

Avaya OneCloud™ CPaaS Terms of Service v1.4

Last Update: October 2020

IMPORTANT – READ CAREFULLY BEFORE ACCEPTING THESE TERMS OF SERVICE

THESE TERMS OF SERVICE (THESE “TERMS”, “TERMS OF SERVICE” OR “AGREEMENT”) ARE BETWEEN THE CORPORATION, COMPANY OR OTHER BUSINESS ENTITY ACCEPTING THESE TERMS (“CUSTOMER”) AND: (I) AVAYA CLOUD INC. A WHOLLY OWNED SUBSIDIARY OF AVAYA INC., AND A DELAWARE USA CORPORATION WITH PRINCIPAL OFFICES AT 350 MOUNT KEMBLE AVE., MORRISTOWN, NJ 07960 IF CUSTOMER JURISDICTION IS IN THE UNITED STATES; OR (II) AVAYA CLOUD CANADA, INC., WITH PRINCIPAL OFFICES AT 11 ALLSTATE PARKWAY, SUITE 300A MARKHAM, ONTARIO L3R9T8 IF CUSTOMER JURISDICTION IS IN CANADA OR (III) AVAYA INTERNATIONAL SALES LIMITED, WITH PRINCIPAL OFFICES AT 25-29 MERVUE BUSINESS PARK MERVUE GALWAY IRELAND, IF THE CUSTOMER JURISDICTION IS IN THE UNITED KINGDOM OR IRELAND OR (IV) THE APPROPRIATE AVAYA AFFILIATE (“AVAYA”).

THESE TERMS CONTAIN TERMS AND CONDITIONS THAT GOVERN CUSTOMER’S USE AND ORDERING OF AVAYA ONECLOUD CPAAS SERVICE(S). IN ADDITION TO THESE TERMS, THE SERVICES MAY BE SUBJECT TO ADDITIONAL TERMS AND CONDITIONS INCLUDING USE POLICIES SUCH AS THE **ACCEPTABLE USE POLICY OR “AUP”** POSTED AT [HTTP://SUPPORT.AVAYA.COM/TERMSOFSALE](http://support.avaya.com/termsofsale) (OR SUCH SUCCESSOR SITE AS DESIGNATED BY AVAYA) WHICH DESCRIBES ACTIONS THAT AVAYA PROHIBITS WHEN ANY PARTY USES ITS SERVICES AND THE APPLICABLE SERVICE DESCRIPTION AND SCHEDULES (INDIVIDUALLY AND COLLECTIVELY, THE “SUPPLEMENTAL TERMS”). WHEN CUSTOMER ACCESSES OR USES THESE INDIVIDUAL PRODUCTS OR SERVICES, THE APPLICABLE SUPPLEMENTAL TERMS WILL APPLY TO CUSTOMER, AND WILL AUTOMATICALLY BE INCORPORATED INTO THESE TERMS BY REFERENCE.

CUSTOMER REPRESENTS THAT IT IS A CORPORATION, COMPANY OR OTHER BUSINESS ENTITY, AND NOT A CONSUMER, AND THAT IT HAS AUTHORIZED THE PERSON ACCEPTING THESE TERMS TO BIND CUSTOMER TO THESE TERMS. THE PERSON ACCEPTING THESE TERMS ON CUSTOMER’S BEHALF REPRESENTS THAT THEY HAVE READ THESE TERMS IN FULL AND HAVE FULL LEGAL AUTHORITY TO LEGALLY BIND CUSTOMER TO THESE TERMS. SUCH PERSON’S ONLINE ACCEPTANCE OF THESE TERMS WILL HAVE THE SAME LEGAL EFFECT AS IF CUSTOMER WAS PROVIDING A HANDWRITTEN SIGNATURE OF ACCEPTANCE. IF SUCH PERSON DOES NOT HAVE SUCH AUTHORITY OR IF CUSTOMER DOES 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 CUSTOMER AGREES TO THESE TERMS. IF AN ACCEPT (OR EQUIVALENT) BUTTON IS NOT PRESENT, THEN CUSTOMER’S USE OR ACCESS OF THE SERVICES SIGNIFIES THAT CUSTOMER AGREES TO THESE TERMS. THESE TERMS ARE EFFECTIVE AS OF THE DATE CUSTOMERS EITHER SELECT THE “ACCEPT” BUTTON OR DOWNLOAD, ACCESS OR USE THE SERVICES.

A. MANDATORY PREREQUISITES FOR THE AVAYA ONECLOUD CPAAS TERMS OF SERVICE

- In order to use the Avaya API’s and markup language (the “API”), or make use of the Properties and various Avaya OneCloud CPaaS services and information contained therein (the API, Properties and Avaya OneCloud CPaaS services are collectively referred to herein as the “Services,” and each a “Service”), Customer must read and accept these Terms of Service.
- Customer agrees to incorporate terms and conditions into the terms and conditions that apply to Customer’s own products and services using applications that incorporate the Services (“Customer’s End User Agreements”) that enable Avaya to use Customer’s or any of Customer’s users, employees, clients or customers’ (“End Users”) data as necessary to provide the Services and that protect Avaya’s rights to the same extent as the terms and conditions of this Agreement, including the AUP. By way of example, Customer’s End User Agreements must include terms concerning restrictions on use, protection of proprietary rights, disclaimer of warranties, and limitations of liability. Customer must ensure that Customer’s End Users using applications that incorporate the API or the Services adhere to these terms, and Customer agrees to notify Avaya promptly if Customer becomes aware of any breach of the terms of Customer’s End User Agreements that may impact Avaya. Customer will take all reasonable precautions to prevent unauthorized access to or use of the Services and notify Avaya promptly of any such unauthorized access or use.
- AVAYA 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 AVAYA SUPPLIERS, BY POSTING MODIFIED TERMS ON <https://resources.avayacloud.com/asp/legals> (OR SUCH SUCCESSOR SITE AS DESIGNATED BY AVAYA) OR UPON NOTICE TO CUSTOMER BY AVAYA VIA EMAIL OR THROUGH SOME OTHER MEANS DESIGNATED BY AVAYA. CHANGES TO THESE TERMS WILL BE EFFECTIVE AS OF THE DATE AVAYA POSTS THEM OR, AT AVAYA'S DISCRETION, ISSUES AVAYA'S NOTICE TO CUSTOMER OF SUCH CHANGE, UNLESS AVAYA SPECIFIES A DIFFERENT EFFECTIVE DATE WHEN AVAYA MAKES A PARTICULAR CHANGE. CUSTOMER IS SOLELY RESPONSIBLE FOR CHECKING FOR ANY AGREEMENT UPDATES. CUSTOMER'S CONTINUED USE OF THE SERVICE MEANS THAT CUSTOMER ACCEPTS AND AGREES TO ANY REVISED TERMS AND CONDITIONS. IN THE EVENT CUSTOMER DOES NOT AGREE TO ANY SUCH MODIFICATION, CUSTOMER'S SOLE AND EXCLUSIVE REMEDY IS TO TERMINATE THE SERVICE AND THESE TERMS AS DETAILED IN SECTION 2.2 BELOW. IN THE EVENT CUSTOMER NOTIFIES AVAYA 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 AVAYA OF ITS INTENT TO TERMINATE. EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, ANY MODIFICATIONS OR AMENDMENTS TO THESE TERMS MUST BE IN WRITING AND PHYSICALLY OR ELECTRONICALLY SIGNED BY BOTH PARTIES.

