

## TERMS OF SERVICE FOR THE NETSUITE SERVICE

**ATTENTION! THE FOLLOWING TERMS AND CONDITIONS (“TERMS OF SERVICE”) WILL BE LEGALLY BINDING ON CUSTOMER UPON EXECUTION OF THE SUBSCRIPTION SERVICES AGREEMENT. CUSTOMER SHOULD CAREFULLY READ THE FOLLOWING TERMS OF SERVICE BEFORE EXECUTING THE AGREEMENT.**

### Section Headings and Numbers.

Certain Sections may have been renamed and/or renumbered in this document for convenience only and such renaming and/or renumbering shall not affect the validity, construction or interpretation of the Agreement. References in the Subscription Services Agreement to any Section names or numbers under this document shall be deemed to be a reference to the identified or corresponding provisions in this document to accomplish the reasonable intent and objectives of such provisions to the greatest extent possible under applicable law.

### 1. Definitions.

**“Affiliates”** means any entity which directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with a party to this Agreement, by way of majority voting stock ownership or the ability to otherwise direct or cause the direction of the management and policies of such party, for so long as such control exists..

**“Confidential Information”** means, except as set forth in the following paragraph: (a) Customer Data; (b) the terms of this Agreement and (c) any commercial, financial, marketing, business, technical or other data, security measures and procedures, know-how or other information disclosed by or on behalf of the disclosing party to the receiving party for purposes arising out of or in connection with this Agreement, that: (i) in the case of information in tangible form, is marked “confidential” or “proprietary;” (ii) in the case of information disclosed orally, visually or any other intangible form, is designated confidential or proprietary at the time of disclosure, and if disclosed orally, is summarized in reasonable detail in a writing delivered to the receiving party within ten (10) days following disclosure; (iii) under the circumstances, a person exercising reasonable business judgment would understand to be confidential or proprietary; and (iv) will include any reproduction of such information in any form or medium, or any part of such information.

Notwithstanding the foregoing, the following shall not be Confidential Information: (1) information that was in the public domain at the time of its disclosure, or which becomes public domain property through no fault of the receiving party; (2) information that was rightfully in the receiving party’s possession without restriction prior to disclosure; (3) information that was rightfully disclosed to the receiving party by a third party without restriction (4) information that was independently developed by employees and/or contractors of the receiving party who did not have access to and without use of or reference to the disclosing party’s Confidential Information; and (5) aggregate data collected or generated by Oracle or on behalf of Oracle regarding Oracle’s products and services (for purposes of providing or improving Oracle products and services, benchmarking system performance, preparing statistics and system metrics, marketing and other purposes) that does not contain any personal information and other Customer-specific information.

**“Customer Data”** means all electronic data or information submitted to and stored in the Service by Users.

**“Electronic Communications”** means any transfer of signs, signals, text, images, sounds, data or intelligence of any nature transmitted in whole or part electronically received and/or transmitted through the Service.

**“Estimate/Order Form”** means an Oracle estimate, renewal notification or order form in the name of and executed by Customer or its Affiliate and accepted by Oracle which specifies the Service, and any Support Services and/or Professional Services to be provided by Oracle subject to the terms of this Agreement.

**“Help Documentation”** means the online English language help center documentation describing the Service features, including User Guides which may be updated from time to time.

**“Professional Services”** means the general consulting, implementation and/or training services to be provided to Customer pursuant to (i) the Professional Services Agreement found at [www.netsuite.com/termservice](http://www.netsuite.com/termservice), or such other URL as specified by Oracle, and (ii) a Statement of Work (as defined in such professional services agreement).

**“Service”** means, collectively, the NetSuite online business application suite (and any optionally procured modules) (the “NetSuite Service”) and/or the OpenAir online Professional Services Automation application suite (and any optionally procured modules) (the “OpenAir Service”) as described in the applicable User Guides that is procured by Customer from Oracle in the Estimate/Order Form and any subsequent Estimate/Order Form from time to time, including associated offline components, but excluding Third Party Applications, Support Services and Professional Services.

