

SmartBear Hosted Services Terms of Use

This SmartBear Hosted Services Terms of Use is a legal agreement between You and SmartBear (as defined in Section 2 below) that governs your access to, and use of, our Hosted Services, whether purchased directly from SmartBear or a Reseller (“EULA” or “Agreement”).

BY ACCEPTING THIS AGREEMENT, EITHER BY (1) CLICKING A BOX INDICATING YOUR ACCEPTANCE OR (2) EXECUTING A QUOTE OR ORDER THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THIS AGREEMENT.

You may not access the Services if You are a direct competitor of SmartBear, except with Our prior written consent.

1. Definitions.

"Affiliate" means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity; for purposes hereof, "control" means possession, directly or indirectly of the power to direct or cause the direction of the activities, management or policies of an entity, whether through the ownership of voting securities, by contract or otherwise. Without limiting the foregoing, control will be presumed to exist when an entity (a) owns or directly or indirectly controls fifty percent (50%) or more of the outstanding voting stock or other ownership interest of the applicable entity or (b) possesses, directly or indirectly, the power to elect or appoint fifty percent (50%) or more of the members of the applicable entity's governing body.

“Data” means (i) content You post or otherwise submit to the Services and (ii) SmartBear's license and/or product usage data transmitted to SmartBear, at the time of registration, use or update, in order to activate your access rights and provide You with update notifications, protect You and SmartBear against unlicensed or illegal use of the Services, and improve customer service and the Services.

“Documentation” means the published and generally available on-line user and administrator materials SmartBear delivers or makes available with the Services, including on-line help, as updated from time to time.

“Hosted Services” means the services provided by SmartBear through which it makes the Software available to you as a service (SaaS) and hosted by SmartBear or its authorized third party provider(s).

“Maintenance and Support” mean those technical support and related services provided by SmartBear as set forth at https://support.smartbear.com/support/media/pdf/SB_PS_SLA.pdf.

"Order" means SmartBear's online purchase order, quote or other document for placing orders entered into between You and SmartBear, which identifies the Services (including the applicable SmartBear product(s), license type, license model (duration or usage-based), quantity/term) ordered by You and any required access information. Any Order that has been accepted by SmartBear shall be deemed incorporated herein by reference.

"Reseller" means an authorized reseller or distributor who may sell the Services to You.

"Software" means the SmartBear software provided as part of the Services pursuant to the applicable Order, and all Updates, in each case, access to which is provided by SmartBear.

"Services" means the Hosted Services, together with Maintenance and Support, as provided to you during the Subscription Term based on the applicable Order.

"Subscription" means Our grant of the right to access and use the Software through the Services for the period of time or usage-based limit set forth in the Order (the "Subscription Term").

"Update" means any subsequent release of the Software that SmartBear generally makes available to its SaaS customers as part of the Services; Updates do not include any Software that is marketed and priced separately by SmartBear as part of the Services.

"User" means an individual who is authorized by You to use the Services in accordance with this Agreement and the applicable license type set forth herein, and who has been supplied usage credentials. A User may include, but is not limited to, your employee, consultant, contractor and any agent with which You transact business.

"You" means the company or other legal entity for which you are accepting this Agreement and Affiliates of that company or entity.

2. Who We Are.

If You acquire access to, and use, the Services from in the United States or Canada, "We", "Us", "Our" or "SmartBear" means SmartBear Software Inc., a Delaware corporation with its principal place of business at 450 Artisan Way, Somerville, MA 02145, and its licensors.

If You acquire access to, and use, the Services from outside of the United States or Canada, "We", "Us", "Our" or "SmartBear" means SmartBear (Ireland) Limited with its principal place of business at 3rd Floor Dockgate, Unit 19, Merchants Rd., Galway, Ireland, together with its licensors.

3. Free Trial Version.

If You register for a free Subscription trial, SmartBear will make the applicable Services available to You on a temporary basis (the "Trial Version") free of charge until the end of the free trial period for which You registered or ordered the applicable Services. The Trial Version may be used only to review evaluate and demonstrate, for Your internal purposes; the Services

and may have limited features. The Trial Version may cease operating after the applicable time period or number of uses based on an internal metering mechanism within the Trial Version itself. Regardless of any such metering, You must stop use of the Services at the end of such period or number of uses.

