Actus

Terms and Conditions

CONTENTS

CLAUSE

1. DEFINITIONS AND INTERPRETATION

1.1 The following terms and expressions shall have the following meanings:

Actus: means Actus, the trading name of Advance Change Ltd.

Actus Software and Service Agreement: means the software and services agreement entered in between Actus and the Customer.

Agreement: means together these Terms and Conditions and the Actus Software and Service Agreement.

Authorised User: means the employees, agents and independent contractors of the Customer who are permitted by the Customer to use the Software and in respect of whom the Customer has paid for a User Licence.

Software Data Security Policy means the software and data security policy available at www.actus.co.uk as may be amended from time to time.

Business Day: any day which is not a Saturday, Sunday or public holiday in England and Wales.

Confidential Information: information that is proprietary or confidential or is clearly labelled as such or expressly identified as Confidential Information in Clause 10.

Comply Admin User: the trained Authorised Users who are appointed by the Customer to take a lead role in administering and managing the Actus SM&CR module of the Software internally and who will have visibility of and access to Compliance and other Personal Data of the Customer which has been uploaded to the Software.

Customer: The party referenced in the Actus Software and Services Agreement that has agreed to take and pay for the Software and Services under the terms of the Agreement.

Customer Data: the data input by the Customer, Authorised Users, or Actus on the Customer's behalf pursuant to clause 6 of these Terms and Conditions for the purpose of using Actus Software or facilitating the Customer's use of other Actus Services, in each case including personal and special category data.

Data Controller: an individual, corporate or unincorporated body who determines what personal or special category data will be processed in a particular activity or operation, and the purpose for that processing.

Data Processor: an individual, corporate or unincorporated body who is contracted by a Data Controller to carry out a specific set of processing activities on a set of personal or special category data on the Data Controller's behalf.

Data Protection Legislation: all applicable data protection and privacy legislation in force from time to time in the UK including the Data Protection Act 2018 and UK & EU General Data Protection Regulation, the Privacy and Electronic Communications Directive 2002/58/EC (as updated by Directive 2009/136/EC) and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended.

Data Protection Losses: means all liabilities and other amounts, including all:

(a) costs (including legal costs), claims, demands, actions, settlements, interest, charges, procedures, expenses, losses and damages (including relating to material or non-material damage);

(b) loss or damage to reputation, brand or goodwill;

(c) to the extent permitted by applicable law:

    (i) administrative fines, penalties, sanctions, liabilities or other remedies imposed by the Information Commissioner's Office;

    (ii) compensation paid to a Data Subject (including compensation to protect goodwill and ex gratia payments); and

    (iii) costs of compliance with investigations by the Information Commissioner's Office; and

(d) the costs of loading Customer Data, to the extent the same are lost, damaged or destroyed, and any loss or corruption of Customer Data (including the costs of rectification or restoration of Customer Data).

Data Subject: The identified or identifiable person to whom the personal or special category data relates.

Extended Licence Term: means the 12 month period at the end of the Initial Licence Term and at the end of each subsequent Extended Licence Term.

Force Majeure: means any event preventing either of the parties to the Agreement from performing any or all of its obligations under the Agreement which arises from or is attributable to acts, events, omissions or accidents beyond the reasonable control of the party so prevented, including, without limitation, nationalisation, expropriation or other government actions; any change of law or regulation, postal or other strikes, lock-outs or other industrial disputes (whether involving the workforce of the party so prevented or the other party), act of terrorism or of God, fire, flood, storm, war, riot, civil commotion, malicious damage (including to systems), failure or breakdown in communications, computer facilities or software for any reason to perform its obligations.

Licence Term Start date: 4-12 weeks after the Agreement signature date or the agreed date when the Software is made fully available to the Customer for system validation or full roll out and from which The User Licence fees commence and are renewed from

HR Admin User: the trained Authorised Users who are appointed by the Customer to take a lead role in administering and managing the Software internally and who will have visibility of and access to all Personal Data of the Customer.

Implementation Services: shall mean the services provided by the Supplier to the Customer in order to implement the Software and as more particularly described in section 3 of the Actus Software and Services Agreement.