“**SuiteApp.com**” means the online directory of applications that interoperate with the Service, located at <http://www.netsuite.com/suiteapp> or at any successor websites.

“**Support Services**” means the supplemental, fee-based technical support services to be provided to Customer pursuant to the terms for Support Services, found at [www.netsuite.com/supportterms](http://www.netsuite.com/supportterms), or such other URL as specified by Oracle.

“**Third Party Applications**” means applications, integrations, services, or implementation, customization and other consulting services related thereto, provided by a party other than Oracle, as further described in Section 2.4 (“Third Party Applications”) that interoperate with the Service, including but not limited to those listed on SuiteApp.com.

“**Users**” means individuals who are authorized by Customer or its Affiliate to use the Service pursuant to this Agreement or as otherwise defined, restricted or limited in an Estimate/Order Form or amendment to this Agreement, for whom subscriptions to a Service have been procured. Users include but are not limited to Customer’s and Customer’s Affiliates’ employees, consultants, contractors and agents.

“**User Guides**” mean the online English language user guides for the Service, accessible via login at <http://www.netsuite.com> (under “Help”), as updated from time to time. Customer acknowledges that it has had the opportunity to review the User Guides through a free trial account made available by Oracle.

“**URL Terms**” means the terms with which Customer must comply, which are located at a URL, referenced in this Agreement and are hereby incorporated by reference.

**2. Terms of Service.** Customer acknowledges and agrees to the following terms of service, which together with the terms of the Subscription Services Agreement entered into between Customer and Oracle, shall govern Customer’s access and use of the Service (collectively, the “Agreement”). Capitalized terms not otherwise defined in these Terms of Service shall have the meaning given to them in the Agreement.

**2.1. Accuracy of Customer’s Contact Information.** Customer shall provide accurate, current and complete information on Customer’s legal business name, address, email address, and phone number, and maintain and promptly update this information if it should change.

**2.2. Users: Passwords, Access, And Notification.** Customer shall authorize access to and assign unique passwords and user names to the number of Users procured by Customer on the Estimate/Order Form. User logins are for designated Users and cannot be shared or used by more than one User, but any User login may be permanently reassigned to another User as needed. Customer will be responsible for the confidentiality and use of User’s passwords and user names. Customer will also be responsible for all Electronic Communications, including those containing business information, account registration, account holder information, financial information, Customer Data, and all other data of any kind contained within emails or otherwise entered electronically through the Service or under Customer’s account. Oracle will act as though any Electronic Communications it receives under Customer’s passwords, user name, and/or account number will have been sent by Customer. Customer shall use commercially reasonable efforts to prevent unauthorized access to or use of the Service and shall promptly notify Oracle of any unauthorized access or use of the Service and any loss or theft or unauthorized use of any User’s password or name and/or Service account numbers.

**2.3. General Restrictions.**

**(a) General.** Customer is responsible for all activities conducted under User logins and for Users’ compliance with this Agreement. Customer must not use, and must ensure that Affiliates do not use, the Service to provide a service bureau or outsourced service, and may not rent, resell, sublicense, or permit the concurrent use of a single User login, or time-sharing of the Service. Customer shall not and shall not permit any Affiliate, User or other third party to: (a) copy, translate, create a derivative work of, reverse engineer, reverse assemble, disassemble, or decompile the Service or any part thereof or otherwise attempt to discover any source code or modify the Service in any manner or form unless expressly allowed in the Help Documentation; (b) access or use the Service to circumvent or exceed Service account limitations or requirements; (c) use the Service for the purpose of building a similar or competitive product or service; (d) obtain unauthorized access to the Service (including without limitation permitting access to or use of the Service via another system or tool, the primary effect of which is to enable input of requests or transactions by other than authorized Users); (e) use the Service in a manner that is in violation of any third party rights of privacy or intellectual property rights; (f) issue or participate in any press release or other public statement related to this Agreement or the Service without prior written consent of Oracle; (g) publish, post, upload or otherwise transmit Customer Data that contains any viruses, Trojan horses, worms, time bombs, corrupted files or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any systems, data, personal information or property of another; or (h) use or permit the use of any tools in order to probe, scan or attempt to penetrate or benchmark the Service. Customer shall comply with all applicable local, state, federal, and foreign laws, treaties, regulations, and conventions in connection with this Agreement, including without limitation those related to privacy,

