

## AVAYA TERMS OF USE FOR HOSTED SERVICES

v. 2.1 June 21, 2018

### IMPORTANT – READ CAREFULLY BEFORE ACCEPTING THESE TERMS.

THESE TERMS OF USE AND THE APPLICABLE WEBSITE TERMS OF USE (COLLECTIVELY THESE “TERMS”) ARE BETWEEN YOU AND AVAYA INC. A DELAWARE USA CORPORATION WITH AN ADDRESS AT 4655 GREAT AMERICA PARKWAY, SANTA CLARA, CALIFORNIA 95054 UNITED STATES OR THE APPROPRIATE AVAYA AFFILIATE PROVIDING THE SERVICES (“COMPANY”) PROVIDED UNDER THESE TERMS AS FURTHER DESCRIBED IN ANY APPLICABLE SERVICE DESCRIPTION FOR THE SERVICES (HEREINAFTER, “SERVICE”) TO YOU AND CONTAIN TERMS AND CONDITIONS THAT GOVERN YOUR USE AND PURCHASE OF AVAYA HOSTED SERVICES.

YOU REPRESENT THAT YOU ARE A CORPORATION, COMPANY OR OTHER BUSINESS ENTITY, AND NOT A CONSUMER, AND THAT YOU HAVE AUTHORIZED THE PERSON ACCEPTING THESE TERMS TO BIND YOU TO THESE TERMS. THE PERSON ACCEPTING THESE TERMS ON YOUR BEHALF REPRESENTS THAT HE OR SHE HAS READ THESE TERMS IN FULL AND HAS FULL LEGAL AUTHORITY TO LEGALLY BIND YOU TO THESE TERMS. SUCH PERSON’S ONLINE ACCEPTANCE OF THESE TERMS WILL HAVE THE SAME LEGAL EFFECT AS IF YOU WERE PROVIDING A HANDWRITTEN SIGNATURE OF ACCEPTANCE. IF SUCH PERSON DOES NOT HAVE SUCH AUTHORITY OR IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS, SELECT THE “**REJECT**” (OR EQUIVALENT) BUTTON AT THE END OF THESE TERMS (IF SUCH A BUTTON EXISTS), OR DO NOT USE OR ACCESS THE SERVICES. OTHERWISE, SELECT THE “**ACCEPT**” (OR EQUIVALENT) BUTTON AT THE END OF THESE TERMS TO SIGNIFY THAT YOU AGREE TO THESE TERMS. IF AN ACCEPT (OR EQUIVALENT) BUTTON IS NOT PRESENT, THEN YOUR USE OR ACCESS OF THE SERVICES SIGNIFIES THAT YOU AGREE TO THESE TERMS. THESE TERMS ARE EFFECTIVE AS OF THE DATE YOU EITHER SELECT THE “**ACCEPT**” BUTTON OR DOWNLOAD, ACCESS OR USE THE SERVICES. YOU RECOGNIZE AND AGREE THAT THE SERVICES ARE FOR BUSINESS USE AND NOT FOR CONSUMERS, AND YOU REPRESENT AND WARRANT THAT YOU WILL USE THE SERVICES FOR BUSINESS PURPOSES ONLY AND NOT FOR PERSONAL, FAMILY, HOUSEHOLD, OR ANY OTHER CONSUMER PURPOSE.

CUSTOMER ACKNOWLEDGES AND AGREES THAT UNLESS THE SERVICE DESCRIPTION EXPRESSLY STATES OTHERWISE, THE SERVICE DOES NOT COMPLY WITH THE REQUIREMENTS OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT, AS AMENDED, AND ITS IMPLEMENTING REGULATIONS (“HIPAA”). UNLESS THE SERVICE DESCRIPTION EXPRESSLY STATES OTHERWISE, CUSTOMER AGREES THAT IT WILL NOT USE THE SERVICES TO CREATE, RECEIVE, TRANSMIT, MAINTAIN, STORE, USE, DISCLOSE, OR OTHERWISE CAUSE THE SERVICES TO HANDLE PROTECTED HEALTH INFORMATION (“PHI”) AS DEFINED UNDER HIPAA. CUSTOMER RETAINS FULL RESPONSIBILITY TO ENSURE THAT THE SERVICES ARE ONLY APPLIED TO USE-CASE SCENARIOS WHERE THE SERVICES DO PROVIDE THE NECESSARY LEVEL OF SECURITY AND PRIVACY PROTECTIONS. CUSTOMER’S AGREEMENT TO THIS PROVISION IS A MATERIAL CONDITION OF MAKING THE SERVICES AVAILABLE TO CUSTOMER. In addition to any indemnity requirements in these Terms, Customer shall indemnify, defend and hold harmless Company, Company Affiliates and all of the directors, officers, managers, partners, employees, agents, representatives, heirs, successors and assigns of Company and each of Company’s Affiliates against all actions, claims, losses, penalties, fines, assessments, administrative costs, credit protection costs, damages and expenses (including reasonable attorneys’ fees) arising out of Customer’s violation of the provisions of this section, caused in whole or in part by any act or omission of Customer, or of anyone employed by or acting as a subcontractor, representative or agent of Customer. Any limitation on liability set forth in these Terms or any other agreement between Company or its Affiliates and Customer shall not apply to Customer’s liability under this provision.

“**Affiliate**” means, with respect to either party, an entity that is directly or indirectly controlling, controlled by, or under common control with a signatory of these Terms. For purposes of this definition, “**control**” means the power to direct the management and policies of such party, directly or indirectly, whether through ownership of voting securities, by contract or otherwise; and the term “**controlled**” has the meaning correlative to the foregoing. “**Customer,**” “**You,**” or “**Your**” as referenced herein means the legal entity which is accepting these Terms, placing an order under these Terms, or is downloading, accessing or using the Services (or has permitted somebody to do so on its behalf). Customer and Company will cause their Affiliates to comply with these Terms.

## 1. SERVICE PROVIDED; ORDERS; ORDER OF PRECEDENCE; CHANGES; SYSTEM REQUIREMENTS

**1.1 Service Provided.** Upon acceptance (pursuant to Section 1.3 below), Company will make the Services available to Customer. The term of Your access to the Services (a “**Subscription**”) will continue for the period stated in the Customer’s order and commences upon the date the Service is available for Your use (“**Initial Term**”). Unless otherwise prohibited by applicable law or otherwise agreed in writing by Company, the Initial Term will renew and continue to renew automatically, at the then current price (“**Renewal Term**”) and in accordance with the applicable description of the Services then current as of the date of Customer’s ordering of the Services (“**Service Description**”), unless either party gives the other thirty (30) days (or longer period if expressly set out by Company in the applicable Service Description) advance written notice before the end of the current term of their intent not to autorenew. The Renewal Term shall be the same duration as the Initial Term, unless otherwise stated in writing by Company. The Initial Term and any Renewal Term shall be referred to collectively as the (“**Service Period**”).

**1.2** Customer may use the Service solely for the Customer’s internal business use in accordance with the Service Description and, for avoidance of doubt, not for further sublicense or resale. Customer’s rights to use the Service are limited to those expressly granted in these Terms. No other rights with respect to the Service or any related Company Intellectual Property are implied.

**1.3 Orders.** Orders are subject to acceptance by Company. Company may accept an order by electronic email, at the email address provided by Customer to Company from time to time, other agreed means of electronic communication or by commencing to perform the Service. Accepted orders will be governed by these Terms. All other terms and conditions contained in any Customer purchase order or other document not expressly referenced in these Terms will have no effect. If applicable, the execution of an in-country order, incorporating the terms and conditions of these Terms, by Customer or its local Affiliate on the local Affiliate constitutes a contract between those parties in that country. Each order placed and accepted under these Terms will be deemed a separate contract between Customer Affiliate who issues such order and Company Affiliate who accepts it.

**1.4 Order of Precedence.** If there is an express conflict between these Terms, the AUP, any other applicable agreement You may have with Company or its Affiliates, the applicable Service Description (unless the Service Description expressly states otherwise), and the Website Terms of Use, these Terms will govern the use of the Service, followed next by the AUP, any applicable agreement You may have with Company or its Affiliates, any applicable Service Description and finally the Website Terms of Use.

