

Subscription and Services Agreement

IMPORTANT – READ CAREFULLY: This Subscription and Services Agreement (the "**Agreement**") is entered into and effective by and between you and Xactly Corporation, a Delaware corporation ("**Xactly**," "**we**" or "**us**"). If you are agreeing to this Agreement not as an individual but on behalf of your company, then "**Customer**" or "**you**" means your company, and you are binding your company to this Agreement. By clicking on the "I agree" (or similar) button that is presented to you at the time of your Order, or by using or accessing the Service, you indicate your agreement to be bound by this Agreement. This Agreement governs your initial purchase of the Service and related Support Services, as well as any future purchases made by you that reference this Agreement. This Agreement includes any Orders, and any other policies and attachments referenced in this Agreement.

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Definitions.

1.1 "**Affiliate**" means any entity that directly or indirectly controls, is controlled by, or is under common control with the Customer entity signing this Agreement. "**Control**," for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

1.2 "**Customer Data**" means all data or information submitted by or on behalf of Customer to the Service, as described in Section 5.4.

1.3 "**Insights Reports**" means the reports, graphs, charts, and similar output generated by the Xactly Insights portion of the Service. Customer shall have access to Xactly Insights if such Service is purchased by Customer under this Agreement as set forth in an Order Form.

1.4 "**Intellectual Property Right**" means unpatented inventions, patent applications, patents, design rights, copyrights, trademarks, service marks, trade names, domain name rights, mask work rights, know-how and other trade secret rights, and all other intellectual property rights, derivatives thereof, and forms of protection of a similar nature anywhere in the world.

1.5 "**Order Form**" means an ordering document executed by the parties that specifies the Service purchased by Customer under this Agreement. Each Order Form must incorporate this Agreement by reference.

1.6 "**Premium**" and "**Premium Plus**" means certain administration services in addition to Support Services provided by Xactly under this Agreement as specified in an Order Form and further set forth in the support policy referenced in Section 3.1(iv) below.

1.7 "**Professional Services**" means consulting services (such as implementation, strategic advice, and technical services), training or educational services, Premium, Premium Plus, and Support Services. Professional Services excludes the Service.

1.8 "**Service**" means the online, web-based application set forth in an Order Form and provided by Xactly via <https://www.xactlycorp.com> or other designated websites or IP addresses as communicated to Customer by Xactly. The Service as defined in this Agreement shall not include the Professional Services.

1.9 "**Statement of Work**" or "**SOW**" means a document executed by the parties that describes certain Professional Services purchased by Customer under this Agreement. Each Statement of Work must incorporate this Agreement by reference.

1.10 "**Subscriber**" means an individual (i) who is authorized by Customer to use or access the Service and who has been supplied an identification and password by Customer or at Customer's direction or (ii) whose information is stored on the Service for compensation calculation, reporting, territory optimization purposes, or any other calculations using the Service. Customer shall purchase a subscription to the Service for each Subscriber (a "**Subscription**"). An individual Subscriber is not a party to this Agreement. A Subscriber may include Customer's or Customer's Affiliates' employees, consultants, representatives, and agents. Subscriber in all cases excludes competitors of Xactly.

1.11 "Subscription Term" means the period identified as the start date and end date in the Order Form during which Customer's Subscribers are authorized to use or access the Service pursuant to the terms set forth in this Agreement, unless earlier terminated as set forth in Section 10.

1.12 "Support Services" means the support services provided by Xactly in accordance with Xactly's then-current support policy and as identified on an Order Form and further set forth in the support policy referenced in Section 3.1(iv) below. In the event that the level of support is not identified on the Order Form, Customer shall receive a "standard" level of support that is included in the Service.

1.13 "Xactly Materials" means any materials that Xactly provides to Customer as part of, or in the course of providing, the Service or Professional Services and may include the Insights Reports but excludes Customer Data.

2. Service.

2.1 Provision of Service. Xactly shall make the Service available to Customer pursuant to this Agreement and all Order Forms during the Subscription Term. Customer agrees that its purchase of the Service or the Professional Services is neither contingent upon the delivery of any future functionality or features, nor dependent upon any oral or written public comments made by Xactly with respect to future functionality or features.

2.2 Additional Subscribers; Add-ons. From time to time, Customer may replace any Subscriber who no longer uses or needs access to the Service with a new Subscriber so long as Customer is no longer optimizing territories, or calculating, processing, modeling, or storing compensation for the previous Subscriber. Such replacement will incur no additional charge. Customer, however, may not allow more than one individual Subscriber to use or otherwise share a single Subscription. Unless otherwise specified in the applicable Order Form, Xactly shall charge Customer a pro-rated Subscription fee if Customer purchases additional Subscriptions during a Subscription Term (such additional Subscriptions, "Add-ons") during the billing month. The rate for Add-ons shall be the same as the per-Subscriber rate applicable to Customer's existing Subscription in effect at the time Customer purchases the Add-ons. If Customer permits additional Subscribers in excess of the quantity listed on the Order Form to use the Service without paying the applicable Subscriber fees in compliance with this Agreement or Order Form, Xactly may invoice Customer, and Customer shall pay for the additional Subscribers at the rate per Subscriber set forth on Customer's then-current Order Form.