electronic communications and anti-spam legislation. Customer is responsible for ensuring that its use of the Service to store or process credit card data complies with applicable Payment Card Industry Data Security Standards ("PCI DSS") requirements and shall not store credit card and social security data in the Service except in the designated encrypted fields for such data. Customer shall comply with the export laws and regulations of the United States and other applicable jurisdictions in using the Service and obtain any permits, licenses and authorizations required for such compliance. Without limiting the foregoing, (i) Customer represents that it is not named on any U.S. government list of persons or entities prohibited from receiving exports, (ii) Customer shall not permit Users to access or use the Service in violation of any U.S. export embargo, prohibition or restriction, and (iii) Customer shall comply with all applicable laws regarding the transmission of technical data exported from the United States and the country in which its Users are located. Customer will not send any Electronic Communication from the Service that is unlawful, harassing, libelous, defamatory or threatening. Customer may not, and may not cause or permit others to: (a) use the Service to harass any person; cause damage or injury to any person or property; publish any material that is false, defamatory, harassing or obscene; violate privacy rights; promote bigotry, racism, hatred or harm; send unsolicited bulk e-mail, junk mail, spam or chain letters; infringe property rights; or otherwise violate applicable laws, ordinances or regulations; (b) perform or disclose any benchmarking, availability or performance testing of the Service; or (c) perform or disclose network discovery, port and service identification, vulnerability scanning, password cracking, remote access or penetration testing of the Service (the "Acceptable Use Policy"). In addition to other rights that Oracle has in this Agreement and Customer Estimate/Order Form, Oracle has the right to take remedial action if the Acceptable Use Policy is violated, and such remedial action may include removing or disabling access to material that violates the policy.

Except as permitted by this Agreement, no part of the Service may be copied, reproduced, distributed, republished, displayed, posted or transmitted in any form or by any means. Customer agrees not to access the Service by any means other than through the interfaces that are provided by Oracle. Customer shall not do any "mirroring" or "framing" of any part of the Service, or create Internet links to the Service which include log-in information, user names, passwords, and/or secure cookies. Customer will not in any way express or imply that any opinions contained in Customer's Electronic Communications are endorsed by Oracle. Customer shall ensure that all access and use of the Service by Users is in accordance with the terms and conditions of this Agreement. Any action or breach by any of such User shall be deemed an action or breach by Customer.

**(b) HIPAA. HIPAA.** Customer agrees that: (i) Oracle is not acting on Customer's behalf as a Business Associate or subcontractor; (ii) the Service may not be used to store, maintain, process or transmit protected health information ("PHI") and (iii) the Service will not be used in any manner that would require Oracle or the Service to be compliant with the Health Insurance Portability and Accountability Act of 1996, as amended and supplemented ("HIPAA"). In the preceding sentence, the terms "Business Associate," "subcontractor," "protected health information" or "PHI" shall have the meanings described in HIPAA.

#### **2.4. Third Party Applications.**

Oracle or third party providers may offer Third Party Applications. Except as expressly set forth in the Estimate/Order Form, Oracle does not warrant any such Third Party Applications, regardless of whether or not such Third Party Applications are provided by a third party that is a member of a Oracle partner program or otherwise designated by Oracle as "Built For NetSuite," "certified," "approved" or "recommended." Any procurement by Customer of such Third Party Applications or services is solely between Customer and the applicable third party provider. Customer may not use Third Party Applications to enter and/or submit transactions to be processed and/or stored in the Service, unless Customer has procured the applicable subscription to the Service for such use and access.

