

## INSTRUCTIONS: HOW TO APPLY FOR A NEW BREAK- CLAUSE

### Introduction

1. The following information will assist you in completing your application form. Please read it carefully before starting your application.
2. ESS has agreed to offer a new 12-month break-clause to certain customers who entered into a standard three-year contract with ESS for Core SIMS Annual Entitlement ('AE') services beginning on 1 April 2022.
3. This new 12-month break-clause will give certain customers the option to end their three-year contract with ESS early on 31 March 2024, by giving written notice to ESS between 1 January 2024 and 29 February 2024 ('New Break-Clause').
4. The key dates relevant to the application process for a New Break-Clause are as follows:

<b>Key stages</b>	<b>Relevant dates</b>
Window for applications to the Adjudicator for a New Break-Clause	between 10 January 2023 to 5pm on 10 February 2023
The Adjudicator to communicate the outcome of the application to the Applicants	between 10 February 2023 and 31 March 2023 (if no extensions)
Customers who have been granted a New Break-Clause to explore whether to switch MIS supplier (and if so, to make the necessary arrangements)	between the date of grant of New Break-Clause and 31 March 2024
Customers who have been granted a New Break-Clause to give notice to ESS if they want to end the contract early under the New Break Clause (if they decide they want to switch MIS supplier)	between 1 January 2024 and 5pm on 29 February 2024
End date for AE contract with ESS if New Break-Clause is exercised	31 March 2024

5. All applications for a New Break-Clause will be considered by an independent adjudicator ('Adjudicator') against the criteria set out below. The Adjudicator's decision over whether to accept or reject any applications will be final. Applications and the adjudication will be free of charge to the Applicants.
  - If the Adjudicator considers that the application criteria have been met, the application will be accepted. The date that an Applicant is informed by the Adjudicator that its application has been accepted will be the date of grant of the New Break-Clause.
  - If a successful Applicant wants to end the contract to which the New Break-Clause relates on 31 March 2024, it needs to tell ESS between 1 January 2024 and 5pm on 29 February 2024.

Once ESS is notified it will honour the New Break-Clause (subject to the Applicant's compliance with the Terms and Conditions set out below).

- If the Adjudicator considers that the application criteria have not been met, the application will be rejected. If the application is rejected, ESS will not grant the Applicant a New Break-Clause.
6. Please note that if the Adjudicator accepts your application and you are granted a New Break-Clause, your contract with ESS will not automatically come to an end. You will, however, be able to end this contract on 31 March 2024, one year before the end of its term, by giving ESS notice between 1 January 2024 and 5pm on 29 February 2024 (subject to your complying with the Terms and Conditions of this New Break-Clause set out below). Please note that the grant of a New Break-Clause does not change the terms and conditions of your contract with ESS, which will continue to apply until that contract comes to the end.
  7. The New Break-Clause gives you a period in which to consider whether or not to switch to another MIS supplier and, if you decide to switch, to implement that change. However, if you conclude that you would rather continue your contract with ESS and you do not give notice between 1 January and 29 February 2024, you will not need to take any further steps and the terms and conditions of your contract will remain the same for its remaining duration.
  8. Your decision to apply to the Adjudicator for a New Break-Clause will not affect the service levels you receive from ESS or prevent you from taking up any other offers ESS may make during the remaining contract term.

### **Background**

9. In January 2022, ESS informed its customers whose Core SIMS AE contracts were due for renewal on 1 April 2022 of a six-month break-clause offer ('Original Break-Clause') which would allow those customers who took up ESS' offer of a new three-year AE contract commencing on 1 April 2022 to terminate their contracts after six months (i.e. on 30 September 2022), by giving notice to ESS by 31 August 2022. To benefit from this offer, customers needed to request the Original Break-Clause by email and accept ESS' quotation by 20 February 2022.
10. ESS made a number of further break-clause offers in July 2022 ("ESS' July Offers").<sup>1</sup>

### **Eligibility Conditions for the New Break-Clause**

11. Eligible customers can now apply to the Adjudicator for the New Break Clause to apply to any three-year Core SIMS AE contract with ESS that began on 1 April 2022. The application criteria are set out in paragraphs (a) and (b) below, depending on customers' circumstances.

