

**WEEE DISTRIBUTOR TAKE BACK SCHEME – PHASE 5
WEEE DISTRIBUTOR TAKE BACK SCHEME MEMBERSHIP TERMS
BAND C AND BAND A & B (DISTANCE SELLER) MEMBERS**

- 1 Background and Application
 - 1.1 Valpak operates a WEEE Distributor Take Back Scheme (DTS). Phase 5 of the DTS operates from 1 January 2020 to 31st December 2021.
 - 1.2 These WEEE Distributor Take Back Scheme Membership Terms ("**Terms**") are applicable to all Members (as defined below) of the Phase 5 DTS (as defined below).
 - 1.3 The DTS replaces the Phase 4 DTS Scheme. Each Member of the Phase 4 DTS Scheme is invited to apply to join the Phase 5 DTS Scheme.
 - 1.4 The Member acknowledges that the DTS shall operate a number of tiers of membership in addition to Band A Members (distance sellers), Band B Members (distance sellers) and Band C Members (as defined below).

- 2 Definitions and Interpretation

- 2.1 In these Terms words and expressions defined in any clause shall (where the context so permits) have the meanings set out in such clause and the following words and expressions shall (where the context so permits) have the following meanings:

"**2012 Directive**" means Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast);

"**Agreement**" means the agreement between Valpak and the Member as set out in the Application Form and these Terms;

"**Application Form**" means the application form and all notes (including but not limited to a declaration of sales by the Member of the Relevant EEE) completed and submitted by the Member;

"**Appropriate Authority**" has the same meaning as in the Regulations;

"**Band A Member (distance seller)**" means a Member who sells via distance selling means only and has no physical stores in the UK whose sales (by value) of the Relevant EEE is within band A (on the Relevant Date) of the bandings for membership of the DTS (published by Valpak from time to time) which are current on the Relevant Date (a copy of which is available on request and/or at <http://dts.valpak.co.uk/>;

"**Band B Member (distance seller)**" means a Member who sells via distance selling means only and has no physical stores in the UK whose sales (by value) of the Relevant EEE is within band B (on the Relevant Date) of the bandings for membership of the DTS (published by Valpak from time to time) which are current on the Relevant Date (a copy of which is available on request and/or at <http://dts.valpak.co.uk/>;

"Band C Member" means a Member whose sales by any means (by value) of the Relevant EEE is within band C (on the Relevant Date) of the bandings for membership of the DTS (published by Valpak from time to time) which are current on the Relevant Date (a copy of which is available on request and/or at <http://dts.valpak.co.uk/>;

"CA Site" means a civic amenity site;

"Common Holding Company" means the Holding Company which signs the Application Form and which is the Holding Company common to all the Group Companies that have Distributor Responsibility Obligations and that are all Members of the DTS as part of the same Group Membership;

"Controller Personal Data" means all Personal Data which is owned, controlled or processed by Controller and which is provided by or on behalf of Controller to the Processor or which comes into the possession of the Processor as a result of performing its obligations under the Agreement;

"Controller, Processor, Data Subject, Personal Data and Processing" shall bear the respective meanings given to them in the Data Protection Law;

"Data Protection Law" means the General Data Protection Regulation 2016 (Regulation (EU) 2016/679) ("GDPR"), the Data Protection Act 2018, the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003), together with the equivalent legislation of any other applicable jurisdiction and all other applicable law, regulations, guidance and codes of conduct or practice in any relevant jurisdiction relating to the processing of personal data, cyber security and/or privacy including the guidance and codes of practice issued by the UK Information Commissioner's Office ("ICO"), the Article 29 Working Party, the European Data Protection Board or any relevant supervisory authority from time to time;

"DCF" means a designated collection facility as detailed in the Regulations;

"DEFRA" means the Department for Environment, Food & Rural Affairs;

"Distributor" means any person who provides EEE on a commercial basis to the party who is going to use such EEE;

"Distributor Responsibility Obligations" means (in accordance with the Regulations): (a) (where the Distributor has supplied new EEE to a person) the Distributor's obligation under the Regulations to ensure that WEEE from private households can be returned to the Distributor free of charge and on a one to one basis by such person provided that any such WEEE is of an equivalent type to and has fulfilled the same function as the new EEE supplied by the Distributor to such person; (b) the Distributor's obligation to maintain records of the number of units of WEEE from private households returned to the Distributor in accordance with the Distributor's obligation in point (a) above, and (c) the collection of Very Small WEEE in those stores with a sales area dedicated to WEEE of over 400m²;