Implementation Fee: the one-off set up fee payable by the Customer to the Supplier for designing and configuring the system; providing project management support; expert consultancy and guidance. This includes the initial upload of customer data but excludes integration functionalities such as Single Sign On; Integration or ongoing data upload.

Initial Licence Term: means the period commencing on the Go-Live Date and, unless terminated in accordance with Clause 12, continuing for three years.

Intellectual Property Rights: include without limitation, rights in patents, trademarks, service marks, trade names, other trade-identifying symbols and inventions, copyrights, design rights, database rights, rights in know-how, trade secrets and any other intellectual property rights arising anywhere in the world, whether registered or unregistered, and including applications for the grant of any such rights.

Licence Term: means the Initial Licence Term or, if Agreement has been automatically extended pursuant to Clause 12, the Extended Licence Term as the context requires.

Module Licence: means the rights to use specific system functionality if not included within standard User Licence Fee e.g. Actus Comply or Actus 360

Normal Business Hours: 9.00 am to 5.30 pm local time in London on a Business Day.

Personal Data: means any information about an individual from which that person can be identified, including special category (sensitive) data and information.

Privacy Policy: means the Supplier's privacy and security policies as amended from time to time and available at www.actus.co.uk.

Services: means the training and/or support services provided by the Supplier to the Customer including face to face, web and video-based learning tools and also other professional services including consultancy and project management that support the Software.

Software: means the online software application known as Actus supplied via www.actuslogin.com or www.actuslogin.co.uk or any other website or application supplied to the Customer by Actus under the Agreement and includes the documentation made available to the Customer by Actus in connection with the software application.

Super User: means the Authorised Users who have received additional training from Actus to provide local guidance and support and to support implementation.

Supplier: means Actus as the provider responsible for supplying the Software and Services under the terms of the Agreement and also referred to hereunder as Actus.

Support Policy: means the Supplier's support policy if as amended from time to time and available at www.actus.co.uk.

Terms and Conditions: means these Actus Terms and Conditions.

User Licences: means the User Licences purchased by the Customer pursuant to the Agreement that entitle Authorised Users to access and use the Software during the Licence Term.

User Licence Fees: the licence fees payable by the Customer to the Supplier for the User Licences, as set out in the Actus Software and Services Agreement.

1.2   Headings are for ease of reference and shall not affect the interpretation of these Terms and Conditions.

1.3   Words in the singular shall include the plural and vice versa.

1.4   References in the Agreement to any statute or statutory instrument shall include any re-enactment, modifications or amendments thereto for the time being in force.

1.5   A reference to writing or written includes e-mail but not fax, text, instant messages or similar.

2.   USER LICENCES

2.1   Subject to the terms of the Agreement, the Supplier grants the Customer with the non-exclusive, non-transferable right to use the Software under User Licences that the Customer may permit its Authorised Users to use to access the Software during the Licence Term.

2.2   The Customer may permit its Authorised Users to access the Software for the purpose of its business activities and not otherwise.

3.   CUSTOMER OBLIGATIONS

3.1   The Customer undertakes that:

(a)   the maximum number of Authorised Users that it authorises to access and use the Software shall not exceed the number of User Licences it has purchased from time to time;

(b)   it will not allow or suffer any User Licence to be used by more than one individual Authorised User unless it has been reassigned in its entirety to another Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Software;

(c)   each Authorised User understands that the login they are provided with by the Supplier to access the Software can provide access to personal and special category data and that they should keep the password associated with the login confidential, should log out of browsers after use particularly on shared devices and should access the Software from a suitably secure device or computer;

(d)   each Authorised User will receive regular and adequate training on data protection practices and behaviours in line with the current enforceable data privacy legislation, to ensure responsibility and accountability of all Authorised Users for the data processing carried out and the unrestricted rights and freedoms of Data Subjects.

3.2   The Customer warrants to the Supplier that it will take all reasonable steps (including testing with up-to-date commercially available virus detection software) to ensure that any software used with or in connection with the Software is not infected by viruses and/or logic bombs, worms, trojan horses and any other type of disruptive, destructive or nuisance programs.

The Supplier reserves the right, without liability to the Customer and without prejudice to any other rights available to it, to suspend the Software and/or disable the Customer's access should the Customer breach the provisions of this Clause 3.2.

