

TERMS OF SERVICE

Last Updated: October 12, 2022

These **TERMS OF SERVICE** (these “**Terms**”) are a legal agreement between you and HarperDB, Inc. a Delaware corporation (“**HarperDB**”) and govern your access to and use of the Platform and the Services, including HarperDB’s database management platform.

You represent and certify that you are of legal age to form a binding contract. To register as a user of the Services you must be 18 years or over.

In the event that you are agreeing to this Terms on behalf of a third party entity, you represent that you are an employee or agent of the third party for whom you are acting as the User (as defined below) of the Services and are entering into these Terms for use of the Services by such third party in accordance with these Terms. You represent and warrant that you have sufficient right to bind such third party to these Terms. Accordingly, all references to “you” and “your” in these Terms shall be references to such third party. If you do not have such authority, you must not accept these Terms and may not use the Services.

BY CHECKING I AGREE, OR BY OTHERWISE ACCESSING THE SERVICES YOU ACCEPT THESE TERMS. YOU FURTHER ACKNOWLEDGE THAT YOUR SUBMISSION OF THE CREDIT CARD PAYMENT FORM SERVES AS YOUR AGREEMENT TO THESE TERMS.

In the case of inconsistencies between these Terms and information included in any other materials related to the Platform or the Services (e.g., promotional materials), these Terms will always govern and take precedence.

IN THE EVENT THAT YOU AND HARPERDB ARE PARTY TO A SEPARATE WRITTEN AGREEMENT GOVERNING THE SERVICES AND YOUR ACCESS TO AND USE OF THE PLATFORM (THE “**SERVICES AGREEMENT**”), THE TERMS OF THAT SERVICES AGREEMENT WILL APPLY IN PLACE OF THESE TERMS AND THESE TERMS WILL BE OF NO FORCE OR EFFECT, EXCEPT WITH RESPECT TO SECTION 3.5.

Please click here: <https://harperdb.io/legal/harperdb-cloud-terms-of-service/> to view a printable version of these Terms.

1. DEFINITIONS.

1.1 “Affiliate” means, with respect to a party, any other entity that directly or indirectly controls, is controlled by or is under common control with such entity, where “control” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of such entity through the ownership of 50% or more of the outstanding voting securities (but only for as long as such entity meets these requirements).

1.2 “Content” means content, data, and information that is owned by HarperDB or any of its licensors that is provided or made available by HarperDB through use of the Platform or as part of or in connection with HarperDB’s provision of Services. Content does not include Customer Data.

1.3 “Customer Data” means the electronic data and information input into the Platform by or on behalf of you. Customer Data does not include Usage Data.

1.4 “Documentation” means any user materials, instructions, and specifications made available by HarperDB to you for the Services.

1.5 “Effective Date” means the date that you accept these Terms.

1.6 “Evaluation Period” means the period beginning on the Effective Date until the date: (a) specified by HarperDB, (b) HarperDB provides you with written notice of termination or (c) you purchase the right to use HarperDB’s paid, production use software program, whichever occurs first.

1.7 “Order” means any order for Services submitted by you (including, but not limited to, your selection of Services made by you through the Platform) and accepted by HarperDB setting forth Services HarperDB will provide. Each Order is incorporated by reference into these Terms.

1.8 “Platform” means HarperDB’s proprietary platform utilized by HarperDB to provide the Software to you under these Terms. The Platform does not include your connectivity equipment, internet and network connections, hardware, software and other equipment as may be necessary for you and your Users to connect to and obtain access to the Platform or to utilize the Services.

1.9 “Services” means, collectively, access to the Platform, Support Services, and the other services made available on, by, or through the Platform by HarperDB under these Terms, with respect to any of the foregoing, as set forth in an Order.

1.10 “Software” means HarperDB’s, or its licensors, proprietary software as a service offering as set forth in an Order and made available through remote access by HarperDB to you and your Users as part of the Platform, including any modified, updated, or enhanced versions that may become part of the Software.

- 1.11 “Support Services”** means HarperDB’s standard technical support and Software maintenance offering for the Platform.
- 1.12 “Users”** means your employees, independent contractors, and other individuals who you authorize to use the Services on your behalf.
- 1.13 “Usage Data”** means any content, data, or information that is collected or produced by the Platform in connection with use of the Services, and may include, but is not limited to, usage patterns, traffic logs, performance metrics, User registration and contact data, and User conduct associated with the Platform.

2. SERVICES.

- 2.1 Provision of Services.** Subject to the terms and conditions of these Terms, HarperDB shall provide the Services to you and your Users in accordance with the Service Level Agreement attached as Exhibit A.
- 2.2 Cooperation.** You shall supply to HarperDB the Customer Data along with access and personnel resources that HarperDB reasonably requests in order for HarperDB to provide the Services.
- 2.3 Resources.** You are solely responsible for, at your own expense, acquiring, installing, and maintaining all connectivity equipment, internet and network connections, hardware, software, and other equipment as may be necessary for your Users to connect to and access the Platform.
- 2.4 Third Party Offerings.** HarperDB may make access to or use of third-party software services, applications, or functionality that link to, interoperate with, or are incorporated into the Platform available to you (collectively, “**Third-Party Offerings**”). You acknowledge that HarperDB does not own or control such Third-Party Offerings, they are made available as a convenience only, and are not part of the Platform or subject to any of the warranties, service commitments, or other obligations with respect to Platform under these Terms and that such Third-Party Offerings may be subject to their own terms and conditions. Any acquisition by you of Third-Party Offerings, and any exchange of data between you and any Third Party Offering is solely between you and the applicable Third-Party Offering provider. Access to and use of any Third-Party Offerings is at your own risk and is solely determined by the relevant third-party provider and is subject to such additional terms and conditions applicable to such Third-Party Offering. HarperDB may disable or restrict access to any Third-Party Offerings on the Platform at any time without notice. HarperDB is not liable for Third-Party Offerings or any Customer Data provided to a third party via a Third-Party Offering.
- 2.5 Data Protection.** The parties agree to comply with the Data Processing Addendum attached as Exhibit B.