- CUSTOMER RECOGNIZES AND AGREES THAT THE SERVICE IS FOR BUSINESS USE AND NOT FOR CONSUMERS, AND CUSTOMER REPRESENTS AND WARRANTS THAT CUSTOMER WILL USE THE SERVICE FOR BUSINESS PURPOSES AND NOT FOR PERSONAL, FAMILY, HOUSEHOLD, OR ANY OTHER CONSUMER PURPOSE.

B. GENERAL TERMS AND CONDITIONS

1. Grant of Rights to Use Services

1.1 So long as Customer is in compliance with the Agreement, Avaya hereby grants Customer a limited, non-exclusive, non-transferable, non-sublicensable, revocable right and license during the Term (as defined in Section 2.1. below) of this Agreement to access and use the Services, solely in accordance with the terms and conditions of this Agreement. Unless explicitly stated otherwise, any new features provided by Avaya that augment or enhance the current Services shall also constitute "Services" and shall be subject to this Agreement. Customer may not, nor may Customer allow any third party to, copy, distribute, sell, disclose, lend, transfer, convey, modify, decompile, disassemble or reverse engineer the Services for any purpose whatsoever. Customer may not allow any unauthorized third party to access the Services for any purpose whatsoever. All rights not expressly granted under this Agreement are retained by Avaya or its Affiliates, licensors or suppliers. "Affiliate" means, with respect to either Party to this Agreement, any direct or indirect subsidiary or an entity, present or future, all of which are controlled by, or under common control with a signatory of this Agreement. 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.

1.2 Customer may create a software application or website (an "Application(s)") that interfaces with the Services, provided that Customer complies with the terms of this Agreement. Customer may use the Services to execute Applications owned or lawfully obtained by Customer, except as limited by these Terms of Service, the AUP or Customer's End User Agreement.

1.3 Customer and any Applications that Customer may create, build or distribute may make network calls or requests to the Services, or may receive telephone calls via the Service, at any time that the Services are available, provided that those requests do not violate the terms of Avaya's AUP or other terms of this Agreement.

1.4 Customer may not remove, obscure, or alter any notice of any Avaya trademark, service mark ("Marks") or other intellectual property or proprietary right appearing on the Avaya OneCloud CPaaS website posted at <https://www.avayacloud.com> or such successor site as designated by Avaya ("Website") or contained within the Services.

1.5 Customer acknowledges that Avaya may change APIs for any Service or any feature of a Service from time to time, and that it is Customer's responsibility to ensure that calls or requests from Customer's Applications made to or via Avaya's Service are compatible with then-current APIs for the Service. Avaya will attempt to provide reasonable prior notice to Customer of any API changes so Customer can adjust Customer's Applications, but Avaya is under no obligation to do so.

1.6 Customer is solely responsible for Customer's Applications, including any data, text, images or content contained therein. Customer is also solely responsible for all traffic originating from Customer's Applications that uses Customer's account credentials to access the Services. For that reason, Customer should protect Customer's authentication keys and security credentials. Actions taken using Customer's credentials shall be deemed to be actions taken by Customer, with all associated consequences including charges for Services, service termination, civil and criminal penalties.

1.7 Avaya may make available to Customer, for Customer's installation, copying or use in connection with the Services, a variety of software, data and other content and printed and electronic documentation (the "Properties"). Avaya hereby grants to Customer a limited, non-exclusive, non-transferable, non-sublicensable, revocable license, during the Term of this Agreement only, to install, copy and use the Properties solely in connection with and as necessary for Customer's use of the Services in accordance with the terms and conditions of this Agreement. The Properties may include, without limitation:

- (a) The Website;
- (b) APIs;
- (c) Documentation; and
- (d) Specifications describing the operational and functional capabilities, use limitations, technical and engineering requirements, and testing and performance criteria relevant to the proper use of a Service and its related APIs and technology.

1.8 Avaya may make additional content or software available under another license agreement, such as an open source license. Any such content or software will be clearly marked with such a license indicating the usage rights available for that content or software. Such content or software may include:

- (a) Developer tools, such as software development kits or sample code for use in connection with the APIs; and
- (b) Articles and documentation for use in connection with the use and implementation of the APIs (collectively, "Documentation").

1.9 Except as may be expressly authorized under this Agreement:

- (a) Customer may not, and may not attempt to, modify, alter, tamper with, repair, or otherwise create derivative works of the Properties.
- (b) Customer may not, and may not attempt to, reverse engineer, disassemble, or decompile the Properties or the Services or apply any other process or procedure to derive the source code of any software included in the Properties.

1.10 Customer hereby grants Avaya a limited, non-exclusive, non-transferable, non-sublicenseable license to display Customer's trade names, trademarks, service marks, logos, domain names and the like for the purpose of providing the Services to Customer or promoting or advertising that Customer uses the Services. Customer may not display or use the Properties in any manner unless Customer obtains Avaya's prior written consent. All uses of the Marks and goodwill associated therewith shall inure to the benefit of Avaya or its Affiliates.

The rights granted by Avaya in this Agreement with respect to the Properties and the Services are nonexclusive, and Avaya reserves the right to: (i) act as a developer of products or services similar to any of the products or services that Customer may develop in connection with the Properties or the Services; and (ii) grant similar rights to those provided under this Agreement to third parties that as developers or systems integrators may offer products or services which compete with Customer's Application(s).

2. Term, Termination and Suspension

2.1 The term of this Agreement will commence once Customer accepts this Agreement ("Term"). The Agreement will remain in effect until terminated by Customer or by Avaya in accordance with this Section 2.

2.2 Customer may terminate this Agreement as to any Service for any reason or no reason at all by closing Customer's account for that Service. Customer may terminate this Agreement in its entirety for any reason or no reason at all by closing all Customer's accounts for Services.

2.3 Avaya may suspend Customer's right and license to use any or all Services or terminate this Agreement in its entirety (and, accordingly, cease providing all Services to Customer) for any reason at any time by providing Customer thirty (30) days' advance notice in accordance with the notice provisions set forth in Section 11 below. If Avaya determines that providing advance notice would negatively impact Avaya's ability to provide Services to other customers, Avaya may suspend Customer's right and license to use any or all Services with no notice.

2.4 Avaya may also suspend Customer's right to use any Service or terminate this Agreement in its entirety (and, accordingly, Customer's right to use any Service) for cause:

2.4.1 Immediately upon Avaya's notice to Customer in accordance with the notice provisions set forth in Section 11 below if: (i) Customer or Customer's End Users violate, or Avaya has reason to believe that Customer or Customer's End Users have violated, any provision of the AUP, (ii) there is an unusual spike or increase in Customer's use of a Service, and there is reason to believe such traffic or use is fraudulent or negatively impacting the operating capability of the Service; (iii) Avaya determines, in Avaya's sole discretion, that Avaya's provision of any of the Services to Customer is prohibited by applicable law, or has become impractical or unfeasible due to any legal or regulatory change; or (iv) subject to applicable law, upon Customer's liquidation, Customer's commencement of dissolution proceedings, the disposal of Customer's assets, the failure to continue Customer's business, an assignment for the benefit of Customer's creditors, or Customer's becoming the subject of a voluntary or involuntary bankruptcy or similar proceeding.

2.4.2 Immediately and without notice if Customer is in default of any payment obligation with respect to any of the Services or if any payment mechanism Customer has provided is or becomes invalid or charges are refused for such payment mechanism.

2.4.3 Five (5) days after Avaya's provision of notice to Customer in accordance with the notice provisions set forth in Section 11 below if Customer commits a material breach of any other provision of this Agreement and fail, to cure such breach within such 5-day period.

