



# Terms of Use

Updated: February 4, 2020

These “**Terms of Use**” or “**Terms**” describes the terms under which Assessment Systems Corporation (“**Assessment Systems**”) offers Customers (defined below) access to its services through the Assessment Systems website and its related applications including, but not limited to, Assess.ai™ and FastTest™ software and services (collectively, the “**Site**”). Assessment Systems and Customer are each a “**Party**” and collectively the “**Parties**”.

Assessment Services offers Paid Accounts to Customers who enter into a separate Subscription and Services Agreement. In the absence of a Subscription and Services Agreement, Assessment Systems expressly limits acceptance to the terms and conditions set forth in these Terms of Use. Any terms and conditions contained in a purchase order, request for proposal, order acceptance or similar document from Customer shall not constitute a part of the contract of sale between the Parties unless such terms and conditions are specifically incorporated in an applicable Subscription and Services Agreement. Customer’s registration for, or use of, the Site shall constitute acceptance on the terms and conditions set forth in these Terms of Use and any additional or different terms proposed by Customer are hereby rejected. If a Customer does not agree to these Terms, the Customer must immediately discontinue use of the Site.

Use of the Site, and any Services or content provided by or on behalf of Assessment Systems, are subject to all terms and policies posted on the Site. By accessing the Site or any Services or content provided by or on behalf of Assessment Systems, Customer agrees to comply with and to be bound by the Terms set out below, including the policies and guidelines linked to (by way of reference or the provided URLs) from these Terms. Customers who do not understand or agree with these Terms, should not access or use the Site or the Services (as defined below).

No Customer may access the Site or the Services if their business competes with Assessment Systems, except with Assessment Systems’ prior written consent. Assessment Systems reserves the right to revoke access if a Customer is deemed to be a competitor.

## 1. Definitions

1.1. In these Terms of Use, the following words shall have the following meanings:

**Access Credentials** means any user name, identification number, password, license or security key, security token, PIN, or other security code, method, technology, or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Site and Services.

**Agreement** has the meaning set forth in Section 4.2.

**Business Day** means every day excluding Saturdays, Sundays and any national holidays throughout the United States unless otherwise defined in a Subscription and Services Agreement.

**CAN-SPAM Act** has the meaning set forth in Section 3.4.1.

**Confidential Information** has the meaning set forth in Section 7.2.

**Consulting Services** means the consulting and/or training services provided by Assessment Systems to Customer and can include, but is not limited to, psychometric services, test development services, and business planning services.

**Copyrights** has the meaning set forth in Section 8.3.

**Customer** means the person and/or entity that has created an account on the Site.

**Customer Data** means the data, information and material provided or submitted by the Customer, User or Examinees in the creation, participation or reporting of assessments as well as any work product generated based on the assessments. Customer Data shall expressly not include the software, scripts, documentation and templates that are provided by Assessment Systems.

**Discloser** has the meaning set forth in Section 7.1.2.

**DMCA** has the meaning set forth in Section 8.4.

**Emergency Maintenance** means maintenance that is required and cannot reasonably be postponed until the next Scheduled Maintenance period.

**Examinee** means a person who accesses the Site for the purpose of taking an assessment.

**Fees** means the monetary sums payable by the Customer to Assessment Systems for premium access to Software Services, Support, or Services, as more particularly described on the Site or in a Subscription and Services Agreement.

**Force Majeure Event** means any act, event, omission or accident beyond the reasonable control of either Party including, but not limited to, acts of God, extreme adverse weather conditions, natural disaster, war, threat of or preparation for war, armed conflict, terrorist attack, civil war, civil commotion or riots, nuclear, chemical or biological contamination, compliance with any newly enacted law, regulation or directive, fire, flood, earthquake, explosion or accidental damage, any labor dispute, including (but not limited to) strikes, industrial action or lockouts, denial of service attacks, viruses, non-performance by suppliers or subcontractors, interruption or failure of utility or transport service and the unavailability of labor or materials to the extent beyond the reasonable control of Assessment Systems.

**Free Accounts** has the meaning set forth in Section 2.2.

**Granting Party** has the meaning set forth in Section 8.3.

**Indemnified Party** has the meaning set forth in Section 10.3.

**Indemnifying Party** has the meaning set forth in Section 10.3.

**Initial Term** means the one-year period which shall start on the Term Effective Date.

**Intellectual Property** or **IP** means the following: (a) works of authorship including, without limitation, recordings, graphs, drawings, items, tests, computer programs, documentation, designs, files, records, data and mask works; (b) ideas, inventions (whether or not patentable), designs, formulas, procedures, methods and technology; (c) Confidential Information and trade secrets; (d) databases, reports, data compilations and collections, analyses and technical data; (e) trademarks; and/or (f) domain names, web addresses and web sites.

**IP Rights** means worldwide common-law and statutory rights associated with (a) patents, divisions, continuations, renewals, reissuances and extensions thereof and patent applications; (b) copyrights, copyright registrations and copyright applications, “moral” rights and mask work rights; (c) the protection of trade and industrial secrets and confidential information; (d) individuals’ names, likenesses and personal characteristics; and (e) trademarks, trade names, service marks and logos.