"Distributor Take Back Scheme" has the same meaning as in the Regulations;

"DTS" means the Phase 5 Distributor Take Back Scheme that has been formally approved by the Secretary of State under the Regulations;

"**EEE**" has the same meaning as in the Regulations;

"**Fee**" means the Membership Fee payable by the Member or any other charges or payments due from the Member in accordance with this Agreement;

"**Group Company**" means a company which is part of a Group Membership; and "**Group Companies**" shall be construed accordingly;

"**Group Membership**" means (subject to clause 8.7) membership of the DTS by a Member both for itself and for and on behalf of: (a) all other Subsidiaries of the Common Holding Company to which that Member belongs whose names and registered numbers are set out on the applicable Application Form; and (b) the Common Holding Company;

"**Intellectual Property Rights**" means all patents, design rights, trade marks, trading or business names, copyrights, database rights, whether registered or not and any applications to register or rights to apply for registration of these, rights in inventions, know-how, trade secrets and confidential information and all other intellectual property rights of a similar or corresponding character that subsist now or in the future in any part of the world;

"**Legislation**" means all statutes, enacting instruments, common law, delegated legislation, regulations, directives, bye-laws, codes of practice, circulars, guidance notes, decisions, recommendations and the like, including, without limitation, the 2012 Directive, the Regulations and Data Protection Law;

"**Member**" means (except as otherwise expressly provided in clause 8.7): (a) a Distributor which has become a member of the DTS in accordance with clause 3.1 and is a Band A Member (distance seller) or Band B Member (distance seller) or Band C Member and "**Members**" shall be construed accordingly ;

"**Membership Fee**" means the membership fee payable by the Member in accordance with clause 6.2;

"**Phase 4 DTS Scheme**" means the Distributor Take Back Scheme operated by Valpak which ended on 31 December 2019;

"**Phase 5 DTS Scheme**" means the Distributor Take Back Scheme operated by Valpak in accordance with these Terms, which ends, unless terminated earlier in accordance with these Terms, on 31 December 2021;

"**Project Fund**" means the fund into which the Membership Fee shall be paid and shall be allocated by Valpak towards maintenance of the network of collection facilities, improve capture rate of recycled WEEE within the relevant Legislation and for projects aimed to establish and share best practice for the collection of WEEE from consumers as advised by DEFRA in accordance with the Proposal;

"**Proposal**" means the proposal to DEFRA for a WEEE Distributor Takeback Scheme- Phase 5 (in conjunction with the British Retail Consortium) and dated January 2020;

"Regulations" means the Waste Electrical and Electronic Equipment Regulations 2013 (as amended) in force in the United Kingdom;

"Relevant Date" means the date on which the Distributor (except as otherwise expressly provided in clause 8.7) applied to become a member of the DTS;

"Relevant EEE" means EEE (in each category) intended for use by private households which was put on the market in the United Kingdom in 2015;

"Subsidiary" and **"Holding Company"** have the same meanings as in Section 1159 of the Companies Act 2006;

"Surplus" means any amounts due from any surplus of funding collected by Valpak from the Phase 4 DTS Scheme members and calculated as an amount in proportion to the total payments made by all of Phase 4 DTS Scheme members in accordance with the Phase 4 DTS Scheme terms and conditions;

"Terms" has the meaning detailed in clause 1.2;

"Valpak" means Valpak Retail WEEE Services Limited, registered in England and whose registered office is at Stratford Business Park, Banbury Road, Stratford-upon-Avon CV37 7GW;

"Very Small WEEE" has the meaning given to it in Article 5(2)(c) of the 2012 Directive, being WEEE with no external dimension more than 25 centimetres, or such other meaning given to it in any future English (or UK (as the case may be)) Legislation which gives effect to the 2012 Directive;

"WEEE" has the same meaning as in the Regulations; and

"WEEE from private households" has the same meaning as in the Regulations.