You shall not (a) access or use the Trial Version of the Services under more than one username, (b) disclose the results of performance benchmarks obtained using the Trial Version to any third party without SmartBear's prior written consent, (c) use the Trial Version for any commercial training or any application deployment or ultimate production purpose, or (d) use the Trial Version other than for the sole purpose of determining whether to purchase a license to access and use the Services.

ANY DATA YOU ENTER INTO A TRIAL VERSION, AND ANY CONFIGURATIONS MADE TO THE TRIAL VERSION BY OR FOR YOU DURING ANY FREE TRIAL MAY BE PERMANENTLY LOST UNLESS YOU PURCHASE A LICENSE TO THE SAME SERVICES AS THOSE COVERED BY THE TRIAL OR EXPORT SUCH DATA, BEFORE THE END OF THE TRIAL PERIOD.

NOTWITHSTANDING SECTION 16 (LIMITED WARRANTY; REMEDIES), DURING A FREE TRIAL, THE TRIAL VERSION AND ANY APPLICABLE SERVICES ARE PROVIDED "AS-IS" WITHOUT WARRANTY AND SMARTBEAR HAS NO RESPONSIBILITY FOR DATA RETENTION OR RESULTS FROM TRIALS.

4. Services Grants.

Subject to the terms of this Agreement and during the Subscription Term, SmartBear grants You a non-exclusive, non-transferable, non-sublicensable, limited license to access and use the Services, Documentation, and, if any, associated media and materials, and, if applicable, third party software programs supplied by SmartBear solely (i) to access and use the Services as listed in the applicable Order and (ii) for Your internal business purposes. You may access and use the Services as permitted by the license type purchased, which license type is (i) specified in the applicable Order and (ii) subject to the further terms below applicable to the relevant product.

5. License Types.

The license granted in Section 4 are subject to all terms and conditions set forth in this Agreement, including the following applicable terms (as specified in the applicable Order):

Single (Named) Licensee: all Services licensed under these terms are single licensee, meaning it can be activated by only one User, with a unique username and password. Access to the Services may not be reassigned other than for the permanent transfer of the access license to the Services to another User if the eligible User is no longer employed by You. An eligible User may access the Services with a unique username and password on one device at a time.

Floating (Concurrent) License: all Software licensed under these terms can be activated for different users and machine combinations, but only one at a time and has a floating license key.

The number of running instances of the Software or the number of individuals simultaneously having access to the Software may not exceed at any one time the number of floating seats licensed. One computer or computing device shall be designated as the “license server”, where the license is installed, and all other devices will require access to the license server to run the Software.

Usage-Based License: access to the Services licensed under these terms is (i) licensed on a time-based or unit-based basis during the Subscription Term as set forth in an Order and (ii) restricted to a computer or computing device, which is applicable to the Alertsite and VirtServer products.

Freeware or Free Version License: all Services licensed under these terms are licensed to an individual User who is specifically named in the Services registration and may only be used on one computer or computing device at a time. These licenses are not eligible for Maintenance and Support other than the materials and discussion groups that may be accessed generally via the SmartBear online community at <https://community.smartbear.com>.

6. License Restrictions.

Your use of the Services is limited to the number of units, duration and such other usage restrictions as are set forth on an Order and herein. SmartBear and its licensors and suppliers reserve any and all rights, implied or otherwise, which are not expressly granted to You hereunder, and retain all rights, title and interest in and to the Services. You shall not (i) modify, adapt, distribute, resell, rent, lease or loan the Services or create or prepare derivative works based upon the Services or any part thereof; (ii) use the Services in a service bureau, or application service provider environment, or in any commercial timeshare arrangement; (iii) attempt to decompile, disassemble or otherwise reverse engineer the Services or any part thereof; (iv) use the Services in contravention of any applicable laws or government regulations; (v) access the Services in order to build a competitive product or service; (vi) copy any features, functions or graphics of the Services; (vii) create duplicate accounts or make the Services available to anyone other than Users, or (viii) use the Services 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. To the extent the Services are used to monitor web sites or devices You do not own, then You shall not publish or otherwise disclose data acquired about such web sites or devices unless express consent is given to You by the web site or device owner; further you shall not (1) interfere with or disrupt the integrity or performance of the Services or third-party data contained therein, or (2) attempt to gain unauthorized access to the Services or their related systems or networks.

