Software Services - Terms & Conditions

1. **Definitions.** For purposes of these Terms and Conditions ("Terms"), and the Agreement that these Terms are attached to and any exhibits attached thereto, the following capitalized terms shall have the following meanings. All undefined capitalized terms shall have the meaning ascribed to such terms in the Agreement.

   - **Client** means a specific Publisher which signed the Agreement with the option to render PowerInbox’s Software Services.
   - **Content** means any content or application, rich, interactive or other, in any technology format, provided by Client, including, without limitation, any programming, images, data, audio, video, text or graphics, live, looped or archived materials, JavaScripts, widgets, and any other content or applications on Client’s domain(s), including the content enabled (from Client’s domains) on emails by means of the Product.
   - **Data Privacy Laws** mean any applicable laws protecting the privacy of individual persons with respect to the processing of their personal information, including, but not limited to, Regulation (EU) 2016/679 ("GDPR") and the California Consumer Privacy Act (Cal. Civ. Code §1798) ("CCPA").
   - **Documentation** means the user’s guides and technical manuals delivered by PowerInbox to Client in connection with the Product.
   - **Intellectual Property Rights** means all intangible legal rights, titles and interests, including without limitation, all rights in inventions, patents, patent applications, trademarks, service marks, trade dress, logos, trade names, and corporate names, domain names, any work of authorship, copyrights, trade secrets, Confidential Information, performing rights and all other proprietary rights in whatever form or medium, in each case on a worldwide basis; together with all revisions, extensions, reexaminations translations, adaptations, derivations, and combinations thereof and including all goodwill associated therewith.
   - **Product** means PowerInbox’s Software Services or service licensed to Client under and subject to these Terms.

2. **License Grant.** Subject to these Terms and during the term of these Terms, PowerInbox hereby grants Client a limited, worldwide, royalty-free, non-exclusive, non-transferable, non-sublicensable, license to use the Product only for serving notifications and ads, solely for its own business purposes. All rights which are not expressly granted herein are reserved by PowerInbox. Client may not make any use of the Product in whole or in part in any manner not expressly permitted by these Terms.

3. **Restrictions.** Except as specifically permitted herein, without the prior written consent of PowerInbox, Client must not, and shall not allow any third party to, directly or indirectly: (i) sell, lease, sublicense or distribute the Product, or any part thereof, or otherwise transfer the Product; (ii) reverse engineer, decompile, disassemble, or otherwise reduce to human-perceivable form the Product’s source code and or any third party software provided by PowerInbox; (iii) modify, revise, enhance, or alter the Product except as expressly permitted by means of the APIs and SDKs provided by PowerInbox hereunder; (iv) copy or allow copies of the Product to be made except for backup or archival purposes and only throughout the term of these Terms hereof; (v) test the Products or use the Product in connection with any benchmark tests, evaluation, or any other tests of which the results are designated or likely to be published in any form or media, or otherwise made available to the public, without PowerInbox’s prior written approval; (vi) if applicable, cause or provide any means for end users to bypass the Product while enabling Content via the Product; (vii) represent that it possesses any proprietary interest in the Products; and (viii) use the Product
in any illegal manner or for unlawful purposes, including but not limited to, in breach of any privacy rights, publicity rights or Intellectual Property Rights.

4. **License to Content.** Client hereby grants PowerInbox a non-exclusive, non-transferable license, throughout the term of these Terms, to access the Content and enable such Content within Client’s emails by means of the Product.

5. **Right to Use Trademarks.** PowerInbox is authorized by Client to use Client’s name, logos and trademarks, in PowerInbox’s marketing and promotional materials, website, customer lists and other promotional activities. In addition, PowerInbox shall be entitled to display PowerInbox’s brand name and logo at designated locations, in Client’s emails enabled by the Product.

6. **Client Representations, Warranties and Undertakings.** Client represents, warrants and agrees that: (i) Client has the power and authority to enter into these Terms and, it is not subject to any agreements that conflicts with Client’s undertakings hereunder; (ii) Client exclusively owns the Content and the Intellectual Property Rights therein or otherwise has the right to access and use the Content as provided herein, and has and shall maintain throughout the term of these Terms the full legal rights and authority to grant the license to PowerInbox as provided in Section 4 above; (iii) the Content and the distribution thereof, as well as the storage, transmission, retransmission and/or any use authorized hereunder by PowerInbox or anyone on its behalf, shall not violate or infringe any Intellectual Property Rights or right of publicity or privacy of any third party; (iv) the Content, does not and shall not contain violent, obscene, discriminatory and/or otherwise unlawful materials; (v) Client shall not use the Product to distribute malicious content, spyware, cause of security breaches, Trojan horses or the like; (v) Client shall comply with PowerInbox’s Publisher Data Processing Agreement; and (vii) Client shall comply with all laws and regulations applicable to its business and use of Content and shall fully comply with any terms and conditions imposed by cloud services providers.

7. **Indemnity.** Client shall indemnify, defend, and hold harmless PowerInbox and its directors, officers, and employees from and against all third party claims with respect to: (a) the Content, including, but not limited to, claims of alleged infringement of third party’s Intellectual Property Rights and privacy rights (b) Client’s breach of any law, rule or regulation, including but not limited to any Data Privacy Laws; (c) Publisher’s breach of this Agreement; and/or (d) Publisher’s alleged breach of any third party’s privacy or intellectual property rights. PowerInbox reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by Publisher hereunder.