Oracle is not responsible for any aspect of such Third Party Applications that Customer may procure or connect to through the Service, or any interoperation, descriptions, promises or other information related to the foregoing. If Customer installs or enables Third Party Applications for use with the Service, Customer agrees that Oracle may enable such third party providers to access Customer Data for the interoperation of such Third Party Applications with the Service, and any exchange of data or other interaction between Customer and a third party provider is solely between Customer and such third party provider pursuant to a separate privacy policy or other terms governing Customer's access to or use of the Third Party Applications. Oracle shall not be responsible for any disclosure, modification or deletion of Customer Data resulting from any such access by Third Party Applications or third party providers. No procurement of such Third Party Applications is required to use the Service. If Customer was referred to Oracle by a member of one of Oracle's partner programs, Customer hereby authorizes Oracle to provide such member or its successor entity with access to Oracle's business information related to the procurement and use of the Service pursuant to this Agreement, including but not limited to User names and email addresses, support cases and billing/payment information.

**2.5. Transmission of Data.** Customer understands that the technical processing and transmission of Customer's Electronic Communications is fundamentally necessary to use of the Service. Customer is responsible for securing DSL, cable or another high speed Internet connection and up-to-date "browser" software in order to utilize the

Service. Customer expressly consents to Oracle's interception and storage of Electronic Communications and/or Customer Data as needed to provide the services hereunder, and Customer acknowledges and understands that Customer's Electronic Communications will involve transmission over the Internet, and over various networks, only part of which may be owned and/or operated by Oracle. Customer further acknowledges and understands that Electronic Communications may be accessed by unauthorized parties when communicated across the Internet, network communications facilities, telephone or other electronic means. Without limiting Oracle's applicable obligations under Sections 2.8 (Security) or 2.9 (Confidentiality), Oracle is not responsible for any Electronic Communications and/or Customer Data which are delayed, lost, altered, intercepted or stored during the transmission of any data whatsoever across networks not owned and/or operated by Oracle, including, but not limited to, the Internet and Customer's local network.

**2.6. Service Level.** During the Term, the Service will meet the service level specified in the "Service Level Commitment" listed on the Oracle website located at [www.netsuite.com/slc](http://www.netsuite.com/slc), or such other URL as specified by Oracle, which is hereby incorporated by reference. If the Service fails to achieve the service level, then Customer will be entitled, as its sole and exclusive remedy, to a credit for the Service in accordance with the terms set forth in the Service Level Commitment. The Service's system logs and other records shall be used for calculating any service level events.

**2.7. Support Services and Professional Services.** As part of the Service, Oracle will provide Customer with Help Documentation and other online resources to assist Customer in its use of the Service. Oracle also offers optional "for fee" Support Services and Professional Services.

**2.8. Security.** Oracle shall maintain commercially reasonable administrative, physical and technical safeguards designed for the protection, confidentiality and integrity of Customer Data. During the Term, Oracle shall maintain PCI DSS compliance for the portions of the Service that store and process credit card data. Any changes made to the Service by the Customer or at the Customer's direction may affect the Customer's compliance with PCI DSS requirements and Customer shall be solely responsible for ensuring that any such changes are compliant with PCI DSS requirements. For the Service, Oracle shall perform an annual third-party audit in accordance with the Statement on Standards for Attestation Engagements No. 16 (SSAE 16) and the International Standards for Assurance Engagements No. 3402 (ISAE 3402) and shall obtain a SSAE 16 (SOC 1) / ISAE 3402 Type II Report. Additionally, Oracle shall perform an annual ISO 27001 audit (or similar security standard), under the International Organization for Standardization (ISO) 27001 standard. No more than once per year, Customer may submit one request for a copy of: (a) Oracle's final SSAE 16 (SOC 1) / ISAE 3402 Type II Report and (b) Oracle's final ISO 27001 certificate. If similar third party audits, standards and/or certifications become available in the future, Oracle may choose to perform such audit and/or certify to such established industry standard selected by Oracle in place of those in the preceding sentences.