2.5 Effect of Suspension or Termination.

2.5.1 Upon Avaya's suspension of Customer's use of any Services for any reason permitted herein: (i) fees will continue to accrue for any Services that are still in use by Customer, notwithstanding the suspension; (ii) Customer remains liable for all fees, charges and any other obligations Customer has incurred up to and through the date of suspension with respect to the suspended Services; and (iii) all of Customer's rights with respect to the suspended Services shall be terminated during the period of the suspension.

2.5.2 Upon termination of this Agreement for any reason: (i) Customer remains liable for all fees, charges and any other obligations Customer has incurred through the date of termination with respect to the Services; and (ii) all of Customer's rights under this Agreement shall immediately terminate.

2.5.3 In the event this Agreement expires or is cancelled or terminated for any reason, Sections 6, 7, 8, 9, 10 and 11 and (as well as any other terms which, by their nature, are intended to survive) will survive any such expiration, cancellation or termination.

2.6 Following the suspension or termination of Customer's right to use the Services for any reason other than a termination for cause, Customer shall be entitled to take advantage of post-termination assistance Avaya may generally elect to make available with respect to the Services, if any. Avaya may also endeavor to provide Customer with unique post-suspension or post-termination assistance, but Avaya shall be under no obligation to do so. Customer's right to take advantage of any such assistance, whether generally made available with respect to the Services or made available uniquely to Customer, shall be conditioned upon Customer's acceptance of and compliance with any fees and terms Avaya specifies for such assistance.

3. Downtime and Service Suspensions

In addition to Avaya's right to terminate or suspend Services to Customer as described in Section 2 above, Customer acknowledges that: (i) Customer's access to and use of the Services may be suspended for the duration of any unanticipated or unscheduled downtime or unavailability of any portion or all of the Services for any reason, including as a result of power outages, hacking, system failures, fraud prevention or other interruptions; and (ii) Avaya shall also be entitled, without incurring any liability to Customer, to suspend access to any portion or all of the Services at any time, on a Service-wide basis: (a) for scheduled downtime to conduct maintenance or make modifications, updates or upgrades to any Service; (b) in the event of a denial of service attack or other attack on the Service or other event that Avaya determines, in Avaya's sole discretion, may create a risk to the applicable Service, to Customer or to any of Avaya's other customers if the Service were not suspended; or (c) in the event that Avaya determines that it is necessary or prudent to do so for legal or regulatory reasons ((a)-(c) collectively, "**Service Suspensions**"). Without limitation to Section 7, Avaya 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 Avaya is able, Avaya will endeavor to provide Customer notice of any Service Suspension in accordance with the notice provisions set forth in Section 10 below and to post updates regarding resumption of Services following any such suspension, but shall have no liability for the manner in which Avaya may do so or if Avaya fails to do so.

4. Data Privacy and Security

4.1 **Data Privacy.** To the extent Avaya processes Personal Data on behalf of Customer, the most current Avaya DPA, published on <http://support.avaya.com/TermsOfSale> at the time of the particular order, applies and is incorporated herein by reference.

4.2 **Co-operation with law enforcement authorities.** Avaya reserves the right to fully cooperate with any law enforcement authorities, regulatory authorities, or court order requesting or directing Avaya to disclose the Personal Data (as defined in the Avaya DPA) or any non-personal data of anyone posting any messages or content or publishing or otherwise making available any materials that are believed to violate this Agreement or applicable law. 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 Avaya. BY ACCEPTING THESE TERMS, CUSTOMER WAIVES AND HOLDS HARMLESS AVAYA 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 AVAYA OR LAW ENFORCEMENT AUTHORITIES. IN ADDITION, CUSTOMER ACKNOWLEDGES AND AGREES THAT AVAYA RESERVES THE RIGHT TO INVOICE CUSTOMER AN ADMINISTRATIVE FEE TO RECOVER AVAYA'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, FRAUDULENT OR UNLAWFUL USAGE OF THE SERVICE BY CUSTOMER OR ITS END USERS.

4.3 **Backup and Retention.** Avaya strives to keep the information Customer provides secure but cannot guarantee that Avaya will be absolutely successful at doing so. Accordingly, without limitation to Section 7 below, Customer acknowledges that Customer bears sole responsibility for adequate backup of Customer's Content, including all audio recordings associated with Customer's account. Notwithstanding the foregoing, Avaya will make commercially reasonable efforts to make data generated by Customer's use of the Service (such as audio recordings) available via Avaya's API for at least thirty (30) days from the date such data was generated and any call detail records or other traffic data as required by applicable law or for billing or dispute resolution purposes. Avaya strongly encourages Customer, where available and appropriate, to use encryption technology to protect Customer's Content from unauthorized access and to routinely archive Customer's Content. NOTWITHSTANDING THE ABOVE AND WITHOUT LIMITATION TO SECTION 7, AVAYA SHALL HAVE NO LIABILITY WHATSOEVER FOR ANY DAMAGE, LIABILITIES, LOSSES (INCLUDING ANY LOSS OF DATA OR PROFITS) OR ANY OTHER CONSEQUENCES THAT CUSTOMER OR CUSTOMER'S END USERS MAY INCUR WITH RESPECT TO LOSS OF DATA ASSOCIATED WITH CUSTOMER'S ACCOUNT AND CUSTOMER'S OR ANY OF CUSTOMER'S END USERS' CONTENT DATA THEREIN.

5. Fees and Taxes.

5.1 In its sole discretion, Avaya shall determine whether Customer is eligible for a free trial subscription to its Services, which terms of the free trial are set forth here. Free trials are limited to one per Customer, and if Avaya finds that Customer has created multiple free trial accounts, Avaya reserves the right to suspend those accounts and take actions to prevent additional violations.

5.2 To the extent the Services or any portion thereof are made available for any fee, Customer agrees to pay all applicable fees (including any minimum subscription fees) as set forth here ("Service Fees"). Customer is solely responsible for all Service Fees and/or any other charges incurred relating to the Services, whether incurred by Customer, Customer's End Users or third parties, even if such Service Fees and/or other charges were incurred through or as a result of fraudulent or unauthorized use of the Services; provided, however Customer is not responsible for fraud emanating from Avaya's network.

5.3 Customer agrees to pay any third-party or carrier costs, such as fees for porting Customer's existing telephone numbers into or out of the Services. Avaya may increase or add new fees for any existing Service or Service feature by giving Customer thirty (30) days' advance notice.

5.4 In addition, Customer is responsible for any charges, taxes, assessments or regulatory fees imposed on Avaya by a carrier, any regulatory or government authority that are caused by Customer's or Customer's customers' use of a Service. Avaya may charge Customer the following regulatory fees:

5.4.1 Federal and State Universal Service Fee. Avaya may be required to make contributions to the Federal and certain state Universal Service Funds (USF), which provide support to promote access to telecommunications services at reasonable rates for those living in rural and high-cost areas, income-eligible consumers, rural health care facilities, and schools and libraries. Avaya is permitted but not required to recover such costs from its customers. The Federal Communications Commission sets the Federal USF rates on a quarterly basis and they are subject to change each quarter.

5.4.2 Emergency Services Fee. This fee is imposed by local governments to help pay for emergency services such as fire and rescue.

5.4.3 911 Service Fee. Avaya may charge a per-DID/ phone number fee to recover Avaya's costs directly associated with providing 911 and E911 or equivalent service in respective jurisdiction to its customers.

5.4.4 Regulatory Recovery Fee. Avaya may charge a monthly regulatory recovery fee to offset costs incurred by Avaya in complying with obligations imposed by, and inquiries made by, federal, state and municipal regulatory bodies/governments and related legal and billing expenses. This fee is not a tax or charge required or assessed by any government. If assessed by Avaya, the regulatory recovery fee will apply to every DID/ phone number assigned to Customer, including toll free and virtual numbers.