### 1.5 Changes to, and Discontinuation of, the Service.

**1.5.1** Unless the Service Description expressly provides otherwise, Company may, at its sole discretion, modify the form, features, or functionality of the Service and Service Description without prior notice. Company will endeavor to timely document material modifications in the Service documentation at the URLs provided in these Terms, and Customer is responsible for monitoring the documents for notice of such changes.

**1.5.2** Notwithstanding anything to the contrary, Company may discontinue the Service, in part or in its entirety, at any time, and will endeavor to provide Customer sixty (60) days advance notice.

**1.6 System Requirements.** Except as may be expressly set forth in the Service Description, the Service does not include the provision of compatible devices or software to access the Service, Internet access, connectivity and SIP trunking. Customer’s ability to use the Service may be affected by the performance of these items and other similar items. System requirements for the Service may change and Customer is solely responsible to adhere to the system requirements at Customer’s own expense.

**1.7 Registration.** To access the Service, Customer may be asked to provide certain information, including, without limitation, email or physical addresses, before any use of, or access to, the Service will be permitted. Customer agrees that any registration information shall be accurate, correct, and up to date. Customer agrees to promptly update such information as needed, including but not limited to the physical location of each user. Customer shall be solely responsible for all activities that occur under Customer’s account or Subscription.

**1.8 Acceptable Use Policy.** Customer shall comply with the [Acceptable Use Policy](http://support.avaya.com/LicenseInfo) (“**AUP**”) posted at <http://support.avaya.com/LicenseInfo> as applicable (or such successor site as designated by Company).

**1.9 Mobile Services.** Some or all of the Service may be available or accessible via a compatible mobile device. Company cannot guarantee that all mobile devices are or will be compatible with the Service, and Customer is responsible for all mobile service charges.

## 2. PAYMENT, INVOICING, AND TAXES

**2.1 Charges.** Unless otherwise stated in the Service Description, or order, prices are quoted on a consumption and/or subscription basis and are expressed in U.S. Dollars. Pricing herein does not include charges for taxes, fees, and surcharges, which may be included in the invoices. All fees due to Company under these Terms are non-cancellable and the sums paid are non-refundable, except as otherwise expressly provided in these Terms. By subscribing to the Service, Customer authorizes Company to investigate Customer’s credit worthiness

and agrees, from time to time, to provide appropriate authorizations and financial information as Company may reasonably request for this purpose. Payments must be made at the address designated on the invoice or other such place as Company may designate.

**2.2** If You use a credit card or other payment mechanism for a transaction, Your account is billed at the time of or shortly after Your transaction. In such case, You hereby authorize Company or its payment processor to bill Your credit card or other payment mechanism as may be approved by Company in advance or on a periodic basis in accordance with the terms on the order or Service Description. You will provide Company with (and maintain) valid and updated credit card information or other payment information reasonably acceptable to Company. Receipt by Company's payment processor of final good funds in settlement of Your credit card or other payment transaction will satisfy Your payment obligation. Subject to certain credit requirements as determined by Company, Company may agree to allow You to pay amounts due hereunder in arrears. In such event, You will make all of the payments due hereunder within thirty (30) days of the date of the invoice.

**2.3 Late Payments.** Company may suspend licenses and performance of the Services for which payment is overdue until the overdue amount is paid in full or otherwise terminate an order for Services or these Terms. Overdue payments will be subject to a late payment charge of the lesser of one and one half percent (1.5%) per month (19.56% per annum) or the maximum rate allowed by applicable law. Customer will reimburse Company for reasonable attorneys' fees and any other costs associated with collecting delinquent payments.

**2.4 Payment Disputes.** Customer must dispute any charges for the Services in writing within ten (10) business (or other time as expressly set forth in the Service Description) days after the date of the invoice at issue; otherwise, notwithstanding anything to the contrary, Customer waives any dispute or further recourse with respect to the applicable charges. Any disputes by Customer must be brought in good faith. Payments of any disputed amount are due and payable upon resolution.

**2.5 Price Changes.** We reserve the right to change the fees associated with any Services upon thirty (30) days' advance notice. Customer's continued use of the Service after any price change becomes effective constitutes Customer acceptance of the modified fees, and such amounts shall apply as of the first day of the next month after the fee change was posted or communicated to Customer.

**2.6 Taxes.** Unless Customer provides Company with a current tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, use, excise or other taxes and fees which may be levied upon the Service, except for any (a) taxes that are imposed on, measured by, or based upon net income of Company; and (b) taxes in the nature of franchise, doing business, or capital stock taxes if such taxes are based on or measured by capital stock value, par value or net worth of Company and are imposed by any taxing jurisdiction in which Company is subject to such taxes as a result of transactions or activities not related to these Terms. If Customer is required to bear a tax pursuant to this Section or make any withholding, then Customer will pay such tax and any additional amounts as are necessary to ensure that the net amounts received by Company hereunder, after all such payments or withholdings, equal the amounts to which Company is otherwise entitled under these Terms as if such tax or withholding did not exist.

**2.7 Changes to these Terms.** COMPANY MAY MODIFY THESE TERMS AT ANY TIME AT ITS SOLE DISCRETION TO THE EXTENT REQUIRED TO COMPLY WITH (A) CHANGES TO LAWS OR REGULATIONS APPLICABLE TO THE SERVICES, (B) GOVERNMENTAL ORDERS, (C) MODIFICATIONS TO THE SERVICE, OR (D) OBLIGATIONS IMPOSED BY COMPANY SUPPLIERS, BY POSTING MODIFIED TERMS ON [Avaya Terms of Use for Hosted Services](#) (OR SUCH SUCCESSOR SITE AS DESIGNATED BY COMPANY) OR UPON NOTICE TO YOU BY COMPANY VIA EMAIL OR THROUGH SOME OTHER MEANS DESIGNATED BY COMPANY. CHANGES TO THESE TERMS WILL BE EFFECTIVE AS OF THE DATE WE POST THEM OR, AT COMPANY'S DISCRETION, ISSUE OUR NOTICE TO YOU OF SUCH CHANGE, UNLESS WE SPECIFY A DIFFERENT EFFECTIVE DATE WHEN WE MAKE A PARTICULAR CHANGE. YOU ARE SOLELY RESPONSIBLE FOR CHECKING FOR ANY AGREEMENT UPDATES. YOUR CONTINUED USE OF THE SERVICE MEANS THAT YOU ACCEPT AND AGREE TO ANY REVISED TERMS AND CONDITIONS. IN THE EVENT CUSTOMER DOES NOT AGREE TO ANY SUCH MODIFICATION, YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE SERVICE AND TERMINATE THESE TERMS BY PROVIDING WRITTEN NOTICE TO COMPANY OF ITS INTENT TO TERMINATE WITHIN FIFTEEN (15) DAYS AFTER COMPANY NOTIFIES CUSTOMER OF (OR POSTS) THE MODIFIED TERMS. IN THE EVENT CUSTOMER NOTIFIES COMPANY OF ITS INTENT TO TERMINATE THESE TERMS DURING SUCH FIFTEEN (15) DAY RESPONSE PERIOD, THESE TERMS SHALL TERMINATE, AND CUSTOMER SHALL CEASE USE OF THE SERVICE, EFFECTIVE AS OF THE LAST DAY OF THE BILLING PERIOD DURING WHICH THE CUSTOMER NOTIFIED COMPANY OF ITS INTENT TO TERMINATE.

### **3. AGREEMENT TERM; TERMINATION; DOWNTIME; SURVIVAL**

**3.1 Agreement Term.** These Terms begin when accepted by You below ("the "Effective Date") and continue until terminated in accordance with Sections 3.2 and 3.3.

**3.2 Termination for Cause.** Either party may terminate these Terms or any order hereunder if the other party materially breaches these Terms and fails to correct such breach within thirty (30) days of written notice of the breach (without prejudice to Company's rights as set forth in the AUP and otherwise under contract, equity, statute or otherwise). Without limiting the foregoing, failure to comply with payment obligations constitutes a material breach. If Company terminates under this provision, then in addition to any other rights Company may

have, Customer will be responsible for all fees for the Service for the full term of the remaining order, as well as any early termination or cancellation fees (if applicable).

