



### IBM Coremetrics Intelligent Offer & IBM Coremetrics Content Recommendations

The terms of this IBM Terms of Use are in addition to those of the IBM International Agreement for Selected IBM SaaS Offerings ("Agreement"). Carefully read these IBM SaaS Terms of Use ("Terms of Use" or "ToU") before using the IBM SaaS and any associated Enabling Software. Customer may use the IBM SaaS and Enabling Software only if Customer first accepts these Terms of Use. By ordering, accessing or using the IBM SaaS or Enabling Software or clicking on an "Accept" button, Customer agrees to these Terms of Use.

**IF YOU ARE ACCEPTING THESE TERMS ON BEHALF OF CUSTOMER, YOU REPRESENT AND WARRANT THAT YOU HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE. IF YOU DO NOT AGREE WITH THESE TERMS OF USE OR DO NOT HAVE FULL AUTHORITY TO BIND CUSTOMER TO THESE TERMS OF USE THEN DO NOT IN ANY MANNER USE OR PARTICIPATE IN ANY OF THE FUNCTIONALITY OFFERED AS PART OF THE IBM SAAS OR USE ANY ENABLING SOFTWARE.**

#### Part 1 – General Terms

##### 1. Purpose

These IBM SaaS Terms of Use ("Terms of Use") are for the following IBM SaaS:

- IBM Coremetrics Intelligent Offer
- IBM Coremetrics Content Recommendations

For the purpose of this ToU only, the term "IBM SaaS" refers to the specific IBM SaaS offering set forth in this Section 1.

Customer may use the IBM SaaS only during a valid Subscription Period.

##### 2. Definitions

Capitalized terms not defined in these Terms of Use are defined in the Agreement. For purposes of these ToU, the term "Program" includes the term "program" each as may be used in the applicable Agreement, and the term "Transaction Document" includes the term "IBM SaaS Quotation".

**Privacy Practice** – the Privacy Practice, located on the Internet at <http://www.ibm.com/privacy>, and any subsequent modification.

**Enabling Software** – any Program and associated materials provided to Customer by IBM or a third party as part of the IBM SaaS offering in order to facilitate access to and use of IBM SaaS.

##### 3. General Charge Terms

###### 3.1 Metrics

Thousand Revenue Conversion Unit (TRCU) is a unit of measure by which the IBM SaaS can be obtained. A Revenue Conversion Unit is a currency-independent measure of a Revenue amount relevant to the IBM SaaS. Currency-specific Revenue amounts must be converted into RCUs in accordance with the table located at: [http://www.ibm.com/software/licensing/conversion\\_unit\\_table](http://www.ibm.com/software/licensing/conversion_unit_table). Each TRCU entitlement represents one Thousand RCUs. Sufficient TRCU entitlements must be obtained to cover the amount of Revenue processed or managed by the IBM SaaS during the measurement period specified in Customer's Proof of Entitlement (PoE) or Transaction Document.

Million Server Calls (MSCs) is a unit of measure by which the IBM SaaS can be obtained. MSCs are one (1) million Server Calls. A Server Call is data passed to and processed by IBM SaaS as a result of a tagged event, initiated by a tracked visitor for one Client ID. A Server Call processed by different Client IDs will be counted as a unique Server Call for each unique Client ID. A Client ID separates and/or controls access rights to data in the IBM SaaS which may encompass processed data from one or more Customer web sites. Sufficient entitlements must be obtained to cover the number of Million Server Calls used during the measurement period specified in a Proof of Entitlement (PoE) or Transaction Document.

Million Server Calls (MSCs) is a unit of measure by which the IBM SaaS can be obtained. MSCs are one (1) million Server Calls. A Server Call is data passed to and processed by IBM SaaS as a result of a

tagged event, initiated by a tracked visitor for one Client ID. A Server Call processed by different Client IDs will be counted as a unique Server Call for each unique Client ID. A Client ID separates and/or controls access rights to data in the IBM SaaS which may encompass processed data from one or more Customer web sites. Sufficient entitlements must be obtained to cover the number of Million Server Calls used during the measurement period specified in a Proof of Entitlement (PoE) or Transaction Document.