3. GRANT OF RIGHTS.

- 3.1 Access Rights; Your Use of the Platform.** Subject to the terms and conditions of these Terms, HarperDB hereby grants to you, during the Term (as defined below), a non-exclusive, non-sublicensable right to access and use the Platform for your and your Affiliates’ internal business purposes in accordance with the Documentation and the terms and conditions of these Terms. HarperDB and its licensors reserve all rights in and to the Platform and the Services not expressly granted to you under these Terms.
- 3.2 Restrictions on Use.** You shall not (a) reproduce, display, download, modify, create derivative works of or distribute the Platform, or attempt to reverse engineer, decompile, disassemble or access the source code for the Platform or any component thereof; (b) use the Platform, or any component thereof, in the operation of a service bureau to support or process any content, data, or information of any party other than you or your Affiliates; (c) permit any party, other than the then-currently authorized Users to independently access the Platform; (d) use the Platform in any manner or for any purpose that infringes, misappropriates, or otherwise violates any intellectual property right or other right of any third-party, or that violates any applicable law; or (e) use the Platform to store or transmit any code, files, scripts, agents, or programs intended to do harm, including, for example, viruses, worms, time bombs and Trojan horses.
- 3.3 Prohibited Data.** Except as provided in Section 4.2, you and your Users shall not upload to the Platform or otherwise submit or make accessible to HarperDB any government issued identifiers (e.g., social security numbers), protected health information, or other types of sensitive data that is subject to specific or elevated data protection requirements (collectively, “**Prohibited Data**”), unless HarperDB has expressly agreed in the relevant Order that it can comply with such requirements. You acknowledge that: (i) the Platform is not intended for the management or protection of Prohibited Data and may not provide adequate or legally required security for Prohibited Data; and (ii) HarperDB has no liability for any failure to provide protections set forth in any laws, rules, regulations, or standards applicable to such Prohibited Data or to otherwise protect the Prohibited Data other than as provided for in these Terms. If you or your Users upload any Prohibited Data to the Platform in violation of these Terms, HarperDB may, without limiting any of its other rights and remedies, delete such Prohibited Data from the Platform after providing you with at least 5 days to export such Prohibited Data from the Platform.
- 3.4 Users.** Under the rights granted to you under these Terms, you may permit independent contractors and employees of your Affiliates to become Users in order to access and use the Platform in accordance with these Terms; provided that you will be liable for the acts and omissions of all your Affiliates and Users. You shall not, and shall not permit any User to, use the Platform, Software or Documentation except as expressly permitted under these Terms. You are responsible for Users’ compliance with these Terms and any activity that occurs under a User’s account.

3.5 Evaluation Period.

(a) *Evaluation Period Access and Use Rights.* If you are accessing and using the Platform free of charge for evaluation purposes, this Section 3.5 shall apply and take precedence over any inconsistent or conflicting terms until you purchase and are granted a right to access and use the Platform. Subject to the terms and conditions of these Terms, HarperDB grants to you, during the Evaluation Period, a revocable, non-exclusive, non-transferable, non-sublicensable right to access and use the Platform solely for your internal business purpose of evaluating and testing the Platform and validating the functionality of the Platform to determine whether to purchase a full right to access and use the Platform and subject to any limitations specified by HarperDB. During the Evaluation Period, access to and use of the Platform will be free of charge. You may elect to purchase a right to access and use the Platform by notifying HarperDB prior to the expiration of the Evaluation Period and paying the applicable Fees (as defined below) in accordance with these Terms. Upon payment of such Fees, HarperDB will grant you a right to access and use the Platform for your future use of the Platform in accordance with Section 3.1. If you do not purchase such a right to access and use the Platform prior to expiration of the Evaluation Period, your right to access and use the Platform free of charge will terminate.

(b) *Evaluation Period Disclaimer and Limitations of Liability.* YOUR USE OF THE PLATFORM DURING THE EVALUATION PERIOD IS ENTIRELY AT YOUR OWN RISK. NOTWITHSTANDING SECTIONS 7.1, 8.1, THE CAP ON DAMAGES IN SECTION 9 OF THESE TERMS, AND EXHIBIT A, DURING THE EVALUATION PERIOD, THE PLATFORM AND THE SERVICES ARE PROVIDED “AS-IS”, WITHOUT ANY WARRANTIES OF ANY KIND, AND HARPERDB WILL HAVE NO INDEMNIFICATION OR DEFENSE OBLIGATIONS OR LIABILITY OF ANY TYPE WITH RESPECT TO THESE TERMS, THE PLATFORM, OR THE SERVICES, UNLESS SUCH EXCLUSION OF LIABILITY IS NOT ENFORCEABLE UNDER APPLICABLE LAW, IN WHICH CASE IN NO EVENT WILL HARPERDB’S LIABILITY WITH RESPECT TO THESE TERMS, THE PLATFORM, AND THE SERVICES PROVIDED DURING THE EVALUATION PERIOD EXCEED \$100. EXCEPT AS ALTERED IN THIS SECTION 3.5, ALL OTHER TERMS OF THESE TERMS SHALL APPLY AND GOVERN YOUR USE OF THE PLATFORM DURING THE EVALUATION PERIOD. HARPERDB WILL HAVE NO OBLIGATION DURING THE EVALUATION PERIOD TO CORRECT ANY BUGS, DEFECTS OR ERRORS IN THE PLATFORM OR TO OTHERWISE SUPPORT OR MAINTAIN THE PLATFORM.

4. FEES AND PAYMENT TERMS.

4.1 Price. You shall pay HarperDB the fees set forth in the applicable Order (“Fees”) in accordance with the terms of these Terms. Fees are exclusive of, and you shall pay all taxes, fees, duties, and other governmental charges arising from the payment of any Fees or any amounts owed to HarperDB under these Terms (excluding any taxes arising from HarperDB’s income or any employment taxes).

4.2 Payment. You shall pay to HarperDB all Fees within 30 days after your receipt of the applicable invoice for such Services. If you disagree with any Fees set forth in an invoice, you shall notify HarperDB of the dispute within 30 days after receipt of such invoice. All payments received by HarperDB are non-refundable except as otherwise expressly provided in these Terms. You shall make all payments in United States dollars.

5. TERM AND TERMINATION.

5.1 Term. These Terms commence on the Effective Date and, unless terminated earlier in accordance with these Terms, continue until all Orders have terminated (“Term”).

5.2 Order Term. The initial term of an Order shall begin on the date set forth in the Order and continue for one month (“Initial Term”). Each Order will automatically renew for additional one-month periods (each, a “Renewal Term”), unless a party gives the other party written notice of its intent to not renew prior to the end of the Initial Term or the then-current Renewal Term.