8. **Title and Ownership**

8.1 **PowerInbox IP.** The Product is a valuable trade secret of PowerInbox and any disclosure or unauthorized use thereof may cause irreparable harm and loss to PowerInbox. All right, title and interest in and to the Product, any derivatives thereof, modifications and enhancements thereto, including Documentation and associated Intellectual Property Rights, evidenced by or embodied in and/or attached or connected or related to the Product, including any feedback related thereof and any analytical and statistical information related thereto, are and will remain with PowerInbox. These Terms do not convey to Client an interest in or to the Product, but only a limited right of use in
accordance with the terms herein. Nothing in these Terms constitute a waiver of PowerInbox’s Intellectual Property Rights under any law.

8.2 Client IP. All right, title and interest in the Content, any derivatives thereof, modifications and enhancements thereto, including associated Intellectual Property Rights, are and shall remain the sole property of Client.

9. **Fees and Payment**. Client shall pay the amount of license fees due to PowerInbox as set forth in the Agreement.

10. **Exclusion of Warranty**. CLIENT ACKNOWLEDGES THAT THE PRODUCT IS PROVIDED "AS IS", AND POWERINBOX DISCLAIMS ANY AND ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY OF NON-INFRINGEMENT. THE ENTIRE RISK ARISING OUT OF THE USE OR PERFORMANCE OF THE PRODUCT AND ANY ACCOMPANYING WRITTEN MATERIALS, TO THE EXTENT PROVIDED, REMAINS WITH CLIENT. CLIENT’S SOLE RECURSIVE IN THE EVENT OF ANY DISSATISFACTION WITH THE PRODUCT IS TO STOP USING IT. POWERINBOX DOES NOT WARRANT THAT THE PRODUCT WILL BE DELIVERED OR PERFORMED ERROR-FREE OR WITHOUT INTERRUPTION. FOR THE AVOIDANCE OF DOUBT, IT IS MADE EXPLICITLY CLEAR THAT POWERINBOX HAS NO RESPONSIBILITY FOR AND SHALL BEAR NO LIABILITY REGARDING THE CONTENT AND NO OBLIGATION TO SCREEN, REVIEW, EDIT, PROGRAM OR MONITOR ANY CONTENT. Client shall be solely responsible for any use of Content by Client, including Client’s use of Content in the Products. UNDER NO CIRCUMSTANCES WHATSOEVER WILL POWERINBOX BE LIABLE IN ANY WAY FOR ANY CONTENT, INCLUDING, WITHOUT LIMITATION, FOR ANY ERRORS OR OMISSIONS IN ANY CONTENT, OR FOR ANY INFRINGEMENT OF THIRD PARTY’S RIGHT, LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF THE CONTENT AND/OR THE PRODUCT.

11. **Limitation of Liability**. IN NO EVENT SHALL POWERINBOX’S LIABILITY UNDER, ARISING OUT OF OR RELATING TO THESE TERMS OR THE AGREEMENT, EXCEED THE AMOUNT PAID TO POWERINBOX FOR THE PRODUCT IN THE 12 MONTHS PRECEDING THE EVENT, AND IF NO FEES WERE CHARGED, THEN POWERINBOX’S LIABILITY SHALL NOT EXCEED $1,000. IN NO EVENT WILL POWERINBOX BE LIABLE FOR LOST PROFITS, LOSS OF USE, LOSS OF DATA, COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR ANY OTHER SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE, WHETHER OR NOT POWERINBOX HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

12. **Term and Termination**. These Terms shall become valid on the Effective Date and shall remain in effect for a period of one (1) year and automatically renewed for consecutive periods of one (1) year. Either party shall have the right to terminate the Terms: (i) in the event that the other party is in material breach of these Terms and has failed within 30 days after receipt of written notice thereof from the non-breaching party to cure such breach or to pursue any and all corrective action with respect to any material breach that cannot be reasonably corrected within such period; (ii) with a 30 days prior notice before each renewal date; or (iii) if either party becomes the subject of any voluntary or involuntary bankruptcy,
receivership or any other insolvency proceedings or makes an assignment or other arrangement for the benefits of its creditors. Upon the termination or expiration of these Terms for any reason, Client shall: (a) cease using the Product and all payments due hereunder to PowerInbox shall be accelerated; (b) promptly remove (return or destroy), any copies of the Product and shall return to PowerInbox any hardware to the extent provided by PowerInbox, Documentation, Confidential Information and all copies thereof; and (c) upon PowerInbox’s request, Client shall certify in writing to PowerInbox its compliance with the terms of this Section 12.

13. **General**. These Terms are included in and incorporated into the Agreement and constitute the entire agreement between the parties and supersede all prior oral or written communications, agreements and/or understandings. These Terms may not be modified except by a written agreement signed by authorized representatives of PowerInbox and Client. In the event of a conflict among a term set forth in the Agreement and/or these Terms, the term set forth in these Terms will control. If a court of competent jurisdiction finds any provision of these Terms to be unenforceable, that provision shall be enforced to the maximum extent permissible so as to affect the intent of the parties, and the remainder of these Terms shall continue in full force and effect. Client may not assign these Terms without PowerInbox’s prior written approval which shall not be unreasonably withheld. PowerInbox shall be entitled to assign these Terms at its sole discretion. No waiver of any breach shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provision, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party. No employer-employee relationship, partnership or joint venture is created hereunder. These Terms shall be governed by and construed in accordance with the laws of the State of New York and only the competent courts of New York, New York shall have jurisdiction over any dispute arising from these Terms. Sections 1, 3, 6-13 shall survive the termination of these Terms.