3.3   Except to the extent expressly permitted under these Terms and Conditions, the Customer shall not:

(a)   attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software or any of the Personal Data contained within the Software in any form or media or by any means or attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or

(b)   access all or any part of the Software in order to build a product or service which competes with Software; or

(c)   use the Software to provide services to third parties without written permission from the Supplier; or

(d)   licence, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Software or any of the Personal Data contained in the Software available to any third party except the Authorised Users, or

(e)   attempt to obtain, or assist third parties in obtaining, access to the Software or any of the Personal Data contained in the Software other than as provided under the Agreement.

3.4   The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Software and the Personal Data contained within the Software and, in the event of any such unauthorised access or use, shall notify the Supplier of such a breach without undue delay.

3.5   The Customer shall:

(a)   provide the Supplier with all necessary co-operation in relation to the Agreement;

(b)   provide all necessary access to such information as may be required by the Supplier in order to facilitate the provision of Software and Services;

(c)   comply with all applicable laws and regulations with respect to the Agreement;

(d)   carry out all Customer obligations in the Agreement in a timely and efficient manner. In the event of any delays by the Customer, the Supplier may adjust any agreed timetable or delivery schedule as reasonably necessary;

(e)   ensure that it notifies the Supplier promptly of changes in HR Admin Users or Super Users who are responsible for the internal management of the Software or the Services;

(f)   ensure that all HR Admin Users are trained and fully competent to use the Actus system and are aware of their additional responsibilities around confidentiality and data protection arising from this higher level of visibility;

(g)   ensure that only Authorised Users use the Software and do so in accordance with these Terms and Conditions;

(h)   take responsibility for any data breaches caused by Authorised Users accessing the Software over inadequately secured networks or devices.

(i)   obtain and maintain all necessary licences, consents, and permissions necessary for the Supplier to process user information within Actus for one or more of the following purposes only: performance management and appraisal, absence management, human resource administration, feedback, talent management or regulatory compliance.

(j)   take accountability for any impact on user experience when accessing the Software caused by using out of date or insecure IT platforms or browsers; and

(k)   be solely responsible for procuring and maintaining its network connections and telecommunications links from their systems to the Software.

4. SUPPLIER OBLIGATIONS

4.1   The Supplier undertakes that the Software and Services will be provided in line with the agreed defined scope of works and with skill, diligence, care and in accordance with best practice in the Supplier's industry.

4.2   Any additional functionality or services may be provided by the Supplier during the Licence Term and charged for in line with the fees set out in the Actus Software and Services Agreement or alternatively as agreed separately in writing between the parties.

4.3   The Supplier shall use commercially reasonable endeavours to make the Software available to the Customer.

4.4   The Supplier shall comply with all UK applicable laws around data protection and information processing with further information available in the Actus Privacy Policy available at www.actus.co.uk or by emailing support@actus.co.uk

4.5   The Supplier undertakes that:

(a)   planned maintenance or upgrades will be carried out within a window of 02.00 am to 07.30 am local time in London, the details of which will be given to the Customer at least 24 hours in advance; and

(b)   it will use reasonable endeavours to perform any necessary unscheduled software or server maintenance outside Normal Business Hours and where practicable, where the Software will be affected, it shall give the Customer at least 24 hours' notice in advance.

4.6   The undertaking in Clause 4.5 shall not apply to the extent that any non-conformance of the Software is caused by the use of the Software contrary to the Agreement, instructions given by the Supplier, the Customer's infrastructure or modification or alteration of the Software by any party other than the Supplier.

(a)   if the Software does not conform, the Supplier will use reasonable commercial endeavours to correct any such non-conformance promptly which shall constitute the Customer's sole and exclusive remedy for breach of the Supplier's undertaking as set out in Clause 4.1.