5.3 Termination or Suspension During the Evaluation Period. During the Evaluation Period, HarperDB may: (a) terminate these Terms for any reason upon written notice to you; or (b) suspend your and your Users’ access to and use of the Platform, without notice, for any reason, including, but not limited to, your breach of these Terms or conduct that HarperDB believes is otherwise harmful. You acknowledge and agree that HarperDB will not be liable to you for any termination of these Terms or suspension of your or your Users’ access to the Platform under this Section.

5.4 Termination. Either party may terminate these Terms or an Order upon written notice to the other party.

5.5 Effects of Termination. Upon termination of these Terms and all Orders: (a) all amounts owed to HarperDB under these Terms before such termination will be due and payable in accordance with Section 4; (b) all of your rights granted in these Terms will immediately cease; (c) you shall promptly discontinue all access and use of the Platform and return or erase, all copies of the Documentation in your possession or control; and (d) HarperDB shall promptly return or erase all Customer Data, except that HarperDB may retain Customer Data in HarperDB’s archived backup files. Sections 3.3, 3.5(b), 4, 5.5, 6, 7.3, 8, 9, 10, and 11 survive expiration or termination of these Terms.

5.6 Suspension. Notwithstanding anything to the contrary in these Terms, HarperDB may suspend your and any of your Users’ access to the Platform if HarperDB determines that: (a) there is an attack on the Platform; (b) your or any of your User’s use of the Platform poses a reasonable risk of harm or liability to HarperDB and, if capable of being cured, you are not taking appropriate action to cure such risk; (c) you or your Users have breached Sections 3.2 or 10; (d) your or your Users use of the Platform violates applicable

law; or (e) you have failed to pay any undisputed charge owed under these Terms when due and has failed to cure such late payment within 15 days after HarperDB has provided you with written notice of such late payment. HarperDB shall use commercially reasonable efforts to provide you with notice of such suspension. HarperDB may suspend your or your Users' access to the Platform until the situation giving rise to the suspension has been remedied to HarperDB's reasonable satisfaction. HarperDB's suspension of your or your Users' access to the Platform will not relieve you of your payment obligations under these Terms, and you will not be eligible for any Downtime Credits due to Platform unavailability under Exhibit A.

6. PROPRIETARY RIGHTS.

6.1 Customer Data. As between the parties, you own all right, title, and interest in Customer Data, including all intellectual property rights therein. You are solely responsible for the legality of Customer Data. You shall obtain all necessary rights, and, where applicable, all appropriate and valid consents and agreements to disclose Customer Data to HarperDB to permit the processing of such Customer Data by HarperDB for the purposes of performing HarperDB's obligations under these Terms or as may be required under applicable law. You shall notify HarperDB of any changes in, or revocation of, the permission to use, disclose, or otherwise process Customer Data that would impact HarperDB's ability to comply with these Terms, or applicable law.

6.2 Customer Data License Grant. You hereby grant to HarperDB and its authorized representatives and contractors, during the Term, a limited, non-exclusive, non-transferable (except as permitted by Section 11.3) license to use the Customer Data solely for the purpose of performing the Services for you under these Terms.

6.3 The Services. All proprietary technology utilized by HarperDB to perform its obligations under these Terms, and all intellectual property rights in and to the foregoing, as between the parties, are the exclusive property of HarperDB. HarperDB or its third party licensors retain ownership of all right, title, and interest to all copyrights, patents, trademarks, trade secrets, and other intellectual property rights in and to the Content and the Platform, including without limitation the Software, Documentation, customizations, and enhancements, and all processes, know-how, and the like utilized by or created by HarperDB in performing under these Terms. Any rights not expressly granted to you hereunder are reserved by HarperDB.

6.4 Usage Data. HarperDB retains ownership of all right, title, and interest in and to the Usage Data. HarperDB may use Usage Data in connection with its performance of its obligations in these Terms and for any other lawful business purpose, including, but not limited to, benchmarking, data analysis, and to improve HarperDB's services, systems, and algorithms.

7. WARRANTY; DISCLAIMERS.

7.1 Access to the Platform. HarperDB warrants that the Platform will perform materially in accordance with the Documentation and these Terms. HarperDB does not warrant that the Platform will be completely error-free or uninterrupted. If you notify HarperDB of a reproducible error in the Platform that indicates a breach of the foregoing warranty (each, an **"Error"**) within 30 days after you experience such Error, HarperDB shall, at its own expense and as its sole obligation and your exclusive remedy (except for Downtime Credits that you may be entitled to receive due to Platform unavailability under Exhibit A): (a) use commercially reasonable efforts to correct or provide a workaround for such Error; or (b) if HarperDB is unable to correct or provide a workaround for such Error within 60 days after receiving notice of such Error from you, you may terminate these Terms upon notice to HarperDB and, HarperDB shall refund the amounts you paid for access to the Platform for the period during which the Platform was not usable by you. The warranties set forth in this Section 7.1 do not apply to any Third Party Offerings or cover any Error caused by: (i) you or your Users; (ii) use of the Platform in any manner or in any environment inconsistent with its intended purpose; or (iii) any equipment, software, or other material you utilize in connection with the Platform not provided by HarperDB.

7.2 Right to Customer Data. You represent and warrant that you have the right to: (a) use the Customer Data as contemplated by these Terms; and (b) grant HarperDB the license in Section 6.2.

7.3 Disclaimer. EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION 7, NEITHER PARTY MAKES ANY OTHER WARRANTIES OF ANY KIND AND EACH PARTY SPECIFICALLY DISCLAIMS ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE. HARPERDB MAKES NO WARRANTY THAT THE PLATFORM OR THE SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR FREE, OR THAT ANY CUSTOMER DATA OR ANY OTHER DATA OR INFORMATION THAT YOU UPLOAD TO THE PLATFORM OR OTHERWISE MAKE AVAILABLE WILL BE SECURE FROM UNAUTHORIZED ACCESS OR USE.

