

Terms of Use

These **TERMS OF USE** ("Terms of Use") are an integral part of the Agreement by and between FOCUSIT, INC., an Arizona corporation ("**FOCUSIT**", "**we**", or "**us**"), and "**Client**" or "**You**". In consideration of Client's right to use the FOCUSIT Application and the FOCUSIT Site pursuant to this Agreement, Client agrees to these following additional Terms of Use:

1. **Definitions.** All terms defined elsewhere in this Agreement shall have the same meaning in these Terms of Use. In addition to the other terms defined elsewhere in the Agreement, the following terms have the following meanings:

"**FOCUSIT Rules & Templates**" means any and all pre-existing and newly created templates of FOCUSIT (including, without limitation, its work flow, email and marketing templates) developed by FOCUSIT from time to time and at any time and which are included or otherwise used in the FOCUSIT Application or FOCUSIT Site.

2. **Access Right; Conditions of Use.**

2.1 **Access Right.** Subject to all of the terms and conditions of your respective FOCUSIT Access Application Agreement with us and these Terms of Use, FOCUSIT hereby grants to Client a non-exclusive, revocable, and limited right to access and use the FOCUSIT Application via the FOCUSIT Site in strict compliance with this Agreement ("**Access Right**"). Notwithstanding the foregoing Access Right, FOCUSIT also has the right to change, suspend, or discontinue any (or all) aspects of the FOCUSIT Application or the FOCUSIT Site at any time, and from time to time, including the availability of content or features provided therein. Access Right granted to Client pursuant to this Agreement will immediately terminate upon the expiration, cancellation or termination of this Agreement for any reason.

2.2 **Conditions of Use.** Client's Access Right is further, and explicitly, subject to the following terms and conditions:

2.2.1 Client shall be responsible for obtaining and maintaining any equipment or ancillary services needed to connect to or access the FOCUSIT Application via the FOCUSIT Site, including, without limitation, Internet connections, modems, hardware, software, and long distance or local telephone service.

2.2.2. As a condition of Client's use of the FOCUSIT Application via the FOCUSIT Site, Client hereby agrees that:

(i) Client will not use the FOCUSIT Application or the FOCUSIT Site for any unlawful purpose or for any purpose that is prohibited by this Agreement;

(ii) Client will not use the FOCUSIT Application or the FOCUSIT Site in any manner that could damage, disable, overburden, or impair the FOCUSIT Site or any of its

Servers, or interfere with any other party's use and enjoyment of the FOCUSIT Application via their access to the FOCUSIT Site;

(iii) Client will not obtain or attempt to obtain any materials or information through any means not intentionally made available or provided for through the FOCUSIT Application via the FOCUSIT Site; and

(iv) Client will not violate or attempt to violate any security features or protocols associated with the FOCUSIT Application and the FOCUSIT Site, including, without limitation, (a) accessing data not intended for the Client or logging into a server or account which Client is not authorized to access; (b) attempting to probe, scan or test the vulnerability of a system or network or to breach security or authentication measures without proper authorization; (c) attempting to interfere with service to any other users, host, or network.

2.2.3. Without limiting the generality of the foregoing, Client further agrees that Client will not provide any Client Content for distribution or other use through via the FOCUSIT Application or the FOCUSIT Site if the distribution or use of such Client Content (i) would be libelous, defamatory, an invasive of privacy or publicity rights, or otherwise violate the rights of any party; (ii) without limiting the foregoing, would infringe any patent, trademark, trade secret, copyright, or other intellectual or proprietary right of any party anywhere; (iii) would otherwise violate any local, state, federal or international law; or (iv) would otherwise create any liability for FOCUSIT.