If the restriction set forth in clause (iii) above is prohibited by applicable law, You shall provide SmartBear with a detailed prior written notice of any such intention to reverse engineer the Services 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 provider for such work. You shall take all reasonable precautions to prevent unauthorized or improper use or disclosure of the Services.

Export. You may not provide to SmartBear or any other person (whether through the Service or any other means), or export or re-export, or allow the export or re-export of the Service, any data or information, or any Software or anything related thereto or any direct product thereof (collectively “Controlled Subject Matter”), in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority. Without limiting the foregoing, You acknowledge and agree that the Controlled Subject Matter will not be used or transferred or otherwise exported or re-exported to countries as to which the United States maintains an embargo (collectively, “Embargoed Countries”), or to or by a national or resident thereof, or any person or entity on the U.S. Department of Treasury’s List of Specially Designated Nationals or the U.S. Department of Commerce’s Table of Denial Orders (collectively, “Designated Nationals”). The lists of Embargoed Countries and Designated Nationals are subject to change without notice. Use of the Service is representation and warranty that the user is not located in, under the control of, or a national or resident of an Embargoed Country or Designated National. The Controlled Subject Matter may use or include encryption technology that is subject to licensing requirements under the U.S. Export Administration Regulations.

7. Term.

The Term of this Agreement shall be determined based on the License Model and License Type as described herein

The Subscription Term begins on the date that SmartBear grants You access to the Services and continues for twelve (12) months thereafter, unless either (i) the Subscription is usage-based (see below) or (ii) a multi-year, or other, agreement is otherwise agreed upon in an Order (“Initial Term”). Except with respect to usage-based Subscriptions, the Agreement shall automatically renew (each a “Renewal Term”) upon the end of the Initial Term and each Renewal 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 forty-five (45) days prior to the end of the then-current Initial or Renewal Term, or as otherwise agreed. In the event that the Subscription is usage-based, the term of this Agreement is based upon the designated units of consumption as set forth in an Order.

8. Termination.

Notwithstanding anything contained herein to the contrary, this Agreement, an Order or an individual license granted hereunder 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) for all breaches that are remediable, by either party if the other party materially breaches this Agreement and fails to cure such breach to such party’s reasonable satisfaction within thirty (30) days following receipt of written notice thereof; or (d) for all breaches that are not remediable, immediately by delivery of written notice thereof to the other party. Without limiting its other rights or remedies, SmartBear may terminate this Agreement, an Order or an individual license granted hereunder with immediate effect by giving written notice to You if You fail to pay any amount due on the due date for payment. Upon any termination of

this Agreement, an Order or a license granted hereunder, all applicable licenses are revoked and You shall immediately cease use of the Services. Termination of this Agreement, an Order or a license granted hereunder 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.

9. Your Responsibilities; Login Credentials.

You shall (i) be responsible for each User's compliance with this Agreement, (ii) be responsible for the accuracy, quality and legality of your Data and of the means by which You acquired Your Data, (iii) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify Us promptly of any such unauthorized access or use, (iv) use the Services in accordance with the Documentation and applicable laws and government regulations, (v) be responsible for obtaining and maintaining all telephone, computer hardware, Internet access services and other equipment or services needed to access and use the Services and all costs and fees associated therewith.

Data Responsibility. You are solely responsible for (a) Your Data, (b) the accuracy, quality, and legality of Your Data, (c) the means by which You acquired Your Data, including ensuring that Your Data does not infringe upon or violate the rights of any person or entity, (d) third party claims relating to Your Data, and (e) responding to any person claiming Your Data violates such persons rights, including notices pursuant to the Digital Millennium Copyright Act.

Login Credentials. SmartBear will provide You with credentials to assign usernames and passwords to each User ("Login Credentials") in order to access and use the Services. In connection with the foregoing, You agree to (i) maintain as confidential all Login Credentials and not distribute or disclose any such Login Credentials and (ii) use the administrator account to assign the authorized number of Login Credentials to each User. Further, You shall be responsible for the Login Credentials, which shall be maintained confidentially and not be distributed or disclosed. You shall immediately terminate Login Credentials upon knowledge or belief that any User is or may be subject to a breach of this Agreement and, at your own expense, provide all equipment, operating systems, web browser and internet access, etc. needed to access and use the Services in accordance with the Documentation.