**3.3 Termination for Convenience.** Customer or Company may terminate these Terms for any reason by providing thirty (30) written notice upon expiration or termination of all Customer's orders (with the exception of during the Free Trial Period, if applicable, when Customer's written notice of termination will be effective immediately upon Company's receipt of Customer's notice). Individual orders may be terminated for convenience by Customer in accordance with the conditions set forth in these Terms and/or the Service Description, and subject to termination, true up, or cancellation fees (if any). For any pre-pay contracts, any cancellation that occurs before the Service Period ends will not be entitled to a refund.

**3.4 Expiration/Termination.** Upon expiration of the Service Period or termination pursuant to Sections 3.2 or 3.3, Customer shall immediately cease use of the Service and return or destroy (in accordance with Company's instructions) any deliverables provided to Customer in connection with the Service, including any Company Intellectual Property. Upon request, Customer shall certify in writing that Customer has complied with this provision and Company may provide such certification to its suppliers. Except as provided in Section 3.2, any termination of these Terms will not affect any rights or obligations of the parties under any order accepted before the termination of these Terms became effective. Under all circumstances, Customer shall pay Company the fees for the Service through the effective date of expiration or termination, in addition to any true up or early termination/cancellation fees (if applicable). The provisions contained in these Terms will continue to apply to such accepted orders until their completion or expiry of the order.

**3.5 Downtime and Service Suspensions.** Customer acknowledges that: (a) Customer's access to and use of the Service may be suspended for the duration of any unanticipated or unscheduled downtime or unavailability of any portion or all of the Service for any reason, including as a result of power outages, hacking, system failures, fraud prevention, or other interruptions; and (b) Company shall also be entitled, without incurring any liability to Customer, to suspend access to any portion or all of the Service at any time, on a Service-wide basis: (i) for scheduled downtime to permit Company to conduct maintenance or make modifications, upgrades, or updates to any Service; (ii) in the event of a denial of service attack or other attack on the Service or other event that Company determines, in its sole discretion, may create a risk to the applicable Service, to Customer or to any of Company's other customers if the Service were not suspended; or (iii) in the event that Company determines that it is necessary or prudent to do so for legal or regulatory reasons (collectively, "**Service Suspensions**"). WITHOUT LIMITATION TO SECTION 9, COMPANY SHALL HAVE NO LIABILITY WHATSOEVER FOR ANY DAMAGE, LIABILITIES, LOSSES (INCLUDING ANY LOSS OF DATA OR PROFITS) OR ANY OTHER CONSEQUENCES THAT CUSTOMER MAY INCUR AS A RESULT OF ANY SERVICE SUSPENSION. TO THE EXTENT COMPANY IS ABLE, COMPANY WILL ENDEAVOR TO PROVIDE CUSTOMER NOTICE OF ANY SERVICE SUSPENSION IN ACCORDANCE WITH THE SERVICE DESCRIPTION AND TO POST UPDATES REGARDING RESUMPTION OF THE SERVICE FOLLOWING ANY SUCH SUSPENSION, BUT SHALL HAVE NO LIABILITY FOR THE MANNER IN WHICH COMPANY MAY DO SO OR IF COMPANY FAILS TO DO SO.

**3.6 Survival.** The provisions concerning survival, Company's Intellectual Property rights, disclaimer of warranties, limitation of liability, any indemnification obligations under these Terms in any section of these Terms, Feedback, Confidentiality and Protection, Miscellaneous, and any other terms which, by their nature, are intended to survive termination will survive any such termination of these Terms.

## **4. CUSTOMER CONTENT AND MARKS**

**4.1** Customer is solely responsible for the content of all information and communications, whether visual, written, audible, or of another nature, sent, displayed, uploaded, posted, published, or submitted by Customer (including Customer personnel) while utilizing the Service ("**Customer Content**") and for the consequences of doing so, including any loss or damage to Company, its suppliers or a third party. Company has no responsibility to Customer or to any third party for Customer Content. Customer represents that (a) Customer is the owner of all copyrights and other intellectual property rights in Customer Content or is authorized to access, use, store, archive for a period of time, modify, display, reproduce, prepare derivative works of, and distribute Customer Content; and (b) Company, its suppliers and subcontractors are authorized to do the same to the extent necessary for the purpose of providing the Service.

**4.2** As between Company and the Customer, Customer retains all right, title and interest in and to Customer Content. Customer is solely responsible for protecting and enforcing, at Customer expense, any intellectual property rights Customer may have in Customer Content.

**4.3** Company will not share Customer Content or Other Users' Content (as defined in Section 4.1) with any third parties unless: (a) Company has Customer written or electronic consent for sharing any of Customer Content and Other Users' Content; (b) it is required by law; or (c) Company provides Customer Content or Other Users' Content to third parties (e.g. sub-contractors) to carry out tasks on Company's behalf (e.g., data storage, etc.) as directed by Company and subject to appropriate agreements with those third parties.

**4.4** Customer hereby grants Company a limited, non-exclusive, non-transferable, non-sublicenseable license to display Customer trade names, trademarks, service marks, logos, domain names and the like ("**Customer Marks**") and to host and display likenesses and photo images for the purpose of providing the Service to Customer or promoting or advertising that Customer uses the Service; provided, that the

use of Customer Marks in connection with these Terms shall not create any right or title in or to the use of the Customer Marks and all such use and goodwill associated with Customer Marks will inure to the benefit of Customer.

## 5. OTHER USERS' CONTENT

**5.1 Other Users' Content.** Company does not control and shall have no liability or responsibility for the content of any information and communications, whether visual, written, audible, or of another nature, sent, displayed, uploaded, posted, published, or submitted by other users while interacting with the Service, including, without limitation, likenesses or photo images, advertisements or sponsored content ("**Other Users' Content**"). Other Users' Content may be protected by copyright and other intellectual property rights of such users or other persons.

**5.2** Customer represents that (a) Customer is authorized by Customer's customers and by any other individuals with whom Customer interacts or communicates via the Service to access, use, store, archive for a period of time, modify, display, reproduce, prepare derivative works of, and distribute their Other Users' Content; (b) Company, its suppliers and subcontractors are authorized to do the same to the extent necessary for the purpose of providing the Service; and (c) Customer is fully responsible for any damages, liabilities, or losses (including, without limitation, attorneys' fees and court costs) incurred by Company arising from any failure by Customer to comply with Sections 5.2(a) or (b).

## 6. COMPANY'S INTELLECTUAL PROPERTY RIGHTS

**6.1 Company Owns Company Intellectual Property.** Company and/or its Affiliates, licensors or suppliers own all right, title, and interest in and to the Service and all intellectual property; including but not limited to software (if any), any and all deliverables provided to Customer in connection with these Terms as well as any know-how, derivative works, inventions, processes, databases, documentation, training materials, and any other intellectual property and any tangible embodiments of it (collectively, "**Company Intellectual Property**"). Customer shall not copy, modify, rent, lease, sell, loan, distribute, or create derivative works of the Service or any Company Intellectual Property.

**6.2 Marks.** Nothing in these Terms grants Customer any right to use any trade names, trademarks, service marks, logos, domain names, trade dress, or other distinctive brand features of Company or its subcontractors or suppliers. Customer shall not remove, obscure, or alter any proprietary rights notices, such as copyright or trademark notices, attached to or contained within Company Intellectual Property, the Service, or any software.