**Losses** has the meaning set forth in Section 10.1.

**New IP** means IP created, developed, or designed by Assessment Systems (or a permitted subcontractor) in the performance of the Services.

**Paid Accounts** mean Customers who agree to a Subscription and Services Agreement.

**Prohibited Activities** has the meaning set forth in Section 3.4.1.

**Receiving Party** has the meaning set forth in Section 8.3.

**Recipient** has the meaning set forth in Section 7.1.

**Renewal Term** means the one-year period of time for which the Agreement may, at Assessment Systems’ sole discretion, automatically renew following the end of the Initial Term or a Renewal Term which shall run from the end of the Initial Term or the then current Renewal Term, unless otherwise defined in an applicable Subscription and Services Agreement.

**Scheduled Maintenance** means maintenance that may interrupt Services that is planned in order to add features, resolve issues and/or enhance functionalities. Scheduled Maintenance occurs every Sunday from 8:00 a.m. until 12:00 p.m. United States Central Time and may also occur at any time Assessment Systems provides notice of such Scheduled Maintenance to Customer.

**Sensitive Personal Information** has the meaning set forth in Section 7.4.

**Services** means the services provided by Assessment Systems to Customer, including (but not limited to) the Software Services, those relating to the Software Services and Support, and, if selected by Customer, Consulting Services. The Services selected shall be more particularly described on the Site or an applicable Subscription and Services Agreement.

**Software** means the Assess.ai™ and/or FastTest™ software applications, including any customized versions, future releases, and upgrades.

**Software Services** means the Software to which Customer is provided access hereunder in accordance with Section 2.1.

**Software as a Service or SaaS** is a software delivery model in which customers are granted the right to access and use centrally hosted software on a subscription basis.

**Subscription and Services Agreement** is a separate agreement between a Customer and Assessment Systems where Customer agrees to subscribe to a Paid Account for the Software and/or the receipt of Services from Assessment Systems.

**Sub-Workspace** means a workspace beneath the parent Workspace, which controls a sub-set of Users' access, and allows certain content and business rules to be controlled by Users of the parent Workspace.

**Term** means the Initial Term together with any Renewal Term unless this Agreement is terminated in accordance with Article 6, unless otherwise defined in an applicable Subscription and Services Agreement.

**Term Effective Date** means the day a Customer signs up for an account and agrees to these Terms.

**Test Credits** means a prepaid or postpaid credit for use in denominating the cost of assessments. Test Credits are non-refundable, bear no cash value, and do not expire as long as the Customer's Admin User's account remains active. Test Credits are purchased according to the schedule contained on the Site or in an applicable Subscription and Services Agreement.

**Unscheduled Downtime** means the unavailability of the Software Services for any reason except Scheduled Maintenance, Emergency Maintenance and a Force Majeure Event. The unavailability of the Services due to Customer actions, Customer requests, or some specific functions that are not material to the Software Services will not constitute unavailability.

**Upgrades** means improvements, modifications, upgrades, updates, fixes and additions to the Software Services that Assessment Systems generally makes available to similarly situated customers, but does not include any Software or Software as a Service products marketed or sold by Assessment Systems as new or distinct products.

**User** means Customer and any person or entity that uses or accesses the Site and/or Services through Customer.

**Workspace** means an organizational account in FastTest™ and/or Assess.ai™ with the purpose of creating a bank of test items, administering examinations, and/or conducting other test related activities.

## **2. Assessment Systems' Obligations**

- 2.1. Software Access and Authorization.** In consideration of, and subject to, Customer's compliance with this Agreement, Assessment Systems shall provide Users with remote access to and use of the Software selected by Customer, and corresponding Upgrades,

for the Term of this Agreement. All rights not expressly granted to Customer hereunder are reserved by Assessment Systems, its suppliers, and its licensors.

- 2.2. Free Accounts.** Assessment Systems provides both paid and free Services offering computer-based testing and item banking. Certain Services may be provided to Customer free-of-charge (“**Free Accounts**”). Other Services require payment and are available to Customers who pay Fees as required to receive such Services or enter into a Subscription and Services Agreement (“**Paid Accounts**”). Free Accounts are limited to one (1) User and five hundred (500) items. Free Accounts have duration of one (1) year but may be deactivated by Assessment Systems due to six (6) months of User inactivity, violation of this Agreement, or for any other commercially reasonable reason. Assessment Systems reserves the right to suspend or discontinue offering or providing Free Accounts at any time. Assessment Systems does not offer Support for Free Accounts. To access Support, Customer must upgrade to a Paid Account.
- 2.3. Excess Use.** If Customer exceeds the allowable level of Services during the term of this Agreement, Customer will be charged as specified using the then-current rates for the overage.

