE with responsibility for Finance and Financial Management;
- 3.1.46 **"NHS Healthcare"** means for the purpose of this Agreement, healthcare services and/or functions provided for the purposes of the NHS which are taxpayer funded through the NHS;
- 3.1.47 [Not used];
- 3.1.48 [Not used];
- 3.1.49 **"NHS Supply Chain"** means the operational name used to describe the provision of an end to end procurement and delivery service for medical consumables (apart from medicines) and associated goods to end-users, as managed by SCCL on behalf of NHSE in the public interest;
- 3.1.50 [Not used]
- 3.1.51 **"NHS Values"** means the values which are captured in the NHS Constitution, which are designed to be upheld to ensure the best possible care for patients and which are: working together with patients; respect and dignity; commitment to quality care; compassion; improving lives; and everyone counts;
- 3.1.52 **"Non-NHS Healthcare"** means, for the purpose of this Agreement, healthcare services and/or functions which may be insurance-based or privately funded but are not NHS Healthcare, including such services or functions of NHS Customers which are not NHS Healthcare;
- 3.1.53 **"original Act of Entrustment"** has the meaning given to it in clause 2.4;
- 3.1.54 **"Original Services Agreement"** has the meaning given to it in clause 2.6;
- 3.1.55 **"Personal Data"** has the meaning given to it in Section 3(2) of the Data Protection Act 2018 (as amended) in relation to data processed under this Agreement;
- 3.1.56 **"Planned Gain-Share Payment"** means the amounts payable by SCCL to the Category Tower Service Providers calculated on an annual basis in accordance with the applicable gain-share mechanism in SCCL's respective service contracts with the Category Tower Service Providers. The estimated sum of these payments is provided for in SCCL's business plan as revised and approved from time to time in accordance with SCCL's Articles of Association;
- 3.1.57 **"Private Healthcare Entities"** has the meaning given to it in paragraph 3.2 of Schedule 1 to this Agreement;
- 3.1.58 **"Process"**, **"Processing"** and **"Processed"** each has the meaning given to it in the Data Protection Act 2018 (as amended) and in article 4(2) of the UKGDPR;
- 3.1.59 **"Profit"** means for the purpose of this Agreement, any sums realised by SCCL which are over and above the actual costs which SCCL has incurred in respect of providing the Chargeable Activities;

- 3.1.60 **"Social Health and Care"** means, for the purpose of this Agreement, social health and care services and/or functions which may be taxpayer funded but are not NHS Healthcare, including Devolved NHS Healthcare;
- 3.1.61 **"Social Health and Care Entities"** has the meaning given to it in paragraph 3.1 of Schedule 1 to this Agreement;
- 3.1.62 **"Quarter"** for the purpose of this Agreement means each period of 3 consecutive months;
- 3.1.63 **"Quarterly Accountability Meetings"** means meetings held every financial quarter involving senior representatives of NHSE as sponsor organisation, and the CEO and other executive directors of SCCL as agreed between the parties, to discuss SCCL's performance of the Services;
- 3.1.64 **"Relevant Requirements"** shall have the meaning given in clause 20.1.1;
- 3.1.65 **"SCCL"** shall have meaning given to it in clause 1.1.2;
- 3.1.66 **"SCCL Commercially Sensitive Information"** shall have meaning given to it in clause 24.1.2;
- 3.1.67 **"Services"** shall have the meaning given to it in clause 7.2 and shall be as categorised in Schedule 1 (NHS Healthcare Services and Chargeable Activities);
- 3.1.68 **"SoS"** shall have the meaning given to it in clause 2.1;
- 3.1.69 **"SPEI tasks"** shall have the meaning given to it in the MoU;
- 3.1.70 **"SPEIs"** shall have the meaning given to it in clause 7.1;
- 3.1.71 **"Supply Chain Service Providers"** means the Category Tower Service Providers together with the IT service provider and the logistics service provider who respectively provide ICT and logistics services pursuant to contracts with SCCL in order to support the NHS Supply Chain and the FOM and any other service providers procured by SCCL from time to time in order to provide services to SCCL for the same purpose;
- 3.1.72 **"Suppliers"** means the providers of medical consumables, personal protective equipment, devices, associated goods and/or ancillary services that are contracted by the Category Tower Service Providers on behalf of SCCL and the term **"Supplier"** shall be interpreted accordingly;
- 3.1.73 **"Surplus Income"** means any sums realised by SCCL which are over and above the actual costs which SCCL has incurred in respect of the operation and management of the FOM with a reasonable level of profit margin;
- 3.1.74 **"Subcontract ABC Terms"** shall have the meaning given in clause 20.10.1;
- 3.1.75 **"the 80:20 ratio"** shall have the meaning given in clause 7.3;
- 3.1.76 **"Term"** shall mean the duration of this Agreement as set out in clause 5.1;
- 3.1.77 **"Transparency Information"** shall have the meaning given in clause 24.1.1; and
- 3.1.78 **"VAT"** means value added tax as provided for in the UK Value Added Tax Act 1994.

#### Interpretation

- 3.2 Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.

- 3.3 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 3.4 The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
- 3.5 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 3.6 Unless the context otherwise requires, words in the singular shall include the plural and words in the plural shall include the singular.
- 3.7 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 3.8 This Agreement shall be binding on, and endure to the benefit of, the parties to this Agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.
- 3.9 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 3.10 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
- 3.11 A reference to writing or written includes fax and email.
- 3.12 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
- 3.13 A reference to this Agreement or to any other agreement or document referred to in this Agreement is a reference to this Agreement or such other agreement or document as varied or novated (in each case, other than in breach of the provisions of this Agreement) from time to time.
- 3.14 References to clauses and Schedules are to the clauses and Schedules of this Agreement, and references to paragraphs are to paragraphs of the relevant Schedule.
- 3.15 Any words following the terms including, "include", "in particular", "for example" or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

#### **4. LEGAL STATUS OF THIS AGREEMENT**

- 4.1 This Agreement is intended to create a legally-binding contract between NHSE and SCCL and sets out the requirements which SCCL shall comply with in delivering the Services, as part of SCCL's public service obligations, as entrusted in the original Act of Entrustment, pursuant to section 223 of the NHS Act and the SGEI framework in the Commission's Decision 2012/21 and as updated in the Addendum.

#### **5. DURATION**

- 5.1 This Agreement shall be deemed to have commenced from the Effective Date and shall continue, unless terminated earlier, in accordance with clause 28, until 27 March 2029 when it shall terminate automatically without notice.

#### **6. ORDER OF PRECEDENCE OF THE ENTRUSTMENT DOCUMENTS**

- 6.1 The terms of the Funding Letter and the Original Services Agreement have been superseded and replaced by the terms of this Agreement, with effect from the Effective Date.



- 6.2 The provisions of the original Act of Entrustment and the Addendum respectively are hereby incorporated by reference into this Agreement.
- 6.3 If there is an inconsistency between any of the provisions of: (a) the original Act of Entrustment; (b) the Addendum; and (c) this Agreement; the provisions of each of these documents shall prevail in the following descending order of precedence:
- 6.3.1 Addendum; then
  - 6.3.2 Act of Entrustment; then
  - 6.3.3 this Agreement.
- 6.4 If there is an inconsistency between any of the provisions of: (a) the main body of this Agreement and (b) the provisions of the Schedules, the provisions of the main body of this Agreement shall prevail save in respect of Schedule 2 (Payment Provisions). In this regard, where there is any inconsistency between the provisions of the main body of this Agreement and Schedule 3 (Payment Provisions), the provisions of Schedule 3 shall prevail.

## 7. PUBLIC INTEREST SERVICES TO BE PROVIDED BY SCCL

- 7.1 SCCL shall, during the Term in accordance with and subject to the terms and conditions of this Agreement and the terms of the original Act of Entrustment as revised by the Addendum, provide the Services of Public Economic Interest ("**SPEIs**").
- 7.2 For the purposes of this Agreement, "**Services**" shall mean those public service obligations in connection with the operation and administration of the FOM, which have been **entrusted** to SCCL by the SoS in the original Act of Entrustment, as updated by the Addendum. Those services are intended to constitute services of public economic interest within the meaning of Article 365 of the UK-EU Trade and Cooperation Agreement and the UK subsidy control regime. Those services are set out in broad terms in the original Act of Entrustment as updated by the Addendum and may be amended and updated from time to time in accordance with the terms of this Agreement.
- 7.3 It is an express condition of this Agreement that SCCL shall at all times maintain a ratio of above 80:20 between the Services and its overall activities in favour of the Services ("**the 80:20 ratio**") in order to continue to meet the criteria for an in-house management entity of NHSE pursuant to Regulation 12(1) of the Public Contract Regulations 2015 or other public procurement exemptions in Regulation 12(4) and/or 12(7).
- 7.4 The charging arrangements applicable to such Services are set out in Schedule 1 (NHS Healthcare Services and Chargeable Activities).