2.3 Customer's Affiliates. Customer's Affiliates may purchase and use Subscriptions and Professional Services subject to the terms of this Agreement by executing Order Forms or Statements of Work hereunder that incorporate by reference the terms of this Agreement, and in each such case, all references in this Agreement to Customer shall be deemed to refer to such Customer's Affiliate for purposes of such Order Form or SOW.

3. Mutual Rights and Responsibilities.

3.1 Xactly's Responsibilities. Xactly shall: (i) comply with all applicable laws in providing the Service and Professional Services; (ii) not use or modify the Customer Data except as otherwise set forth in this Agreement; (iii) use commercially reasonable efforts to maintain the security and integrity of the Service and maintain appropriate administrative, physical, and technical safeguards designed to protect the security, confidentiality, and integrity of Customer Data, as set forth in Xactly's security procedures generally available to Xactly's customers, a copy of which is accessible at: <https://www.xactlycorp.com/current-security-policy>; (iv) provide Support Services to Customer in accordance with its then-current support policies generally available to Xactly's customers, a copy of which is accessible at: <https://www.xactlycorp.com/current-customer-support-policy>; and (v) use commercially reasonable efforts to make the Service available in accordance with its service levels generally available to Xactly's customers, a copy of which is accessible at: <https://www.xactlycorp.com/current-global-service-level-agreement>. The foregoing security procedures, support policies, and service levels are collectively referred to as "**Xactly Policies**." Xactly reserves the right to update its Xactly Policies at any time in its sole discretion provided that any updates shall not materially diminish the level of security, support, or the service levels set forth in such Xactly Policies during the Subscription Term in which Xactly updates such Xactly Policies. Customer may review Xactly's current system status, security overview, and privacy policy at: <https://trust.xactlycorp.com/>.

If Customer's use of the Service involves processing personal data pursuant to Regulation 2016/679 (the "GDPR") and/or transferring personal data outside the United Kingdom, the European Economic Area, or Switzerland to any country not deemed by the UK Information Commissioner's Office or European Commission as providing an adequate level of protection for personal data or applicable personal data regulations, the terms of a separately executed data processing addendum shall apply. Provided however if the parties have not entered into such a separately executed data processing addendum, then the Xactly standard data processing addendum, accessible at <https://www.xactlycorp.com/data-processing-addendum/>, shall apply to personal data processing and be incorporated into this Agreement.

3.2 Customer's Responsibilities. Customer is responsible for all activity that occurs in its instance(s) of the Service and for its Subscribers' compliance with this Agreement. Customer shall: (i) have sole responsibility for the accuracy, quality, integrity, legality, reliability, and appropriateness of all Customer Data; (ii) use commercially reasonable efforts to prevent unauthorized access to, or use of, the Service, and notify Xactly promptly of any such unauthorized access or use; (iii) comply with all applicable laws in using the Service; and (iv) not provide Xactly with any Customer Data that is personally identifying information subject to specialized security regimes, including without limitation for the purposes of Art. 4 No. 13 ("Genetic Data"), No. 14 ("Biometric Data"), No. 15 ("Health Data"), Art. 9 subs. (1) GDPR ("Special Categories of Personal Data") or is covered by the scope of the Health Insurance Portability and Accountability Act ("HIPAA"), the standards promulgated by the PCI Security Standards Council ("PCI"), and the requirements promulgated by IRS Publication 1075 related to Federal Tax Information data ("FTI"). Xactly is not a "Business Associate" under HIPAA, and Customer shall not provide any protected health information to Xactly. Customer acknowledges that social security numbers, government identification numbers, credit card data, and similarly sensitive information are not required for use of the Service and Customer agrees not to provide Xactly with any such information.

4. Fees and Payment.

4.1 Fees. Customer shall pay all fees specified in all Order Forms and Statements of Work executed by the parties hereunder. Except as otherwise specified in any Order Form or Statement of Work, all fees are quoted and payable in United States dollars, payment obligations are non-cancelable, and except as expressly permitted in this Agreement, fees paid are non-refundable. Fees for the Service are based on Subscriptions purchased during the Subscription Term and not actual usage. The number of Subscriptions purchased cannot be decreased during a Subscription Term.

