

Service Terms

These Service Terms ("Terms") govern services provided by Clutch to the Company identified in the Agreement to which these Terms are appended and to any customer or representative of the Company (a "User") who accesses or uses the Clutch customer platform that provides data aggregation and processing, front end user interface tools, analytics and business intelligence software, customer relationship management, email marketing, mobile messaging marketing, electronic gift and loyalty transaction management (the "Platform") and related support services ("Services").

1. **Acceptance of Terms.** All Services are subject to these Terms, which will bind Clutch after Company delivers to Clutch a statement of work ("SOW") for Services and Clutch accepts the SOW in writing.
2. **Scope.** Upon approval of a SOW, these Terms and the SOW, together, shall constitute a binding agreement of Company and Clutch. If there is a conflict between these Terms and the SOW, the SOW shall govern. Any changes to a SOW must be memorialized in a written amendment signed by Company and Clutch.
3. **Payment Terms.** Payment is due at the time stated in the SOW. Clutch may delay or cancel delivery of Services if Company' is delinquent in paying, becomes insolvent, makes an assignment in favor of creditors or becomes subject to any bankruptcy, dissolution or similar proceeding. Payments not received when due shall bear interest at the lesser of the rate set forth in the SOW or the maximum rate permitted by law.
4. **Price and Delivery.** Prices for Services exclude any federal, state, municipal, or other tax that may be imposed upon the Services, and any duties, state fees and other such expenses. Company shall be responsible for and pay all such taxes or provide a tax exemption certificate acceptable to the taxing authorities. If Clutch does not receive an exemption certificate for a jurisdiction where Clutch is obligated to collect sales tax, Clutch may include such sales tax as an additional charge on the invoice.
5. **Warranty Disclaimer.** THE PLATFORM AND ALL SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE" AND WITHOUT WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR WARRANTY ARISING FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR TRADE USAGE. ALL SUCH WARRANTIES ARE EXPRESSLY DISCLAIMED. EXCEPT AS SET FORTH IN THE SLA, CLUTCH DOES NOT WARRANT THAT THE PLATFORM, OR SERVICES WILL MEET COMPANY'S REQUIREMENTS OR THAT USE AND OPERATION OF THE PLATFORM WILL BE AVAILABLE, ACCESSIBLE, UNINTERRUPTED, TIMELY, SECURE, COMPLETE OR ERROR-FREE.
6. **LIMITATION OF LIABILITY.** IN NO EVENT WILL CLUTCH BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, INDIRECT OR PUNITIVE DAMAGES ARISING OUT OF, RELATING TO, OR IN CONNECTION WITH AN ORDER, THE PLATFORM, OR THE PERFORMANCE OF SERVICES, WHETHER ARISING FROM A CLAIM BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CLUTCH'S TOTAL LIABILITY TO COMPANY SHALL BE LIMITED TO THE LESSER OF (A) THE TOTAL FEES PAID TO CLUTCH FOR THE SERVICES; OR (B) THE TOTAL FEES PAID TO CLUTCH FOR THE PRIOR TWELVE (12) MONTHS OF SERVICES.
7. **Intellectual Property Rights:** Clutch shall solely and exclusively own (a) all rights, title and interest in and to the Platform and the Services, and all of the technology and intellectual property incorporated or used in the Platform and the Services, including without limitation, all software, hardware, object code, source code, ideas, processes, algorithms, inventions, documents, reports, materials, works of authorship, other tangible or intangible technical materials and other works used in providing, developed by or for, derived from or created under or pursuant to this Agreement or any SOW, including without limitation all upgrades, modifications, refinements, enhancements or improvements, (b) all rights, title and interest in and to all documents, inventions, reports, materials, trends, ideas, processes and other works and information derived by Clutch from the customer data, aggregated customer data, and data obtained by, in connection with, or relating to the Platform or the provision of the Services, (c) any rights, title and interest in and to all derivatives, suggestions, ideas, enhancement requests, feedback recommendations or other information relating to the Platform, the Services, and any aggregated metrics, data and trends compiled by Clutch, and (d) all patent, copyright, trademark and other intellectual property rights associated with any of the foregoing. Company may not use the name, logos, trademarks, or service marks of Clutch without the prior written consent of Clutch, and hereby assigns to Clutch all of its right, title and interest in and to the foregoing and any patents, copyrights, trade secrets and other intellectual property rights therein or related thereto.