### Warranties in respect of the Services

- 7.5 SCCL agrees, and warrants, represents and undertakes, that it shall throughout the Term:
- 7.5.1 provide the Services in accordance with Good Industry Practice and in accordance with NHS Values and good value for taxpayers money;
  - 7.5.2 ensure that the Services are fit for any relevant and legitimate purpose expressly or implicitly made known to SCCL by NHSE, or any Customer or end user of the Services;
  - 7.5.3 perform the Services with the highest level of care, skill and diligence in accordance with best practice in relation to the Services including in healthcare product and services procurement;
  - 7.5.4 co-operate with NHSE in all matters relating to the Services and comply with NHSE's reasonable instructions;

- 7.5.5 at all times during the Term maintain all necessary licences and consents required for it to provide the Services;
- 7.5.6 comply with all Applicable Laws in relation to the Services;
- 7.5.7 observe all health and safety rules and regulations and any other reasonable security requirements that apply at any of NHSE's premises from time to time (and NHSE reserves the right to refuse any of SCCL's personnel involved in the provision of the Services access to NHSE's premises, which shall in any event only be given to the extent necessary for the performance of the Services);
- 7.5.8 hold all documentation, information and data pertaining to the Services in safe custody at its own risk and maintain such documentation, information and data in good condition until returned to NHSE (or its nominee), and not dispose of or use the documentation, information and data other than in accordance with NHSE's written instructions or authorisations; and
- 7.5.9 comply with the above requirements and that it has been doing so since the Effective Date.

## 8. CHARGEABLE ACTIVITIES

- 8.1 SCCL shall be permitted to carry out, and generate revenues and Profits, from social and/or economic activities which are provided to and carried out in respect of Chargeable Entities ("**Chargeable Activities**") upon the following conditions:
  - 8.1.1 SCCL shall at all times observe the condition in clause 7.3 above so that the Chargeable Activities are limited to 19% of its overall activities;
  - 8.1.2 SCCL shall at all times keep its financial and other accounting for the Chargeable Activities separate from that of the Services provided for use in NHS Healthcare;
  - 8.1.3 SCCL shall at all times keep separate its cost allocations in relation to the Services provided for use in NHS Healthcare from its cost allocations in relation to the Chargeable Activities, and shall at no time cross-subsidise the costs in respect of the Services provided for use in NHS Healthcare and the Chargeable Activities;
  - 8.1.4 Any charges made by SCCL in respect of Chargeable Activities shall be cost orientated and applied in accordance with the methodology referred to under clause 11.1.5 below so that they reflect reasonable costs incurred by SCCL or anticipated to be incurred with a reasonable return on such costs;
  - 8.1.5 SCCL shall keep and shall make these available to NHSE as requested by NHSE from time to time during the Term and for a period of 6 years following the expiration or termination of this Agreement:
    - (a) a record of the time spent or turnover generated in delivering the Chargeable Activities, which shall also contain a breakdown of how this was allocated for the purposes of maintaining the 80:20 ratio; and
    - (b) accurate financial accounting records in respect of the Chargeable Activities;
  - 8.1.6 SCCL shall provide any further information reasonably required by NHSE in respect of any FOM arrangement that it may have entered into in connection with the Chargeable Activities, as such may be required by NHSE from time to time;
  - 8.1.7 SCCL shall work with NHSE to review any future supply of goods, devices, associated goods and ancillary services in respect of the Chargeable Activities within 12 months of the Effective Date, as part of the ongoing Annual Review and retrospective adjustment process (as defined and set out in sections F and G of the Addendum);

- 8.1.8 SCCL shall, commencing from 1 October 2021, on the date falling one month after the expiry of each Quarter thereafter, provide to NHSE a report of its income and expenditure for providing any goods and services in connection with the Chargeable Activities. This report shall specifically show the net income received from the provision of such goods and services and shall be in a format agreed with NHSE. The contents of the report shall include, but not be limited to, the quarterly DHSC Group Financial Consolidation Schedules; and
- 8.1.9 SCCL shall also provide ongoing details of its supplier rebates and management fees income (related to the Chargeable Activities) on a monthly (in arrears) basis to NHSE and will work with NHSE to determine and agree SCCL's future policy in connection with any applicable supplier rebates and/or management charges income,

and, for the avoidance of doubt, all reports referred to in this clause 8 shall be in addition to any existing financial information reporting requirements falling on SCCL outside of this Agreement.

## **9. KEY PERFORMANCE INDICATORS**

- 9.1 The KPIs applicable to SCCL's discharge of its public service obligations and performance of the Services are set out Section D of the original Act of Entrustment (as amended from time to time), updated by the Addendum, and stipulated in Schedule 2 (KPIs) to this Agreement.
- 9.2 Without prejudice to the SoS's powers to entrust SCCL with public service tasks and KPIs (and revise the same) in the original Act of Entrustment, as updated by the Addendum, it is agreed the KPIs will be further developed and agreed between SCCL and NHSE on an iterative basis as part of the annual approval process by NHSE of SCCL's Business Plan and Annual Budget as defined and set out in SCCL's Articles of Association. SCCL's performance against the KPIs shall be discussed at the Monthly Finance Meetings held pursuant to clause 12.1.1.

## **10. KEY REGULATORY OBJECTIVES RELATING TO THE SERVICES**

- 10.1 The key regulatory objectives applicable to SCCL's discharge of its public service obligations and performance of the Services are set out in Sections B and C of the original Act of Entrustment, the Addendum and are consolidated in Schedule 2 (Key Regulatory Objectives and KPIs) to this Agreement.

## **11. ACCOUNTING AND COST ORIENTATION**

- 11.1 SCCL shall ensure that, in discharging its public service obligations and performing the Services:
  - 11.1.1 it shall allocate its costs fairly and separately in respect of each element of its overall activities, so that it maintains clear and separate accounting for any and all costs allocated and incurred, and any revenues generated from Services provided for use in NHS Healthcare and each of the Chargeable Activities;
  - 11.1.2 it shall allocate costs separately, and produce separate accounts, for the Services provided for use in NHS Healthcare and the Chargeable Activities;
  - 11.1.3 its costs are allocated and reflect the efficiently incurred costs of a typically well-run organisation;
  - 11.1.4 it does not charge any margin in respect of Services provided to NHS Customers for use in NHS Healthcare, except in relation to the provision of capital equipment in respect of which SCCL will charge a management fee; and
  - 11.1.5 any Profits generated from Chargeable Activities shall be kept to reasonable market levels, such levels to be assessed and, where necessary, reconciled pursuant to an agreed methodology between the parties within three (3) months from the Effective Date.

## **Return or Re-assignment of Surplus Income**

- 11.2 If SCCL realises any Surplus Income, it is agreed between the parties that, consistent with the terms of the MoU, any or all such Surplus Income shall be re-assigned to the FOM through redistribution back to the NHS healthcare system, unless the parties agree another appropriate mechanism. Such other mechanism may comprise:
- 11.2.1 offsetting such Surplus Income against future annual Fees;
  - 11.2.2 being designated and re-assigned as funding to further support and develop the operation of the Future Operating Model; and/or
  - 11.2.3 any other appropriate redistribution mechanism that SCCL and NHSE may agree from time to time.
- 11.3 If SCCL proposes another mechanism it shall present its case to NHSE which, following liaison with SCCL, shall make a decision on the mechanism (or combination of different mechanisms) which it considers most appropriate in the circumstances.