2.2.4. Without limiting the generality of the foregoing, to the extent Client or its Users provide any Client Content for distribution or other use via the FOCUSIT Application or the FOCUSIT Site, Client hereby represents and warrants to FOCUSIT that Client has the lawful right to distribute and use the Client Content. Also, Client is solely responsible for its conduct (and the conduct of its Users) while using the FOCUSIT Application and the FOCUSIT Site, including, but not limited to, all Client Content in any folders, web pages, or any other interactions Client or Client's Users generate, transmit, or maintain via the FOCUSIT Application and the FOCUSIT Site. FOCUSIT takes no responsibility for any such online distribution, publication or use by Client, any of its Users, or by any other party.

2.2.5. In addition to any other right to suspend, revoke or terminate this Access Right or this Agreement, FOCUSIT hereby has the absolute right to immediately suspend, revoke and/or terminate, without warning, the Access Right and this Agreement of the Client if FOCUSIT believes, in its sole discretion, that Client or any of its Users have violated or otherwise breached any provision of this Agreement or of the FOCUSIT Rules & Templates,

2.2.6. FOCUSIT also reserves the right to suspend, revoke and/or terminate this Access Right and this Agreement without cause, upon notice to Client, provided, however, if said suspension, revocation or termination by FOCUSIT is not based, in any part, on a claim by FOCUSIT that Client or any of its Users have violated or otherwise breached any provision of this Agreement or of the FOCUSIT Rules & Templates, then FOCUSIT will provide a pro-rata refund to the Client of only the Access Fees (as such Access Fee is identified and defined in the

FOCUSIT Standard Pricing Schedule) for that billing cycle already paid by Client pursuant to Section 4 hereof.

2.2.7 CLIENT AGREES AND ACKNOWLEDGES THAT CLIENT IS SOLELY RESPONSIBLE FOR ALL AUTHORIZED USERS' ACTS AND OMISSIONS AND WILL INFORM ALL AUTHORIZED USERS OF THIS AGREEMENT'S APPLICABLE PROVISIONS AND REQUIRE THEM TO COMPLY.

2.3 Other Permitted Users Through Client; User Accounts.

2.3.1 Client shall restrict use of the Access Right solely to End Users who (i) have been issued a Client Account, a Permitted User Account or an End User Account by FOCUSIT; and (ii) have consented to FOCUSIT's then current Third Party Data Access Agreement binding that Client User to terms and conditions of use similar to those set forth in this Agreement.

2.3.2 With regard to each of the End Users, the Client agrees that each of the End Users shall only access and use the FOCUSIT Application and FOCUSIT Site as expressly permitted by this Agreement. Client hereby agrees that: (i) Client will be responsible for all uses of the FOCUSIT Application and FOCUSIT Site by Client and all of its End Users; (ii) when Client allows End Users to use the Applications, each End User will have access to all data and the ability to modify or delete any or all data; and (iii) without limiting the foregoing, Client shall be responsible for compliance by End Users with this Agreement Client shall indemnify, defend and hold harmless FOCUSIT from (a) all damages arising from any misuse of the FOCUSIT Application or FOCUSIT Site by any employees, contractors or other agents of Client (including, without limitation, all End Users) or any other uses by any such person or persons that are otherwise not in compliance with this Agreement or the End User Agreement.

2.4 **Authorized Requesters.** As a condition to the provision of the FOCUSIT Applications, Client must identify to FOCUSIT the Authorized Requester. FOCUSIT is only required to take instructions from an Authorized Requester on behalf of the Client with regard to any rights and obligations of Client under this Agreement and with regard to any other matters related to or arising out of this Agreement. Without limiting the generality of the foregoing, Client agrees that only Authorized Requesters have the right to supply FOCUSIT with the following information, and FOCUSIT is only required to accept the following information from an Authorized Requester: (i) the names of any End Users that will be added or deleted; (ii) personal identifiable information about any End User. The Authorized Requesters must provide FOCUSIT with all information about Users that is requested by FOCUSIT in order to allow FOCUSIT to establish the user accounts as contemplated in Section 2.3.1 of these Terms of Use.