- 2.2 Any reference in the Agreement to a law, directive, statute, bye-law, regulation, secondary, ancillary or delegated legislation or related non-legislative rules, guidance, arrangements or codes of practice shall include any law, directive, statute, by-law, regulation, secondary, ancillary or delegated legislation or related non-legislative rules, guidance, arrangements or codes of practice in force from time to time modifying, re-enacting, extending or consolidating the same, or made pursuant to the same, or which is modified, re-enacted, replaced, extended or consolidated by the same or pursuant to which the same is made and includes all legislation replacing or superseding legislation that formerly implemented any European Union ("EU") legislation notwithstanding that such new legislation may no longer implement EU legislation; and all legislation replacing or superseding EU legislation that formerly had direct effect in the United Kingdom.
- 2.3 Clause headings in the Agreement are for ease of reference only and shall not be taken into account in construing the Agreement.
- 2.4 In the Agreement expressions denoting **"in writing"** or **"written"** shall, unless the contrary intention appears, be construed as including references to printing, electronic communication or lithography, photography and any other mode of reproducing words in visible form.

- 2.5 In the Agreement words importing the singular number only shall include the plural number and vice versa, words importing the masculine gender only shall include the feminine gender and words importing individuals shall include firms and corporations.
- 3 DTS membership
- 3.1 (Except as otherwise expressly provided in clause 8.7) this Agreement and the Distributor's membership of the DTS shall commence when Valpak notifies the Distributor in writing that i) the Distributor's application to become a member of the DTS has been successful, ii) the Distributor has provided all information reasonably required by Valpak; and iii) Valpak has received the Distributor's payment of the Fees. This Agreement shall (unless otherwise terminated earlier in accordance with these Terms) continue in force until 31 December 2021.
- 3.2 Where and to the extent provided by the Regulations, the Member's membership of the DTS shall (subject to and in accordance with these Terms and the Regulations), exempt the Member from complying with the Member's Distributor Responsibility Obligations for the period during which the Member's membership of the DTS subsists.
- 3.3 Valpak may also from time to time provide to the Member (free of charge) such assistance with the Member's information obligations under regulation 44 of the Regulations (via Valpak Limited's recycle-more website <http://www.recycle-more.co.uk/>) as Valpak may in its absolute discretion decide.
- 3.4 Where a Member's membership of the DTS terminates or expires (for whatever reason):
- (a) the Member shall be responsible for complying with the Member's Distributor Responsibility Obligations from the date of such termination or expiry (as appropriate); and
 - (b) Valpak shall not (unless otherwise expressly set out in these Terms) be liable to repay or refund (in whole or in part) the Fees or any other sums already paid or payable by the Member in accordance with these Terms.
- 3.5 Valpak shall use its reasonable endeavours to carry out its operations diligently and in a reasonable, proper and cost effective manner having regard to the interests of Members and of any other tier of membership of the DTS and exercise the skill and expertise reasonably to be expected of an organisation approved by the Secretary of State as the operator of the distributor take back scheme.
- 4 Member's Obligations
- 4.1 (Subject to clause 3.2) the Member shall comply with the Regulations.
- 4.2 The Member shall comply with the terms of this Agreement, the requirements of Valpak's website terms and conditions and Internet privacy policy (copies of which are available on request and/or at <http://dts.valpak.co.uk/>).
- 4.3 The Member shall provide such co-operation, assistance, information, records and/or reports as Valpak may reasonably request and the Member shall comply with all reasonable instructions given and requests made by Valpak (including but not limited to such co-operation, assistance, information,

records and/or reports as may be required to enable Valpak to comply with any request by and/or requirement of any appropriate agency, governmental authority and/or any other regulatory body).

4.4 The Member shall promptly (and in any event within 30 days) notify Valpak of any and all enforcement notices and/or proceedings (including but not limited to entry and inspection proceedings) (and all associated information) issued or taken against the Member under the Regulations and any conviction of the Member for any offence under the Regulations.

5 Provision of Information

5.1 The Member acknowledges and agrees that Valpak shall be entitled to make a list of Members of the DTS publicly available.

5.2 (Without prejudice to clause 5.1) the Member agrees that Valpak shall be entitled to provide copies and/or details of information provided to Valpak by the Member to any person (including but not limited to any appropriate agency and/or any governmental authority) to which Valpak is obligated pursuant to Legislation or in response to a request from any relevant enforcement agency and/or governmental authority and/or agency.

5.3 The Member shall inform Valpak promptly upon becoming aware of any change in the information provided by the Member to Valpak in connection with the Member's membership of the DTS (including but not limited to any change in the address or other telephone/facsimile, email address and/or address of the registered office and/or person who is nominated as the Member's primary contact, where such details are provided for the purpose of its membership of the DTS).

5.4 The Member shall inform Valpak promptly where any appropriate agency and/or governmental authority has requested and/or carried out any audit of the Member under the Regulations.