(b)   in the unlikely event of sustained non-conformance which shall be the Customer's total inability to access the Software for 24 hours or more, the Supplier will provide the Customer with regular updates about the extent of the issue and will provide a written explanation of the cause and mitigation within 7 days of the event. Further information including the application of service credits is outlined in the most recent Actus Support Policy which can be found at www.actus.co.uk or by emailing support@actus.co.uk

4.7   Notwithstanding the foregoing, the Supplier:

(a)   does not warrant that the Customer's use of the Software will be uninterrupted or error-free; nor that the Software and the information obtained by the Customer through the Services will meet any of the Customer's requirements; and

(b)   is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet; and the

Customer acknowledges that the Software may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

4.8 Save as set out in these Terms and Conditions, all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law excluded.

4.9 The Supplier warrants to the Customer that it will take all reasonable steps (including testing with up-to-date commercially available virus detection software) to ensure that any software used with or in connection with the Software is not infected by viruses and/or logic bombs, worms, trojan horses and any other type of disruptive, destructive or nuisance programs.

5. SUPPORT AND SERVICES

5.1 The Supplier shall, during the Licence Term, provide the Software and Services as agreed with the Customer subject to the Agreement.

5.2 If bespoke software development is carried out on behalf of a Customer, whether paid or unpaid, the resulting code and functionality from the software development will become the Intellectual Property of the Supplier and may be made available to all Customers in order to maintain consistency in the configuration build of the Software.

5.3 The Customer is responsible for first line end user support in respect of the Software and shall only escalate support issues to the Supplier via the designated HR Admin User or a Super User. The Customer is encouraged to minimise support issues by making full use of the learning materials provided by the Supplier.

5.4 During Normal Business Hours the Supplier will provide the Customer's trained HR Admin Users with second line support for the Software at no additional cost to the Customer. Further details are outlined in the support policy available at www.actus.co.uk or by emailing support@actus.co.uk

5.5 In the event of a significant or repetitive support issues being caused by use of the system by untrained HR Admin Users then the Supplier reserves the right to charge for this support at the applicable hourly rate.

5.6 The Supplier will proactively contact the Customer to recommend additional services that it believes will add value to the Customer such as training or system enhancements that are likely to improve the Customer experience and/or return on investment.

6. CUSTOMER DATA

6.1 The Customer shall own all rights, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.

6.2 The Supplier shall follow stringent back up and archiving procedures for Customer Data as set out in its Security Policy accessible at www.actus.co.uk.

6.3 Both parties will comply with all applicable requirements of the Data Protection Legislation.

6.4   The parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the Data Controller and the Supplier is the Data Processor. Schedule A sets out the scope, nature and purpose of processing by the Supplier, the duration of the processing and the types of Personal Data and categories of Data Subject.

6.5   The Supplier shall, in relation to any Personal Data processed in connection with the performance by the Supplier of its obligations under the Agreement:

(a)   ensure that it has in place appropriate technical and organisational measures, reviewed and provided to the Customer, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);

(b)   at the written direction of the Customer, delete or return Personal Data and copies thereof to the Customer on termination of the agreement unless required by Data Protection legislation to store the Personal Data;

(c)   notify the Customer without undue delay on becoming aware of a Personal Data Breach;

(d)   assist the Customer, at the Customer's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;

(e)   ensure that all personnel who have access to and/or process Personal Data are contractually obliged to keep the Personal Data confidential;

(f)   process the Personal Data only in accordance with these Terms and Conditions and any lawful instructions reasonably given by the Customer in writing from time to time;

(g)   maintain complete and accurate records and information to demonstrate its compliance with this clause and allow for audits by the Customer or the Customer's designated auditor;

(h)   not transfer or store any Personal Data outside the UK unless specifically requested by the Customer in writing and the following conditions are fulfilled:

(1)   the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;

(2)   the data subject has enforceable rights and effective legal remedies;

(3)   the Customer or the Supplier comply with their obligations under the current enforceable Data Protection Legislation by providing an adequate level of security protection to any Personal Data that is transferred;

(4)   the Customer or the Supplier ensure that any proposed recipients for the exported Personal Data have in place a signed written agreement containing applicable clauses for protection of data transfers under an approved framework, such as Binding Corporate Rules, Standard Contractual (EU Model) Clauses.

(5)   the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data.

6.6   The Customer shall ensure that it is entitled to transfer the relevant Personal Data to the Supplier so that the Supplier may lawfully use, process and transfer the Personal Data in accordance with the Agreement on the Customer's behalf.

6.7   The Customer shall ensure that Authorised Users and any relevant third parties have been informed of, and where applicable have given their consent to, such use, processing, and transfer as required by all applicable Data Protection Legislation for one or more of the following purposes only: performance management and appraisal; absence management; human resource administration; feedback, talent management or regulatory compliance including the Senior Managers and Certification Regime.