3. Copyrights and Other Intellectual Property Rights; Reservation of Rights.

3.1 **Must Respect Intellectual Property Rights of Others.** FOCUSIT's policy is to respect the copyright and intellectual property rights of others. FOCUSIT has the absolute right to (i) immediately terminate, without warning, the accounts of Client and any End Users who, in FOCUSIT's sole opinion, infringe upon the copyright or intellectual property rights of others,

and (ii) remove any Content from the FOCUSIT Application and FOCUSIT SITE that, in FOCUSIT's sole opinion, may infringe the copyright or other intellectual property rights of any third party.

3.2 Reservation of Rights by FOCUSIT.

3.2.1 FOCUSIT or its licensors, solely and exclusively own all rights, title and interest in and to all inventions, patents, trademarks/service marks, logos, images, graphics, content, reports, analysis, data, formulae, processes, techniques, software, website designs, all other copyrights, and all other intellectual property rights provided in, made available by using, or otherwise contained in or arising out of, the FOCUSIT Application, the FOCUSIT Rules & Templates (including, without limitation, all FOCUSIT Rules & Templates which FOCUSIT may develop while providing the PULSE Application to Client and any End User), and the FOCUSIT Site, or which is otherwise provided in furtherance of this Agreement (collectively, "**FOCUSIT IP Assets**"). Except for the limited Access Right, this Agreement shall not be interpreted to transfer any rights in any intellectual property rights in any FOCUSIT IP Assets from FOCUSIT to Client or any other End User.

3.2.2 Except as expressly granted in this Agreement, FOCUSIT IP Assets may not be used by any End User (including, without limitation, the Client or any other End Users) without the prior written permission from FOCUSIT, and then only with proper acknowledgement. Any rights not expressly granted herein are reserved to FOCUSIT. In addition to any other conditions on the Access Right set forth in this Agreement, the Access Right of every End User is subject to the following additional conditions: (i) End User shall not modify, disassemble, decompile or reverse translate or create derivative works from any of the FOCUSIT IP Assets or otherwise attempt to derive any source code of the same or let any third party do the same; (ii) no copyrighted material, content, or any other FOCUSIT IP Assets may be modified, copied, displayed, transferred, distributed, sold, published, broadcast or otherwise used except as expressly stated herein, in such material or in this notice without the express prior written permission of FOCUSIT (which FOCUSIT may or may not grant in its sole discretion); (iii) End Users shall not remove, alter, cover or obscure any copyright notices or other proprietary rights notices of FOCUSIT or any other party placed on or embedded in the FOCUSIT IP ASSETS and shall otherwise retain all such notices on all copies of the same; and (iv) use of the FOCUSIT IP Assets is expressly prohibited by an End User unless it/he/she is a Permitted User or End User pursuant to Section 2.3 herein and this Agreement. Unauthorized use is a violation of copyright and other intellectual property rights and is actionable under law.

3.2.3 For purposes of clarity, the FOCUSIT IP Assets do not include Client Content as such term is defined herein.

3.3 **Survival.** Client also acknowledges and agrees that the terms and conditions of this provision shall survive the cancellation, expiration or termination of this Agreement for any reason.

4. General Obligation to Control Users of Client.

4.1 Client is responsible for maintaining the confidentiality of all Client Content, all other information about Client and any other End Users, including all Client Accounts, Permitted User Accounts, and End User Accounts of all of its Users. Client shall be responsible for all uses of all of such Accounts, regardless of whether the actual uses are authorized by Client. Client agrees to promptly notify FOCUSIT of any unauthorized use, access or disclosure of any of such Accounts.

4.2 Without limiting any of the foregoing, Client is responsible for all access to and use of the FOCUSIT Application and FOCUSIT Site by all of its End Users, and shall assure compliance with this Agreement (and any applicable FOCUSIT Agreement consented to by that End User) by each such End User provided access to the FOCUSIT Application and FOCUSIT Site through Client. Any act or omission by any such third party user shall be deemed to be committed by Client for purposes of this Agreement.

5. **Survival.** All provisions of this Agreement that by their nature or understanding reasonably should survive the termination or expiration of this Agreement shall survive such termination or expiration.

