

Actuate OnDemand – Terms of Use Agreement

The term "Company" as used herein shall mean Actuate Corporation and any of its affiliated entities, either directly or indirectly through a reseller. Your use of the Company Site, or any of the software subscription service offerings or other services offered on the Company Site including any online, offline, or third-party components, data, lists, reports, dashboards, templates, applications or services, and any software products provided in connection thereto (collectively, the "Application"), is subject to these Terms of Use (this "Agreement"). If you do not agree to this Agreement, you agree not to use or access the Application or the Company Site. If you are agreeing to this Agreement on behalf of a company or other legal entity, you represent that you have the authority to bind such entity to this Agreement (collectively referred to herein as "You" and its derivative "Your(s)"). Your registration for, or use of, the Company Site or the Application shall be deemed to be Your acceptance of this Agreement.

1. DEFINITIONS

- 1.1 "Account Administrators" shall have the meaning ascribed to it in Section 2.6 of this Agreement.
- 1.2 "Agreement" shall have the meaning ascribed to it in the header of this Agreement.
- 1.3 "Application" shall have the meaning ascribed to it in the header of this Agreement.
- 1.4 "Authorized User(s)" means You and Your employees, consultants, contractors or agents for whom You have paid the applicable Fees and who are authorized to use the Services, and have been supplied user identifications and passwords.
- 1.5 "BIRT OnDemand Instance" means a set amount of dedicated compute capacity as determined by the comparable Amazon standard instance type. For example, the capacity of a "Large" BIRT OnDemand Instance is equivalent to the analogous "Amazon EC2 Large Instance".
- 1.6 "Case Materials" shall have the meaning ascribed to it in Section 10.13 of this Agreement.
- 1.7 "Claims" shall have the meaning ascribed to it in Section 8.1 of this Agreement.
- 1.8 "Company" shall have the meaning ascribed to it in the header of this Agreement.
- 1.9 "Company Content" shall have the meaning ascribed to it in Section 3.2 of this Agreement.
- 1.10 "Company IP Rights" shall have the meaning ascribed to it in Section 3.7 of this Agreement.
- 1.11 "Company Materials" shall have the meaning ascribed to it in Section 3.4 of this Agreement.
- 1.12 "Company Network" shall have the meaning ascribed to it in Section 2.3 of this Agreement.
- 1.13 "Company Site" means www.birtondemand.com, www.birt-exchange.com, www.birtperformanceanalytics.com, or any other website located at a URL designated by Company from time to time.
- 1.14 "Company Technology" shall have the meaning ascribed to it in Section 3.7 of this Agreement.
- 1.15 "Confidential Information" shall have the meaning ascribed to it in Section 6.1 of this Agreement.
- 1.16 "Documentation" means the User Guide and any other written materials provided to You during the Term of this Agreement and identified as Documentation.
- 1.17 "Fees" means the fees set forth on the applicable Order Form.

- 1.18 “Losses” shall have the meaning ascribed to it in Section 8.1 of this Agreement.
- 1.19 “Order Form” means the ordering document representing Your request to subscribe to the Services and that specifies, among other things, the quantity and type of Services ordered (including the number of Authorized Users or BIRT OnDemand Instances), the subscription account term, and the applicable Fees.
- 1.20 “Personally Identifiable Information” or “PII” is any information provided by You or an Authorized User, or collected by Company in connection with Company’s relationship with You (i) that identifies or can be used to identify, contact, or locate the person to whom such information pertains, (ii) from which identification or contact information of an individual person can be derived, or (iii) that constitutes Protected Health Information (PHI) as that term is defined in the U.S. Health Insurance Portability and Accountability Act. PII includes, but is not limited to: name, address, phone number, fax number, email address, social security number or other government-issued identifier, credit card information and any health-related information. Additionally, to the extent any other information (such as, but not necessarily limited to, a personal profile, unique identifier, biometric information, and/or IP address) is associated or combined with PII, then such information also will be considered PII.
- 1.21 “Pre-existing Information” means, among other things, information that was in Company’s possession prior to the time it is provided to You by Company, including, but not limited to, its knowledge-base of metrics and frameworks for industries and professional functions.
- 1.22 “Public Software” means any software, documentation or other material that contains, or is derived (in whole or in part) from, any software, documentation or other material that is distributed as free software, open source software (e.g., Linux) or similar licensing or distribution models, including, but not limited to software, documentation or other material licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: (i) the GNU General Public License (GPL); Lesser/Library GPL (LGPL), or Free Documentation License; (ii) The Artistic License (e.g., PERL); (iii) the Mozilla Public License; (iv) the Netscape Public License; (v) the Sun Community Source License (SCSL); (vi) the Sun Industry Standards License; (vii) the BSD License; and (viii) the Apache License.
- 1.23 “Related Agreement” shall have the meaning ascribed to it in Section 10.15 of this Agreement.
- 1.24 “Residual Knowledge” shall have the meaning ascribed to it in Section 6.3 of this Agreement.
- 1.25 “Services” means, collectively, Company’s provision of the Application and Support to You under an Order Form.
- 1.26 “Service Interruptions” shall have the meaning ascribed to it in Section 2.4 of this Agreement.
- 1.27 “Service Offerings” shall have the meaning ascribed to it in Section 7.3 of this Agreement.
- 1.28 “Service Suspensions” shall have the meaning ascribed to it in Section 2.5 of this Agreement.
- 1.29 “Support” means the services provided under Company’s Maintenance Services policy in effect on the date such services are ordered. Company’s current Maintenance Services policy is described at <http://www.actuate.com/supportpolicy>. Unless otherwise specified in the Order Form, You shall receive Silver Service Plan, as such term is defined in the aforementioned website, as part of Your subscription to the Application.
- 1.30 “Taxes” shall have the meaning ascribed to it in Section 5.6 of this Agreement.
- 1.31 “Term”, and its derivatives “Initial Term” and “Renewal Term”, shall have the meaning ascribed to them in Section 9.1 of this Agreement.