4.2 Invoicing and Payment. Except as otherwise specified in any Order Form or Statement of Work, all fees and charges under this Agreement will be invoiced annually in advance and are due net thirty (30) days from the invoice date. Invoices will be emailed on the day of the date of invoice. In the event that the email date is later, such later date will apply. Customer agrees to accept invoices via email at the billing contact email address specified in the applicable Order Form, as may be updated by Customer upon prior written notice. Customers located outside of the U.S. shall submit payment to Xactly via wire transfer. Customer must provide its complete and accurate billing address and contact information to Xactly.

4.3 Payment Disputes. If Customer has a good faith belief that a particular invoice is incorrect, Customer must contact Xactly in writing within sixty (60) days of such invoice date detailing the basis of the dispute. Customer may only withhold payment on the timely disputed amount in accordance with this Section. Any payment not received by Xactly by the due date and not subject to a good faith dispute may accrue late charges at the maximum rate permitted by law, from the date such payment was due until the date paid. Xactly's other contractual and/or statutory rights, claims, and remedies remain unaffected.

4.4 Suspension of Service. Except as provided in Section 4.3 above, if Customer's account is thirty (30) days or more overdue, then, following five (5) business days' written or emailed notice and an opportunity to cure, in addition to any of its other rights, claims, or remedies, Xactly may suspend Customer's access to the Service until such amounts are paid in full. Provided Xactly provides emailed notice to Customer, Xactly may immediately suspend Customer's access to the Service if Customer is in material breach of Section 5.3(vii)-5.3(xiii) below, provided that such suspension will be narrowly tailored to address the cause of suspension for only the duration needed for Customer to cure such breach.

4.5 Taxes. Unless otherwise stated, Xactly's fees do not include any direct or indirect local, state, federal, or foreign taxes, levies, duties, or similar governmental assessments of any nature, including value-added, use or withholding taxes (collectively, "Taxes"). All payments under this Agreement shall be made free and clear and without deduction of Taxes by Customer. Customer is responsible for paying all Taxes associated with its purchases hereunder, excluding taxes based on Xactly's net income or property. If Customer withholds any Taxes, Customer will gross up the payment to Xactly for the amount specified in the Order Form. If Xactly has the legal obligation to pay or collect Taxes for which Customer is responsible under this Section, the appropriate amount shall be invoiced to and paid by Customer, unless Customer provides Xactly with a valid tax exemption certificate authorized by the appropriate taxing authority.

5. Proprietary Rights.

5.1 Access to Service. In exchange for payment of the fees listed on the applicable Order Form, and subject to the terms of this Agreement, Xactly grants Customer solely for Customer's internal business purposes (a) a nonexclusive, royalty-free, nontransferable right, solely during the Subscription Term (i) to access and use the Service and (ii) to use the Xactly Materials solely in conjunction with Customer's authorized use of the Service, and (b) a nonexclusive, royalty free, worldwide, perpetual license to copy and use the Insights Reports, without modification. Customer shall not, nor permit any third party to, alter or remove, any proprietary trademark or copyright markings incorporated in, marked on or affixed to any Xactly Materials.

5.2 Reservation of Rights. Except for the limited rights expressly granted to Customer in Section 5.1, Xactly reserves all rights, title, and interest in and to the Service, the underlying software, Xactly Technology (as defined in Section 5.5), the Xactly Materials, and the Professional Services, including all related Intellectual Property Rights inherent therein. No rights are granted to Customer hereunder other than as expressly set forth in Section 5.1.

5.3 Restrictions. Customer and its Subscribers shall not (i) modify, copy, display, republish, or create derivative works based on the Service or the underlying software; (ii) modify, copy, or create derivative works of the Xactly Materials, except Customer may copy the Insights Reports as expressly permitted in either Section 5.1(b) above or Section 5.4 below; (iii) frame, scrape, link to, or mirror any content forming part of the Service, other than framing on Customer's own intranets or otherwise for its own internal business purposes; (iv) disassemble, reverse engineer, or decompile the Service or the underlying software; (v) access the Service in order to build a competitive product or service, or copy any ideas, features, functions, or graphics of the Service; (vi) license, sublicense, sell, resell, rent, lease, transfer, assign (except as permitted in Section 11.6), distribute, time share, or otherwise commercially exploit or make the Service available to any third party or include any Service or Xactly Materials in a service bureau or outsourcing offering, other than to Subscribers or as otherwise contemplated by this Agreement; (vii) use the Service to send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (viii) use the Service to send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to children or violative of third-party privacy rights; (ix) upload to the Service or use the Service to send or store viruses, worms, time bombs, Trojan horses or other harmful or malicious code, files, scripts, agents, or programs; (x) interfere with or disrupt the integrity or performance of the Service or the data contained therein; (xi) conduct any platform monitoring, penetration testing or vulnerability scanning of the Service; (xii) attempt to gain unauthorized access to the Service or its related systems or networks; or (xiii) use the Service in a way that circumvents a contractual usage limit. Xactly may monitor Customer's use of the Service to confirm Customer's compliance with the terms and conditions in this Agreement.

