

PROTOCOL COMMUNICATION

REF NO. : PR/EF/2021/01

ALL AMENDMENTS ARE INCLUDED IN THE 2020/21 EF RULES AND ARE EFFECTIVE FROM 1 APRIL 2020

CLAUSE NO.	DETAILS OF CLARIFICATION/AMENDMENT (ALL CHANGES HIGHLIGHTED IN YELLOW)	REASON FOR AMENDMENT
<p>Please note any agreement for variation to the EF Rules must be submitted for review on an annual basis. Any agreements currently in place will run to 31 March 2021 only, subject to review.</p>		
Throughout	<p>EF Contract Employability Fund Services SDS Provider Web Pages Removal of reference to "Work Programme"</p>	Updated
Introduction	<p>This document sets out The Skills Development Scotland Co. Limited ("SDS") programme rules ("the Rules") for the public funding of services under the Employability Fund, described in the Invitation to Tender, the Rules and each Contract Schedule ("the Employability Fund Services") during the period 1 April 2020 to 31 March 2021, with possible extensions by SDS in one yearly increments to 31 March 2022 and 31 March 2023.</p>	Reviewed and updated
Part 1 1. Operating Rules	<p>1.1 The arrangements, definitions, terms and conditions set out in the Rules, as revised and updated from time to time by SDS together with the Invitation to Tender and Provider's ITT Response (subject to any amendments thereto in accordance with the terms of the Rules) and any and all SDS policy statements relating to the Covid-19 pandemic issued by SDS from time to time shall form part of the EF Contract as if such arrangements, terms and conditions and documents were expressly set out in the EF Contract.</p>	Reviewed and updated
Part 1 2 Provider's Appointment	<p>2.1 SDS appoints the Provider as a Provider of Employability Fund Services in respect of the Employability Fund, as further described in the Invitation to Tender, the Rules and the Contract Schedule. In addition to the Contract Schedule attached to the Letter of Award, the Provider shall be eligible to be considered for the award of additional Starts by SDS during the term of the EF Contract in the event that the volumes of Starts required to be reallocated, or additional Starts become available</p> <p>2.3 The Provider hereby agrees and accepts that in entering into the EF Contract (i) it has received all information required by it in order to determine whether it is able to provide the Employability Fund Services and (ii) it is deemed to have satisfied itself in relation to all matters connected with the Employability Fund Services and in regard to its ability to meet all requirements of the EF Contract.</p>	Reviewed and updated
Part 1 3 Contract Term	<p>3.1. Subject to:- 3.1.1. any extension in accordance with Rule 3.2; 3.1.2. earlier termination in accordance with the Rules or on one month's notice in writing by SDS to the Provider at any time; and</p>	Reviewed and updated

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	<p>3.1.3. rule 3.5 below the EF Contract shall have effect from 1 April 2020 until 31 March 2021 (“the Contract Term”).</p> <p>3.2. SDS shall have two separate opportunities to extend the Contract Term, (i) until 31 March 2022, and (ii) until 31 March 2023, in each case, by emailing the Provider to confirm any such extension, and the term ‘Contract Term’ shall be construed accordingly. Except as otherwise provided in this EF Contract, the terms and conditions set out in the EF Contract shall apply during any such extended period.</p>	
Part 1 4 Contract Schedule Process	<p>4.4 – removed 4.5 - removed</p>	Removed
Part 2 2. Eligibility	<p>2.5.1 An overseas national who is subject to an employment restriction or to a time limit on their stay in Great Britain or both except where the individual is a refugee or overseas national where the Biometric Residence Permit (BRP) which is provided by the Home Office shows they have the right to work regardless of the time shown</p>	Clarification
Part 2 4 Referral Process	<p>4.2.1 The EF Provider fact sheet is submitted by the Provider to SDS as part of the proposal to offer Employability Fund programme. No later than 7 calendar days after the date of the Provider’s written acceptance of each Contract Schedule, the Provider must return to the Provider’s local SDS Skills Investment Adviser the EF Provider fact sheet reviewed and updated in respect of the total volumes of Starts awarded within the Contract Schedule</p>	Reviewed and updated
Part 2 6 Entering Participants on FIPS	<p>6.2.4 The Provider shall ensure that the Training Agreement is kept accurate and up-to-date and amended to reflect any subsequently agreed variation in content or timescale, and where any variations are made to the Participants NI number, start date, date of birth, output type, the Training Agreement shall be immediately updated, signed and dated by the Participant and Provider and the changes updated immediately on FIPS. Where any variation is made to any other information contained in the Training Agreement such as email address or work experience employer details, the Provider must ensure that the changes are updated on FIPS and recorded on the ITP at the next formal review.</p>	Reviewed and updated
Part 2 8 Recruitment, Outputs and Outcomes	<p>8.1 SDS shall, subject to Rules 8.2 to 8.6, pay the Provider the Recruitment Payments, Output Payments and Outcome Payments in accordance with the Funding Model set out in Appendix 1.</p>	New
Part 2 8 Recruitment, Outputs and Outcomes	<p>8.3.8 In the case of an Outcome Payment for progression to a sustained job/self employment, the Provider shall provide to SDS a declaration (in the form set out at Appendix 12) that the Participant has sustained a Job/self employment. A sustained job/self employment can be claimed for the same Participant if they are in a job/self-employment, but not necessarily the same job/self-employment, 26 weeks after the first job/self employment has commenced. The Achievement Date to be entered onto FIPS must be the first day after the 26 weeks. For progression to a sustained job (where the Participant is</p>	Clarification