## 7. RIGHTS AND DISCLAIMERS

**7.1** All information transmitted through the Service is the sole responsibility of the person from whom such information originated. Company is not responsible for and will not be liable in any way for such content. Company reserves the right, but is not obligated to: (a) pre-screen, refuse, flag, filter, or remove any material posted on the Service, including any Customer Content, which Company, in its sole discretion, deems inconsistent with these Terms, including any material Company has been informed or has reason to believe constitutes intellectual property infringement; and/or (b) take any action it deems appropriate with respect to any prohibited use of the Service or other Company Intellectual Property or other use of the Service that it deems to be inappropriate, in violation of these Terms, or potentially disruptive to the Service or Company's network, including, without limitation, issuing warnings or disabling or terminating Customer's Subscription to the Service, accounts or any user's access to all or part of the Service. Notwithstanding any other provision in these Terms, Company may take the action(s) set forth in Sections 7.1(a) and 7.1(b), or similar actions, without notice or liability to Customer or any other party, although Company will have no obligation or responsibility to take any such action or review material or content posted on the Service. Accordingly, Company assumes no liability for any action or inaction regarding transmissions, communications, or content provided by Customer or any third parties.

**7.2** Customer acknowledges that, as part of the Service, Company may, for a period of time, but is not obligated to, archive Customer Content and Other Users' Content and may periodically delete Customer Content and Other Users' Content after a certain period of time without notice to You, including, without limitation, after expiration or termination of Your Subscription or as may be required by applicable law. To the extent that You wish to retain any Customer Content or Other Users' Content, You are solely responsible to ensure that such information is downloaded, saved and/or backed-up. Company may also implement reasonable limits as to the size or duration of storage of any Customer Content or Other Users' Content.

**7.3** It is Company's policy to respond to notices of alleged copyright or trademark infringement that comply with applicable international intellectual property law (including, without limitation, in the United States the Digital Millennium Copyright Act) and where appropriate at Company's discretion to terminate the accounts or subscription of infringers. If You would like to send Company an alleged copyright or trademark infringement notice as it pertains to the Service, go to the following link <http://support.avaya.com/AvayaCopyrightAgent> (or such successor site as designated by Company) and follow the instructions on how to get in touch with Company. If You have trouble accessing this link, then You may contact Company for further information at [copyrightagent@avaya.com](mailto:copyrightagent@avaya.com) with the subject line: "DCMA Takedown Request" or by mail to:

Avaya Copyright Agent Notification  
350 Mount Kemble Avenue  
Room 2C109  
Morristown, NJ 07960

Phone: +1-908-953-2044

## **8. DISCLAIMER OF OTHER WARRANTIES**

**8.1** TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, COMPANY PROVIDES NO OTHER WARRANTIES, AND EXPRESSLY DISCLAIMS ANY WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE SERVICE OR ANY SERVICES HEREUNDER, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES AND CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, OR NON-INFRINGEMENT. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, NEITHER COMPANY, NOR ITS LICENSORS, NOR ITS SUPPLIERS WARRANTS THAT: (A) CUSTOMER'S USE OF THE SERVICE WILL MEET CUSTOMER REQUIREMENTS OR PROVIDE ANY SPECIFIC RESULTS; (B) CUSTOMER'S USE OF THE SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE, OR FREE FROM ERROR OR VIRUSES; (C) THAT CUSTOMER'S USE OF THE SERVICE WILL BE FREE FROM LOSS, CORRUPTION, OR DELETION OF CUSTOMER OR THIRD PARTY DATA; (D) THAT THE SERVICES WILL PREVENT TOLL FRAUD; (E) INFORMATION OR CONTENT PROVIDED TO CUSTOMER THROUGH THE USE OF THE SERVICES WILL BE ACCURATE OR RELIABLE; (F) DEFECTS IN THE SERVICE WILL BE CORRECTED, OR (G) THE SERVICE WILL HAVE ANY PARTICULAR UP-TIME, QUALITY OF SERVICE, OR QUALITY OF VOICE OR FAX COMMUNICATIONS.

## **9. LIMITATION OF LIABILITY**

EXCEPT FOR CLAIMS OF PERSONAL INJURY, WILLFUL MISCONDUCT, VIOLATION OF COMPANY'S OR ITS SUPPLIERS' OR LICENSORS' INTELLECTUAL PROPERTY RIGHTS, AND/OR TO THE EXTENT OF THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THESE TERMS, IN NO EVENT WILL COMPANY AND ITS AFFILIATES AND LICENSORS OR SUPPLIERS, OR CUSTOMER, BE LIABLE, REGARDLESS OF THE THEORY OF LIABILITY OR WHETHER ARISING OUT OF THE USE OR INABILITY TO USE THE SERVICE OR OTHERWISE FOR: (A) ANY INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY, STATUTORY, INDIRECT, OR CONSEQUENTIAL DAMAGES; (B) LOSS OR CORRUPTION OF DATA OR INTERRUPTED OR LOSS OF BUSINESS; OR (C) TOLL FRAUD, ANY LOSS OF PROFITS, REVENUE, REPUTATION, GOODWILL, OR ANTICIPATED SALES OR SAVINGS, OR COST OF COVER, SUBSTITUTE GOODS, OR PERFORMANCE, EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

ALL LIABILITY OF COMPANY, ITS AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, SUPPLIERS, AND LICENSORS COLLECTIVELY FOR CLAIMS ARISING OUT OF THESE TERMS, CUSTOMER'S ORDER, OR THE SERVICE SHALL NOT EXCEED THE FEES PAID TO COMPANY FOR THE SERVICE DURING THE TWELVE (12) MONTHS BEFORE THE LAST EVENT THAT GAVE RISE TO THE CLAIM. THE LIMIT IS IN THE AGGREGATE AND NOT PER INCIDENT.

NOTHING IN THESE TERMS LIMITS OR EXCLUDES LIABILITY THAT CANNOT BE LIMITED OR EXCLUDED UNDER APPLICABLE LAW.

## **10. INDEMNIFICATION**

**10.1 Company's Defense and Indemnification Obligations.** Company will defend Customer against third party claims brought against Customer to the extent arising solely from an allegation that the Service directly infringes a third party patent or copyright. Company will indemnify Customer against damages (specifically excluding any increased or enhanced damages resulting from Customer's willful infringement) finally awarded against Customer by a court of competent jurisdiction or a settlement amount approved by Company. Company's obligations under this Section will not apply if the claim arises or results from (a) Customer's breach of these Terms (including, but not limited to the AUP), and the Service Description, (b) modification to the Service or use of the Service outside the scope of these Terms, (including, but not limited to the AUP incorporated herein), and the Service Description, (c) combination, operation, or use of the Service with, or damages based on the value of, products, software, data, services or business processes not provided by Company, (d) non-Company products, software, services, or business processes, (e) Company's compliance with any designs, specifications, requirements or instructions provided by Customer or a third party on Customer's behalf, (f) use of non-current or unsupported versions of the Service, or use of the Service after Company notifies Customer to stop use due to a third party claim, (g) Customer Content or data, Other Users' Content or any other content not provided by Company, or (h) any services, products, software or business processes Customer provides based on or related to the Service. In the event a claim is made or likely to be made, Company may, at Company's option, (i) procure for Customer the right to continue using the Service under the terms of these Terms, or (ii) replace or modify the Service to be non-infringing without material decrease in functionality. If these options are not commercially reasonably available, at Company's discretion, Company may terminate the Service upon written notice to Customer and refund Customer any advanced payments for unused subscription rights.



**10.2 Your Defense and Indemnification Obligations.** Customer will defend Company and its Affiliates, and their respective officers, directors, employees, contractors, suppliers, licensors, partners and agents (each, an “Company Indemnified Party”) against third party claims brought against a Company Indemnified Party arising from (a) Customer’s breach of these Terms (including, but not limited to the AUP), and the Service Description, (b) Customer’s violation of applicable law, (c) Customer Content or data, Other Users’ Content, or the combination of Customer’s Customer Content or data, or Other Users’ Content, with other applications, content or processes (including, but not limited to any claim involving infringement or misappropriation of third party rights), (d) Customers use of the Services, (e) a dispute between Customer and any client, or dispute between Customer and any third party with whom Customer uses the Service to interact, or (f) Customers or its employees’ or agents’ negligence or willful misconduct. Customer will indemnify the applicable Company Indemnified Party against all damages finally awarded against the Company Indemnified Party (or the amount of any settlement entered into by Customer) with respect to such claims.