10. Non-Human Devices.

Non-human devices that access or use the Services, whether or not without interaction, are counted as Users. Each such device that accesses or uses the Services must be properly licensed to use the Services pursuant to one of the license types described herein. Examples of non-human devices include, but are not limited to, virtual PCs, build servers, unattended PCs for batch jobs, or similar devices.

11. Usage Verification.

At SmartBear's written request and expense, and no more than once every twelve (12) months, You will permit SmartBear to review your deployment and use of the Services in order to verify your compliance with the terms and conditions of this Agreement. Any such review shall be scheduled at least ten (10) days in advance, conducted during normal business hours at your facilities, and shall not unreasonably interfere with your business activities. Within ten (10) days of completion of any review that finds your use of the Services to be greater than that which was licensed, You will provide SmartBear an Order for the applicable number of additional licenses and pay all applicable fees in accordance herewith.

12. Maintenance and Support.

Your Subscription to the Services includes Maintenance and Support during the Subscription Term. Any Maintenance and Support purchased through a Reseller shall be subject to this Agreement. During the Subscription Term, SmartBear will provide you with Maintenance and Support, including Updates, all in accordance with 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/SB_PS_SLA.pdf, or as otherwise may be made available. In addition, as part of Maintenance and Support, 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.

13. Fees and Payments.

Fees. You shall pay all fees specified in an Order. Fees are based on the Services purchased and, in the case of usage-based licenses only, actual usage; all payment obligations are non-cancelable and fees paid are non-refundable and You will not, except as expressly provided herein, be entitled to a refund of amounts paid for the license to use the Services, or any other amounts for any reason. The number of units or time period purchased cannot be decreased during the relevant Subscription Term. Unless otherwise stated in an applicable Order, payment is due thirty (30) days from the date of invoice. You shall provide a purchase order or notice that a purchase order is not required for purchase or payment prior to the date on which SmartBear provides you access to the Services. If You provide credit card information to Us, You authorize Us to charge such credit card for all Services (including Maintenance and Support services) listed in the Order; such authorization shall include for the initial Subscription Term and any renewal Subscription Term(s)and, in the case of usage-based licenses, for any excess units. Such

charges shall be paid in advance, either annually or in accordance with any different billing frequency stated in the applicable Order.

Overdue Charges. If any payment is not received from You by the due date, then at Our discretion, (a) such charges may accrue late interest at the rate of 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 paid, and/or (b) for Subscriptions, We may condition future subscription renewals and Orders on payment terms shorter than those specified herein.

Suspension of Service and Acceleration. If any amount owing by You under this or any other agreement for the Services is 15 or more days overdue or if Your credit card is not valid, in the event You are paying by credit card, You shall be considered in default of this Agreement and We may, without limiting Our other rights and remedies, accelerate Your unpaid fee obligations under such agreements so that all such obligations become immediately due and payable, and suspend access to the Services until such amounts are paid in full.

Taxes. You shall be responsible for taxes levied on any transaction under this Agreement, including all federal, state, and local taxes, levies and assessments, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"), excluding any tax based on SmartBear's income. Unless otherwise stated, Our fees do not include any Taxes. If We have the legal obligation to pay or collect Taxes for which You are responsible under this paragraph, the appropriate amount shall be invoiced to and paid by You, unless You provide Us with a valid tax exemption certificate authorized by the appropriate taxing authority. We are solely responsible for taxes assessable against Us based on Our income, property and employees.

14. Confidentiality and Data Privacy.

Confidential Information. Each party will regard any information provided to it by the other party and designated in writing as proprietary or confidential to be confidential ("Confidential Information"). Confidential Information shall also include information which, to a reasonable person familiar with the disclosing party's business and the industry in which it operates, is of a confidential or proprietary nature. A party will not disclose the other party's Confidential Information to any third party without the prior written consent of the other party, nor make use of any of the other party's Confidential Information except in its performance under this Agreement. Each party accepts responsibility for the actions of its agents or employees (including, in Your case, all Users) and shall protect the other party's Confidential Information in the same manner as it protects its own valuable confidential information, but in no event shall less than reasonable care be used. The parties expressly agree that the Services and the terms and pricing of this Agreement are the Confidential Information of SmartBear. You will not remove or destroy any proprietary markings or restrictive legends placed upon or contained in the Services. A receiving party shall promptly notify the disclosing party upon becoming aware of a breach or threatened breach hereunder, and shall cooperate with any reasonable request of the disclosing party in enforcing its rights.

