

**Customer Order Form and Agreement**

After signing this Customer Order Form and Agreement, please mail or fax to MKT Analytics, LLC, 3040 S Colonial St, Gilbert, AZ 85295

**Contact Information:**

<b>Order Date</b>	7-1-2014		
<b>Customer Name</b>	Jefferson County Board of Education dba Jefferson County Public Schools		
<b>Customer Contact</b>	Name: Dr. Robert Rodosky	Phone: 502-485-3036	Email: robert.rodosky@jefferson.kyschools.us
<b>Service Administrator</b>	Name:	Phone:	Email:
<b>Mailing Address</b>	3332 Newburg Road		
	City: Louisville	State: KY	Zip: 40218

**Ordered Subscriptions and Services:**

Subscriptions and Services	Fees*
<input checked="" type="checkbox"/> Smart ED	
\$100,000 for 2014-15 Academic Year	<b>\$100,000</b>
\$80,000 for 2015-16 Academic Year	<b>\$80,000</b>
\$64,000 for 2016-2017 Academic Year	<b>\$64,000</b>
<b>Total Fees over 3 Year Term:</b>	<b>\$244,000</b>

\* See relevant Schedules for details concerning fees. Fees do not include applicable sales, withholdings or value-added taxes.

**Installation Location:**  MKT Analytics, LLC's Location

**Initial Term:** 7-15-2014 through 7-14-2017 (36 months)

**Service Administrators:** Dr. Robert Rodosky and Kyle Underwood

**Payment Information:**

<b>Payment Method:</b>	<input checked="" type="checkbox"/> Please Invoice P.O. number _____
	<input type="checkbox"/> Check is Enclosed
	<input type="checkbox"/> Please charge to: <input type="checkbox"/> Visa; <input type="checkbox"/> MasterCard; <input type="checkbox"/> Discover **
**(if payment is by credit card, you will need to complete an Automatic Credit Card Billing Authorization)	

**Schedules:** The following Schedules are hereby incorporated by reference into this Customer Order Form and Agreement.

<b>Schedule A</b>	Product Description
<b>Schedule B</b>	Customer Data Obligations
<b>Schedule C</b>	Terms of Use
<b>Schedule D</b>	Technical Support and Service Level Agreement

**Signature**

IN WITNESS WHEREOF, the parties hereto, each by a duly authorized representative, have executed this Customer Order Form and Agreement as of the Order Date first set forth above:

<b>Jefferson County Public Schools:</b>	<b>MKT Analytics, LLC</b>
Signature:	Signature: <i>Michael K. Tobin</i>
Printed:	Printed: MICHAEL K. TOBIN
Title:	Title: PRESIDENT
Date:	Date: 8/12/14

## **Schedule A - Product Description**

SMART ED is an early warning for predicting high school dropouts early in a student's educational career. Included in the system are:

- Initial scoring of all students as to their probability to drop out
  - Prediction of which interventions are likely to change that trajectory
- Real-time scoring and predictions for students based on daily data feeds and updated information
- Tailored dashboards with information at three levels: district, school and student
- Measurement of the effectiveness of intervention programs denoted in data
- External data appends as needed

<b>Data Input</b>	▪ Student Information System
<b>Predictions / Output</b>	▪ Dropout probability
	▪ Best intervention opportunity
<b>Dashboard Depth</b>	▪ 3-level hierarchy
<b>Training Support</b>	▪ 80 hours per year, including on-site classroom training
<b>Hosting Environment</b>	▪ Hosted at MKT Analytics off-site location

## **Schedule B – Customer Data Obligations**

- As many years as are available, District wide, Grades 1 – 12

### **BASE DROPOUT PREDICTION AND/OR GRADUATION PREDICTIONS**

#### **Student Classification and Performance Summary**

- This file should include all update to these fields, such as school, address, resides with changes, etc. Representative fields include but are not limited to:

<b>Field</b>	<b>Notes</b>
Student ID	
Current School ID	
Residential School Location	Where the student is meant to attend according to geographic boundaries
Student Birthdate	
Student Race	
Student Gender	
Current Grade	
Actual Grade	Used with Special Education students
Federal Lunch Program Status	
ECE Category	
ECE Class Plan	
Student Resides With	
Entry Code	Student's entry status at the start of the school year
Entry Date	
Withdraw Code	Reason for withdrawal
Withdraw Date	
Advanced Program Participation	
House No	Address info is for appending geocodes and associated socio-demographic data. The address format should be standardized.
Street Direction	
Street	
Street Type	
ZIP	
First Location	First school attended in the current year.
First Grade	Grade designation at the beginning of the current year.
Dropout Date	A subset of withdrawal code. The codes and dates should match.
Dropout Code	

## Table or Database for Daily Attendance Data (for a period to match the previous sections)

•Representative fields include but are not limited to:

Field	Notes
Student ID	
Date	
School ID	
Attendance Code	Present, absent excused/unexcused, tardy excused/unexcused
Grade	Student's academic grade
Minutes Absent	
Minutes in Day	The length of the school day in minutes