**10.3 Indemnification Procedures.** The party against whom a third party claim is brought will (a) timely notify the other party in writing of the claim (provided, that the failure to provide timely notice shall not relieve the indemnifying party of its obligations under Section 10 unless the indemnifying party’s defense of such claim is materially prejudiced by such failure), and (b) reasonably cooperate in the defense of the claim and may participate in the defense of the claim at its own expense. The party that is obligated to defend a claim will have the right to fully control the defense and to settle the claim; provided, however, that any settlement of a claim shall not include a financial or specific performance obligation on, or admission of liability by, the party against whom the claim is brought.

**10.4 Sole Remedy.** THE FOREGOING STATES THE INDEMNIFYING PARTY’S ENTIRE LIABILITY, AND THE INDEMNIFIED PARTY’S SOLE AND EXCLUSIVE REMEDY, WITH RESPECT TO ANY INTELLECTUAL PROPERTY CLAIMS. THE FOREGOING ALSO IS IN LIEU OF, AND COMPANY DISCLAIMS, ALL WARRANTIES OF NON-INFRINGEMENT WITH RESPECT TO THE SERVICE AND ANY OTHER COMPANY INTELLECTUAL PROPERTY.

## **11. PRIVACY**

**11.1 Definitions.** For the purpose of these Terms: (a) “**Personal Data**” means any information relating to an identified or identifiable natural person (“**Data Subject**”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; (b) “**Processing**”, “**Process**”, “**Processed**” means any operation or set of operations which is performed on Personal Data or on sets of Personal Data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction; (c) “**Data Controller**” means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of Personal Data; (d) “**Data Processor**” means a natural or legal person, public authority, agency or other body which processes Personal Data on behalf of the Data Controller. For the avoidance of doubt, the foregoing terms shall have the meaning as per [the European General Data Protection Regulation](#) (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016) (“**GDPR**”).

### **11.2 Processing Personal Data on behalf of Customer**

**11.2.1** Any Processing of Personal Data by Company under these Terms shall occur only (a) on behalf of Customer (including when Processing is initiated by Customer’s users), (b) in accordance with these Terms, and (c) for the purpose of fulfilment of Customer’s instructions.

**11.2.2** Customer’s instructions for the Processing of Personal Data shall comply with applicable data protection laws and regulations. Customer shall have sole responsibility for the legitimacy, adequacy and accuracy of Personal Data and the means by which Customer acquired Personal Data. Provided Company considers an instruction of Customer to violate applicable data protection regulations, it shall notify Customer without undue delay. This does not include an obligation of Company to actively monitor Customer instructions for compliance.

**11.2.3** These Terms are Customer’s complete and final instructions at the time of signature of these Terms to Company for the Processing of Personal Data. However, such instructions may be amended, supplemented or replaced by Customer in documented form at any time (new instruction). If such new instructions from Customer exceed the scope of these Terms, they shall be considered as a request to amend these terms, and the parties shall commence good faith negotiation on this change request.

**11.2.4** If for any reason Company is unable to comply with any agreed instruction(s), Company will inform Customer of this fact without undue delay. Customer may then suspend the transfer of Personal Data to Company, restrict the access to it, request all Personal Data to be returned to Customer and / or terminate these Terms as per the terms of these Terms.

**11.2.5** Customer is responsible as Data Controller for compliance with the applicable data protection laws and regulations, unless the applicable laws and regulations specifically impose an obligation on Company (acting as Data Processor).

**11.2.6** Company will Process Personal Data as necessary to provide Services pursuant to these Terms (and as further instructed by Customer in its use of the above).

**11.2.7** Company will Process Personal Data for the duration of respective order, unless otherwise agreed upon in writing or required by applicable law.

**11.2.8** The categories of Data Subjects affected by the Processing of Personal Data on behalf of Customer within the scope of these Terms result from these Terms and in particular from Customer's individual usage of Services provided by Company. They typically include: employees, agents, advisors, freelancers and business partners of Customer (who are natural persons); natural persons (employees etc.) of customers and prospective customers of Customer, as well as of Customer customers' customers, etc.

**11.2.9** The types of Personal Data affected by the Processing on behalf of Customer within the scope of these Terms result from these Terms and in particular from Customer's individual usage of (and input into) Services provided by Company. They typically include: name, contact information (company, title / position, email address, phone number, physical address), connection data, location data, video / call (recordings) data, information concerning family, lifestyle and social circumstances (including age, date of birth, marital status, number of children and name(s) of spouse and / or children) and metadata derived thereof, etc.

**11.3 Company's personnel.** Company shall: (a) ensure all employees involved in Processing of Personal Data on behalf of Customer have committed themselves to confidentiality, are prohibited from Processing Personal Data without authorization, have received appropriate training on their responsibilities; (b) appoint in country / global data protection officer, to the extent required by the applicable law, and provide his / her contact details on request to Customer in writing.

#### **11.4 Technical and organizational measures**

**11.4.1** Company has implemented and shall maintain technical and organizational security measures that are appropriate with respect to the Processing of Personal Data that is undertaken on behalf of Customer. Company shall ensure a level of security appropriate to the risk of varying likelihood and severity for the rights and freedoms of Data Subjects and regularly check their abidance.

**11.4.2** Company shall be entitled to modify its technical and organizational measures as long as an at least equivalent level of security appropriate to the risk of varying likelihood and severity for the rights and freedoms of natural persons is maintained. Current technical and organizational measures at Company may be reviewed and accessed via <https://www.avaya.com/en/privacy-toms-customers-24778>. Additional technical and organizational measures and information concerning such measures may be specified in these Terms and associated documentation.

#### **11.5 Sub-processors (sub-contractors) and international Personal Data transfers.**

**11.5.1** Company may engage sub-processors (sub-contractors) to Process Personal Data on behalf of Customer. Company shall make sure that at least equivalent data protection obligations, as set out in this DPA, are imposed on all sub-processors Processing Personal Data on behalf of European Economic Area or Switzerland ("EEA / CH") based Customers by way of a contract or other legal act under European Union or European Member State law, in particular providing sufficient guarantees to implement appropriate technical and organizational measures.

**11.5.2** A list of sub-processors that may be engaged by Company while Processing Personal Data on behalf of EEA / CH based Customers can be found via <https://www.avaya.com/en/privacy-subcontractors>. At least twenty (20) calendar days before Company engages any new sub-processor, Company will update the directory on the website above. Customer is entitled to object to the use of new sub-processor(s) for any Processing of Personal Data on its behalf with a term of ten (10) business days after any new sub-processor is listed on the aforementioned website. This objection shall be sent by e-mail to [dataprivacy@avaya.com](mailto:dataprivacy@avaya.com) (a) referencing the full legal name (and other credentials) of Customer and these Terms, (b) including the copy of the respective purchase order, and (c) providing the reason for the objection. If Customer exercises his right to objection, Company shall at its choice and sole discretion (a) refrain from using the objected sub-processor to Process Personal Data on behalf of Customer and confirm this to Customer in writing, (b) contact Customer and seek for an agreement on a mitigation of the reason for the objection (if an agreement between the parties is reached, Customer shall revoke the objection), or (c) have the right to terminate these Terms entirely or only with respect to the Processing on behalf of Customer for which the objected new sub-processor shall be engaged.

**11.6** For any transfer of Personal Data to a country outside the EEA / CH the requirements of Article 44 GDPR must be fulfilled.

**11.6.1** The transfers of Personal Data between Company's Affiliates shall be governed by the Binding Corporate Rules Policy. The Company's Binding Corporate Rules Policy is available at [www.avaya.com/privacy-BCRprocessor](http://www.avaya.com/privacy-BCRprocessor) and is incorporated herein by reference.



**11.6.2** If Company transfers Personal Data originating from the EEA / CH to third party sub-processors (i.e., Company's sub-contractors that are not Company's Affiliates) located in countries outside the EEA / CH that have not received a binding adequacy decision by the European Commission, such transfers shall be subject to (a) the terms of Standard Contractual Clauses (as per European Commission's Decision 2010/87/EU); or (b) other appropriate transfer mechanisms that provide an adequate level of protection in compliance with the GDPR.

