

All references to the manufacturer in these Terms and Conditions should be read as "Contractor (immixTechnology, Inc.), acting by and through its supplier, Netscout."

TERMS AND CONDITIONS FOR NETSCOUT PRODUCTS AND SERVICES

Definitions

"APIs" mean the software application interfaces and workflow methods made generally available by NetScout in certain Products to enable integration, implementation, and interoperability with third party hardware and software.

"Documentation" means installation guides and operation manuals provided with the Product on its original date of shipment in printed, electronic, or online form.

"Hardware" means hardware products generally available on NetScout's price list.

"NetScout Quotation" means the document under which NetScout offers for sale and license its Products and associated services.

"Product" means Software and Hardware provided by NetScout or NetScout's authorized reseller or distributor.

"Software" means NetScout proprietary programs in object code and the firmware contained on the Hardware. The term Software does not include APIs.

"Software Development Kit" or "SDK" means the NetScout API, together with the Documentation, any sample code, and any sample applications provided with the API.

1. License. NetScout grants you a limited, non-exclusive, non-transferable license to use the Software for which you paid the applicable license fee and the Documentation, subject to the terms set forth herein and the technical requirements set forth in the Documentation.

2. License Restrictions.

(a) You may:

i. use the Software on a single computer;

ii. make a copy of the Software for archival or backup purposes only ("Copy"). The Copy may not be used to implement a fault tolerant environment, redundant environment, or contingency environment; and

iii. use the Software and Documentation for your own internal business purposes.

(b) NetScout retains all right, title, and interest in and to the Software (which includes all corrections, modifications, enhancements, updates, and upgrades), Documentation, and Copies, and all patents, copyrights, trade secrets, trademarks, and other intellectual property rights therein. NetScout retains all rights to the intellectual property associated with the Hardware except as expressly granted herein, and the above Software restrictions will apply to Hardware to the extent applicable. The Software, Documentation, and Copies are protected under copyright laws, and any permitted Copies must include all copyright, government-restricted rights, and other proprietary notices or legends included on the Software when it was shipped to you. Without limiting the generality of the foregoing, you, your employees, and your consultants will not and will not authorize or permit any third party to:

- i. copy or reproduce any part of the Software or Documentation except in loading the Software into, or making a Copy for, the single computer as permitted above;
- ii. transfer the Software from one machine to another or share the Software between or among multiple machines through networking or other communication packages;
- iii. sell, market, distribute, sublicense, lease, provide timeshares, rent, or grant other rights in the Software to others or permit third parties to access the Software, without the written consent of NetScout;
- iv. use the Software or any portions thereof for which you have not paid the applicable fee;
- v. modify, develop, port, translate, localize, reverse engineer, de-compile, disassemble, or create derivative works based on the Software, except to the extent expressly permitted by applicable law and solely to extent the parties shall not be permitted by that applicable law to exclude or limit such rights. Additional restrictions are as set forth in the applicable Supplemental Terms and terms governing open source software that are located in the Documentation.

3. Evaluation Copies

NetScout may distribute Product for evaluation ("Evaluation Product"). While the Evaluation Product is identical to the commercial Product, the Evaluation Product may not be used for production purposes, and, for Software, contains a license key that disables the Software after 30 days and which will render the Evaluation Product unusable. If, after using the Evaluation Product, you wish to continue such use, you must purchase the Product. Upon payment of the applicable fee, Product that can be used for production purposes will be provided to you, along with the Documentation. NetScout does not offer Maintenance on Evaluation Products.

4. License Term. The license is effective until terminated. You may terminate the license at any time by destroying the Software, Documentation, and Copies, and providing written certification to NetScout that all of the foregoing have been destroyed. You agree that upon termination you will either return the Software, Documentation, and Copies or, with NetScout's prior consent, destroy the Software, Documentation, and Copies.

5. Confidentiality. The Product contains valuable trade secrets of NetScout and constitutes confidential information of NetScout and its licensors. You agree to protect the confidentiality of the Product with the same degree of care by which you protect your own such confidential information, but no less than reasonable care. Accordingly, you will not provide access to or disclose the Product or Copy to any third party without the prior written consent of a duly authorized U.S. NetScout corporate officer.