8. INDEMNIFICATION.

8.1 Claims Against You. HarperDB shall defend any claim, suit, or action against you brought by a third party to the extent based on an allegation that the Software infringes any intellectual property rights of such third party (each, a **"Customer Claim"**), and HarperDB shall indemnify and hold you harmless, from and against damages, losses, liabilities, and expenses (including reasonable attorneys' fees and other legal expenses) (collectively, **"Losses"**) that are specifically attributable to such Customer Claim or those costs and damages agreed to in a settlement of such Customer Claim. The foregoing obligations are conditioned on you: (a) promptly notifying HarperDB in writing of such Customer Claim; (b) giving HarperDB sole control of the defense thereof and any related settlement

negotiations; and (c) cooperating and, at HarperDB's request and expense, assisting in such defense. In the event that the use of the Platform is enjoined, HarperDB shall, at its option and at its own expense either (a) procure for you the right to continue using the Platform, (b) replace the Software with a non-infringing but functionally equivalent product, (c) modify the Software so it becomes non-infringing or (d) terminate these Terms and refund the amounts you paid for access to the Platform that relate to the period during which you were not able to use the Platform. Notwithstanding the foregoing, HarperDB will have no obligation under this Section 8.1 with respect to any infringement claim based upon: (1) any use of the Platform not in accordance with these Terms; (2) any use of the Platform in combination with products, equipment, software, or data that HarperDB did not supply or approve of if such infringement would have been avoided without the combination with such other products, equipment, software or data; (3) any modification of the Platform by any person other than HarperDB or its authorized agents or subcontractors; or (4) any Third-Party Offering. This Section 8.1 states HarperDB's entire liability and your sole and exclusive remedy for infringement claims or actions.

8.2 Claims Against HarperDB. You shall defend, any claim, suit, or action against HarperDB brought by a third party (including, but not limited to your Users) to the extent that such claim, suit or action is based upon: (a) your or HarperDB's use of any Customer Data in accordance with these Terms; or (b) your breach of Section 3.3 (each, a "**HarperDB Claim**") and you shall indemnify and hold HarperDB harmless, from and against Losses that are specifically attributable to such HarperDB Claim or those costs and damages agreed to in a settlement of such HarperDB Claim. The foregoing obligations are conditioned on HarperDB: (a) promptly notifying you in writing of such HarperDB Claim; (b) giving you sole control of the defense thereof and any related settlement negotiations; and (c) cooperating and, at your request and expense, assisting in such defense.

9. LIMITATIONS OF LIABILITY. IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL, OR INCIDENTAL DAMAGES, OR FOR ANY LOST DATA, LOST PROFITS, OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, ARISING FROM OR RELATING TO THESE TERMS, HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY (INCLUDING NEGLIGENCE), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EACH PARTY'S TOTAL CUMULATIVE LIABILITY IN CONNECTION WITH THESE TERMS, WHETHER IN CONTRACT OR TORT OR OTHERWISE, WILL NOT EXCEED THE AMOUNT OF FEES PAID BY YOU TO HARPERDB UNDER THESE TERMS DURING THE 12 MONTHS PRECEDING THE EVENTS GIVING RISE TO SUCH LIABILITY. THE EXCLUSIONS AND LIMITATION OF LIABILITIES SET FORTH IN THIS SECTION 9 DO NOT APPLY TO A PARTY'S OBLIGATIONS UNDER SECTION 8 OR TO LIABILITY ARISING FROM YOUR BREACH OF SECTION 3.2.

10. CONFIDENTIALITY.

10.1 Definitions. "Confidential Information" means all information disclosed by one party ("**Discloser**") to the other party ("**Recipient**") under these Terms during the Term. Confidential Information includes information that is marked or identified as confidential and, if not marked or identified as confidential, information that should reasonably have been understood by Recipient to be proprietary and confidential to Discloser or to a third party. HarperDB's Confidential Information includes Software and Documentation.

10.2 Protection. Recipient shall not use any Confidential Information for any purpose not expressly permitted by these Terms and shall not disclose Confidential Information to anyone other than Recipient's employees and independent contractors who have a need to know such Confidential Information for purposes of these Terms and who are subject to confidentiality obligations no less restrictive than Recipient's obligations under this Section 10. Recipient shall protect Confidential Information from unauthorized use, access, and disclosure in the same manner as Recipient protects its own confidential or proprietary information of a similar nature and with no less than reasonable care.

10.3 Exceptions. Recipient shall have no confidentiality obligations under Section 10.2 above with respect to any information of Discloser that Recipient can document: (a) was already known to Recipient prior to Discloser's disclosure; (b) is disclosed to Recipient by a third party who had the right to make such disclosure without violating any confidentiality agreement with or other obligation to the party who disclosed the information; or (c) is, or through no fault of Recipient has become, generally available to the public; or (d) is independently developed by Recipient without access to or use of Confidential Information. Recipient may disclose Confidential Information if required to as part of a judicial process, government investigation, legal proceeding, or other similar process on the condition that, to the extent permitted by applicable law, Recipient gives prior written notice of such requirement to Discloser. Recipient shall take reasonable efforts to provide this notice in sufficient time to allow Discloser to seek an appropriate confidentiality agreement, protective order, or modification of any disclosure, and Recipient shall reasonably cooperate in such efforts at the expense of Discloser.

11. GENERAL.

11.1 Independent Contractor. The relationship of the parties established under these Terms is that of independent contractors and neither party is a partner, employee, agent, or joint venture partner of or with the other, and neither party has the right or authority to assume or create any obligation on behalf of the other party.

11.2 Subcontractors. HarperDB may utilize subcontractors, third-party service providers, and subprocessors (collectively, "**Subcontractors**") in the performance of its obligations, provided that HarperDB will remain liable and responsible for the

Subcontractors' acts and omissions to the extent any of such acts or omissions, if performed by HarperDB, would constitute a breach of, or otherwise give rise to liability to HarperDB under, these Terms when they are performing for or on behalf of HarperDB.

11.3 Assignment. Neither party may assign these Terms or any of its rights under these Terms to any third party without the other party's prior written consent; except that a party may assign these Terms without consent from the other party to (a) an Affiliate; or (b) any successor to its business or assets to which these Terms relates, whether by merger, acquisition, or sale of all or substantially all of its assets, or otherwise. Any attempted assignment in violation of the foregoing will be void and of no force or effect. These Terms does not confer any rights or remedies upon any person or entity not a party to these Terms.

11.4 Force Majeure. Except for payment obligations, neither party will be liable for any breach of these Terms, or for any delay or failure of performance, resulting from any cause beyond that party's reasonable control.

11.5 Notices. To be effective, notices under these Terms must be delivered to the other party in writing by electronic mail, courier, or certified or registered mail (postage prepaid and return receipt requested) at the address identified below and will be effective upon receipt. Either party may update its notice address by notifying the other party of such address change in accordance with this Section 11.5.

If to HarperDB:

HarperDB, Inc.

Attention: Legal

2420 17th St, Suite 270

Denver, CO 80202

legal@harperdb.io

If to You: At the address that HarperDB has on file for you.