5.5 The Member shall maintain and store in either electronic or written form all documents, data and/or appropriate records it holds, obtains or creates in respect of its membership of the DTS and in respect of its obligations under these Terms for a minimum of 5 years from the date on which such document, data and/or record is made and the Member shall make available such document, data and/or records to Valpak on request, provided that Valpak requires the same in relation to compliance with Legislation.

5.6 Valpak may from time to time on reasonable notice in its absolute discretion alter the requirements for the format or period of storage as set out in clause 5.5.

6 Fee Calculation

6.1 The Member shall pay to Valpak the Membership Fee in accordance with this clause **Error! Reference source not found.** and clause **Error! Reference source not found.**

6.2 Valpak shall from time to time publish its Membership Fees for membership of the DTS applicable to a Band A Member (distance seller), Band B Member (distance seller) or a Band C Member (a copy of the Membership Fees is available on request and/or at <http://dts.valpak.co.uk/>). The Membership Fee payable by the Member shall be the Membership Fee applicable to that Member which is current on the Relevant Date.

- 6.3 In respect of Members who were previously Band A Members, Band B Members or Band C Members (being Members that fell into the definitions of Band A, Band B or Band C of the bandings for the DTS during the Phase 4 DTS Scheme) for the purposes of Phase 4 DTS Scheme and who shall be Band A Members (distance sellers) or Band B Members (distance sellers), or Band C Members for the purposes of Phase 5 DTS Scheme those Members acknowledge and agree that any proportion of the Surplus that was contributed by it as part of its Membership Fee for Phase 4 DTS Scheme will constitute its Membership Fee for Phase 5 DTS Scheme and will be available for use by Valpak in accordance with clause 6.5. These Members further acknowledge and agree that under no circumstances shall any of the Surplus be refundable to it, unless authorised in writing by Valpak and that the Surplus is for the benefit of the DTS as a whole and not individual Members.
- 6.4 Where the Member applied to become a member of the DTS in Band A (distance seller) or Band B (distance seller) or Band C under the Phase 5 DTS Scheme, then the Member shall pay to Valpak the Membership Fee for Band A Members (distance seller), Band B Members (distance seller) or Band C Members (which will be current as on the Relevant Date) as prescribed in the Proposal and published on the DTS website <http://dts.valpak.co.uk/>.
- 6.5 Members who were members of the Phase 4 DTS Scheme agree that any Surplus shall be made available for use by Valpak during the term of this Agreement to meet the requirements and deductions as set out in the Proposal insofar, but not limited to:
- (a) establishing new DCFs at existing CA sites;
 - (b) establishing DCFs at new CA sites;
 - (c) establishing DCFs at replacement CA sites;
 - (d) increasing the capture rate of WEEE that is already recycled but not included in the Legislation; and
 - (e) special projects designed to establish best practice for collection of WEEE as instructed by DEFRA and described in the Proposal.
- 6.6 Where a Member applied to become a member of the DTS part-way through a calendar year and has not previously been a Distributor under the Regulations, then Valpak shall pro-rata the Membership Fees to take into account the expired portion of the calendar year. In all other circumstances the Member shall be required to pay the full Membership fee for the calendar year regardless of the start date of its membership. The provisions of this clause **Error! Reference source not found.** shall continue in force notwithstanding the termination or expiry of the Agreement howsoever caused.
- 7 Payment of Fees
- 7.1 Unless otherwise agreed in writing:
- (a) the Membership Fee shall be paid by the Member in full and in advance on application to become a member of the DTS; and