## **12. GOVERNANCE AND REPORTING REQUIREMENTS**

### **General**

- 12.1 NHSE and SCCL will establish and maintain effective working relationships between the two organisations. These relationships will operate at a number of levels through a number of meetings, including but not limited to the following:
- 12.1.1 Monthly Finance Meetings with the NHSE Company Management;
  - 12.1.2 Monthly Operational Meetings between NHSE and SCCL representatives to discuss and review:
    - (a) the overall joint priorities as agreed with NHSE Company Management including an action and resourcing plan to address the key issues; and
    - (b) the overall performance of SCCL as measured against the KPIs and regulatory objectives set out in clauses 9 and 10;
  - 12.1.3 Quarterly Accountability Meetings (as defined) to include:
    - (a) review and monitoring of SCCL's profitability levels which must all times be consistent with the limitations and requirements imposed on SCCL under this Agreement including under clauses 8, 11 (including, in particular, 11.1.5) and the overriding principles in paragraph 1 of Schedule 3 (Payment Provisions); and
    - (b) review and monitoring of any Surplus Income realised by SCCL and approving (or not) SCCL's specific implementation proposals for the reassignment of such Surplus Income to the NHS Healthcare system or in connection with another mechanism proposed by SCCL and agreed by NHSE in accordance with clause 11.
- 12.2 SCCL shall notify NHSE in writing about any impending contract terminations or contractual issues with regard to the Supply Chain Service Providers and any material issues and/or disputes in respect of Customers or Suppliers.
- 12.3 SCCL shall retain all accounting records in relation to this Agreement and ratio of activities and shall make them available to NHSE on request during the Term and for a period of 6 years from expiry or termination of this Agreement.

## **NHS Healthcare Services**

- 12.4 SCCL will provide ongoing details of its supplier rebates and management fees income (related to the operations of the Future Operating Model in respect of Services provided for use in NHS Healthcare and, in connection to management fees income, subject to paragraph 11.1.4) on a monthly (in arrears) basis to NHSE Company Management. It will also work with NHSE Company Management to determine and agree SCCL's future policy in connection with such supplier rebates and income from Fees.
- 12.5 The Fees realised by SCCL shall be ring-fenced and used only for the purpose of operating the Future Operating Model in respect of Services provided for use in NHS Healthcare only. Any Surplus Income derived by SCCL from the Fees in excess of the efficiently incurred costs of providing the Services or otherwise incompatible with the methodology mentioned in clause 11.1.5 shall be re-assigned in the manner set out in clauses 11.2 and 11.3 above.

## **Chargeable Activities**

- 12.6 In addition to the provisions of clause 8 (Chargeable Activities) which set out the governance and accounting that shall be applicable to the Chargeable Activities under this Agreement, the income received from the Chargeable Activities shall be used only for the purpose of operating the Future Operating Model and any Surplus Income derived from the Chargeable Activities shall be reassigned in the manner set out in clauses 11.2 and 11.3 above.

## **13. CHANGE CONTROL**

- 13.1 Either party may propose changes to the scope or execution of the Services, but no proposed changes shall come into effect until a relevant Change Order has been signed by both parties. A "**Change Order**" shall be a document setting out the proposed changes and the effect those changes will have on the Services and/or any of the terms and conditions of this Agreement.
- 13.2 If NHSE wishes to make a change to the scope or execution of the Services, including on regulatory conditions that apply to such Services:
- 13.2.1 it shall notify SCCL providing as much detail as is reasonably necessary to enable SCCL to prepare the draft Change Order; and
- 13.2.2 SCCL shall, within ten Business Days of receiving NHSE's notification given pursuant to clause 13.2.1, provide a draft Change Order to NHSE.
- 13.3 If SCCL wishes to make a change to scope or execution of the Services, it shall provide a draft Change Order to NHSE and NHSE shall respond within a reasonable time.
- 13.4 If SCCL submits a draft Change Order in order to comply with any applicable safety or regulatory requirements and such changes do not affect the nature, scope of, or charges for the Services, NHSE shall not unreasonably withhold or delay consent to it and shall in any case use reasonable endeavours to respond within ten Business Days of receiving SCCL's draft Change Order.
- 13.5 If the parties:
- 13.5.1 agree to a Change Order, they shall sign it and that Change Order shall amend this Agreement; or
- 13.5.2 are unable to agree a Change Order, either party may require the disagreement to be dealt with in accordance with clause 42.
- 13.6 No Change Order shall be permitted if it renders the Agreement or the relationship between the parties materially different in character from the one initially concluded or changes the fundamental nature of the Agreement (including the 80:20 ratio), the identity of the entity performing the Services or extends the scope of Services under the Agreement to a significant extent.

- 13.7 NHSE shall notify DHSC in writing when any amendments to the SLA are made under this clause 13.

#### **14. COOPERATION AND REVIEW**

- 14.1 SCCL hereby consents to NHSE sharing with DHSC/SoS all relevant reporting and accounting information made available to NHSE pursuant to this Agreement.
- 14.2 NHSE and SCCL shall cooperate with and provide assistance to each other in the event of any investigation by the CMA/European Commission or in connection with any litigation proceedings relating to the operation and/or funding of the FOM, including but not limited to the provision of data and information, preparation of witness evidence and testimony and compliance with any orders of Court.
- 14.3 SCCL will cooperate with NHSE and/or their relevant representatives (as appropriate) on the Board in order to provide all information reasonably requested and/or respond to any requests for clarification made by them, and in order to facilitate the regular periodic reviews of the operation of the FOM.

#### **15. COMPETITION AND FREEDOM OF CHOICE**

##### **Ensuring undistorted competition and freedom of choice**

- 15.1 SCCL shall ensure:
- 15.1.1 the application of the principle of open and non-discriminatory access by Supply Chain Service Providers, Customers to the NHS Supply Chain and the principle of non-discrimination as regards their respective contractual terms of engagement;
  - 15.1.2 the products in the catalogues held by the Category Tower Service Providers from which Customers make their selection of what they would like to procure are the result of open, fair competitive tender exercises amongst Suppliers of the products;
  - 15.1.3 unless otherwise permitted under the law, contracts held by the Supply Chain Service Providers shall not exceed a duration of 5 years and are re-let through competitive re-tender without the possibility of tacit renewal beyond any maximum duration period for each such contract (inclusive of potential extension periods stated in the contracts);
  - 15.1.4 objective criteria shall be applied to the review of contracts as to ensure best value for money if renewed within the 5-year duration referred to in clause 15.1.3 above and re-let if not;
  - 15.1.5 Customers shall remain free to exercise their freedom of choice between any suppliers (and can select their choice of either products offered by Suppliers through Category Tower Service Providers or from other sources on the basis of best value for money); and
  - 15.1.6 no appreciable restrictions are put in place regarding Customers' choice of supplier.

##### **Principles of non-discrimination and transparency**

- 15.2 SCCL shall ensure:
- 15.2.1 it applies centralised procurement to ensure that all Customers and their patients are able to benefit from cost savings generated from economies of scale, distribution efficiencies and product rationalisation;
  - 15.2.2 all Customers receive equal treatment in terms of access to the FOM;

- 15.2.3 that in managing the NHS Supply Chain and administering the FOM, there is no appreciable distortion of competition between the private sector and the NHS or other taxpayer funded sector;
  - 15.2.4 that in managing the NHS Supply Chain and administering the FOM, precise mechanics to ensure equivalence of treatment of Customers in both private and NHS or other taxpayer sectors are under active consideration and implementation; and
  - 15.2.5 it observes principles of fairness, transparency and good administration in its dealings with Supply Chain Service Providers and Customers.
- 15.3 [Not used].

#### **Public service aims**

- 15.4 SCCL shall ensure and use best endeavours to realise:
- 15.4.1 the overall aim of improving the quality and efficiency of NHS services for the benefit of all members of society, regardless of their contribution to the NHS system or their state of health in line with the solidarity principle;
  - 15.4.2 the aim of making NHS-funded products more efficient to provide savings for NHS Customers which the NHS Customers can in turn apply in other areas to support and improve their services;
  - 15.4.3 reasonable cost allocation between the Services provided for use in NHS Healthcare and Chargeable Activities and separate cost accounting to ensure transparency and prevent cross subsidy.
  - 15.4.4 the obligations and principles set out in Article 366 of the EU-UK Trade and Cooperation Agreement or under the UK's subsidy control regime pursuant to any enactment, including without limitation ensuring best value for taxpayers' money and protection of the Great Britain internal market;
  - 15.4.5 compliance with the 80:20 ratio.