**11.7 Requests from Data Subjects.** Company shall, in accordance with applicable laws, promptly notify Customer if Company receives a request from Data Subject to exercise his rights, such as: right of access, right to rectification, restriction of Processing, erasure ("right to be forgotten"), data portability, object to the Processing, or right not to be subject to an automated individual decision making, etc. Taking into account the nature of the Processing, Company shall assist Customer by appropriate technical and organizational measures, insofar as this is possible, for the fulfilment of Customer's obligation to respond to Data Subject request under data protection laws and regulations. In addition, to the extent Customer, in its use of the Services provided by Company, does not have the ability to address Data Subject request, Company shall upon Customer's written request assist Customer in responding to such Data Subject request, to the extent Company is legally permitted to do so and the response to such Data Subject request is required under applicable data protection laws and regulations. To the extent legally permitted, Customer shall be responsible for any costs arising from Company's provision of such assistance.

### **11.8 Notification and incidents**

Company shall:

**11.8.1** Immediately notify Customer of any actual or alleged incident of unauthorized or accidental disclosure of or access to any Personal Data or other material breach of these Terms by Company or any of its staff, sub-processors or any other third party (the "**Security Breach**");

**11.8.2** Promptly provide Customer with full cooperation and assistance in respect of any Security Breach and all information in Company's possession concerning the Security Breach, including the following: (a) the possible cause and consequences of the breach; (b) the categories of Personal Data involved; (c) a summary of the possible consequences for the relevant Data Subjects; (d) a summary of the unauthorized recipients of Personal Data; and (e) the measures taken by Company to mitigate any related risk and / or loss or damage or (potential loss or damage);

**11.8.3** Not make any announcement or publish or otherwise authorize any broadcast of any notice or information about a Security Breach (the "**Breach Notice**") without the prior written consent from Customer; and prior written approval by Customer of the content, media and timing of the Breach Notice unless such Beach Notice is mandatory under the applicable law.

### **11.9 Data protection impact assessment and prior consultation**

**11.9.1** Upon written request of Customer and subject to reasonable remuneration which shall be subject to a separate agreement, Company shall assist Customer in ensuring compliance with its obligations pursuant to Articles 35 (Data protection impact assessment) and 36 (Prior consultation) GDPR, taking into account the nature of processing and the information available to Company.

### **11.10 Return and deletion of Customer Personal Data**

**11.10.1** Personal Data (including any copy of it) shall not be kept longer than is required for the Processing purposes, unless (a) a longer retention period is required by applicable law or (b) Customer instructs Company in writing (i) to keep certain Personal Data longer and Company agrees to follow such instruction or (ii) return or delete certain Personal Data earlier.

**11.10.2** The return of any data storage medium provided by Customer to Company shall be conducted without undue delay (a) after termination / expiration of the Processing activity or (b) earlier as instructed by Customer.

### **11.11 Audits**

**11.11.1** Upon prior written request by Customer Company shall supply Customer with all information necessary to effectively perform an audit on Company's compliance with Section 11 of these Terms.

**11.11.2** Upon prior written notice and within a reasonable term Company shall grant Customer access to its data Processing facilities, data files and documentation relevant for the Processing activities during its usual business hours without disturbances to the normal course of operations. For clarity purposes Company is not under an obligation to provide Customer with an access to its systems which Process Personal Data of other Company's customers / partners (Data Controllers). The engagement of a third party auditor to conduct the audit on behalf of Customer shall be subject to Company's prior written consent, which may only be refused on due cause, and to an executed written confidentiality agreement between the third party auditor, Customer and Company. Customer will provide Company any audit report(s) generated in connection with any audit under this Section 11.11.2. Customer may use the audit report(s) only for the purposes of meeting its regulatory audit requirements and / or confirming compliance with the requirements of these Terms. The audit report(s) shall constitute confidential information of the parties under these Terms.

## 11.12 Co-operation with law enforcement authorities

Company reserves the right to fully cooperate with any law enforcement authorities, regulatory authorities, or court order requesting or directing Company to disclose the Personal Data of anyone posting any messages or content or publishing or otherwise making available any materials that are believed to violate these Terms. Customer is fully responsible for informing all relevant Data Subjects with whom Customer may communicate or otherwise interact via the Service of the foregoing right belonging to Company. BY ACCEPTING THESE TERMS, CUSTOMER WAIVES AND HOLDS HARMLESS COMPANY FROM ANY CLAIMS RESULTING FROM ANY ACTION TAKEN DURING OR AS A RESULT OF ITS INVESTIGATIONS AND / OR FROM ANY ACTIONS TAKEN AS A CONSEQUENCE OF INVESTIGATIONS BY EITHER COMPANY OR LAW ENFORCEMENT AUTHORITIES. IN ADDITION, CUSTOMER ACKNOWLEDGES AND AGREES THAT COMPANY RESERVES THE RIGHT TO INVOICE CUSTOMER AN ADMINISTRATIVE FEE TO RECOVER COMPANY'S COST TO RESPOND TO VALID SUBPOENAS, COURT ORDERS OR COMPLAINTS ISSUED BY A COMPETENT LAW ENFORCEMENT AUTHORITY, REGULATORY AUTHORITY, OR COURT OF LAW REGARDING ABUSIVE OR FRAUDULENT USAGE OF THE SERVICE BY CUSTOMER OR ITS END USERS.

## 12. FEEDBACK

Company welcomes Customer comments, suggestions, or feedback (collectively, "**Feedback**") about the Service. All such Feedback provided by Customer to Company or its authorized channel partners becomes Company's property and Customer agrees that all intellectual property rights therein are transferred and hereby assigned to Company. Customer agrees to cooperate fully with Company in connection with such transfer and assignment and Company may use such Feedback however it elects without any monetary or other consideration of any kind owed to Customer or any third party.

## 13. EXTERNAL LINKS AND THIRD PARTY SERVICES

In some cases, the Service may contain hyperlinks to non-Company websites, content, or resources or otherwise interface or work with third party services which are not maintained or controlled by Company (collectively, "**External Services and Sites**"). Customer's use of such External Services and Sites is at Customer's own risk. Customer acknowledges and agrees that Company has no responsibility for the availability, security, or other aspect of External Services and Sites; Company does not endorse any advertising, products, resources or third party services available on such External Services and Sites or the External Services and Sites themselves. Company shall not be liable for any loss or damage incurred related to such External Services and Sites, including, without limitation, their availability or the completeness, accuracy, or existence of any advertising, products, or other materials on or available through them.

## 14. CONFIDENTIALITY AND PROTECTION OF SERVICE.

**14.1 Confidentiality.** "**Confidential Information**" means non-public confidential or proprietary information of the disclosing party that is (a) clearly marked confidential at the time of disclosure or (b) a reasonable person would know, based on the circumstances surrounding disclosure and the nature of the information, that the information should be treated as confidential. The party receiving Confidential Information ("**Receiving Party**") will exercise the same degree of care that it uses to protect its own Confidential Information but in no event less than reasonable care to (i) protect and not disclose to third parties (except as otherwise permitted in these Terms) any Confidential Information, (ii) restrict dissemination of Confidential Information to individuals (including Receiving Party's employees, agents, directors, officers, professional legal advisers, Affiliates and/or subcontractors) with a need to know and who are under a substantially similar duty of confidentiality, and (iii) not use any Confidential Information for any purpose other than to perform its obligations under these Terms. The Receiving Party's obligations hereunder shall not apply to information that (i) is rightfully in its possession prior to receipt from the disclosing party, (ii) is or becomes publicly available other than as a result of a breach of these Terms, (iii) is rightfully obtained by the Receiving Party from a third party under no obligation of confidentiality with respect to the information, or (iv) is independently developed by the Receiving Party. The Receiving Party may disclose Confidential Information to the extent required by law or regulation. The confidentiality obligations of each party will survive for three (3) years following termination of these Terms and any orders under it, or the period required by applicable law, whichever is greater, including laws governing the protection of personally identifiable information and the protection of trade secrets; provided trade secrets will remain confidential for so long as they remain trade secrets under applicable law or until Confidential Information falls under one of the exceptions to the confidentiality obligations specified in this Section.