## Table or Database for **Discipline** Data Detail (for a period to match previous sections)

•Representative fields include, but are not limited to:

Field	Notes
Event ID	
Event Code	Type of incident
Time stamp	Date and time of incident
Staff ID	Person responsible for carrying out discipline
Referral ID	Person reporting the incident
Student ID	
Discipline Code	Nature of discipline (suspension, etc.)
Begin Date	Start of disciplinary period
End Date	End of disciplinary period
School ID	

## Table or Database of Standardized Testing Detail (as complete a history as exists on a student at both elementary and secondary levels)

•Representative fields include but are not limited to:

Field	Notes
Student ID	
TestDate	
Grade	Student's academic grade
Location ID	Where the test was administered
Level	Intended grade level of the test
Test ID	Name of test
Performance	In the form of a performance code, a raw score or percentile rank

## **Table of Periodic Grade Updates (sent as frequently as system updates)**

**-Minimum field requirement would include:**

<b>Field</b>	<b>Notes</b>
Student ID	
Course ID	
Course Area Code	e.g., Math, Science, English, etc.
Current Grade	expressed as either A-D/U or number
Date of Last Update	

## **Homeless Student Database**

**-Need Student ID and other indicators**

## **Federal Lunch Program Database**

**-Need Student ID, plus associated socio-demographic information**

## **ADDITIONAL ANALYSIS**

## **Tables or Files Tracking Intervention Eligibility and Participation (as much history as possible)**

**-Minimum field requirements would include:**

<b>Field</b>	<b>Notes</b>
Student ID	
Student Eligibility Flag	
Student Start Date	
Student Complete Date	
Student Status	currently active/inactive
Program Cost	

## Schedule C – Terms of Use

The following Terms of Use (the "Agreement") govern Your use of the MKTA Service, MKTA Technology and any related Services provided to You by MKT Analytics, LLC ("MKTA").

### 1. DEFINITIONS

~~"Client" means those specific business organizations or divisions within Your organization that desire to use the ATi Service. The number and types of Your Clients initially authorized to use the ATi Service are set forth on the Order Form.~~

"Customer Data" means the data You are required to provide to MKTA as specified in Schedule B to this Order Form.

"MKTA Materials" means any documentation, user guides or other materials provided by MKTA to You in connection with your use of the MKTA Service.

"MKTA Service" means the hosted set of solutions that are developed, operated, and maintained by MKTA (and its third party service providers) for the purpose of providing you with tailored business intelligence and advanced predictive analytics, and specifically the modules specified on Your Order Form.

"Order Form" means the Customer Order Form and Agreement for the MKTA Service to which this Agreement is attached and any future purchase order or order form signed by both You and MKTA that makes reference to this Agreement.

"Query Utilities" mean software code that MKTA provides to You (by CD, download or otherwise) for the purpose of facilitating the collection and transmission of Your Data to the MKTA Service, and includes any updates, upgrades or enhancements to such code provided to You by MKTA. Query Utilities shall be deemed part of the MKTA Service for the purposes of this Agreement.

"MKTA Technology" means MKTA's proprietary technology and intellectual property rights therein (including, but not limited to, Query Utilities, MKTA Materials, software, documents, processes, algorithms, user interfaces, patent, copyright and trade secret rights) used by MKTA in providing the MKTA Service or Services to You.

"Service Administrator" means the person that You designate to purchase usage of the MKTA Service, authorize Users under the Agreement, create accounts ~~for additional Clients~~ and otherwise administer Your use of the MKTA Service and the Services.

"Services" means any implementation, training or other professional services provided by MKTA to You pursuant to the terms of an Order Form.

"Subscription Term" means the initial use term ("Initial Term") set forth on Your Order Form and any additional renewal terms (each, a "Renewal Term") to the MKTA Service purchased by You.

"Technical Support" or "Support" means the end user support for the MKTA Service provided by MKTA during the Subscription Term, as defined in Section 3.2 below.

"User(s)" means Your employees, consultants, contractors or agents authorized by Your Service Administrator to use the MKTA Service.

"Your Data" means registration information, User ~~and Client~~ information, business and financial information, electronic transmissions and all other data of any kind contained within e-mails or otherwise submitted by You or entered electronically in the course of Your use of the MKTA Service or the Services, including without limitation all Customer Data.