### **16. REMEDIES**

- 16.1 NHSE shall be entitled to retain and/or recover from SCCL any Fees (or portion thereof) which is payable or has been paid by NHSE in respect of any Services that have not been provided including elements of the Services that are no longer required by NHSE, or which do not meet the requisite service levels or other regulatory requirements, as set out in the terms and conditions of this Agreement.
- 16.2 If SCCL fails to perform the Services in accordance with the terms and conditions of this Agreement then, without prejudice to any other rights or remedies NHSE may have under this Agreement or otherwise, NHSE may require SCCL by notice in writing (which notice shall specify details of the default), at SCCL's own expense, to remedy any default or to perform or re-perform (where such re-performance is possible) any non-conforming Services as soon as reasonably practicable and in any event within 3 days or any other period as agreed by NHSE and, where so notified, SCCL shall do so.

### **17. FEES AND PAYMENT**

- 17.1 In determining the Fees payable to SCCL for providing the Services, the provisions of Schedule 3 (Payment Provisions) shall apply. SCCL shall issue to NHSE for the provision of the Services an invoice monthly in arrears.
- 17.2 [REDACTED]

## **18. AUDIT**

- 18.1 SCCL shall allow NHSE (or its professional advisers) to access SCCL's premises, personnel, systems and relevant records (including SCCL's own audit reports) to verify that any sums received from NHSE under this Agreement are reasonable, accurate and comply with the requirements of this Agreement.
- 18.2 Subject to NHSE's obligations of confidentiality set out in this Agreement, SCCL shall provide NHSE (and its professional advisers) with all reasonable co-operation, access and assistance in relation to each audit.
- 18.3 NHSE shall provide at least 2 Business Days' notice of its intention to conduct an audit and any audit shall be conducted between 9.00 am and 5.00 pm on a Business Day.
- 18.4 NHSE and its professional advisers shall have the right to take copies of any records which they reasonably require and remove such copies and SCCL shall provide the necessary facilities to assist in copying.

## **19. COMPLIANCE WITH LAWS AND ETHICAL STANDARDS**

- 19.1 In performing its obligations under this Agreement, SCCL shall comply with all Applicable Laws, including competition law to the extent that it does not impede the discharge of its public service obligations.
- 19.2 SCCL will agree with NHSE and adopt clear and consistent policies and procedures to define the way in which SCCL operates in order to ensure a clear and consistent approach by SCCL in respect of how it works with Customers and Supply Chain Service Providers.
- 19.3 The policy documentation referred to in clause 19.2 shall also include details of NHSE requirements in respect of reporting of information, the commissioning of legal and other professional advice and other standard governance provisions.

### **Sustainable Development**

- 19.4 In complying with all Applicable Laws under clause 19.1, SCCL shall:
  - 19.4.1 comply in all material respects with all applicable environmental, social and labour Applicable Law requirements in force from time to time in relation to the Services; and
  - 19.4.2 agrees to the sustainability objectives and KPIs listed in Schedule 2 of this Agreement.
- 19.5 In addition to clause 19.4, NHSE and SCCL shall co-operate in order to discuss and agree, as soon as reasonably possible, the extent to which SCCL is subject to any additional sustainability policy requirements and guidelines which may be relevant to SCCL, its Services and impact from SCCL's Supply Chain Service Providers and to thereafter enact, if relevant, an implementation plan thereof (including any changes necessary to this Agreement).
- 19.6 SCCL shall meet reasonable requests by NHSE for information evidencing SCCL's compliance with clause 19.4.

## **20. ANTI-BRIBERY AND CORRUPTION**

- 20.1 SCCL shall and shall procure that the Supply Chain Service Providers shall:
  - 20.1.1 comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption (the "**Relevant Requirements**"), including but not limited to the Bribery Act 2010;



- 20.1.2 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
  - 20.1.3 not do, or omit to do, any act that will cause or lead NHSE to be in breach of any of the Relevant Requirements;
  - 20.1.4 promptly report to NHSE any request or demand for any undue financial or other advantage of any kind received by SCCL;
  - 20.1.5 have, and maintain in place throughout the term of this agreement, its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements and clause 20.1.2, and will enforce them where appropriate; and
  - 20.1.6 if requested, provide NHSE with any reasonable assistance, at NHSE's reasonable cost, to enable NHSE to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with any of the Relevant Requirements.
- 20.2 SCCL shall once in each period of 12 consecutive months from the Effective Date and throughout the Term, certify to the Commercial Directorate of NHSE in writing (signed by an officer of SCCL) compliance with this clause 20 by SCCL and each of the Supply Chain Service Providers respectively and provide such supporting evidence of compliance as NHSE may reasonably request. Such certification may be carried out in respect of one or more of any of these entities (SCCL and the Supply Chain Service Providers) at any given time during each period of 12 consecutive months provided that certification is given in respect of all of the entities by the end of each period of 12 consecutive months.
- 20.3 SCCL shall indemnify NHSE against any losses, liabilities, damages, costs (including but not limited to legal fees) and expenses incurred by, or awarded against, NHSE as a result of any breach of this clause 20 by SCCL.
- 20.4 SCCL shall keep at its normal place of business detailed, accurate and up to date records and books of account showing all payments made by SCCL in connection with this Agreement and the steps taken by SCCL to comply with its obligations under this clause 20 during the Term. SCCL shall ensure that such records and books of accounts are sufficient to enable NHSE to verify SCCL's compliance with its obligations under this clause 20.
- 20.5 SCCL shall permit NHSE and its third party representatives, on reasonable notice during normal business hours, but without notice in case of any reasonably suspected breach of this clause 20, to access and take copies of SCCL's records and any other information held at SCCL's premises and to meet with SCCL's personnel to audit SCCL's compliance with its obligations under this clause 20. Such audit rights shall continue for three years after termination of this Agreement. SCCL shall give all necessary assistance to the conduct of such audits.
- 20.6 SCCL warrants and represents that:
- 20.6.1 neither SCCL nor any of its officers or employees:
    - (a) has been convicted of any offence involving bribery or corruption, fraud or dishonesty;
    - (b) having made reasonable enquiries, to the best of its knowledge, has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence under the Relevant Requirements; or
    - (c) has been or is listed by any government agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in

government procurement programmes or other government contracts including without limitation, any exclusion under regulation 57 of the Public Contracts Regulations 2015 (SI 2015/102) or regulation 80 of the Utilities Contracts Regulations 2016 (SI 2016/274);

- 20.6.2 none of the officers or employees of SCCL or any person associated with it or any other person who is performing services in connection with this Agreement is a foreign public official; and
- 20.6.3 none of the officers or employees of SCCL or any person associated with it or any other person who is performing services in connection with this Agreement has any legal or beneficial interest in any payments made by SCCL to its suppliers save that in the case of persons performing services in connection with this Agreement, such legal or beneficial interest shall not include a legal or beneficial interest in payments made to such persons by SCCL as remuneration due and payable for goods and/or services rendered to SCCL.
- 20.7 SCCL shall promptly notify NHSE if, at any time during the Term, its circumstances, knowledge or awareness changes such that it would not be able to repeat the warranties set out in this clause 20 at the relevant time.
- 20.8 If NHSE terminates this Agreement for breach of this clause 20, SCCL shall not be entitled to claim compensation or any further remuneration, regardless of any activities or agreements with additional third parties entered into before termination.
- 20.9 Regardless of any other provision in this Agreement, NHSE shall not be obliged to do, or omit to do, any act which would, in its reasonable opinion, put it in breach of any of the Relevant Requirements.
- 20.10 Any subcontract entered into by SCCL on or after the Effective Date in order to subcontract its obligations under this Agreement shall be recorded in writing and shall:
  - 20.10.1 impose on and secure from the relevant subcontractor obligations, liabilities, undertakings, warranties, acknowledgements and grants of rights equivalent to those imposed on and secured from SCCL in this clause 20 (the “**Subcontract ABC Terms**”);
  - 20.10.2 include an undertaking from the relevant subcontractor in favour of NHSE (directly enforceable by NHSE under the Contracts (Rights of Third Parties) Act 1999) not to enter into any further subcontract with any third party;
  - 20.10.3 include provisions, directly enforceable by NHSE under the Contracts (Rights of Third Parties) Act 1999, granting NHSE:
    - (a) the same direct access to the premises, records, information and personnel of the relevant subcontractor as NHSE has to the premises, records, information and personnel of SCCL;
    - (b) the same auditing rights in respect of the relevant subcontractor’s compliance with the Subcontract ABC Terms as NHSE has regarding SCCL’s compliance with this clause 20; and
    - (c) include provisions allowing termination of the relevant subcontract by SCCL for a breach of the Subcontract ABC Terms and a provision for automatic termination of the relevant subcontract in the event of, and at the same time as, the termination of this Agreement.
- 20.11 Notwithstanding any of the provisions of this clause 20, SCCL shall:

- 20.11.1 establish, maintain and enforce and require that the Supply Chain Service Providers establish, maintain and enforce policies and procedures which are adequate to ensure compliance with this clause 20 and prevent a breach of this clause 20;
- 20.11.2 notify NHSE in the case of any such breach; and
- 20.11.3 if any Supply Chain Service Provider fails to perform or observe any of the terms of this clause 20, and if requested by NHSE, immediately give the relevant Supply Chain Service Provider notice, specifying the breach complained of, and:
  - (a) where the breach is not capable of remedy, terminate the relevant contract with the Supply Chain Service Provider immediately; or
  - (b) where the breach is capable of remedy, give notice that the contract with the Supply Chain Service Provider is to terminate thirty days from the date of the notice being given unless the Supply Chain Service Provider has remedied the breach within that period.
- 20.12 For the purpose of this clause 20 the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act, and section 8 of that Act respectively and, for the purpose of this clause 20, a person associated with SCCL includes but is not limited to any subcontractor.