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	not self-employed), such evidence shall take the form of a declaration from the Participant’s employer (or employers as the case may be) confirming the Participant’s start date in the job and that he/she has been in the job for a minimum of 15 hours per week. In the case of progression to a job, as an alternative only to the Employer’s signature on the declaration, SDS will accept copies of the Participant’s wage slips which show the name of the employer and clearly confirms the dates and hours of employment or an email from the employer confirming these details. In the case of an Outcome Payment for progression to sustained self-employment, the Provider must, by providing a declaration in the form set out at Appendix 12 together with the evidence referred to in rule 8.3.7 satisfy SDS that the Participant is in self-employment 26 weeks after the date they first entered self-employment	
Part 2 8 Recruitment, Outputs and Outcomes	8.6 All claims for payment relating to a Participant must be made no later than the last day of the calendar month occurring 15 months after the Participant’s leaving date.	New
Part 2 8 Recruitment, Outputs and Outcomes	8.7	Renumbered
Part 2 9 Performance Management	9.6 Where an assessment is made under rule 9.5 that a Provider has failed to attain a rate of achievement similar to other Providers within the LEP area, without prejudice to SDS’s other rights, SDS and the LEPs shall have the right to reallocate Participants to other Providers within the area as they may deem appropriate	Reviewed and updated
Part 3 Introduction	Removed	Removed
Part 3 2 Policies, Procedures and Systems	2.2.1 Where the Provider undertakes any work which is ‘regulated work’ in terms of the Protection of Vulnerable Groups (Scotland) Act 2007 (the 2007 Act) with either ‘children’ (section 97 of the 2007 Act) or ‘protected adults’ (section 94 of the 2007 Act), by entering into this EF Contract the Provider agrees that it is confirming that it meets and shall continue to meet for the period of the EF Contract, all legal requirements of the 2007 Act. 2.2.2 Where the Provider did not at the date of submission of its ITT Response but does in the future undertake any ‘regulated work’, as referred to in condition 2.2.1 above, the Provider will inform SDS within 28 days of doing so and the Provider hereby confirms that all legal requirements of the 2007 Act will be met for the period during the EF Contract when it is undertaking ‘regulated work’. 2.2.3 Where any of the Provider’s employees who undertake ‘regulated work’, as referred to in condition 2.2.1 above, is the subject of a report made by the Provider to Scottish Ministers (section 5) as the result of allegations of the employee causing ‘harm’ (section 93 of the 2007 Act), the Provider will	Reviewed and updated