- (b) all other sums payable by the Member to Valpak under the Agreement shall be paid by the Member within 30 days from the date of invoice.
- 7.2 All sums payable under the Agreement are exclusive of any value added tax and any other sales or similar taxes, which shall be added to such sum to the extent applicable from time to time.
- 7.3 All sums payable by the Member to Valpak shall be paid in full without any deduction, withholding, counterclaim or set off.
- 7.4 If any sum payable by the Member to Valpak under this Agreement remains unpaid:
- (a) for more than 30 days from the date of invoice Valpak may charge the Member interest on such sum (after as well as before judgment) at the rate of four per cent (4%) per annum (or such other percentage rate as Valpak shall from time to time decide and notify to Members such revised rate to come into effect 10 working days after the date of such notice) above Barclays Bank Plc's base rate from time to time, such interest to be calculated on a daily basis from the date upon which such sum became due to be compounded with quarterly rests and to be payable on demand; and
- (b) as at the end of 31 March 2020, then Valpak may charge the Member an additional sum of five per cent (5%) of the outstanding Membership Fee, to be payable by the Member in addition to the outstanding Membership Fee.
- 8 Group Membership
- 8.1 The Common Holding Company warrants the accuracy of the details of each other Group Company set out on the Application Form and therefore to be included in the Group Membership and warrants that each other Group Company is a Subsidiary of the Common Holding Company.
- 8.2 The Common Holding Company warrants that it has the authority to enter into the Agreement both on its own behalf and for and on behalf of each other Subsidiary that is to become a Member.
- 8.3 In relation to the Group Membership the total sales (by value) of the Relevant EEE of all Group Companies shall be used to determine whether the Group Membership as a whole shall be treated as a Band A Member (distance seller) or Band B Member (distance seller) or a Band C Member or any other tier of membership applicable to the DTS and the Common Holding Company shall pay to Valpak (on behalf of the Group Membership) the applicable Fees based on such calculation) in accordance with these Terms or any other terms applicable to any other tier of membership of the DTS (as appropriate).
- 8.4 The Member shall be jointly and severally liable hereunder with each other Group Company that is part of the same Group Membership each of whom shall be severally liable hereunder.
- 8.5 Any Group Company that ceases at any time to be a Subsidiary of the Common Holding Company shall cease to be a Member of the DTS as part of that Group Membership and that company shall automatically become a Member of the DTS in its own right, and be subject to these Terms or the terms applicable to any other tier of membership of the DTS (as appropriate). The Common Holding Company shall promptly notify Valpak where any Group Company ceases at any time to be a

Subsidiary of the Common Holding Company and shall ensure that each such departing Group Company shall contract directly with Valpak to comply with these Terms.

- 8.6 The Common Holding Company shall sign and complete the Application Form and shall be responsible to Valpak for ensuring that each Group Company that is a Member of the DTS as part of the Group Membership complies with these Terms or any other terms applicable to any other tier of membership of the DTS (as appropriate).
- 8.7 Where a Common Holding Company is not a Distributor and/or does not have any Distributor Responsibility Obligations under the Regulations that Common Holding Company:
- (a) shall not be a Member of the DTS in its own right;
 - (b) may (notwithstanding clause 8.7(a)):
 - (i) sign the Application Form;
 - (ii) act as the Common Holding Company; and
 - (iii) be a Member of the DTS,for and on behalf of all other Group Companies which are part of the Group Membership subject to and in accordance with this clause 8; and
 - (c) shall for the purposes of these Terms be deemed to be a Member of the DTS subject to and on the basis of this clause 8.7.

9 Confidentiality

- 9.1 Each party hereby undertakes to the other that it shall not (and shall procure so far as it is able that each of its directors, officers and employees and group companies shall not) at any time (whether before or after the termination or expiry (as appropriate) for whatever reason of the Agreement) (save with the prior consent in writing of the other) divulge or communicate to any person other than as is reasonably necessary for the purpose of conducting its business any secret or confidential information concerning the business, financial or contractual arrangements or other dealings or affairs of the other party or of any customers or clients thereof save to the extent to which:
- (a) such information shall (other than through any unauthorised disclosure by it or any of its directors, officers or employees) come within the public domain on a non-confidential basis; or
 - (b) it is required by law or by any court or tribunal of competent jurisdiction or other applicable regulatory body to divulge or communicate such information; or
 - (c) (in the case of Valpak only) Valpak is required to divulge or communicate such information in the circumstances referred to in clauses 5.1 and/or 5.2.
- 9.2 The provisions of this clause 9 shall continue in force notwithstanding the termination or expiry of the Agreement howsoever caused.