- 1.32 “Third-Party Content” means any third-party software, applications, libraries, data and other content that may be made available by any third-party on the Services, which You may elect to access or use.
- 1.33 “User Guide” means the online documentation for the Services provided to You and/or accessible via the Company Site, and as updated by Company from time to time. You acknowledge that You have had the opportunity to review the User Guide during the free trial described in Section 2.1 below.
- 1.34 “Work Product” shall have the meaning ascribed to it in Section 3.5 of this Agreement.
- 1.35 “You / Your(s)” shall have the meaning ascribed to it in the header of this Agreement.
- 1.36 “Your Data” means, subject to (i) Company’s ownership of its Pre-existing Information, (ii) information that is otherwise publicly available, or (iii) information that is otherwise available to Company (including without limitation the provisions of Section 6.3 herein), all electronic data or information submitted by or on behalf of You or any Authorized User (including without limitation all data contained in Your data warehouse), or collected or processed by You or any Authorized User or other third-party on Your or any Authorized User’s behalf, or otherwise generated in connection with or as a result of Your or any Authorized User’s use of the Application or Company’s provision of the Services, including without limitation any PII information.

2. SERVICES

- 2.1 Free Trial Period. Company may make the Application only (and not the Services) available to You on a trial basis (including, without limitation, on a demonstration or evaluation basis) free of charge for a period of time equal to fifteen (15) days or the period set forth in an Order Form approved by the Company, whichever is longer. To request a free trial, You must register at the Company Site and have a complete Order Form accepted by Company. At the end of the free trial period, Your trial account will automatically terminate.

WITHOUT LIMITING THE FOREGOING AND NOTWITHSTANDING ANYTHING TO THE CONTRARY STATED HEREIN, IF THE APPLICATION IS OFFERED ON A NO COST OR TRIAL BASIS TO YOU, IT IS PROVIDED “AS IS” WITHOUT WARRANTIES OF ANY KIND. For the purposes of the free trial, only the following Sections shall apply: 1; 2.1; 2.4; 2.5; 2.7; 3; 4 (except for the last sentence in 4.3 and 4.7); 5.5; 5.7; 6; 8.3; 8.5; 9.1; 9.2; 9.3; 9.4(ii) and (iii); 9.5; and 10.

- 2.2 Services. Beginning on the date Actuate accepts Your Order Form, and subject to Your payment of the Fees, Company will make the Services available to You consistent with the manner in which Company makes the Services generally available to other users of the Service, including with the same features and functionality, upgrades, new features, and service level agreements, and pursuant to the terms and conditions set forth in this Agreement. Your Order Form may be submitted by You through a Company Site or by a separate, mutually signed Order Form. You agree that Your purchase of subscription accounts is not contingent upon the delivery of any future Services functionality and/or features, nor is it dependent upon any oral or written public comments made by Company with respect to future Services functionality and/or features. Company may modify certain Services functionality and/or features during the Term at its convenience. Should the modified Services functionality and/or features no longer attend to Your needs, You acknowledge and agree that Your only option will be to terminate this Agreement.
- 2.3 Company Responsibilities. Company shall: (i) use commercially reasonable efforts to establish and maintain administrative, technical and physical safeguards for the Company Network that are designed to (a) protect the security and integrity of the Company Network, (b) guard against anticipated threats or hazards to the security and integrity of the Company Network; (ii) make the BIRT onDemand related Services generally available per the terms of Actuate OnDemand Service Level Agreement; (iii) make the BIRT Performance Analytics related Services generally available during Company’s business hours, except in either case for (a) planned downtime (of which Company shall endeavor to give at least eight

(8) hours notice via the Services, and which Company shall schedule to the extent reasonably practicable during the weekend hours from 6:00 p.m. PT Friday to 3:00 a.m. PT Monday), or (b) any unavailability caused by Service Interruptions; and (iv) provide Support per industry standards. “Company Network” means Company’s internal data center facilities, servers, networking equipment, and host software systems that are within Company’s reasonable control and are used to provide the Services. The safeguards will be at least equal to the generally accepted security standards within the IT industry. Notwithstanding the foregoing, Company does not make any representations or guarantees regarding uptime or availability of the Services except as expressly stated in this Section 2.3.