- (a) **Customers who did not opt to take up the Original Break-Clause offered by ESS in January 2022 and have not successfully taken up one of ESS' July Offers<sup>2</sup>**

For customers who did not opt to take up the Original Break-Clause offer, ESS has agreed to offer a New Break-Clause to **any customer that, after genuine consideration, reasonably concluded** on or before 20 February 2022 that switching to an alternative supplier was not

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<sup>1</sup> Please see Appendix 1 of the Commitments for details on ESS' July Offers: <https://www.ess-sims.co.uk/breakoffers>.

<sup>2</sup> For a description of the relevant offer (referred to as "Group 2 Offer"), see Appendix 1 of the Commitments.

possible by 30 September 2022 and for this reason did not opt to take up the Original Break-Clause offer.

**(b) Customers who did opt to take up the Original Break-Clause but who never exercised it and have not successfully taken up one of ESS' July Offers<sup>3</sup>**

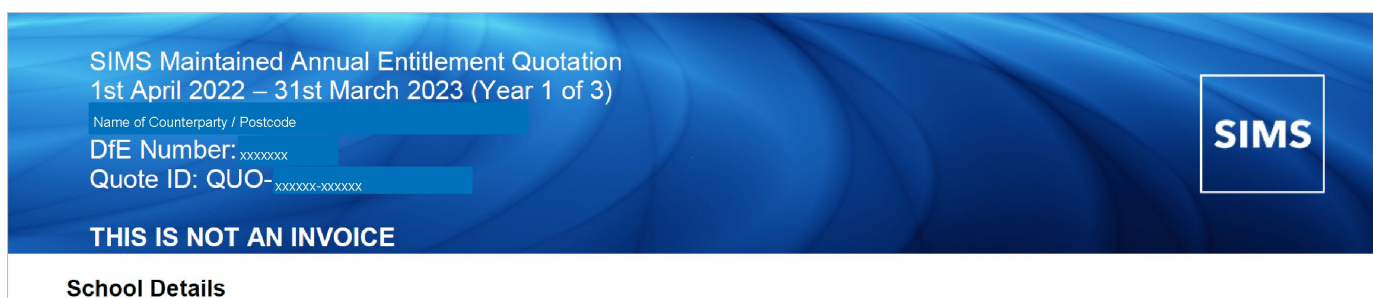
For customers who did opt to take the Original Break-Clause but never exercised it (i.e. did not terminate their contract by 30 September 2022), ESS has agreed to offer a New Break-Clause **to any customer that, after genuine consideration, reasonably concluded in a timely manner** that switching to an alternative supplier was not possible by 30 September 2022 and for this reason did not exercise the Original Break-Clause.

**Application Requirements**

12. The application form consists of five sections: Section 1 (Customer Details), Section 2 (Applicant Contact Details), Section 3 (Your Eligibility for the New Break Clause, including your explanation of your conclusions as to why it was not possible to switch in the time available), Section 4 (Optional Request for Redaction(s)) and Section 5 (Statement of Truth).
13. Applications should only cover a single contract, which should be identified by its ESS quotation number. Contracts can include all or some of the schools in a Multi-Academy Trust or federation, where such schools contracted as a group with ESS under the terms of a single contract.
14. **Applications should be made by 5.00pm on Friday 10 February 2023 by emailing the application form and any supporting documents to the Adjudicator at [apply.ess@evelyn.com](mailto:apply.ess@evelyn.com).**

**How to find your Quotation Number**

15. The quotation number, referred to as a 'Quote ID', takes the form "QUO-xxxxxx-xxxxxx" and is shown at the head of your quotation:



16. Your quotation number was also set out in the email confirming your new SIMS Annual Entitlement agreement, an example of which is set out below:

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<sup>3</sup> For a description of the relevant offers (referred to as "Group 1 Offer" or "Group 3 Offer"), see Appendix 1 of the Commitments.

Dear {Name}

Thank you for completing your quotation online via the ESS Portal.  
Please find attached a final PDF summary of your Quotation.  
Your confirmation reference is {QuoteNumber}.  
Your payment will be processed according to the invoicing options you selected when processing your quotation.