**14.2 Protection of Service.** Customer acknowledges that the Service, any deliverables delivered to Customer in connection with the Service, and all other Company Intellectual Property are the property and Confidential Information of Company, its suppliers, and/or its licensors and contain trade secrets of Company, its suppliers, and/or its licensors. Customer agrees at all times to protect and preserve the Service, any such deliverables, and Company Intellectual Property and to implement reasonable security measures to protect the trade secrets of Company, its Affiliates, suppliers, and its licensors.

## 15. SOFTWARE LICENSE TERMS AND UPDATES

**15.1** If use of the Service requires Customer to download software or software is otherwise made available to Customer, such software is licensed pursuant to (1) the terms and conditions made available to Customer when Customer downloads or installs the software portion of the Service, or (2) if no such terms and conditions exist, then the applicable Global Software License Terms posted at <http://support.avaya.com/LicenseInfo> as applicable (or such successor site as designated by Company) as of the date of the Service commencement per the Customer order will apply, for the sole purpose of using the Service, in accordance with these Terms or Service Description, and solely for the duration of the Service Period.

**15.2** It is possible that software may automatically download and install updates from Company or its Affiliates from time to time. In such event, Customer agrees to allow such updates to be promptly downloaded and installed as part of Customer's use of the Service.

## **16. GOVERNING LAW, DISPUTE RESOLUTION**

**16.1 Governing Law.** These Terms and any dispute, claim or controversy arising out of or relating to these Terms ("Dispute"), including without limitation the formation, interpretation, breach or termination of these Terms, or any issue regarding whether a Dispute is subject to arbitration under these Terms, will be governed by California State laws, excluding conflict of law principles, and the United Nations Convention on Contracts for the International Sale of Goods.

**16.2 Dispute Resolution.** Any Dispute will be resolved in accordance with the provisions of this Section 16. The disputing party shall give the other party written notice of the Dispute in accordance with the notice provision of these Terms. The parties will attempt in good faith to resolve each controversy or claim within thirty (30) days, or such other longer period as the parties may mutually agree, following the delivery of such notice, by negotiations between designated representatives of the parties who have dispute resolution authority.

**16.3 Arbitration of Non-US Disputes.** If a Dispute that arose anywhere other than in the United States or is based upon an alleged breach committed anywhere other than in the United States cannot be settled under the procedures and within the timeframe set forth in Section 16.2, it will be conclusively determined upon request of either party by a final and binding arbitration proceeding to be held in accordance with the Rules of Arbitration of the International Chamber of Commerce by a single arbitrator appointed by the parties or (failing agreement) by an arbitrator appointed by the President of the International Chamber of Commerce (from time to time), except that if the aggregate claims, cross claims and counterclaims by any one party against the other party exceed One Million US Dollars at the time all claims, including cross claims and counterclaims are filed, the proceeding will be held in accordance with the Rules of Arbitration of the International Chamber of Commerce by a panel of three arbitrator(s) appointed in accordance with the Rules of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language, at a location agreed by the parties or (failing agreement) ordered by the arbitrator(s). The arbitrator(s) will have authority only to award compensatory damages within the scope of the limitations of Section 9 and will not award punitive or exemplary damages. The arbitrator(s) will not have the authority to limit, expand or otherwise modify the terms of these Terms. The ruling by the arbitrator(s) will be final and binding on the parties and may be entered in any court having jurisdiction over the parties or any of their assets. The parties will evenly split the cost of the arbitrator(s)' fees, but Company and Customer will each bear its own attorneys' fees and other costs associated with the arbitration. The parties, their representatives, other participants and the arbitrator(s) will hold the existence, content and results of the arbitration in strict confidence to the fullest extent permitted by law. Any disclosure of the existence, content and results of the arbitration will be as limited and narrowed as required to comply with the applicable law. By way of illustration, if the applicable law mandates the disclosure of the monetary amount of an arbitration award only, the underlying opinion or rationale for that award may not be disclosed.

**16.4 Choice of Forum for US Disputes.** If a Dispute by one party against the other that arose in the United States or is based upon an alleged breach committed in the United States cannot be settled under the procedures and within the timeframe set forth in Section 16.2, then either party may bring an action or proceeding solely in either the Superior Court of the State of California, Santa Clara County, or the United States District Court for the Northern District of California. Except as otherwise stated in Section 16.3 each party consents to the exclusive jurisdiction of those courts, including their appellate courts, for the purpose of all actions and proceedings arising out of or relating to these Terms.

**16.5 Injunctive Relief.** Nothing in these Terms will be construed to preclude either party from seeking provisional remedies, including, but not limited to, temporary restraining orders and preliminary injunctions from any court of competent jurisdiction in order to protect its rights, including its rights pending arbitration, at any time. The parties agree that the arbitration provision in Section 16.3 may be enforced by injunction or other equitable order, and no bond or security of any kind will be required with respect to any such injunction or order.

**16.6 Time Limit.** Actions on Disputes between the parties must be brought in accordance with this Section within two (2) years after the cause of action arises. For the avoidance of doubt, this time limit does not trump the ten (10) business day period in Section 2.5, Payment Disputes.

**16.7 Compliance.** Customer and Company will cause their Affiliates to comply with the dispute resolution procedures described in this Section.

**16.8 Disputes with Other Users.** Customer is solely responsible for Customer's interactions with third parties with whom it uses the Service to interact. Company will have no liability with respect to such Customer interactions or disputes that may arise between Customer and such third parties. Company reserves the right, but has no obligation, to become involved with disputes between Customer and any such third party in the event that Company's interests are impacted.

## **17. RECORDING**

**17.1** Some Services may involve recording and/or monitoring. For those Services, information uploaded to or in any way passing through the Service, including written, visual, or oral communications or other electronic means, may be recorded or monitored for quality assurance, diagnostic, and/or training purposes. By accessing or using the Service, You consent to such recording, monitoring and usage. You are also responsible for informing anyone with whom You interact or otherwise communicate via the Service that information uploaded to or in any way passing through the Service, including written, visual or oral communications or other electronic means, may be recorded or monitored for quality assurance, diagnostic, and/or training purposes.

**17.2 Recording of Conferences.** If conferences are applicable to the Service You are subscribing to, You acknowledge that the laws of certain states, provinces or countries require that if a conference is to be recorded, all participants in the conference must be informed of that prior to the recording taking place, so they may consent to being recorded (if required by applicable laws) in the relevant jurisdictions when using recording features. You acknowledge and agree that You shall be solely responsible for complying with the local laws in the relevant jurisdictions when using recording features (this includes Your obligation to obtain the consent, if required by applicable laws, of all participants before the commencement of the recording). Company shall have no liability to You or any participant in Your recorded conference if such announcement is not made or You fail to comply with applicable laws.

## **18. MISCELLANEOUS**

**18.1 Compliance with Laws.** Customer shall observe all applicable local, state, national, foreign and international laws and regulations when accessing and/or using the Service and any work product or content of the Service, including, without limitation, any export and import laws and/or regulations.

**18.2 International Trade Compliance.** Customer shall not import/export, re-export and/or transfer any work product or content of the Service when accessing and/or using Service in violation of the import/export control laws and regulations of the United States, Canada, Wassenaar Arrangement Member States, World Trade, World Customs Organizations and local laws. In that regard, Customer represents and warrants that: (a) Customer shall obtain any export, re-export, or import authorizations as required; (b) Customer shall not use the Service, content, or work product from Company's Service to design, develop or produce missile, chemical/biological, or nuclear weaponry; and (c) neither Customer nor anyone acting on Customer behalf who accesses or uses the Service, content or work product from Company's Service are (i) subject to total and/or partial country embargos, or (ii) a foreign person or entity blocked or denied by the United States, Canada, Wassenaar Arrangement Member States, World Trade, World Customs organizations or local laws.

### **18.3 Notices.**

**18.3.1** Notices made under this Agreement for You or Your account specifically will be provided to You via a notification message displayed on Your account page or sent to the email address provided in Your registration for the Services or to any updated email address You have provided to Company in accordance with Our standard account information update procedures. It is Your responsibility to keep Your email address current and You will be deemed to have received any email sent to any such email address the next business day upon Our sending of the email, whether or not You actually receive the email.