6.8   The Supplier will provide regular upgrades and enhancements to the Software and/or Services within the Licence Fee and may migrate Customer Data to the most up to date version of the Software during the Licence Term at no additional cost to the Customer in order to optimise functionality and security. In addition, the Supplier will regularly assess and evaluate the effectiveness of the technical and organisational measures adopted by it.

6.9   The Customer consents to the Supplier appointing Memset Ltd as a third-party processor of Personal Data under the Agreement. The Supplier confirms that it has entered or (as the case may be) will enter with the third-party processor into a written agreement incorporating terms which are substantially similar to those set out in this Clause 6. As between the Customer and the Supplier, the Supplier shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this Clause 6. The Customer acknowledges that the Supplier is able to appoint
additional third-party processors in accordance with this clause provided that the Customer is informed in writing of their appointment. A full list of third-party processors used by the Supplier for a range of purposes is available upon request.

6.10   In accordance with clause 11.0, the Supplier shall be responsible to the Customer in respect of all Data Protection Losses suffered or incurred by, awarded against or agreed to be paid by, the Customer arising from or in connection with:

(a)   any breach by the Supplier (or any third-party processor appointed by the Supplier) of its obligations under this Clause 6; or

(b)   the Supplier (or any person acting on its behalf) acting outside or contrary to the lawful instructions of the Customer in respect of the processing of Personal Data.

7.   THIRD PARTY PROVIDERS

7.1   The Customer acknowledges that where the Software and/or Services may enable or assist it to access the website content of, correspond with, and purchase products and services from third parties via third-party websites, the Customer does so solely at its own risk. The Supplier does not endorse or approve any third-party website nor the content of any of the third-party websites made available via the Software and/or Services.

8.   CHARGES AND PAYMENT

8.1   The Customer shall pay the Implementation Fee and any Module or User Licence Fees as set out in the Actus Software and Services Agreement to the Supplier in accordance with this Clause 8.

8.2   The Supplier shall invoice the Customer for Implementation Fees and Module Licence Fees at point of Contract. User Licence Fees will commence at the agreed Licence Term Start date or within a maximum of 12 weeks at which time billing will commence.

8.3   The Implementation Fees shall include the number of hours work as specified in the Actus Software and Services Agreement and should be sufficient to complete the entire implementation. The Supplier will communicate the project status regularly to the Customer and in the rare event of an implementation exceeding the allocated hours the Customer will be entitled to buy extra Implementation Hours as required. The Supplier will absorb a maximum 15% of project hours overrun before extra implementation hours are applied. Allocated hours expire 12 weeks after contract unless otherwise agreed.

8.4   The Customer may pay monthly, quarterly or annually and shall settle each invoice via Direct Debit unless otherwise agreed and confirmed in writing by the Supplier.

8.5   Except if the Customer is paying by direct debit, an annual increase of 3% will be applied to the Licence Fees on the anniversary date of the Actus Software and Services Agreement for the Licence Term.

8.6   Any exemption from the annual 3% increase to the Licence Fees that is available to the Customer as a result of the Customer paying by Direct Debit, is only available during the Initial Licence Term. After the Initial Licence Term the annual 3% increase to the Licence Fees will apply.

8.7   Should the Customer wish to take advantage of any additional functionality or modules offered by the Supplier during the Licence Term, these can be provided and charged for at a rate agreed in writing between the parties.

8.8   The Supplier operates to 30 day payment terms; if the Supplier has not received payment within 15 days after the due date of an invoice the Supplier will first contact the Customer in order to resolve the situation. If the situation is not resolved the Supplier reserves the right to:

(a)   disable the Customer's password, account and access to all or part of the Software and shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and

(b)   if access to the Software is disabled in line with clause 8.8a and then reinstated, the Supplier shall be entitled to levy a minimum admin fee of £500 for up to 500 Authorised Users and a further £500 per additional 500 Authorised Users for this and any subsequent reinstatement.

8.9   All amounts and fees stated or referred to in the Agreement:

(a)   shall be payable in the agreed currency; GBP unless otherwise agreed.