11.6 Governing Law; Venue. The laws of the State of Colorado govern these Terms and any matters related to these Terms, without regard to any conflicts of laws principles that would require the application of the laws of a different jurisdiction.. The parties hereby submit to the exclusive jurisdiction of, and waive any venue objections against, state or federal courts sitting in Denver, Colorado in any litigation arising out of these Terms or the Services.

11.7 Remedies. Each party acknowledges that any actual or threatened breach of Sections 3.2 or 10 will constitute immediate, irreparable harm to the non-breaching party for which monetary damages would be an inadequate remedy, that injunctive relief is an appropriate remedy for such breach, and that if granted, the breaching party agrees to waive any bond that would otherwise be required.

11.8 Compliance with Laws. Each party shall comply with all laws, rules, and regulations, applicable to that party in connection with these Terms.

11.9 Waivers. To be effective, any waivers must be in writing and signed by the party to be charged. Any waiver or failure to enforce any provision of these Terms on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

11.10 Severability. If any provision of these Terms is unenforceable, the other provisions of these Terms will be unimpaired, and the unenforceable provision will be deemed modified so that it is enforceable to the maximum extent permitted by law (unless such modification is not permitted by law, in which case such provision will be disregarded).

11.11 Modification. HarperDB may modify these Terms at any time, upon written notice to you. Any such modification will become effective with respect to the applicable Order upon the commencement of the Renewal Term for such Order following the date of such notice. If you do not agree to the revised Terms, you may choose to not renew the then-current term. Except as otherwise set forth in this Section, these Terms may not otherwise be modified except by a written amendment signed by an authorized representative of each party.

11.12 Entire Agreement. These Terms, including any Order and any exhibits or attachments thereto, constitute the final and entire agreement between the parties regarding the subject hereof and supersedes all other agreements, whether written or oral, between the parties concerning such subject matter. No terms and conditions proposed by either party shall be binding on the other party unless accepted in writing by both parties, and each party hereby objects to and rejects all terms and conditions not so accepted. To the extent of any conflict between the provisions of these Terms and the provisions of any Order, the provisions of these Terms will govern unless the Order specifically overrides these Terms.

Exhibit A
Service Level Agreement

Service Level	Description and Measurement Method	Target Service Levels	Minimum Service Levels
System Availability	The percentage time that the Platform is in service and fully available for access and data input by Users	100%	99.9%
Support Response Times (24-hour)	Response to Fatal Issues	1 hour	1 hour for Severity 1 Problems; 24 hours for Severity 2 problems; 72 hours for all other problems.
Help Desk Response Times (9 am – 6pm, MT)	Response to support tickets.	1 hour	1 hour for Severity 1 Problems; 24 hours for Severity 2 problems; 72 hours for all other problems.

Classification of Problems or Support Calls:

Severity 1 (“**Fatal**”) – A problem for which there is no known Workaround and which (a) prevents the execution of a Primary Function, or (b) results in data corruption or crash.

Severity 2 (“**Critical**”) – A problem for which (a) causes difficulty in execution of a Primary Function or (b) prevents the execution of a Secondary Function, and as to any of the preceding, for which there is no known Workaround.

Severity 3 (“**Serious**”) – A problem for which causes difficulty in execution of a Secondary Function, but for which there is a Workaround, although with significant User inconvenience.

Severity 4 (“**Minor**”) – A problem which causes inconvenience, but for which there is an acceptable Workaround.

Definitions:

“**Excused Delay**” means any failure or delay which is beyond the reasonable control of HarperDB, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labor problems, telecommunications failures or delays, computer failures involving hardware or software not within HarperDB’s possession or reasonable control, and acts of vandalism (including network intrusions and denial of service attacks), but only if such unavailability results notwithstanding the exercise of reasonable care and diligence to avoid or mitigate the same in anticipation of or in response to such causes. Excused Delay shall also include downtime due to necessary maintenance and troubleshooting.

“**Primary Function**” means a function that is frequently used or an essential function of the Platform.

“**Secondary Function**” means a function that is not frequently used or does not represent an essential function of the Platform.

“**Workaround**” means a feasible change in operating procedures whereby a User can avoid the deleterious effects of a non-conformance without material inconvenience.

Exclusive Remedy:

If HarperDB fails to meet any of the above “Minimum Service Levels” during any calendar month, and such failure is not excused due to any Excused Delay, you shall promptly notify HarperDB in writing of such failure, but in any event no later than 15 days following the end of the applicable month, and you may choose to request a service credit to be applied against future payments that become due from you to HarperDB under these Terms. Such service credit shall be computed as follows:

- For System Availability: The ratio of unavailable minutes to total potentially available minutes (net of Excused Delays) in the applicable calendar month during which the Minimum Service Level was not met multiplied by the monthly fees due for such month; provided, however, in no event will the service credit due exceed ten percent (10%) of the applicable monthly fees.

- For Support and Help Desk Response Times: One percent (1%) for each full hour during any calendar month that the Minimum Service Level was not met multiplied by the monthly fees due for such month; provided, however, in no event will the service credit due exceed ten percent (10%) of the applicable monthly fees.

Notwithstanding anything to the contrary, the foregoing credits will be your sole and exclusive remedy with respect to any unscheduled downtime or any failure by HarperDB to meet any Minimum Service Level and in no event will the cumulative service credits for any calendar month exceed ten percent (10%) of the applicable monthly fees.

EXHIBIT B

DATA PROCESSING ADDENDUM

This Data Processing Addendum (“**DPA**”) supplements and forms part of the Terms between you and HarperDB and applies to HarperDB’s Processing of Customer Personal Data. The terms of this DPA shall only apply to the extent required by Data Protection Laws with regard to the relevant Customer Personal Data, if applicable.

1. DEFINITIONS. Capitalized terms used in this DPA have the meanings set forth below. Capitalized terms used but not defined herein shall have the meaning set forth in the Terms.