Exclusions. Information will not be deemed Confidential Information hereunder if such information: (i) is known prior to receipt from the disclosing party, without any obligation of confidentiality; (ii) becomes known to the receiving party directly or indirectly from a source other than one having a known obligation of confidentiality to the disclosing party; (iii) becomes publicly known or otherwise publicly available, except through a breach of this Agreement; or (iv) is independently developed by the receiving party without use of or access to the Confidential Information. The receiving party may disclose Confidential Information pursuant to the requirements of applicable law, legal process or government regulation, provided that it (to the extent permitted) gives the disclosing party reasonable prior written notice to permit the disclosing party to contest such disclosure, and such disclosure is otherwise limited to the required disclosure.

Data Privacy: The terms and conditions of SmartBear's Privacy Policy is set forth at <http://www.smartbear.com/privacy> and are incorporated by reference into this Agreement. By your acceptance of the terms of this Agreement or access or use of the Services, You authorize the collection, use and disclosure of information collected by SmartBear for the purposes provided for in this Agreement in accordance with the Privacy Policy as revised from time to time. International users understand and consent to the processing of personal information in the United States for the purposes described herein in accordance with the Privacy Policy. You are responsible for your personally identifiable information, You shall only supply data that You have the right to and are authorized to provide and we are not responsible for any such data.

In addition to any other information transmitted as specified in the Privacy Policy, the Services may transmit license and/or product usage data at the time of registration, use or update in order to activate your access rights and provide You with update notifications, protect You and SmartBear against unlicensed or illegal use of the Services, and improve customer service and the Services. By accessing the Services, You authorize SmartBear to create aggregated anonymous data based on activities and use of all Users. Upon creation, We will be deemed to be the owner of such aggregated anonymous data and may use and copy such data, in our discretion, for any lawful purpose. The Services do not collect or communicate any proprietary application data. SmartBear may elect to provide the User with the ability to disable the collection of certain license and/or product usage data through the settings menu in the Services.

Feedback. You may provide feedback (which may be oral or written) to Us including on the functions, operation, and utility of the Services and are encouraged to provide prompt reports of any issues, bugs or service errors, feature suggestions and corrections to problems in the Services and/or Documentation (collectively "Feedback"). You agree that Feedback provided by You becomes the property of, and upon creation, shall be deemed to be assigned to, Us and that We may use or exploit the same without any accounting or payment to You. You will not include in Feedback any third party proprietary or confidential information.

15. Ownership.

Except as expressly provided in this Agreement, SmartBear and its licensors, where applicable, retain all right, title and interest, including all copyright and intellectual property rights, in and to, the Services, as an independent work and as an underlying work serving as a basis for any

improvements, modifications, derivative works, and applications You may develop, and all copies thereof. All rights not specifically granted in this Agreement, including U.S. and international copyrights, are reserved by SmartBear and its suppliers.

SmartBear and other trademarks contained in the Services are trademarks or registered trademarks of SmartBear Software Inc. in the United States or other countries. You may not remove or alter any trademark, trade names, product names, logo, copyright or other proprietary notices, legends, symbols or labels in the Services.

Subject to the limited rights granted by You hereunder, We acquire no right, title or interest from You or Your licensors hereunder in or to Your data, including any intellectual property rights therein.

The 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, and you acknowledge and agree that these accompanying license terms govern their use. Nothing in this Terms of Service 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 Software on our website at <http://support.smartbear.com/support/thirdparty.aspx> If required by any license for a particular Third Party Component, SmartBear makes the source code of such Third Party Component, and any of SmartBear’s modifications to such Third Party Component as required, available by written request to SmartBear at the following address: support@smartbear.com.