### **3. Customer Obligations**

- 3.1. Software Services.** Customer may use the Software Services during the Term solely in conformance with the terms of this Agreement. In the event that Customer exceeds the limitations of the Software Services, Assessment Systems may charge Customer for any excess use at its current list prices. Customer shall be responsible for the acts or omissions of its Users and any act or omission of Customer’s Users shall be deemed to be an act or omission directly by Customer.
- 3.2. Permitted Uses.** The Software Services (and underlying Software) may only be used to create, deliver and report on assessments, and as may be further defined on a Subscription and Services Agreement. Customer may not, directly or indirectly (i) modify or make derivative works based upon the Services or any associated documentation except as permitted by law; (ii) hide or attempt to hide copyright information, trademarks or identification of Assessment Systems’ ownership of the Services (unless a Subscription and Services Agreement expressly permits Customer to white label aspects of the Services); or, (iii) reverse engineer or access the Services in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the Services, or (c) copy any ideas, features, functions or graphics of the Services. In addition, Customer may not access the Services for competitive purposes, including, but not limited to, monitoring availability, performance, functionality, or benchmarking. To ensure compliance with the terms and conditions contained within this Agreement, Assessment Systems reserves the right to audit any Workspace or Sub-Workspace at any time.
- 3.3. Use of Assessments.** Customer acknowledges that the Software Services may be used to correspond with Examinees and to assess an Examinee’s knowledge, skills and attitudes and allocate a score. Scores should be considered one piece of evidence about an Examinee’s knowledge, skill and/or attitude. When the Software Services are being used to make decisions about an Examinee (such as whether to hire, promote, or fire the Examinee), Customer is solely responsible for the quality and validation of the assessment and corresponding assessment material, and should review and evaluate the Examinee’s

score to ensure that the appropriate decision has been made. Customer is solely responsible for its use of the Software Services, including entering and maintaining the assessment material, validating the assessment, checking this material, checking scores, checking reports, and using the Software Services fairly.

### **3.4. Acceptable Use and Compliance with Law.**

**3.4.1.** Customer shall not use, or attempt to use, the Services: (a) in such a way as to exceed the scope of its rights hereunder, (b) to store or transmit anything that is reasonably likely to be offensive, harassing, threatening, abusive, obscene, illegal or defamatory, breaches the rights of any third party, (c) for illegal activities or junk mail, chain letters, pyramid schemes, “spam” or distribution to any person who has not given specific permission to be included in such a process, or (d) in a way that transmits contains software viruses, worms, trojan horses or other harmful computer code, files, scripts, agents or programs (hereinafter “**Prohibited Activities**”). Customer shall use the Service in compliance with this Agreement and Assessment Systems’ Privacy Policy available at <http://www.assess.com/privacy-policy>. Assessment Systems may make changes to this acceptable use policy from time to time, provided such changes are consistent with good industry practice. Without limiting the generality of the foregoing, Users are required to comply with the United States’ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “**CAN-SPAM Act**”), the rules and regulations promulgated thereunder.

**3.4.2. Violation of Acceptable Uses.** If the Customer uses the Services for any Prohibited Activities, Assessment Systems may immediately suspend or terminate access to the Services. Assessment Systems reserves the right to base its findings with respect to spam and related analysis and decisions on, among other things, received complaints, observed email patterns, including rates of delivery and email percentage of emails sent reported as being read by Assessment Systems’ application. Assessment Systems may, but is not obligated to, also take any lawful self-help remedies necessary to prevent continued Prohibited Activities, including, but not limited to, deleting the contact information from a User’s address book on behalf of those individuals who lodge complaints with Assessment Systems or Assessment Systems’ webhosting company. The Customer is still responsible for full payment as listed on an applicable Subscription and Services Agreement even if access to the Services is terminated for spamming or other Prohibited Activities.

**3.4.3. GDPR.** Customer is solely responsible for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right of use of all Customer Data. Customer shall be solely responsible for ensuring that Customer’s use of the Services and that all information that the Services receives and transmits pursuant to such use complies with all applicable local, state, national, and foreign laws, treaties, and regulations, including, without limitation, any applicable data protection and human rights laws regarding the transmission and processing of personal data. In the event Assessment Systems receives any personal data from Customer regarding individuals residing in the European Union, Assessment Systems shall be deemed to be a “processor” and Customer a “controller” as such terms are understood and/or defined in data privacy laws with regard to Customer Data or the information passing through the Services. To the extent required by applicable law, Customer shall procure all Examinees’

agreement, prior to use of the Software Services, to transmitting or processing their personal data as necessary for the provision of the Services and the assessments, including troubleshooting and maintenance, which Customer instructs Assessment Systems to undertake as necessary.