- 2.4 Service Interruptions. The Services may be unavailable at certain times, including during any unanticipated or unscheduled downtime or unavailability of all or any portion of the Services, as a result of system failures or force majeure events described in Section 10.12 (collectively, “Service Interruptions”). Company will use commercially reasonable efforts, circumstances permitting, to provide information regarding any Service Interruption and the restoration of use and access to the Services following the Service Interruption, including by information posted on the Company Site or sent to Your registered email address. You are responsible for properly configuring and using the Services and taking Your own steps to maintain appropriate security, protection and backup of Your Data, including using encryption technology to protect Your Data from unauthorized access and routinely archiving Your Data. Company is not responsible for any unauthorized access to, alteration of, or the deletion, destruction, damage, loss or failure to store any of, Your Data or other data that You or any Authorized User submits or uses in connection with the Services (including as a result of Your errors, acts or omissions).
- 2.5 Service Suspensions. Company may temporarily suspend Your and any Authorized Users’ access to any portion or all of the Services if Company reasonably determines that: (i) there is a threat or attack on the Services (including a denial of service attack) or other event that may create a risk to the Services, You or any other Company customer; (ii) Your or Your Authorized Users’ use of the Services or Your Data disrupts or poses a security risk to the Services or any other Company customer, may harm Company’s system or any other Company customer, or may subject Company or any third party to liability; (iii) You or Your Authorized Users are using the Services for fraudulent or illegal activities; (iv) subject to applicable law, You have ceased to continue its business in the ordinary course, made an assignment for the benefit of creditors or similar disposition of its assets, or become the subject of any bankruptcy, reorganization, liquidation, dissolution or similar proceeding; (v) You or Your Authorized Users are using the Services in breach of this Agreement; or (vi) You are in default of Your payment obligations hereunder and there is an unusual spike or increase in Your use of the Services (collectively, “Service Suspensions”). Company will make commercially reasonable efforts, circumstances permitting, to provide written notice of any Service Suspension to You (including notices sent to Your registered email address) and to provide updates regarding resumption of Services following any Service Suspension. Company will have no liability for any damage, liabilities, losses (including any loss of data or profits) or any other consequences that You or any Authorized User may incur as a result of any Service Suspension and You will not be entitled to any refund or credits for any Service Suspension.
- 2.6 Cooperation. Both Company and You will provide timely and effective cooperation with each other in the performance of their respective obligations under each Order Form including, but not limited to, designating qualified and authorized personnel to act as liaison(s) with each other and responding promptly to any requests made by the other party (“Account Administrators”).
- 2.7 Your Data. Your Data shall be considered Confidential Information subject to the terms of this Agreement. You shall be solely responsible for the content and data provided by You including, but not limited to, uploading Your Data to the Application, assuring that all such data is properly formatted and configured, is in all respects "application-ready", and otherwise complies with all other terms of this Agreement, including without limitation Sections 3.2(vii) through (x). Except for Company’s provision of the Application and its responsibilities stated in Section 2.3, and notwithstanding the provisions of Section 9.4 herein, Company will not have any responsibilities relating to Your Data including, but not limited to, modifying, securing or maintaining any of Your Data. Under no circumstances will Company

be liable for any Application failure or impairment caused by or related to Your Data. You acknowledge and agree that Company may utilize a third-party service provider to host the Application and Your Data, and that Company will not have any responsibilities relating to such hosting services and its impact, if any, on the Application and Your Data. You are solely responsible for the development, operation, and maintenance of Your Data and for all materials that appear on or in any of Your Data. You represent and warrant that Your Data will not contain any malicious or hidden mechanisms or code for the purpose of damaging or corrupting the Services. You agree that You will, without limitation, be solely responsible for: (i) the technical operation of Your Data, including ensuring that calls You makes to any Service are compatible with the then-current APIs for that Service; (ii) the accuracy and appropriateness of any of Your Data (including, among other things, any product-related materials); (iii) ensuring that any materials posted within any of Your Data are not illegal and do not promote illegal activities; (iv) ensuring that Your Data accurately and adequately discloses, either through a privacy policy or otherwise, how You collect, use, store, and disclose data collected from Authorized Users, including, where applicable, that third-parties (including advertisers) may serve content and/or advertisements and collect information directly from visitors and may place or recognize cookies on visitors' browsers; (v) any Authorized User's claims to the extent such claims are based upon Your Data; (vi) Your use of any Third-Party Content; and (vii) handling and processing notices sent to You (or any of You affiliates) by any third-party claiming that any of Your Data violates such party's rights including, without limitation, notices pursuant to the Digital Millennium Copyright Act.

3. LICENSE AND RESTRICTIONS

- 3.1 Limited License. Subject to the terms and conditions of this Agreement, Company grants to You during the Term a limited, non-exclusive, non-transferable, non-sublicensable license through a subscription account to access and use, and allow Authorized Users to access and use, the Application via the Company Site or any applicable software license keys solely for Your own internal business purposes. The extent of Your access to the Application and use of the Services shall be limited to the subscription package specified in the applicable Order Form. You shall have no right or license to any Services unless such Services are properly documented in an Order Form, including, without limitation, product names, quantity of Authorized Users or BIRT OnDemand Instances, licensed term and Fees.
- 3.2 Restrictions. You shall not, and shall not allow Authorized Users or any third-party to: (i) share any data or content output in its entirety, be in Excel format, PDF, web visualization or otherwise, generated through the Services with anyone other than Authorized Users that are part of Your subscription account at the time of sharing (notwithstanding the foregoing, portions of such data or content output, such as informational derivatives, graphs, charts, data inferences or informational inferences, gathered from reports generated by the Services may be shared by You in documents or presentations utilized for Your own business purposes); (ii) rent, lease, re-license, transfer, assign, distribute, time-share or otherwise commercially exploit or provide access to the Application to any third-party except as explicitly set forth in this Agreement; (iii) alter, modify or create derivative works of the Application; (iv) use any reverse compilation, decompilation or disassembly techniques or similar methods to determine any design structure, concepts and construction method of the Application, or replicate the functionality of the Application for any purpose; (v) create Internet "links" to or from the Application, or "frame" or "mirror" any content forming part of the Application, other than on Your own intranet or otherwise for Your own internal business purposes; (vi) copy the Application or any content, materials, information and other data provided by Company on the Company Site (collectively, "Company Content") and/or Documentation without Company's prior written consent; (vii) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (viii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material, including material harmful to children or in violation of third-party privacy rights; (ix) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (x) interfere with or disrupt the integrity or performance of the Application or the data contained therein; or (xi) attempt to gain unauthorized access to the Application or its related systems or networks, or (xii) use any Public Software in connection with the Services in any manner that requires, pursuant to the license applicable to such Public Software, that

any Services be (a) disclosed or distributed in source code form, (b) made available free of charge to recipients, or (c) modifiable without restriction by recipients.