6. Limited Warranty. NetScout warrants that the media on which the Software is recorded will be free from defects in materials and workmanship under normal use and service for a period of 90 days from the original date of shipment of the Software ("Media Warranty Period"). NetScout warrants that the Software for a period of 90 days ("Software Warranty Period") and the Hardware for a period of 12 months ("Hardware Warranty Period"), in either case from its original date of shipment, will substantially conform to the Documentation.

If, during (a) the Media Warranty Period, a defect in the media occurs and is reported to NetScout, the media may be returned to NetScout, and NetScout will replace the media without charge to you, or (b) the Software Warranty Period or Hardware Warranty Period, a failure of the Software or Hardware to conform as warranted occurs and is reported to NetScout, NetScout, at its option, will use commercially reasonable efforts to repair or replace the non-conforming Software or Hardware.

The foregoing warranties will apply provided you give NetScout prompt written notice of the material defect or nonconformity within the warranty period specified above and return the defective media or non-conforming Software or Hardware to NetScout.

7. Warranty Limit. The warranty set forth in Section 6 does not apply to any failure of the Software or Hardware caused by (a) your failure to follow NetScout's installation, operation, or maintenance instructions or procedures; (b) your mishandling, misuse, negligence, or improper installation, de-installation, storage, servicing, or operation of the Product; (c) unauthorized modifications or repairs; and (d) power failures or surges, fire, flood, accident, actions of third parties, or other events outside NetScout's reasonable control. NetScout cannot and does not warrant the performance or results that may be obtained by using the Products, nor does NetScout warrant that Products are appropriate for your purposes or error-free.

EXCEPT AS OTHERWISE PROVIDED IN SECTION 6, THE WARRANTY SET FORTH IN SECTION 6 IS YOUR SOLE AND EXCLUSIVE REMEDY AND NETSCOUT'S ENTIRE LIABILITY FOR DEFECTIVE MEDIA OR NONCONFORMING PRODUCTS AND IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT.

8. Liability Limit. TO THE MAXIMUM EXTENT PERMITTED BY LAW, EXCEPT IN THE EVENT OF YOUR (a) BREACH OF THE LICENSE GRANT, (b) VIOLATION OF THE RESTRICTIONS SET FORTH IN SECTION 2 HEREIN, OR (c) BREACH OF CONFIDENTIALITY, IN NO EVENT WILL EITHER PARTY OR ITS LICENSORS OR SUPPLIERS BE LIABLE FOR SPECIAL, INDIRECT, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE, LOSS OF DATA, BUSINESS INTERRUPTION, OR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, EVEN IF ADVISED OF THE POSSIBILITY THEREOF. IN NO EVENT WILL THE CUMULATIVE LIABILITY OF NETSCOUT EXCEED THE AMOUNTS PAID TO NETSCOUT FOR THE APPLICABLE PRODUCT OR SERVICE THAT GAVE RISE TO SUCH CLAIM.

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THE FOREGOING, IN THE CASE OF SDKs AND EVALUATION PRODUCTS, NETSCOUT'S CUMULATIVE LIABILITY WILL NOT EXCEED ONE HUNDRED U.S. DOLLARS.

THE FOREGOING LIMITS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN. THE LIMITATIONS OF LIABILITY SET FORTH HEREIN ARE CUMULATIVE AND ARE INTENDED AND ACKNOWLEDGED BY END USER TO BENEFIT NETSCOUT AND ITS THIRD PARTY SUPPLIERS.

NETSCOUT'S LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM THE NEGLIGENCE OF NETSCOUT OR THAT OF ITS EMPLOYEES WHICH MAY NOT BY APPLICABLE LAW BE EXCLUDED IS NOT EXCLUDED BY THESE PROVISIONS BUT IS RATHER LIMITED TO THE MAXIMUM EXTENT PERMISSIBLE BY APPLICABLE LAW.

Some jurisdictions do not allow the exclusion or limitation of direct, incidental, or consequential damages, so the above limitations may not apply to you.

9. Audit Rights. NetScout may conduct, during normal business hours, according to Ordering Activity's regulations, an audit of your applicable records to verify the number of copies of the Software in use and the host processors on which such copies are installed.

