

## SMARTBEAR TERMS OF USE

Last Modified: February 11, 2020

These Terms of Use (these "**Terms**") is a binding agreement between you ("**Customer**," "**you**," or "**your**") and **SmartBear Software Inc.**, a Delaware corporation with its principal place of business at 450 Artisan Way, Somerville, MA 02145 ("**SmartBear**," "**we**," "**our**" or "**us**"). These Terms govern (a) your access to and use of SmartBear's Software as a Service offering in which we host our software for your use (the "**Service**"), or (b) your license to SmartBear's software which we deliver to you for use on your premises (the "**Licensed Software**").

THESE TERMS TAKE EFFECT WHEN YOU ACCESS OR USE THE SERVICE OR DOWNLOAD, INSTALL OR USE THE LICENSED SOFTWARE (THE "**EFFECTIVE DATE**"). BY ACCESSING OR USING THE SERVICE, OR BY DOWNLOADING, INSTALLING OR USING THE LICENSED SOFTWARE, YOU (A) ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND THESE TERMS; (B) REPRESENT AND WARRANT THAT YOU HAVE THE RIGHT, POWER, AND AUTHORITY TO ENTER INTO THESE TERMS AND, IF ENTERING INTO THESE TERMS FOR AN ORGANIZATION, THAT YOU HAVE THE LEGAL AUTHORITY TO BIND THAT ORGANIZATION; AND (C) ACCEPT THESE TERMS AND AGREE THAT YOU ARE LEGALLY BOUND BY THESE TERMS. IF YOU DO NOT ACCEPT THESE TERMS, YOU MAY NOT ACCESS OR USE THE SERVICE OR DOWNLOAD, INSTALL OR USE THE LICENSED SOFTWARE. YOU MAY NOT ACCESS THE SERVICE OR THE LICENSED SOFTWARE IF YOU ARE A COMPETITOR OF SMARTBEAR, EXCEPT WITH OUR PRIOR WRITTEN CONSENT.

1. Definitions.

- (a) "**Aggregated Statistics**" has the meaning set forth in Section 2(f).
- (b) "**AUP**" has the meaning set forth in Section 2(b).
- (c) "**Authorized User**" means Customer and Customer's employees, consultants, contractors, and agents (i) who are authorized by Customer to access and use the Service or the Licensed Software under the rights granted to Customer pursuant to these Terms, and (ii) for whom access to the Service or Licensed Software has been purchased hereunder in accordance with the applicable purchase order.
- (d) "**Confidential Information**" has the meaning set forth in Section 10.
- (e) "**Customer Data**" means, other than Aggregated Statistics, information, data, and other content, in any form or medium, that is submitted, posted, or otherwise transmitted by or on behalf of Customer or any other Authorized User through the Service.

- (f) **“Documentation”** means SmartBear's user manuals, handbooks, and guides relating to the Service or the Licensed Software provided by SmartBear to Customer either electronically or in hard copy form.
- (g) **“Feedback”** has the meaning set forth in Section 13.
- (h) **“Fees”** has the meaning set forth in Section 6.
- (i) **“Initial Maintenance Term”** has the meaning set forth in Section 11(b).
- (j) **“Initial Subscription Term”** has the meaning set forth in Section 11(a).
- (k) **“Licensed Software”** has the meaning set forth in the preamble to these Terms.
- (l) **“Losses”** has the meaning set forth in Section 15(a)(i).
- (m) **“Maintenance and Support Services”** has the meaning set forth in Section 9(a).
- (n) **“Privacy Policy”** has the meaning set forth in Section 2(h).
- (o) **“Renewal Maintenance Term”** has the meaning set forth in Section 11(b).
- (p) **“Renewal Subscription Term”** has the meaning set forth in Section 11(a).
- (q) **“Service”** has the meaning set forth in the preamble to these Terms.
- (r) **“Service Suspension”** has the meaning set forth in Section 2(g).
- (s) **“SmartBear IP”** means the Service (including any software component of the Service), the Licensed Software, the Documentation, and all intellectual property provided to Customer or any other Authorized User in connection with the foregoing. For the avoidance of doubt, SmartBear IP includes Aggregated Statistics and any information, data, or other content derived from SmartBear's monitoring of Customer's access to or use of the Service or Licensed Software, but does not include Customer Data.
- (t) **“Subscription Term”** has the meaning set forth in Section 11(a).
- (u) **“Third Party Claim”** has the meaning set forth in Section 15(a)(i).
- (v) **“Third-Party Components”** has the meaning set forth in Section 8.
- (w) **“Warranty Period”** has the meaning set forth in Section 14(a).