- 3.4.4. Access Control.** Customer has and will retain sole responsibility for and liability related to: (a) the security and use of Customer's and its Users' Access Credentials, whether provided by Assessment Systems or generated by an administrative level User of Customer; (b) all access to and use of the Site and Services directly or indirectly by or through its or its Users' Access Credentials, with or without Customer's knowledge or consent, including all results obtained from, and all conclusions, decisions, and actions based on, such access or use. Customer shall employ all physical, administrative, and technical controls, screening, and security procedures and other safeguards necessary to securely administer the distribution and use of all Access Credentials and protect against any unauthorized access to or use of the Services, and shall indemnify, defend and hold harmless Assessment Systems from any Losses arising out of any such unauthorized access.
- 3.5. Connections to the Software.** Customer shall, at its own cost, provide all Internet connections, hardware, software, and all other equipment necessary to use the Services and shall have sole responsibility for the maintenance, performance, and upkeep of such items unless otherwise agreed between the Parties.
- 3.6. Third Party Software.** To the extent any third-party software license or right is required to use the Software Services, Customer undertakes to comply with any End User Agreement for any Software Services supplied by Assessment Systems under this Agreement and Customer shall ensure that Examinees and any other party accessing such Software Services shall be bound by such undertaking.
- 3.7. System Requirements.** Customer acknowledges that the Services may only be used via compatible systems and/or compatible browsers.
- 3.8. Cooperation.** Customer acknowledges that in the performance of the Services, Assessment Systems may require the disclosure by Customer of certain information, or access to certain of Customer's computer systems or databases. Customer shall provide Assessment Systems all access reasonably requested to enable Assessment Systems to complete the Services in accordance with the Subscription and Services Agreement. Assessment Systems will have no liability for any failure or delay to provide the Services where such failure or delay is caused by or arises from Customer's failure to provide necessary information or access.
- 3.9. Customer Contact Information.** Customer shall provide Assessment Systems with complete and accurate billing and contact information. This information includes Customer's legal organization name, street address, and the name, e-mail address and telephone number of an authorized billing contact, administrator, and backup administrator Customer shall update this information within thirty (30) days of any change.
- 3.10. Data Backup.** The Software Services includes a function for archiving and exporting assessments, results and other data, and such functionality may be provided by a third-party. However, Customer is responsible for backing-up and retaining such data. Assessment Systems shall not be responsible or liable for Customer's deletion, correction, destruction, damage, loss, or failure to store any Customer Data including, but not limited

to, an event where Customer fails to make regular backups of Customer Data. If Customer Data that is achieved or stored on or through the Software Services is lost or damaged, Assessment Systems agrees to use reasonable efforts to restore such Customer Data using tools and functionality then in place and in use by Assessment Systems, but Assessment Systems shall not be liable for failure to successfully retain or restore any Customer Data.

#### **4. Subscription and Services Agreement**

**4.1. Incorporated by Reference.** These Terms are incorporated by reference into each Subscription and Services Agreement, if applicable, or any other agreement executed by the Customer therein and Assessment Systems, pursuant to which the Customer receives the right to access and use the Site and Services, including Assessment Systems owned, licensed and/or leased computer systems and other information, as upgraded from time to time.

**4.2. Terms.** These Terms and Subscription and any Services Agreement together comprise a binding written agreement between Customer and Assessment Systems, effective as of the Term Effective Date (this “**Agreement**”). In the event that no Subscription and Services Agreement exists between Assessment Systems and the Customer, then these Terms, along with Assessment Systems current standard pricing and service levels constitute the terms of the Agreement.

**4.3. Updating Terms.** Assessment Systems may update these Terms from time-to-time. Notice that the Terms have been updated and an opportunity to review and consent to the updated Terms will be provided to Customer. Updated Terms will be binding upon Customer following affirmation of consent (including any check-the-box consent) to such updated terms, or Customer’s continued use of the Services following receipt of notice of updates, without notice of any objections to such updated terms being delivered from Customer to Assessment Systems in writing.

**4.4. Conflict of Terms.** In the event of any conflict between the provisions contained in Subscription and Services Agreement and these Terms, the provisions in the Subscription and Services Agreement shall control (provided, however, that the fact that a provision appears in a Subscription and Services Agreement but not these Terms, or in these Terms but not the applicable Subscription and Services Agreement shall not be deemed to be a conflict for purposes of this sentence).

#### **5. Fees.**

**5.1. Fees.** Certain features of the Site require the payment of Fees. Assessment Systems may change its Fees, including charges for Test Credits, at any time by posting a new pricing structure to the Site. Quoted Fees don’t include sales or other transaction-based taxes of any kind.

#### **6. Term and Termination**

**6.1. Term & Renewal.** The Term of this Agreement and Customer’s right to access and use the Software Services shall commence on the Term Effective Date and shall continue for the Initial Term of the Agreement. Free Accounts must be renewed by Customer after the



Initial Term. If the Customer purchases a Paid Account, Term and Termination will be governed by the applicable Subscription and Services Agreement.

- 6.2. Termination.** In addition to any other express termination or suspension right set forth elsewhere in this Agreement, this Agreement or any portion hereof (including specific Services or Support provided and/or purchased hereunder, including any Subscription and Services Agreement) may be terminated before expiration of the Term on written notice (A) by Assessment Systems, without cause, effective sixty (60) days following such notice; or (2) by either Party, if the other Party (i) becomes insolvent, (ii) is generally unable to pay, or fails to pay, its debts as they become due, (iii) files, or has filed against it, a petition for voluntary or involuntary bankruptcy or pursuant to any other insolvency Law, (iv) makes or seeks to make a general assignment for the benefit of its creditors, or (v) applies for, or consents to, the appointment of a trustee, receiver or custodian for a substantial part of its property or business.
- 6.3. Suspension.** Whenever Assessment Systems has the option to terminate this Agreement under Section 6.2, Assessment Systems may, at its sole discretion and without liability, instead elect to immediately suspend Customer's account and access to any Services. Following suspension under this Section 6.2, Assessment Systems may terminate this Agreement by delivery of written notice to Customer at any time.
- 6.4. Assessment Systems Termination.** If Assessment Systems exercises its termination or suspension rights under Sections 6.2 or 6.3 of this Agreement:
- 6.4.1.** Assessment Systems may immediately bar access to and use of any Services by Customer or anyone accessing the Services under Customer;
- 6.4.2.** If Customer's account is suspended for more than sixty (60) days, then Assessment Systems may, without liability, delete or destroy any Customer Data in its possession; and
- 6.4.3.** In the event of termination, Assessment Systems has no obligation to retain any Customer Data, and may immediately delete or destroy any Customer Data in its possession.
- 6.5. Effect of Termination.** Except as otherwise set forth in Section 6.4, upon termination of this Agreement:
- 6.5.1.** Customer's right to access and use the Services shall immediately cease, and Assessment Systems may take such steps as are necessary to ensure such access and use ceases;
- 6.5.2.** Each Party shall promptly delete or destroy all Confidential Information of the other Party in its possession; and
- 6.5.3.** All provisions in this Agreement which by their nature should survive, shall survive termination of this Agreement, including without limitation, ownership provisions, confidentiality, non-payment, warranty disclaimers, indemnification, and limitation of liability.

