



## MORTGAGE PARTICIPATING LENDER AGREEMENT

This Agreement, entered into this \_\_\_\_\_ day of \_\_\_\_\_, by and between the **South Dakota Housing Development Authority** ("SDHDA"), 3060 East Elizabeth Street, Pierre, South Dakota, and \_\_\_\_\_ ("Participating Lender") having its principal office located at \_\_\_\_\_.

### RECITALS

**WHEREAS**, SDHDA expects to issue new money, tax-exempt bonds or otherwise make funds available to enable SDHDA to finance certain qualified mortgage loans (individually, a "Mortgage Loan" and collectively, "Mortgage Loans") on residential real estate under SDHDA's single family mortgage loan program (the "Program") through the acquisition of fully-modified mortgage-backed securities issued on behalf of and guaranteed as to timely payment of principal and interest by the Government National Mortgage Association ("Ginnie Mae") or issued by and guaranteed as to timely payment of principal and interest by the Federal Home Loan Mortgage Corporation ("Freddie Mac") or Federal National Mortgage Association ("Fannie Mae");

**WHEREAS**, Section 103 and Section 143 of the Internal Revenue Code provide that when the interest on obligations issued by or on behalf of a state or a political subdivision are to be used to finance qualifying owner-occupied residences, the gross income shall be excludable from federal income tax if such bonds meet certain requirements stated in said Section 103 and Section 143;

**WHEREAS**, SDHDA has entered into a Master Servicing Agreement with a qualified servicer which will serve as the master servicer (the "Master Servicer") for all Mortgage Loans under the Program;

**WHEREAS**, Participating Lender wishes to originate Mortgage Loans under the Program and sell such Mortgage Loans to the Master Servicer; and

**WHEREAS**, Participating Lender shall also enter into an Agreement with the Master Servicer with respect to the sale of Mortgage Loans (the "Participating Lender Agreement").

**NOW, THEREFORE**, in consideration of the representations, warranties and mutual terms and conditions herein contained, and for good and other valuable consideration, the sufficiency and receipt of which is hereby acknowledged, SDHDA and the Participating Lender agree as follows:

**1. ORIGINATION AND SALE OF MORTGAGE LOANS:** From time to time pursuant to this Agreement, Participating Lender shall originate Mortgage Loans for sale to the Master Servicer pursuant to the Participating Lender Agreement. This Agreement shall govern the origination of such Mortgage Loans by Participating Lender, and each such Mortgage Loan shall be subject to the warranties, representations, and agreements set forth herein, as well as the terms and conditions of any separate written offering with respect to the Program, including but not be limited to, SDHDA's Homeownership Program Guide for Mortgage Backed Securities (the "Program Guide") and the applicable lending manual established and maintained by the Master Servicer (the "Lending Manual").

**2. ELIGIBLE MORTGAGE LOANS:** Participating Lender shall originate eligible Federal Housing Administration ("FHA"), Veterans Administration ("VA"), U.S. Department of Agriculture Rural Housing

Service (“RHS”), or Conventional (i.e., originated on Fannie Mae or Freddie Mac uniform loan documents but not FHA insured or VA or RHS guaranteed) Mortgage Loans. All such Mortgage Loans shall be originated and closed according to standard agency regulations as established and amended from time to time by the Program Guide, the Lending Manual, and, as applicable, Fannie Mae, Freddie Mac, Ginnie Mae, FHA, VA, and RHS. It is hereby understood and agreed, for purposes of this Agreement, that the aforementioned standard agency regulations are incorporated in and made a part hereof. All Mortgage Loans offered by Participating Lender must be secured by residential first mortgages. Participating Lender shall be responsible for ensuring the compliance of Mortgage Loans originated hereunder with the applicable agency regulations which may exist at the time of origination and sale.

**3. PARTICIPATING LENDER COMPENSATION:** Participating Lender shall be compensated for originating Mortgage Loans as set forth in the Program Guide.

**4. DELIVERY OF DOCUMENTS:** In connection with each Mortgage Loan, Participating Lender shall deliver to SDHDA all documents required by SDHDA in order to complete its compliance review as set forth in the Program Guide.