- 1.1. “Controller”** means the individual or entity that determines the purposes and means of the Processing of Personal Data.
- 1.2. “Customer Personal Data”** means Personal Data contained in Customer Data that is covered by Data Protection Laws. For the avoidance of doubt, Customer Personal Data does not include Usage Data or Personal Data of HarperDB Studio users and other HarperDB business contacts.
- 1.3. “Data Protection Laws”** means, to the extent applicable to the Processing of Customer Personal Data, the data protection or privacy laws of any country including, to the extent applicable, (a) European Data Protection Laws, (b) the California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100 et seq. (“**CCPA**”), or (c) the Lei Geral de Proteção de Dados (“**LGPD**”).
- 1.4. “Data Subject”** means the identified or identifiable natural person who is the subject of Personal Data.
- 1.5. “European Data Protection Laws”** means, to the extent applicable to the Processing of Customer Personal Data, the EU General Data Protection Regulation 2016/679 (“**GDPR**”), any data protection laws substantially amending, replacing or superseding the GDPR following any exit by the United Kingdom from the European Union (“**UK GDPR**”), and any other applicable national rule and legislation on the protection of Personal Data in the European Economic Area or Switzerland that is already in force or that will come into force during the term of this DPA.
- 1.6. “Personal Data”** means “personal data”, “personal information”, “personally identifiable information”, or similar term defined in and governed by Data Protection Laws.
- 1.7. “Process”** means any operation or set of operations performed upon Personal Data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation, alteration, retrieval, consultation, use, alignment, combination, restriction, erasure, destruction or disclosure by transmission, dissemination or otherwise making available.
- 1.8. “Processor”** means the individual or entity that Processes Personal Data on behalf of a Controller.
- 1.9. “Security Incident”** means a breach of HarperDB’s security that leads to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to Customer Personal Data in HarperDB’s possession, custody, or control.
- 1.10. “Subprocessor”** means any Processor appointed by HarperDB to Process Customer Personal Data on behalf of you under the Terms.
- 1.11. “Supervisory Authority”** means any supervisory authority (as defined in Data Protection Laws) or any other governmental authority responsible for the oversight, regulation, or enforcement of Data Protection Laws.

2. PROCESSING OF CUSTOMER PERSONAL DATA.

- 2.1. Roles of the Parties; Compliance.** The parties acknowledge and agree that, as between the parties, with regard to the Processing of Customer Personal Data under the Terms (a) you are a Controller, and (b) HarperDB is a Processor of Customer Personal Data. Each party will comply with the obligations applicable to it in such role under Data Protection Laws with respect to the Processing of Customer Personal Data. For the avoidance of doubt, in respect of Usage Data and Personal Data of HarperDB Studio users and other HarperDB business contacts, HarperDB is the Controller with respect to such data and will Process such data in accordance with its Privacy Policy, which can be found at <https://harperdb.io/legal/privacy-policy/>.
- 2.2. Your Instructions.** HarperDB will Process Customer Personal Data only (a) in accordance with your documented instructions, including the instructions set forth in the Terms and this DPA and any instructions initiated by Users via the Services; (b) as necessary to provide the Services and prevent or address technical problems with the Services or violations of the Terms or this DPA; or (c) as required by applicable law. Your instructions shall comply with Data Protection Laws and be duly authorized, with all necessary rights, permissions, and consents secured.
- 2.3. Details of Processing.** The parties acknowledge and agree that: (a) the subject matter and duration of the Processing of Customer Personal Data are as set out in the Terms and this DPA; (b) the nature and purpose of the Processing of Customer Personal Data are to facilitate or support the provision of the Services as described under the Terms and this DPA; (c) the categories of Data Subjects about whom the Customer Personal Data relates are determined and controlled by you in your sole discretion, and may include your employees, agents, advisors, consultants, clients, potential clients, business partners, vendors,

and other business contacts; (d) the types of Customer Personal Data Processed are determined and controlled by you in your sole discretion, subject to the restrictions on Prohibited Data, and may include first and last name and contact information (title, position, company, email, phone, physical business address).

2.4. Processing Subject to the CCPA. HarperDB shall not (a) sell (as defined in the CCPA) any Customer Personal Data; (b) retain, use, or disclose any Customer Personal Data for any purpose other than for the specific purpose of providing the Services as described in Section 2.2 and as otherwise permitted by the CCPA, including retaining, using, or disclosing Customer Personal Data for a commercial purpose (as defined in the CCPA) other than provision of the Services; or (c) retain, use, or disclose the Customer Personal Data outside of the direct business relationship between HarperDB and you. HarperDB hereby certifies that it understands its obligations under this Section 2.4 and will comply with them. Notwithstanding anything in the Terms, the parties acknowledge and agree that HarperDB's access to Customer Personal Data does not constitute part of the consideration exchanged by the parties in respect of the Terms.

3. SECURITY.

3.1. HarperDB Personnel. HarperDB shall take reasonable steps to ensure that HarperDB personnel that Process Customer Personal Data: (a) access Customer Personal Data only to the extent necessary to perform HarperDB's Processing obligations under this DPA and the Terms; and (b) are bound by appropriate confidentiality obligations with respect to Customer Personal Data.

3.2. Security Measures. Taking into account the state of the art, the costs of implementation and the nature, scope, context, and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, HarperDB shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk, in accordance with the security standards in Attachment 1 (the "**Security Measures**"). You acknowledge that the Security Measures may be updated from time to time upon reasonable notice to you to reflect process improvements or changing practices, provided that the modifications will not materially decrease HarperDB's security obligations hereunder.

3.3. Security Incidents. Upon becoming aware of a confirmed Security Incident, HarperDB will (a) notify you of the Security Incident without undue delay after becoming aware of the Security Incident and (b) take reasonable steps to identify the cause of such Security Incident, minimize harm, and prevent a recurrence. HarperDB's notification of or response to a Security Incident under this Section 3.3 will not be construed as an acknowledgement by HarperDB of any fault or liability with respect to the Security Incident.

3.4. Your Responsibilities. You agree that, without limitation of HarperDB's obligations under this Section 3, you are solely responsible for your and your Users' use of the Services, including (a) making appropriate use of the Services to ensure a level of security appropriate to the risk in respect of the Customer Personal Data; (b) securing the account authentication credentials, systems, and devices you use to access the Services; and (c) determining the type and substance of Customer Personal Data. You are responsible for reviewing the information made available by HarperDB relating to data security and making an independent determination as to whether the Services meet your requirements and legal obligations under Data Protection Laws. You shall give adequate notice and make all necessary disclosures to Data Subjects regarding your use and disclosure, and HarperDB's Processing of, Customer Personal Data.

4. SUBPROCESSORS.

4.1. Authorization. You generally authorize HarperDB to engage Subprocessors as HarperDB considers reasonably appropriate for the Processing of Customer Personal Data.

4.2. Subprocessor List. A list of HarperDB's Subprocessors, including their functions and locations, is available at <https://harperdb.io/legal/subprocessors/> and may be updated by HarperDB from time to time in accordance with this DPA.

