

Terms of Use

By registration to DataRails Service or by otherwise accessing DataRails Service you agree to be bound by these terms of service between Company and DataRails (“**Terms of Service**” or “**Agreement**”). If you do not agree to these Terms of Service or to any other portion of the Agreement you must not use the Service. “**You**” means you individually or the entity that you represent (“**Company**”). If you are entering into the Agreement for an entity, you represent that you have the authority to bind that entity. “**DataRails**”, “**we**”, or “**us**” means DataRails, Inc., a Delaware corporation. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service. Section references in this document are to the provisions of these Terms of Service.

1. **Subscription to the Service.** Subject to Company’s compliance with this Agreement, and payment of applicable fees, DataRails hereby grants Company and Company’s End Users a worldwide, non-exclusive, non-transferable, non-sublicensable, and fully revocable right to access and use the Service during the Term (defined below) for Company’s internal business purposes only. Company’s subscription to the Service is limited to the number of End Users designated in the Order Form. “**End Users**” means employees and independent contractors that Company has authorized to access the Service via Company’s employee Account interface. “**Order Form**” means DataRails’ then current order form that Company enters into with DataRails prior to registering for the Service.

2. **Restrictions on Use.** Company must not, and shall not allow any permitted End User to: (i) circumvent, disable or otherwise interfere with security-related features of the Service or features that prevent or restrict use or copying of any content or that enforce limitations on use of the Service; (ii) allow any third party to use the Service; (iii) use the Service to process data on behalf of any third party; (iv) give, sell, rent, lease, timeshare, outsource, sublicense, disclose, publish, assign, market, resell, transfer or distribute any portion of the Service to any third party, including, but not limited to Company’s affiliates, or use the Service in any service bureau arrangement; (v) reverse engineer, decompile or disassemble the Service or any components thereof, except to the extent such acts are required to be permitted by applicable law; (vi) disclose or publish the results of any benchmark tests run on the Service; (vii) use any robot, spider, scraper, or other automated means to access the Service for any purpose; (viii) take any action that imposes or may impose (at DataRails’ sole discretion) an unreasonable or disproportionately large load on the DataRails infrastructure; (ix) interfere or attempt to interfere with the integrity or proper working of the Service, or any related activities; (x) modify, translate, patch, alter, change or create any derivative works of the Service, or any part thereof; (xi) disclose Company’s Account (defined below) user names or passwords to any third party; (xii) remove, deface, obscure, or alter DataRails’ or any third party’s copyright notices, trademarks, or other proprietary rights affixed to or provided as part of the Service, or use or display logos with the Service differing from DataRails’ own without DataRails’ prior written approval; and/or (xiii) use the Service in any unlawful manner or in breach of this Agreement.

3. **Account.** In order to use the Service, Company has to create an account (“**Account**”). Company must not allow anyone other than an authorized End User to access and use the Account. Company acknowledges and agrees (i) not to exceed the aggregate number of authorized End Users or any other Units (defined below)

designated in the applicable Order Form unless Company first notifies DataRails in writing and pay DataRails the required additional subscription fees; (ii) that the login details for each End User may only be used by that End User, and that multiple people may not share the same login details; (iii) to provide accurate and complete Account and login information; (iv) to keep, and ensure that End Users keep, all Account login details and passwords secure at all times; (v) that Company remains solely responsible and liable for the activity that occurs in connection with Company's Account, and the activities of Company's End Users on or relating to the Services, whether or not Company knows of such activity, and (vii) to promptly notify DataRails in writing if Company becomes aware of any unauthorized access or use of Company's Account or the Service. DataRails may suspend or terminate any End User's access to the Services upon notice to Company in the event that DataRails reasonably determines that such End User has violated this Agreement or any other terms between DataRails and such End User pursuant to which such End User is permitted to access and use the Service. Company will ensure that all End users comply with the terms and conditions of this Agreement. Company will be liable for any violation of the Terms by any End User. "**Units**" means any measuring unit, in addition to End Users, described in the applicable Order Form upon which the fees set forth in the Order Form are calculated.

4. Customer Data.

4.1 Company and Company's End Users may choose to provide, post, input, submit, or otherwise make accessible to DataRails, data or information about Company, Company's employees, customers, or any third party ("**Data**"), and DataRails will store such Data on Company's behalf, all in connection with Company's use of the Service. Company hereby provides DataRails a royalty-free, irrevocable, non-exclusive right to use, process, upload, display, copy, distribute copies of, perform, transform, and display publicly, and store Data, in order to: (i) provide the Service, and (ii) aggregate, de-identify and/or anonymize Data to administer and make improvements to the Service.