## **2. USE RIGHTS AND RESTRICTIONS; YOUR RESPONSIBILITIES**

**2.1 Use Rights; Restrictions.** Subject to the terms of this Agreement, ATi grants to You during the Subscription Term the non-transferable, non-exclusive right to permit Your Users to use the MKTA Service (and any MKTA Materials provided to You), solely for Your own internal business operations. The rights granted to You in this Agreement are subject to the following restrictions: (i) Your use of the MKTA Service shall be limited to Your authorized Users and shall not be used on behalf of Clients anyone other than those Clients for whom You have purchased use rights, as evidenced on the Order Form; (ii) You shall not license, sell, rent, lease, transfer, assign, distribute, host, outsource, disclose or otherwise commercially exploit or make the MKTA Service or the MKTA Materials available to any third party; (iii) You shall not modify, make derivative works of, disassemble, reverse compile, or reverse engineer any part of the MKTA Service or MKTA Materials, or access or use the MKTA Service or MKTA Materials in order to build a similar or competitive product or service; (iv) You may not use the Query Utilities in connection with any software product, database, spreadsheet or tools, or any other software as a service not provided by MKTA including but not limited to use of the Query Utilities to populate databases in any software program not provided by MKTA; (v) except as expressly stated herein, no part of the MKTA Service or MKTA Materials may be copied, reproduced, distributed, republished, downloaded, displayed, posted or transmitted in any form or by any means, including but not limited to electronic, mechanical, photocopying, recording, or other means; (vi) You shall not disclose any review of the MKTA Service, including but not limited to the results of any performance tests, to any third party without MKTA's prior written approval; and (vii) You acknowledge and agree that MKTA shall own all right, title and interest in and to all intellectual property rights (including all derivatives or improvements thereof) in the MKTA Service and the MKTA Materials and any suggestions, enhancement requests, feedback, recommendations or other information provided by You or any of Your Users relating to the MKTA Service or the MKTA Materials.

**2.2 Query Utilities.** Subject to the terms of this Agreement and only where required for You to use the MKTA Services, Your Users are permitted under this Agreement to run the Query Utilities on a reasonable number of server machines, and to make archival and backup copies of the Query Utilities, provided each such copy retains all confidentiality and copyright markings and notices included in the original.

**2.3 General Requirements for Use of the MKTA Service.** In order to use the MKTA Service, You must have access to the Internet and provide all equipment necessary to make and maintain such connection. If not designated in the Order Form, You shall designate a Service Administrator and notify MKTA of the identity and contact information for said Service Administrator. You agree to provide MKTA with Your Service Administrator's e-mail address, to promptly provide MKTA with any changes to such e-mail address, and to accept e-mails (or other electronic communications) from MKTA to Your Service Administrator. Except as otherwise provided in this Agreement, You further agree that MKTA may provide any and all notices, statements, and other communications to You through either e-mail to the Service Administrator or posting on the MKTA Service.



**2.4** Passwords, Access. Your Service Administrator may designate and add Users and shall provide and assign unique passwords and user names to each authorized User. The Service Administrator shall ensure that multiple Users do not share a password or user name. You acknowledge and agree that You are prohibited from sharing passwords and/or user names with unauthorized users. You will be responsible for the confidentiality and use of Your passwords and user names. MKTA will act as though any electronic communications it receives under Your passwords, user names, and/or account numbers have been sent by You. You agree to immediately notify MKTA if You become aware of any loss or theft or unauthorized use of any of Your passwords, user names, and/or account numbers. You agree not to access the MKTA Service by any means other than through the interfaces that are provided by MKTA.

**2.5** Transmission Of Data. You understand that the technical processing and transmission of Your Data is necessary to Your use of the MKTA Service, and consent to MKTA's interception and storage of Your Data. You understand that You or MKTA may be transmitting Your Data over the Internet, and over various networks, only part of which may be owned and/or operated by MKTA. You agree that MKTA is not responsible for any portions of Your Data that are lost, altered, intercepted or stored without authorization during the transmission of Your Data across networks not owned and/or operated by MKTA.

### **3. SERVICES; TECHNICAL SUPPORT**

**3.1** Services. MKTA shall provide You with implementation, training or other Services set forth on the Order Form in exchange for the fees set forth on the Order Form.

**3.2** Technical Support. During the Subscription Term, You will be entitled to standard technical support resources (collectively, "Technical Support") offered by MKTA from time to time. MKTA's current Technical Support plans are described on Schedule D to Your Order Form, which may be modified by MKTA upon notice to You.

**3.3** Expenses. Except as may be otherwise provided herein or as pre-approved in writing, each party will be responsible for all expenses associated with the performance of its obligations hereunder.

### **4. SUBSCRIPTION FEES; PAYMENT**

**4.1** Fees; Invoices. The fees for the MKTA Service and any additional Services are set forth in the Order Form and are payable in advance, irrevocable and non-refundable except as set forth in the Order Form and this Agreement. If the Order Form specifies payment upon invoice, MKTA will invoice You at the time of the initial Order Form and each month thereafter during the Subscription Term; all amounts invoiced hereunder shall be due within 10 days of Your receipt of MKTA's invoice. Late payments shall be subject to a service charge of one and a half percent (1.5 %) per month, or the maximum charge permitted by law, whichever is less.

~~o Taxes. You shall pay all personal property, sales, use, value-added, withholding and similar taxes (other than taxes on ATI's net income) arising from the transactions described in this Agreement, even if such amounts are not listed on an Order Form. To the extent You are exempt from sales or other taxes, You agree to provide ATI, upon request, with the appropriate exemption certificate.~~

**4.2 Non-Payment.** MKTA reserves the right to suspend Your access and/or use of the MKTA Service for which any payment is overdue, but only after MKTA has provided You two (2) e-mail notices over no less than a fifteen (15) day period. You agree that MKTA shall not be liable to You nor to any third party for any suspension of the MKTA Service resulting from Your non-payment of fees. Should MKTA choose to exercise the suspension right set forth herein, MKTA may need to remove MKTA Technology installed on Your server machines and You agree to promptly provide MKTA reasonable access to Your facilities to do so. Upon payment in full of all amounts overdue (including any interest owed), You may request the reactivation of Your account. MKTA shall reactivate Your account within one (1) week, provided that (a) MKTA has not already terminated pursuant to Section 7 of this Agreement and (2) You have paid MKTA in advance all applicable reactivation fees.