5.4 Customer Data. As between Xactly and Customer, Customer retains ownership of all rights, title, and interest in and to all Customer Data. Customer Data is deemed the Confidential Information of Customer under this Agreement. Customer grants Xactly a nonexclusive, worldwide, royalty-free, license to copy, modify, retain, distribute and disclose, display, and otherwise use Customer Data to provide the Service, subject to Section 10.5 (Return/Deletion of Customer Data), and to De-identify Customer Data. "**De-identified**" means that the data cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular company, or individual person, including by removing, without limitation and as applicable, the following identifiers: company names and the names of individuals, addresses, phone numbers, e-mail address(es), and any other information which could reasonably identify, when taken in the aggregate, a specific company, organization, or individual. Customer Data that has been De-identified shall not be deemed Confidential Information or Customer Data, i.e., Xactly may copy, modify, retain, distribute and disclose, display, and otherwise use and commercialize such De-identified data for any purpose permitted under applicable law.

5.5 Intellectual Property Rights Ownership, Use. Xactly alone, its affiliates (and their third party providers, where applicable) shall own all right, title, and interest, including all related Intellectual Property Rights, in and to all of Xactly's Proprietary Technology, as defined in Section 6.1 below, including software, hardware, products, processes, algorithms, user interfaces, know-how, techniques, designs, and other tangible or intangible technical material or information ("**Xactly Technology**") made available to Customer by Xactly in providing the Service, the Xactly Technology, or the Professional Services, and Customer hereby assigns to Xactly any suggestions, ideas, enhancement requests, feedback, recommendations, or other information, in all cases excluding Customer Data and Customer Confidential Information, provided by Customer or its Subscribers relating to the Service, the Xactly Technology, or the Professional Services (the "**Feedback**"). To the extent an assignment of such rights is not possible under applicable law, the foregoing shall be deemed the grant of a comprehensive royalty free, exclusive, worldwide, unlimited, transferable, sublicensable, irrevocable, perpetual license to exploit, modify, create derivative works of, and otherwise use in any way or incorporate Feedback into the Service. Customer agrees to take such further reasonable actions, at Xactly's cost, as Xactly may request to give effect to this Section. Xactly may use such Feedback as it deems appropriate in its sole discretion. This Agreement is not a sale and does not convey to Customer any rights of ownership in or related to the Service, the Xactly Technology, or the Intellectual Property Rights owned by Xactly, its affiliates, and their third-party providers. The Xactly name, the Xactly logo, and the Xactly product names associated with the Service are trademarks of Xactly, its affiliates, and their third party providers, and unless expressly granted herein, no right or license is granted to use them. Customer will not accrue any residual rights to the Xactly Technology or the Service, including any rights to the Intellectual Property Rights in connection therewith.

6. Confidentiality.

6.1 Definition of Confidential Information. As used herein, "**Confidential Information**" means all confidential and proprietary information of a party ("**Disclosing Party**") disclosed to the other party ("**Receiving Party**"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information or the circumstances of disclosure, including (a) the terms and

conditions of this Agreement (including pricing and other terms reflected in all Order Forms and Statements of Work hereunder), (b) the Customer Data, (c) a party's proprietary technology or computer software in all versions and forms of expression and the Service and Professional Services, whether or not the same has been patented or the copyright thereto registered, is the subject of a pending patent or registration application, or forms the basis for a patentable invention (collectively the "**Proprietary Technology**"), (d) the Xactly Materials, Xactly's security information, audits, or reports, and (e) each party's respective business and marketing plans, technology and technical information, product designs, and business processes. The obligations in this Section 6 shall not apply to any information that: (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality; (iii) was independently developed by the Receiving Party without the use of or reference to the Confidential Information of the Disclosing Party; or (iv) is lawfully received from a third party without breach of any obligation owed to the Disclosing Party and without an obligation of confidentiality.

6.2 Confidentiality. The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, except with the Disclosing Party's prior written permission. Either party may disclose Confidential Information to its personnel, auditors, accountants, attorneys, or advisors and those of its affiliates who are subject to confidentiality obligations at least as protective as those herein, which are in no event less than a reasonable standard of care.

6.3 Protection. Receiving Party will use at least the same level of care to prevent unauthorized use of the Confidential Information as it uses for its own confidential and proprietary information of like kind, but in no event less than a reasonable standard of care. The confidentiality obligations contained herein supersede and replace any prior non-disclosure agreement between the parties regarding the subject matter covered by this Agreement.

6.4 Compelled Disclosure. If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prompt prior notice of such compelled disclosure, to the extent legally permitted, and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.