## **21. RISK REGISTER AND BUSINESS CONTINUITY**

- 21.1 SCCL shall maintain a risk register and business continuity plan, reflecting best practice in the healthcare product and services procurement industry and meeting NHSE's reasonable requirements as communicated from time-to-time. SCCL shall make such risk register and business continuity plan available to the NHSE (and its professional advisers) on request.

## **22. CONFIDENTIALITY**

- 22.1 Each party undertakes that it shall not at any time during this Agreement and for a period of 5 years after termination or expiry of this Agreement disclose to any person any confidential information concerning the business, affairs, customer, clients or suppliers of the other party except as permitted by clauses 22.2 and 22.3.
- 22.2 Each party may disclose the other party's confidential information:
  - 22.2.1 to its employees, officers, representatives or advisers, and in NHSE's case to DHSC/SoS (including pursuant to clause 14) who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this Agreement provided that each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this clause 21; and
  - 22.2.2 as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- 22.3 NHSE, SoS and DHSC may disclose the confidential information of SCCL in accordance with clauses 23 and 24.
- 22.4 SCCL shall only use NHSE's confidential information to exercise its rights and perform its obligations under or in connection with this Agreement.

## **23. FREEDOM OF INFORMATION ETC.**

- 23.1 NHSE, SoS, DHSC and SCCL will respectively from time to time receive official correspondence, including but not limited to Parliamentary Questions, Freedom of Information Requests, enquiries

of the National Audit Office or other authority with statutory audit or investigatory powers, legal proceedings and disclosure applications and/or requests for briefing for ministers' purposes and will need each other's cooperation in that regard. SCCL shall co-operate fully with NHSE and DHSC (as applicable) to produce the information required for these in a timely manner so as to enable the required deadlines (statutory and non-statutory) and quality standards to be met whilst at the same time protecting any confidential or sensitive materials contained therein.

23.2 NHSE, SoS and DHSC may disclose the confidential information of SCCL:

- 23.2.1 on a confidential basis to any central government body for any proper purpose of NHSE or of the relevant central government body (which shall include disclosure to the Cabinet Office and/or HM Treasury for the purpose of ensuring effective cross-Government procurement processes, including value for money and related purposes);
- 23.2.2 to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
- 23.2.3 to the extent that NHSE (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
- 23.2.4 on a confidential basis to a professional adviser, consultant or other person engaged by NHSE (including benchmarking organisation) for any purpose relating to or connected with this Agreement;
- 23.2.5 on a confidential basis for the purpose of the exercise of its rights under this Agreement;  
or
- 23.2.6 on a confidential basis to a proposed body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement.

23.3 For the purposes of clause 23.2, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on NHSE under clause 22.

23.4 Before sharing any information under this clause 23, NHSE or DHSC (as the case may be) may redact the information. NHSE or DHSC shall discuss with SCCL any proposal to redact or not to redact information but NHSE or DHSC shall make the final decision as to whether to redact information or not.

23.5 NHSE and DHSC (as the case may be) shall not be in breach of clause 22 where it can show that any disclosure of information is made solely and to the extent necessary to comply with the Freedom of Information Act 2000 (the "**FOIA**") or the Environmental Information Regulations 2004 (the "**EIR**"). To the extent permitted by the time for compliance under the FOIA or the EIR, NHSE or DHSC shall consult SCCL where NHSE or DHSC is considering the disclosure of information under the FOIA or the EIR and, in any event, shall provide prior notification to SCCL of any decision to disclose SCCL's confidential information. SCCL acknowledges and accepts that its representations on disclosure during consultation may not be determinative and that the decision whether to disclose information in order to comply with the FOIA or the EIR is a matter in which NHSE or DHSC shall exercise its own discretion, subject always to the provisions of the FOIA or the EIR. For the avoidance of doubt, nothing in this clause 23 shall affect SCCL's rights at law.

23.6 Nothing in this clause 23 shall affect the parties' obligations of confidentiality where information is disclosed orally in confidence.

## 24. TRANSPARENCY

24.1 For the purpose of this clause 24, the expressions:

- 24.1.1 **“Transparency Information”** shall mean the content of this Agreement in its entirety, including from time to time agreed changes to this Agreement, and details of any payments made by NHSE to SCCL under this Agreement.
- 24.1.2 **“SCCL Commercially Sensitive Information”** shall mean such information that the parties agree in writing from time to time shall be deemed SCCL Commercially Sensitive Information.
- 24.2 Notwithstanding any other term of this Agreement, including clause 22, SCCL understands that NHSE may publish the Transparency Information to the general public. SCCL shall assist and cooperate with NHSE to enable NHSE to publish the Transparency Information.
- 24.3 Before publishing the Transparency Information to the general public in accordance with clause 24.2, NHSE shall redact any information that would be exempt from disclosure if it was the subject of a request for information under the FOIA and the EIR, including the SCCL Commercially Sensitive Information.
- 24.4 NHSE shall consult with SCCL before redacting any information from the Transparency Information in accordance with clause 24.3. SCCL acknowledges and accepts that its representations on redactions during consultation may not be determinative and that the decision whether to redact information is a matter in which NHSE shall exercise its own discretion, subject always to the provisions of the FOIA and the EIR.
- 24.5 For the avoidance of doubt, nothing in this clause 24 shall affect SCCL's rights at law.

## **25. DATA PROTECTION**

- 25.1 Where applicable during the course of the Term, the parties shall comply with their respective obligations under Data Protection Legislation and where needed, shall fully cooperate with each other to facilitate such compliance.

## **26. CYBER SECURITY**

- 26.1 Where relevant SCCL shall comply with any policies notified by NHSE in respect of Cyber Security.

## **27. INTELLECTUAL PROPERTY**

- 27.1 Any Intellectual Property Rights in any Deliverables shall vest in and be the absolute property of NHSE. SCCL assigns with full title guarantee and free from all third-party rights any and all Intellectual Property Rights in any Deliverables to NHSE and SCCL shall (at its own cost) do all necessary acts to vest the Intellectual Property Rights in any Deliverables in NHSE, including, without limitation, executing or procuring the execution of documents. SCCL may only use the Intellectual Property Rights in Deliverables as may be necessary for the purposes of performing any of its obligations under this Agreement.
- 27.2 SCCL shall indemnify NHSE against any and all liability, loss, claims, costs, expenses, damages, payments and royalties of any kind whatsoever incurred by NHSE as a result of or in connection with any claim or allegation that the Intellectual Property Rights owned or controlled by a third party are infringed by the use of the Deliverables.
- 27.3 Save as otherwise agreed, nothing in this Agreement shall give or be deemed to give SCCL during or after the term of this Agreement any right, title or interest in any of NHSE's trademarks, service marks or trade names.

## **28. TERMINATION**

### **Termination linked to Act of Entrustment**

- 28.1 This Agreement shall automatically terminate with immediate effect if the original Act of Entrustment or the Addendum is revoked or otherwise terminated.

### **Termination for Force Majeure**

- 28.2 NHSE may terminate this Agreement in accordance with clause 33.5.

