

**WEB IMPACT INC.
APPLICATION SERVICE PROVIDER AGREEMENT**

THIS APPLICATION SERVICE PROVIDER AGREEMENT (THE "AGREEMENT") IS A LEGAL AGREEMENT BETWEEN WEB IMPACT INC. ("WEB IMPACT") AND THE PERSON, COMPANY, OR ORGANIZATION ("CUSTOMER") THAT HAS SUBSCRIBED TO THE HOSTED SOFTWARE SERVICE PURSUANT TO THE ORDER FORM OR THIRD PARTY AGREEMENT REFERENCING THIS AGREEMENT. BY EXECUTING THE ORDER FORM OR THIRD PARTY AGREEMENT REFERENCING THIS AGREEMENT, AS THE CASE MAY BE, CUSTOMER ACCEPTS THE TERMS OF THIS AGREEMENT. READ IT CAREFULLY BEFORE EXECUTING THE ORDER FORM REFERENCING THIS AGREEMENT. BY EXECUTING THE ORDER FORM OR THIRD PARTY AGREEMENT REFERENCING THIS AGREEMENT, CUSTOMER IS CONFIRMING CUSTOMER'S AGREEMENT TO BECOME BOUND BY THE TERMS OF THIS AGREEMENT.

1. Definitions

In this Agreement, the following capitalized terms shall have the following meanings:

"Affiliate" means an affiliate as defined in the *Canada Business Corporations Act*.

"Business Day" means a day other than a Saturday, Sunday or statutory holiday observed in the Province of Ontario.

"Designated Employees" means those Customer employees who are assigned by Customer to perform certain tasks to affect the purposes of this Agreement as defined in **Section 4(a)(i)** of this Agreement.

"Documentation" means any and all technical publications relating to the use of the Software such as reference, user, installation, and test guidelines, test requirement documents, systems administrator and technical guides (whether in print, CD or electronic format), provided by Web Impact to Customer (whether directly or through the internet).

"Customer Address" means the customer address listed in the Order Form.

"Order Form" means Web Impact's or a Reseller's standard order form for the acquisition of the Hosted Software Service by the Customer from Web Impact either directly or through an authorized Reseller, which shall create a binding agreement between Web Impact and Customer and which incorporates by reference the terms of this Agreement.

"Software" means the software listed in the Order Form as being delivered by Web Impact as part of the ASP Service.

"Site" means Web Impact's facilities from which the ASP Service is provided, which are currently located at Web Impact's datacentre or such other address at which the Software will be hosted as part of the ASP Service.

"Term" means the period commencing on the Effective Date and ending on that date set out in the Order Form.

2. License and Restrictions

- (a) On the terms and conditions set out in this Agreement, Web Impact grants Customer a non-exclusive, non-transferable license, during the Term for Customer and Designated Employees to access and use the Software installed at the Site through Customer workstations solely to use the Software for Customer's business purposes as listed in the Order Form.

- (b) The Software and Documentation are the property of or are licensed to Web Impact. Web Impact and/or its third party licensors shall retain all right, title and interest in and to the Software and the Documentation. Customer acknowledges that Web Impact may subcontract its obligations under this Agreement to an Affiliate or independent third party provider. Customer acknowledges and agrees that this Agreement grants Customer no title or right of ownership in or to (a) the Software or the Site or any components thereof, (b) the Documentation and any associated materials, documentation or intellectual property, or (c) any enhancements, modifications or improvements thereto (collectively referred to hereinafter as the "**Proprietary Intellectual Property**"). Customer shall not, at any time, take or cause any action, which would be inconsistent with or tend to impair or infringe upon the rights of Web Impact or its licensors in the Proprietary Intellectual Property.
- (c) Customer shall make no attempt to, and shall not permit any third party to make any attempt to: (i) alter, modify, improve, reverse engineer, disassemble or decompile the Software, (ii) interfere in any manner with the operation of the Software or the Site, (iii) authorize or permit any third party or any Customer employee other than Designated Employees to access and use the Site, Software or Documentation, (iv) make available, distribute or otherwise provide Documentation to a third party, or (v) sublicense or transfer any of Customer's rights under this Agreement.
- (d) Web Impact reserves all rights not expressly granted herein. Customer does not acquire any rights, express or implied, in the Software or the Documentation, other than those specified in this Agreement.
- (e) Ownership of Customer's corporate data supplied and input by Customer onto the Site ("**Customer Data**") shall remain with the Customer.