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	<p>advise SDS’s Skills Investment Advisor as soon as reasonably practicable that it had caused to make such report.</p> <p>2.2.4 Where the Provider undertakes work which is ‘regulated work’, as referred to at condition 2.2.1 above, the Provider will make all of its relevant policies and procedures available to SDS’s Skills Investment Advisor on demand or as may be required.</p>	
<p>Part 3 2 Policies, Procedures and Systems</p>	<p>2.4.2.2 include at least 1 equality action within their quality action plan which outlines how they intend to improve the diversity of their Employability Fund programme, for example through their recruitment process; by providing staff with relevant development in equality topics; by supporting the needs of Participants; or through taking positive action targeting specific customer groups. The Provider should seek to continuously improve their equality outcomes by providing evidence of how they will measure, analyse and evaluate the impact of their programme in relation to different customer groups. Using your equality monitoring information and other data sources demonstrate how this evaluative information improves the delivery of the Employability Fund Services as part of your quality assurance (continuous improvement process)</p> <p>For more detailed information on identifying key actions and providing evidence to support equality actions please refer to the Equality Support guide</p> <p>https://www.skillsdevelopmentscotland.co.uk/media/45855/ntp-equality-support-guide-2019.pdf</p>	<p>Reviewed and updated</p>
<p>Part 3 3 In Training</p>	<p>3.2.1 The Provider will always have in place management processes and controls to ensure the Provider is meeting their contracted obligations, all of the Provider’s staff involved with the Employability Fund Services are aware of all the Employability Fund Services requirements; the Provider promptly identifies and discloses to SDS any actual or potential conflict of interest; and the Provider must ensure that there is clear segregation of duties that provide a check that the Rules are followed. The Provider should, on request, present to SDS an accurate record of their controls in a format determined by SDS.</p> <p>3.2.2 SDS will be entitled to assess the Provider controls (during and after the period of the EF Contract), (accessing the Provider and any sub-contractor premises as deemed appropriate by SDS) and take such action as SDS deems appropriate to establish the extent to which the controls are (or were, as appropriate) operating satisfactorily. The Provider will co-operate fully with SDS in each such assessment and/or action.</p> <p>3.2.3 In the event that the Provider is no longer providing training or assessment services to Participants and has no outstanding claims for payment under the terms of the EF Contract, the Provider will comply with their contracted obligations for the duration of the remaining retention period set out in rule 21 of Part 3 of the Rules.</p>	<p>Reviewed and updated</p>

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	<p>3.2.4 If the Provider has had an EF Contract at any time during the period between 1 April 2019 and 31 March 2020 and an action/improvement plan was in operation under that contract as at the expiry/termination of that contract, any such action/improvement plan will continue to apply to the Provider under the Provider’s current EF Contract (as may be extended), unless SDS advises the Provider otherwise in writing in the form of an email from the SDS assigned Skills Investment Advisor.</p>	
<p>Part 3 3 In Training</p>	<p>3.4 Quality Assurance</p> <p>3.4.1 The Quality Assurance and Improvement Framework sets out standards which are designed to assess the extent to which Providers deliver quality learning and assessment services which are focused on the needs of the Participants and employers. The Provider is required to meet minimum standards and take action to strive for improvements in their delivery. A copy of the current SDS Quality Assurance and Improvement Framework is available on the Employability Fund training/learning provider area of the SDS Provider Web Pages. The Quality Assurance and Improvement Framework may be amended from time to time by SDS. Any amended version shall be available on the said website.</p> <p>3.4.2 The Provider shall submit to SDS no later than 30th April each year during the Contract Term, a Self Assessment and Quality Action Plan for review and acceptance by SDS, the format of which shall be determined and made available by SDS, to evidence Provider achievement and planned improvement actions against the Quality Standards referred to within the Quality Assurance and Improvement Framework. Subject to any alternative arrangements which SDS may advise in writing, SDS staff shall periodically visit the Provider to review supporting evidence held by the Provider.</p> <p>3.4.3 Except where otherwise confirmed by SDS under paragraph 3.4.2 immediately above, SDS will use each of the Provider’s Self Assessment(s) submitted by the Provider and additional appropriate evidence, to assess the Provider against each of the Quality Standards. SDS may examine a range of evidence as indicated within the SDS Quality Assurance and Improvement Framework. SDS will routinely monitor Providers on an ongoing basis in relation to the Quality Standards. SDS will also undertake formal reviews of Providers using a risk based approach. SDS may not formally review all Providers during the period of this EF Contract. SDS will publish its findings on each such review, on the SDS website. Where any Provider is subject to any alternative quality assessment process for example ‘How Good is Our College’, the Provider shall be required to meet the requirements of that process</p> <p>3.4.4 , The Provider should ensure your Quality Action Plan is kept up to date and liaise with SDS Assigned Skills Investment Adviser on the progress of improvement actions. If however, following a quality assurance visit, a material change is required to the Quality Action Plan this must be agreed with the Quality Assessor before returning to the Skills Investment Adviser for ongoing quality assurance monitoring.</p> <p>3.4.5 In the event that the Provider fails to achieve a grade of at least satisfactory in relation to any of our quality standards at any time (whether established through SDS’s own examination, or through such</p>	<p>Reviewed and updated</p>