6.5 Remedies. If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of the confidentiality protections hereunder, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.

7. Warranties and Disclaimers.

7.1 Warranties. Each party represents and warrants that it has the legal power and authority to enter into this Agreement. Xactly warrants that: (i) it will provide the Service in a manner consistent with general industry standards reasonably applicable to the provision thereof; (ii) Xactly will not materially decrease the overall functionality of the Service; (iii) it will perform all Professional Services in a professional and workmanlike manner; (iv) it owns or otherwise has sufficient rights in the Service to grant to Customer the rights to use the Service granted herein and the Service will not infringe a third-party's registered Intellectual Property Rights; and (v) it will employ then-current, industry-standard measures to test the Service to detect and remediate viruses, worms, time bombs, Trojan horses, and other malicious code, files, scripts, agents, or programs designed to negatively impact the operation of the Service. Customer warrants that: (a) it owns or otherwise has sufficient rights in the Customer Data to grant to Xactly the rights to use the Customer Data granted herein; and (b) its Subscribers will not provide any false information to gain access to the Service.

7.2 Remedies. Customer's exclusive remedy and Xactly's entire liability for a breach of the warranties set forth in Section 7.1 above shall be as follows: (i) for a breach of the warranties set forth in Sections 7.1(i), 7.1(ii) and 7.1(v), and provided that the decrease in functionality is not caused by the combination of the Service with any services, hardware, connection, interface, data, or business processes not provided by Xactly, Xactly shall correct any material reproducible impairments to the features and functionality in the Service so that it materially conforms to this warranty, and if Xactly is unable to provide such Service as warranted within a commercially reasonable time following receipt of written notice of breach, Customer shall be entitled to terminate the applicable Subscription and receive a refund of any prepaid fees applicable to the remaining portion of the Subscription Term following the effective date of termination; (ii) for a breach of the warranty set forth in Section 7.1(iii), Customer shall provide written notice of breach and Xactly shall re-perform the applicable Professional Services; if Xactly determines that it is unable to reperform such Professional Services as warranted within a commercially reasonable time, Customer shall be entitled to terminate the applicable SOW and recover the portion of the fees paid for such non-conforming Professional Services, provided that Customer discontinues all use of any Xactly Materials delivered under the applicable SOW and upon request certifies that it has done such and has destroyed all copies in Customer's control; and (iii) for a breach of the warranty set forth in Section 7.1(iv), Xactly will provide the indemnification described in Section 8.1 below. Xactly's exclusive remedy for a breach of Customer's warranty in Section 7.1(a), is that Customer will provide the indemnification described in Section 8.2 below.

7.3 Disclaimers. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, OR AS LIMITED BY APPLICABLE LAW CUSTOMER UNDERSTANDS AND AGREES THAT THE SERVICE AND THE XACTLY MATERIALS ARE PROVIDED "AS IS" AND XACTLY, ITS AFFILIATES, THIRD PARTY PROVIDERS, RESELLERS, AND ITS LICENSORS MAKE NO WARRANTIES OF ANY KIND WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, AND SPECIFICALLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUIET ENJOYMENT, AND NON-INFRINGEMENT OF THIRD PARTY RIGHTS, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW. IN ADDITION, CUSTOMER ACKNOWLEDGES AND AGREES THAT: (A) THE SERVICE DOES NOT CONSTITUTE THE PROVISION OF LEGAL ADVICE IN ANY MANNER; (B) THE SERVICE DOES NOT ENSURE CUSTOMER'S COMPLIANCE WITH APPLICABLE LABOR OR EMPLOYMENT LAWS; AND (C) CUSTOMER IS SOLELY RESPONSIBLE FOR ITS COMPLIANCE WITH ALL APPLICABLE LAWS.

8. Indemnification.

8.1 Indemnification by Xactly. Xactly shall defend Customer, at Xactly's expense, against any claims, demands, suits, or proceedings ("**Claim[s]**") made or brought against Customer by a third party alleging that the use of the Service as contemplated hereunder directly infringes any registered U.S. Intellectual Property Right of a third party and Xactly shall indemnify and hold Customer harmless against all reasonable costs (including attorneys' fees) finally awarded against Customer by a court of competent jurisdiction or an arbitrator, or agreed to in a written settlement agreement signed by Xactly, as a result of such Claims, provided that Customer shall (a) promptly upon receiving notice of a Claim, give Xactly written notice of the Claim; (b) give Xactly sole control of the defense and settlement of the Claim (except that Xactly may not settle or defend any Claim unless it unconditionally releases Customer of all liability); and (c) provide to Xactly, at Xactly's expense, all reasonable assistance in the defense or settlement of such Claim. Xactly's indemnification obligation shall be offset to the extent its ability to defend or settle a claim is jeopardized by Customer's failure to comply with the preceding sentence. Xactly shall have no indemnification obligation for Claims arising from (x) the combination of the Service or any part thereof with any services, hardware, connection, interface, data, or business processes not provided by Xactly, to the extent such modification contributed to the infringement; (y) use of the Service by Customer other than in accordance with this Agreement, the applicable Order Form, and/or the SOW; or (z) Customer Data.