3. Fees

- (a) The Customer agrees to pay to Web Impact the fees described on the Order Form in the manner described in such Order Form. At any time following the initial Term of this Agreement, the fees may be changed by Web Impact so long as Web Impact has given the Customer not less than 30 days prior written notice of such change. Such change of fees shall be deemed accepted by the Customer unless the Customer elects to terminate this Agreement by giving the Customer written notice thereof within 15 days following the Customer's receipt of the fee change from Web Impact. Payments which are not received on the due date shall bear interest at the lesser of eighteen percent (18%) per annum or the maximum rate allowed under applicable law.
- (b) Excluding taxes based on Web Impact's income, Customer is liable for all taxes, duties and customs fees relating to the Software or services of Web Impact provided hereunder, unless Customer has provided Web Impact with a valid tax exemption or direct pay certificate which exempts Customer from such payments.

4. Customer Responsibilities

Customer agrees to perform the following obligations:

- (c) Technical Responsibilities.
 - (i) Customer shall make available technical resources as Web Impact deems are reasonably necessary to support Customer's use of the Software (collectively, such employees shall be referred to as the "**Designated Employees**").
 - (ii) Customer shall work cooperatively with Web Impact's development and support personnel to assist with problem analysis and resolution. Customer shall promptly report

any and all problems to Web Impact, and provide the necessary problem report details, deficiencies in the code and functionality, and associated documentation.

- (iii) Customer shall provide the technical environment as necessary for successful access and use of the Software, including the appropriate number of workstations, facilities and internet access, at its sole expense.

(b) **General Responsibilities**

- (i) Customer shall be solely responsible for the adequate protection of its hardware and other equipment used with the Software and Customer shall not make any claims against Web Impact for re-run time, inaccurate output or work delays resulting from the use of the Software or any portion thereof.
- (ii) Customer acknowledges that Web Impact has no control over the content of Customer Data and other information and Customer shall be solely responsible to ensure that Customer Data and/or other information: (A) complies with all applicable laws and regulations now in place or enacted in the future (including privacy and publicity rights); and (B) does not infringe or violate any intellectual property rights or confidential information of a third party.
- (iii) Customer shall work cooperatively with Web Impact's development and support personnel to assist with problem analysis and resolution. Customer shall report any and all problems to Web Impact and provide the necessary problem report details.

5. Web Impact Responsibilities

Provided Customer has complied with each of the terms of this Agreement, Web Impact shall use commercially reasonable efforts to:

- (a) provide Customer with access to the Site via an internet connection supplied by Customer for Customer to use the Software for the purposes set forth herein.
- (b) provide a manager to manage the relationship created under this Agreement, including but not limited to, coordinating communication between Customer's and Web Impact's technical resources, arranging conference calls between Customer and Web Impact's support, consulting, or development groups, and facilitating issue escalation.
- (c) Provide training and implementation consulting to Designated Employees to enable Customer to use the Site if provided for in (and on terms and conditions contained in) the Order Form.
- (d) Provided that Customer is current in its payment of all fees under this Agreement, at no additional charge to Customer, Web Impact or its representative will supply telephone support on Business Days within the standard hours of 8:30 a.m. to 5:00 p.m. Eastern Standard Time. This telephone assistance will consist in Web Impact or its representative using commercially reasonable efforts to: explain functions and features and guide the Designated Employees in the use of the Software; clarify any documentation relating to the Software; and correcting errors, if correction can be reasonably made by telephone. This telephone assistance service is to be used by the Customer, within the parameters described above, for resolving problems and difficulties relating to the Software experienced by the Customer, and not for educating or training Customer's employees. If Web Impact or its representative reasonably determines that the telephone assistance under this Section is being used by Customer for educating or training its employees, then Web Impact or its representative shall so advise the Customer that such support is outside the scope of services to be provided at no charge.