Engagement is a unit of measure by which the services can be obtained. An Engagement consists of professional and/or training services including but not limited to a training event, business analysis, or a deliverable-based services event. Sufficient entitlements must be obtained to cover each Engagement.

## **3.2 Charges & Billing**

### **3.2.1 Billing Options**

The Subscription Period for this IBM SaaS offering is available to be ordered for up to sixty (60) months. The amount payable for the IBM SaaS is specified in a Transaction Document. The billing options for the IBM SaaS subscription fee are as follows:

- a. Entire commitment amount upfront
- b. Monthly (in arrears)
- c. Quarterly (upfront)
- d. Annually (upfront)

The selected billing option will be valid for the length of the term specified in a PoE or a Transaction Document. The amount payable per billing cycle will be based on the annual subscription fee and number of billing cycles in a year.

### **3.2.2 Partial Month Charges**

The Partial Month charge is a pro-rated daily rate that will be charged to Customer and included in their first invoice. The Partial Month Charges are calculated based on the remaining days of the partial month starting on the date Customer is notified by IBM that their access to the IBM SaaS is available.

### **3.2.3 Overage Charges**

If Customer's actual usage of the IBM SaaS in any business quarter (based on a calendar year) exceeds three (3) times the entitlement specified in a PoE or Transaction Document, then Customer will be invoiced for the overage in accordance with the overage rates specified in the applicable PoE or Transaction Document. If Customer is provisioned within a given business quarter, overage will be prorated accordingly.

### **3.2.4 Remote Services (Human Based)**

The rate and billing term for additional remote services will be specified in a Transaction Document and billed accordingly.

## **4. Account Creation and Access**

When IBM SaaS Users register for an account ("Account"), IBM may provide the IBM SaaS User with an Account identification and password. Customer is responsible for ensuring that each IBM SaaS User manages and keeps their Account information current. At any time Customer may request that any Personal Data provided as part of registering for an Account or use of the IBM SaaS be corrected or removed from Account information and this information will be corrected or removed, but removal of required Account information (e.g., email address) may prevent access to the IBM SaaS for that Account.

Customer is responsible for ensuring that each IBM SaaS User protects their Account identification and password and controls who may access an IBM SaaS User Account or use any IBM SaaS on Customer's behalf.

## **5. Trade-Ups**

Certain IBM SaaS offerings may be acquired for a reduced charge to replace qualifying IBM SaaS offerings. Customer agrees that IBM will terminate Customer's use of the replaced IBM SaaS offering when Customer is provided access to the replacement IBM SaaS offering.

## **6. Remote Services (Human Services)**

### **6.1 IBM Coremetrics Intelligent Offer Premium Onboarding Services – Flat file delivery**

Provides up to 40 hours of remote consulting, best practices, training and configuration for onboarding Customers to IBM Coremetrics Intelligent Offer for the flat file delivery method. Services are purchased per Client ID and expire 90 days from purchase regardless of whether all hours have been used.

### **6.2 IBM Coremetrics Intelligent Offer Premium Onboarding Services – Dynamic or mixed delivery**

Provides up to 48 hours of remote consulting, best practices, training and configuration for onboarding Customers to IBM Coremetrics Intelligent Offer for the dynamic or mixed delivery method. Services are purchased per Client ID and expire 90 days from purchase regardless of whether all hours have been used.

### **6.3 IBM Coremetrics Content Recommendations Premium Onboarding Services**

Provides up to 48 hours of remote consulting, best practices, training and configuration for onboarding Customers to IBM Coremetrics Content Recommendations. Services are purchased per Client ID and expire 90 days from purchase regardless of whether all hours have been used.