6. **Disclaimer of Warranties; Limitation and Disclaimer of Liability.**

6.1 **DISCLAIMER OF REPRESENTATIONS AND WARRANTIES:**

EXCEPT FOR THE SPECIFIC SERVICE LEVEL COMMITMENT SET FORTH IN SECTION 3 OF THE TERMS AND CONDITIONS OF THE AGREEMENT, TO THE MAXIMUM EXTENT PERMITTED BY LAW THE FOCUSIT APPLICATION, FOCUSIT SITE, AND ANY OTHER FOCUSIT IP ASSETS MADE AVAILABLE BY FOCUSIT ARE PROVIDED ON AN "AS IS," "AS AVAILABLE" BASIS, AND THE ENTIRE RISK AS TO USE, SATISFACTORY PERFORMANCE, ACCURACY AND EFFORT IS WITH CLIENT.

EXCEPT FOR THE SPECIFIC SERVICE LEVEL COMMITMENT SET FORTH IN SECTION 3 OF THE TERMS AND CONDITIONS OF THE AGREEMENT, FOCUSIT EXPRESSLY DISCLAIMS AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY IMPLIED OR OTHER WARRANTIES: (a) OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, VALIDITY, WORKMANLIKE EFFORT, QUALITY, ACCURACY, TIMELINESS, COMPLETENESS, RELIABILITY, TITLE, QUIET ENJOYMENT, NO ENCUMBRANCES, NO LIENS, OR SYSTEM INTEGRATION; (b) OF CONFORMANCE TO ANY DEMONSTRATION OR PROMISE BY FOCUSIT; (c) ARISING THROUGH COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE, OR (d) THAT ACCESS TO OR USE OF THE FOCUSIT APPLICATION OR THE FOCUSIT SITE WILL BE UNINTERRUPTED, ERROR FREE OR COMPLETELY SECURE. FOCUSIT ALSO MAKES NO WARRANTIES WITH RESPECT TO ANY THIRD PARTY SOFTWARE PRODUCTS OR INFORMATION CONTENT THAT MAY BE USED OR PROVIDED FOR USE UNDER THIS AGREEMENT. THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE FACE OF THIS

AGREEMENT IN SECTION 3 OF THE TERMS AND CONDITIONS OF THE AGREEMENT.

6.2 LIMITATION OF LIABILITY:

6.2.1 **Exclusion of Certain Damages.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER FOCUSIT , NOR ANY OF ITS SUPPLIERS OR LICENSORS, SHALL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE, OR OTHER DAMAGES WHATSOEVER (INCLUDING DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS) ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY USE OF, OR ACCESS TO, THE FOCUSIT APPLICATION, FOCUSIT SITE OR ANY OTHER FOCUSIT IP ASSETS (OR ANY COMPONENT OF ANY OF THE FOREGOING) EVEN IF FOCUSIT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

6.2.2 Limitation of Damages.

FOCUSIT'S TOTAL AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING, BUT NOT LIMITED TO, ANY LIABILITY ARISING OUT OF A FAILURE BY FOCUSIT OF THE SPECIFIC SERVICE LEVEL COMMITMENT SET FORTH IN SECTION 6.1 HEREIN) SHALL BE LIMITED AS FOLLOWS AND SUBJECT TO THE FOLLOWING:

(A) TO CLIENT'S DIRECT DAMAGES ACTUALLY INCURRED BUT ONLY UP TO THE AMOUNT OF COVERAGE OF FOCUSIT'S ERRORS AND OMISSIONS INSURANCE COVERAGE. RECOVERY OF DAMAGES UP TO SUCH AMOUNT SHALL BE CLIENT'S SOLE AND EXCLUSIVE REMEDY; AND