2. Service Terms. If you purchased a subscription to use the Service, the following terms apply to you:

(a) Access to the Service. SmartBear hereby grants you a revocable, non-exclusive, non-transferable, non-sublicensable, limited right to access and use the Service during the Subscription Term solely for your internal business operations by Authorized Users in accordance with the terms and conditions herein and the restrictions set forth in the Service type applicable to your subscription. SmartBear shall provide you the necessary passwords and access credentials to allow you to access the Service.

(b) Acceptable Use Policy. The Service may not be used for unlawful, fraudulent, offensive, or obscene activity, as further described and set forth in SmartBear's acceptable use policy ("AUP") located at <https://www.smartbear.com/AUP/>, as may be amended from time to time, which is incorporated herein by reference. You will comply with all terms and conditions of these Terms, all applicable laws, rules, and regulations, and all guidelines, standards, and requirements that may be posted on <https://www.smartbear.com> from time to time, including the AUP

(c) Account Use. You are responsible and liable for all uses of the Service, resulting from access provided by you, directly or indirectly, whether such access or use is permitted by or in violation of these Terms. Without limiting the generality of the foregoing, you are responsible for all acts and omissions of Authorized Users, and any act or omission by an Authorized User that would constitute a breach of these Terms if taken by you will be deemed a breach of these Terms by you. You shall use reasonable efforts to make all Authorized Users aware of the provisions of these Terms applicable to such Authorized User's use of the Service and shall cause Authorized Users to comply with such provisions.

(d) Customer Data. You hereby grant to SmartBear a non-exclusive, royalty-free, worldwide license to reproduce, distribute, and otherwise use and display the Customer Data and perform all acts with respect to the Customer Data as may be necessary for SmartBear to provide the Service to you, and a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to reproduce, distribute, modify, and otherwise use and display Customer Data incorporated within the Aggregated Statistics. You will ensure that Customer Data and any Authorized User's use of Customer Data will not violate any policy or terms referenced in or incorporated into these Terms or any applicable law. You are solely responsible for the development, content, operation, maintenance, and use of Customer Data. You warrant that you own all right, title, and interest, including all intellectual property rights, in and to Customer Data and that both the Customer Data and your use of the Service are in compliance with the AUP.

(e) Passwords and Access Credentials. You are responsible for keeping your passwords and access credentials associated with the Service confidential. You will not sell or transfer them to any other person or entity. You will promptly notify us about any unauthorized access to your passwords or access credentials.

(f) Aggregated Statistics. Notwithstanding anything to the contrary in these Terms, SmartBear may monitor Customer's use of the Service or Licensed Software and collect and compile data and information related to Customer's use of the Service to be used by SmartBear in an aggregated and anonymized, de-identified, or otherwise

obfuscated manner, including to compile statistical and performance information related to the provision and operation of the Service ("**Aggregated Statistics**"). As between SmartBear and Customer, all right, title, and interest in Aggregated Statistics, and all intellectual property rights therein, belong to and are retained solely by SmartBear. You acknowledge that SmartBear may compile Aggregated Statistics based on Customer Data input into the Service. You agree that SmartBear may (i) make Aggregated Statistics publicly available in compliance with applicable law, and (ii) use Aggregated Statistics to the extent and in the manner permitted under applicable law; provided that such Aggregated Statistics do not identify Customer or Customer's Confidential Information.

(g) Suspension of the Service. Notwithstanding anything to the contrary in these Terms, SmartBear may temporarily suspend Customer's and any other Authorized User's access to any portion or all of the Service if: (i) SmartBear reasonably determines that (A) there is a threat or attack on the Service; (B) Customer's or any other Authorized User's use of the Service disrupts or poses a security risk to the Service or to any other customer or vendor of SmartBear; (C) Customer or any other Authorized User is using the Service for fraudulent or illegal activities; (D) subject to applicable law, Customer has 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; or (E) SmartBear's provision of the Service to Customer or any other Authorized User is prohibited by applicable law; or (ii) any vendor of SmartBear has suspended or terminated SmartBear's access to or use of any third-party services or products required to enable Customer to access the Service (any such suspension described in subclause (i) or (ii), a "**Service Suspension**"). SmartBear shall use commercially reasonable efforts to provide written notice of any Service Suspension to Customer and to provide updates regarding resumption of access to the Service following any Service Suspension. SmartBear shall use commercially reasonable efforts to resume providing access to the Service as soon as reasonably possible after the event giving rise to the Service Suspension is cured. SmartBear will have no liability for any damage, liabilities, losses (including any loss of or profits), or any other consequences that Customer or any other Authorized User may incur as a result of a Service Suspension.