**2.9. Confidentiality.** Each party agrees to use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (at all times exercising at least a commercially reasonable degree of care in the protection of such confidential information) not to use or disclose Confidential Information except to the extent necessary to perform its obligations or exercise rights under this Agreement or as directed by Customer. Either party may disclose Confidential Information on a need to know basis to its Affiliates, contractors and service providers who have executed binding written agreements requiring confidentiality and non-use obligations at least as restrictive as those in this Section. Additionally, Customer must input credit card information and social security numbers only in the fields designated for such data in the Service. Either party may disclose Confidential Information to the extent that such disclosure is required by law or order of a court or other governmental authority or regulation.

**2.10.** Intentionally left blank.

**2.11. Ownership of Customer Data.** As between Oracle and Customer, all title and intellectual property rights in and to the Customer Data is owned exclusively by Customer. Customer acknowledges and agrees that in connection with the provision of the Service, Oracle may store and maintain Customer Data for a period of time consistent with the NetSuite standard business processes. Following expiration or termination of the Customer Estimate/Order or a Customer account Oracle may deactivate the applicable Customer account(s) and delete any data therein.

**2.12. Oracle Intellectual Property Rights.** All rights, title and interest in and to the Service (including without limitation all intellectual property rights therein and all modifications, extensions, customizations, scripts or other derivative works of the Service provided or developed by Oracle) are owned exclusively by Oracle or its licensors. Except as provided in this Agreement, the rights granted to Customer do not convey any rights in the Service, express or implied, or ownership in the Service or any intellectual property rights thereto. Customer grants Oracle a royalty free, worldwide, perpetual, irrevocable, transferable right to use, modify, distribute and incorporate into the Service (without attribution of any kind) any suggestions, enhancement request, recommendations, proposals, correction or other feedback or information provided by Customer or any Users related to the operation or functionality of the Service. Any rights in the Service or Oracle's intellectual property not expressly granted herein by Oracle are reserved by Oracle. Oracle, NetSuite and OpenAir service marks, logos and product and service names are marks of Oracle (the "Oracle

Marks"). Customer agrees not to display or use the Oracle Marks in any manner without Oracle's express prior written permission. The trademarks, logos and service marks of Third Party Application providers ("Marks") are the property of such third parties. Customer is not permitted to use these Marks without the prior written consent of such third party which may own the Mark.

**2.13. U.S. Government Rights.** The Service is a "commercial item" as that term is defined at FAR 2.101. If Customer or User is a US Federal Government (Government) Executive Agency (as defined in FAR 2.101), Oracle provides the Service, including any related software, technology, technical data, and/or professional services in accordance with the following: (a) if acquired by or on behalf of any Executive Agency (other than an agency within the Department of Defense (DoD), the Government acquires, in accordance with FAR 12.211 (Technical Data) and FAR 12.212 (Computer Software), only those rights in technical data and software customarily provided to the public as defined in this Agreement; or (b) if acquired by or on behalf of any Executive Agency within the DoD, the Government acquires, in accordance with DFARS 227.7202-3 (Rights in commercial computer software or commercial computer software documentation), only those rights in technical data and software customarily provided in this Agreement. In addition, DFARS 252.227-7015 (Technical Data – Commercial Items) applies to technical data acquired by DoD agencies. Any Federal Legislative Agency or Federal Judicial Agency shall obtain only those rights in technical data and software customarily provided to the public as set forth in this Agreement. If any Federal Executive Agency, Federal Legislative Agency, or Federal Judicial Agency has a need for rights not conveyed under the terms described in this Section, it must negotiate with Oracle to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement to be effective. This U.S. Government Rights Section is in lieu of, and supersedes, any other FAR, DFARS, or other clause, provision, or supplemental regulation that addresses Government rights in computer software or technical data under this Agreement.

### **3. Warranties, Disclaimers and Exclusive Remedies.**

**3.1.** Each party represents that it has validly entered into this Agreement and that it has the power and authority to do so. Oracle warrants that during the subscription term, Oracle will perform the Service using commercially reasonable care and skill in all material respects as described in the User Guides and that Oracle will not materially decrease the functionality described in the User Guides during the then-current subscription term. If the Service provided to Customer was not performed as warranted, Customer must promptly provide Oracle with a written notice that describes the deficiency in the Service (including, as applicable, the service request number notifying Oracle of the deficiency in the Service).