(b)   are non-cancellable and non-refundable; and

(c)   are exclusive of value added tax where applicable, which shall be payable in addition at the appropriate rate.

9.   INTELLECTUAL PROPERTY RIGHTS

9.1   The Customer acknowledges and agrees that the Supplier owns all Intellectual Property in respect of the Software and Services. Except as expressly stated herein, these Terms and Conditions do not grant the Customer any rights or licences in respect of the Software or Services.

9.2 The Supplier confirms that it holds all the rights in relation to the Software and Services that are necessary to grant all the rights it purports to grant under, and in accordance with the Agreement.

9.3 In no event shall the Supplier be liable to the Customer to the extent that any alleged infringement is based on:

(a) a modification of the Software by anyone other than the Supplier or its' agents;

(b) the Customer's use of the Software in a manner contrary to the terms of the Agreement or the instructions given to the Customer by the Supplier; or

(c) the Customer's use of the Software after it became aware of the alleged or actual infringement.

9.4 The Supplier shall indemnify the Customer against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs) suffered or incurred by the Customer arising out of or in connection with any claim brought against the Customer for actual or alleged infringement of a third party's rights (including any Intellectual Property Rights) arising out of, or in connection with, the receipt or use of the Software or the Services by the Customer.

9.5 The Customer gives consent, in principle to the Supplier to display the logo and name of the Customer on its website or in marketing material pre-authorised by the Customer, such consent may be withdrawn by the Customer at any time.

10. CONFIDENTIALITY

10.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under the Agreement. A party's Confidential Information shall not be deemed to include information that:

(a) is or becomes publicly known other than through any act or omission of the receiving party;

(b) was in the other party's lawful possession before the disclosure;

(c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure; or

(d) is independently developed by the receiving party, which independent development can be shown by written evidence.

10.2 Each party shall hold both parties Confidential Information in confidence and, unless required by law, any court of competent jurisdiction or any regulatory or administrative body or regulatory authority, not make such Confidential Information available to any third party, or for any purpose other than the implementation of these Terms and Conditions.

10.3 Each party shall take all reasonable steps to ensure that access to Confidential Information relating to either party is carefully controlled and is not disclosed or distributed by its employees or agents in violation of these Terms and Conditions.

10.4 The Customer acknowledges that the results of any performance tests of the Software, or competitive marketing information such as client lists or pricing constitute Confidential Information of the Supplier.

10.5 The Supplier acknowledges that the Customer Data is the Confidential Information of the Customer, and that the Personal Data contained within the Software belongs to the individual Data Subjects to whom that data relates.

10.6 This Clause 10 shall survive termination of the Agreement, however arising.

11. LIMITATIONS OF LIABILITY

11.1 This Clause 11 sets out the entire financial liability of each party to the other arising under or in connection with the Agreement.

11.2 Except as expressly provided in these Terms and Conditions, the Customer assumes sole responsibility for results or assurances required by its use of the Software. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the Supplier by the Customer in connection with the Software, or any actions taken by the Supplier at the Customer's direction.

11.3 The Customer shall be solely responsible for all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.

11.4 Subject to the provisions of clauses 11.5

(a) neither party shall be liable to the other (whether in tort, contract or otherwise) for any loss of profits, loss of business, special, indirect or consequential loss, depletion of goodwill and/or similar losses howsoever arising; and

(b) without prejudice to the Customer's obligation to comply with its payment obligations set out in the Agreement, the total aggregate liability of each party to the other arising under or in connection with the Agreement shall be limited to the lower of:

(i) the total Licence Fees received by the Supplier for User Licences during the 12 months immediately preceding the date on which a claim arises; or

(ii) £25,000.

11.5 Nothing in the Agreement excludes the liability of either party:

(a) for death or personal injury caused by the Supplier's negligence; or

(b) for fraud or fraudulent misrepresentation.

12. TERM AND TERMINATION

12.1 The Licence Term shall commence on agreed Licence Term Start date and, unless otherwise terminated as provided for in this Clause 12, shall continue for the Initial Licence Term and shall automatically extend for the Extended Licence Term at the end of the Initial Licence Term and at the end of each Extended Licence Term.