(h) Usage Verification. At SmartBear's written request, and no more than once every twelve (12) months, you shall certify in writing to SmartBear that you are compliant with these Terms.

(i) Privacy Policy. SmartBear complies with its privacy policy available at <https://smartbear.com/privacy/> ("**Privacy Policy**"), in providing the Service. The Privacy Policy is subject to change as described therein. By accessing, using, and providing information to or through the Service, you acknowledge that you have reviewed and accepted our Privacy Policy, and you consent to all actions taken by us with respect to your information in compliance with the then-current version of our Privacy Policy.

3. Licensed Software Terms. If you purchased a license to use the Licensed Software on your premises, the following terms apply to you:

(a) License. SmartBear grants to you a non-transferable, non-exclusive, non-assignable, royalty-free license to use the Licensed Software in object code form on your premises in accordance with the terms and conditions herein and the restrictions set forth in the software license type applicable to your license.

(b) Delivery. Delivery of the Licensed Software to you shall be made by electronic means and deemed to have occurred when the Licensed Software has been made available to you for download.

(c) Virtualization. The Licensed Software may be installed within a virtual (or otherwise emulated) hardware system as long as the use of the Licensed Software meets the terms of the license type purchased by you and the virtual machines are run on hardware owned or leased by you. Virtualization technology may not be used to circumvent other licensing terms or restrictions.

(d) Backup Copy. You may make one copy of the Licensed Software for the sole purpose of backing-up and archiving the Licensed Software. Any such copy of the Licensed Software is subject to all terms and conditions of these Terms and must contain the same titles, trademarks, and copyrights as the original.

4. Documentation License. Subject to the terms and conditions contained in these Terms, SmartBear hereby grants you a non-exclusive, non-sublicensable, non-transferable license for your Authorized Users to use the Documentation solely for your internal business purposes in connection with your use of the Service or Licensed Software.

5. Use Restrictions. You shall not, and shall not permit any Authorized Users to, use the Service, any software component of the Service, the Licensed Software or Documentation for any purposes beyond the scope of the access granted in these Terms and the terms of any invoice provided by SmartBear. . You shall not at any time, directly or indirectly, and shall not permit any Authorized Users to: (i) copy, modify, or create derivative work, in whole or in part, of the Service (including any software component of the Service), the Licensed Software, or Documentation; (ii) rent, lease, lend, sell, license, sublicense, assign, distribute, publish, transfer, or otherwise make available the Service (including any software component of the Service), the Licensed Software or any Documentation except as expressly permitted under these Terms; (iii) reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to any software component of the Service or the Licensed Software, in whole or in part; (iv) use the Service (including any software component of the Service) or the Licensed Software in order to build a competitive product or service; (v) copy any features, functions or graphics of the Service (including any software component of the Service) or the Licensed Software; (vi) use the Service or the Licensed Software to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights; (vii) remove any proprietary notices

from the Service, the Licensed Software or Documentation; or (viii) use the Service (including any software component of the Service), the Licensed Software or Documentation in any manner or for any purpose that infringes, misappropriates, or otherwise violates any intellectual property right or other right of any person, or that violates any applicable law, regulation, or rule. If the restriction set forth in clause (iii) above is prohibited by applicable law, you shall provide SmartBear with detailed prior written notice of any such intention to reverse engineer the Service or the Licensed Software and shall provide SmartBear with a right of first refusal to perform such work at rates equal to those proposed by a recognized third-party software services SmartBear for such work.