4.3. New Subprocessors; Right to Object. HarperDB shall notify you of the addition or replacement of any Subprocessor and you may, on reasonable grounds, object to a Subprocessor by notifying HarperDB in writing within ten (10) days of receipt of HarperDB's notification, giving reasons for your objection. Upon receiving such objection, HarperDB shall: (a) work with you in good faith to make available a commercially reasonable change in the provision of the Services which avoids the use of that proposed Subprocessor; and (b) where such change cannot be made within thirty (30) days of HarperDB's receipt of your notice, you may by written notice to HarperDB with immediate effect terminate the portion of the Terms or relevant Order to the extent that it relates to the Services which require the use of the proposed Subprocessor. This termination right is your sole and exclusive remedy to your objection of any Subprocessor appointed by HarperDB.

4.4. Subprocessor Engagement. When engaging any Subprocessor, HarperDB will enter into a written contract with such Subprocessor containing data protection obligations not less protective than those in this DPA with respect to Customer Personal Data. HarperDB shall be liable for all obligations subcontracted to, and all acts and omissions of, the Subprocessor.

5. DATA SUBJECT RIGHTS. In most cases, data subject requests under Data Protection Laws are managed by you via the self-service functionality of the Services. In cases where such functionality is not available, HarperDB will (taking into account the nature of

the Processing of Customer Personal Data) provide you with reasonable assistance as necessary for you to perform your obligations under Data Protection Laws to fulfill requests by Data Subjects to exercise their rights under Data Protection Laws, provided that HarperDB may charge you on a time and materials basis in the event that HarperDB considers, in its reasonable discretion, that such assistance is onerous, complex, frequent, or time consuming. If HarperDB receives a request from a Data Subject under any Data Protection Laws in respect to Customer Personal Data, HarperDB will advise the Data Subject to submit the request to you and you will be responsible for responding to any such request.

- 6. DATA PROTECTION IMPACT ASSESSMENT AND PRIOR CONSULTATION.** In the event that that Processing of Customer Personal Data requires a privacy impact assessment to be undertaken under Data Protection Laws or you require assistance with a prior consultation to any Supervisory Authority, following written request from you, HarperDB shall use reasonable commercial efforts to provide relevant information and assistance to you to fulfil such request, taking into account the nature of HarperDB's Processing of Customer Personal Data, the information available to HarperDB, and the information already available to Customer. Notwithstanding the foregoing, HarperDB may charge you on a time and materials basis in the event that HarperDB considers, in its reasonable discretion, that such assistance is onerous, complex, frequent, or time consuming.

7. RELEVANT RECORDS AND AUDIT RIGHTS.

- 7.1. Review of Information and Records.** To the extent such information is not otherwise available to you, HarperDB will make available to you all information reasonably necessary to demonstrate compliance with the obligations set out in this DPA and allow for and contribute to reviews of relevant records maintained by HarperDB. Such information will be made available to you upon written request no more than annually and subject to the confidentiality obligations of the Terms or a mutually-agreed non-disclosure agreement
- 7.2. Audits.** If you requires information for your compliance with Data Protection Laws in addition to the information provided under Section 7.1, at your sole expense and to the extent you are unable to access the additional information on your own, HarperDB will allow for and cooperate with you or an auditor mandated by you ("**Mandated Auditor**"), provided that: (a) you provide HarperDB with reasonable advance written notice including the identity of any Mandated Auditor, which shall not be a competitor of HarperDB, and the anticipated date and scope of the audit; (b) HarperDB approves the Mandated Auditor by notice to you, with such approval not to be unreasonably withheld; (c) the audit is conducted during normal business hours and in a manner that does not have any adverse impact on HarperDB's normal business operations; (d) you and any Mandated Auditor comply with HarperDB's standard safety, confidentiality, and security procedures in conducting any such audits; (e) any records, data, or information accessed by you and/or any Mandated Auditor in the performance of any such audit will be deemed to be the Confidential Information of HarperDB; (f) you may initiate such audit not more than once per calendar year unless otherwise required by a Supervisory Authority; and (g) all such audits shall be at your sole expense.
- 7.3. Results of Audits.** You will promptly notify HarperDB of any non-compliance discovered during the course of an audit and provide HarperDB any audit reports generated in connection with any audit under this Section 7, unless prohibited by Data Protection Laws or otherwise instructed by a Supervisory Authority. You may use the audit reports only for the purposes of meeting your regulatory audit requirements and confirming that HarperDB's Processing of Customer Personal Data complies with this DPA.

8. DATA TRANSFERS.

- 8.1. Data Processing Facilities.** HarperDB may, subject to Section 8.3, Process Customer Personal Data in the United States or anywhere HarperDB or its Subprocessors maintains facilities. Subject to HarperDB's obligations in this Section 8, you are responsible for ensuring that your use of the Services comply with any cross-border data transfer restrictions of Data Protection Laws.
- 8.2. Restricted Transfers.** If the Services involve the transfer of Customer Personal Data to HarperDB where such transfer would be prohibited by Data Protection Laws in the absence of an adequate transfer mechanism, and such transfer is not otherwise addressed in Section 8.3 below, you shall notify HarperDB in writing and cooperate with HarperDB to implement an appropriate transfer mechanism to the extent required under Data Protection Laws.
- 8.3. Standard Contractual Clauses.** If the Services involve the transfer of Customer Personal Data to HarperDB from the European Union, the European Economic Area, Switzerland, or the United Kingdom, to the extent such transfers require an adequate transfer mechanism under European Data Protection Laws and no lawful alternative basis for such transfer applies, such transfer will be governed by the Standard Contractual Clauses for processors, attached as Attachment 2, the terms of which are hereby incorporated into this DPA. In furtherance of the foregoing, HarperDB and you agree that:
- (a) you (as data exporter) will be deemed to have entered into the Standard Contractual Clauses with HarperDB (as data importer);
 - (b) for purposes of Appendix 1 to the Standard Contractual Clauses, the categories of data subjects, data, and the processing operations shall be as set out in Section 2.3 of this DPA;