### **Termination for Default**

- 28.3 Without affecting any other right or remedy available to it, NHSE may terminate this Agreement with immediate effect by giving written notice to SCCL if:

- 28.3.1 SCCL fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than 10 Business Days after being notified to make such payment;
- 28.3.2 SCCL commits a Material Breach of any term of this Agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 20 Business Days after being notified to do so;
- 28.3.3 SCCL repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement;
- 28.3.4 SCCL suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, in either case, within the meaning of section 268 of the Insolvency Act 1986;
- 28.3.5 SCCL commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors;
- 28.3.6 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of SCCL;
- 28.3.7 an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or if an administrator is appointed, over SCCL;
- 28.3.8 the holder of a qualifying floating charge over the assets of SCCL has become entitled to appoint or has appointed an administrative receiver;
- 28.3.9 a person becomes entitled to appoint a receiver over all or any of the assets of SCCL or a receiver is appointed over all or any of the assets of SCCL;
- 28.3.10 a creditor or encumbrancer of SCCL attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 10 Business Days;
- 28.3.11 any event occurs, or proceeding is taken, with respect to SCCL in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clauses 28.3.4 to 28.3.10 (inclusive); and
- 28.3.12 SCCL suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

## **29. CONSEQUENCES OF TERMINATION**

- 29.1 On termination or expiry of this Agreement:

- 29.1.1 SCCL shall immediately deliver documentation, information and data pertaining to the Services to NHSE as specifically required by NHSE, and if SCCL fails to do so then NHSE (and its representatives) may enter SCCL's premises and take possession of such documentation, information and data pertaining to the Services;
- 29.1.2 until they have been delivered or returned, and for a period of 6 years from expiry or termination of this Agreement, SCCL shall be solely responsible for the safe keeping of all documentation, information and data pertaining to the Services in its possession and will not use such documentation, information and data pertaining to the Services for any purpose not connected with this Agreement; and
- 29.1.3 SCCL shall, if so requested by NHSE, provide all assistance reasonably required by NHSE to facilitate the smooth transition of the Services to NHSE or any replacement supplier appointed by NHSE.
- 29.2 On termination of this Agreement under clause 28.3, SCCL shall on demand repay to NHSE such portion of Fees that have been paid to SCCL but remain unspent by SCCL at the time of termination. SCCL shall not make any material change to the manner in which it distributes or spends the Fees in the period between the date of the notice and termination.
- 29.3 The following clauses shall continue in force following the expiry or termination of this Agreement: 6, 20, 21, 22, 23, 24, 25, 29, 31, 43, 44 and 45.
- 29.4 Termination or expiry of this Agreement shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination or expiry, including the right to claim damages in respect of any breach of the Agreement which existed at or before the date of termination or expiry.

### **30. DESIGNATED LEADS**

- 30.1 Each party to this Agreement shall identify a designated lead individual who shall be a member of that party's senior management team.
- 30.2 For NHSE, the designated lead at the Effective Date shall be the Director of Procurement Transformation and Commercial Delivery.
- 30.3 For SCCL, the designated lead at the Effective Date shall be the Director of Governance, Assurance and Legal SCCL.
- 30.4 The designated leads for this Agreement shall be responsible for overseeing this Agreement and the effective working arrangements between the parties. The designated leads shall also act as a point of escalation for significant issues between the parties which have not been resolved through normal channels.
- 30.5 Either party may change the identity of their designated lead at any time by giving notice to the other party (to be given in accordance with clause 40).

### **31. LIABILITY AND INDEMNIFICATION**

- 31.1 Nothing in this Agreement shall limit or exclude either party's liability for:
  - 31.1.1 death or personal injury caused by its negligence, or the negligence of its personnel, agents or subcontractors;
  - 31.1.2 fraud or fraudulent misrepresentation; or
  - 31.1.3 breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession) any other liability which cannot be limited or excluded by applicable law.

- 31.2 Subject to clause 31.1, NHSE shall have no liability to SCCL for any indirect or consequential loss arising under or in connection with this Agreement.
- 31.3 Subject to clauses 31.1, 31.2 and 31.4, NHSE's total aggregate liability under or in connection with this Agreement (including all payments to be made to SCCL under this Agreement, whether in relation to any one event or any series of events and whether in contract, tort, under any indemnity or otherwise) shall be limited to:
- 31.3.1 for the period from the Effective Date to 31 March 2022, the amount of Fees payable for that period, calculated in accordance with paragraph 1.13 of Schedule 3; and
  - 31.3.2 for each subsequent year from 1 April 2022, the amount of the Fees payable for that year, as stipulated by NHSE in accordance with paragraph 1.13 of Schedule 3.
- 31.4 SCCL shall indemnify NHSE, without limit, against any and all liability, loss, claims, costs, expenses, damages, payments and royalties of any kind whatsoever claimed as a result of or in connection with a third-party claim arising in respect of SCCL's Chargeable Activities.
- 31.5 SCCL shall indemnify NHSE, to the limit of:
- 31.5.1 for the period from the Effective Date to March 2022, the amount of Fees payable for that period, calculated in accordance with paragraph 1.13 of Schedule 3; and
  - 31.5.2 for each subsequent year from 1 April 2022 the amount of the Fees payable by NHSE for that year, as stipulated by NHSE in accordance with paragraph 1.13 of Schedule 3,
- against any and all liability, loss, claims, costs, expenses, damages, payments and royalties of any kind whatsoever incurred by NHSE as a result of or in connection with any third party claim arising from a breach of the terms and conditions of this Agreement by SCCL.
- 31.6 Without prejudice to any other rights or remedies that NHSE may have, SCCL acknowledges and agrees that damages alone would not be an adequate remedy for any breach of the terms of this Agreement by SCCL. Accordingly, NHSE shall be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of the terms of this Agreement.

## **32. INSURANCE**

- 32.1 During the Term and for a period of two years after the expiry or termination of this Agreement, SCCL shall maintain in force, with a reputable insurance company, professional indemnity insurance at an amount [REDACTED] to cover the liabilities that may arise under or in connection with this Agreement and shall produce to NHSE on request both the insurance certificate giving details of cover and the receipt for the current year's premium in respect of each insurance.

## **33. FORCE MAJEURE**

- 33.1 **"Force Majeure Event"** means any circumstance not within a party's reasonable control including, without limitation:
- 33.1.1 acts of God, flood, drought, earthquake or other natural disaster;
  - 33.1.2 epidemic or pandemic;
  - 33.1.3 terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
  - 33.1.4 nuclear, chemical or biological contamination or sonic boom;



- 33.1.5 any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition;
  - 33.1.6 collapse of buildings, fire, explosion or accident; and
  - 33.1.7 interruption or failure of utility service.
- 33.2 Provided it has complied with clause 33.4, if a party is prevented, hindered or delayed in or from performing any of its obligations under this Agreement by a Force Majeure Event (the “**Affected Party**”), the Affected Party shall not be in breach of this Agreement or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.
- 33.3 The corresponding obligations of the other party will be suspended, and it's time for performance of such obligations extended, to the same extent as those of the Affected Party.
- 33.4 The Affected Party shall:
- 33.4.1 as soon as reasonably practicable after the start of the Force Majeure Event, but no later than 5 Business Days from its start, notify the other party in writing of the Force Majeure Event, the date on which it started, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under the Agreement; and
  - 33.4.2 use all reasonable endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations.
- 33.5 If the Force Majeure Event prevents, hinders or delays the Affected Party's performance of its obligations for a continuous period of more than 20 Business Days, NHSE may terminate this Agreement by giving 5 Business Days' written notice to SCCL.
- 33.6 Without prejudice to clause 33.5, it is agreed that in the event of a Force Majeure Event which is an epidemic or a pandemic, NHSE may extend the continuous period referred to in clause 33.5 by such time as it considers appropriate following notice by the Affected Party in accordance with the clause 33.4 and further consultation with SCCL in which both Parties will use all reasonable endeavours to further mitigate the effect of the epidemic or pandemic on this Agreement if possible.

#### **34. WAIVER**

- 34.1 A waiver of any right or remedy under this Agreement or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.
- 34.2 A failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under this Agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy.

#### **35. RIGHTS AND REMEDIES**

- 35.1 The rights and remedies provided under this Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

#### **36. SEVERANCE**

- 36.1 If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.