6. Fees and Payment. Customer shall pay SmartBear the fees as described in the applicable invoice ("Fees") on the dates indicated therein. For subscriptions to the Service, all monthly subscription fees shall be paid in advance of the subscription period to which such payment relates. If a payment date is not otherwise specified in the applicable purchase order, all Fees for Licensed Software shall be paid within thirty (30) days from the invoice date without offset or deduction. Customer shall make all payments hereunder in US dollars on or before the due date. If Customer fails to make any payment when due, without limiting SmartBear's other rights and remedies: (i) SmartBear may charge interest on the past due amount at the rate of 1.5% per month calculated daily and compounded monthly or, if lower, the highest rate permitted under applicable law; and (ii) Customer shall reimburse SmartBear for all reasonable costs incurred by SmartBear in collecting any late payments or interest, including attorneys' fees, court costs, and collection agency fees. All Fees and other amounts payable by Customer under these Terms are exclusive of taxes and similar assessments. Customer is responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state, or local governmental or regulatory authority on any amounts payable by Customer hereunder, other than any taxes imposed on SmartBear's income.

7. Reservation of Rights. SmartBear reserves all rights not expressly granted to Customer in these Terms. Except for the limited rights and licenses expressly granted under these Terms, nothing in these Terms grants, by implication, waiver, estoppel, or otherwise, to Customer or any third party any intellectual property rights or other right, title, or interest in or to the SmartBear IP.

8. Third-Party Components. The Service or the Licensed Software may contain or otherwise make use of software, code or related materials from third parties, including, without limitation, "open source" or "freeware" software ("**Third Party Components**"). Third Party Components may be licensed under additional or other license terms that accompany such Third Party Components. You acknowledge and agree that these accompanying license terms govern their use. Nothing in this Terms limits your rights under, or grants you rights that supersede, the license terms that accompany any Third Party Components. For your convenience, we provide you with a list of the Third party Components that may be contained in the Service or Licensed Software on our website at <https://smartbear.com/legal/third-party-software-license-information/general/>. SmartBear shall: (a) pass through to you any warranty or other rights it receives for any

Third Party Components; and (b) reasonably cooperate with you in enforcing such rights, at your expense.

9. Maintenance and Support Services.

(a) Description. SmartBear shall provide maintenance and support services (the “**Maintenance and Support Services**”) to you set forth in SmartBear’s Product Support Manual as it exists from time to time. The current version of the SmartBear Product Support Manual is located at <https://support.smartbear.com/support/media/pdf/SSG.pdf>, or as otherwise made available. In addition, as part of the Maintenance and Support Services, SmartBear may make available bug lists, planned feature lists, and other supplemental materials. SmartBear makes no representations or warranties of any kind for these materials.

(b) Support Fees. If you purchased a subscription to the Service, Maintenance and Support Services are provided to you without additional charge as part of your subscription to the Service. If you purchased a license to use the Licensed Software, Support Services are provided in consideration of payment of applicable annual maintenance and support fees.

10. Confidential Information. From time to time, SmartBear and Customer may disclose or make available to the other party information about its business affairs, products, confidential intellectual property, trade secrets, third-party confidential information, and other sensitive or proprietary information, whether orally or in written, electronic, or other form or media/in written or electronic form or media, whether or not marked, designated, or otherwise identified as "confidential" at the time of disclosure (collectively, "**Confidential Information**"). Confidential Information does not include information that, at the time of disclosure is: (a) in the public domain; (b) known to the receiving party; (c) rightfully obtained by the receiving party on a non-confidential basis from a third party; or (d) independently developed by the receiving party. The receiving party shall not disclose the disclosing party's Confidential Information to any person or entity, except to the receiving party's employees, agents, or subcontractors who have a need to know the Confidential Information for the receiving party to exercise its rights or perform its obligations hereunder and who are required to protect the Confidential Information in a manner no less stringent than required under these Terms. Notwithstanding the foregoing, each party may disclose Confidential Information to the limited extent required (i) to comply with the order of a court or other governmental body, or as otherwise necessary to comply with applicable law, provided that the party making the disclosure pursuant to the order shall first have given written notice to the other party and made a reasonable effort to obtain a protective order; or (ii) to establish a party's rights under these Terms, including to make required court filings. Each party's obligations of non-disclosure with regard to Confidential Information are effective as of the date such Confidential Information is first disclosed to the receiving party and will expire five years thereafter; provided, however, with respect to any Confidential Information that constitutes a trade secret (as determined under applicable law), such obligations of non-disclosure will survive the termination or expiration of these Terms for as long as such Confidential Information remains subject to trade secret protection under applicable law.