**6.5.4.** The termination of this Agreement prior to expiration of the Term shall automatically terminate any Subscription and Services Agreement. Customer shall pay all Fees and other amounts owed under a Subscription and Services Agreement (if any). Termination or expiration of a Subscription and Services Agreement shall not terminate this Agreement.

## **7. Confidential Information**

**7.1.** Each Party receiving Confidential Information hereunder ("**Recipient**") agrees that:

**7.1.1.** it will treat all Confidential Information of the other Party with the same degree of care as such Recipient accords to its own Confidential Information, but in no case less than reasonable care; and,

**7.1.2.** it will not use, disseminate, or disclose to third parties any Confidential Information of the disclosing Party ("**Discloser**"), except for the purpose of providing the Services, and for any other purpose Discloser may authorize, including but not limited to Assessment Systems' use of Customer Data for research and as stated in the provisions of this Agreement.

**7.2.** For purposes of this Agreement, "**Confidential Information**" means any information, regardless of form, proprietary to or maintained in confidence by either Party, including, without limitation, any Customer Data, information, technical data or know-how relating to discoveries, ideas, inventions, software, designs, specifications, processes, systems, diagrams, research, development, business plans, strategies or opportunities, and information related to finances, costs, prices, suppliers, vendors, customers and employees which is disclosed by either Party or on its behalf whether directly or indirectly, orally, visually, or in writing, to the other Party or any of its employees or agents. The terms and conditions of any order for Assessment Systems products or services shall be deemed the Confidential Information of both Assessment Systems and Customer.

**7.3.** Recipient will have no obligation with respect to any portion of the Confidential Information which:

**7.3.1.** is now, or hereafter becomes, through no act or failure to act on the part of Recipient, generally known or available to the public;

**7.3.2.** was acquired by Recipient before receiving such information from Discloser and without restriction as to use or disclosure;

**7.3.3.** is hereafter rightfully furnished to Recipient by a third party, without restriction as

**7.3.4.** is information that was independently developed by Recipient without reference to Confidential Information received hereunder. If Recipient is compelled by applicable law or government agency to disclose any Confidential Information then, to the extent permitted by applicable law, Recipient shall: (a) promptly, and prior to such disclosure, notify Discloser in writing of such requirement so that Discloser can seek a protective order or other remedy or waive its rights under this Section 7; and (b) provide reasonable assistance to Discloser in opposing such disclosure or seeking a protective order or other limitations on disclosure. If Discloser waives compliance or, after providing the notice and assistance required

under this Section 7.3, Recipient remains required by applicable law to disclose any Confidential Information, Recipient shall disclose only that portion of the Confidential Information that Recipient is legally required to disclose and, on Discloser's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment.

**7.4. Sensitive Personal Information.** Notwithstanding any provision to the contrary in this Agreement, Customer acknowledges and agrees that use of the Services to transmit, process or store Sensitive Personal Information (as defined below) is unnecessary for use of the Services and therefore Customer shall be solely responsible for any such use of the Services by Customer or Customer's employees, agents or subcontractors and Assessment Systems shall bear no risk or liability for same. "**Sensitive Personal Information**" shall be defined to include, but not be limited to:

**7.4.1.** social security numbers;

**7.4.2.** passport numbers or other government issued I.D. numbers;

**7.4.3.** date of birth and/or gender, except solely to the extent required by applicable law; and

**7.4.4.** other information not generally available to the public regarding an Examinee or the Customer.

**7.5. Quality Assurance Purposes.** Assessment Systems may collect usage data in connection with Customer's usage of the Software Services to understand how Customer uses the Software Services and its features, including, without limitation, for quality assurance and product improvement purposes.

## **8. Intellectual Property**

**8.1. Existing or Independently Developed IP.** Each Party will retain all IP Rights in the IP that is owned by it or developed by it prior to the date of this Agreement, or acquired or developed after the date of this Agreement without reference to or use of the IP of the other Party. No rights or licenses will be deemed to have been granted by either Party to any of its IP, except as otherwise expressly provided in this Agreement or any addendum hereto. Except as may be expressly authorized by this Agreement or an addendum, neither Party shall (a) assign, license, sell, loan, lease, copy or otherwise transfer in whole or in part; (b) modify, reuse, reverse engineer, decompile or disassemble; and (c) allow or aid any third party to use the IP of the other Party.