- 10 Data Protection
- 10.1 The parties agree that the Member is a Controller and that Valpak is a Processor. The Processor warrants that it has complied and shall continue to comply with Data Protection Law.
- 10.2 To the extent that the Controller collects and passes Personal Data to the Processor, it represents, warrants and undertakes that:
- (a) it has obtained appropriate authority from all Data Subjects to whom it relates, or has provided them with the requisite information required under the Data Protection Law, to pass their Personal Data to Processor for the purposes for which the Controller intends to use it and/or as specified by the Controller in writing; and
 - (b) it is accurate and up to date.
- 10.3 To the extent that Processor or any Processor employees, staff and contractors processes any Controller Personal Data it shall:
- (a) process it only in accordance with the Controller's documented instructions from time to time unless required to do so by Union or Member State Law to which the Processor is subject, in such a case the Processor shall inform the Controller of that legal requirement before processing, unless that law prohibits such information on the grounds of public interest;
 - (b) not transfer, or otherwise directly or indirectly disclose, any Controller Personal Data to a third party or to a country or territory outside the European Economic Area without the prior written consent of the Controller; and
 - (c) taking into account the nature of the processing, assist the Controller (by appropriate technical and organisational measures), insofar as this is possible, in relation to any request from any Data Subject for access, rectification or erasure of the Controller Personal Data, or any objection to processing.
- 10.4 Processor shall comply with the provisions set out in Article 28 of the GDPR (together with any provisions referenced therein) which shall have effect as obligations on Processor as if set out in full in this clause and the expressions "controller" and "processor" used in those provisions and incorporated in this Agreement pursuant to this clause shall be deemed references to the Controller and Processor respectively.
- 10.5 The Parties acknowledge and agree that the types of Personal Data that shall be processed by Processor in connection with this Agreement are the name, email, telephone or postal addresses of employees, staff and contractors of the Controller, appropriate agencies, government authorities or service providers that Processor engages to provide services to Processor for the purpose of administering and complying with this Agreement or regulatory requirements. All such processing shall be carried out only to the extent and duration necessary for those purposes. The Controller will not pass to Valpak any Personal Data from any EEE customers.
- 10.6 The Parties acknowledge and agree that Processor may share Controller Personal Data with third parties (including any appropriate agency, government authority or service provider that Processor engages to provide services to Processor) in accordance with clauses 4.3 and 5.2 of this Agreement

DMS-35374605 - 4.0 - 12.02.2020

or otherwise, which the Parties agree is in order for the Processor to fulfil its obligations to comply with the Controller's instructions under this Agreement. All such processing shall be carried out only to the extent and duration necessary for those purposes.

10.7 The obligations and rights of the Controller as the applicable Data Controller of the Controller Personal Data processed in connection with this Agreement are set out in this Agreement and in Data Protection Law.

10.8 The Controller acknowledges that Processor may receive and process Personal Data of the Controller's employees, staff and/or contractors in connection with the Controller's performance or either Party's obligations under this Agreement. The Controller acknowledges that Processor shall process such Personal Data in connection with its business activities acting as an independent Controller determining the legal basis and conditions for which it processes it as described in Processor's privacy policy or other notice required under Data Protection Law as amended from time to time.

11 Intellectual Property Rights

11.1 The Member acknowledges and agrees that Valpak is and shall remain the owner of all Intellectual Property Rights in, arising from or created under, or as a result of the operation by Valpak of the DTS (including but not limited any financing mark or symbol developed by Valpak for use by Members of the DTS ("**Financing Mark**") and that nothing in these Terms shall confer on the Member any ownership or other rights in these or any other Intellectual Property Rights except such rights as are expressly set out in these Terms or are agreed in writing by Valpak from time to time.

11.2 The Member shall be entitled to use the Financing Mark subject to and in accordance with such terms as Valpak may from time to time specify.

11.3 The provisions of this clause 11 shall continue in force notwithstanding the termination or expiry of the Agreement howsoever caused.

12 Indemnity

12.1 The Member hereby irrevocably and unconditionally agrees to indemnify and keep indemnified Valpak from and against all demands, claims, liabilities, losses, damages, costs and expenses whatsoever (including all reasonable legal and other costs and expenses, together with value added and similar taxes thereon (if applicable) incurred by Valpak in enforcing Valpak's rights under this indemnity) and from and against all actions, suits and proceedings which may be commenced, taken or made against Valpak arising in relation to or in connection with any breach by the Member of the Agreement.

12.2 The provisions of this clause 12 shall continue in force notwithstanding the termination or expiry of the Agreement howsoever caused.

13 Limitation of Liability

13.1 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Agreement.