(B) IN THE CASE OF ANY SECURITY BREACH (INCLUDING, BUT NOT NECESSARILY LIMITED TO, ANY "SYSTEM SECURITY BREACH" AS SUCH TERM IS CONTEMPLATED BY SECTION 7.6 IN THE TERMS AND CONDITIONS OF THIS AGREEMENT) OF ANY CLIENT CONTENT, OR OF ANY OTHER CONFIDENTIAL INFORMATION OR OTHER PERSONAL IDENTIFIABLE INFORMATION OF CLIENT, ITS USERS, OR THEIR CUSTOMERS, SUBJECT ONLY TO FOCUSIT INFORMING THE CLIENT OF SUCH SYSTEM SECURITY BREACH PURSUANT TO THE PROVISIONS OF SECTION 7.6(A) IN THE TERMS AND CONDITIONS OF THIS AGREEMENT, FOCUSIT'S SOLE AND TOTAL AGGREGATE LIABILITY FOR SUCH SYSTEM SECURITY BREACH SHALL NOT EXCEED FOCUSIT'S AMOUNT OF COVERAGE UNDER ITS DATA SECURITY BREACH INSURANCE POLICY.

6.2.3 **Application.** THE LIMITATIONS IN THIS SECTION 6 SHALL BE DEEMED TO APPLY TO ALL CAUSES OF ACTION AND ALL LEGAL THEORIES (INCLUDING FOR BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY, AND OTHER TORTS, AND ANY OTHER CAUSES OF ACTION, HOWEVER STATED). THE LIMITATIONS AND EXCLUSIONS OF DAMAGES SET FORTH IN THIS SECTION ARE

INDEPENDENT OF THE EXCLUSIVE REMEDY SET FORTH IN THIS SECTION, AND SHALL SURVIVE IF SUCH REMEDY FAILS OF ITS ESSENTIAL PURPOSE OR IS OTHERWISE DEEMED TO BE UNENFORCEABLE.

7. MISCELLANEOUS

7.1 **Non-Solicitation.** Client acknowledges that FOCUSIT invests significant resources into the training of its technical support representatives in order to provide Client with service. Client shall not, except with the prior written consent of FOCUSIT, solicit or hire the employees of FOCUSIT for the Term of this Agreement and for a period of one (1) year following the termination of this Agreement. If Client hires an employee of FOCUSIT in violation of this provision, Client shall pay FOCUSIT a lump sum finder's fee of 25% of the employee's annual salary.

7.2 **Independent Contractor Status.** It is expressly agreed that the parties are acting as independent contractors and not as partners or joint ventures, and under no circumstances shall any of the employees of one party be deemed the employees of the other for any reason or purpose. This Agreement shall not be construed as authority for either party to act for the other party in any agency or other capacity, or to make commitments of any kind for the account of or on behalf of the other.

ATTACHMENT 1 TO TERMS OF USE

I. OTHER SERVICES (BEYOND ACCESS RIGHTS) AND OTHER FEES

In the event Client seeks any additional services beyond the Access Rights provided pursuant to this Agreement, including, without limitation, any installation services or any maintenance services (the “**Other Services**”) then the Client and FOCUS IT must sign a written statement of work (“**Statement of Work**”) which identifies the scope of the Other Services and the Other Fees for such same. It is agreed that: (a) the signed Statement of Work will be deemed an addendum to this Agreement and by this reference incorporated herein; (ii) all remunerations to be paid to FOCUSIT by the Client pursuant to the Statement of Work shall be deemed to be, and shall be governed as, “Other Fees” and, as applicable, “Fees” pursuant to this Agreement; and (iii) in the even any provision of this Agreement and the Statement of Work conflicts, then the provisions of this Agreement shall govern unless the parties explicitly stated in the Statement of Work that a particular provision in that Statement of Work shall govern over a conflicting provision in this Agreement.

II. CONFIRMATON OF USER’S LICENSE STATUS

Client understands and agrees that FOCUSTIT has the right to regularly contact our software partners to confirm the license status of each User being hosted by our software partners. Client further understands and agrees that FOCUS IT regularly sends reports to our software partners which includes installation and other usage data of each User being hosted by our software partners.