4.2 Company represents and warrants that (i) Company owns all Data or has all rights that are necessary to grant DataRails the licensed rights in Data under this Agreement; (ii) Company's collection of Data has and will be in compliance with all applicable laws and regulations, including, without limitation, those concerning data or information privacy; and (iii) neither the Data, nor the inclusion of Data in or use of Data in connection with the Service, will infringe, misappropriate or violate any Intellectual Property Rights, or violate the privacy rights, of any third party, or result in the violation of any applicable law or regulation, including without limitation those concerning data or information privacy. DataRails reserves the right, but is not obligated, to remove or disable access to any Data, at any time and without notice. As between Company and DataRails, Company retains exclusive ownership of the Data. Company may download Company's Data at any time during the Term, or as otherwise set forth herein, provided Company complies with this Agreement and DataRails' security requirements. "**Intellectual Property Rights**" means patent rights (including, without limitation, patent applications and disclosures), copyrights, trademarks, trade secrets, moral rights, know-how, and any other intellectual property rights recognized in any country or jurisdiction in the world.

4.3 To the maximum extent permitted under applicable law, DataRails shall maintain generally accepted industry safeguards to protect the security and confidentiality of

Company's Data. We will maintain any personally identifiable information that we collect and/or receive in connection with the Service in accordance with our Privacy Policy.

5. **Title.** The Service (and all parts thereof), all reproductions, corrections, modifications, enhancements and improvements thereto, and all data related Company's usage thereof, and all Intellectual Property Rights therein or relating thereto, are and will remain the exclusive property of DataRails or its licensors. Any rights therein not explicitly granted to Company hereunder, are reserved to and shall remain solely and exclusively proprietary to DataRails (or its third party licensors).

6. The Service is provided for the period designated in the Order Form ("**Subscription Period**"). This Agreement shall become effective on the Effective Date, and shall continue until expiration of the Subscription Period (the "**Initial Term**"), unless terminated earlier as provided in this Agreement.

7. **Termination for Cause.** Either party may terminate this Agreement upon written notice in the event that the other party materially breaches this Agreement and, to the extent that the breach can be cured, fails to cure that breach within thirty (30) days of said notice.

8. **Rights and Obligations upon Expiration or Termination; Survival.**

8.1 Upon expiration or termination of this Agreement, (i) Company and Company's End Users rights to access and use the Service will immediately terminate; (ii) Company and Company's End Users will immediately cease all use of the Service; and (iii) each party will return and make no further use of any Confidential Information, materials, or other items (and all copies thereof) belonging to the other party. For a period of forty-five (45) days from the effective date of expiration or termination of this Agreement we will provide Company, upon Company's written request, with a reasonable opportunity to download Company's Data at a time nominated by us. We reserve the right to permanently delete from our (or our third party service provider's) servers any Data that may be contained in Company's Account at any time following said forty-five (45) day period. We do not accept any liability for any deactivation of the Service or Data that is deleted in connection thereto. Also upon expiration or termination of this Agreement, DataRails will cease use of the Customer Marks; provided, however, that (a) DataRails will have a reasonable time to remove the Customer Marks from promotional materials, (b) DataRails will be entitled to exhaust materials printed during the Term that include the Customer Marks, and (c) DataRails will not be required to remove any such printed materials from circulation.

8.2 For the avoidance of doubt, expiration or termination of this Agreement for any reason shall not relieve Company from Company's obligation to pay DataRails any outstanding payments due under this Agreement and/or Order Form and DataRails has the right to issue an invoice to Company for any such outstanding payments. If either party terminates this Agreement for cause pursuant to Section 7 herein, Company will remain liable for payment of the entire subscription fee described in the applicable Order Form for the Initial Term or the applicable Renewal Term, as applicable; provided however, if Company terminates this Agreement for cause pursuant to Section 7 herein due to DataRails' intentional or wilful breach of this Agreement, then Company will be liable only for a prorated amount of the

subscription fee described in the applicable Order Form directly attributable to Company's access to the Services prior to the effective date of termination.

8.3 This Section 9, and Sections 3, 6, 9.1, 10, 12, 13, 15, 16 and 17 shall survive expiration or termination of this Agreement.

9 CONFIDENTIALITY

9.1 "**Confidential Information**" means any information disclosed by one party to the other party that: (i) if disclosed in writing, is marked "confidential" or "proprietary" at the time of disclosure; (ii) if disclosed orally, is identified as "confidential" or "proprietary" at the time of disclosure, and is summarized in a writing sent by the disclosing party to the receiving party within thirty (30) days after any such disclosure; or (iii) under the circumstances, a person exercising reasonable business judgment would understand to be confidential or proprietary. Data is considered to be Company's Confidential Information, the Services are DataRails' Confidential Information, and the terms of this Agreement constitute Confidential Information of both Company and DataRails.