- 13.2 Nothing in the Agreement shall exclude or restrict either parties' liability for death or personal injury resulting from its own negligence, for fraudulent misrepresentation or for breach of the terms (if any) implied by section 17 Consumer Rights Act 2015 and for any act, omission or matter, liability for which may not be excluded or limited by law.
- 13.3 (Subject to clause 13.2) Valpak shall not be liable to a Member (in contract, tort (including but not limited to negligence), misrepresentation or otherwise) for any loss or damage suffered or incurred by the Member (or its employees, agents, sub-contractors or any third party) (even if the loss or damage is reasonably foreseeable or the possibility of such loss or damage occurring has been advised) arising from:
- (a) any circumstances outside Valpak's reasonable control;
 - (b) the Member's failure to comply with the Agreement;
 - (c) loss of business, use, profit, anticipated profit, contracts, revenues, goodwill or anticipated savings;
 - (d) loss of data or use of data; and/or
 - (e) consequential, special or indirect loss or damage (collectively meaning those losses recoverable under the second limb of the rule in *Hadley v Baxendale (1854) 9Ex341*).
- 13.4 (Subject to clauses 13.2 and 13.3) Valpak's entire liability in contract, tort (including but not limited to negligence), misrepresentation or otherwise for all matters arising out of or in connection the Agreement shall not exceed the total amount of the Membership Fee paid by the Member to Valpak under these Terms.
- 13.5 The provisions of this clause 13 shall continue in force notwithstanding the termination or expiry of the Agreement howsoever caused.
- 14 Effective Date and Termination
- 14.1 The Agreement and the Member's membership of the DTS may be terminated by Valpak by notice in writing to the Member with immediate effect on or after the occurrence of any of the following events:
- (a) any failure by the Member to pay to Valpak any sum due to Valpak under these Terms within 15 days of the due date for payment thereof pursuant to clause 7.1;
 - (b) the Member (if an individual) having a bankruptcy petition presented against him (such petition not being dismissed within 14 days), presenting his own bankruptcy petition, proposing a voluntary arrangement with his creditors or a deed of arrangement, being unable to pay his debts within the meaning of Section 268 of the Insolvency Act 1986, dying, becoming of unsound mind or a patient under any statute relating to mental health or becoming incapable through illness or injury of being able properly to perform his obligations hereunder;

- (c) the Member (if a company) becoming unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, proposing or making a composition or arrangement with its creditors, the presentation of a petition that the Member be put into liquidation or administration (such petition not being dismissed within 14 days), the passing of a resolution putting the Member into voluntary liquidation (other than for the purposes of amalgamation or reconstruction), the appointment of an administrator, provisional liquidator, receiver, manager or administrative receiver, the crystallisation of a floating charge over the business undertaking or assets or any part thereof of the Member or the dissolution of the Member;
 - (d) the Member (if a partnership) becoming unable to pay its debts within the meaning of Section 222 of the Insolvency Act 1986, the presentation of a petition that the Member be wound up or dissolved (such petition not being dismissed within 14 days) or the dissolution of the Member;
 - (e) the Member suffers any equivalent or analogous events to those set out in clauses 14.1(b), (c), or (d) above;
 - (f) any material breach by the Member of the Agreement which, if capable of remedy, shall not have been remedied to the reasonable satisfaction of Valpak within 30 days of receipt by the Member of a written request from Valpak for such breach to be remedied;
 - (g) (without prejudice to the generality of clause 14.1(f)) by Valpak (in its absolute discretion) by notice in writing to the Member with immediate effect where any enforcement notice and/or proceedings are issued and/or taken against the Member under the Regulations or the Member is convicted of any offence under the Regulations or has failed to comply with the Regulations;
 - (h) the Member knowingly and/or recklessly supplies false information to Valpak in connection to the Member's membership of the DTS; and/or
 - (i) Valpak collects insufficient funding for the Project Fund and/or attracts insufficient membership of the DTS (for whatever reason).
- 14.2 The Agreement and the Member's membership of the DTS may be terminated by the Member giving not less than 90 days' notice in writing to Valpak at any time. For the avoidance of doubt, Fees paid up until termination shall not be refundable if the Member exercises this termination right.
- 14.3 The Agreement and the Member's membership of the DTS may be terminated by either party by notice in writing to the other party with immediate effect if the approval of the DTS is withdrawn for any reason under the Regulations and Valpak has not successfully appealed (for whatever reason) such decision to withdraw such approval under the Regulations.
- 14.4 Termination or expiry (for whatever reason) shall not: (a) affect any provision of the Agreement which is expressed to survive or operate (or which by implication survives or operates) in the event of such termination or expiry (as appropriate) which shall remain in full force and effect; and (b) shall not prejudice or affect the accrued rights and/or liabilities of either party including but not limited to the rights of either party against the other in respect of any breach of the Agreement or any monies payable by one party to the other prior to such termination or expiry (as appropriate).