If the applicable Service or any part thereof is held or likely to be held infringing, in addition to its obligations in this Section 8.1, Xactly may in its sole discretion, and at no cost to Customer (i) modify the Service so that it is no longer infringing; (ii) obtain a license for Customer to continue using that Service in accordance with the Agreement; (iii) replace the Service with a functionally equivalent service; or (iv) terminate Customer's Subscriptions to the applicable Service and refund Customer any prepaid, unused fees applicable to the remaining portion of the Subscription Term of the applicable Service following the effective date of such termination.

This Section 8.1 states Xactly's entire liability and Customer's exclusive remedy for any Claim of intellectual property infringement.

8.2 Indemnification by Customer. Customer shall defend Xactly, at Customer's expense, against any Claims made or brought against Xactly by a third party alleging that the Customer Data, or Customer's use of the Service in violation of this Agreement, infringes, or otherwise violates a third party's property, privacy, or directly infringes any registered U.S. Intellectual Property Right of a third party and Customer shall indemnify and hold Xactly harmless against all reasonable costs (including reasonable attorneys' fees) finally awarded against Xactly by a court of competent jurisdiction or an arbitrator, or agreed to in a written settlement agreement signed by Customer, as a result of such Claims, provided that Xactly shall (a) promptly upon receiving notice of a Claim, give Customer written notice of the Claim; (b) give Customer sole control of the defense and settlement of the Claim (except that Customer may not settle or defend any Claim unless it unconditionally releases Xactly of all liability); and (c) provide to Customer, at Customer's expense, all reasonable assistance in the defense or settlement of such Claim. Customer's indemnification obligation shall be offset to the extent its ability to defend or settle a claim is jeopardized by Xactly's failure to comply with the preceding sentence.

This Section 8.2 states Customer's entire liability and Xactly's exclusive remedy for any Claim of intellectual property infringement.

9. Limitation of Liability.

9.1 Limitation of Liability. SUBJECT TO SECTION 9.2,

(a) EXCEPT AS SET FORTH IN SECTIONS 9.1(b) AND 9.1(c), IN NO EVENT SHALL EITHER PARTY'S OR ITS LICENSORS' AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT, OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE TOTAL AMOUNT ACTUALLY PAID OR PAYABLE BY CUSTOMER UNDER THE APPLICABLE ORDER FORM OR SOW FOR THE SERVICES OR PROFESSIONAL SERVICES GIVING RISE TO THE LIABILITY IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE FIRST EVENT GIVING RISE TO THE LIABILITY.

(b) CUSTOMER'S BREACH OF SECTION 4 (FEES AND PAYMENTS) OR SECTION 5.3 (RESTRICTIONS), OR EITHER PARTY'S INDEMNIFICATION OBLIGATIONS IN SECTIONS 8.1 (INDEMNIFICATION BY XACTLY) AND 8.2 (INDEMNIFICATION BY CUSTOMER) ARE NOT SUBJECT TO THE LIMITATION OF LIABILITY IN SECTION 9.1(a) ABOVE OR SECTION 9.1(c) BELOW.

(c) WITH RESPECT TO EITHER PARTY'S BREACH OF SECTION 6 (CONFIDENTIALITY), IN NO EVENT SHALL EITHER PARTY'S OR ITS LICENSORS' AGGREGATE LIABILITY EXCEED TWICE THE AMOUNTS ACTUALLY PAID OR PAYABLE BY CUSTOMER UNDER THE APPLICABLE ORDER FORM OR SOW IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE LIABILITY.

9.2 Exclusion of Consequential and Related Damages. IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY ARISING OUT OR RELATED TO THIS AGREEMENT TO THE OTHER PARTY OR ITS LICENSORS FOR ANY LOST PROFITS OR FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOSS OR INACCURACY OF DATA, LOSS OF PROFITS OR REVENUE, BUSINESS INTERRUPTION, COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, HOWEVER ARISING AND, WHETHER IN CONTRACT, TORT, OR UNDER ANY OTHER THEORY OF LIABILITY, WHETHER OR NOT THE PARTY FROM WHICH DAMAGES ARE BEING SOUGHT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10. Term and Termination.

10.1 Term of Agreement. This Agreement commences on the Effective Date and continues until all Order Forms or SOWs under this Agreement have expired or been terminated.