8. **User Data.** The operation of the Platform and provision of Services involves the processing of data regarding or populated by Users ("User Data"). User is responsible for the accuracy and adequacy of all User Data, which shall not (a) contain any materials that are obscene, threatening, malicious, or that violate any applicable U.S. federal, state or international laws or regulations governing content or relating to advertising or marketing practices, privacy or data security, (b) infringe on any contract rights, privacy rights, intellectual property rights or any other rights of third parties, or (c) include or constitute (i) personally identifiable information relating to any child under the age of thirteen; (ii) government-issued identification numbers (including social security number, driver's license number or state-issued identified number) of any natural person; or (iii) financial account number, credit report information, access code, personal identification number or password, that would permit access to a natural person's financial account. Clutch may use the User Data to provide the Platform and the Services, and to compile, analyze and use for any purpose the aggregated metrics, data and trends relating to the use of the Platform and the Services. Clutch shall own and have the sole and exclusive right to use all aggregated metrics, data and trends derived from the User Data and to disclose, such aggregated information to third parties, as long as such metrics, data and trends do not contain uniquely identifiable User or customer data. Clutch shall have no responsibility for the accuracy, legality and quality of the User Data.
9. **Use of Name and Logo.** Absent a restriction in the SOW or written prohibition from Company, Clutch may use the name, logo, trademarks, trade names, service marks or copyrights of Company and its affiliates to identify Company as a customer in any advertising, marketing, promotional or instructional materials provided by or for Clutch.

10. **No Unauthorized Use.** Users shall not access or use the Platform or Services except as expressly permitted by these Terms and a SOW. Without limiting the generality of the foregoing, Users shall not (a) copy, modify or create derivative works or improvements of the Platform or Services; (b) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer or otherwise make available the Platform or Services to any person; (c) reverse engineer, disassemble, decompile, decode, adapt or otherwise attempt to derive or gain access to the source code of the Platform or Services, in whole or in part; (d) remove, delete, alter or obscure any trademarks, specifications, documentation, warranties or disclaimers, or any copyright, trademark, patent or other intellectual property or proprietary rights notices from the Platform or any Services; or (e) otherwise access or use the Platform or Services beyond the scope of the authorization granted under these Terms or an applicable SOW.
11. **User Passwords.** User passwords to access the Platform and Services shall not be disclosed to any unauthorized person. User is solely responsible for maintaining password confidentiality, and solely responsible for all activities that occur under User's passwords.
12. **Connectivity.** Company and Users are solely responsible for providing and supporting their own equipment, software and connectivity (including, without limitation, computer hardware, browser software and internet connectivity) to access and use the Platform and the Services. Clutch shall not be responsible for any telecommunications or Internet service fees incurred by Company or Users to access the Internet or otherwise maintain communications links to the Platform or access the Services. Company and User must obtain any approvals, permits, licenses, or other authorizations that are necessary to access or use the Platform, or for Clutch to provide the Services.
13. **Compliance with Laws and Rules.** Company and Users are solely responsible for complying with all applicable federal, state and local laws, rules, regulations and judicial decisions related to their use of the Platform, including without limitation, those relating to SMS content (i.e. TCPA, COPPA and CAN-SPAM), financial transactions, the establishment and sharing of the POS Terminals, consumer protection, antitrust and franchise laws, data protection and privacy laws, and escheat laws.