5.4.5 Other Fees. Customer agrees to pay any other fees that may be levied on the Service which are chargeable to customers by any governmental authority.

In addition to Customer's obligation to pay taxes in accordance with Section 5, Customer will be responsible for the payment of all governmental assessments, surcharges and fees pertaining to the use of the Service. Customer will be responsible for all governmental assessments, surcharges and regulatory fees that are imposed on Avaya or any Affiliate of Avaya incident to the provision or sale of the Service, including, but not limited to, any government assessment or regulatory fees imposed on Avaya as a result of a material change in the manner in which the Service or Avaya is regulated.

5.5 All fees payable by Customer are exclusive of applicable taxes and duties, including, without limitation, applicable sales tax. Unless Customer provides Avaya with a current tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, excise or other taxes and fees which may be levied upon the Service, except for any (i) taxes that are imposed on, measured by, or based upon net income of Avaya; and (ii) 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 Avaya and are imposed by any taxing jurisdiction in which Avaya is subject to such taxes as a result of transactions or activities not related to this Agreement. If Customer is entitled to an exemption from any taxes or fees, Customer is responsible for presenting Avaya with a valid exemption certificate (in a form reasonably acceptable to Avaya). Avaya will give effect to any valid exemption certificate provided in accordance with the foregoing sentence to the extent it applies to any Service billed by Avaya to Customer following Avaya's receipt of such exemption certificate. Provided that Avaya timely identifies the taxes and fees payable by Customer, Customer shall indemnify, defend and hold Avaya harmless from payment and reporting of all such taxes and fees, including costs, expenses, and penalties incurred by Avaya in settling, defending or appealing any claims or actions brought against Avaya related to, or arising from, Customer's non-payment of taxes or fees.

5.6 Avaya may specify the manner in which Customer will pay any fees, and any such payment shall be subject to Avaya's general accounts receivable policies from time to time in effect. All amounts payable by Customer under this Agreement will be made without setoff or counterclaim and without deduction or withholding. If any deduction or withholding is required by applicable laws or regulations, Customer shall notify Avaya and shall pay such additional amounts as necessary to ensure that the net amount that Avaya receives, after such deduction and withholding, equals the amount Avaya would have received if no such deduction or withholding had been required. Additionally, Customer shall provide documentation that the withholding and deducted amounts have been paid to the relevant taxing authority.

5.7 If Customer uses a credit card or other payment mechanism for a transaction, Customer's account is billed at the time of or shortly after Customer's transaction. In such case, Customer hereby authorizes Avaya or its payment processor to bill Customer's credit card or other payment mechanism as may be approved by Avaya in advance or on a periodic basis in accordance with the terms on the order. Customer will provide Avaya with (and maintain) valid and updated credit card information or other payment information reasonably acceptable to Avaya. If a credit card is declined and no replacement card has been entered, Customer's access to the Service will be

suspended, and Customer agrees to pay any outstanding fees within thirty (30) calendar days after receiving notification from Avaya. If the credit card is accepted on any billing attempt, the Services billing date will remain the same as the original date for subsequent months. Receipt by Avaya's payment processor of final good funds in settlement of Customer's credit card or other payment transaction will satisfy Customer's payment obligation. Subject to certain credit requirements as determined by Avaya, Avaya may agree to allow Customer to pay amounts due hereunder in arrears. In such event, Customer will make all of the payments due hereunder within thirty (30) days of the date of the invoice. 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 Avaya for reasonable attorneys' fees and any other costs associated with collecting delinquent payments.

5.8 Customer acknowledges and agrees that if applicable, Customer's credit card on file or other payment mechanism will be automatically charged recurring renewal fees on a monthly basis during the Term unless Customer cancels the Service. If Customer cancels the Service, Customer will not be entitled to a refund or a credit for any fees already due or paid, and Customer may be subject to termination fees if applicable.

5.9 Customer must dispute any charges for the Service in writing within thirty (30) days after the date the charge is made by Avaya; otherwise Customer waives any dispute or further recourse with respect to the applicable charges. Avaya reserves the right to require credit approval prior to providing Services to Customer. Payments of any disputed amount are due and payable upon resolution. All other amounts remain due within thirty (30) days. In the event of non-payment, Avaya may suspend performance or delivery until the overdue amount is paid in full or otherwise terminate an order for Services and/or this Agreement.

6. Intellectual Property

- 6.1. Other than the limited use and access rights and licenses expressly set forth in this Agreement, Avaya and/or its Affiliates, suppliers and licensors reserve all right, title and interest (including all intellectual property and proprietary rights) in and to: (i) the Services; (ii) the Properties; (iii) the Marks; and (iv) any other technology and software that Avaya provides or uses to provide the Services and the Properties. Customer does not, by virtue of this Agreement or otherwise, acquire any ownership interest or rights in the Services, the Properties, the Marks, or any other technology and software, except for the limited use and access rights described in this Agreement.
- 6.2. Avaya may, at its discretion, offer certain software development kits, tools, application samples, documentation or other software under an open source license. Any such products will be marked with copyright details, and those copyrights will apply to those and only those software development kits, tools, application samples, documentation or other software. Avaya, its Affiliates, suppliers and licensors reserve all rights to any documents, tools, services, technologies and the like not subject to an open source license.
- 6.3. Other than the rights and interests expressly set forth in this Agreement and excluding any and all works derived from Properties, Customer reserves all right, title and interest (including all intellectual property and proprietary rights) in and to: (i) content and data Customer may send to Avaya or use as part of Customer's use of any Services ("**Customer's Content**"); and (ii) Customer's Applications.
- 6.4. In the event Customer elects, in connection with any of the Services, to communicate to Avaya suggestions for improvements to the Services, the Properties or the Marks (collectively, "**Feedback**"), Avaya shall own all right, title, and interest in and to the same, even if Customer has designated the Feedback as confidential, and Avaya shall be entitled to use the Feedback without restriction. Furthermore, any other content or information Customer posts or provides to Avaya via comments, forums, emails and the like (collectively, "**Communications**") shall be considered the property of Avaya. Customer hereby irrevocably assigns all right, title and interest in and to the Feedback and Communications to Avaya and agrees to provide such assistance as Avaya may require to document, perfect, and maintain Avaya's rights to the Feedback and Communications.
- 6.5. During and after the Term of the Agreement, with respect to any of the Services that Customer elects to use, Customer will not assert, nor will Customer authorize, assist, or encourage any third party to assert, against Avaya or any of Avaya's Affiliates, customers, end users, vendors, business partners (including third-party sellers on websites operated by or on behalf of Avaya), sub-licensees or transferees, any patent infringement or other intellectual property infringement claim with respect to such Services.
- 6.6. **Digital Millennium Copyright Act.** It is Avaya'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 Avaya's discretion to terminate the accounts or subscriptions of infringers. If Customer would like to send Avaya an alleged copyright or trademark infringement notice as it pertains to the Service, Customer can go to the following link <http://support.avaya.com/AvayaCopyrightAgent> (or such successor site as designated by Avaya) and follow the instructions on how to get in touch with Avaya. If Customer has trouble accessing this link, then Customer may contact Avaya for further information at copyrightagent@avaya.com with the subject line: "*DCMA Takedown Request*" or by mail to:

7. Representations and Warranties; Disclaimers; Limitations of Liability

- 7.1. Customer represents and warrants that Customer will not use the Services, Properties, Marks, Customer's Application or Customer's Content in a manner that violates these Terms, including the AUP. Although Avaya does not assume the duty or obligation to monitor any materials created, posted or uploaded by Customer or any third parties, Avaya reserves the right, in its sole and absolute discretion, to monitor any and all materials posted or uploaded by Customer or any third parties at any time without prior notice to ensure that they conform to any usage guidelines or policies (including Avaya's AUP).
- 7.2. Customer shall not use the Services to create a medical device or take other action that would violate regulations promulgated by the Food and Drug Administration, including but not limited to (i) diagnosing a disease or other condition, (ii) curing, mitigating, treating, or preventing a disease or condition, or (iii) using the Services in a way that may affect the structure or function of the body of a human or animal. Avaya shall have no liability of any kind whatsoever as a result of Customer's violation of this Section 7.2. Customer's violations of this Section 7.2 will be subject to the indemnification provisions of Section 9.
- 7.3. Customer represents and warrants that Customer is responsible for any charges incurred by virtue of Customer's use of the Services, no matter whether Customer's Application acted in error. Customer also represents and warrants: (i) that Customer is solely responsible for the development, operation, and maintenance of Customer's Application and for Customer's Content, including without limitation, the accuracy, appropriateness and completeness of Customer's Content and all product-related materials and descriptions; (ii) that Customer has the necessary rights and licenses, consents, permissions, waivers and releases to use and display Customer's Application and Customer's Content; (iii) that neither Customer's Application nor Customer's Content (a) violates, misappropriates or infringes any rights of Avaya or any third party, (b) constitutes defamation, invasion of privacy or publicity, or otherwise violates any rights of any third party, (c) violates any applicable laws or regulations, or (d) is designed for use in any illegal activity or promotes illegal activities, including, without limitation, activity that might be libelous or defamatory or otherwise malicious, illegal or harmful to any person or entity, or discriminatory based on race, sex, religion, nationality, disability, sexual orientation, or age; (iv) that neither Customer's Application nor Customer's Content contains any components capable of harming Avaya's network or Services; and (v) to the extent to which Customer is authorized by Avaya to use any of the Marks, that Customer will conduct Customer's business in a professional manner and in a way that reflects favorably on the goodwill and reputation of Avaya.
- 7.4. Customer agrees to abide by all applicable local, state, national, foreign and international laws and regulations and that Customer will be solely responsible for all acts or omissions that occur under or through Customer's account or password, including the content of Customer's and Customer's customers' transmissions through the Services. Customer further agrees that neither Customer nor Customer's End Users will use the Service for any purpose that is unlawful, abusive, intrusive on another's privacy, harassing, libelous, threatening or hateful, or in any other way that would violate any applicable laws or regulations. Customer represents and warrants that (i) Customer has the legal right and authority, and will maintain the legal right and authority during each Service Term, to install and use the Services as contemplated hereunder; (ii) the performance of Customer's obligations under this Agreement and use of Services will not violate any applicable law, rule or regulation or any applicable manufacturers' specifications or unreasonably interfere with Avaya's or its other customers' use of the Services or network; (iii) Customer is authorized and has completed all required corporate actions necessary to execute this Agreement; and (iv) Customer shall not intentionally carry out any act or omission that results in Avaya breaching any law, rule or regulation. Customer shall comply with all the applicable legal and/or regulatory licenses and consents specifically required from the relevant governmental authorities with respect to any permitted resale of Services. Customer shall be solely responsible and liable for any misuse of Services by Customer's End Users or any third parties in respect of Customer's resale of Services and shall defend and indemnify and hold harmless Avaya for against any claims or proceedings, including any judgements, settlements and reasonable attorney's fees resulting from and against any and all third party claims or proceedings arising from or related to such resale of Services by Customer. Any failure by any third party (including End Users) to comply with any applicable law rule or regulation regarding sale or use of the Services shall be attributable to Customer for the purposes of this Agreement. Any resale or sublicense by Customer of the Services shall not relieve Customer of Customer's obligations under this Agreement. Any such third party waives any liability by Avaya in connection therewith.
- 7.5. Customer represents and warrants that without Avaya's express written consent Customer will not use, and will not authorize any third party to use, any Public Software (as defined below) in connection with the Services in any manner that requires, pursuant to the license applicable to such Public Software, that any Properties or Services be (i) disclosed or distributed in source code form, (ii) made available free of charge to recipients, or (iii) modifiable without restriction by recipients. Customer

represents and warrants that all Feedback and Communications contributed by or through Customer (a) are legally distributable by Customer, either because Customer owns the copyright or because Customer has fully complied with any copyright terms associated with the software or content, (b) contain no third-party software or any software that may be considered Public Software, and (c) do not violate, misappropriate or infringe any intellectual property rights of any third party. "Public Software" means any software, documentation or other material that contains, or is derived (in whole or in part) from, any software, documentation or other material that is distributed as free software, open source software (e.g., Linux or Asterisk) or similar licensing or distribution models, including, but not limited to software, documentation or other material licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: (1) GNU Affero General Public License (AGPL), Common Public Attribution License (CPAL), European Public License (EUPL), GNU's General Public License (GPL), Lesser/ Library GPL (LGPL), or Free Documentation License, (2) The Artistic License (e.g., PERL), (3) the Mozilla Public License, (4) the Netscape Public License, (5) the Sun Community Source License (SCSL), (6) the Sun Industry Standards License (SISL), (7) the BSD License and (8) the Apache License.

- 7.6. In addition to the foregoing, Avaya specifically disclaims all liability for, and Customer agrees that Customer shall be solely responsible for:
- 7.6.1. the development, operation, and maintenance of Customer's Application, all related equipment, and all materials that appear on or within Customer's Application and Customer's Content;
 - 7.6.2. the accuracy and appropriateness of any materials posted on or within Customer's Application or Customer's Content (including, among other things, any product-related materials);
 - 7.6.3. ensuring that any materials posted on Customer's site or within Customer's Application do not violate Avaya's AUP, are not illegal and do not promote illegal activities, including without limitation any activities that might be libelous or defamatory or otherwise malicious, illegal or harmful to any person or entity, or discriminatory based on race, sex, religion, nationality, disability, sexual orientation, or age;
 - 7.6.4. ensuring that Customer's Application accurately and adequately discloses, either through a privacy policy or otherwise, how Customer collects, uses, stores, and discloses data collected from visitors, including, where applicable, that third parties (including advertisers) may serve content and/or advertisements and collect information directly from visitors and may place or recognize cookies on visitors' browsers; and
 - 7.6.5. any of Customer's End Users' claims relating to Customer's Application or Customer's Content or any Services utilized in connection with Customer's Application.
- 7.7. **DISCLAIMER OF WARRANTIES.** TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, THE PROPERTIES, THE MARKS, API'S, THE SERVICES AND ALL TECHNOLOGY, SOFTWARE, FUNCTIONS, CONTENT, IMAGES, MATERIALS AND OTHER DATA OR INFORMATION PROVIDED BY AVAYA OR AVAYA'S AFFILIATES, LICENSORS AND SUPPLIERS IN CONNECTION THEREWITH (COLLECTIVELY THE "SERVICE OFFERINGS") ARE PROVIDED "AS IS." AVAYA AND AVAYA'S AFFILIATES, LICENSORS AND SUPPLIERS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE WITH RESPECT TO THE SERVICE OFFERINGS. EXCEPT TO THE EXTENT PROHIBITED UNDER APPLICABLE LAW, AVAYA AND AVAYA'S AFFILIATES, LICENSORS AND SUPPLIERS DISCLAIM ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, TITLE, QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE. AVAYA AND AVAYA'S AFFILIATES, LICENSORS AND SUPPLIERS DO NOT WARRANT THAT THE SERVICES OR WEBSITE WILL FUNCTION AS DESCRIBED, WILL BE UNINTERRUPTED OR ERROR FREE, OR FREE OF HARMFUL COMPONENTS, OR THAT THE DATA CUSTOMER STORES WITHIN THE SERVICES WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. AVAYA AND AVAYA'S AFFILIATES, LICENSORS AND SUPPLIERS SHALL NOT BE RESPONSIBLE FOR ANY SERVICE OR WEBSITE INTERRUPTIONS, INCLUDING, WITHOUT LIMITATION, POWER OUTAGES, SYSTEM FAILURES OR OTHER INTERRUPTIONS. NO ADVICE OR INFORMATION OBTAINED BY CUSTOMER FROM AVAYA OR FROM ANY THIRD PARTY OR THROUGH THE SERVICES SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT.
- 7.8. **LIMITATION OF LIABILITY.** EXCEPT FOR CLAIMS OF PERSONAL INJURY, WILLFUL MISCONDUCT, VIOLATION OF AVAYA'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 AVAYA 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 AVAYA OR CUSTOMER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. ALL LIABILITY OF AVAYA, 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 AVAYA 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.