	alternative quality standard assessment), this shall be deemed a breach of the EF Contract. This includes failure to submit a Self – Assessment and Quality Action Plan which is acceptable to SDS; an SDS formal quality review which has one or more grades at weak or unsatisfactory.	
Part 3 4. Standard Conditions	4.1.12.1 Any and all SDS policy statements relating to the Covid-19 pandemic issued by SDS from time to time	New
Part 3 4. Standard Conditions	4.1.12.2 - 4.1.12.10	Renumbered
Part 3 6 Prevention of Bribery	<p>6.1 The Provider:</p> <p>6.1.1 shall not, and shall procure that its employees, consultants, contractors, sub-contractors and agents shall not, in connection with this EF Contract commit a Prohibited Act; and</p> <p>6.1.2 warrants, represents and undertakes that it is not aware of any financial or other advantage being given to any person working for or engaged by SDS, or that an agreement has been reached to that effect, in connection with the execution of this EF Contract or any other contract with a public authority, excluding any arrangement of which full details have been disclosed in writing to SDS before execution of this EF Contract.</p> <p>6.2 The Provider shall:</p> <p>6.2.1 if requested, provide SDS with any reasonable assistance to enable SDS to perform any activity required by any relevant government or agency in any relevant jurisdiction for the purpose of compliance with the Bribery Act 2010; and</p> <p>6.2.2 immediately following any request from SDS, certify to SDS in writing (such certification to be signed by a Director or equivalent of the Provider’s organisation) compliance with this Rule 6 by the Provider and all persons associated with the Provider or other persons who are supplying services in connection with this EF Contract. The Provider shall promptly provide all supporting evidence of compliance as SDS may reasonably request.</p> <p>6.3 The Provider shall have an anti-bribery policy (which shall be disclosed to SDS immediately on request) to prevent any of the Provider’s employees, consultants, contractors, sub-contractors and agents from committing a Prohibited Act and shall enforce it where appropriate.</p> <p>6.4 If any breach of condition 6.1 is suspected or known, the Provider must notify SDS immediately.</p>	Reviewed and updated

	<p>6.5 If the Provider notifies us that the Provider suspects or knows that there may be a breach of condition 6.1, the Provider must respond promptly to SDS’s enquiries, co-operate with any investigation, and allow SDS and/or SDS’s representatives to audit books, records and any other relevant documents.</p> <p>6.6 SDS may terminate this EF Contract by written notice with immediate effect if the Provider, or any of the Provider’s employees, consultants, contractors, sub-contractors or agents (in all cases whether or not acting with the Provider’s knowledge) breaches condition 6.1.</p> <p>6.7 Any notice of termination under condition 6.6 must specify:</p> <p>6.7.1 the nature of the Prohibited Act; and</p> <p>6.7.2 the date on which this EF Contract will terminate</p> <p>6.8 Any dispute relating to:-</p> <p>6.8.1 the interpretation of this condition 6; or</p> <p>6.8.2 the amount or value of any gift, consideration or commission,</p> <p>shall be determined by SDS and SDS’s decision shall be final and conclusive.</p> <p>6.9 Any termination under this condition 6 will be without prejudice to any right or remedy which SDS may have.</p>	
<p>Part 3 11 Data Protection</p>	<p>11 Data Protection</p> <p>11.1 Subject to rule 11.2., the parties agree that SDS is the “Data Controller” and the Provider is the “Data Processor” in relation to the collection and processing of all Personal Data (under exception of Data) under the EF Contract (“the Processed Data”). The Provider will act only on SDS’s instructions and ensure that there are appropriate technical and organisational measures in place to ensure the security of all Processed Data in accordance with the Data Protection Principles set out in Data Protection Legislation and shall not use any Processed Data for any other purpose nor shall the Provider disclose the same to any third person. The Provider will comply with the provisions of Appendix 14 (Processed Data) in respect of such Personal Data.</p> <p>11.2 In relation to the collection and processing of Personal Data comprising Data only, the parties agree that they are each a “Data Controller” in terms of the Data Protection Legislation and that any sharing of Personal Data comprised in the Data between the Provider and SDS relating to the Employability Fund Services will be on a Data Controller to Data Controller basis. The Provider shall comply with the provisions of the Data Protection Legislation in relation to the Data and shall ensure that</p>	<p>Reviewed and updated</p>