The technical support services described in this **Section** do not include, among other items: user education and training; correction of problems and assistance regarding problems caused by operator errors (such as entering of incorrect data, use of incorrect data for posting. Notwithstanding the terms

of this **Section**, if Web Impact or its representative makes a reasonable business determination that the technical support requested by Customer pursuant to this section will entail detailed, specialized maintenance or support services, different in kind or amount from those provided to other similar customers using the Software (including, but not limited to, assistance to enable the interfacing or operation with a non supported, unusual or proprietary system, training or implementation consulting), Web Impact or its representative shall advise Customer that the requested support is considered an additional service which shall be subject to additional fees.

Notwithstanding the above, Customer understands and acknowledges that from time to time, the Site may be inaccessible via an internet connection supplied by Customer or inoperable for various reasons, including equipment malfunctions, upgrades or modifications, or any causes beyond the control of Web Impact (collectively "Downtime"). Web Impact shall use commercially reasonable efforts to minimize any disruption, inaccessibility and/or inoperability of the Site, and in the case of any scheduled Downtime, if applicable, Web Impact shall provide twenty-four (24) hour advance e-mail notice to Customer or such other shorter period of time as Web Impact shall reasonably determine.

6. Warranty and Representation

- (a) Web Impact warrants that Web Impact or its representative will use commercially reasonable efforts to correct errors in the Software, if any, of which Customer has notified Web Impact in writing in sufficient detail to enable Web Impact to identify and replicate the error.
- (b) Web Impact makes no representation as to the interoperability of the Software or Site with any system. Web Impact does not guarantee continuous, uninterrupted or error free access to its Site. Customer acknowledges that it has not entered into this Agreement in reliance upon any warranty or representation of any kind by Web Impact.
- (c) THE SITE, SOFTWARE AND DOCUMENTATION PROVIDED BY WEB IMPACT TO CUSTOMER IN CONNECTION WITH THIS AGREEMENT ARE PROVIDED "AS IS", WITHOUT REPRESENTATIONS OR WARRANTIES OR CONDITIONS OF ANY KIND. WEB IMPACT MAKES NO REPRESENTATIONS OR WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, BY OPERATION OF LAW OR OTHERWISE, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OR CONDITIONS OF NONINFRINGEMENT, MERCHANTABILITY, MERCHANTABLE QUALITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY IMPLIED WARRANTIES OR CONDITIONS ARISING OUT OF COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE.

7. Limitation of Liability

- (a) WEB IMPACT SHALL NOT BE LIABLE FOR ANY INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING OUT OF, RELATING TO OR IN ANY WAY CONNECTED WITH THE RELATIONSHIP OF THE PARTIES, THIS AGREEMENT, ITS NEGOTIATION OR TERMINATION, OR THE PROVISION OR NONPROVISION OF THE SOFTWARE, THE SITE OR SERVICES (WHETHER IN CONTRACT OR TORT OR OTHERWISE), INCLUDING WITHOUT LIMITATION, FAILURE OF ELECTRONIC OR MECHANICAL EQUIPMENT OR COMMUNICATION LINES; TELEPHONE OR OTHER INTERCONNECTION PROBLEMS; ACCESS TO, OR OTHER PENETRATION OF, THE SITE BY ANY HACKER OR UNAUTHORIZED USER, AND ANY DAMAGES RESULTING THEREFROM; INTERRUPTED COMMUNICATIONS, LOST DATA OR LOST PROFITS AND DAMAGES RESULTING FROM INCONVENIENCE, DELAY OR LOSS OF USE OF ANY INFORMATION OR DATA OR OF THE SOFTWARE OR SITE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. WEB IMPACT'S TOTAL ACCUMULATED LIABILITY TO THE CUSTOMER OR TO ANY THIRD PARTY FOR ANY LOSS, DAMAGES, COSTS OR EXPENSES SHALL BE LIMITED TO FEES ACTUALLY PAID BY

CUSTOMER HEREUNDER DURING THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH SUCH LOSS, DAMAGES, COSTS OR EXPENSES BECOME PAYABLE BY WEB IMPACT.