**3.2.** ORACLE DOES NOT WARRANT THAT THE SERVICE WILL BE PERFORMED ERROR-FREE OR UNINTERRUPTED, THAT ORACLE WILL CORRECT ALL SERVICE ERRORS, OR THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS OR EXPECTATIONS. ORACLE IS NOT RESPONSIBLE FOR ANY ISSUES RELATED TO THE PERFORMANCE, OPERATION OR SECURITY OF THE SERVICE THAT ARISE FROM CUSTOMER DATA OR THIRD PARTY APPLICATIONS OR SERVICES PROVIDED BY THIRD PARTIES.

**3.3.** FOR ANY BREACH OF THE WARRANTY, CUSTOMER'S EXCLUSIVE REMEDY AND ORACLE'S ENTIRE LIABILITY SHALL BE THE CORRECTION OF THE DEFICIENT SERVICE THAT CAUSED THE BREACH OF WARRANTY, OR, IF ORACLE CANNOT SUBSTANTIALLY CORRECT THE DEFICIENCY IN A COMMERCIALY REASONABLE MANNER, CUSTOMER MAY END THE DEFICIENT SERVICE AND ORACLE WILL REFUND TO CUSTOMER THE FEES FOR THE TERMINATED SERVICE THAT CUSTOMER PRE-PAID TO ORACLE FOR THE PERIOD FOLLOWING THE EFFECTIVE DATE OF TERMINATION.

**3.4.** TO THE EXTENT NOT PROHIBITED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING FOR SOFTWARE, HARDWARE, SYSTEMS, NETWORKS OR ENVIRONMENTS OR FOR MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR A PARTICULAR PURPOSE.

**4. Limitations of Liability.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL EITHER PARTY OR ITS AFFILIATES HAVE ANY LIABILITY TO THE OTHER PARTY OR ITS AFFILIATES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT FOR ANY LOST PROFITS OR REVENUE OR FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE, COVER, SPECIAL, RELIANCE OR EXEMPLARY DAMAGES, OR INDIRECT DAMAGES OF ANY TYPE OR KIND HOWEVER CAUSED, WHETHER FROM BREACH OR REPUDIATION OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, OR OTHERWISE (AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES). CERTAIN STATES AND/OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, IN WHICH CASE SUCH DAMAGES SHALL BE SUBJECT TO THE LIMITATIONS SET FORTH IN THE FOLLOWING PARAGRAPH.

THE MAXIMUM AGGREGATE LIABILITY OF EITHER PARTY AND ITS AFFILIATES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED ON

BREACH OR REPUDIATION OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, OR OTHERWISE, SHALL NOT EXCEED THE TOTAL SUBSCRIPTION FEES PAID FOR THE SERVICE GIVING RISE TO THE LIABILITY DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT OUT OF WHICH THE LIABILITY AROSE, BUT IN THE EVENT OF A BREACH OF SECTION 2.9 OF THIS AGREEMENT, SUCH MAXIMUM AGGREGATE LIABILITY SHALL BE INCREASED TO TWO (2) TIMES THE TOTAL SUBSCRIPTION FEES PAID FOR THE APPLICABLE SERVICE DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT OUT OF WHICH THE LIABILITY AROSE.

BOTH PARTIES ACKNOWLEDGE THAT THE FEES REFLECT THE ALLOCATION OF RISK SET FORTH IN THIS AGREEMENT AND THAT THE PARTIES WOULD NOT ENTER INTO THIS AGREEMENT WITHOUT THESE LIMITATIONS ON THEIR LIABILITY. THE LIMITATIONS OF LIABILITY SET FORTH IN THE SECOND PARAGRAPH OF THIS SECTION SHALL NOT APPLY TO: (A) FEES DUE UNDER THIS AGREEMENT; (B) A BREACH OF SECTION 2.3 OF THESE TERMS OF SERVICE; OR (C) EITHER PARTY'S DEFENSE AND INDEMNITY OBLIGATIONS EXCEPT AS SET FORTH IN SECTION 5 ("Indemnification") BELOW. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS SECTION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY TO THE EXTENT SUCH LIABILITY WOULD NOT HAVE OCCURRED BUT FOR THE OTHER PARTY'S FAILURE TO COMPLY WITH THE TERMS OF THIS AGREEMENT.