16. Limited Warranty; Remedies.

SmartBear warrants that (a) it has the necessary corporate power and authority and has taken required corporate action on its part necessary to permit it to execute and deliver You this Agreement; (b) it has taken commercially reasonable steps to provide the Services free from any virus at the time of initial access; (c) for a period of thirty (30) days following the initial grant of access to You to the Services (the “Warranty Period”), the Services will perform in substantial conformity with the Documentation; and (d) the Services will be provided with reasonable skill and care conforming to generally accepted software industry standards and in accordance with any specifications set forth in the Order in all material respects. Your exclusive remedy and SmartBear’s sole obligation for SmartBear’s breach of 16(c), is that SmartBear will, at its option, and at no cost, to (a) provide remedial services necessary to enable the Services to conform to the warranty, or (b) replace any defective Services to enable the Services to conform to the warranty without loss of any material functionality, or in the event that SmartBear determines that neither of the foregoing are reasonably practicable, (c) terminate this Agreement and refund amounts paid in respect of the defective Services for the balance of the then-current Subscription Term. SmartBear’s warranty obligations will only extend (i) to material errors that can be demonstrated to exist in an unmodified version of the Services except where the modifications were carried out by SmartBear or with its written approval and (ii) in respect of alleged breaches for which SmartBear has received written notice within the Warranty Period, if applicable. You

will provide SmartBear with a reasonable opportunity to remedy any breach and reasonable assistance in remedying any defects. If the Services are not performed as warranted in this Section 16(d) then, upon your written request, SmartBear shall promptly re-perform, or cause to be re-performed, such Services, at no additional charge to You, provided that this warranty shall only survive for ninety (90) days following the completion of the Services. We provide no warranty or remedy for a Trial Version, Freeware or Free Version of the Software.

EXCEPT AS SET FORTH IN THE FOREGOING LIMITED WARRANTY, SMARTBEAR AND ITS SUPPLIERS AND LICENSORS DISCLAIM ALL OTHER WARRANTIES AND REPRESENTATIONS, WHETHER EXPRESS, IMPLIED, OR OTHERWISE, INCLUDING THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND TITLE OR QUIET ENJOYMENT. SMARTBEAR DOES NOT WARRANT THAT THE SERVICES ARE ERROR-FREE OR WILL OPERATE WITHOUT INTERRUPTION. IN ADDITION, ALL THIRD PARTY COMPONENTS ARE PROVIDED "AS IS," "WHERE IS," "AS AVAILABLE," "WITH ALL FAULTS" AND, TO THE FULLEST EXTENT PERMITTED BY LAW, WITHOUT WARRANTY OF ANY KIND. SMARTBEAR AND ITS LICENSORS DISCLAIM ALL WARRANTIES WITH RESPECT TO THE THIRD PARTY COMPONENTS, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, AND TITLE, AND ANY WARRANTIES REGARDING THE SECURITY, QUIET ENJOYMENT, RELIABILITY, TIMELINESS, AND PERFORMANCE OF THE SERVICES. NO RIGHTS OR REMEDIES REFERRED TO IN ARTICLE 2A OF THE UCC WILL BE CONFERRED ON YOU UNLESS EXPRESSLY GRANTED HEREIN. THE SERVICES ARE NOT DESIGNED, INTENDED OR LICENSED FOR USE IN HAZARDOUS ENVIRONMENTS REQUIRING FAIL-SAFE CONTROLS, INCLUDING WITHOUT LIMITATION, THE DESIGN, CONSTRUCTION, MAINTENANCE OR OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, AND LIFE SUPPORT OR WEAPONS SYSTEMS. SMARTBEAR SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR SUCH PURPOSES.

No oral or written information or advice given by SmartBear, its Resellers, dealers, distributors, agents, representatives or employees shall create any warranty or in any way increase any warranty provided herein.

If applicable law requires any warranties other than the foregoing, all such warranties are limited in duration to thirty (30) days from the date of grant of initial access to the Services to You. Some jurisdictions do not allow the exclusion of implied warranties, so the above exclusion may not apply to You. The warranties provided herein give You specific legal rights and You may also have other legal rights that vary from jurisdiction to jurisdiction. The limitations or exclusions of warranties, remedies or liability contained in this EULA shall apply to You only to the extent such limitations or exclusions are permitted under the laws of the jurisdiction where You are located.