**8.2. New IP.** Customer shall be the sole owner of all New IP that is test content and test response data ("**Test Data**"), and information relating to test takers stored in the Services, which is provided by Assessment Systems (but not the Services or Software itself). Customer hereby grants Assessment Systems a perpetual fully-paid license to use the Test Data solely for research and/or product/service development purposes. Assessment Systems shall own all IP related to the Software, the Site and the Services, including but not limited to, computer programs, software libraries, database structure, system ID's, documentation, designs, artifacts, methods, and all derivatives of the forgoing. The Software is not licensed or assigned in this Agreement, and only access to and use of the

applicable Software Services is provided hereunder. Any software or code developed by Assessment Systems, whether pursuant to this Agreement (including any Deliverable), or otherwise, shall be and remain the property of Assessment Systems.

**8.3. IP License.** Each Party grants (“**Granting Party**”) a limited, non- exclusive, non-transferrable, revocable license to use its name and logo, and any other explicitly specified copyright and trademarks granted with written permission by Granting Party (hereinafter “**Copyrights**”) to the other Party (“**Receiving Party**”) for use on its website and marketing materials including creating a hyperlink to the Granting Party’s website. Use of Copyrights is limited to the Customer identifying products and services received from Assessment Systems, and Assessment Systems indicating products and services delivered to Customer. Neither Party may use the Copyrights to portray the Granting Party, its affiliates or their respective products and/or services in a false, misleading, derogatory or otherwise offensive manner, nor represent the Granting Party’s Copyrights as their own in anyway. Furthermore, upon written notice of the Granting Party revoking the Receiving Party’s license to use the Granting Party’s Copyrights, Receiving Party shall remove and not subsequently use any Copyrights owned by Granting Party, and will immediately destroy all advertising matter, computer displays, on-line matter, hyperlinks, printed matter and any and all other matter in any format in its possession or under its control containing any Copyrights owned by the Granting Party.

**8.4. DMCA.** Assessment Systems complies with the Digital Millennium Copyright Act (“**DMCA**”). To provide notice of claimed infringement, email [support@assess.com](mailto:support@assess.com) alleging that certain content (specify content) on the Site violates intellectual property rights. Users who have a good faith belief that they received a notice under the DMCA as a result of a mistake or misidentification, may consider submitting a counter notice. Assessment Systems accepts counter notices submitted in response to copyright takedowns only. Users may submit a counter notice by replying to email Assessment Systems sent informing them of the copyright infringement notice and takedown.

Once Assessment Systems confirms that the counter notice includes all of the information required by the DMCA, Assessment Systems emails both parties: the member submitting the counter notice and the party who submitted the initial infringement claim. Assessment Systems provides a copy of the counter notice to the party who submitted the initial infringement claim, who may use the information to obtain a court order to restrain them from reactivating the material.

If, within ten (10) Business Days of receipt of a counter notice, the party who submitted the initial copyright claim doesn’t inform Assessment Systems of an action seeking a court order against them, the material specified in the counter notice may be reactivated. Reactivating the material before this time may result in account termination.

This information is not legal advice. Users are responsible for any use of this information. If a User has any questions or concerns, they should consult an attorney. Users may also consider communicating directly with the party who filed the initial infringement claim.

## **9. Warranties**

**9.1. Mutual Representations.** Each Party represents and warrants to the other that (i) the terms of this Agreement do not violate and will not cause a breach of the terms of any other agreement or any applicable law, decree, or regulation to which it is a party or by

which it is subject or bound; and (ii) that this Agreement is, and shall remain, a valid and binding obligation, enforceable in accordance with its terms, as limited by applicable bankruptcy, insolvency, reorganization, moratorium, and other laws of general application affecting enforcement of creditors' rights generally.

**9.2. Assessment Systems Representations.** Assessment Systems represents and warrants that it will comply with applicable local, state, national, and foreign laws, treaties, and regulations in connection with Assessment Systems' performance under, and compliance with this Agreement.

**9.3. Disclaimer of Warranties.** EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SERVICES ARE PROVIDED "AS-IS" WITHOUT WARRANTY OF ANY KIND, AND ASSESSMENT SYSTEMS HEREBY DISCLAIMS, ANY AND ALL EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE.

EXCEPT AS EXPRESSLY PROVIDED HEREIN, ASSESSMENT SYSTEMS, ITS SUPPLIERS, AND ITS LICENSORS DO NOT REPRESENT OR WARRANT THAT THE USE OF THE SERVICES WILL BE SECURE, TIMELY, UNINTERRUPTED, OR ERROR-FREE, OR OPERATE IN COMBINATION WITH ANY OTHER SYSTEM OR DATA. IN NO EVENT SHALL ASSESSMENT SYSTEMS BE LIABLE OR OTHERWISE RESPONSIBLE FOR ANY DAMAGE TO, OR LOSS OF, ANY CUSTOMER DATA OR ANY THIRD PARTY DATA PROVIDED BY CUSTOMER, RESULTING FROM ANY CAUSE WHATSOEVER, EXCEPT TO THE EXTENT CAUSED BY ASSESSMENT SYSTEMS' GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. THE SOFTWARE SERVICES MIGHT BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. ALTHOUGH ASSESSMENT SYSTEMS WILL USE COMMERCIALY REASONABLE EFFORTS TO TAKE ACTIONS IT DEEMS APPROPRIATE TO REMEDY AND AVOID SUCH EVENTS AND EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN SECTION 11, ASSESSMENT SYSTEMS DISCLAIMS ANY AND ALL LIABILITY OR RESPONSIBILITY RESULTING FROM OR RELATED TO SUCH EVENTS.