## **7. Suspension of IBM SaaS and Termination**

### **7.1 Suspension**

#### **7.1.1 Suspension of User Account**

In the event of a breach of the Terms of Use, Agreement, or Acceptable Use Policy, misappropriation of IBM intellectual property or violation of applicable law by an IBM SaaS User, IBM reserves the right to suspend or revoke the offending IBM SaaS User's access to the IBM SaaS, and/or delete the offending IBM SaaS User's Content, at any time. IBM will notify Customer of any suspension or revocation action.

#### **7.1.2 Suspension of Customer Account**

If Customer's account is 30 days or more overdue (except with respect to charges then under reasonable and good faith dispute), in addition to any of its other rights or remedies, IBM reserves the right to suspend the IBM SaaS provided to Customer, without liability to Customer, until such amounts are paid in full; provided, however, that no suspension will take effect unless IBM has given Customer at least 10 business days prior written notice that its account is overdue.

### **7.2 Termination**

IBM may terminate Customer's access to IBM SaaS for cause if Customer does not comply with the terms of the Agreement or this ToU and such noncompliance is not remedied within a reasonable time after receiving written notice from IBM. Upon termination, Customer's access and other rights to the IBM SaaS will be cancelled and cease. In such event Customer and its IBM SaaS Users must cease any further use of the IBM SaaS and destroy any copies of the associated Enabling Software within their possession or control.

## **8. Renewal of a Subscription Period**

### **8.1 Customer Renewal Required**

For the IBM International Agreement for Selected IBM SaaS Offerings customers, notwithstanding anything to the contrary in that Agreement (including country unique terms), the IBM SaaS offering will not renew at the end of the initial Subscription Period. In order to continue use of the IBM SaaS beyond the initial Subscription Period, Customer must obtain a new subscription for the IBM SaaS under the terms of the IBM International Passport Advantage Agreement or IBM International Passport Advantage Express Agreement, as applicable.

## **9. Emergency Maintenance & Scheduled Maintenance**

IBM may perform regularly scheduled maintenance during maintenance windows defined by IBM. Other scheduled and non-scheduled down times may occur.

IBM SaaS will not be available during these times.

## **10. Updates; Applicable Terms and Authorization for Auto Updates**

These Terms of Use apply to all enhancements, modifications, variations, revisions, updates, supplements, add-on components, and replacements for the IBM SaaS (collectively, "Updates") that IBM

may provide or make available for the IBM SaaS, subject to any additional terms provided by IBM applicable to such Updates. Customer authorizes IBM to, and agrees that IBM may, in accordance with IBM's standard operating procedures, automatically transmit, access, install, and otherwise provide Updates to IBM SaaS without further notice or need for consent. IBM has no obligation to, and nothing in these Terms of Use may be construed to require IBM to, create, provide, or install Updates.

## **11. Updates to Terms of Use**

IBM reserves the right to prospectively modify these Terms of Use, to account for any Updates that IBM may provide or make available for the IBM SaaS during the Subscription Period and as otherwise required by applicable law, by providing at least thirty (30) days notice of such modified terms to Customer. Subscription renewals will be governed by the Terms of Use in effect at the time of renewal.

## **12. Technical Support**

Technical support is provided for the IBM SaaS offering and Enabling Software, as applicable, during the Subscription Period. Such technical support is included with the IBM SaaS and is not available as a separate offering.

Technical Support information can be found at the following URL:

[http://www.ibm.com/software/info/emm/coremetrics\\_support\\_comm.html](http://www.ibm.com/software/info/emm/coremetrics_support_comm.html).

## **13. Data Privacy and Data Security**

### **13.1 Customer's Obligations**

In relation to all Personal Data provided by or through Customer to IBM, Customer will be responsible as the sole data controller for complying with all applicable data protection or similar laws such as, but not limited to, EU Directive 95/46/EC (and laws implementing that Directive) that regulate the processing of Personal Data including special categories of data, as such terms are defined in that Directive (and laws implementing that Directive).

Customer agrees to obtain all legally required consents, authorizations and approvals and make all necessary disclosures before (i) including any Personal Data in Content and (ii) using the Enabling Software and IBM SaaS.