- 3.3 Suggestions. Company shall have a royalty-free, worldwide, perpetual license to use or incorporate into the Services any suggestions, ideas, enhancement requests, feedback, recommendations or other information and derivatives thereof provided by You or Your Authorized Users relating to the operation of the Application.
- 3.4 Application Hosting. Company and its suppliers shall provide the hardware, software and other equipment required to host the Application ("Company Materials"). You acknowledge and agree that Your Data may be stored on the same hardware as data of Company's other customers, and that You at all times shall observe all the terms and conditions of this Agreement.
- 3.5 Ownership and Changes. Any expression of Company's findings, analyses, conclusions, opinions, recommendations, ideas, techniques, know-how, designs, programs, enhancements, software and other technical information (collectively "Work Product") provided to You by Company in the course of performing the Services are the property of Company and are licensed to You, without further license fees, pursuant to the Company software license(s) for use with the Services; provided, however, to the extent such Work Product provided to You by Company contains Your Confidential Information, You shall retain title to such Confidential Information.
- 3.6 Compliance Monitoring and Audits. Company may monitor and perform remote audits of Your use of the Application and Company Site, and Your Data, for the purpose of verifying that You and Authorized Users are using the Application in compliance with the terms of this Agreement, and to determine if Your use of the Application and Company Site can be improved. Notwithstanding the foregoing and Section 4.4 below, You acknowledge and agree that (i) the Application is not currently designed to prevent You from adding unpaid Authorized Users or BIRT OnDemand Instances to your subscription account, and that (ii) it is Your responsibility to ensure compliance by You and Your Authorized Users with the terms of this Agreement. If You have any doubts about Your rights, You agree to immediately contact Company to clarify them. You agree that use of the Services beyond the scope of Your license grant, to include without limitation the number of paid Authorized Users or BIRT OnDemand Instances, constitutes a material breach of this Agreement and a violation of Company's intellectual property rights, and Company shall be entitled to, among other things, prompt payment for any such breach at the higher of the non-discounted list price in effect (a) at the time any unlicensed use is discovered by, or made known to, Company or (b) at the time You exceeded Your rights.
- 3.7 Reservation of Rights. You acknowledge that in providing the Services, You utilize (i) the Company's name, the Actuate.com logo, the birt-exchange.com, birtperformanceanalytics.com and actuate.com domain names, the product and service names associated with the Services, and other trademarks and service marks; (ii) certain audio and visual information, documents, software and other works of authorship; and (iii) other technology, software, hardware, products, processes, algorithms, user interfaces, know-how and other trade secrets, techniques, designs, inventions and other tangible or intangible technical material or information (collectively, "Company Technology"), and that the Company Technology is covered by intellectual property rights owned or licensed by Company (collectively, "Company IP Rights"). Other than as expressly set forth in this Agreement, no license or other rights in or to the Company Technology or Company IP Rights are granted to You, and all such licenses and rights are hereby expressly reserved by Company.
- 3.8 Non-Assertion. During the term of the Agreement and for a period of one (1) year thereafter, You will not assert, nor will You authorize or assist any third-party to assert, against Company, its affiliates or any of their respective customers, vendors, business partners, or licensors, any patent infringement claim with respect to any Services that You elect to use.

4. ACCESS TO THE APPLICATION

- 4.1 Connection to the Application. Company shall be responsible for connecting the Application to the Internet, and You shall be responsible for connecting to the Internet to gain access to the Application.
- 4.2 User Information. Only Your Account Administrator will have access to account administrative tools and may approve Authorized Users to gain access to the Services. Each request for approval of an Authorized User must include such user's full name, email address, and username. Your Account Administrator may update the list of Authorized Users at any time within the Term, so long as the Account Administrator observes the number of Authorized User seats selected in the relevant Order Form, if applicable.
- 4.3 Passwords and Access to the Application. For BIRT onDemand products, upon approval of an Authorized User, Company will email such Authorized User an individual password and instructions about how to access the Application. Emails will also be sent for every instance where a BIRT onDemand Authorized User has been replaced per the terms of Section 4.4 below. For BIRT Performance Analytics products, Company will send You a password and key to the application and You will be responsible for generating individual passwords and user IDs for Your Authorized Users.
- 4.4 Additional Authorized Users. Authorized User passwords are for named individual Authorized Users and cannot be shared or used by more than one (1) Authorized User; provided, however, seats within a subscription account (but not passwords) may be reassigned from time to time to new Authorized Users replacing former Authorized Users who have terminated an employment or some other prior relationship with You, changed job status or function, or otherwise no longer require use of the Application. You must inform Company in writing which Authorized User is being replaced, and the replacement/substitute Authorized User must receive a new password in accordance with Section 4.3 before accessing or using the Application. Should You wish to increase the number of Authorized User seats or BIRT OnDemand Instances in Your subscription account during the current subscription account Term, Your Account Administrator may request such increase by logging into the contacting Company and purchasing the additional Authorized Users or BIRT OnDemand Instances at Company's then-current prices. All provisions of this Agreement shall apply to any and all additional Authorized Users or BIRT OnDemand Instances You may order from Company during Your current subscription account Term.
- 4.5 Your Responsibilities / Security of Passwords. You are responsible for all activities that occur under Your Authorized User passwords. You acknowledge and agree that You shall be solely responsible for (i) selecting Authorized Users, (ii) ensuring that only Authorized Users have access to the correct passwords, (iii) implementing a system to control, track and account for all Authorized User passwords, (iv) strictly maintaining the confidentiality and integrity of the passwords, (v) ensuring that Authorized Users shall at all times comply with the terms and conditions of this Agreement, (vi) the accuracy, quality, integrity, legality, reliability, and appropriateness of all Your Data, and (vii) compliance with all applicable local, state, federal, and foreign laws in using the Services and, if using the Services outside of the United States, not use the Services in a manner that would violate any federal or state laws of the United States if conducted therein. You further agree that You shall notify Company immediately in writing if the security or integrity of any password has been compromised.
- 4.6 Privacy Statement. Company's privacy statement is set forth at <http://www.actuate.com/company/privacy-policy/>. By entering into this Agreement, You acknowledge and agree to Company's privacy policy and to obtain Your Authorized Users' agreement to Company's privacy policy.
- 4.7 Vendor Agreement. Company may require You to enter into and be bound by the terms of Company's vendor's agreement if the use of the Service requires that the You obtain Your own, unique account identifier to use or access any of Your Data. In such instances, You will be solely responsible for Your and Your Authorized Users compliance with the terms and conditions of such vendor agreement(s). Neither party may extend on behalf of the other any written or oral warranty or guarantee, or make any

representation or claim, with respect to such other party's products or services without the other party's prior written consent.