12.2 Either party may give written notice to the other party no later than 60 days before the end of the Initial Licence Term or the Extended Licence Term, to terminate the Agreement at the end of the Initial Term or the relevant Extended Licence Term, as the case may be,

12.3 Without prejudice to any other rights or remedies to which the parties may be entitled, either party may terminate the Agreement with immediate effect without liability by giving written notice to the other if:

(a) the other party fails to pay an undisputed amount due under the Agreement by the due date for payment and the amount remains unpaid 30 days after being requested in writing to make such payment; or

(b) the other party commits a breach of any term of the Agreement and fails to remedy that breach within 30 days of that party being notified in writing of the breach; or

(c) a petition is filed, an order is made or a resolution is passed for the winding up of the other party; an application is made to the court or an order is made for the appointment of an administrator to manage the affairs of the other party; a receiver is appointed over any of the other party's assets or undertaking; a person takes possession of or sells the other party's assets; the other party enters into a voluntary arrangement with its creditors, makes any arrangement or composition with its creditors, or makes an application to a court of competent jurisdiction for the protection of its creditors in any way; the other party ceases or threatens to cease trading; the other party takes or suffers any similar or analogous action in any jurisdiction.

12.4 On termination and at the end of any applicable notice period:

(a) each party shall return and make no further use of any equipment, property, documentation and other items (and all copies of them) belonging to the other party;

(b) the Customer is responsible for downloading any Personal Data that they wish to retain using the existing Software functionality;

(c) access to the Software shall cease and all licences granted under the Agreement shall terminate;

(d) the Supplier will destroy or otherwise dispose of any of the Customer Data in its possession 60 days after termination, unless a data extract is requested 14 days ahead of the termination date. In this event the Supplier shall use reasonable commercial endeavours to provide the data to the Customer in a CSV file or PDF within 60 days of the termination date on condition that the Customer has paid all outstanding fees and charges due to the Supplier. The Supplier reserves the right to charge up to £500 per 500 Users, for the administration and provision of any CSV or PDF file;

(e) the accrued rights, remedies, obligations or liabilities of the parties as at termination, or the continuation after termination of any provision expressly stated to survive or implicitly surviving termination, shall not be affected or prejudiced.

13. FORCE MAJEURE

13.1 No party to the Agreement shall be liable for any failure or delay in performing any of its obligations under or pursuant to the Agreement, and any such failure or delay in performing its obligations will not constitute a breach of the Agreement, if and to the extent that such failure or delay is due to an event of Force Majeure.

14.   VARIATION

14.1   The version of the Terms and Conditions that is referred to in the Agreement is deemed to govern the contract between the two parties for the duration of the Licence Term, unless a new version of the Terms and Conditions is adopted by the Customer.

14.2   The Supplier may, without giving any notice to the Customer, update their Terms and Conditions from time to time provided that such new terms will not vary the Terms and Conditions referred to in clause 14.1. The current version of the Terms and Conditions will at all times be available on the website: www.actus.co.uk and the Customer may formally adopt the newer Terms and Conditions at any point during the Licence Term.

15.   ASSIGNMENT

15.1   The Customer shall not assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement without the prior written consent of the Supplier.

15.2   The Supplier may, having given the Customer 60 days prior notice, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement.

16.   RIGHTS OF THIRD PARTIES

16.1   A person who is not a party to the Agreement (other than a successor in title or permitted assignee) has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Agreement.

17.   NOTICES

17.1   Any notice required to be given under the Agreement may be given in any manner set forth below to the address and/or email provided in the Actus Software and Services Agreement, or to such other address as shall be notified in accordance with this Clause 17 by one party to the other, and will be deemed as given:

(a)   if in writing and delivered in person or by courier, on the date it is delivered;

(b)   if sent by registered or certified mail or equivalent, on the date that mail is delivered; and

(c)   if sent by email, on the date that email is acknowledged by the by way of read receipted email,

unless the date of delivery or that receipt, as applicable, is not a Business Day or that the notice delivered, received or acknowledged, as applicable, after 5.00pm in which case that notice shall be deemed given and effective on the first following day that is a Business Day.

18.   GENERAL

18.1   Except where the parties have expressly agreed a variation to these Terms and Conditions in the Actus Software and Service Agreement, if there is an inconsistency between any of the provisions in these Terms and Conditions and the Actus Software and Service Agreement, the provisions in these Terms and Conditions shall prevail.