10.2 Term of Subscriptions. Subscriptions commence on the start date specified in the relevant Order Form and continue for the Subscription Term specified therein. Unless a party gives written notice of non-renewal at least thirty (30) days prior to the expiration of the relevant Subscription Term, Subscriptions will automatically renew for a period equal to the initial Subscription Term upon the expiration of the initial Subscription Term or any renewal Subscription Term. Xactly may increase the Subscription fees at the beginning of each Subscription Term or upon any renewal Subscription Term. Notwithstanding anything to the contrary, any renewal in which the number of Subscriptions or Subscription Term has decreased from the prior Order Form will result in re-pricing at the then-current per-unit Subscription rate without regard to the prior Subscription Term's per-unit pricing.

10.3 Termination for Cause. A party may terminate this Agreement, an Order Form or a Statement of Work for cause: (i) if the other party is in material breach under this Agreement and fails to cure such breach within thirty (30) days of receipt of written notice of such material breach from the non-breaching party; or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation, or assignment for the benefit of creditors and such proceeding is not favorably resolved within sixty (60) days. In the event of a Customer Default, Xactly shall have the right to: (i) Suspend Service to Customer in accordance with section 4.4 herein; (ii) cease processing or accepting orders for Service; and/or (iii) terminate this SSA or any Service. If Xactly terminates this SSA due to a Customer Default, Customer shall remain liable for all charges in accordance with the Term of Subscription outlined in section 10.2 herein. Customer agrees to pay Xactly's reasonable expenses (including attorney and collection agency fees) incurred in enforcing Xactly's rights in the event of a Customer Default. Upon any termination for cause by Customer, Xactly shall refund to Customer any prepaid, unused fees applicable to the remaining portion of the Subscription Term following the effective date of termination. Upon any termination for cause by Xactly, Customer's right to access or use Customer Data in the Service immediately ceases.

10.4 Outstanding Fees. Termination shall not relieve Customer of its obligation to pay any fees accrued or payable to Xactly relating to the Service or the Professional Services prior to the effective date of termination, and Customer shall pay to Xactly all such fees upon the effective date of termination in accordance with Section 4.

10.5 Return/Deletion of Customer Data. Customer may access and download Customer Data from the Service at any time during the Subscription Term, subject to the terms of this Agreement. At the termination or expiration of the Subscription Term, if Customer is unable to retrieve Customer Data from the Service, Customer may request in writing that Xactly provide a file of Customer Data in comma-separated value (.csv) format within thirty (30) days after the effective date of termination or expiration. Xactly will make available to Customer such .csv file at no charge during the 30-day period following termination or expiration. After such 30-day period, Xactly has no obligation to maintain or provide any Customer Data and shall thereafter delete all Customer Data in its production systems, unless legally prohibited; provided, however, Xactly may retain copies of Customer Data solely as part of a routine disaster recovery backup until such time as the disaster recovery backup is destroyed in accordance with Xactly's standard disaster recovery/business continuity processes. After such 30-day period, and subject to Xactly's ability to recover Customer Data and payment of applicable fees to Xactly at Xactly's then prevailing Professional Services rates, Xactly may provide Customer Data to Customer in a file format to be agreed by the parties.

Except to the extent expressly agreed otherwise in an applicable Order Form or SOW, Xactly may delete or otherwise destroy Customer Data that has been stored in the Service for more than seven (7) years on a rolling basis. Customer further acknowledges that the Service and the Professional Services are not data backup services. Customer is responsible for creating and maintaining reasonable regular backups of their data including Customer Data.

10.6 Surviving Provisions. The following provisions shall survive any termination or expiration of this Agreement: Sections 1, 4.1, 4.2, 4.3, 4.5, 5.2, 5.3, 5.4, 5.5, 6, 7.2, 7.3, 8, 9, 10.4, 10.5, 10.6, and 11.

11. General Provisions.

11.1 Export Control. Customer and its Subscribers shall not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations that may be imposed by the U.S. Government and any country or organization of nations within whose jurisdiction Customer operates or does business, such as the Export Administration Regulations ("EAR") maintained by the United States Department of Commerce, trade and economic sanctions maintained by the United States Treasury Department's Office of Foreign Assets Control, and the International Traffic in Arms Regulations ("ITAR") maintained by the United States Department of State, and shall not cause Xactly to violate the same.

11.2 Relationship of the Parties. The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the parties.

11.3 Notices. Except as specified in Section 3.1 and Section 4.4, all notices required to be sent hereunder shall be in writing and shall be deemed to have been given upon (i) the date it was delivered by courier, or (ii) if sent by certified mail return receipt requested, on the date received, in each case addressed to the addresses set forth above and, if to Xactly, to the attention of General Counsel, and, if to Customer, to the attention of the signatory of this Agreement, or to such other address or individual as the parties may specify from time to time by written notice to the other party.