7.9. **Third Party Materials:** Certain content, products, and services available via the Website (or links contained therein) may include materials, software, plug-ins, applications and other resources from third parties and access to third-party websites (collectively "**Third Party Materials**"). Customer acknowledges and agrees that Avaya is not responsible for examining or evaluating the content or accuracy of any such Third Party Materials and that Avaya does not warrant or endorse and does not assume (and will not have) any liability or responsibility for any Third Party Materials or any damage or loss resulting therefrom. The availability of Third Party Materials is provided solely as a convenience to Customer. Customer agrees that Customer must evaluate, and bear all risks associated with, the use of any Third Party Materials, including any reliance on the accuracy, completeness, or usefulness thereof.

8. 911 LIMITATIONS AND RESTRICTIONS, NUMBER PORTING

- 8.1. THE SERVICE IS NOT DESIGNED FOR, NOR SHOULD IT BE RELIED UPON, FOR ANY TYPE OF EMERGENCY CALL. THIRD PARTY EMERGENCY SERVICES, INCLUDING, BUT NOT LIMITED TO 911 AND E911 SERVICE, USED WITH OR OTHERWISE MADE ACCESSIBLE USING THE SERVICE MAY FUNCTION DIFFERENTLY OR MAY BE LIMITED OR UNAVAILABLE, AND AVAYA AND ITS AFFILIATES, AND THEIR SUBCONTRACTORS AND SUPPLIERS, ARE NOT LIABLE IN ANY WAY FOR ANY SUCH CALLS. IT IS HIGHLY RECOMMENDED THAT ANY USER OF THE SERVICE HAVE AN ALTERNATIVE MEANS OF ACCESSING EMERGENCY SERVICES.
- 8.2. AS THE RETAIL SERVICE PROVIDER, IT IS CUSTOMER'S SOLE RESPONSIBILITY TO COMPLY WITH ALL APPLICABLE E911/911 REQUIREMENTS, AND TO THE EXTENT REQUIRED BY FEDERAL OR STATE LAW, ORDER, REGULATION OR RULE TO PROVIDE E911 OR 911 SERVICE.
- 8.3. **911/E911 LIMITATION OF LIABILITY/INDEMNITY.** TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, AVAYA AND ITS AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, CONTRACTORS, AGENTS, LICENSORS, SUPPLIERS, AND RESELLERS ("911/E911 INDEMNIFIED PARTIES") WILL HAVE NO LIABILITY TO CUSTOMER, CUSTOMER'S USERS, OR ANY THIRD PARTY, AND CUSTOMER WAIVES ALL CLAIMS AND CAUSES OF ACTION, ARISING OUT OF OR RELATED TO CUSTOMER'S, CUSTOMER'S USERS, OR ANY THIRD PARTY'S INABILITY TO DIAL 911 OR ANY OTHER EMERGENCY TELEPHONE NUMBER OR TO ACCESS AN EMERGENCY SERVICE OPERATOR OR EMERGENCY SERVICES. CUSTOMER HEREBY RELEASES AND AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE 911/E911 INDEMNIFIED PARTIES FROM ANY AND ALL CLAIMS, LIABILITY, DAMAGES, LOSSES, EXPENSES, AND/OR COSTS (INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES AND COST OF SUIT) BY OR ON BEHALF OF CUSTOMER OR ANY THIRD PARTY OR USER ARISING FROM OR RELATED TO THE FAILURE OF 911/E911 TO FUNCTION OR FUNCTION PROPERLY OR AVAYA'S PROVISION OF 911/E911 SERVICES OR FAILURE TO PROVIDE ACCESS TO 911/E911 SERVICES.
- 8.4. **Number Porting.** "Porting" is causing number(s) to be transferred, switched, or otherwise moved to any other service provider, such as a telephone carrier. Avaya reserves the right to refuse to port any telephone number(s) in its sole discretion. Customer understands and agrees that Customer will have use of any telephone number(s) that are provided as part of the Services only until the end of the term of Customer's Agreement with Avaya or until Avaya no longer provides Customer with the Services. Customer understands and agrees that Avaya is the customer of record for all telephone number(s) provided as part of the Services and, therefore, Avaya owns or controls the telephone number(s) assigned to Customer and has certain rights with respect to Porting of the number(s).
- 8.5. If Customer "ported in" any telephone number(s) in connection with Customer's use of Services, or Avaya assigned Customer one or more toll free telephone numbers, or Customer is entitled to "port out" a telephone number under non-U.S. law, or Avaya has agreed to port out any telephone number(s), Customer may port out such number(s) only if Customer satisfies the following requirements: (1) Customer provides written notice to Avaya of Customer's intent to port out such number(s) no later than thirty (30) days after providing Avaya notice of Customer's intent to terminate this Agreement (the "Porting Notice Period"); (2) Customer's new telephone carrier provides Avaya's telephone carrier a duly executed Porting request prior to the expiration of the Porting Notice Period; (3) Customer has paid Avaya for all Services provided to Customer prior to the date Customer provides Avaya notice of Customer's intent to terminate this Agreement; and (4) Customer has paid Avaya any administrative fees associated with processing the port. Customer hereby authorizes Avaya to charge Customer's account in the applicable amount for the administrative fees as detailed above or to otherwise arrange to make this payment to Avaya within the Porting Notice Period. The Porting process can be lengthy; if Customer would like

to maintain Customer's account with the company during the Porting process, Customer must maintain Customer's account in an active status and not terminate Customer's account until the Porting out is complete. Regardless of when the port out is complete, Customer will continue to be responsible to pay all applicable account fees with respect to the telephone numbers until Customer formally terminates this Agreement. If Customer fails to satisfy any of the foregoing requirements, Avaya remains the customer of record over the number(s) and Customer is expressly prohibited from causing or attempting to cause such number(s) to be transferred to any other service provider, telephone carrier or any other person or entity. Avaya also retains the right to reclaim the number(s) from Customer after the number(s) are ported out in contravention with these requirements and authorize Avaya to charge Customer's account or take any other measures to collect the costs associated with causing the number(s) to be returned to Avaya. Customer understands and agrees that even if Customer satisfies the requirements set forth in this section, technical or procedural difficulties or interruptions may occur when attempting to port out these numbers and such difficulties or interruptions may prevent Customer's new carrier from Porting the numbers. Avaya is not responsible for such technical or procedural difficulties or interruptions.