5. FEES, EXPENSES AND PAYMENT TERMS

- 5.1 Fees. In consideration of the license granted by Company and the Services performed, You shall pay the Fees specified in the applicable Order Form submitted by You. All Fees are quoted in United States dollars and payable immediately unless otherwise stated in the Order Form. Fees are based on the number of Authorized User seats or BIRT OnDemand Instances, and storage and transfer capacity, selected in the relevant Order Form. Except as otherwise provided, Fees are non-refundable and the number of Authorized Users or BIRT OnDemand Instances selected cannot be decreased during the relevant subscription account Term stated on the Order Form. Fees for subscription accounts purchased in the middle of a monthly period will be pro-rated for that initial monthly period and then charged in full going forward based on the number of monthly periods remaining in the subscription account Term.
- 5.2 Invoices and Payment. Any credit card information provided by You in the applicable Order Form will be charged in full for all Fees. Fees for the Services will be invoiced in advance of the subscription Term. Invoices will be due net thirty (30) days after the date of invoice. If a purchase order contains terms which are additional to or inconsistent with the terms of this Agreement, such terms shall be disregarded and the terms of this Agreement shall prevail. All amounts payable by You to Company under this Agreement will be made without the right of setoff or counterclaim, and without deduction or withholding.
- 5.3 Overdue Payments. In the event Your credit card is rejected or any amounts owed are past due, Your subscription account may accrue late charges at the rate of one and one half percent (1.5%) of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date it is fully paid.
- 5.4 Suspension of Services. If Your account is thirty (30) days or more overdue, in addition to any of its other rights or remedies, Company reserves the right to suspend the Services provided to You, without liability to You, until such amounts are paid in full.
- 5.5 Exceeding Scope. If You exceed the storage and/or transfer capacity for the Services ordered, You will pay the applicable overage charges (for storage and/or transfer capacity), which will be billed at the Company's then-current storage and transfer fees. If applicable, Company will use reasonable efforts to notify You via the email address provided by You when Your storage per account reaches approximately ninety percent (90%) of maximum; provided, however, any failure by Company to provide such notification will not affect Your responsibility for such additional storage and transfer charges.
- 5.6 Taxes. Unless otherwise stated, Fees do not include any local, state, federal or foreign taxes, levies or duties of any nature ("Taxes"). You are responsible for paying all Taxes, excluding only taxes based on Company's income. If Company has the legal obligation to pay or collect Taxes for which You are responsible under this Section 5.6, the appropriate amount shall be charged to Your credit card on file or billed to You, in Company's sole discretion, unless You provide Company with a valid tax exemption certificate authorized by the appropriate taxing authority.
- 5.7 Billing and Contact Information. You shall maintain complete and accurate billing and contact information on the Services at all times, including without limitation a valid credit card number for Order Forms paid by credit card.

6. CONFIDENTIALITY

- 6.1 Confidential Information. "Confidential Information" means any non-public data, information, or other materials provided by one party to the other party where such information is marked or otherwise communicated as being "proprietary" or "confidential" or the like, or where such information should, by

its nature, be reasonably considered to be confidential and/or proprietary. Without limiting the foregoing, the Services shall be considered the Confidential Information of Company or its licensors.

- 6.2 Disclosure and Use. Each party shall use the Confidential Information of the other party only in performing its obligations under this Agreement and shall use commercially reasonable efforts to retain the Confidential Information in confidence and not disclose to any third-party (except as necessary to provide the Services) without the disclosing party's prior written consent (but in any event no less effort than used to protect its own Confidential Information). The receiving party shall disclose the disclosing party's Confidential Information only to those employees and contractors of the receiving party who have a need to know such information for the purposes of this Agreement (including without limitation the Authorized Users), and such employees and contractors must be bound by this Agreement or have entered into agreements with the receiving party containing confidentiality provisions covering the Confidential Information with terms and conditions at least as restrictive as those set forth herein. All Confidential Information shall remain the sole property of the disclosing party or its licensors. Each party shall hold the Confidential Information of the other in confidence during the Term of this Agreement and for a period of five (5) years thereafter.
- 6.3 Exceptions. Notwithstanding the foregoing, each party's confidentiality obligations hereunder shall not apply to information which: (i) is already known to the receiving party prior to disclosure by the disclosing party; (ii) becomes publicly available without fault of the receiving party; (iii) is rightfully obtained by the receiving party from a third-party without restriction as to disclosure, or is approved for release by written authorization of the disclosing party; or (iv) is independently developed by the receiving party without reference to the Confidential Information of the disclosing party, as evidenced by contemporaneous written record. This Agreement does not prevent the receiving party from using Residual Knowledge subject to any valid patents and copyrights of the disclosing party. "Residual Knowledge" means ideas, concepts, know-how or techniques related to the disclosing party's technology that are retained in the unaided memories of the receiving party's employees who have had access to Confidential Information. An employee's memory will be considered to be unaided if the employee has not intentionally memorized the Confidential Information for the purpose of retaining and subsequently using or disclosing it.
- 6.4 Authorized Disclosure. In addition, each party shall be entitled to disclose the other party's Confidential Information to the extent such disclosure is requested by the order or requirement of a court, administrative agency, or other governmental body; provided, however, that the party required to make the disclosure shall give prompt, advance notice thereof to enable the other party to seek a protective order or otherwise prevent such disclosure. Notwithstanding the provisions of this Agreement, each party may disclose the terms of this Agreement: (i) in connection with the requirements of an initial public offering or securities filing, or as otherwise required to comply with disclosure requirements for publicly traded companies; (ii) in confidence, to accountants, banks, and financing sources and their advisors; and (iii) in confidence, in connection with the enforcement of this Agreement or rights hereunder.
- 6.5 Injunctive Relief. The parties agree that any breach by the receiving party or any of its officers, directors, employees, subcontractors or Authorized Users of any provision of this Section 6 may cause immediate and irreparable injury to the disclosing party and that, in the event of such breach, the receiving party will be entitled to immediate injunctive and other equitable relief, without the placement of a bond and without the necessity of showing actual monetary damages. Nothing in this Section 6 will be construed as prohibiting either party from pursuing any other remedies available to it for such breach or threatened breach.