Customer confirms and acknowledges that Customer is solely responsible for any Personal Data that may be contained in Content, including any information which any IBM SaaS User shares with third parties on Customer's behalf. Customer is solely responsible for determining the purposes and means of processing any Personal Data by IBM under these Terms of Use, including that such processing according to Customer's instructions will not place IBM in breach of applicable data protection laws.

Customer agrees to (i) provide a clear and conspicuous link to Customer's website terms of use and privacy policy which includes a link to Customer's and IBM's (<http://www.ibm.com/software/marketing-solutions/privacy/index.html>) data collection and use practices (ii) provide notice that cookies and clear gifs/web beacons are being placed on the visitor's computer by IBM working on Customer's behalf along with an explanation of the purpose and utilization of such technology, and (iii) to the extent required by law, obtain consent from website visitors prior to the placement of cookies and clear gifs/web beacons placed by Customer or IBM on Customer's behalf on website visitor's devices.

IBM SaaS is not intended for the storage or receipt of any Sensitive Personal Information or Protected Health Information (as defined below), in any form, and Customer will be responsible for reasonable costs and other amounts IBM may incur relating to any such information provided to IBM or the loss or disclosure of such information by IBM, including those arising out of any third party claims. "Sensitive Personal Information" is; 1) Personal Data, the loss of which would trigger a data breach notification requirement, and includes, but is not limited to financial information, country identification number (e.g. Social Insurance Number (SIN), Social Security Number (SSN)) or other governmentally issued identification number such as driver's license or passport number, bank account number, credit card or debit card number; and 2) Personal Data relating to racial or ethnic origin, sexual orientation, or political opinions or religious, ideological or philosophical beliefs or activities or trade union membership. "Protected Health Information" is "individually identifiable health information" as defined under the Health Information Portability and Accountability Act of 1996 ("HIPAA"), as amended.

Customer agrees that IBM may process Content, including any Personal Data, across a country border through entities and countries notified to Customer. IBM abides by the U.S. - EU Safe Harbor Framework as set forth by the United States Department of Commerce regarding the collection, use and retention of

information collected from the European Union. For more information about Safe Harbor or to access IBM's certification statement, go to <http://www.export.gov/safeharbor/>. IBM will also enter into an agreement with Customer based on the EU standard contractual model clauses for the transfer of personal data where required. Customer is solely responsible for determining and confirms that any transfer of any Personal Data across country borders under the terms of the Terms of Use complies with applicable data protection laws. IBM shall reasonably cooperate with Customer for the benefit of a Customer data controller, in its fulfillment of any legal requirement, including obtaining mandatory approvals.

If IBM makes a change to the way it processes or secures Personal Data as part of IBM SaaS and the change causes Customer to be noncompliant with data protection laws applicable to it, Customer may terminate the current Subscription Period for the affected IBM SaaS, by providing written notice to IBM within thirty (30) days of IBM's notification of the change to Customer. Any such termination will not obligate IBM to issue a refund or credit to Customer.

## **13.2 IBM's Obligations**

IBM will only process Personal Data in a manner that is reasonably necessary to provide IBM SaaS, and only for that purpose.

IBM will only process Personal Data in delivering IBM SaaS as described by IBM, and Customer agrees that the description provided by IBM is consistent with Customer's processing instructions.

Upon Customer's written request, following termination or expiry of either this ToU or the Agreement, IBM will destroy or return to Customer all Content that Customer identifies as Personal Data.

If Customer or a Customer data controller is required by applicable data protection laws to provide information about or access to Personal Data to any individual or to a relevant authority, IBM will reasonably cooperate with Customer in providing such information or access.

## **13.3 Protection of Content**

Notwithstanding anything to the contrary in the Agreement, IBM commits to protect Customer Content using the practices and standards described in this ToU.

- a. IBM will not intentionally disclose or use Customer's Content except to operate and perform the IBM SaaS as contemplated in this ToU, subject to IBM's compliance with applicable laws.
- b. IBM will only process Customer Content on systems used to host and operate the IBM SaaS, on which IBM has implemented the security practices and procedures referenced below.