**18.3.2** For notices made by You under this Agreement and for questions regarding this Agreement or the Services, You may contact Company as follows:

by US Postal Mail at  
Avaya Inc  
Attn: Director of Contracts  
4655 Great America Parkway  
Santa Clara, CA 95054

**18.4 High Risk Activities.** The Service is not designed, manufactured, or intended for any use in any environment that requires fail-safe performance in which the failure of the Service could lead to death, personal injury, or significant property damage ("**High Risk Activities**"). Customer assumes the risk for use of the Service in any High Risk Activities.

**18.5 Force Majeure.** Company will not be liable for any delay or failure in performance, including failure of the Service to function or operate, to the extent the delay or failure is caused by events beyond Company's reasonable control, including, without limitation, fire, flood, Act of

God, explosion, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, inability to secure services or materials, transportation or hosting facilities.

**18.6 Agreement in English.** The parties confirm that it is their wish that these Terms, as well as all other documents relating hereto, including all notices, have been and shall be drawn up in English only. Les parties aux présentes confirment leur volonté que cette convention, de même que tous les documents, y compris tout avis, qui s'y rattachent, soient rédigés en langue anglaise. To the extent that the *Civil code of Québec* is found to govern any part of these Terms, the Customer hereby waives its rights pursuant to articles 2125, 2126 and 2129 of the *Civil code of Québec*, and acknowledges that its sole rights and recourses with respect to termination of these Terms are those set forth in these Terms.

**18.7 Miscellaneous.** These Terms (including, but not limited to, the AUP and applicable Service Description and the Service order(s)) constitutes the entire understanding of the parties with respect to the subject matter of these Terms and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between the parties relating to that subject matter and will not be contradicted or supplemented by any prior course of dealing between the parties. These Terms may be executed in multiple counterparts, each of which will constitute an original and all of which will constitute but one agreement, subject to local law requirements. These Terms may be executed by electronic signature, which will be binding between the parties as though handwritten. Subject to local law requirements, electronic signature will include either an electronic symbol adopted by a person with the intent to sign these Terms or a photostatic copy of a handwritten signature. Except as otherwise provided herein in Section 2.8, Changes to These Terms, any modifications or amendments to these Terms must be in writing and physically or electronically signed by both parties. In no event will electronic mail constitute a modification or amendment to these Terms. If any provision of these Terms is determined to be unenforceable or invalid by court decision, these Terms will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law. The failure of either party to assert any of its rights under these Terms, including, but not limited to, the right to terminate these Terms in the event of breach or default by the other party, will not be deemed to constitute a waiver by that party of its right to enforce each and every provision of these Terms in accordance with its terms. Customer agrees that no joint venture, partnership, employment, or agency relationship exists between Customer and Company as a result of these Terms or use of the Service. Company or its representative may audit at Company's discretion, Customer's compliance with these Terms and Customer's use of the Service, and Customer shall reasonably cooperate with such audit.

**18.8 Assignment & Subcontractors.** Company may assign these Terms and any order under these Terms to any of its Affiliates or to any entity to which Company may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under these Terms. Any other assignment of these Terms or any rights or obligations under these Terms without the express written consent of the other party (not to be unreasonably withheld) will be invalid. Company may subcontract any or all of its obligations under these Terms, but will retain responsibility for the work.

**Schedule 1  
To Terms of Use**

**GOOGLE SUPPLEMENT**

**THIS SCHEDULE 1 TO THE TERMS OF USE (HEREINAFTER, "GOOGLE SUPPLEMENT") APPLIES TO YOU IN ADDITION TO THE TERMS ONLY IF YOU ARE USING OR ACCESSING ANY SERVICE DEPLOYED OR HOSTED IN THE GOOGLE CLOUD. IF YOU HAVE ANY QUESTIONS REGARDING WHETHER OR NOT THE SERVICE YOU ARE USING OR ACCESSING IS DEPLOYED OR HOSTED IN THE GOOGLE CLOUD, CONTACT COMPANY.**

Any capitalized terms used in this Google Supplement that have not been defined earlier in the Terms of Use will have the meaning set forth in the "Definitions" section of Google's Cloud Platform License Agreement ("**GCPLA**"), which is found at <https://developers.google.com/cloud/terms/> (or a successor link as designated by Google). If You cannot find the GCPLA at <https://developers.google.com/cloud/terms/> or if any of the following URL links in this Google Supplement do not work, contact Company for assistance. "**Google Services**", when used in this Google Supplement, will have the same meaning as "**Services**" as defined in the GCPLA. Any definitions, URL links, or terms from the GCPLA that are referenced in this Google Supplement are incorporated herein by reference.

**BY USING OR ACCESSING A SERVICE DEPLOYED OR HOSTED IN THE GOOGLE CLOUD, THEN IN ADDITION TO THE TERMS OF USE AND THE THEN-CURRENT SERVICE DESCRIPTION REGARDING THE APPLICABLE SERVICE, YOU ARE AGREEING TO ALL OF THE FOLLOWING TERMS AND CONDITIONS. GOOGLE MAY UPDATE ANY OF THE URL LINKS IN THIS GOOGLE SUPPLEMENT AT ITS DISCRETION AT ANY TIME. YOU ARE RESPONSIBLE FOR COMPLYING WITH THE THEN-CURRENT URL LINKS. IF YOU DO NOT AGREE TO ANY OF THE TERMS AND CONDITIONS IN THIS GOOGLE SUPPLEMENT, THEN YOU MAY NOT USE OR ACCESS A SERVICE DEPLOYED OR HOSTED IN THE GOOGLE CLOUD.**

1. Any use of the Google Services hereunder must be solely in connection with Your use of the Service deployed or hosted in the Google cloud.
2. You agree to comply fully with (a) Google's Acceptable Use Policy ("**Google AUP**") located at <https://cloud.google.com/cloud/terms/aup> (or a successor link as designated by Google), (b) Google's Service Specific terms set forth here: <https://developers.google.com/cloud/terms/service-terms> (or a successor link as designated by Google), and (c) the restrictions in the "Restrictions" section of the GCPLA, some of which may be further addressed in Google's Service Specific Terms.
3. You acknowledge and agree that any content or data You transmit or submit through the Service is being hosted and stored in the Google cloud, and that any content or data You transmit or submit through the Service will be made available to and used, monitored, and accessed by Company, its Affiliates, and third parties (*i.e.*, Google and any subcontractor providing support for the Service) as part of providing the Service to You that is hosted or deployed in the Google cloud. For more information regarding Google's right to use such information or content, see "Use of Customer Data" section in the GCPLA. In addition to Your obligations with respect to privacy under the Privacy section in the Terms of Use, You are responsible for obtaining and maintaining any required privacy-related consents from users of the Service, or any users with whom You use the Service to interact with, to allow access, monitoring, use and disclosure of such content or data as set forth in this Section 3.
4. In addition to any of Your other indemnity obligations set forth in these Terms, You shall defend, indemnify and hold harmless Google, Company, their respective affiliates, and their respective officers, directors, employees, consultants, agents, and Company authorized channel partners, (individually, "**Indemnified Party**" and collectively, "**Indemnified Parties**"), against Indemnified Liabilities in any proceeding to the extent arising from or related to: (a) any failure by You (or anyone acting on Your behalf) to comply with any of the terms and conditions in this Google Supplement (including, but not limited to, any URL links set forth in this Google Supplement); and/or (b) any content, data and/or information provided, transmitted, submitted, and/or displayed by or on behalf of You via the Service in the Google cloud. "**Indemnified Liabilities**" means any (a) settlement amounts approved by the indemnifying party; and (b) damages, fees, and costs finally awarded against the Indemnified Party(ies) by a court of competent jurisdiction.
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cloud, and any other applicable agreement You may have with Company, this Google Supplement will govern, followed next by the Terms, followed then by the Service Description regarding the Service in the Google cloud (unless the Service Description expressly states otherwise), and finally followed by any other applicable agreement you may have with Company or its Affiliates.

**END OF TERMS OF USE**