10. **Inspection/Acceptance.** The Contractor (immixTechnology, Inc.) can only, and shall only tender for acceptance those items that substantially conform to the software manufacturer's ("NETSCOUT") published specifications. Therefore, items delivered shall be considered accepted upon delivery. The Government reserves the right to inspect or test any supplies or services that have been delivered. The Government may require repair or replacement of nonconforming supplies or re-performance of nonconforming services at no increase in contract price. If repair/replacement or re-performance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights-

- (1) Within the warranty period; and
- (2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

11. **Survival.** Sections 2(b) and 5-17 will survive termination.

12. **Assignment.** You will not directly or indirectly sell, transfer, assign, or delegate in whole or in part the contract to which these terms are attached, or any rights, duties, obligations, or liabilities hereunder, to any third party, including to any affiliated entity, without the prior written consent of NetScout.

13. **U. S. Government Restricted Rights.** All NetScout Software, including the Documentation and technical data, sold or delivered pursuant to these provisions for Government use are commercial as defined in Federal Acquisition Regulation ("FAR") 2.101 and any supplement and further is provided with RESTRICTED RIGHTS. All Software was fully developed at private expense. Use, duplication, release, modification, transfer, or disclosure (for purposes of this section, "Use") of the Software is restricted by the terms of this Agreement and further restricted in accordance with FAR 52.227-14 for civilian Government agency purposes and 252.227-7015 of the Defense Federal Acquisition Regulations Supplement ("DFARS") for military Government agency purposes, or the similar acquisition regulations of other applicable Government organizations, as applicable and amended. The Use of Software and the Product is restricted by these provisions, in accordance with DFARS Section 227.7202 and FAR Section 12.212. All other Use is prohibited except as described herein.

14. **General.** In the event of a conflict between any term herein and attachments, the terms of the attachment will control solely with respect to the subject matter contained therein. Any conflicting or additional terms in your purchase orders or other documentation are expressly rejected. These provisions may be modified only in writing, signed by authorized representatives of both parties. No use of trade or other regular practice or course of dealing between the parties will be used to modify, interpret, supplement, or alter these provisions. No failure of either party to exercise any power or right hereunder or to insist upon strict compliance with the terms herein, and no custom or practice of the parties at variance with the terms hereof, will constitute a waiver of either party's right to demand compliance with the terms. If any of the provisions herein are determined to be invalid, illegal, or unenforceable, such provisions will be severed and the remainder of the terms will be valid and enforceable to the extent permitted by applicable law, provided that the intent of the parties is not materially impaired. The parties will use their best efforts to replace the invalid or unenforceable provision by a provision that, to the extent permitted by law, achieves the purposes intended under the invalid or unenforceable provision. Except for the obligation to make payments, non-performance of either party will be excused to the extent that performance is rendered impossible by strike, fire, flood, acts of God, governmental acts or orders or restrictions, act of terrorism, war, or any other reason where failure to perform is beyond the reasonable control of the non-performing party and not due to its fault or negligence.

15. **High Risk Activities.** The Product is not fault-tolerant and is not designed or intended for use in hazardous environments requiring fail-safe performance, including without limitation in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, weapons systems, direct life-support machines, or any other application in which the failure of the Product could lead directly to death, personal injury, or severe

physical or property damage (collectively, "High Risk Activities"). NetScout expressly disclaims any express or implied warranty of fitness for High Risk Activities.

16. Maintenance and Support Services. Maintenance and technical support services ("Maintenance") for the Products will be made available in accordance with NetScout's then current support services terms, provided upon request.

17. APIs and Software Development Kits. NetScout may make APIs generally available. You may use the SDK to design, develop, and test software programs; make a single copy of the SDK for back-up purposes only; copy the runtime components of the SDK ("Runtime Component") into software code created through your use of the SDK; and reproduce and distribute such Runtime Component solely as a component of your software code. In addition to the restrictions in Section 2, you may not use the SDK to develop a product or service that competes with products or services offered by NetScout, or incorporate the Runtime Component in a product that competes with the products offered by NetScout.

NetScout's ownership rights in Section 2 apply to the SDK, including any output such as the Runtime Component, but do not include any original software code you may develop. The inclusion of the Runtime Components in your original code created through your use of the SDK in no way alters NetScout's ownership rights in the Runtime Component. NetScout may develop software programs substantially similar or identical to those developed by you through your use of the SDK and reserves the right to sell and distribute those software programs.