## **13.4 Security Practices**

IBM implements and maintains practices and procedures, which may be revised periodically, regarding the systems used to host and operate the IBM SaaS. These practices and procedures are designed to reduce the vulnerability of our systems to accidental loss, unlawful intrusions, unauthorized access, disclosure or alteration, or wrongful conduct that may interfere with, misappropriate, or otherwise damage the Content or Customer's use of the IBM SaaS. A description of the practices and procedures applicable to the IBM SaaS, including applicable technical and operational measures, is available to Customer upon request. Customer is responsible for determining whether these practices and procedures are appropriate to meet Customer's requirements. By using the IBM SaaS, Customer acknowledges its acceptance of the IBM practices and procedures and their adequacy for Customer's purposes. Except as specifically provided in the Security Practices for the IBM SaaS, IBM makes no representations or warranties regarding any security functions.

## **14. Compliance with Applicable Export Law**

Each party agrees to comply with all applicable import and export laws and regulations, including those of the United States regarding embargo and sanctions regulations and prohibitions on export by certain end users or for any prohibited end uses (including nuclear, space or missile, and chemical and biological weapons). Customer represents that Content will not, in whole or part, be controlled under the U.S. International Traffic in Arms Regulation (ITAR). Customer acknowledges that IBM may use global resources (non-permanent residents used locally and personnel in locations worldwide) to remotely support the delivery of IBM SaaS. Customer represents that no Content accessible to IBM for the IBM SaaS will require an export license or is restricted from export to any IBM global resource or personnel under applicable export control laws.

## **15. Indemnity**

Customer agrees to indemnify, defend and hold IBM harmless against any third party claim arising out of or relating to: 1) violation of the Acceptable Use policy by Customer or any IBM SaaS User; or 2) Content created within IBM SaaS or provided, uploaded, or transferred to IBM SaaS by Customer or any IBM SaaS User.

## **16. Copyright Infringement**

It is IBM's policy to respect the intellectual property rights of others. To report the infringement of copyrighted material, please visit the Digital Millennium Copyright Act Notices Page at <http://www.ibm.com/legal/us/en/dmca.html>.

## **17. Warranty and Exclusions**

### **17.1 No Warranty**

SUBJECT TO ANY STATUTORY WARRANTIES THAT CANNOT BE EXCLUDED, IBM MAKES NO WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, REGARDING THE IBM SaaS, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND TITLE, AND ANY WARRANTY OR CONDITION OF NON-INFRINGEMENT.

IBM does not make any representation that it will provide uninterrupted, secure, or error-free operation of IBM SaaS or that IBM will be able to prevent third party disruptions of IBM SaaS or that IBM will correct all defects.

Customer is responsible for the results obtained from the use of the IBM SaaS.

## **18. IBM SaaS Offering Unique Terms**

In connection with Customer's use of the IBM SaaS, Customer acknowledges and agrees that: (i) IBM SaaS User names, titles, company names and photographs may be posted by an IBM SaaS User as part of a profile ("Profile") and that the Profile can be viewed by other IBM SaaS Users, and (ii) at any time Customer may request that an IBM SaaS User Profile be corrected or removed from the IBM SaaS and such Profile will be corrected or removed, but removal may prevent access to the IBM SaaS.

If Customer or an IBM SaaS User transmits Content to a third party website or other service that is linked to or made accessible by the IBM SaaS, Customer and the IBM User provide IBM with the consent to enable any such transmission of Content, but such interaction is solely between Customer and the third party website or service. IBM makes no warranties or representations about such third party sites or services, and shall have no liability for such third party sites or services.

## **19. General**

Customer agrees that IBM may use cookie and tracking technologies to collect and use basic statistics about Customer's use of IBM SaaS in accordance with the Privacy Practice.

If any provision of these Terms of Use is held to be invalid or unenforceable, the remaining provisions of these Terms of Use remain in full force and effect. Failure by either party to insist on strict performance or to exercise a right when entitled does not prevent either party from doing so at a later time, either in relation to that default or any subsequent one. Any terms of these Terms of Use that by their nature extend beyond termination of these Terms of Use or the applicable Subscription Period remain in effect until fulfilled, and apply to respective successors and assignees.