- 36.2 If any provision or part-provision of this Agreement is deemed deleted under clause 36.1, the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

### **37. ENTIRE AGREEMENT**

- 37.1 This Agreement, together with the Act of Entrustment and the Addendum, constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 37.2 Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement.
- 37.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation based on any statement in this Agreement

### **38. NO PARTNERSHIP OR AGENCY**

- 38.1 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, or authorise any party to make or enter into any commitments for or on behalf of any other party.
- 38.2 Each party confirms it is acting on its own behalf and not for the benefit of any other person.

### **39. THIRD PARTY RIGHTS**

- 39.1 Save where such rights are sought to be enforced by the SoS acting through DHSC (including under the SoS's statutory powers under section 223 of the NHS Act or under the original Act of Entrustment or the Addendum or its public health functions, this Agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.
- 39.2 The rights of the parties to rescind or vary this Agreement are not subject to the consent of any other person.

### **40. NOTICES**

- 40.1 Any notice or other communication given to a party under or in connection with this Agreement shall be in writing and shall be sent by email to:

**[REDACTED] (Director of Governance, Assurance and Legal) at**  
**[REDACTED]** (in the case of SCCL); or

**[REDACTED] (Director of Procurement Transformation and Commercial Delivery)**  
**at [REDACTED]** (in the case of NHSE).

- 40.2 Any notice or communication by email shall be deemed to have been received at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume (and for the purposes of this clause 40.2, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt).
- 40.3 This clause does not apply to the service of any proceedings or any documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

## **41. COUNTERPARTS**

- 41.1 This Agreement may be executed in any number of counterparts, each of which when executed shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 41.2 Transmission of the executed signature page of a counterpart of this Agreement by (a) fax or (b) email (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Agreement. If either method of delivery is adopted, without prejudice to the validity of the agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.
- 41.3 No counterpart shall be effective until each party has executed at least one counterpart.

## **42. DISPUTE RESOLUTION PROCEDURE**

- 42.1 If a dispute arises out of or in connection with this Agreement or the performance, validity or enforceability of it ("**Dispute**") then the parties shall follow the procedure set out in this clause:
- 42.1.1 either party shall give to the other written notice of the Dispute, setting out its nature and full particulars ("**Dispute Notice**"), together with relevant supporting documents and on service of the Dispute Notice the designated leads appointed pursuant to clause 30 shall attempt in good faith to resolve the Dispute;
- 42.1.2 if the designated leads are for any reason unable to resolve the Dispute within 10 Business Days of service of the Dispute Notice, the Dispute shall be referred to the Chief Commercial Officer of NHS England and the Chief Executive Officer of SCCL who shall attempt in good faith to resolve it; and
- 42.1.3 if the Chief Commercial Officer of NHS England and the Chief Executive Officer of SCCL are for any reason unable to resolve the Dispute within 10 Business Days of it being referred to them, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure and:
- (a) unless otherwise agreed between the parties, the mediator shall be nominated by CEDR;
  - (b) to initiate the mediation a party must serve notice in writing ("**ADR Notice**") to the other party to the Dispute, requesting a mediation;
  - (c) a copy of the ADR Notice should be sent to CEDR; and
  - (d) the mediation will start not later than 20 Business Days after the date of the ADR Notice.
- 42.2 The commencement of mediation shall not prevent the parties commencing or continuing court proceedings in relation to the Dispute under clause 44 which clause shall apply at all times.
- 42.3 No party may commence any court proceedings under clause 44 in relation to the whole or part of the Dispute until 40 Business Days after service of the ADR notice, provided that the right to issue proceedings is not prejudiced by a delay.
- 42.4 If the Dispute is not resolved within 40 Business Days after service of the ADR notice, or either party fails to participate or to continue to participate in the mediation before the expiration of the said period of 20 Business Days, or the mediation terminates before the expiration of the said period of 20 Business Days, the Dispute shall be finally resolved by binding arbitration under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators in accordance with the said rules. For this purpose, NHSE and SCCL shall each independently appoint an arbitrator and shall agree on and jointly appoint the third arbitrator who shall be the presiding arbitrator. The seat of arbitration shall be the United Kingdom.

#### **43. GOVERNING LAW**

- 43.1 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

#### **44. JURISDICTION**

- 44.1 Subject to clause 43, each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.

#### **45. AMENDMENTS**

- 45.1 Subject to clause 13 (Change Control), no amendment to this Agreement shall be effective save where in writing and signed by both NHSE and SCCL.
- 45.2 NHSE shall notify DHSC in writing of any amendment to this Agreement under this clause and/or clause 13 as applicable.

#### **46. ASSIGNMENT, NOVATION AND OTHER DEALINGS**

- 46.1 SCCL shall not, without the prior written consent of NHSE, assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement such consent to not be unreasonably withheld or delayed.
- 46.2 NHSE shall be entitled, without the consent of SCCL, to assign transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement.
- 46.3 Furthermore, NHSE shall be entitled to novate this Agreement to a body or bodies which succeeds NHSE or undertakes equivalent functions or duties in accordance with an Act of Parliament, a direction of a government body or a regulatory authority's request, without SCCL's consent and without prejudice to any other provision of this Agreement. SCCL hereby agrees to enter into such documents as are reasonably necessary to give effect to this purpose.

This Agreement has been entered into on the date stated at the beginning of it.

Signed by a duly authorised representative of  
**NHS Commissioning Board**

.....  
Name:

Position:

Signed for and on behalf of  
**Supply Chain Coordination Limited**

.....  
Name:

Position:

## SCHEDULE 1 SERVICES

### NHS Healthcare Services and Chargeable Activities

#### NHS Healthcare Services

1. For the purpose of the original Act of Entrustment, the Addendum and this Agreement, the Services that have been entrusted by the SoS to SCCL **in return for payment of public service compensation in the form of the Fees** under the Original Services Agreement and which continue to be entrusted in this way under the Act of Entrustment, the Addendum and this Agreement are the **Services which relate to NHS Healthcare only**.
2. As per paragraph 1.3 of Schedule 3, SCCL shall not impose a margin in respect of Services obtained for use in NHS Healthcare, except in relation to capital equipment in respect of which SCCL will be entitled to charge a margin by way of a reasonable management fee.

#### Chargeable Activities

3. For the purpose of this Agreement (and consistently with section 223(3) of the NHS Act under NHSE's ownership of SCCL), SCCL has also been entrusted by the SoS under the original Act of Entrustment and continues to be entrusted under the Addendum and this Agreement with the tasks of providing social and/or economic services in the general public interest through procurement of a range of medical devices, clinical consumables, associated goods and ancillary services for the benefit of Chargeable Entities. In those instances, SCCL will be entitled to charge the Chargeable Entities a reasonable margin and profit. Such Chargeable Entities to which SCCL may provide Chargeable Activities include but are not limited to the categories described in paragraphs 3.1 and 3.2 of this Schedule 1 below.
- 3.1 **Social Health and Care Entities:** being entities providing social services in the general public interest through procurement of a range of medical devices, clinical consumables, associated goods and related services for ultimate end use in Social Health and Care (including for the benefit of other public sector entities that use the NHS Supply Chain for ultimate end-use in Social Health and Care). These entities include but are not limited to:
  - (a) organisations providing Devolved NHS Healthcare;
  - (b) [Not used];
  - (c) [Not used];
  - (d) Ministry of Defence + military hospital;
  - (e) Royal British Legion;
  - (f) [Not used];
  - (g) Crown dependencies;
  - (h) prisons;
  - (i) community interest companies;
  - (j) charities;
  - (k) academic institution (charitable);
  - (l) social enterprise;
  - (m) public health organisations;

- (n) social care organisations.

3.2 **Private Healthcare Entities (SPEI):** being entities providing services of general economic interest (but not of a social nature) through procurement of a range of medical devices, clinical consumables, associated goods and related services for ultimate end-use in Non-NHS Healthcare (including for the benefit of Chargeable Entities for ultimate end-use in providing Non-NHS Healthcare). These entities include but are not limited to:

- (a) managed service providers comprising private companies that are providers to NHS Customers of outsourced services that range from property maintenance to theatre clinical services;
- (b) private healthcare: private clinic and hospitals providing privately funded or insurance-based healthcare to patients outside of the NHS;
- (c) private sales comprising a mixture of private sector providers, individuals, care homes, GP practices;
- (d) general practices (Some GPs have organised into CICs, others are limited companies or private partnerships that derive a 'shareholder' profit); and
- (e) academic institution (non-charitable).