## **5. INTELLECTUAL PROPERTY RIGHTS; YOUR DATA; CONFIDENTIALITY**

**5.1 Intellectual Property Rights.** MKTA and its licensors own all right, title and interest to the MKTA Technology, the MKTA Service and any modifications, ideas, or recommendations provided by You. This Agreement does not convey or transfer any ownership rights in the MKTA Service or MKTA Technology.

**5.2 Your Data.** In the course of using the MKTA Service or the Services, You will submit Your Data to MKTA as set forth on Schedule B to Your Order Form. MKTA reserves the right to make reasonable modifications to the terms and conditions set forth in Schedule B effective upon notice to You. As between You and MKTA, You shall remain the sole owner of Your Data. Subject to the terms and conditions of this Agreement, You hereby grant to MKTA the non-exclusive right to use, copy, distribute and display Your Data solely in connection with MKTA's operation of the MKTA Service. You, not MKTA, shall have responsibility for the accuracy, integrity, and reliability of Your Data, and MKTA shall not be responsible or liable for the deletion, correction, destruction, damage, loss or failure to store any of Your Data. MKTA will protect any of Your Data provided to MKTA by You in the course of using the MKTA Service or Services as confidential in accordance with Section 5.3 below.

**5.3 Confidential Information.** For purposes of this Agreement, confidential information shall include the business terms in the Order Form, Your Data, the MKTA Service and MKTA Materials, and any other information that is clearly identified in writing at the time of disclosure as confidential ("Confidential Information"). Each party agrees to the extent allowed by Kentucky state law: (a) to receive and maintain in confidence all Confidential Information disclosed to it by the other party or by a third-party; (b) not to use the Confidential Information of the other party except to the extent necessary to perform its obligations or exercise rights hereunder; (c) to limit the internal dissemination of Confidential Information to those officers and employees, if any, of the recipient who have a need to know and an obligation to protect it; and (d) to protect the confidentiality thereof in the same manner as it protects the confidentiality of similar information and data of its own (at all times exercising at least a reasonable degree of care in the protection of such Confidential Information). MKTA may disclose Confidential Information on a need-to-know basis to its contractors who have executed written agreements requiring them to maintain such information in strict confidence and use it only to facilitate the performance of their services for MKTA. ~~Confidential Information shall not include information that: (1) is known publicly; (2) is generally known in the industry before disclosure; (3) has become known publicly, without fault of the recipient, subsequent~~

to disclosure by the disclosing party; (4) the recipient becomes aware of from a third party not bound by non-disclosure obligations to the disclosing party and with the lawful right to disclose such information to the recipient; or (5) was independently developed by the recipient without use of or reference to any Confidential Information belonging to the disclosing party. This Section 5.3 will not be construed to prohibit the disclosure of Confidential Information to the extent that such disclosure is required by law or order of a court or other governmental authority. The parties agree to give the other party prompt notice of the receipt of any subpoena or other similar request for such disclosure.

## **6. LIMITED WARRANTIES; INDEMNIFICATION; LIABILITY LIMITATIONS**

**6.1 MKTA Service Warranty.** MKTA warrants that the MKTA Service will function and perform substantially in accordance with its online documentation (and any technical specifications included in the MKTA Materials), and that such functionality will be maintained in all material respects in subsequent upgrades to the MKTA Service. MKTA does not warrant that the MKTA Service, including without limitation any reports or predictions, will be error-free. Your sole and exclusive remedy for MKTA's breach of this warranty shall be that MKTA shall be required to use commercially reasonable efforts to modify the MKTA Service to comply with the foregoing warranty and if MKTA is unable to restore such functionality You shall be entitled to terminate the Agreement and shall be entitled to receive a pro-rata refund of the Subscription Term fees paid under the Agreement for the remaining portion of the Subscription Term. MKTA shall have no obligation with respect to a warranty claim unless notified in writing of such claim within thirty (30) days of the first instance of any material functionality or performance problem.

**6.2 Services Warranty.** MKTA warrants that Services will be performed in a workmanlike manner, in conformity with the professional standards for comparable services in the industry. For any breach of this warranty, Your exclusive remedy shall be the re-performance of the deficient Services, and if MKTA is unable to re-perform the deficient Services as warranted, You shall be entitled to recover that portion of the fees paid to MKTA for such deficient Services, and such refund shall be MKTA's entire liability.