8. Non-Disclosure Obligation

- (a) The terms of this Agreement are confidential and shall not be disclosed, orally or in writing by Customer to any third party without the prior written consent of Web Impact. To the extent any information disclosed to a party hereunder is considered confidential or proprietary, the parties agree to the following mutual non-disclosure terms:
- (b) The term "Confidential Information" shall mean any and all information which is disclosed by either party to the other that is proprietary to the disclosing party (or its third party providers) which is not generally disclosed to the public. Confidential Information includes disclosures made in connection with the relationship established by this Agreement, even if the disclosure took place prior to the signing of this Agreement. Confidential Information includes, but is not limited to, in the case of Web Impact, trade secrets, computer programs, the Proprietary Intellectual Property and any and all information based thereon, formulas, data, inventions, techniques, marketing plans, strategies, forecasts, customer lists and third party personal information and in the case of Customer, Customer Data.
- (c) Each party shall protect the other party's Confidential Information with at least the same degree of care and confidentiality, but not less than a reasonable standard of care, which such party utilizes for its own information that it does not wish disclosed to the public. Accordingly, the parties agree that neither party shall permit or authorize access to or disclosure of the other party's Confidential Information to any person or entity other than its employees who have a "need to know" such information consistent with the rights and obligations of such party hereunder and only insofar as such persons are bound by a nondisclosure agreement consistent with these non-disclosure terms. Both parties shall keep Confidential Information in strict confidence and shall not disclose it to any third party. Both parties shall only use Confidential Information in a manner consistent with the terms and for the purposes of this Agreement. A party shall promptly notify the other of any unauthorized disclosure or use of Confidential Information by any person.
- (d) This Agreement imposes no obligation upon the parties with respect to Confidential Information which either party can establish by legally sufficient evidence: (i) was in the possession of, or was rightfully known by Recipient without an obligation to maintain its confidentiality prior to receipt from the other party; (ii) is or becomes generally known to the public without violation of this Agreement; (iii) is obtained by Recipient in good faith from third party having the right to disclose it without an obligation on confidentiality; (iv) is independently developed by Recipient without use of the other party's Confidential Information; or (v) is required to be disclosed by judicial or other government order provided that Recipient shall give the disclosing party reasonable notice prior to such disclosure, will seek confidential treatment of the information disclosed, and shall comply with any applicable protective order or equivalent.

9. Termination

- (a) This Agreement will commence on the Effective Date and unless terminated earlier in accordance with the terms of this Agreement, will terminate on the date provided for in the Order Form. This Agreement may be renewed based on the terms provided for in the Order Form.
- (b) Notwithstanding the foregoing, if either party breaches any material term of this Agreement, the non-breaching party may terminate this Agreement if the breach continues for a period of thirty (30) days after written notice of breach has been provided by the non-breaching party to the other party. Upon termination or expiration of this Agreement, Customer shall immediately cease accessing and using the Site, Software and Documentation and return all Web Impact Confidential Information and all other related materials and media to Web Impact within five (5) days of such termination or expiration. Upon termination or expiry of this Agreement, Web

Impact shall have the right to immediately deny Customer access to the Site.

- (c) Except as expressly provided otherwise in this Agreement, all remedies available to Web Impact are cumulative and nonexclusive.
- (f) The provisions of Sections 1, 2(b), 2(c), 2(d), 2(e), 3(b), 7, 8, 9(b), 10 and 11 shall survive termination or expiration of this Agreement.

10. Responsibility for Customer Data

The Customer agrees that it is solely responsible for the content of all visual, written, audible, or content in any form whatsoever that is stored, relayed, communicated using the Software or any Web Impact developed component or software. The Customer agrees that it shall not use the Software to send unsolicited emails outside the Customer's organization. The Customer further agrees not to use the Software or services to communicate, store, or allow to be transmitted or stored any content that is harassing, libelous, threatening, obscene, would violate the intellectual property rights of any party or is otherwise unlawful, that would give rise to civil liability, or that constitutes or encourages conduct that could constitute a criminal offence, under any applicable law or regulation.