## 5. Indemnification.

**5.1. Infringement.** Subject to the terms and conditions set forth in this Section ("Indemnification"), Oracle shall, at its own expense, defend Customer from and against any and all allegations, threats, claims, suits, and proceedings brought by third parties (collectively "Claims") alleging that the Service, as used in accordance with this Agreement, infringes such third party's copyrights or trademarks, or misappropriates such third party's trade secrets and shall indemnify Customer from and against liability, damages, and costs finally awarded or entered into in settlement (including, without limitation, reasonable attorneys' fees) (collectively, "Losses") to the extent based upon such a Claim.

Oracle will have no liability for Claims or Losses to the extent arising from (a) use of the Service in violation of this Agreement or applicable law, (b) use of the Service after Oracle notifies Customer to discontinue use because of an infringement claim, (c) modifications to the Service not made by Oracle or made by Oracle based on Customer specifications or requirements, (d) use of the Service in combination with any non-Oracle software, application or service, or (e) services offered by Customer or revenue earned by Customer for such services.

If a Claim of infringement as set forth above is brought or threatened, Oracle shall, at its sole option and expense, use commercially reasonable efforts either (a) to procure a license that will protect Customer against such Claim without cost to Customer; (b) to modify or replace all or portions of the Service as needed to avoid infringement, such update or replacement having substantially similar or better capabilities; or (c) if (a) and (b) are not commercially feasible, terminate the Agreement and refund to the Customer a pro-rata refund of the subscription fees paid for under the Agreement for the terminated portion of the Term. The rights and remedies granted Customer under this Section 6.1 state Oracle's entire liability, and Customer's exclusive remedy, with respect to any claim of infringement of the intellectual property rights of a third party.

**5.2. Customer's Indemnity.** Subject to the terms and conditions set forth in this Section 5, Customer shall, at its own expense, defend Oracle from and against any and all Claims (i) alleging that the Customer Data or any trademarks or service marks, or any use thereof, infringes the copyright or trademark or misappropriates the trade secrets of a third party, or violates applicable law ;and shall indemnify Oracle from and against liability for any Losses to the extent based upon such Claims.

**5.3. Indemnification Procedures and Survival.** In the event of a potential indemnity obligation under this Section 5, the indemnified party shall: (i) promptly notify the indemnifying party in writing of such Claim; (ii) allow the indemnifying party to have sole control of its defense and settlement; and (iii) upon request of the indemnifying party, cooperate in all reasonable respects, at the indemnifying party's cost and expense, with the indemnifying party in the investigation, trial, and defense of such Claim and any appeal arising therefrom. The indemnification obligations under this Section 55 are expressly conditioned upon the indemnified party's compliance with this Section 5.3 except that failure to notify the indemnifying party of such Claim shall not relieve that party of its obligations under this Section 5 but such obligations shall be reduced to the extent of any damages attributable to such failure. The indemnification obligations contained in this Section 5 shall survive termination of this Agreement for one year.

## 6. Suspension/Termination.

**6.1. Suspension for Delinquent Account.** Oracle reserves the right to suspend Customer's and any Customer Affiliates' access to and/or use of the Service and/or Support Services if any payment is due but unpaid but only after Oracle has provided Customer two (2) delinquency notices, and at least thirty (30) days have passed since the

transmission of the first notice. Customer agrees that Oracle shall not be liable to Customer or to any Customer Affiliate or other third party for any suspension pursuant to this Section.