**9.4. Corrective Action.** If Customer's use of the Service is prevented by injunction for infringement of intellectual property rights of third parties, or if in Assessment Systems' sole determination such an outcome is likely, Assessment Systems will, as Customer's sole remedy and Assessment Systems' sole liability other than indemnification under Section 10.2: (i) modify the Service so that it becomes non-infringing, but of equivalent functionality; (ii) replace the Service with a non-infringing Service of equivalent functionality; or (iii) if neither of the first two (2) alternatives is commercially reasonable, in Assessment Systems' sole determination, terminate the Service and refund any prepaid fees attributable to such infringing Service paid by Customer.

## **10. Indemnity**

**10.1. Customer's Indemnification.** Customer shall indemnify, defend and hold Assessment Systems, its licensors, and each such Party's parent organizations, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents, harmless from and against any and all third party claims, costs, damages, losses, liabilities, and expenses (including

attorneys' fees and costs) (collectively, "**Losses**") to the extent arising out of or in connection with (i) Customer's use of, or the Customer Data used in connection with, the Services, other than to the extent due to reasons for which Assessment Systems is providing indemnification in Section 9.2; (ii) infringement or misappropriation of a patent, copyright, trademark, or other similar intellectual property right of a third party that results from the combination of the Services with the Customer Data and any other products, services, or business process(s) used, provided, licensed, or owned by Customer; and/or, (iii) Customer's breach of this Agreement.

**10.2. Assessment Systems' Indemnification.** Subject to the limitations contained herein, Assessment Systems shall defend and hold Customer and Customer's parent organizations, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents harmless from and against all third party Losses to the extent arising out of or in connection with Assessment Systems' infringement or misappropriation of a patent, copyright, trademark, or other similar intellectual property right of a third party other than to the extent resulting from (a) use of the Services that does not conform with the terms of this Agreement; (b) any Customer Data or other Customer materials provided by Customer or used in combination with the Services; or (c) any modifications or changes made to the Services by or on behalf of any person other than Assessment Systems.

**10.3. Indemnification Procedure.** The indemnifying party's ("**Indemnifying Party**") indemnification and hold harmless obligation to the indemnified party ("**Indemnified Party**") is expressly conditioned on the following: (i) Indemnifying Party shall be notified in writing promptly of any such claim or demand, provided that the failure to provide prompt notice shall not relieve the Indemnifying Party of its obligations hereunder except to the extent that such delay adversely impacts the Indemnifying Party; (ii) Indemnifying Party shall have sole control of the defense of any action or such claim or demand and of all negotiations for its settlement or compromise; and, that (iii) Indemnified Party shall cooperate with Indemnifying Party in a reasonable way and at Indemnifying Party's expense to facilitate the settlement or defense of such claim or demand. The Indemnified Party may, at its expense and option, use counsel of their choosing to observe the defense of any such claim. Indemnifying Party may not settle or otherwise dispose of a claim that includes a finding or admission of culpability of, or otherwise materially adversely affects, the Indemnified Party without Indemnified Party's prior written consent, which consent shall not be unreasonably withheld.

## **11. Limitation of Liability**

Except to the extent otherwise contemplated in Section 11, in the event that an assessment does not perform properly due solely to the fault of the Assessment Systems technology, Assessment Systems shall allow the affected Examinees to retake the assessment at no additional charge, or, at Assessment Systems' option refund the Test Credits charged to Customer and this shall be Customer's sole remedy for Assessment Systems' non-performance.

IN NO EVENT SHALL ASSESSMENT SYSTEMS TOTAL AGGREGATE LIABILITY IN CONNECTION WITH THIS AGREEMENT EXCEED THE GREATER OF (i) ONE THOUSAND DOLLARS (\$1,000.00) OR (ii) AMOUNTS ACTUALLY PAID BY CUSTOMER IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM AND IN NO EVENT SHALL ASSESSMENT SYSTEMS AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY INDIRECT,

PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL, OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING LOSS OF DATA, REVENUE, PROFITS, USE, OR OTHER ECONOMIC ADVANTAGE) ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THESE SERVICES EVEN IF ASSESSMENT SYSTEMS OR ITS LICENSORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

NOTWITHSTANDING THE FOREGOING, ASSESSMENT SYSTEMS SHALL HAVE NO LIABILITY WITH RESPECT TO CUSTOMER'S USE OF THE SERVICES WHERE ASSESSMENT SYSTEMS IS PROVIDING A FREE ACCOUNT.

NOTWITHSTANDING THE FORGOING, NOTHING IN THIS AGREEMENT SHALL EXCLUDE EITHER PARTY'S LIABILITY FOR LIABILITY WHICH CANNOT BE PROPERLY EXCLUDED BY APPLICABLE LAW.