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	<p>it has obtained all permissions required in relation to the Data Protection Legislation to enable it to comply with the requirements of the EF Contract. The provisions of Appendix 13 (Data Sharing) shall apply in respect of the sharing of any Data in relation to the EF Contract.</p> <p>11.3 The Provider shall, at all times during and after the period of the EF Contract, indemnify SDS and keep SDS indemnified against all losses, damages, costs or expenses and other liabilities (including legal fees) incurred by, awarded against or agreed to be paid by SDS arising from any breach of the Provider’s obligations under this rule 11 (and the corresponding appendices) except and to the extent that such liabilities have resulted directly from SDS’s instructions.</p> <p>11.4 SDS acknowledges that the Provider is reliant on SDS alone for direction as to the extent the Provider is entitled to use and process the Personal Data where the Provider is a Data Processor under the EF Contract. Subject to paragraph 4 of Appendix 14 to these Rules, the Provider shall be entitled to relief from liability in circumstances where the Data Subject makes a claim or complaint with regards to the Provider’s actions to the extent that such actions directly result from instructions received from SDS in connection with the Processed Data</p>	
<p>Part 3 12 Freedom of Information</p>	<p>12 Freedom of Information</p> <p>12.1 To the extent that either party (“FOISA Party”) is subject to the requirements of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (together ‘FOISA’) the other party shall assist and cooperate with the FOISA Party to enable the FOISA Party to comply with its Information disclosure obligations.</p> <p>12.2 The other party shall and shall procure that its sub-contractors and agents shall at its cost:-</p> <p>12.2.1 transfer to the FOISA Party all requests for Information that it receives as soon as practicable and in any event within four calendar days of receiving a request for Information;</p> <p>12.2.2 provide the FOISA Party with a copy of all Information in its possession or power in the form that the FOISA Party reasonably requires, within 7 calendar days (or such other period as we may specify) of the FOISA Party’s request; and</p> <p>12.2.3 provide all necessary assistance as reasonably requested by the FOISA Party to enable the FOISA Party to respond to the request for Information within the relevant time for compliance set out in FOISA.</p> <p>12.3 The FOISA Party shall be responsible for determining in its absolute discretion and notwithstanding any other provision in or relating to the EF Contract or any other agreement, whether the Information and/or any other Information is exempt from disclosure in accordance with the</p>	<p>Reviewed and updated</p>