Kind regards,



Education Software Solutions Ltd.  
Registered in England and Wales | Registration no. 12595779  
Registered office: 11 Kingsley Lodge | 13 New Cavendish Street | London | W1G 9UG  
www.educationsoftwaresolutions.co.uk

### **Your explanation of your conclusions as to why it was not possible to switch in the time available**

17. To enable the Adjudicator to make its decision, you will need to provide some information in Section 3 - Your Eligibility for the New Break Clause. This should be in the form of an explanation (to the best of your ability and recollection and on the basis of your belief and the information you had at the time) as to how you concluded that it was not possible to switch to an alternative MIS supplier in the timeframes available to you. By way of guidance, we would not expect a typical application to exceed 600 words (excluding any attachments).
18. This explanation should include:
  - an outline of what steps you thought you might need to take to switch to an alternative supplier and broadly when you started thinking about it;
  - approximately how long you thought the switching process would take in total and the basis for that time estimate;
  - if relevant to your view that you had insufficient time, a description of any research you carried out and/or discussions you had with alternative suppliers (either verbally or in writing), and how that may have impacted on your conclusions;
  - if relevant, why you decided not to opt for the Original Break Clause; or
  - if you opted for the Original Break-Clause, approximately when you made your decision that it was not possible to switch to an alternative supplier in the timeframe available to you.
19. Your explanation could also include any other information relevant to your specific circumstances at the time, for example:
  - the type, size and needs of the school(s) covered by your application and/or available resource and experience to consider and complete a switch to an alternative supplier;
  - any details and approximate timings that you can recall as to whether you discussed this internally within your school/Multi-Academy Trust (either formally or informally) and any procurement processes you thought you might be required to follow;

- any details and approximate timings that you can recall about any external discussions you held (either verbally or in writing) with other schools, your local authority, your federation or Multi-Academy Trust or ESS, and if so, how that impacted on your conclusions; and/or
  - you may also include any details of whether you considered if you were eligible for the Original Break-Clause extension offers published by ESS in July 2022.
20. If you do not have access to records of the relevant discussions/decisions because they were taken informally or verbally, you could include your recollection of these discussions as part of your explanation.
  21. Similarly, if your conclusion on whether or not to switch MIS supplier was impacted by discussions or guidance given by your local authority, you could include in your explanation your recollection of any such discussions or guidance.
  22. If your conclusion that it was not possible to switch to an alternative MIS supplier in the timeframes available to you was based on the time that it would take that alternative MIS supplier to carry out the switch, please include details of any inquiries you made to form that view.
  23. Please note that it would not be sufficient in itself to state in the Application that the reason it was not possible to switch was because there was not an alternative supplier available at the time.

### **Supporting documents and evidence**

24. Supporting documentation is not required for your application to be considered and accepted by the Adjudicator. **However, you should include copies of documents from the relevant time period which would support your narrative in Section 3 of the application form, if such documents are reasonably available.**
25. This could for example include any of these documents; internal or external emails; text or WhatsApp messages; electronic diary notes recording a call or meeting; and/or typed or handwritten notes.
26. It is possible that supporting documentation may not be reasonably available to you, for example, because it does not exist or is held by someone external to the school or Trust or if it can only be located by undertaking extensive searches. If this applies to you, please tick the relevant boxes in Section 3 of the application form or if another reason applies, please provide a short explanation of why no supporting documentation is reasonably available.

### **Statement of Truth and Terms and Conditions**

27. Applications in all cases must be verified by a statement of truth (within Section 5) signed by the person submitting the Application, who must have sufficient authority to sign such a statement, and must have read and agreed to the terms and conditions set out below:

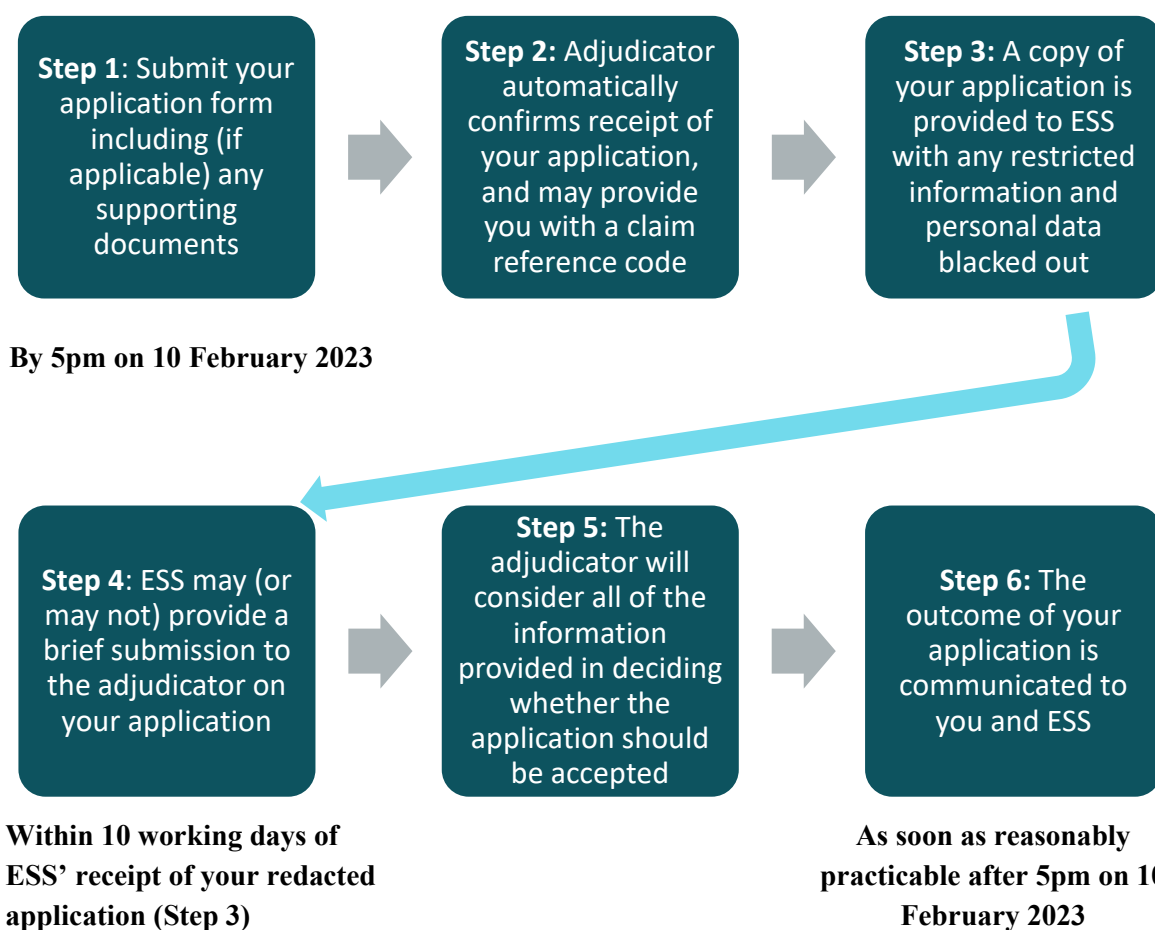
By submitting this application, the Applicant understands and accepts that the following terms apply and agrees to these terms in all respects:

- (a) The Adjudicator's determination will be final and is not subject to appeal or legal challenge.
- (b) The Adjudicator shall not be liable for any claim, loss or damage arising as a result of the adjudication process.

- (c) The Applicant will not share the contents of this application form or any other correspondence from the Adjudicator with another MIS supplier. For the avoidance of doubt the Applicant can, however, engage with others (eg federation or Multi-Academy Trust, local authority or another MIS supplier) to check if they have any relevant facts or supporting documentation relevant to this application.
- (d) The Adjudicator:
- shall reject applications submitted after the deadline specified;
  - may extend the timetable for the adjudication process (after any change has been agreed with the CMA and ESS), in accordance with the relevant parts of the Adjudicator's Briefing (available at: <https://www.ess-sims.co.uk/breakoffers>); and
  - shall reject any application that fails to comply with these instructions (e.g. any application that is not accompanied by a completed statement of truth), unless such failure can be remedied by the Adjudicator making (at the Adjudicator's discretion) a request for any further information from the Applicant.
- (e) Nothing in this application, or in any other documentation provided as part of the adjudication process shall be regarded as a commitment or representation or constitute the basis of an express or implied contract.
- (f) If the Applicant is a SIMS perpetual licence holder, the New Break-Clause right will be conditional upon the Applicant agreeing to terminate all SIMS perpetual licences that relate to the AE contract covered by this application from the New Break-Clause effective date (31 March 2024).
- (g) A New Break-Clause in respect of a given ESS AE contract can be exercised only following the payment in full of any outstanding invoices relating to this contract (save in respect of a bona fide dispute as to the amounts owed).