**6.3 Disclaimer Of Warranties.** EXCEPT AS STATED IN SECTIONS 6.1 AND 6.2, MKTA DOES NOT REPRESENT THAT YOUR USE OF THE MKTA SERVICE OR SERVICES WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR-FREE OR THAT THE MKTA SERVICE OR THE SERVICES WILL MEET YOUR REQUIREMENTS OR THAT ALL ERRORS IN THE MKTA SERVICE AND/OR DOCUMENTATION WILL BE CORRECTED. THE WARRANTIES STATED IN SECTIONS 6.1 AND 6.2 ARE THE SOLE AND EXCLUSIVE WARRANTIES OFFERED BY MKTA. THERE ARE NO OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. EXCEPT AS STATED IN SECTIONS 6.1 AND 6.2, THE MKTA SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. YOU ASSUME ALL RESPONSIBILITY FOR DETERMINING WHETHER THE SERVICE OR THE INFORMATION GENERATED THEREBY IS ACCURATE OR SUFFICIENT FOR YOUR PURPOSES.

**6.4** Limitation of Liability. YOU ACKNOWLEDGE AND AGREE THAT THE CONSIDERATION CHARGED BY MKTA HEREUNDER DOES NOT INCLUDE CONSIDERATION FOR ASSUMPTION BY MKTA OF THE RISK OF YOUR INCIDENTAL OR CONSEQUENTIAL DAMAGES. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MKTA BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY INCIDENTAL, CONSEQUENTIAL, PUNITIVE, SPECIAL, EXEMPLARY OR INDIRECT DAMAGES OF ANY TYPE OR KIND (INCLUDING LOST PROFITS, LOST SAVINGS, CURRENCY CONVERSION LOSSES, OR LOSS OF OTHER ECONOMIC ADVANTAGE) ARISING FROM BREACH OF WARRANTY OR BREACH OF CONTRACT, OR NEGLIGENCE, OR ANY OTHER LEGAL CAUSE OF ACTION ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT OR MKTA'S PERFORMANCE HEREUNDER, INCLUDING WITHOUT LIMITATION (A) THE MKTA SERVICE OR SERVICES, (B) ANY INTERRUPTION OF USE OF THE MKTA SERVICE OR SERVICES, OR (C) FOR LOSS, INACCURACY OR CORRUPTION OF YOUR DATA, EVEN IF MKTA HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. EXCEPT FOR BREACHES OF THE CONFIDENTIALITY PROVISIONS IN SECTION 5.3 ABOVE AND MKTA'S INDEMNIFICATION OBLIGATIONS IN SECTION 6.5 BELOW, AND SUBJECT TO ANY GREATER AMOUNT SET FORTH IN THE REFUND PROVISIONS IN SECTIONS 6.1 AND 6.2, IN NO EVENT SHALL MKTA'S LIABILITY HEREUNDER EXCEED **TWICE** THE AMOUNT THAT YOU PAID TO MKTA UNDER THIS AGREEMENT DURING THE PREVIOUS TWELVE MONTHS.

**6.5** Infringement Indemnification. MKTA will defend You from and against any and all claims brought by any third party against You that arises out of or results from the infringement of any copyright, United States patent, trademark, or misappropriation of a trade secret relating to the MKTA Service or MKTA Material or the Services and/or costs, liabilities, and expenses (including, but not limited to, reasonable attorneys' fees) finally awarded against You in any such claim or settlement thereof; provided that You (a) promptly give MKTA notice of the claim, suit, action, or proceeding; (b) give MKTA sole control of the defense and related settlement negotiations; and (c) provide MKTA with all reasonably available information and assistance necessary to perform MKTA's obligations under this Section. If the MKTA Service is held to infringe or in MKTA's opinion is likely to infringe any intellectual property right, MKTA may, in its sole discretion and at its own expense, either procure a license that will protect You against such claim without cost to You or replace the MKTA Service with a non-infringing service with comparable functionality. Provided that MKTA complies with this Section, You shall have no additional remedy against MKTA by reason of a third party infringement claim.

## **7. TERM AND TERMINATION**

**7.1** Initial Term; Renewal Terms. The Subscription Term shall commence upon the date set forth on the Order Form and shall continue for the period of time set forth in the Order Form. In the case of any Client or additional MKTA Service that is added and authorized after the beginning of the Initial Term, the term of such added usage shall be coterminous with the existing Subscription Term unless otherwise agreed in writing. Upon the expiration of the Initial Term (and except as otherwise provided in the Order Form), the Subscription Term shall automatically renew for successive one year renewal terms at MKTA's then current fees and pricing terms and conditions based on the number of Your Client use rights in effect at the time of renewal. MKTA will provide You with written notice of the fees due for the Renewal Term at least one hundred and twenty (120) days by March 1 prior to the commencement of the Renewal Term. You may elect not to renew the Subscription Term (or elect to reduce the number of authorized Clients use rights) by providing written notice to MKTA at least ninety (90) days prior to the commencement of the Renewal Term with the first renewal term commencing after the initial twenty four month term.