## **20. Entire Agreement**

The complete agreement between the parties, replacing any prior oral or written communications between Customer and IBM, consists of these Terms of Use and the Agreement. If there is a conflict among the terms of these Terms of Use and the Agreement, then these Terms of Use prevail over the Agreement.

Additional or different terms in any written communication from Customer (such as a purchase order, acknowledgement or e-mail) are void. These Terms of Use may only be amended as set forth herein.

## Part 2 – Country-unique Terms

The following terms replace or modify the referenced terms in Part 1. All terms in Part 1 that are not changed by these amendments remain unmodified and in effect. This Part 2 is comprised of amendments to this Terms of Use and is organized as follows:

- Asia Pacific country amendments; and
- Europe, Middle East, and Africa country amendments.

### ASIA PACIFIC COUNTRY AMENDMENTS

#### AUSTRALIA

##### 17. Warranty and Exclusions

*The following is added to the end of Section 17:*

Although IBM specifies that there are no warranties, Customer may have certain rights under the Competition and Consumer Act 2010 or other legislation and are only limited to the extent permitted by the applicable legislation.

#### NEW ZEALAND

##### 17. Warranty and Exclusions

*The following is added to the end of Section 17:*

Although IBM specifies that there are no warranties, Customer may have certain rights under the Consumer Guarantees Act 1993 or other legislation which cannot be excluded or limited. The Consumer Guarantees Act 1993 will not apply in respect of any goods which IBM provides, if Customer requires the goods for the purposes of a business as defined in that Act.

### EUROPE, MIDDLE EAST, AFRICA (EMEA) COUNTRY AMENDMENTS

#### EUROPEAN UNION MEMBER STATES

*The following is added to Section 17: Warranty and Exclusions:*

In the European Union ("EU"), consumers have legal rights under applicable national legislation governing the sale of consumer goods. Such rights are not affected by the provisions set out in this Section 17: Warranty and Exclusions.

#### AUSTRIA

##### 17. Warranty and Exclusions

*If you paid a charge for the IBM SaaS then the Section 17 Warranty and Exclusions is replaced in its entirety by the following:*

##### 17. Warranties and Exclusions

IBM provides the IBM SaaS in conformity with its descriptions as contained in the IBM SaaS announcement and maintains it in this condition for the term of the IBM SaaS. IBM, its Affiliates and suppliers disclaim all further warranties ("*Ausschluß der Gewährleistung*").

Warranties, if any, for Enabling Software supplied as part of this IBM SaaS may be found in their license agreements.

## **GERMANY**

### **17. Warranty and Exclusions**

*If you paid a charge for the IBM SaaS then the Section 17 Warranty and Exclusions is replaced in its entirety by the following:*

### **18. Warranties and Exclusions**

IBM provides the IBM SaaS in conformity with its descriptions as contained in the IBM SaaS announcement and maintains it in this condition for the term of the IBM SaaS. IBM, its Affiliates and suppliers disclaim all further warranties ("*Ausschluß der Gewährleistung*").

Warranties, if any, for Enabling Software supplied as part of this IBM SaaS may be found in their license agreements.

## **IRELAND**

### **17. Warranty and Exclusions**

*The following paragraph is added:*

Except as expressly provided in these terms and conditions, or Section 12 of the Sale of Goods Act 1893 as amended by the Sale of Goods and Supply of Services Act, 1980 (the "1980 Act"), all conditions or warranties (express or implied, statutory or otherwise) are hereby excluded including, without limitation, any warranties implied by the Sale of Goods Act 1893 as amended by the 1980 Act (including, for the avoidance of doubt, Section 39 of the 1980 Act).

## **IRELAND AND UNITED KINGDOM**

### **20. Entire Agreement**

*The following sentence is added at the beginning of this Section 20:*

Nothing in the following paragraphs shall have the effect of excluding or limiting liability for fraud.