9.2 The use and nondisclosure obligations and restrictions set forth in **Section 9.3** will not apply to any information that: (i) is or becomes generally known to the public through no breach of this Agreement by the receiving party; (ii) is rightfully known by the receiving party at the time of disclosure; (iii) is independently developed by the receiving party without use of or access to the disclosing party's Confidential Information; or (iv) the receiving party rightfully obtains from a third party who has the right to disclose such information without breach of any confidentiality obligation to the disclosing party.

9.3 A receiving party will not use the disclosing party's Confidential Information except as necessary for the performance or enforcement of this Agreement and will not disclose such Confidential Information to any third party except to those of its employees and subcontractors who have a bona fide need to know such Confidential Information for the performance or enforcement of this Agreement; provided that each such employee and subcontractor is bound by a written agreement that contains use and disclosure restrictions consistent with the terms set forth in this Section. Each receiving party will protect the disclosing party's Confidential Information from unauthorized use and disclosure using efforts equivalent to the efforts that the receiving Party ordinarily uses with respect to its own confidential information and in no event less than a reasonable standard of care. The provisions of this **Section 9.3** will remain in effect during the term of this Agreement and for a period of three (3) years after the expiration or termination of this Agreement.

9.4 The provisions of this **Section 9** will not restrict either party from disclosing Confidential Information pursuant to the order or requirement of a court, administrative agency, or other governmental body; provided that the party required to make such a disclosure gives reasonable notice to the other party to enable it to contest such order or requirement or limit the scope of such request. The party responding to such an order or requirement will only disclose that information that is expressly required.

10. Warranty and Disclaimer.

10.1 Each party represents and warrants that: (a) it has full power to enter into this Agreement and to grant to the other party the rights granted to such other party

under this Agreement; (b) it has obtained all necessary corporate approvals to enter into and execute this Agreement; and (c) its entering into this Agreement and performance of obligations under this Agreement will not in any way conflict or violate any duty that it may have to any other person or entity, or under any agreement and/or commitment on its part.

10.2 DataRails warrants that DataRails' delivery of the Service will meet the requirements set forth in the Service Level Agreement attached to the Order Form. Company's sole and exclusive remedy (and DataRails' entire liability) for any breach of the warranty set forth in this Section 10.2 will be as set forth in the Service Level Agreement.

10.3 Except for as expressly provided in this Agreement, the Service is provided on an "as is" and "as available" basis, and without warranties of any kind either express or implied. Company assumes all responsibility for the selection of the Service to achieve Company's intended results. DATARAILS HEREBY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED, IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. DATARAILS DOES NOT WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED, ERROR FREE, OR THAT DEFECTS WILL BE CORRECTED. DATARAILS DOES NOT OFFER A WARRANTY OR MAKE ANY REPRESENTATION REGARDING ANY INFORMATION, RESULTS, OR ADVICE THAT COMPANY OBTAINS THROUGH THE SERVICE. Applicable law may not allow the exclusion of certain warranties, so to that extent such exclusions may not apply.

11 Limitation of Liability. EXCEPT FOR LIABILITY ARISING FROM A BREACH OF SECTIONS 2 OR 3 OR SECTION 9, AND FOR THE PARTIES INDEMNIFICATION OBLIGATIONS IN SECTION 12, TO THE FULLEST EXTENT PERMISSIBLE BY LAW, NEITHER PARTY SHALL BE LIABLE FOR ANY INDIRECT, EXEMPLARY, SPECIAL, CONSEQUENTIAL, OR INCIDENTAL DAMAGES OF ANY KIND (INCLUDING WITHOUT LIMITATION LOST PROFITS OR REVENUE) ARISING OUT OF THIS AGREEMENT OR IN CONNECTION WITH THE SERVICE, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF DATARAILS FOR ANY DAMAGES UNDER THIS AGREEMENT OR IN CONNECTION WITH THE SERVICE EXCEED THE TOTAL AMOUNT OF SUBSCRIPTION FEES ACTUALLY PAID BY COMPANY AND COLLECTED BY DATARAILS FOR THE SERVICE DURING THE TWELVE (12) MONTHS PRIOR TO BRINGING THE CLAIM.