**7.2 Termination; Effect of Expiration or Termination.** In the event of any breach of this Agreement by either party, the non-breaching party shall have the right to terminate the Agreement (or the relevant Order Form) for cause if such breach has not been cured within 30 days of written notice from the non-breaching party specifying the breach in detail. MKTA shall also have the suspension rights set forth in Section 4.3 in the event of non-payment. Upon any termination of the Agreement or an Order Form, (a) Your right to access and use the MKTA Service, MKTA Materials and Query Utilities shall terminate; and (b) if MKTA notifies You that it needs to remove Query Utilities installed on Your server machines, You agree to promptly provide MKTA reasonable access to Your facilities to do so. Upon any termination or expiration of this Agreement, You agree that (a) MKTA has no obligation to retain Your Data or any MKTA Technology required to provide You the MKTA Services and (b) both may be irretrievably deleted from the MKTA Service. Your obligation to make a payment of any outstanding, unpaid fees and reimbursable expenses shall survive termination of this Agreement. In addition, the following provisions shall survive any termination of this Agreement: Sections 4, 5, 6, 7, and 8. Further, in the event that termination occurs before the expiration of the Initial Term for any reason other than a breach by MKTA, You agree to pay an early cancellation fee in an amount equal to Your monthly fixed charges multiplied by the number of months remaining in the Initial Term, plus any expense incurred by MKTA to discontinue any third party services used in providing the MKTA Services, plus any applicable non-recurring charges waived by MKTA to establish the MKTA Service. The parties acknowledge that the foregoing amounts are an accurate estimate of MKTA's actual damages caused by any such cancellation or early termination and are not intended as a penalty.

## **8. GENERAL PROVISIONS**

**8.1 Notice.** Notices regarding this Agreement to MKTA shall be in writing and sent by first class mail or overnight courier (if from within the USA), or international courier, addressed to MKTA at the address provided on the Order Form. MKTA may give notice applicable to MKTA's general MKTA Service customer base by means of a general notice on the MKTA Service portal, and notices specific to You by electronic mail to Your Service Administrator's e-mail address on record with MKTA, or by written communication sent by first class mail or overnight courier (if to an address within the USA), or international courier, to Your address on record in MKTA's account information. All notices shall be deemed to have been given three days after mailing or posting (if sent by first class mail), upon delivery in the case of courier, or 12 hours after sending by confirmed facsimile, e-mail or posting to the MKTA's Service portal.

**8.2 Audit and Verification.** At MKTA's written request, but not more frequently than once per calendar year, You shall furnish MKTA with a document signed by Your Service Administrator verifying that the MKTA Service is being used pursuant to the provisions of this Agreement and the applicable Order Form. MKTA reserves the right to audit Your use of the MKTA Service no more than once per calendar year at MKTA's expense. MKTA shall schedule any audit at least thirty (30) days in advance, and any such audit shall be conducted during regular business hours at Your facilities and shall not unreasonably interfere with Your business activities. If such audit reveals that You have underpaid fees to MKTA, You shall promptly pay to MKTA such fees pursuant to the pricing set forth in the applicable Order Form, plus applicable interest and any expenses associated with conducting the audit.

**8.3 Export.** You agree that U.S. export control laws and other applicable export and import laws govern Your use of the MKTA Service, including MKTA Technology. You represent that You are not a citizen of an embargoed country or prohibited end user under applicable U.S. export and anti-terrorism laws, regulations and lists. You will not use, export or allow a third party to use or export the MKTA Service or MKTA Technology in any manner that would violate applicable law, including but not limited to export control laws and regulations.

**8.4 Force Majeure.** Except for Your obligation to pay for the MKTA Service or other Services rendered, neither party will be responsible for failure of performance due to causes beyond its control. Such causes include (without limitation) accidents, acts of God, labor disputes, actions of any government agency, shortage of materials, acts of terrorism, or the stability or availability of the Internet or a portion thereof.

**8.5 Governing Law; Jurisdiction.** This Agreement shall be governed by the laws of the State of ~~Arizona~~ Kentucky and controlling U.S. federal law. The Uniform Computer Information Transactions Act, the United Nations Convention on the International Sale of Goods, and choice of law rules of any jurisdiction will not apply to this Agreement. Any legal action or proceeding relating to this Agreement shall be instituted in a state or federal court in ~~Maricopa County, Arizona~~ Jefferson County, Kentucky, and each party hereby submits to the personal jurisdiction of such courts and waives any defense relating to venue or forum non convenience.

**8.6 Integration; Modification.** This Agreement together with any applicable Order Form, represents the parties' entire understanding relating to the MKTA Service, the MKTA Materials and the Services, and supersedes any prior or contemporaneous, conflicting or additional, communications. Except as otherwise set forth herein, the terms and conditions of this Agreement may only be amended by written agreement of the parties. Nothing contained in any purchase order submitted by You other than order dates, identity, location, quantity and price shall in any way serve to modify or add to the terms of this Agreement or the Order Form.

**8.7 Severability.** If any provision of this Agreement is determined to be illegal or unenforceable, that provision will be limited to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect.

**8.8 Relationship of Parties.** No joint venture, partnership, employment, or agency relationship exists between MKTA and You as a result of this Agreement or use of the MKTA Service.