15 Whole Agreement

- 15.1 In entering into the Agreement the Member does not rely on any agreement, understanding, arrangement, representation, warranty, collateral contract or other assurance, made by or on behalf of Valpak (in particular, but not limited to, the interpretation of the Regulations) that is not expressly set out in the Agreement and the Member waives all rights and remedies which, but for this clause 15.1, might otherwise be available to it in respect of any such agreement, understanding, arrangement, representation, warranty, collateral contract or other assurance provided that nothing in the Agreement shall limit or exclude any liability for fraud.
- 15.2 The Agreement and any other document specified as constituting part of the Agreement sets out the entire understanding and agreement between Valpak and the Member relating to the DTS and supersedes all prior written or oral agreements, understandings and/or arrangements made between Valpak and the Member relating to the subject matter of the Agreement.

16 General

- 16.1 The provisions of the Agreement shall be binding on and inure to the benefit of the successors and personal representatives of each party hereto.
- 16.2 Valpak may at any time and from time to time amend, modify or add to any provision of the Agreement on giving to the Member not less than 60 days' notice in writing of such amendment, modification or addition, unless such amendment, modification or addition is made by reason of any requirement of or any amendment to or pursuant to Legislation or the requirement of any relevant appropriate agency, governmental authority and/or other regulatory body in which event such amendment, modification or addition shall have effect from the date specified in the notice.
- 16.3 Each party irrevocably and unconditionally waives any right which it may have to claim damages and/or to rescind the Agreement for any misrepresentation whether or not contained in the Agreement or for any breach of any warranty not contained in the Agreement unless such misrepresentation or warranty was made fraudulently.
- 16.4 No failure or delay by either party in exercising any right, power or privilege under the Agreement shall operate as a waiver of such right, power or privilege nor shall any single or partial exercise by either party of any right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege.
- 16.5 Except as otherwise expressly provided the rights and remedies provided in the Agreement are cumulative and not exclusive of any other rights and remedies provided by law.
- 16.6 (Subject to clause 16.2) no variation of the Agreement shall be valid unless it is in writing and validly signed by or on behalf of both Valpak and the Member.
- 16.7 Each provision of the Agreement is severable and distinct from every other provision. If any provision of the Agreement is found by any competent court or administrative body to be illegal, invalid or unenforceable, this shall not affect the other provisions of the Agreement or remainder of the affected provision, which shall remain in full force and effect.

- 16.8 A waiver of any term, provision or condition of the Agreement shall be effective only if given in writing and validly signed by the waiving party.
- 16.9 Nothing in the Agreement and no action taken by either party pursuant to the Agreement shall constitute, or be deemed to constitute, a partnership, association, joint venture, agency or any other co-operative entity.
- 16.10 No term of the Agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to the Agreement.
- 16.11 Time shall be of the essence for compliance by the Member of its obligations under this Agreement.
- 16.12 Valpak shall not be in breach of the Agreement or otherwise liable to the Member by reason of any delay in performance, non-performance and/or mis-performance of Valpak's obligations under the Agreement or the consequences of any such delay in performance, non-performance and/or mis-performance due to any circumstances outside Valpak's reasonable control.
- 17 Notices and Communications
- 17.1 Any notice to be given to or by any person under the Agreement must be in writing. Any notice or document may be served by Valpak on any Member either personally or by leaving it and/or by sending it through the post in a prepaid letter addressed to him at his registered address. Valpak may also send a notice or document by electronic communication to an address notified to Valpak by the Member.
- 17.2 Any notice or other document, if served by post or by electronic communication shall be deemed to have been served at the expiration of 48 hours after the envelope containing it was posted and in the case of a notice contained in an electronic communication at the expiration of 48 hours after the time it is sent. In proving postal service, it shall be sufficient to prove that the letter containing the notice or document was properly addressed, stamped and posted, and in the case of proving electronic communication it shall be deemed received at the time and date of transmission.
- 17.3 For the purpose of clause 17.1 Valpak's address, fax, email and website address are: (a) Stratford Business Park, Banbury Road, Stratford-upon-Avon CV37 7GW; (b) Fax Valpak on 08450 682 532; and (c) Website address <http://dts.valpak.co.uk/> or email address dts@valpak.co.uk.
- 18 Governing Law
- 18.1 The Agreement shall be governed by and construed in all respects in accordance with English law. The parties agree to submit to the exclusive jurisdiction of the English courts as regards any claim or matter arising in relation to the Agreement.