11.4 Waiver and Cumulative Remedies. No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party at law or in equity.

11.5 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in full force and effect.

11.6 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 Order Forms and Statements of Work), without the consent of the other party, in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets not involving a direct competitor of the other party. Any attempt by a party to assign its rights or obligations under this Agreement in breach of this section shall be void and of no effect. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors, and permitted assigns.

11.7 Governing Law.

(a) If Customer is located outside of Europe or the United Kingdom, as determined by Customer's principal place of business address set forth at the beginning of this Agreement, then this Agreement and any disputes arising out of or related hereto shall be governed by and construed in accordance with the laws of the State of California, without giving effect to its conflicts of laws rules, the United Nations Convention on the International Sale of Goods, or the Uniform Computer Information Transactions Act.

(b) If Customer is located within Europe or the United Kingdom, as determined by Customer's principal place of business address set forth at the beginning of this Agreement, then this Agreement and any disputes arising out of or related hereto shall be governed by and construed in accordance with the laws of England and Wales, without giving effect to its conflicts of laws rules or the United Nations Convention on the International Sale of Goods.

11.8 Venue; Waiver of Jury Trial. If Section 11.7(a) above applies, then the state and Federal courts located in Santa Clara County, California shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. If Section 11.7(b) above applies, then the English courts located in London shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this Agreement. Each party hereby consents to the exclusive jurisdiction of such courts and waives any objection it might otherwise have to venue, personal jurisdiction, inconvenience of forum, and any similar or related doctrine. Each party also hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this Agreement.

11.9 Force Majeure. Neither party shall be liable for delay or non-performance of its obligations hereunder (or part thereof) if the cause of delay or non-performance is an event which is unforeseeable, beyond the control of the party affected, and cannot be remedied by the exercise of reasonable diligence, including without limitation acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes, computer, telecommunications, Internet service provider or hosting facility failures, or delays involving hardware, software, or power systems not within Xactly's possession or reasonable control, and denial of service attacks (each a "**Force Majeure Event**"). The party affected shall be relieved from its obligations (or part thereof) as long as the Force Majeure Event lasts and hinders the performance of said obligations (or part thereof), it being understood that a Force Majeure Event shall not excuse any obligation of Customer to pay invoices due in accordance with the provisions hereof. The party affected shall promptly notify the other party and make reasonable efforts to mitigate the effects of the Force Majeure Event with reasonable dispatch. Either party may terminate this Agreement in the event the Force Majeure Event continues for more than forty-five (45) days.

11.10 Publicity. Either party may reference the name and logo of the other party in lists of customers or vendors. Either party may issue press releases relating to this Agreement with the other party's prior written consent.

11.11 Third party beneficiaries. There are no third-party beneficiaries under this Agreement. The parties do not intend the Contract (Rights of Third Parties) Act 1999 to apply to this Agreement and its operation is hereby expressly excluded.

11.12 Compliance with Anti-corruption Laws. Each party shall comply with the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act, and the anti-corruption laws of other countries, to the extent applicable. Each party shall not, at any time, directly or indirectly (through a subcontractor or other third party), pay, offer, give, or promise to pay or give, or authorize the payment of, any monies or any other thing of value to influence the improper performance of any individual government officials and employees of state-owned enterprises.

11.13 Entire Agreement. This Agreement, including all exhibits and addenda hereto and all Order Forms and Statements of Work, constitutes the entire agreement between the parties, and supersedes all prior and contemporaneous agreements, proposals, or representations, written or oral, concerning its subject matter. The parties are not relying and have not relied on any representations or warranties whatsoever regarding the subject matter of this agreement, express or implied, except for the representations and warranties set forth in this Agreement. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom the modification, amendment, or waiver is to be asserted. To the extent of any conflict or inconsistency between the provisions in the body of this Agreement and any exhibit or addendum hereto or any Order Form or Statement of Work, the terms of such exhibit, addendum, Order Form, or Statement of Work shall prevail. No terms or conditions set forth on any purchase order, preprinted form, or document shall add to or vary the terms and conditions of this Agreement, and all such terms or conditions shall be null and void.

11.14 Modifications to this Agreement. Xactly reserves the right to modify the terms and conditions of this Agreement, including any referenced policies and other documents, effective upon the commencement of any renewal term. If Xactly modifies the Agreement during your Subscription Term, the modified version will be effective upon your next renewal of the Subscription Term. In this case, if you object to the updated Agreement, as your exclusive remedy, you may choose not to renew, including cancelling any terms set to auto-renew. You may be required to click through the updated Agreement to show your acceptance. If you do not agree to the updated Agreement after it becomes effective, you will no longer have a right to use the Service. For the avoidance of doubt, any Order Form or Statement of Work is subject to the version of the Agreement in effect at the time of such Order Form or Statement of Work.