11. Term. Unless earlier terminated in accordance with Section 12 below, the term of these Terms as applied to you shall be as follows:

(a) Subscription to the Service. If you purchased a subscription to the Service, the term of these Terms shall commence upon access to the Service and continue for twelve (12) months thereafter, unless a multi-year, or other, agreement is otherwise agreed upon in a purchase order (“**Initial Subscription Term**”). These Terms shall automatically renew, at the then-current and then-applicable subscription price (each a “**Renewal Subscription Term**”) upon the end of the Initial Subscription Term and each Renewal Subscription Term for the same period of time as the prior term, unless either party delivers written notice of non-renewal to the other party at least sixty (60) days prior to the end of the then-current Initial Subscription Term or Renewal Subscription Term, or as otherwise agreed. The Initial Subscription Term and any Renewal Subscription Term shall be referred to as the “**Subscription Term**”.

(b) License to the Licensed Software. If you purchased a license to the Licensed Software, the term of these Terms shall commence upon delivery of the Licensed Software and these Terms shall continue for the period specified for the license type (if any) or until terminated by either party in accordance with Section 12. Notwithstanding the foregoing, if you purchased a perpetual license to the Licensed Software, the license to the Licensed Software set forth in Section 3(a) shall be perpetual upon full payment of the associated license fees. Maintenance and Support services for a Licensed Software shall start upon delivery of the Licensed Software and shall continue for the one-year period following delivery (the “**Initial Maintenance Term**”). Thereafter, the Initial Maintenance Term shall automatically renew, at the then-current and then-applicable annual maintenance fee, for subsequent one-year periods (the “**Renewal Maintenance Term**”) unless one party gives the other written notice of non-renewal at least sixty (60) days before the end of the Initial Maintenance Term or the then-current Renewal Maintenance Term.

12. Termination. Notwithstanding anything contained herein to the contrary, these Terms may be terminated: (a) by mutual agreement of SmartBear and you, (b) by either party if the other party is adjudicated as bankrupt, or if a petition in bankruptcy is filed against the other party and such petition is not discharged within sixty (60) days of such filing, (c) by either party if the other party materially breaches these Terms and fails to cure such breach to such party’s reasonable satisfaction within thirty (30) days following receipt of written notice thereof; or (d) by SmartBear immediately by delivery of written notice thereof to you if you violate the use restrictions set forth in Section 5. Termination shall not limit either party from pursuing any remedies available to it, including injunctive relief, or relieve you of your obligation to pay all fees that have accrued or become payable hereunder. Any right, obligation, or required performance of the parties in these Terms which, by its express terms or nature and context is intended to survive termination of these Terms, will survive any such termination.

13. Intellectual Property Ownership; Feedback. As between you and us, (a) we own all right, title, and interest, including all intellectual property rights, in and to the Service and the Licensed Software; and (b) you own all right, title, and interest, including

all intellectual property rights, in and to Customer Data. If you or any of your employees, contractors, or agents sends or transmits any communications or materials to us by mail, email, telephone, or otherwise, suggesting or recommending changes to the Service or the Licensed Software, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like ("**Feedback**"), we are free to use such Feedback irrespective of any other obligation or limitation between you and us governing such Feedback. All Feedback is and will be treated as non-confidential. You hereby assign to us on your behalf, and shall cause your employees, contractors, and agents to assign, all right, title, and interest in, and we are free to use, without any attribution or compensation to you or any third party, any ideas, know-how, concepts, techniques, or other intellectual property rights contained in the Feedback, for any purpose whatsoever, although we are not required to use any Feedback.

14. Limited Warranty and Warranty Disclaimer.

(a) Limited Warranty. SmartBear warrants for the Warranty Period (as defined below) that the Service or the Licensed Software (not including any Third Party Components) will conform in all material respects in accordance with its Documentation. If, during the Warranty Period, the Service or the Licensed Software fails to comply with the limited warranty set forth in this Section and such failure is not excluded from this warranty pursuant to Section 14(b), SmartBear shall, subject to you promptly notifying SmartBear in writing of such failure, at its sole option, repairs or replaces the Service or the Licensed Software, provided that you provide SmartBear with all information SmartBear reasonably requests to resolve the reported failure, including sufficient information to enable SmartBear to recreate such failure. For purposes of these Terms, "**Warranty Period**" is either (i) one (1) year after your initial access to the Service if you purchased a subscription to the Service; or (ii) ninety (90) days after delivery of the Licensed Software to you if you are licensing the Licensed Software from SmartBear (the "**Warranty Period**") The remedies set forth in this Section 14(a) are Licensee's sole remedies and Licensor's sole liability under the limited warranty set forth in this Section 14(a).