12. Indemnification.

12.1 DataRails will defend any suit or action brought against Company to the extent that it is based upon a third party claim that the Service, as provided by DataRails to Company pursuant to this Agreement, infringe any U.S. patent or any copyright or misappropriate any trade secret, and will pay any costs, damages and reasonable attorneys' fees attributable to such claim awarded in final judgment against or paid in settlement by Company. DataRails' obligations under this **Section 12.1** are contingent upon: (a) Company providing DataRails with prompt written notice of such claim; (b) Company providing reasonable cooperation to DataRails, at DataRails'

expense, in the defense and settlement of such claim; and (c) DataRails having sole authority to defend or settle such claim.

12.2 If Company's use of the Service is, or in DataRails' opinion is likely to be, enjoined due to the type of claim specified in **Section 12.1**, then DataRails may at its sole option and expense: (i) replace or modify the Service to make them non-infringing and of equivalent functionality; (ii) procure for Company the right to continue using the Service under the terms of this Agreement; or (iii) if DataRails is unable to accomplish either (i) or (ii) despite using its reasonable efforts, terminate Company's rights and DataRails' obligation under this Agreement with respect to such Service and refund to Company a pro-rata portion of the fees paid for the remaining term during which Company would have had access to the Service.

12.3 Exclusions. Notwithstanding the terms of **Section 12.1**, DataRails will have no liability for any infringement or misappropriation claim of any kind to the extent that it results from: (i) the combination, operation or use of the Service with equipment, devices, software or data (including without limitation Data) not supplied by DataRails, if a claim would not have occurred but for such combination, operation or use; or (ii) Company's or an End User's use of the Service other than in accordance with the Terms.

12.4 Sole Remedy. THE FOREGOING STATES THE ENTIRE OBLIGATION OF DATARAILS AND ITS LICENSORS WITH RESPECT TO ANY ALLEGED OR ACTUAL INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS BY THE SERVICE.

12.5 Company agrees to defend, indemnify and hold harmless DataRails and our affiliates and our respective officers, directors, agents, consultants and employees from any third party claims, damages, liabilities, costs, and expenses (including reasonable attorney's fees) arising from (i) Company's access or use of the Service; and/or (ii) Company's breach of this Agreement. Company's obligations under this **Section 12.5** are contingent upon: (a) DataRails providing Company with prompt written notice of such claim; (b) DataRails providing reasonable cooperation to Company, at Company's expense, in the defense and settlement of such claim; and (c) Company having sole authority to defend or settle such claim.

13. **Publicity.** Company agrees that DataRails may identify Company as a customer of the Services, and display Company's name and/or logo ("**Customer Marks**") on the Site, in press releases and in DataRails' published marketing materials, solely in connection with the Service and such identification. DataRails will comply with any reasonable trademark usage guidelines Company provides to DataRails in connection with Customer Marks. Company retains all title in and to Customer Marks, and all goodwill developed from such use shall be solely for Company's benefit.

14. **Compliance with laws.** Each party shall comply with all applicable laws relating in any way to its performance of its obligations under this Agreement. Company agrees to comply fully with all applicable export laws and regulations in any jurisdiction to ensure that neither the Service nor any technical data related thereto are exported or re-exported directly or indirectly in violation of, or used for any purposes prohibited by, such laws and regulations.

15. **Assignment.** This Agreement, and any rights granted hereunder, may not be transferred or assigned by Company but may be assigned by DataRails without restriction.

16. **General.** This Agreement and the Order Form, represent the complete agreement concerning the Service between Company and DataRails and supersede all prior agreements and representations related to the subject matter hereof. This Agreement and each Order Form shall be governed by the laws of the State of New York, without reference to its conflict of laws rules. The exclusive jurisdiction and venue for all disputes hereunder shall be the state and federal courts located in New York, and each party hereby irrevocably consents to the jurisdiction of such courts. Application of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transaction Act are excluded from this Agreement. All proceedings shall be conducted in English. Notwithstanding the foregoing, DataRails reserves the right to seek injunctive relief against Company to enforce this Agreement in any venue and court of competent jurisdiction. Section headings are provided for convenience only and have no substantive effect on construction. Except for Company's obligation to pay DataRails, neither party shall be liable for any failure to perform due to causes beyond its reasonable control. Notice shall be deemed effective one (1) day after being sent to either the designated fax, email, or postal address set forth in the Order Form or as displayed on the Site. Nothing herein shall be construed to create any employment relationship, partnership, joint venture or agency relationship or to authorize any party to enter into any commitment or agreement binding on the other party. If any provision is held to be unenforceable, this Agreement shall be construed without such provision. The failure by a party to exercise any right hereunder shall not operate as a waiver of such party's right to exercise such right or any other right in the future.