NetScout does not offer Maintenance or any other support on the SDK and may change, suspend, or discontinue any aspect of the SDK at any time, including the availability of any SDK, and impose limits on certain features and services or restrict your access to parts or all of the SDK.

NETSCOUT DOES NOT REPRESENT OR WARRANT THAT THE SDK IS FREE OF ERRORS, BUGS, OR INTERRUPTIONS OR IS RELIABLE, ACCURATE, OR COMPLETE. NETSCOUT HEREBY DISCLAIMS ALL LIABILITY FOR ANY CLAIMS, DAMAGE TO, OR OTHER IMPACT ON YOUR BUSINESS, EQUIPMENT, HARDWARE, SOFTWARE, DATA, OR OTHER INFORMATION OR MATERIALS RESULTING FROM, CAUSED BY, OR RELATED TO THE USE OF THE SDK. YOUR USE OF THE SDK IS AT YOUR OWN DISCRETION AND RISK, AND YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE THAT RESULTS FROM THE USE OF ANY SDKs. THE SDK IS PROVIDED "AS IS" WITH NO WARRANTY, EXPRESS OR IMPLIED, AND NETSCOUT EXPRESSLY DISCLAIMS ALL WARRANTIES AND CONDITIONS, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NONINFRINGEMENT.

To the maximum extent permitted by applicable law, you hereby (a) release and waive all claims against NetScout and its subsidiaries, affiliates, officers, agents, licensors, and employees (collectively "Indemnitees") from liability for claims, damages (actual and consequential), and expenses (including litigation costs and attorneys' fees) arising from or in any way related to your use of the SDK; and (b) agree to hold harmless Indemnitees from and against any third party claims arising from or in any way related to your use of the SDK, including any liability or expense arising from all claims, losses, damages (actual and consequential), suits, judgments, litigation costs, and attorneys' fees.

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These supplemental license terms for Performance Manager for Netflow and Sniffer Global ("Supplemental Terms") add to or modify the terms herein. Capitalized terms not defined in these Supplemental Terms will have the same meanings ascribed to them herein. These Supplemental Terms supersede any inconsistent or conflicting terms herein or in any license contained within the Software and provide for an enterprise license for Performance Manager for NetFlow ("PM for NetFlow") or Sniffer Global ("Sniffer Global").

1. License Grant.

- a. The license granted hereunder is hereby extended to allow you to install, copy, and use PM for NetFlow or Sniffer Global on multiple servers on your network for your internal use only and, in the case of PM for NetFlow, for use only with nGenius Collectors, provided further that you purchase Maintenance in connection with such license. Unless otherwise agreed in writing with express reference to these Supplemental Terms, your network will mean the computer network for, (i) in the case of direct customers, the corporate entity listed on the NetScout Quotation or, (ii) in the case of Resellers, the end user customer listed on the NetScout order fulfillment.
- b. Notwithstanding anything to the contrary in the foregoing, in cases of authorized resale under a Reseller Agreement, with respect to Resellers the above PM for NetFlow or Sniffer Global license is limited to allow Reseller to sublicense the above license to the end user customer on the license terms set forth herein.

2. Restrictions.

- a. The enterprise license is strictly limited to NetScout's PM for NetFlow or Sniffer Global software and does not apply to any other NetScout software. This license may not be deployed for government entities, for which the scope of the license must be separately determined in each case.
- b. For the avoidance of doubt, Resellers must purchase separate PM for NetFlow or Sniffer Global licenses for each end user customer. The license terms of these Supplemental Terms applicable to end user customers are hereby included as part of the obligations in the Reseller Agreement regarding flow down terms to end user customers. Further, Reseller will not remove the Addendum from the documentation included with the product.
- c. For service providers and managed services providers (collectively, "Service Provider"), the enterprise license may be used for Service Provider's internal business purposes only, including for monitoring and managing Service Provider's own networks. Separate licenses must be purchased for deployment and use of PM for NetFlow or Sniffer Global for each end user customer of such Service Provider.
- d. Without limiting these provisions and these Supplemental Terms, NetScout retains all right, title, and interest in and to the Software, including without limitation PM for NetFlow and Sniffer Global, and all associated corrections, modifications, enhancements, updates, upgrades, and Documentation. Except as expressly provided in these Supplemental Terms, all other license restrictions remain in full force.