17. Indemnification.

SmartBear will (a) defend indemnify and hold You harmless from and against all any claims and causes of action brought against You by a third party arising out of an allegation that the Services as provided to You by SmartBear infringes any third party's intellectual property rights enforceable under United States law or international copyright treaty and (b) pay any accrued costs and damages against You or the amount stated in a written settlement signed by SmartBear, provided You: (a) promptly notify SmartBear after learning of the suit or claim (provided, however, that SmartBear's obligations under this Section 17 shall only be mitigated to the extent that it is prejudiced by a delay in receipt of such notification); (b) give SmartBear the authority to defend or settle the suit or claim (provided that SmartBear does not agree to any settlement that requires You to pay money or make any admissions); and (c) give SmartBear all available non-privileged information and assistance reasonably requested by SmartBear, at SmartBear's expense, concerning the suit or claim.

18. Remediation.

If the Services are held or is reasonably believed by SmartBear to be held to infringe any third party rights described in Section 17 above, SmartBear may, at its expense, modify or replace the applicable Services to be non-infringing with similar functionality, or obtain permission for You to continue using the Services as permitted under the Agreement, or if neither option is commercially feasible, then to terminate this Agreement and refund that portion of the fees paid in respect of the applicable Services, which portion is equal to the amount of pre-paid fees for the balance of the then-current Subscription Term.

19. Limitations of Liability.

NEITHER SMARTBEAR NOR ITS SUPPLIERS OR LICENSORS SHALL BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, COVER OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR THE INABILITY TO USE EQUIPMENT OR ACCESS DATA, LOSS OF BUSINESS, LOSS OF PROFITS, BUSINESS INTERRUPTION OR THE LIKE), ARISING OUT OF THE USE OF, OR INABILITY TO USE, THE SERVICES AND BASED ON ANY THEORY OF LIABILITY INCLUDING BREACH OF CONTRACT, BREACH OF WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, EVEN IF SMARTBEAR OR ITS REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. SMARTBEAR'S, SUPPLIERS', AND LICENSORS' TOTAL AGGREGATE LIABILITY TO YOU FOR ACTUAL DAMAGES FOR ANY CAUSE WHATSOEVER WILL BE LIMITED TO THE AMOUNT PAID BY YOU OR RESELLER, IF ORDERED THROUGH A RESELLER, FOR THE SERVICES THAT CAUSED SUCH DAMAGE IN THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE APPLICABLE CLAIM.

20. Government Matters

This Section applies to all acquisitions of the Services 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 was developed at private expense and is Commercial Computer Software, as defined in Section 12.212 of the Federal Acquisition Regulation (48 CFR 12.212 (October 1995)) and Sections 227.7202-1 and 227.7202-3 of the Defense Federal Acquisition Regulation Supplement (48 CFR 227.7202-1, 227.7202-3 (June 1995)). Accordingly, any use, duplication or disclosure by the Federal Government or any of its authorized users is subject to restrictions as set forth in this standard license agreement for the Services. If for any reason, Sections 12.212, 227.7202-1 or 227.7202-3 are deemed not applicable, then the Federal Government's rights to use, duplicate or disclose the Services are limited to "Restricted Rights" as defined in 48 CFR Section 52.227-19(c)(1) and (2) (June 1987), or DFARS 252.227-7014(a)(14) (June 1995), as applicable. If this Agreement fails to meet the Federal Government's needs or is inconsistent in any respect with Federal law, the Federal Government agrees to terminate its access to the Services. Manufacturer is SmartBear Software Inc., 450 Artisan Way, Somerville, MA 02145.

Federal Government End Use Provisions. We provide the Services, including related software and technology, for ultimate federal government end use solely in accordance with the following: Government technical data and software rights related to the Services include only those rights customarily provided to the public as defined in this Agreement. This customary commercial license is provided in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Software) and, for Department of Defense transactions, DFAR 252.227-7015 (Technical Data – Commercial Items) and DFAR 227.7202-3 (Rights in Commercial Computer Software or Computer Software Documentation). If a government agency has a need for rights not conveyed under these terms, it must negotiate with Us to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement.