**6.2. Suspension for Ongoing Harm.** Oracle may with reasonably contemporaneous telephonic notice to Customer suspend access to the Service if Oracle reasonably concludes that Customer's Service is being used to engage in denial of service attacks, spamming, or illegal activity, and/or use of Customer's Service is causing immediate, material and ongoing harm to Oracle or others. In the event Oracle suspends access to the Service, Oracle will use commercially reasonable efforts to limit the suspension to the offending portion of the Service and work with Customer to resolve the issues causing the suspension of Service. Customer agrees that Oracle shall not be liable to Customer nor to any third party for any suspension of the Service under such circumstances as described in this Section. Any suspension under this section shall not excuse Customer from Customer's obligation to make payments under this Agreement.

**6.3. Termination for Cause, Expiration.** Either party may immediately terminate this Agreement and all Estimates/Order Forms issued hereunder in the event the other party commits a material breach of any provision of this Agreement which is not cured within thirty (30) days of written notice from the non-breaching party. Such notice by the complaining party shall expressly state all of the reasons for the claimed breach in sufficient detail so as to provide the alleged breaching party a meaningful opportunity to cure such alleged breach and shall be as set forth in Section 6.4. Upon termination or expiration of this Agreement, Customer shall have no rights to continue use of the Service. If this Agreement is terminated by Customer for any reason other than a termination expressly permitted by this Agreement, then Oracle shall be entitled to all of the fees due under this Agreement for the entire Term. If this Agreement is terminated as a result of Oracle's breach of this Agreement, then Customer shall be entitled to a refund of the pro rata portion of any subscription fees paid by Customer to Oracle under this Agreement for the terminated portion of the Term.

**6.4. Notice.** Any legal notice required under this Agreement shall be provided to the other party in writing. If Customer has a legal dispute with Oracle or if Customer wishes to provide a notice under the Indemnification Section of this Agreement, or if Customer becomes subject to insolvency or other similar legal proceedings, Customer will promptly send written notice to: Oracle America, Inc., 500 Oracle Parkway, Redwood Shores, CA 94065, Attention: General Counsel, Legal Department.

## **7. Modifications; Discontinuation of Service.**

**7.1 To the Service.** Oracle may make modifications to the Service or particular components of the Service from time to time and will use commercially reasonable efforts to notify Customer of any material modifications. Oracle reserves the right to discontinue offering the Service at the conclusion of Customer's then current subscription term for such Service. Oracle shall not be liable to Customer nor to any third party for any modification of the Service as described in this Section.

**7.2 To Applicable Terms.** If Oracle makes a material change to any applicable URL Terms, then Oracle will notify Customer by either sending an email to the notification email address or posting a notice to the administrator in Customer's account. If the change has a material adverse impact on Customer and Customer does not agree to the change, Customer must so notify Oracle via [legalnotices@netsuite.com](mailto:legalnotices@netsuite.com) within thirty days after receiving notice of the change. If Customer notifies Oracle as required, then Customer will remain governed by the URL Terms in effect immediately prior to the change until the end of the then current subscription term for the affected service(s). If the affected service(s) is renewed, it will be renewed under Oracle's then current URL Terms.

## **8. Service Monitoring and Analyses**

**8.1** Oracle continuously monitors the Service to facilitate Oracle's operation of the Service; to help resolve Customer service requests; to detect and address threats to the functionality, security, integrity, and availability of the Service as well as any content, data, or applications in the Service; and to detect and address illegal acts or violations of the Acceptable Use Policy. Oracle monitoring tools do not collect or store any Customer Data residing in the Service, except as needed for such purposes. Oracle does not monitor, and does not address issues with, non-Oracle software provided by Customer or any of Customer's Users that is stored in, or run on or through, the Service. Information collected by Oracle monitoring tools (excluding Customer Data) may also be used to assist in managing Oracle's product and service portfolio, to help Oracle address deficiencies in its product and service offerings, and for license management purposes.

**8.2** Oracle may (i) compile statistical and other information related to the performance, operation and use of the Service, and (ii) use data from the Service in aggregated form for security and operations management, to create statistical analyses, and for research and development purposes (clauses i and ii are collectively referred to as "Service Analyses"). Oracle may make Service Analyses publicly available; however, Service Analyses will not incorporate

Customer Data, personal information or Confidential Information in a form that could serve to identify Customer or any individual. Oracle retains all intellectual property rights in Service Analyses.