*Further provisions related to the Services*

4. In carrying out the Services, SCCL shall discharge the following public service obligations pursuant to the terms of the original Act of Entrustment, the Addendum and this Agreement:

- 4.1 the administration of the NHS Supply Chain in relation to products and services required in connection with the Services;
- 4.2 the management and co-ordination of NHS Supply Chain services, including procurement, logistics, e-Commerce, reporting, analysis, quality control, communications, payments, supplier management, emergency response and consultancy services for the provision of everyday hospital consumables, clinical products, home-care and capital equipment and associated services and supplies;
- 4.3 the financial administration of the NHS Supply Chain including but not limited to administering the provision of transaction processing services to ensure that suppliers are paid, Customers receive and pay their invoices and accurate financial/statutory accounting is performed in a timely manner;
- 4.4 overseeing the procurement and delivery of clinically assured products focused on patient safety;
- 4.5 coordinating the procurement of a range of medical devices and clinical consumables from suppliers;
- 4.6 ensuring the provision of reliable logistics services for the delivery of products to Customers;
- 4.7 managing the provision of IT services to provide systems platforms that support the operations of NHS Supply Chain;
- 4.8 enabling the provision of customer engagement services so that Customers, as immediate customers, can make effective best value judgments in exercising their choice of products for use in the provision of health services;

- 4.9 ensuring the provision of clinical and product assurance services to give Customers confidence that the products they are using are of good quality and clinically suitable for their intended use;
- 4.10 complying with public procurement principles (where applicable) so that goods and services procured pursuant to this Agreement is done through open competitive conditions ensuring equal access and opportunity to all suppliers; and
- 4.11 exercising performance management and supervision powers to ensure that the Services are all delivered efficiently and effectively, providing best value for money.

## SCHEDULE 2

### KEY REGULATORY OBJECTIVES AND KPIs

1. This Schedule 2 consolidates the agreed key regulatory objectives and KPIs relating to SCCL's discharge of its public service obligations and performance of the Services, as derived from the original Act of Entrustment and the Addendum.
2. This Schedule may be amended from time to time during the term of this Agreement in accordance with clause 45, provided that nothing agreed under this Schedule 2 shall be in conflict with the requirements on SCCL in relation to discharging its public service obligations and delivering the Services set out in the original Act of Entrustment, the Addendum and the main body and remaining Schedules of this Agreement ((and the parties also note the application of clause 6 (Order of Precedence))).
3. For the avoidance of doubt, any periodic amendments to this Schedule 2 agreed in accordance with paragraph 2 of this Schedule 2 shall not require incorporation to this document, but NHSE shall control and maintain a separate record of the agreed amendments to this Schedule 2 2 from time to time and provide a copy thereof to SCCL.
4. The agreed KPIs applicable from the Effective Date and until 31 March 2022 are as set out in SCCL's annual business plan for financial year 1 April 2021 to 31 March 2022 and the document entitled 'Context to Business Plan and Budget 2021/22 and Corporate KPIs', as approved by DHSC for the same period.
5. SCCL shall provide the Services on an efficient basis so that the Fees do not exceed the level of reasonable compensation for such public services carried out under this Agreement based on SCCL's efficiently incurred costs and, where expressly permitted by NHSE, any reasonable margin, so as to ensure the effective use of taxpayers' money which is the ultimate source of the Fees paid to SCCL.
6. SCCL shall ensure efficient cost management, managing the NHS Supply Chain on an efficient basis, including in accordance with [HM Treasury Managing Public Money](#) and all applicable [Cabinet Office Controls](#) and [DHSC Efficiency Controls](#).



## SCHEDULE 3

### Payment Provisions

#### Overriding Principles

1. The overriding principles applied in determining amounts payable to SCCL under this Agreement shall be that:
  - 1.1 In respect of the Services, SCCL shall neither be paid, nor shall it be permitted to retain any Surplus Income from the Fees.
  - 1.2 With regard to the Services, SCCL shall not impose a margin in respect of Services obtained for use in NHS Healthcare, except in relation to capital equipment in respect of which SCCL will be entitled to charge a margin by way of a reasonable management fee.
  - 1.3 It is the intention of the Parties that SCCL shall not realise any Surplus Income in respect of the delivery of the Services.
  - 1.4 With regard to Chargeable Activities, SCCL will be entitled to charge a reasonable margin and profit to be assessed by NHSE pursuant to an agreed methodology under clause 11.1.5.

#### Re-assignment of Surplus Income

- 1.5 In the event that SCCL does realise any Surplus Income or in the circumstances outlined in paragraph 1.1 above of this Schedule 3, then such Surplus Income shall be reassigned in accordance with clauses 11.2 and 11.3 (Accounting and Cost Orientation).

#### Determination and Payment of Fees

- 1.6 Subject to the terms and conditions of this Agreement, NHSE shall pay SCCL the Fees in respect of the Services, subject to and in accordance with the provisions of this Schedule 3.
- 1.7 Payment of the Fees will be made in six equal instalments for the period from the Effective Date to 31 March 2022 and in twelve equal instalments for each consecutive 12 months of the Term, monthly in arrears and within 30 days of the receipt of a valid and undisputed invoice which shall be dated no earlier than the 1st of the month following that which the Services being invoiced for are carried out. SCCL shall submit invoices electronically via the NHS Shared Business Services e-invoicing platform, Tradeshift, (guide at <https://networkgrowth.s3.amazonaws.com/Tradeshift%20Supplier%20Training%20Guide.pdf>) who will process the payment each month.
- 1.8 The Fees shall be exclusive of VAT. VAT shall be separately identified on the invoice and shall be payable by NHSE subject to receipt of a valid VAT invoice.

#### Determination of Payments to Supply Chain Service Providers

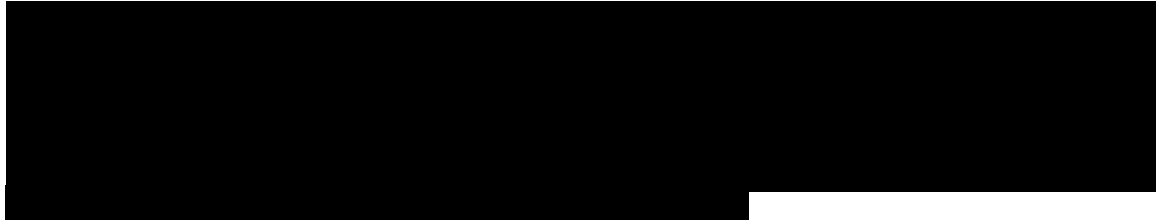
- 1.9 The payments which SCCL shall make to Supply Chain Service Providers ("**Payments to Supply Chain Service Providers**") shall be such costs as agreed as part of the contractual obligations that SCCL has assumed with the Supply Chain Service Providers. These include the fixed payments relating to the delivery of goods and services by the Supply Chain Service Providers, as well as Planned Gain-Share Payments.
- 1.10 In respect of the period to 31 March 2022 during the financial year 2021/2 and at the end of each consecutive 12-month period of the Term, a "true up" process will be undertaken to establish the over-spend or under-spend that SCCL has incurred related to Payments to Supply Chain Service Providers.
- 1.11 Any Additional Gain-Share Payments which cannot be absorbed through the additional income generated by SCCL through Chargeable Activities will need to be justified to NHSE, supported by

audited evidence and in such circumstances where the Additional Gain-Share Payments cannot be absorbed through the additional income generated by SCCL then NHSE will enter into discussions with DHSC with a view to identifying funding for such Additional Gain-Share Payments.

- 1.12 For the avoidance of doubt, the parties understand that NHSE is not obliged to fund any Additional Gain-Share Payments made by SCCL through the Fees or by any other means.

#### **Cap on Fees**

1.13



#### **Operating Costs Above Fees Cap**

- 1.14 To the extent that the cost of operating the Future Operating Model by SCCL during the Term exceeds the Fees payable as stipulated in this Agreement or pursuant to this Agreement, NHSE confirms that SCCL is authorised to meet any such costs in excess of this amount from income generated from Chargeable Activities, subject always to the provisions of clause 8.
- 1.15 For the avoidance of doubt any new arrangements and material variations to the existing arrangements to provide the Chargeable Activities shall only be entered into or agreed by SCCL upon the prior approval of NHSE.
- 1.16 NHSE shall have no obligation to pay to SCCL any amount(s) incurred by SCCL in excess of the amount of the Fees stipulated under or pursuant to this Agreement.