14. **Notice.** All notices or reports permitted or required under these Terms shall be in writing and delivered by personal delivery, certified or registered mail (postage prepaid and return receipt requested), nationally recognized overnight carrier, or email transmission that is confirmed in writing by the receiving Party. Notice will be effective upon receipt or refusal of delivery. Notices shall be sent to the addresses set forth in the SOW or such other address as either Party may specify in writing.
15. **Assignment.** Clutch shall not assign these Terms and related SOWs, except to any acquirer of all or substantially all of its equity securities, assets or business. Company may not assign these Terms or any SOW without the written consent of Clutch. Any assignment by Company without consent shall be void and of no effect.
16. **Non-Solicitation.** During the term of the Agreement and for twelve (12) months thereafter, without the prior written consent of the other Party, neither Company nor Clutch shall, directly or indirectly, on behalf of itself or a third party, knowingly hire or engage any person who was an employee or contractor of the other Party during such time or knowingly solicit any such person to terminate or reduce the scope of their employment or business relationship with the other Party.
17. **Dispute Resolution.** Any dispute concerning the Platform or Services must be addressed through good faith discussions designed to resolve the dispute. Should a dispute not be resolved within sixty (60) days from the date either Party identified the disputed issue with the other Party, either Party may commence an action, in law or in equity, in a court of competent jurisdiction. If either Party brings an action to enforce or exercise its rights under these Terms, the prevailing Party in such action shall be entitled to reimbursement for its reasonable attorneys' fees (but not contingent attorneys' fees) and expenses incurred in connection with such action.
18. **Governing Law.** These Terms and any related SOWs shall be governed by and construed in accordance with the laws of the State of Delaware without regard to conflict of law rules.
19. **Force Majeure.** Clutch will not be liable for any loss, expense or cost resulting from the failure to operate the Platform or perform the Services due to any causes beyond its reasonable control, including without limitation, acts of nature or unexplained events, acts of Government, war or other hostility, civil disorder, interruptions due to disease or destruction, weather, fire, power failure, labor dispute, pandemic, or utility breakdown or malfunction.
20. **Entire Agreement.** These Terms and any related SOWs constitute the entire agreement regarding the Platform and the provision of Services, and supersedes all previous negotiations, commitments and writings with respect to the Platform and Services. Neither these Terms nor any SOW can be modified or rescinded except by a writing signed by an authorized officer of Clutch.
21. **Indemnification.** Company shall indemnify, defend and hold harmless Clutch, its affiliates and subsidiaries, and the officers, directors, agents, employees and subcontractors of the foregoing from any claim, demand, action, proceeding, lawsuit, liability, damage, cost or expense arising from or relating to (i) any claim or dispute between Company and any of Company's customers, Users, accountholders or other business partners, (ii) any violation of applicable law, (iii) any actual or alleged infringement, misappropriation or violation of any intellectual property right of any third party by User Data or Company Material, or (iv) Company's or User's breach of these Terms or any SOW. Subject to the liability limitations set forth in Section 6 of these Terms, Clutch shall indemnify, defend and hold harmless the Company, its affiliates and subsidiaries, and the officers, directors, agents, employees and subcontractors of the foregoing from any claim, demand, action, proceeding, lawsuit, liability, damage, cost or expense resulting from (i) Clutch's violation of applicable law or (ii) Clutch's infringement, misappropriation or violation of any intellectual property right of any third party in connection with the Platform or the Services. Each Party's indemnity obligation is conditioned on receiving prompt notice from the other Party of any claim or event that could give rise to the indemnity obligation and the ability to direct the defense of, response to, or settlement of such claim or event.
22. **Waiver.** Failure of Clutch to enforce one or more of the provisions of these Terms shall not constitute a waiver of rights to enforce, privileges or obligations under the same or any other provision in the future. All waivers must be in writing.
23. **Survival.** If any of these Terms are held invalid or unenforceable by any court of competent jurisdiction, such invalidity or unenforceability shall not affect the enforceability of other Terms, and the remaining Terms shall continue to be fully valid, and enforceable.