21. General.

Headings. The headings to the clauses in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

Governing Law and Venue. If the access to the Services was acquired in the United States or Canada, this Agreement shall be governed by the internal law of the Commonwealth of Massachusetts, U.S.A., without giving effect to principles of conflict of laws. You hereby consent to the exclusive jurisdiction and venue of the state courts sitting in the Commonwealth of Massachusetts or the federal courts in the Commonwealth of Massachusetts to resolve any disputes arising under this EULA. In each case this EULA shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods.

If You acquire access to, and use, the Services from outside the United States or Canada, this Agreement shall be governed by and construed in accordance with the laws of Ireland, without

giving effect to principles of conflict of laws. You hereby consent to the exclusive jurisdiction and venue of the Irish courts to resolve any disputes or issues arising directly or indirectly under this Agreement. Nothing in this Agreement shall operate to prevent SmartBear from seeking interim, protective or provisional relief in the courts of another State or to enforce an Irish order or collect or enforce a debt in the courts of another State.

Notice. Except as otherwise specified in this EULA, all notices, permissions and approvals hereunder shall be in writing and shall be deemed to have been given upon: (i) personal delivery, (ii) five (5) business days after being sent by certified mail return receipt requested, or (iii) the first business day after sending by a generally recognized national or international guaranteed overnight delivery service. Billing-related notices to You shall be addressed to the relevant billing contact designated by You. All other notices to You shall be addressed to the relevant system administrator designated by You. You shall send all notices, demands, requests or other communications which may be or are required to be given hereunder to SmartBear at the address set forth above. SmartBear shall send all notices, demands, requests or other communications which may be or are required to be given hereunder to You at in the address set forth in the applicable Order, as You may update such information from time to time.

If You acquire access to and use the Services from in the United States or Canada, You shall address all such notices, permissions and approvals to the Legal Department, 450 Artisan Way, Somerville, MA 02145.

If You acquire access to and use the Services from outside the United States or Canada, You shall address all such notices, permissions and approvals to the Legal Department, 3rd floor Dockgate, Unit 19, Merchants Road, Galway, Ireland.

Publicity. You agree to be identified as a customer of SmartBear and agree that SmartBear may refer to You by name, trade name and trademark, if applicable, and may briefly describe your business in SmartBear's marketing materials and web site. 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 marketing section. You grant us the right to add your name and company logo to our customer list and website.

Assignment. Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety (including all Orders, without consent of the other party, to its Affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets). Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

Severability. If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law that provision will be enforced to the maximum extent permissible and the remaining provisions of this Agreement will remain in full force and effect.

Waiver. The failure or delay of SmartBear to exercise any of its rights under this EULA or upon any breach of this EULA shall not be deemed a waiver of those rights or of the breach. A waiver by either party of any term or condition of this EULA or any breach thereof, in any one instance, shall not waive such term or condition or any subsequent breach thereof.

Force Majeure. Except for failure to make payments when due, neither party shall be liable to the other by reason of any failure in performance of this Agreement by either party if the failure arises out of any cause beyond the reasonable control of that party, including, but not limited to, the unavailability or faulty performance of communication networks or energy sources, any act of God, any act or omission of governmental or other competent authority, fires, strikes, industrial dispute, riots, war, inability to obtain materials, embargo, refusal of license, theft, destruction, denial of service attacks, unauthorized access to computer systems or records, programs, equipment, data, or services.

Anti-Bribery. You have not received or been offered any illegal or improper bribe, kickback, payment, gift, or thing of value from any of SmartBear's employees or agents in connection with this EULA. If You learn of any violation of the above restriction, You will use reasonable efforts to promptly notify SmartBear's Legal Department.

Independent Contractors. The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties. There are no third-party beneficiaries to this EULA.

Entire Agreement. This Agreement, together with all applicable Orders and the Maintenance and Support terms contain the complete agreement between the parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous agreements or understandings, whether oral or written. You agree that any varying or additional terms contained in any purchase order or other written notification or document issued by You in relation to the Services licensed hereunder shall be of no effect. No Reseller is authorized to make any amendment to this EULA.

Survival. All provisions of this Agreement which by their nature are intended to survive the expiration or termination of this Agreement (including, without limitation, the following Sections: Termination, Usage Verification, Fees and Payment, Confidentiality and Data Privacy, Ownership, Intellectual Property, Limited Warranty; Remedies, Indemnification, Disclaimers, Limitations of Liability and General)

Last Updated: February 2, 2017