**5. REPRESENTATIONS, WARRANTIES AND COVENANTS OF PARTICIPATING LENDER:**

Participating Lender hereby represents, warrants, and covenants as follows:

- a) Participating Lender is and will continue to be duly organized, validly existing, and in good standing under the laws of the jurisdiction in which it was incorporated or organized, as applicable, and has and will continue to maintain all licenses, registrations, and certifications necessary to carry on its business as now being conducted. Participating Lender has, and will continue to maintain, all licenses, registrations, and certifications necessary to make Mortgage Loans to South Dakota residents and is not in any way restricted or prohibited from making such Mortgage Loans;
- b) Participating Lender has and will maintain the full corporate or partnership power and authority to execute and deliver the documents contemplated by this Agreement and to perform in accordance with the terms hereof and the terms of the Program Guide. The execution, delivery, and performance of this Agreement by Participating Lender and the consummation of the transactions contemplated hereby have been duly and validly authorized. This Agreement is a legal, valid, binding, and enforceable obligation of Participating Lender, and all requisite corporate or partnership action has been taken by Participating Lender to make this Agreement valid and binding upon Participating Lender and enforceable in accordance with its terms;
- c) Participating Lender has the ability to perform each and every obligation and/or requirement imposed on Participating Lender pursuant to this Agreement, and no offset, counterclaim, or defense exists to the full performance by Participating Lender of the requirements of this Agreement;
- d) Neither (i) Participating Lender’s application to the Master Servicer (the “Application”), (ii) this Agreement, nor (iii) any statement, report or other document furnished or to be furnished by Participating Lender pursuant to this Agreement or pursuant to the Participating Lender Agreement between Participating Lender and the Master Servicer (the “Participating Lender Agreement”) contains any untrue statement of material fact or omits to state a material fact necessary to make the statements contained herein or therein not misleading; and
- e) Participating Lender has complied with, and has not violated any law, ordinance, requirement, regulation, rule, or other order applicable to its business or properties, the violation of which might adversely affect the operations or financial condition of Participating Lender to consummate the transactions contemplated by this Agreement or by the Participating Lender Agreement.

**6. CERTIFICATION OF PARTICIPATING LENDER:** With respect to each Mortgage Loan originated by Participating Lender and sold to the Master Servicer, Participating Lender hereby certifies that: (a) in Participating Lender's judgment, the Mortgage Loan would in all respects be a prudent investment for its own account, and (b) (i) the Mortgage Loan is for residential housing for persons or families of low or moderate income within South Dakota or (ii) the proceeds of sale to the Master Servicer shall be reinvested in residential Mortgage Loans within the State of South Dakota, or invested in short-term obligations pending the purchase of such residential Mortgage Loans.

**7. THIRD PARTY BENEFICIARY:** Participating Lender acknowledges that the various representations, warranties, and covenants made by Participating Lender to the Master Servicer under the Participating Lender Agreement are made in connection with Mortgage Loans originated pursuant to this Agreement. Participating Lender therefore specifically agrees that SDHDA is entitled to rely upon and enforce as a third party beneficiary the provisions of the Participating Lender Agreement, and the breach of such agreement by Participating Lender, including the breach of any document referenced and incorporated therein, shall be considered a breach of this Agreement.

**8. CONSENT TO USE PARTICIPATING LENDER'S NAME:** Participating Lender hereby agrees that SDHDA may identify the Participating Lender as an originator of Mortgage Loans in connection with the Program and that SDHDA may publish the Participating Lender's name, address and telephone number in media advertisements and any promotional materials distributed by SDHDA in connection with the Program. Participating Lender further agrees that SDHDA shall have no responsibility or liability in the event SDHDA omits or incorrectly states Participating Lender's name, address, and/or telephone number in any such advertisements or promotional materials, and that such advertisements or promotional materials need not identify those SDHDA loan programs under which Participating Lender is currently originating Mortgage Loans.

**9. BOND PROGRAM INFORMATION:** In addition to all of the obligations, agreements, representations, and warranties specifically set forth herein, Participating Lender hereby agrees to perform all obligations and agreements, make all representations and warranties, and comply with all the provisions of any applicable bond program information including any policies and procedures contained in bond program announcements, bulletins, memoranda, or other similar communication, which are collectively referred to as "Bond Program Information." This Bond Program Information may be modified or amended from time to time. Modifications and additions to the Bond Program Information shall become effective upon the date received by Participating Lender or such later date specified in such modifications or additions. All provisions of the Bond Program Information are hereby incorporated into this Agreement.