7. WARRANTIES; DISCLAIMERS

- 7.1 Warranty. Each party represents and warrants that it has the legal power to enter into this Agreement. Company warrants to You that the Service will perform substantially in accordance with the Documentation.

- 7.2 Third-Party Content. You acknowledge that (i) Company has not tested or screened Third-Party Content, and (ii) You use Third-Party Content at Your sole risk.
- 7.3 No Other Warranties. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 7.1 (WARRANTY), THE SERVICES, COMPANY CONTENT, COMPANY MATERIALS, SUPPORT, WORK PRODUCT, THIRD-PARTY CONTENT AND ALL TECHNOLOGY, SOFTWARE, FUNCTIONS, CONTENT, IMAGES, MATERIALS AND OTHER DATA OR INFORMATION PROVIDED BY COMPANY OR ITS LICENSORS IN CONNECTION THEREWITH (COLLECTIVELY, THE “SERVICE OFFERINGS”) ARE PROVIDED “AS IS”. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 7.1 (WARRANTY), COMPANY AND ITS LICENSORS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, WITH RESPECT TO THE SERVICE OFFERINGS. COMPANY AND ITS LICENSORS DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE. COMPANY AND ITS LICENSORS DO NOT WARRANT THAT THE SERVICE OFFERINGS OR ANY THIRD-PARTY CONTENT WILL BE UNINTERRUPTED OR ERROR FREE OF HARMFUL COMPONENTS, OR THAT YOUR DATA STORED WITHIN THE SERVICE OFFERINGS WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. EXCEPT AS MAY BE EXPRESSLY SET FORTH HEREIN, COMPANY AND ITS LICENSORS WILL NOT BE RESPONSIBLE FOR ANY SERVICE INTERRUPTIONS. NO ADVICE OR INFORMATION OBTAINED BY YOU FROM COMPANY, ITS AFFILIATES OR FROM ANY THIRD-PARTY OR THROUGH THE SERVICES WILL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT.

8. INDEMNIFICATION; LIMITATION OF LIABILITY

- 8.1 Company Indemnity. Subject to this Agreement, Company shall defend, indemnify and hold You harmless against any losses, damages, liabilities, judgments, penalties, fines, costs and expenses (including reasonable attorneys' fees), (collectively, “Losses”) in connection with claims, demands, suits, or proceedings (“Claims”) made or brought against You by a third-party alleging that the use of the Services as contemplated hereunder infringes the intellectual property rights of such party; provided, however, that You: (i) promptly give written notice of the Claim to Company; (ii) give Company sole control of the defense and settlement of the Claim; and (iii) provide to Company, at Your own cost, all reasonable assistance in defending against the Claim.
- 8.2 Right to Substitute. Without limiting Section 8.1 above, if a final injunction is, or Company believes in its sole discretion is likely to be, entered prohibiting the use of the Services by You as contemplated herein, Company will, at its sole option and expense, either: (i) procure for You the right to continue using the Services as provided herein, (ii) replace the infringing property with non-infringing, functionally, equivalent products, (iii) suitably modify the infringing property so that it is not infringing, or (iv) immediately terminate the allegedly infringing portion of the Services or this Agreement. SECTIONS 8.1 AND 8.2 CONSTITUTE YOUR SOLE AND EXCLUSIVE REMEDIES AND COMPANY’S ENTIRE OBLIGATION TO YOU WITH RESPECT TO ANY CLAIM THAT THE SERVICES INFRINGE, MISAPPROPRIATE, OR OTHERWISE VIOLATE THE RIGHTS OF ANY THIRD-PARTY. Except as specified above, Company will not be liable for any costs or expenses incurred without its prior written authorization.
- 8.3 Indemnity. Subject to this Agreement, You shall defend, indemnify and hold Company, its affiliates, and licensors, and each of their respective employees, officers, directors, agents and representatives, harmless from and against any Losses arising out of or related to (i) Your or Authorized Users use of the Services in breach of this Agreement, (ii) any third-party claim alleging that You or Your Authorized Users of the Services are in violation of applicable law, or Your Data infringes, misappropriates or violates the rights of, or has otherwise harmed, a third-party (except to the extent caused by the Services), and (iii) any

dispute between You and any Authorized Users regarding the creation, promotion, distribution or use of Your Data.