11. General

(a) *Governing Law.* This Agreement shall be governed by the laws of the Province of Ontario, Canada, without giving effect to principles of conflict of laws. The Customer hereby consents to the non-exclusive jurisdiction and venue of the courts sitting in Ontario, Canada to resolve any disputes arising under this Agreement. In each case this Agreement shall be construed and enforced without regard to the United Nations Convention on the International Sale of Goods.

(b) *Entire Agreement and Waiver.* This Agreement contains the complete agreement between the parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous agreements or understandings, whether oral or written. The Customer agrees that any varying or additional terms contained in any purchase order or other written notification or document issued by the Customer in relation to the subject matter of this Agreement shall be of no force or effect. The failure or delay of Web Impact to exercise any of its rights under this Agreement or upon any breach of this Agreement shall not be deemed a waiver of those rights or of the breach.

(c) *Amendment.* No amendments or modifications may be made to this Agreement except in writing signed by both parties. No Web Impact dealer, agent or employee is authorized to make any amendment to this Agreement.

(d) *Survival.* If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, that provision will be enforced to the maximum extent permissible, and the remaining provisions of this Agreement will remain in full force and effect.

(e) *Headings.* Titles and headings contained in this Agreement are for reference purposes only and shall not be used in the interpretation of this Agreement.

(f) *Force Majeure.* Web Impact shall not be liable for any delay or failure in performance due to Force Majeure, which shall mean acts of God, earthquake, labor disputes, changes in law, regulation or government policy, riots, war, fire, epidemics, acts or omissions of vendors or suppliers, terrorism, power failures, internet interruption, transportation difficulties or other occurrences which are beyond Web Impact's reasonable control. In the event that Web Impact is prevented or delayed in the delivery or implementation of the Software or from providing any services in relation to the Software for reasons beyond its control, such delivery or implementation or provision of services shall take place as soon thereafter as is reasonably possible.

(g) *Notices.* Any notice or other document required or permitted to be given hereunder shall be validly given if delivered personally, by courier service, by prepaid registered mail or facsimile transmission to the addressee thereof. Notices shall be deemed received three (3) days after mailing in the case of certified mail, and on the next business day in the case of courier delivery or facsimile transmission. Notices shall

be sent to the Customer at the address specified on the Order Form. Notices shall be sent to Web Impact as follows: Web Impact Inc., 99 Atlantic Ave., Suite 200, Toronto, Ontario, Canada, M6K 3J8, Attention: President.

(h) *Contact.* All questions concerning this Agreement shall be directed to: Web Impact Inc., 99 Atlantic Ave., Suite 200, Toronto, Ontario, Canada, M6K 3J8, Attention: President.

(i) *Enurement and Assignment.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, permitted assigns and legal representatives, provided, however, the rights and obligations of the Customer hereunder may not be assigned, sublicensed or otherwise transferred, in whole or in part, without the prior written consent of Web Impact, which may be granted or withheld by Web Impact in its sole and absolute discretion and any purported assignment, sublicense or other transfer, without such prior written consent shall be null and void. This Agreement may be assigned by Web Impact without notice or consent by the Customer.

(j) *Language.* This Agreement has been drawn up in English at the express wish of the parties. Le présent contrat a été rédigé en anglais à la demande expresse des parties.

Web Impact, PRISM, and other trademarks contained in the Software are trade-marks of Web Impact Inc. in Canada, the United States and/or other countries. Third party trade-marks, trade names, product names and logos may be the trade-marks of their respective owners. You may not remove or alter any trade-mark, trade names, product names, logo, copyright or other proprietary notices, legends, symbols or labels in the Software or Documentation. This Agreement does not authorize the Customer to use Web Impact's or its licensors' names or any of their respective trade-marks, trade names, product names and/or logos.