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	<p>provisions of FOISA, and may at its absolute discretion disclose to a third party any Information relating to or provided by or on behalf of the other party.</p> <p>12.4 In no event shall the other party respond directly to a request for information unless expressly authorised to do so by the FOISA Party</p>	
Part 3 14 termination	14.1.8 where any of the circumstances set out in rules 14.8 - 14.10 arise	New
Part 3 14 termination	<p>14.8 SDS shall be entitled to terminate the EF Contract by written notice with immediate effect if the Provider and/or any of its directors, staff, Permitted Sub-contractors or representatives:-</p> <p>14.8.1 has committed a crime; or</p> <p>14.8.2 has become involved in any situation or programme which:-</p> <p>14.8.2.1 tends in SDS's opinion to have a negative effect on the reputation of SDS, any Scottish Minister or the Employability Fund programme or any aspect of SDS's or any Scottish Minister's business;</p> <p>14.8.2.2 would expose SDS, any Scottish Minister or the Employability Fund programme or any aspect of SDS's or any Scottish Minister's business to disrepute, scandal, ridicule or contempt, or would tend to shock, insult or offend the public in Scotland;</p> <p>14.8.2.3 reflects unfavourably on the reputation of SDS, any Scottish Minister or the Employability Fund programme or any of SDS's or any Scottish Minister's services, interests or activities; or</p> <p>14.8.2.4 might affect the supply and/or exploitation of the services, activities and interests of SDS, any Scottish Minister or the Employability Fund programme.</p> <p>14.9 SDS's decision on all matters arising under rule 14.8 shall be conclusive.</p> <p>14.10 Examples of acts or conduct considered to be prejudicial to the business of SDS, any Scottish Minister or the Employability Fund programme include:</p> <p>14.10.1 the posting or publishing on social media or elsewhere of any content that promotes bigotry, racism or discrimination based on race, gender, religion, nationality, disability, sexual orientation or age;</p> <p>14.10.2 the expression of any political views in a context that could give rise to an association with SDS's or any Scottish Minister's business;</p> <p>14.10.3 the use of, trade in, or other association with, illegal drugs.</p>	New
Part 3 15 Other remedies	15.1.2.1 suspend any or all payments under the EF Contract and any other contract the Provider has entered into with SDS, until SDS has concluded a full investigation of the Provider's activities. Except where it may not, in SDS's reasonable opinion, be appropriate to do so, SDS will give the Provider written notice if SDS is going to impose a payment suspension, and shall set out the commencement date for the payment suspension. SDS may also include details of the anticipated duration of the payment suspension	Reviewed and updated

	<p>in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the payment suspension if SDS has good reason to do so in order to complete a full investigation.</p> <p>15.1.2.2 suspend the Provider’s appointment under the EF Contract and any other contract the Provider has entered into with SDS. Except where it may not, in SDS’s reasonable opinion, be appropriate to do so, SDS will give the Provider written notice if it is going to impose such suspension, and shall set out the commencement date for the suspension. SDS may also include details of the anticipated duration of the suspension in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the suspension if SDS has good reason to do so in order to complete a full investigation;</p> <p>15.1.2.3 suspend the Provider’s right to access FIPS under the EF Contract and any other contract the Provider has entered into with SDS, until the Provider has concluded a full investigation of the Provider’s activities. SDS will give the Provider written notice if it is going to impose a FIPS suspension, and shall set out the commencement date for the FIPS suspension. SDS may also include details of the anticipated duration of the payment suspension in the notice, or advise the Provider about that separately in writing. SDS may extend the duration of the FIPS suspension if SDS has good reason to do so in order to complete a full investigation.</p>	
<p>Part 3 15 Other remedies</p>	<p>15.3 Where SDS discovers that the Provider has submitted any inaccurate claims for payment to SDS, SDS shall be entitled, in addition to requiring repayment of those amounts, to apply extrapolation at the rate of inaccuracy identified and to demand repayment of a proportion of claims which are deemed to have been paid erroneously on the basis of such extrapolation.</p> <p>15.4 Where SDS becomes aware of any breach of any other agreement which SDS entered into with the Provider at any time for the provision by the Provider of services relating to employability fund (or equivalent), and where SDS considers that the Provider is likely to be committing a similar breach of the Provider’s EF Contract, SDS shall be entitled to require the Provider to agree to an action / improvement plan in accordance with the process set out in rule 15.1.2.8;</p>	<p>New</p>
<p>Part 3 23 Performance Levels</p>	<p>23.3.1 – change to the measurement period 23.3.2 – change to the measurement period</p>	<p>Reviewed and updated</p>
<p>Part 3 28 Entire Agreement</p>	<p>28.1.1 the EF Contract (including the ITT Response, any and all policy statements issued by SDS from time to time relating to the Covid-19 pandemic, the award letter from SDS, each Contract Schedule and any other document properly incorporated by reference into the EF Contract) constitutes the entire agreement and understanding between the parties in respect of the matters dealt with in it and supersedes, cancels or nullifies any previous agreement between the parties in relation to such matters</p>	<p>Reviewed and updated</p>
<p>Appendix 1,2,3,4,5,6,7,10,11,12</p>	<p>Updated</p>	<p>Reviewed and updated</p>

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Appendix 8,9,15	Updated and renumbered	Reviewed and updated
Appendix 13, 14	New appendices	New
Fact Sheet Annual Certificate of Assurance	Removed	Removed