(b) EXCEPT FOR THE LIMITED WARRANTY SET FORTH IN SECTION 14(a), THE SERVICE IS PROVIDED "AS IS" AND SMARTBEAR SPECIFICALLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE. SMARTBEAR SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE, OR TRADE PRACTICE. SMARTBEAR MAKES NO WARRANTY OF ANY KIND THAT THE SERVICE, THE LICENSED SOFTWARE OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET YOUR OR ANY OTHER PERSON'S OR ENTITY'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY OF YOUR OR ANY THIRD PARTY'S SOFTWARE, SYSTEM, OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, FREE OF HARMFUL CODE, OR ERROR-FREE, OR THAT ANY ERRORS OR DEFECTS CAN OR WILL BE CORRECTED.

15. Indemnification.

(a) SmartBear Indemnification.

(i) SmartBear shall indemnify, defend, and hold harmless Customer from and against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees ("**Losses**"), incurred by Customer resulting from any third-party claim, suit, action, or proceeding ("**Third-Party Claim**") that the Service, the Licensed Software, or any use of the Service or Licensed Software in accordance with these Terms, infringes or misappropriates such third party's US patents, copyrights, or trade secrets, provided that Customer promptly notifies SmartBear in writing of the Third-Party Claim, cooperates with SmartBear, and allows SmartBear sole authority to control the defense and settlement of such Third-Party Claim.

(ii) If such a Third-Party Claim is made or SmartBear anticipates such a Third-Party Claim will be made, Customer agrees to permit SmartBear, at SmartBear's sole discretion, to (A) modify or replace the Service, Licensed Software, or any component or part thereof, to make it non-infringing, or (B) obtain the right for Customer to continue use the Service or the Licensed Software, as the case may be. If SmartBear determines that neither alternative is reasonably available, SmartBear may terminate these Terms, in its entirety or with respect to the affected component or part, effective immediately on written notice to Customer. This Section 15(a)(ii) sets forth your sole remedies and our sole liability and obligation for any actual, threatened, or alleged Third-Party Claims that the Service or the Licensed Software infringe, misappropriate, or otherwise violate any intellectual property rights of any third party.

(iii) This Section 15(a) will not apply to the extent that any such Third-Party Claim arises from Customer Data or Third-Party Products.

(b) Customer Indemnification. Customer shall indemnify, hold harmless, and, at SmartBear's option, defend SmartBear and its officers, directors, employees, agents, affiliates, successors, and assigns from and against any and all Losses arising from or relating to any Third-Party Claim (i) that the Customer Data, or any use of the Customer Data in accordance with these Terms, infringes or misappropriates such third party's intellectual property rights; or (ii) based on Customer's or any Authorized User's negligence or willful misconduct or use of the Service or the Licensed Software in a manner not authorized by these Terms; provided that Customer may not settle any Third-Party Claim against SmartBear unless SmartBear consents to such settlement, and further provided that SmartBear will have the right, at its option, to defend itself against any such Third-Party Claim or to participate in the defense thereof by counsel of its own choice.

16. Limitations of Liability. IN NO EVENT WILL SMARTBEAR BE LIABLE UNDER OR IN CONNECTION WITH THESE TERMS UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT

(INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, FOR ANY: (a) CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED, OR PUNITIVE DAMAGES; (b) INCREASED COSTS, DIMINUTION IN VALUE OR LOST BUSINESS, PRODUCTION, REVENUES, OR PROFITS; (c) LOSS OF GOODWILL OR REPUTATION; (d) USE, INABILITY TO USE, LOSS, INTERRUPTION, DELAY OR RECOVERY OF ANY DATA, OR BREACH OF DATA OR SYSTEM SECURITY; OR (e) COST OF REPLACEMENT GOODS OR SERVICES, IN EACH CASE REGARDLESS OF WHETHER SMARTBEAR WAS ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE. IN NO EVENT WILL SMARTBEAR'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THESE TERMS UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE EXCEED THE TOTAL AMOUNTS PAID TO SMARTBEAR UNDER THESE TERMS IN THE TWELVE (12) MONTH PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

17. Modifications. You acknowledge and agree that we have the right, in our sole discretion, to modify these Terms from time to time, and that modified terms become effective on posting. You will be notified of modifications through notifications or posts on our website. You are responsible for reviewing and becoming familiar with any such modifications. Your continued use of the Service after the effective date of the modifications will be deemed acceptance of the modified terms.