- (c) for purposes of Appendix 2 to the Standard Contractual Clauses, the technical and organizational measures shall be the Security Measures as set out in Attachment 1 to this DPA;
- (d) upon data exporter's request under the Standard Contractual Clauses, data importer will provide the copies of the subprocessor agreements that must be sent by the data importer to the data exporter pursuant to Clause 5(j) of the Standard Contractual Clauses, and that data importer may remove or redact all commercial information or clauses unrelated the Standard Contractual Clauses or their equivalent beforehand;
- (e) the audits described in Clause 5(f) and Clause 12(2) of the Standard Contractual Clauses shall be performed in accordance with Section 7 of this DPA;
- (f) your authorizations in Section 4 of this DPA will constitute your prior written consent to the subcontracting by HarperDB of the Processing of Customer Personal Data if such consent is required under Clause 5(h) of the Standard Contractual Clauses;
- (g) certification of deletion of Customer Personal Data as described in Clause 12(1) of the Standard Contractual Clauses shall be provided only upon your request;
- (h) the Standard Contractual Clauses shall automatically terminate once the Customer Personal Data transfer governed thereby becomes lawful under Data Protection Laws in the absence of such Standard Contractual Clauses on any other basis; and
- (i) in the event that the Standard Contractual Clauses cease to be recognized as a legitimate basis for the transfer of Personal Data to HarperDB under Data Protection Laws, the parties shall reasonably cooperate to identify and implement an alternative legitimate basis for such transfer to the extent that one is required by Data Protection Laws.

9. DELETION OR RETURN OF CUSTOMER PERSONAL DATA. Unless otherwise required by Data Protection Laws, following termination or expiration of the Terms HarperDB shall, at our option, delete or return Customer Personal Data and all copies to you in accordance with the Terms.

10. MISCELLANEOUS. This DPA will, notwithstanding the expiration or termination of the Terms, remain in effect until, and automatically expire upon, HarperDB's deletion of all Customer Personal Data. To the extent any conflict or inconsistency exists between this DPA and the Terms relating to the Processing of Customer Personal Data or compliance with Data Protection Laws, this DPA will govern. Unless otherwise expressly stated herein, the parties will provide notices under this DPA in accordance with the Terms, provided that all such notices may be sent via email. Any liabilities arising in respect of this DPA are subject to the limitations of liability under the Terms.

ATTACHMENT 1 TO THE DPA
SECURITY MEASURES

The Platform and the Software are hosted on Amazon Web Services (“AWS”) and the Services utilize various AWS components. For more information about the security controls and other documentation relating to AWS, please visit <https://aws.amazon.com/compliance/programs/>.

In addition to the security infrastructure and controls provided by AWS, HarperDB has implemented security controls including the following:

1. Organizational management and staff responsible for the development, implementation, and maintenance of information security.
2. Audit and risk assessment procedures for the purposes of review and assessment of risks to the Platform and Software and escalation and remediation of identified risks.
3. Data security controls which include at a minimum, but may not be limited to, logical segregation of data, restricted (e.g. role-based) access and monitoring, and utilization of commercially available and industry standard encryption technologies for Customer Personal Data that is transmitted over public networks (i.e. the Internet) or when transmitted wirelessly.
4. Logical access controls designed to manage electronic access to data and system functionality based on authority levels and job functions.
5. Password controls designed to manage and control password strength, expiration and usage including prohibiting users from sharing passwords and requiring each HarperDB account to use a password with minimum complexity requirements.
6. Change management procedures and tracking mechanisms designed to test, approve, and monitor changes to HarperDB’s technology and information assets.
7. Incident / problem management procedures designed to allow HarperDB to investigate, respond to, mitigate, and notify of events related to HarperDB’s technology and information assets.
8. Platform security controls including firewalls and the use of AWS Security Groups designed to protect systems from intrusion.
9. Vulnerability assessment and scheduled monitoring procedures designed to identify, assess, mitigate, and protect against identified security threats, viruses, and other malicious code in the Software.

ATTACHMENT 2 TO THE DPA
STANDARD CONTRACTUAL CLAUSES (PROCESSORS)

For the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection you (the data exporter) and HarperDB (the data importer), each a “party”; together “the parties”, HAVE AGREED on the following Contractual Clauses (the Clauses) in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1.

Clause 1
Definitions

For the purposes of the Clauses:

- (a) ‘personal data’, ‘special categories of data’, ‘process/processing’, ‘controller’, ‘processor’, ‘data subject’ and ‘supervisory authority’ shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- (b) ‘the data exporter’ means the controller who transfers the personal data;
- (c) ‘the data importer’ means the processor who agrees to receive from the data exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country’s system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;
- (d) ‘the sub-processor’ means any processor engaged by the data importer or by any other sub-processor of the data importer who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for processing activities to be carried out on behalf of the data exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;
- (e) ‘the applicable data protection law’ means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;
- (f) ‘technical and organisational security measures’ means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Clause 2
Details of the transfer

The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

Clause 3
Third-party beneficiary clause

- 1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.
- 2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.
- 3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
- 4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

Clause 4
Obligations of the data exporter

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;

- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;
- (c) that the data importer will provide sufficient guarantees in respect of the technical and organisational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;
- (e) that it will ensure compliance with the security measures;
- (f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;
- (g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;
- (h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;
- (i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and
- (j) that it will ensure compliance with Clause 4(a) to (i).

Clause 5

Obligations of the data importer

The data importer agrees and warrants:

- (a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (c) that it has implemented the technical and organisational security measures specified in Appendix 2 before processing the personal data transferred;
- (d) that it will promptly notify the data exporter about:
 - (i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
 - (ii) any accidental or unauthorised access; and
 - (iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;
- (e) to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (f) at the request of the data exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (g) to make available to the data subject upon request a copy of the Clauses, or any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;
- (h) that, in the event of sub-processing, it has previously informed the data exporter and obtained its prior written consent;
- (i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;
- (j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the data exporter.

Clause 6

Liability

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.
2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.
3. The data importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.
4. If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

Clause 7

Mediation and jurisdiction

1. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:
 - (a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;
 - (b) to refer the dispute to the courts in the Member State in which the data exporter is established.
2. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8

Cooperation with supervisory authorities

1. The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.
2. The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.
3. The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the data importer, or any sub-processor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(b).

Clause 9

Governing law

The Clauses shall be governed by the law of the Member State in which the data exporter is established.

Clause 10

Variation of the contract

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

Clause 11

Sub-processing

1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the data importer shall remain fully liable to the data exporter for the performance of the sub-processor's obligations under such agreement.
2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by

contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established.
4. The data exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority.

Clause 12

Obligation after the termination of personal data-processing services

1. The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.
2. The data importer and the sub-processor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.

Appendix 1 to the Standard Contractual Clauses

Section 2.3 of the DPA is incorporated herein by reference.

Appendix 2 to the Standard Contractual Clauses

Attachment 1 to the DPA is incorporated herein by reference.