**8.9 Assignment.** You may not assign this Agreement without the prior written approval of MKTA. Any purported assignment in violation of this Section shall be void. MKTA reserves the right to provide some or all of the MKTA Service (including but not limited to Technical Support) from locations, and/or through use of third party providers, located worldwide.

**8.10 Waiver.** The failure of either party to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by such party in writing.

## **Schedule D – Technical Support and Service Level Agreement**

Capitalized terms used in this document and not separately defined shall have the meanings set forth in the Order Form and Schedule C. The Support and professional services ("Services") described in the Standard Support Agreement below do not expand on or change any warranty provisions set forth in Schedule C or any other agreement between You and MKTA. If You wish to purchase Services for tasks excluded from the terms set forth below, You may purchase such Services from us on a time and materials basis at our then current published rates. Any such purchase should be through a written agreement (such as an MKTA Order Form), signed by an authorized employee of Your company. We agree not to accept any request for the performance of additional Services if such request is not documented through a signed written agreement. The Service Level Agreement ("SLA") below defines MKTA's responsibility with respect to the Services that it provides (the "Service Commitments") and Your remedies in the event that MKTA fails to meet these Service Commitments. This SLA and the refunds set forth herein (the "Service Credits") represent MKTA's sole obligation and Your sole remedy for our failure to meet such Service Commitments.

### **A. STANDARD SUPPORT AGREEMENT (INCLUDED WITH ALL MKTA SERVICE ORDERS)**

#### **1. GENERAL SUPPORT TERMS AND CONDITIONS**

1.1 Appointment of System Managers: You will need to designate up to two (2) of Your employees as designated "System Managers," each of whom will be entitled to contact our helpdesk to ask questions, report errors or seek help troubleshooting use of the MKTA Service. Before contacting our helpdesk, Your System Manager(s) should be reasonably trained in the use of the MKTA Service and familiar with the MKTA Materials. MKTA will issue each of Your System Managers an I.D. number upon his/her first contacting Support (this number is required when contacting Support). In the event that a System Manager is no longer able to serve in such capacity, You may designate a replacement.

1.2 E-mail and Telephone Support: A System Manager may contact our helpdesk by phoning our call system to be connected to a Support representative (if none is available You will be routed to voice mail to report the problem). Additionally, a System Manager may send us an e-mail at **TBD** [smarted@mktanalytics.net](mailto:smarted@mktanalytics.net) to report a problem or ask a question. Any e-mail requests identifying potential errors or problems should provide us with sufficient information to reproduce the error. Our helpdesk will assist a System Manager in accessing and utilizing the MKTA Service, and work with a System Managers in good faith to determine the final disposition of all reported problems or errors, including identifying and providing workarounds for any problems discovered. Assistance may include communicating via telephone, e-mail, our Support web site, or, if allowed by you, remote desktop sharing.

1.3 Support Coverage: Our Support helpdesk currently accepts calls between 8:00 am to 5:00 pm, U.S. Mountain Standard Time. Currently we do not offer Support during the weekends or standard U.S. holidays.

1.4 Error Corrections: We use commercially reasonable efforts to correct any reproducible and material programming error discovered in the MKTA Service, applying a level of effort reasonably commensurate with the severity class of the error (see Section 2 below). We are not responsible for correcting errors that result from problems residing outside of the MKTA Service. Typically, we address errors through updates to the hosted application software, but on occasion we may provide You with an interim correction (such as a work-around) pending formal implementation of an update.

1.5 Your Suggestions: Any errors or suggested changes, clarifications, additions or other improvements to the MKTA Service that You communicate to us shall constitute Your grant to MKTA, without charge, of the right to incorporate such suggestions, changes and modifications into the MKTA Service under MKTA's standard intellectual property notices.

## **2. CLASSES OF ISSUE SEVERITY**

2.1 Severity Definitions. To assist us with effective issue management, we ask that Your System Manager prioritize any reported issue, using the following severity definitions: *Class 1* (critical faults that seriously impair or halt Your use of the MKTA Service: system, service or critical application down; You cannot make use of an essential function in the MKTA Service; the fault cannot be solved through re-login, bypass or a workaround); *Class 2* (urgent or serious fault that significantly impacts use of the MKTA Service: high-impact problem where use of the MKTA Service is proceeding, but in a significantly impaired fashion; the MKTA Service is operational, but with repeated interruptions; the fault relates to a time-sensitive issue that is important to long-term productivity, but is not causing an immediate stoppage of use of the MKTA Service; the fault cannot be solved through re-login or by pass; and *Class 3* (important problems that do not have a significant impact on current productivity: the MKTA Service is operational, but with some limitations; a function in the MKTA Service is failing, but there is a bypass available; a workaround has been found, but it is not an acceptable long term solution).

2.2 Response Targets: The following table defines severity class level response timeframes, resolution targets and escalation processes currently employed by our Support staff:

<b>Severity Class</b>	<b>Initial Response to You</b>	<b>Target Resolution</b>	<b>Escalation Time</b>
Class 1	Within one hour	Within one day	After 6 hours
Class 2	Within 6 hours	Within three days	Within 12 hours
Class 3	Within three days	Within 10 days	Within 5 days

References to hours are to "business hours" and references to five or less days are to "business days." Business hours are counted sequentially through the hours of 7:00 am to 5:00 pm (hours between 5:00 pm and 7:00 am are not counted, then counting continues again at the hour of 7:00 am the next business day). Business days are counted as weekdays, excluding standard US holidays.