- 8.6. Customer understands and agrees that (a) following the termination of this Agreement for any reason, Customer's number(s) may be re-assigned to another customer and (b) Avaya may need to change the telephone number(s) assigned to Customer. CUSTOMER AGREES THAT AVAYA WILL NOT BE LIABLE FOR DAMAGES (INCLUDING CONSEQUENTIAL OR SPECIAL DAMAGES) ARISING OUT OF ANY SUCH RE-ASSIGNMENT OR SUCH CHANGE IN THE TELEPHONE NUMBER(S) ASSIGNED TO CUSTOMER, AND CUSTOMER HEREBY WAIVES ANY CLAIMS WITH RESPECT TO ANY SUCH RE-ASSIGNMENT, WHETHER BASED ON CONTRACTUAL, TORT OR OTHER GROUNDS, EVEN IF AVAYA HAS BEEN ADVISED OF THE POSSIBILITY OF DAMAGES.

9. Indemnification

- 9.1. Customer agrees to indemnify, defend and hold Avaya, Avaya's Affiliates, suppliers and licensors and each of Avaya's and their respective employees, officers, directors and representatives, harmless from and against any and all claims, losses, damages, liabilities, judgments, penalties, fines, costs and expenses (including reasonable attorneys' fees), arising out of (i) Customer's or Customer's customers' use of the Services, Properties or Marks in a manner that is not authorized by this Agreement or is in violation of the applicable restrictions contained herein, the AUP, or applicable law; (ii) Customer's Applications, Customer's Content, or the combination of either with other applications, content or processes, or the use, development, design, manufacture, production, advertising, promotion, or marketing of Customer's Application or Customer's Content; (iii) Customer's violation of any term or condition of this Agreement, including the AUP or any applicable additional policies; or (iv) Customer's, or Customer's employees' or agents', negligence or willful misconduct. Customer will indemnify and defend Avaya from and against any third party claim (including reasonable attorneys' fees) based on any actual or alleged infringement or misappropriation of any third party's intellectual property rights arising from (i) Avaya's authorized use of Customer's systems, Applications, or Customer's Content to the extent said claim arises from said use; (ii) any use of the Services not in accordance with the Agreement or Avaya's written documentation (iii) any addition to, or modification of, the Services made by Customer or Customer's End Users not approved or specified by Avaya; (iv) any use or combination of the Services with other software, hardware, or other materials not owned by Avaya.
- 9.2. Avaya agrees to promptly notify Customer of any claim subject to indemnification hereunder; provided that Avaya's failure to promptly notify Customer shall not affect Customer's obligations hereunder except to the extent that Avaya's failure to promptly notify Customer delays or prejudices Customer's ability to defend the claim. At Avaya's option, Customer will have the right to defend against any such claim with counsel of Customer's own choosing (subject to Avaya's written consent) and to settle such claim as Customer deems appropriate, provided that Customer shall not enter into any settlement without Avaya's prior written consent and provided that Avaya may, at any time, elect to take over control of the defense and settlement of the claim.

10. Governing Law; Disputes

- 10.1 **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 will be governed by New York State laws, excluding conflict of law principles, and the United Nations Convention on Contracts for the International Sale of Goods.
- 10.2 **Dispute Resolution.** Any Dispute will be resolved in accordance with the provisions of this Section 10. 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.
- 10.3 **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 10.2, 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 10 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 Avaya 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.

- 10.4 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 10.2, then either Party may bring an action or proceeding solely in either Supreme Court of the State of New York, New York County, or the United States District Court for the Southern District of New York. Except as otherwise stated in Section 10.3 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.
- 10.5 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 10.3 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.
- 10.6 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 5.7.
- 10.7 Compliance.** Customer and Avaya will cause their Affiliates to comply with the dispute resolution procedures described in this Section.
- 10.8 Disputes with Other Users.** Customer is solely responsible for Customer's interactions with third parties with whom it uses the Service to interact. Avaya will have no liability with respect to such Customer interactions or disputes that may arise between Customer and such third parties. Avaya reserves the right, but has no obligation, to become involved with disputes between Customer and any such third party in the event that Avaya's interests are impacted.

11. Notices

- 11.1 Notices made under this Agreement for Customer or Customer's account specifically will be provided to Customer via a notification message displayed on Customer's account page or sent to the email address provided in Customer's registration for the Services or to any updated email address Customer has provided to Avaya in accordance with Avaya's standard account information update procedures. It is Customer's responsibility to keep Customer's email address current and Customer will be deemed to have received any email sent to any such email address the next business day upon Avaya's sending of the email, whether or not Customer actually receives the email.
- 11.2 For notices made by Customer under this Agreement and for questions regarding this Agreement or the Services, Customer may contact Avaya as follows:
By US Postal Mail at:
Avaya Cloud Inc.
Attn: Director of Contracts
350 Mount Kemble Ave.
Morristown, NJ 07960
or by contacting Avaya at cpaassupport@avaya.com

12. Miscellaneous Provisions

- 12.1 **Responsibility.** If Customer authorizes, assists, encourages or facilitates another person or entity to take any action related to the subject matter of this Agreement, Customer shall be deemed to have taken the action.
- 12.2 **Severability.** If any portion of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remaining portions of this Agreement will remain in full force and effect, and any invalid or unenforceable portions shall be construed in a manner that most closely reflects the effect and intent of the original language. If such construction is not possible, the provision will be severed from this Agreement, and the rest of the Agreement shall remain in full force and effect.
- 12.3 **Message Routing.** Customer may not use phone numbers provided by Avaya ("Avaya OneCloud CPaaS Phone Numbers") to route SMS messages over any other provider's network. All SMS messages sent and received for an Avaya OneCloud CPaaS Phone Number must be sent and received via the Services. If Customer uses SMS it's Customer's responsibility to ensure that if Customer initiates any unsolicited SMS Customer provides Customer's End User with the option to opt in or opt out of receiving those messages as required by applicable law.
- 12.4 **Waivers.** The failure by Avaya to enforce any provision of this Agreement shall in no way be construed to be a present or future waiver of such provision nor in any way affect Avaya's right to enforce such provision thereafter. All waivers by Avaya must be in writing to be effective.
- 12.5 **Assignment & Subcontractors.** Avaya may assign the Agreement and any order under the Agreement to any Affiliate or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under the Agreement. Any other assignment of the Agreement or any rights or obligations under the Agreement without the express written consent of the other Party will be invalid. Avaya may subcontract any or all of its obligations under the Agreement, but will retain responsibility for the work.
- 12.6 **Entire Agreement; Order of Precedence.** This Agreement, including the Supplemental Terms as they may be modified thereafter and constitutes the entire agreement between Customer and Avaya regarding the subject matter hereof. It supersedes any and all prior or contemporaneous representations, understandings, agreements, or communications between Customer and Avaya, whether written or oral, regarding such subject matter. If there is an express conflict between this Agreement, the AUP or the Schedules, this Agreement will govern followed next by the AUP and finally followed by the Schedules.
- 12.7 **No Endorsement.** Customer understands and acknowledges that Avaya is not certifying or endorsing, and have no obligation to certify or endorse, any of Customer's Applications or Customer's Content.
- 12.8 **International Sale of Goods.** Customer and Avaya hereby agree to opt out from and expressly exclude any applicability of the Uniform Computer Information Transactions Act (UCITA).
- 12.9 **International Trade Compliance.** Customer shall not import/export, re-export and/or transfer any work product or content of the Services when accessing and/or using Services 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 Services, content, or work product from the Services to design, develop or produce missile, chemical/biological, or nuclear weaponry; and (c) neither Customer nor anyone acting on Customer's behalf who accesses or uses the Services, content or work product from the Services 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.
- 12.10 **No Third Party Beneficiary.** Customer acknowledges and agrees that, except as otherwise expressly provided in the Terms, there shall be no third party beneficiary to this agreement.
- 12.11 **Recording.** If conferences are applicable to the Service Customer is subscribing to, Customer acknowledges 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. Customer acknowledges and agrees that Customer shall be solely responsible for complying with the local laws in the relevant jurisdictions when using recording features (this includes Customer's obligation to obtain the consent, if required by applicable laws, of all participants before the commencement of the recording). Avaya shall have no liability to Customer or any user or third party if consent is not obtained.
- 12.12 **Force Majeure.** Except for the payment of monies due hereunder, neither Party shall be responsible or have any liability for any default or failure to perform to the extent due to unforeseen circumstances or causes beyond its reasonable control, including, without limitation, acts of nature, terrorism, earthquake, fire, flood, embargoes, labor disputes and strikes, riots, war, error in the coding of electronic files, Internet or other network (including without limitation mobile phone network or other telecommunications network) "brownouts" or failures, power failures, novelty of product manufacture or other unanticipated product development problems, and acts of civil and military authorities; provided that such party