**10. INDEMNIFICATION:** Participating Lender shall protect, indemnify, and hold SDHDA harmless from and in respect to, any and all losses, liabilities, reasonable costs, and expenses, including attorneys' fees, that may be incurred by SDHDA with respect to, or proximately resulting from, any breach of any representation, warranty, or covenant of Participating Lender hereunder. Participating Lender shall protect, indemnify, and hold SDHDA harmless from and in respect to, any and all losses, liabilities, reasonable costs, and expenses, including attorneys' fees that may be incurred by SDHDA with respect to Participating Lender's refusal to repurchase any Mortgage Loan from the Master Servicer pursuant to the Participating Lender Agreement. SDHDA shall be entitled to rely upon Participating Lender as assembler and preparer of all Mortgage Loan documents, and is under no duty whatsoever to investigate or confirm any of the information set forth therein as to its honesty, accuracy, or completeness. Participating Lender hereby agrees to indemnify and hold SDHDA harmless from any claim, loss, or other damage to SDHDA including reasonable attorneys' fees resulting in whole or in part from any inaccuracy or incompleteness in the Mortgage Loan documents or any act or omission by Participating Lender, its agents, and employees, including but not limited to failure to comply with applicable state, federal, and local statutes or regulations. To the extent Participating Lender, its agents, or employees commits an actual wrong, or makes some error or omission in the preparation of any Mortgage Loan or its documents and as a result thereof, and based thereon, SDHDA or the Master Servicer commits an act or omission for which SDHDA becomes liable to the mortgagor or any third party, and/or a claim or cause of action is instituted against SDHDA, Participating Lender shall and hereby agrees to indemnify and hold SDHDA harmless from any such loss or damage, including reasonable attorney fees, resulting therefrom.

**11. NOTICES:** Any notice provided for herein shall be sufficient if sent by first class United States mail, postage prepaid, addressed as follows:

If to SDHDA: South Dakota Housing Development Authority  
c/o Mark Lauseng  
P.O. Box 1237  
Pierre, SD 57501-1237  
Fax Number: 605/773-7092  
Telephone Number: 605/773-3181

If to Participating Lender: \_\_\_\_\_  
c/o \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Fax Number: \_\_\_\_\_  
Telephone Number: \_\_\_\_\_

Either party may change its address for purposes hereof by giving notice to the other party.

**12. INSURANCE:** Participating Lender shall maintain in full force Errors and Omissions Insurance and a Fidelity Bond, Mortgage Banker Bond or Mortgage Originator Policy in such amounts as required by HUD or as SDHDA may reasonably require to indemnify it from any loss or damage incurred in connection with this Agreement. SDHDA must be named as a "loss payee" and must have the right to file a claim directly with the insurer if Participating Lender fails to file a claim for a covered loss that SDHDA incurs. The insurer must agree to notify SDHDA at least thirty (30) days before it cancels, reduces, or modifies Participating Lender's coverage for any reason or within ten (10) days after it receives a request from Participating Lender to cancel or reduce any coverage.

**13. RELATIONSHIP OF THE PARTIES:** SDHDA and Participating Lender hereby agree that neither this Agreement nor the origination of Mortgage Loans pursuant hereto shall constitute any agency relationship, legal representation, joint venture, partnership, or employment. SDHDA and Participating Lender agree that neither party is in any way authorized to make any contract, agreement, warranty, or representation, or to create any obligation, express or implied, on behalf of the other.

**14. EVENTS OF DEFAULT:** Each of the following shall constitute an Event of Default on the part of Participating Lender under this Agreement: (i) any breach by Participating Lender of any of Participating Lender's representations, warranties, or covenants set forth in this Agreement, the Application, the Participating Lender Agreement, or the Lending Manual; (ii) the failure of Participating Lender to perform any of its obligations under this Agreement, the Participating Lender Agreement, or the Lending Manual; (iii) the occurrence of any act of insolvency or bankruptcy concerning Participating Lender; (iv) Participating Lender's failure to meet any capital, leverage, or other financial standard imposed by any applicable regulatory authority, or warehouse lender, or in SDHDA's sole opinion, any material adverse change occurs in the financial condition of Participating Lender; (v) any federal or state regulatory authority or licensing agency shall cancel, rescind, or fail to renew Participating Lender's license or institute any action against Participating Lender for fraud or criminal conduct.