## **12. Support and Maintenance**

**12.1. Support Generally.** Support is not provided for Free Accounts.

**12.2. Ongoing Maintenance.** Assessment Systems conducts Scheduled Maintenance and Emergency Maintenance. Assessment Systems will use good faith efforts to minimize the duration of and perform any Scheduled Maintenance and Emergency Maintenance during off peak hours.

**12.3. Basic Remedies.** In the event of Unscheduled Downtime, Assessment Systems will provide Customer a Test Credit for the affected Examinee(s) who were unable to take the assessment affected by the Unscheduled Downtime.

## **13. Notice**

**13.1. Notice to Customer.** Assessment Systems may give notice via the Software Services, by electronic mail to Customer's e-mail address on record, or by written communication sent by first class mail or pre-paid post to Customer's address on record in Assessment Systems' account information. Such notice shall be deemed to have been given upon two (2) business days after mailing or posting (if sent by first class mail or pre-paid post) or twelve (12) hours after sending by email. Assessment Systems shall have the right to notify Customer in the event of a general notice to all Users of the Software Services or Site of important announcements regarding the operation of the Service, including by email correspondence, and Customer hereby provides its express consent to such notification, regardless of whether Customer has generally opted out of receipt of notifications from Assessment Systems.

**13.2. Notice to Assessment Systems.** Customer may give notice to Assessment Systems (such notice shall be deemed given when received by Assessment Systems) by letter delivered by nationally recognized overnight delivery service or first class postage prepaid mail to Assessment Systems Corporation, 5865 Neal Ave N #377, Stillwater, MN 55082 United States or other address as notified by Assessment Systems.

## 14. Miscellaneous

- 14.1. Assignment.** This Agreement may not be assigned by either Party without the prior written approval of the other Party. Notwithstanding the foregoing, Assessment Systems reserves the right to assign this Agreement without the approval of the Customer, to (i) a parent or subsidiary entity, (ii) to subcontractors engaged by Assessment Systems, (iii) an acquirer of assets either in whole or in part, or (iii) a successor by merger. Any purported assignment in violation of this Section shall be void.
- 14.2. Non-Solicitation.** Customer agrees that it, its organization, and its affiliates will not attempt to hire, or assist in hiring anyone currently employed by Assessment Systems, except insofar as such recruitment results from a general solicitation of employment not specifically directed towards employees or subcontractors of Assessment Systems during the Term and for a period of two (2) years thereafter. Customer further agrees that should such a situation occur, Assessment Systems would be caused irreparable harm and be entitled to injunctive relief.
- 14.3. Legal Fees.** Assessment Systems shall be entitled to recover reasonable attorney's fees in the event Assessment Systems is the prevailing party in any legal action between the Parties, including but not limited to enforcing or interpreting this Agreement. Assessment Systems shall be entitled to recover any additional expenses (including but not limited to reasonable attorneys' fees and accrued interest) Assessment Systems incurs in collecting all delinquent Fees.
- 14.4. Non-Exclusivity.** Assessment Systems may contract for similar services to be performed for other customers while under contract with Customer provided that doing so will not cause Assessment Systems to violate the terms of this Agreement.
- 14.5. No Third Party Beneficiaries.** This Agreement is not intended to, and does not confer any rights, benefits or remedies upon any person other than the Parties.
- 14.6. No Waiver.** Failure by either Party to exercise or enforce any right or benefit conferred by this Agreement will not be deemed to be a waiver of any such right or benefit nor operate so as to bar the exercise or enforcement thereof or of any other right or benefit on any later occasion.
- 14.7. Severability.** If any provision, or part provision, of this Agreement, is held by a court or any competent authority to be invalid, illegal, or unenforceable in any jurisdiction, that provision or part provision shall be deemed deleted for purposes of application of this Agreement in such jurisdiction and the remainder of this Agreement shall continue in full force and effect. Such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.
- 14.8. Amendments.** No amendment of this Agreement shall be binding on Assessment Systems unless it is in writing and signed by both Parties. Assessment Systems may change the configuration of its network, equipment, or any other item material to the provision of the Services at any time provided that such change does not adversely affect the Services.



- 14.9. Reliance.** Customer acknowledges that Assessment Systems has set its prices and entered into this Agreement in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth herein, and that the same form an essential part of the bargain between the Parties.
- 14.10. Independent Contractor.** The relationship of the Parties is that of independent contractor, and nothing herein shall be construed to create a partnership, joint venture, franchise, employment, or agency relationship between the Parties. Customer shall have no authority to enter into agreements of any kind on behalf of Assessment Systems and shall not have the power or authority to bind or obligate Assessment Systems in any manner to any third party.
- 14.11. Governing Law and Forum.** This Agreement shall be governed by Minnesota law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Services shall be subject to the exclusive jurisdiction of the state and or Federal courts located in Minneapolis, Minnesota.

Should Customer be domiciled in a country outside the United States, Customer will be exclusively liable for any issues triggered by the applicability and/or enforcement of the laws of that country in related in any way to this Agreement. Customer hereby expressly waives any right granted by that country that may confer to Customer any rights different than those specifically contemplated and provided under this Agreement. Customer shall defend and indemnify Assessment Systems against any and all claims related to any claims or additional obligations imposed on Assessment Systems due to the application and/or enforcement of law in non-U.S. jurisdictions. The Parties explicitly waive and disclaim application of the United Nations Convention on Contracts for the International Sale of Goods.