gives the other party prompt written notice of the failure to perform and the reason therefor and uses its reasonable efforts to limit the resulting delay in its performance.

- 12.13 **High Risk Activities.** The Service is not fault-tolerant and 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.
- 12.14 **No Agency.** Nothing in this Agreement shall be construed as creating a partnership, contract of employment, agency, joint venture or franchise relationship between Avaya with Customer.
- 12.15 **Agreement in English.** The Parties confirm that it is their wish that this Agreement, as well as all other documents relating hereto, including all notices, have been and shall be drawn up in the English language 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 this Agreement, 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 the Agreement are those set forth in Section 2 of the Agreement or as otherwise provided in the applicable Avaya service description.

SCHEDULE 1
VOICE/SPEECH TRANSCRIPTION/RECOGNITION SERVICE ADDITIONAL TERMS

Notwithstanding any other provision in the Agreement, the following additional terms shall apply if Customer is accessing or using any voice/speech transcription or recognition services ("Speech Services") through the Website. To provide the Speech Services, Avaya uses external service providers who contract with Avaya and are subject to duties of confidentiality. In particular, Avaya uses Nuance Communications, Inc. ("Nuance") as a service provider for Speech Services.

1. **Incomplete Messages.** As a result of system constraints, some processed messages may not be fully transcribed and will appear as incomplete messages. Such incomplete messages will be denoted by an ellipsis "... " or some other indication that Customer's message has been truncated. In such situations, Customer may obtain the full message by listening to Customer's voicemail message.
2. **NO NUANCE DAMAGES.** IN NO EVENT SHALL AVAYA'S SUPPLIERS BE LIABLE FOR ANY DIRECT, INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, LOSS OF REVENUES AND LOSS OF PROFITS, EVEN IF AVAYA OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
3. **Proprietary Rights.** Avaya and/or its Suppliers own all rights in and to the Services. Except as expressly stated herein, this Agreement does not grant any rights to, or in, patents, copyrights, database rights, trade secrets, trade names, trademarks (whether registered or unregistered), or any other rights or licenses in respect of, or related to the Services or any related documentation.
4. **Voicemail Data.** Customer consents under all applicable laws and regulations to provide Voicemail Messages to Nuance such that Nuance shall be authorized to process those voice files and use Voicemail Messages, portions thereof, and/or log files or other data associated therewith, to tune, enhance, and improve the Speech Services, including but not limited to, improving speech recognition technologies.

5. Data protection, consent.

Customer consents and agrees that:

- a. Nuance and third parties acting under the direction of Nuance may use, compile (including creating statistical and other models), annotate and otherwise analyze the "Speech Data" (i.e., audio files, associated transcripts, log files generated in connection with the Speech Services and other Personal Data, such as name, email address, phone number that may be used to identify a single person) to provide the Speech Service, including troubleshooting issues raised by Avaya's users, for up to 72 hours after such Speech Data is received by Nuance.
- b. Nuance shall delete each piece of Speech Data from its computer systems w/in 72 hours after such Speech Data is received by Nuance, except for log files to be used for billing and SLA purposes only.
- c. Nuance may only provide access to Speech Data to its employees and (i) to 3rd parties acting under the direction of Nuance (and any such disclosure shall be subject to the 72 hour restriction above, and shall only be made in order to fulfill the foregoing use of the Speech Data and pursuant to a confidentiality agreement(s), or (ii) to meet legal or regulatory requirements, such as under a court order or to a government institution if required or authorized by law.
- d. For clarity, Nuance shall not use any Speech Data for any purpose except as permitted in this Schedule 1, and specifically shall not use any Speech Data for soliciting or to permit any others to solicit, its or Avaya's users to subscribe to any other services, or to promote the sale of any product.
- e. Except as permitted in this Schedule 1, Nuance shall in no circumstances directly or indirectly reveal any Speech Data to any 3rd party for any reason without the express advance written consent of Avaya, which may be withheld in Avaya's sole discretion for any reason or no reason.
- f. Nuance may transfer Speech Data around the world over public or private networks where data protection requirements may differ and be less comprehensive than in Customer's country.

SCHEDULE 2 EKATA PROVISIONS

Notwithstanding any other provision in the Agreement, the following additional terms shall apply if Customer is using the Service to view and access certain data from databases of residential, business and government listings which Ekata, Inc. ("**Ekata**") obtains from the telephone numbers used by Customer's customers. The information that Avaya obtains from Ekata and delivers to Customer is referred to as the "Ekata Data."

It is a condition to Customer's receipt of any Ekata Data that Customer agrees to the following:

(a) Customer represents and warrants that Customer will comply with the "**Ekata Terms**" (set forth below); (ii) Customer acknowledges and agrees that the Ekata Data is provided to Customer on an "as is" basis without warranties of any kind; (iii) Customer acknowledges and agrees that Ekata will not be liable to Customer in any manner in connection with Customer's use of the Ekata Data; and (iv) Customer agrees to indemnify, defend, and hold harmless Ekata from and against all claims, actions, and judgments arising out of Customer's use of the Ekata Data. Customer agrees that Ekata shall be a third-party beneficiary of the forgoing with the right to enforce the Ekata Terms.

(b) The following are the "Ekata Terms":

Customer may only use the Ekata Data for Customer's own internal use, and may not:

(i) use the Ekata Data for marketing purposes except to respond to an inquiry, application, purchase or transaction;

(ii) publish, offer, sell, license, transmit, distribute, or reproduce the Ekata Data via any means;

(iii) use the Ekata Data in violation of any applicable law, rule, or regulation (e.g., the Telephone Consumer Protection Act, the Fair Credit Reporting Act, etc.) or in violation of any third-party legal right;

(iv) use the Ekata Data to violate, if applicable, the requirement regarding registration, certification and payment in connection with access to and use of the National Do-Not-Call Registry;

(v) store the Ekata Data for purposes other than Customer's own internal business purposes (storage of Ekata Data for resale is expressly prohibited);

(vi) merge the Ekata Data with similar data obtained from third parties; or

(vi) use the Ekata Data for file download online in a fixed page format.

Customer accepts all Ekata Data "AS IS" and acknowledge and agree that Ekata obtains its data from third-party sources, which may or may not be completely thorough and accurate, and Customer shall not rely on Ekata for the accuracy or completeness of the Ekata Data. Customer understands that Customer may be restricted from accessing certain services or data which may be otherwise available from Ekata.

If Customer cannot or does not agree to the forgoing, please advise Avaya so that Avaya does not provide Customer with any of the Ekata Data.

– END OF THE AVAYA ONECLOUD cPaaS TERMS OF SERVICE –