### **3. NONQUALIFYING SUPPORT ISSUES AND EVENTS**

3.1 Non-Qualified Products: We do not provide Support for any hardware or software product that is not part of the MKTA Service (each such product, a "Nonqualified Product"). You remain responsible for the compatibility and functioning of Nonqualified Products with the MKTA Service. If we provide Support services for a problem caused by a Nonqualified Product or the failure of Your computer system or environment to comply with any minimum system requirements specified in the MKTA Materials (or our Support efforts are materially increased as a result of Your use of Nonqualified Product or failure to comply with minimum requirements), we reserve the right to charge You time and materials for such extra services at our then current published rates for customized technical support services.

3.2 Other Excluded Systems and Applications: Our Support also does not cover general networking or firewall issues or Your database support issues. Our Support does extend to errors relating to the operation of any Query Utilities provided by us to You for use in conjunction with the MKTA Service, but only to the extent Your use of such Query Utilities complies with the MKTA Materials. For excluded systems and applications (including problems resulting from Your use of the Query Utilities contrary to the terms of the MKTA Materials), we reserve the right to charge You time and materials for such extra services at our then current published rates for customized technical support services.

### **4. YOUR RESPONSIBILITIES; ADDITIONAL TERMS RELATING TO SUPPORT SERVICES**

4.1 Onsite Visits: If You request that our personnel come on site to provide Support or Services, You agree to reimburse MKTA on a time and materials basis for such assistance. We will notify You of such estimated fees and costs before they are incurred.

Included in the price of the product is onsite training in the use of the dashboards. MKTA will provide a trainer to conduct one-to-two hour sessions with each level of user hierarchy (e.g., executive, director, manager, etc.). The training will proceed through the following agenda:

- How to access the dashboard product
- How to navigate through all levels of the solution
  - How to change user settings
- How to interpret the outputs and turn them into action
- How to access technical support

4.2 Assistance: Subject to our compliance with Your security requirements, You agree to: (i) provide us with access to and use of information, personnel and facilities as reasonably necessary to render the Support described in this document; and (ii) reasonably perform any tests or procedures that we recommend for the purpose of identifying and/or resolving any problems.

4.3 Maintenance of Systems/Environment: You need to maintain any computer systems that access the MKTA Service in good working order and in compliance with any minimum system requirements set forth in the MKTA Materials, to ensure that any problems relating to Your use of the MKTA Service are not due to hardware, firewall, access or internet malfunction.

4.4 Protection of Data: You need to maintain procedures external to the MKTA Service for reconstruction of Your Data entered on the MKTA Service in the event data is lost or damaged.

## **B. MKTA SERVICE LEVEL AGREEMENT**

### **1. SERVICE COMMITMENTS**

1.1 Scheduled Maintenance: MKTA performs periodic upgrades and maintenance on the MKTA Service hardware and supporting software which will require making the hosted services unavailable for a limited time. Often these operations can be performed without a service outage. For tasks which require a service outage, a maintenance window will be defined and communicated to customers using the application dashboard. Announcements will be as much as several weeks in advance but at a minimum, the last announcement is released at least 24 hours before the beginning of a planned window. In general maintenance windows are scheduled and performed during non-work days and/or during non-business hours (MST/PDT).

1.2 Uptime: MKTA guarantees 98% of uptime for the MKTA Service, excluding scheduled maintenance. The MKTA Services shall be deemed available if all material aspects of the MKTA Services are operating as designed and in a non-degraded manner. In the event of a failure to meet this uptime commitment, the duration of such period will be considered downtime and You will accrue Service Credits.

### **2. SERVICE CREDITS**

2.1 Service Credits: The Service Credit shall equal the percentage of the total monthly fixed charges MKTA is receiving under the Order Form and will not exceed the monthly fee. Service Credits must be requested in writing, per the notice requirements in the Agreement, within 7 days of the downtime. All Service Credits will be issued as credits against future services. In order to qualify for Service Credits, you must be current on all payment obligations, not be in violation of the Order Form or any other policies and procedures of MKTA.

2.2 Accrual: Service credits are accumulated monthly based on the following metrics:

<u>Monthly Cumulative Downtime (minutes)</u>	<u>Service Credits (% of monthly fee)</u>
0-60	5%
60-120	10%
120-180	20%
180-240	30%
240-300	55%
> 300	100%

Monthly Cumulative Downtime shall be reset at the beginning of each calendar month.

### **3. EXCEPTIONS**

No Service Credits will be given for service interruptions: (i) caused by the action or failure to act by You or Your personnel, (ii) due to failure of any equipment provided by You, (iii) which are the result of scheduled maintenance, (iv) due to a force majeure event, (v) for which you are entitled to a Service Credit for the same or contemporaneous Service Commitment failure or (vi) resulting from your breach of the Order Form or any other policies and procedures of MKTA.