- 8.4 Limitation of Liability. IN NO EVENT SHALL COMPANY, ITS LICENSORS, AGENTS AND SUBCONTRACTORS' AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE TOTAL AMOUNT PAID BY YOU HEREUNDER IN THE 12 MONTHS PRECEDING PRECEDING THE CLAIM GIVING RISE TO THE LIABILITY. THE FOREGOING LIMITATION OF LIABILITY SHALL NOT LIMIT YOUR PAYMENT OBLIGATIONS TO COMPANY UNDER SECTION 5 HEREIN.
- 8.5 Disclaimer. IN NO EVENT SHALL COMPANY NOR ITS LICENSORS, AGENTS AND SUBCONTRACTORS HAVE ANY LIABILITY FOR ANY LOST PROFITS, LOSS OF REVENUE, LOSS OF DATA, COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY OTHER INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, CONSEQUENTIAL OR COVER DAMAGES HOWEVER CAUSED AND, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, INCLUDING, WITHOUT LIMITATION, ANY SUCH DAMAGES RESULTING FROM: (I) WITH RESPECT TO THE COMPANY AS THE POTENTIALLY LIABLE PARTY, THE USE OR INABILITY TO USE THE SERVICES, (II) WITH RESPECT TO THE COMPANY AS THE POTENTIALLY LIABLE PARTY, THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES; (III) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR DATA; OR (IV) ANY THIRD-PARTY CONTENT. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

9. LICENSE TERM AND TERMINATION

- 9.1 Term. The term of this Agreement begins on the Order Form date, and continues until terminated by either party pursuant to this Section 9. The initial subscription account period selected by You in such Order Form ("Initial Term") will automatically renew on a twelve (12) month basis, or any other period as mutually agreed in writing by the parties (each a "Renewal Term"), unless Company receives written notice of Your intent to terminate Your account thirty (30) days prior to the termination date of the Initial Term or any Renewal Term, as applicable (the Initial Term and each Renewal Term shall be jointly known as the "Term"). The pricing during any such Renewal Term shall be Company's then current list price at the start of the applicable Renewal Term. If You request access to the Application for a free trial, the Term of this Agreement shall begin on the date You register with the Company Site and complete an acceptable Order Form, and shall expire at the end of the trial period stated in the Order form or fifteen (15) days thereafter, whichever comes last. No renewals of the free trial period are permitted unless otherwise agreed to in writing by the parties. Notwithstanding the foregoing or anything to the contrary stated herein, and as further detailed in Section 2.1, Company reserves the right to terminate any free or trial account or Application at any time, with or without notice, in its sole discretion without liability.
- 9.2 Termination for Cause.

9.2.1 This Agreement may be terminated by either party for material breach as follows: (i) upon thirty (30) days written notice if the other party breaches or defaults under any material provision of this Agreement (including any act, breach, or default resulting in a Service Suspension) and does not cure such breach prior to the end of such thirty (30) day period, (ii) effective immediately and without notice if the other party ceases to do business, or otherwise terminates its business operations, except as a result of an assignment permitted under the terms and conditions of this Agreement, or (iii) effective immediately and without notice if the other party becomes insolvent or seeks protection under any bankruptcy, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other and continues for ninety (90) days undismissed, unbonded and undischarged. Company may temporarily cease performance of its obligations to You under this

Agreement during any cure period by You.

9.2.2 This Agreement may be terminated immediately upon Company's written notice to You if Company determines that: (i) You or any Authorized Users use of the Services or Your Data disrupts or poses a security risk to the Services or any other Company customer, may harm Company's systems or any other Company customer or vendor, or may subject Company or any third-party to liability; (ii) You or any Authorized Users are using the Services for fraudulent or illegal activities; (iii) You or Your Authorized Users are using the Services in breach of this Agreement; or (iv) Company's continued provision of any of the Services to You or any Authorized Users is prohibited by applicable law.

9.3 Termination for Convenience. Company hereby reserves the right to terminate this Agreement at any time, for convenience or any other reason, by providing You with ninety (90) days prior written notice thereof.

9.4 Effect of Termination. Expiration or termination of this Agreement shall have the following effects: (i) Company shall provide You with limited access to Your Data for retrieval and download, in the current format in which it was last stored in the Application, for a period of thirty (30) days thereafter, (ii) all licenses granted under this Agreement shall terminate immediately, (iii) all rights to use the Application shall cease immediately, and (iv) in the event of termination for convenience by Company, Company shall refund You any prepaid fees covering the remainder of the Term of Your subscription account after the effective date of termination. Any additional post-termination assistance from Company is subject to the mutual agreement of the parties, including Your acceptance of any reasonable fees and terms Company specifies for such assistance. Except as provided in this Section 9.4, Company will have no obligation to continue to store, maintain or provide any of Your Data and shall thereafter, unless legally prohibited, use commercially reasonable efforts to delete all of Your Data in its systems or otherwise in its possession or under its control.

9.5 Survival. Except to the extent expressly provided to the contrary herein, any right of action for breach of this Agreement prior to termination, and those provisions which should by their nature survive, shall survive the termination of this Agreement.

10. GENERAL

10.1 Relationship. The relationship between the parties created by this Agreement is that of independent contractors and not partners, joint venturers, or agents.

10.2 No Third-Party Beneficiaries. There are no third-party beneficiaries to this Agreement.

10.3 Third-Party Licensors. You acknowledge and agree that Company's third-party licensors disclaim all (i) liability under this Agreement, whether direct or indirect, incidental or consequential, and (ii) warranties of any kind, express or implied, with respect to such third-party's software that may be part of the Services. As such, You agree that You will not pursue any claim or seek any remedy against such third-party licensors.

10.4 Export Control Laws. The Services, Support and any Documentation delivered under this Agreement are subject to U.S. export laws and applicable laws of other countries. You shall strictly comply with all such laws and assume responsibility to obtain licenses to export, re-export, or import as may be required. You agree not to export or re-export to entities on the most current U.S. export exclusion lists or to any country subject to U.S. embargo or terrorist controls as specified in the U.S. export laws. You represent and warrant that You are not identified on any U.S. Government export exclusions list, including without limitation the Denied Persons List of the U.S. Department of Commerce.