18.2 The Agreement, and any documents referred to therein, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or contract for services between them relating to the subject matter they cover.

18.3 Each of the parties acknowledge and agree that in entering into the Agreement they are not relying on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to the Agreement or not) relating to the subject matter of the Agreement, other than as expressly set out in these Terms and Conditions.

18.4 Nothing in these Terms and Conditions is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way.

18.5 These Terms and Conditions shall not prevent Actus from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under these Terms and Conditions.

18.6 In addition to those provisions which by their nature are intended to survive the termination of the Agreement, Clause 6 (Customer Data), Clause 9 (Intellectual Property Rights), Clause 10 (Confidentiality), Clause 11 (Limitations of Liability) and Clause 19 (Disputes, Governing Law and Jurisdiction) shall survive such termination.

19. DISPUTES, GOVERNING LAW AND JURISDICTION

19.1 If any dispute arises in connection with the Agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of notice of the dispute being given to the CEDR, the mediator will be nominated by CEDR. To initiate mediation, a party must give notice in writing (ADR notice) to the other party to the dispute requesting mediation. A copy of the request should be sent to the CEDR. Unless otherwise agreed, the mediation will start not later than 28 days after the date of the ADR notice.

19.2 Subject to Clause 19.1, no party may commence any court proceedings in relation to any dispute arising out of the Agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided always that the right to issue proceedings is not prejudiced by a delay.

19.3 If a dispute arises which relates to a possible claim with a value in excess of £10,000 a party shall be entitled to issue proceedings without first seeking to resolve the dispute by means of mediation.

19.4 The Agreement and any disputes or claims arising out of or in connection with it or its subject matter (including non-contractual disputes or claims) are governed by, and construed in accordance with, the laws of England and Wales and the parties irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims).

PROCESSING, PERSONAL DATA AND DATA SUBJECTS

1.   PROCESSING BY ACTUS

1.1   Data Controller and Data Processor

The Customer shall be the Data Controller and Actus as the Supplier shall be a Data Processor.

1.2   Scope

Personal Data collected by the Customer via the Software in relation to some or all of the following human resource or compliance related activities, including but not limited to:

(a)   employee performance management and appraisal;
(b)   talent management; absence management;
(c)   professional development and feedback;
(d)   storage of personal data for human resource reporting and remuneration; and
(e)   monitoring of regulatory compliance and assurance including in relation to the Senior Managers and Certification Regime.

1.3   Nature

The Software is being used to process Personal Data to allow the Customer to operate the Software.

1.4   Purpose of Processing

The purpose may include some or all of the following depending on the modules that the Customer has selected:

(f)   Performance Management and Appraisal;
(g)   Training and Development;
(h)   Professional Revalidation;
(i)   Feedback and Development;
(j)   SMCR assurance and accreditation; and
(k)   Other related human resource reporting and documentation.

1.5   Duration of the Processing

For the duration of the Agreement.

2.   TYPES OF PERSONAL DATA

The following data is likely to be held within the Software (this list may be subject to update). Due to the nature of the Software being customisable, this list is indicative, not exhaustive.

2.1   Personal Data

- Employee ID
- First Name
- Last Name
- Job Title or Role
- Email address
- Known as

- Hire Date
- Bespoke HRD fields as agreed with the Customer

2.2 ***Special Category Data***

- Gender
- Salutation (Mr, Mrs, Miss etc.)
- Date of Birth
- Disability data (e.g. dyslexia or other conditions that may impact performance)
- Any additional sensitive data contained in notes sections by managers indicating mitigating circumstances arising during performance evaluation meetings, such as health or family issues, study leave, maternity or other family leave, employee relations cases etc.

Other Personal Data includes but may not be limited to:

- Objectives and measures
- Feedback
- Appraisal data or ratings
- Personal development plan/career aspirations
- Performance improvement plans
- Department
- Location
- Other HRD fields if relevant

3. CATEGORIES OF DATA SUBJECT

- Users of the Software
- HR Admin User
- Super User
- Customer's employees (may include a variety of workers, such as contractors, fixed term, temps, volunteers, apprentices, interns etc.)