18. Export Regulation. The Service and the Licensed Software utilizes software and technology that may be subject to US export control laws, including the US Export Administration Act and its associated regulations. You shall not, directly or indirectly, export, re-export, or release the Service, the software or technology included in the Service to, or the Licensed Software, or make the Service, the software or technology included in the Service or the Licensed Software accessible from, any jurisdiction or country to which export, re-export, or release is prohibited by law, regulation, or rule. You shall comply with all applicable federal laws, regulations, and rules, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), prior to exporting, re-exporting, releasing, or otherwise making the Service, the software or technology included in the Service or the Licensed Software available outside the US.

19. U.S. Government End Users. This Section 19 applies to all acquisitions of the Software by or for the United States Federal government, including by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the Federal government. The Software and related documentation were developed at private expense and 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 and subject to 48 CFR 12.212 and 48 CFR 227.7202-1 through 227.7702-4, as applicable, the Commercial Computer Software is being licensed to U.S. Government end users (a) only as Commercial Items and (b) with

only those rights as are granted to all other end users pursuant to the terms herein. Any provisions of these Terms that are inconsistent with federal procurement regulations or other federal law are not enforceable against the U.S. Government. Unpublished rights reserved under the copyright laws of the United States.

20. Governing Law and Jurisdiction. These Terms is governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule that would require or permit the application of the laws of any jurisdiction other than those of the State of New York. Any legal suit, action, or proceeding arising out of or related to these Terms or the rights granted hereunder will be instituted exclusively in the federal courts of the United States or the courts of the State of New York, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding.

21. Force Majeure. SmartBear is not liable for delay in the performance of its duties, obligations or responsibilities hereunder due to force majeure. A force majeure impediment is an unforeseen event which occurs after acceptance of orders, and which is beyond SmartBear's reasonable control, such as strikes, blockade, war, mobilization, natural disaster, refusal of license by government or other stipulations or restrictions by the authorities, Internet service failures, delays or availability issues (including downtime or service outages) or any other similar or dissimilar cause beyond the control of SmartBear. Notwithstanding the foregoing, a force majeure does not extinguish your obligations to pay the applicable Fees hereunder.

22. Publicity. Unless you request in writing, which may be via e-mail, to be added to the SmartBear unauthorized logos list, you agree to be identified as a customer of SmartBear and agree that SmartBear may refer to you by name, trade name and/or trademark, if applicable, and may briefly describe your business in SmartBear's marketing materials and on SmartBear's websites. You hereby grant SmartBear a license to use your name and any of your trade names and trademarks solely in connection with the rights granted to SmartBear pursuant to this Section 22. You also grant SmartBear the right to add your name and company logo to our customer list and website.

23. Miscellaneous. These Terms, together with the SmartBear Data Processing Addendum set forth at <https://www.smartbear.com/DPA/>, if applicable, the AUP, and the Privacy Policy set forth at <https://www.smartbear.com/privacy/>, each as may be amended by SmartBear from time to time, constitutes the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect to such subject matter. The terms of any purchase order or other document relating to the transactions contemplated by these Terms or delivered by you to SmartBear shall not apply. Any notices to us must be sent to our corporate headquarters address set forth in the preamble to these Terms and must be delivered either in person, by certified or registered mail, return receipt requested and postage prepaid, or by recognized overnight courier service, and are deemed given upon receipt by us. Notwithstanding the foregoing, you hereby consent to receiving electronic communications from us. These electronic communications may include notices about

applicable fees and charges, transactional information, and other information concerning or related to the Service or the Licensed Software. You agree that any notices, agreements, disclosures, or other communications that we send to you electronically will satisfy any legal communication requirements, including that such communications be in writing. The invalidity, illegality, or unenforceability of any provision herein does not affect any other provision herein or the validity, legality, or enforceability of such provision in any other jurisdiction. Any failure to act by us with respect to a breach of these Terms by you or others does not constitute a waiver and will not limit our rights with respect to such breach or any subsequent breaches. These Terms is personal to you and may not be assigned or transferred for any reason whatsoever without our prior written consent and any action or conduct in violation of the foregoing will be void and without effect. We expressly reserve the right to assign these Terms and to delegate any of its obligations hereunder.