- 10.5 Government Restrictions. The Services, Support and related Documentation are “Commercial Items”, as that term is defined at 48 C.F.R. §2.101, consisting of “Commercial Computer Software” and “Commercial Computer Software Documentation”, as such terms are used in 48 C.F.R. §12.212 or 48 C.F.R. §227.7202, as applicable. Consistent with 48 C.F.R. §12.212 or 48 C.F.R. §227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software and Commercial Computer Software Documentation are being licensed to U.S. Government end users (i) only as Commercial Items and (ii) with only those rights as are granted to all other end users pursuant to the terms and conditions herein. Unpublished-rights reserved under the copyright laws of the United States. Use of the Services, Support and related Documentation by the U.S. Government is further restricted according to the terms of this Agreement and any amendment hereto.
- 10.6 Entire Understanding. This Agreement (including the Order Forms submitted hereunder) states the entire understanding between the parties with respect to its subject matter, and supersedes all prior proposals, marketing materials, negotiations and other written or oral communications between the parties with respect to the subject matter hereof.
- 10.7 Modification and Waiver. No modification or amendment of this Agreement, and no waiver of any breach of this Agreement, shall be effective unless in writing and acknowledged also in writing by the party against whom the modification, amendment or waiver is to be asserted. No waiver of any breach of this Agreement, and no course of dealing between the parties, shall be construed as a waiver of any subsequent breach of this Agreement. In the event of any conflict between the provisions in this Agreement and any Order Form hereto, the terms of such Order Form shall prevail to the extent of any inconsistency. Notwithstanding any language to the contrary therein, no terms or conditions stated in Your purchase order or in any other of Your order documentation (excluding Order Forms) shall be incorporated into or form any part of this Agreement, and all such terms or conditions are hereby specifically rejected and shall be considered null and void. Each Party agrees it will make no claim at any time or place that this Agreement has been altered or modified or otherwise changed by oral communications or mutually unsigned documents of any kind.
- 10.8 Severability. A determination that any provision of this Agreement is invalid or unenforceable shall not affect the other provisions of this Agreement.
- 10.9 Headings. Section headings are for convenience of reference only and shall not affect the interpretation of this Agreement.
- 10.10 Choice of Law; Arbitration. This Agreement, and any dispute arising out of or in connection with this Agreement or the Services ("Dispute"), will be governed by California law. The Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act shall not apply. If You are based in the United States, You submit to the personal jurisdiction of the courts in San Mateo County, California, USA, and all Disputes shall be exclusively subject to the jurisdiction of such courts. Otherwise, all Disputes shall be resolved by final and binding arbitration before three (3) arbitrators pursuant to the rules and under the auspices of the International Chamber of Commerce, Paris. The arbitrators shall have the authority to determine issues of arbitrability and to award compensatory damages, but they shall not award punitive or exemplary damages. At either party's request, the arbitrators shall issue a written decision explaining the facts and legal reasoning on which their decision is based. The arbitration proceedings shall be conducted in the English language. The prevailing party shall be entitled to attorneys' fees and costs, in addition to any other relief to which that party may be entitled, under either a legal action or arbitration proceeding.
- 10.11 Notices. All notices under this Agreement shall be in writing and shall be deemed to have been given upon: (i) personal delivery; (ii) the second business day after mailing; or (iii) the second business day after sending by confirmed facsimile. Notices to Company shall be addressed to the attention of its SVP Operations and CFO, with a copy to its General Counsel.

- 10.12 Force Majeure. Neither party shall be liable or deemed in default for any delay or failure in performance of an order or any part of this Agreement, other than a failure to pay, to the extent that such delay or failure is caused by the following, but not limited to: accident, fire, industry-wide strike, embargo, act of the government, war, terrorism or national emergency requirement, act of God, act of the public enemy or any other cause beyond the reasonable control of You or Company. If any of the foregoing condition occurs, the party delayed or unable to perform shall use commercially reasonable efforts to give notice to the other party and continue performing this Agreement to the fullest extent possible. Notwithstanding the foregoing, should the event of force majeure continue for longer than thirty (30) consecutive days, the party not claiming the force majeure may immediately terminate this Agreement upon written notice to the other party.
- 10.13 Publicity and Advertising. Notwithstanding anything contained herein or in any other agreement to the contrary, Company shall have the right to reference You and the nature of the Services provided hereunder in Company's business development and marketing efforts, including without limitation adding Your company logo to the Company Site. Company shall further have the right to create case studies, presentations, articles and similar materials using non-Confidential Information, statistics and materials developed and learned by Company during its performance hereunder (the "Case Materials") and, upon Your review and approval of such Case Materials, which approval shall not be unreasonably withheld or delayed, to utilize Case Materials in award programs, public speaking engagements, publications and similar uses.
- 10.14 Mutual Non-Exclusivity. Company may work with other entities that may be in competition with You. You may work with other entities that may be in competition with Company. This is a non-exclusive arrangement.
- 10.15 No Assignment. You cannot assign this Agreement or any rights or obligation hereunder. Any purported assignment by You, whether by operation of law, change in control, or otherwise, shall be null and void. Company can assign or delegate performance under this Agreement: (i) to an affiliated company, or (ii) in the event of a merger, acquisition, or sale of all or substantially all of the assets of Company or a Company business unit. Anything in this Agreement or any written understanding related to this Agreement (a "Related Agreement") to the contrary notwithstanding, Company shall have the right, without Your prior written consent, at any time and in its sole discretion, to assign for security interest purposes any or all of its rights under this Agreement and any Related Agreement to any lender providing financing to Company and any of such lender's permitted assigns, and, upon the occurrence and during the continuance of any event of default under the financing agreements between any such lender (or its permitted assigns) and Company, such lender (or its permitted assigns) may exercise any or all of the rights, interests, and remedies of Company under this Agreement or any Related Agreement.
- 10.16 Governing Language. The English version of this Agreement is legally binding and shall prevail in case of any inconsistencies with any translated versions, which are provided for convenience purposes only.