**15. ENTIRE AGREEMENT:** This Agreement, the Program Guide, the Participating Lender Agreement, and the Lending Manual contain the entire agreement of the parties with respect to the subject matter hereof, and there are no representations, inducements, or other provisions other than those expressed in writing and included herein. No changes, addendums, additions, or deletions to this Agreement will be acceptable except under the terms of Section 18.

**16. SURVIVAL OF PROVISIONS/SEVERABILITY/COUNTERPARTS:** All of the covenants, agreements, representations, and warranties made herein by the parties hereto shall survive and continue in effect after the termination of the Agreement or the consummation of the transactions contemplated hereby. If any provision of this Agreement shall be held invalid or unenforceable by any court of competent

jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof, and in lieu of such invalid or unenforceable provision there shall be added automatically, as part of this Agreement, a provision as similar in terms as may be valid and enforceable, if possible. This Agreement may be executed in counterparts, all of which taken together shall constitute one and the same instrument.

**17. ASSIGNMENT:** This Agreement may not be assigned or transferred by Participating Lender without the prior written consent of SDHDA.

**18. AMENDMENT/TERMINATION:** SDHDA shall have the right to amend this Agreement with written notice to the Participating Lender. At SDHDA's request, Participating Lender shall acknowledge changes to the Agreement in writing, but Participating Lender's failure to provide written acknowledgement of any amendment shall not impair the enforceability of such amendment; provided, however, that Participating Lender may terminate the Agreement with respect to the future origination of Mortgage Loans upon any amendment by SDHDA. This Agreement may be terminated with respect to future origination of Mortgage Loans by either party at any time by giving written notice of termination to the other party. Upon the occurrence of any Event of Default as described in Section 14(i), 14(ii), 14(iv) or 14(v) hereof, SDHDA may either terminate this Agreement upon notice to Participating Lender or, without affecting any other rights or remedies available to SDHDA under this Agreement or at law or in equity, immediately suspend all registrations and lock-ins and may refuse to fund any or all Mortgage Loans, pending the cure, to SDHDA's satisfaction, of such Event of Default. Upon the occurrence of an Event of Default under Section 14(iii), this Agreement shall terminate automatically. Amendment or termination of this Agreement shall not in any respect change, alter, or modify the obligations of SDHDA and Participating Lender with respect to Mortgage Loans that have been originated by Participating Lender prior to the date of such amendment or termination.

**19. GOVERNING LAW; INTERPRETATION:** It is mutually understood and agreed that this Agreement shall be governed by the laws of the State of South Dakota as to both interpretation and performance. Any disputes arising out of or relating to this Agreement, including but not limited to any alleged breach of this Agreement, shall be venued exclusively in the state or federal courts in the State of South Dakota and the parties to this Agreement hereby expressly consent to the exercise of personal jurisdiction over them by such courts. All terms of this Agreement shall be construed and interpreted according to their plain meaning and no term shall be more strictly construed against SDHDA merely because SDHDA has drafted this Agreement.

**20. AGREEMENT TO PAY ATTORNEYS' FEES:** If it is determined in a judicial proceeding that the Participating Lender has failed to perform under any provision of this Agreement or if SDHDA employs attorneys or incurs other expenses for the enforcement, performance, or observance of the terms of this Agreement on the part of Participating Lender, then SDHDA shall be reimbursed by Participating Lender on demand for reasonable attorneys' fees and other out-of-pocket expenses.

**21. ACCEPTANCE:** This Agreement shall become binding upon acceptance and execution by SDHDA.

**IN WITNESS WHEREOF,** the parties have executed this Agreement as of the date first written above.

Participating Lender:

\_\_\_\_\_

South Dakota Housing Development Authority

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: Mark Lauseng

Title: \_\_\_\_\_

Title: Executive Director