## Adjudication Process

28. An overview of the adjudication process is provided in the diagram below:



29. Please ensure that all relevant information is included in your application. The Adjudicator may at its discretion, request further information from you, for example, if something is clearly missing from your application or in light of any submission provided by ESS. Where such a request is made, you must respond within three working days. If you do not respond in that time period, the Adjudicator will proceed with its decision absent your response.
30. In making its determination, the Adjudicator will consider the information provided in your application (including any supporting documentation), any submission received from ESS and any response to a request for further information. The Adjudicator will also follow the Briefing and may also take into account any general points made in ESS' General Submission and the CMA's Decision to accept the commitments. These documents are available at <https://www.ess-sims.co.uk/breakoffers>.
31. The Adjudicator intends to communicate the outcome of your application to you as soon as possible after 5pm on 10 February 2023 and in any event, by 31 March 2023. Where an application is rejected, the Adjudicator will provide a brief summary of its reasons.
32. Please note that the timings provided above are indicative and although the Adjudicator does not intend to depart from this timetable, it may do so subject to the agreement of the CMA and ESS.

### **Redaction of restricted information from your application**

33. In Section 4 of the application form you have the opportunity to (but do not have to) indicate if there is any information/documents included in the application you do not wish ESS to see because they are confidential. The Adjudicator will then review the application and prepare a version of the application with confidential information blacked out (or redacted) before sharing it with ESS.
34. The Adjudicator will review your application (irrespective of whether you have filled in Section 4) to check if it contains any confidential information relating to you or anyone else (including other MIS suppliers or your local authority) before sharing it with ESS. If the Adjudicator identifies any confidential information, it will be redacted from the version of the application provided by the Adjudicator to ESS.
35. The Adjudicator will anonymise/redact contact details of individual members of staff except the names of any individual employed by you who, it is clear from your application, had direct communications with ESS. In order to avoid disclosing the identity of any individual concerned, where appropriate, the Adjudicator will anonymise the individual's name by replacing it with a general description of the role they fulfilled. For example, Member of Governing Body, Member of Local Authority, Member of Staff (if your POR number is below 150), or Member of Staff or Senior Member of Staff (if your POR number is 150 and above).
36. Any information which the Adjudicator decides to redact from the application form, will not be shared with ESS, and will only be accessible to the Adjudicator for the purposes of deciding the applications. The Adjudicator will treat it in the strictest confidence.
37. The contents of your redacted application form will only be shared with ESS and the CMA and not made public.
38. For avoidance of doubt, you are not required to provide information relating to individual students, their educational needs or progress, safeguarding or any information which you are not allowed to share with the Adjudicator because of the relevant legal/regulatory provisions.

#### *Categories of confidential information*

39. The categories of confidential information, which the Adjudicator will redact from the version of the application are included below (alongside some examples):
  - (i) commercial information whose disclosure might significantly harm the legitimate business interests of the organisation to which it relates. This would include commercially sensitive information relating to other MIS suppliers including any supporting documents such as notes of discussions or emails with those suppliers;
  - (ii) information relating to the private affairs of an individual whose disclosure might significantly harm the individual's interests. Examples of such information could include details of serious or long-term illness, private addresses, email addresses, telephone numbers or other contact details, names and personal details of family members;
  - (iii) information whose disclosure is contrary to the public interest.



### *Data protection legislation*

40. In addition to reviewing the Application for, and redacting, any confidential information, the Adjudicator will also review the application for, and redact any, special category personal data as defined in the UK General Data Protection Regulation (GDPR).<sup>4</sup>
41. The Adjudicator will also redact any personal data where it is required to do so under UK data protection and privacy legislation.<sup>5</sup>
42. The Adjudicator's privacy policies can be found here: <https://www.evelyn.com/legal-compliance-regulatory/privacy-notices/>.

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<sup>4</sup> This reads "... *personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.*" (<https://www.legislation.gov.uk/eur/2016/679>).

<sup>5</sup> Including the Data Protection Act 2018, the UK General Data Protection Regulation and the Privacy and Electronic Communications (EC Directive) Regulations 2003.