



**COMPANY CONFIDENTIAL – DO NOT DISTRIBUTE**

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# Digital Gateway, Inc.

## Terms of Use: Beta Testing in a Production Environment

(2011)

Version 1.0

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**IMPORTANT:** This Agreement contains the exclusive terms and conditions that govern the use by Customer ("you" or "Customer") of a BETA version copy of **Digital Analytics** ("Software") to be distributed by Digital Gateway, Inc. ("DGI") for commercial use and continued beta testing ("Beta Test"). By signing this agreement, you are agreeing to the terms and conditions of this Agreement.

The parties agree as follows:

- 1. Beta Test.** Subject to Customer's compliance with the terms and conditions of this Agreement, DGI hereby grants Customer a limited, non-exclusive, non-transferable right to test the Software in Customer's operating environment(s) with third-party products or software for research and commercial use only at Customer's site(s).
- 2. Other Limitations.** Customer agrees not to modify, adapt or translate the Software and further agrees not to attempt to reverse engineer, decompile, disassemble or otherwise attempt to discover the source code of the Software. Customer may not rent, lease, distribute or lend the Software to third parties. The Software may not be reproduced, stored in a retrieval system or transmitted, in any form or by any means without prior written consent of DGI. The Software is licensed as a single unit and its component programs may not be separated for some other use. Further, Customer agrees not to place the Software onto a server so it is accessible via a public network such as the Internet.
- 3. Confidentiality.** Each party undertakes at all times in confidence for the other party, to use only for the purposes hereof and not to disclose to any third party, confidential information of the other party,. "Confidential Information" shall include any information, document, material, idea or data which is disclosed by one party hereto to the other party hereto, including but not limited to information regarding a party's products and services, technology, business plans, customer prices, financial information and other trade secrets or confidential information, and anything tangible from which such information may be obtained. Confidential Information of the other party does not however include any document, material, idea, data or other information which (i) is known to the receiving party under no obligation of confidence, at the time of disclosure by the other party; or (ii) is lawfully obtained by the receiving party from a third party who in making such disclosure breaches no obligation of confidence to the other party; or (iii) is or becomes publicly known through no wrongful act of the receiving party; or (iv) is independently developed by the receiving party; or (v) is disclosed by the other party to a third party under no obligation of confidence. In the event of disclosure of Confidential Information to a third party in default of this section, the defaulting party shall use all reasonable endeavors to assist the other party in recovering and preventing such third party from using, disseminating, selling or otherwise deposing of such Confidential Information.
- 4. Responsibility for Testing in a Production Environment.** Customer acknowledges that Customer is solely responsible for the commercial use of the Software, configuring or interfacing the Software with the third-party products or software in Customer's operating environments, and the results of the commercial use. By participating in the Beta Test of the Software you choose to use the Software at your own risk and you acknowledge that this product may exhibit erratic/erroneous behavior and the results of the Software's behavior may cause issues with your e-automate system and/or your computer system, network, software or



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other technology. DGI will provide remote support for the Software through the DGI Quality Assurance Department (“QA”) but will not provide any on-site support. Please do not call or send email to DGI Customer support regarding the Software. The DGI QA (“QA”) should be sent all feedback and notifications of found issues via email during the Beta Testing phase. As issues may be found and resolved, DGI QA reserves the right to issue multiple beta builds with the expectation that said Customer will upgrade and operate on the latest build when notified. The DGI QA provides no warranties regarding turnaround times for resolutions on identified issues during the Beta Testing phase of the Software.

**5. Ownership.** Title, ownership rights, and intellectual property rights in and to the Software shall remain with DGI. The Software is protected by United States Copyright Law and international copyright treaties, as well as other intellectual property laws and treaties. There is no transfer to you of any title to or ownership of the Software and this License shall not be construed as a sale of any rights in the Software. DGI reserves all rights not granted. You agree to respect and not to remove, obliterate or conceal from view any copyright, patent, trademark, confidentiality or similar notice, mark or legend appearing on the Software or Confidential Information or any output generated therefrom.

**6. NO WARRANTY.** The Software and the Confidential Information is provided "AS IS," without any warranty, express or implied of any kind, including without limitation the warranties of merchantability, fitness for a particular purpose, title and non-infringement. This disclaimer of any and all warranties must be communicated to employees, and, if appropriate, Customer's customers by Customer, who hereby indemnifies and holds DGI harmless from and against any failure to so inform said parties. Customer acknowledges that DGI has not publicly announced the availability of the Software, that DGI has not promised or guaranteed to Customer that such Software will be announced and made available for sale to anyone in the future, and that DGI has no express or implied obligation to develop and to announce or produce the Software, or any similar or compatible product.

**7. DISCLAIMER OF LIABILITY.** Customer expressly acknowledges and agrees that any commercial use and/or continued testing that it performs with respect to the Software is entirely at Customer's own risk and expense. IN NO EVENT SHALL DGI BE LIABLE FOR ANY DIRECT, CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE OR OTHER DAMAGES WHATSOEVER, ARISING OUT OF OR RELATED TO THIS LICENSE EVEN IF DGI HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. DGI RESERVES THE RIGHT TO DISCONTINUE THE AVAILABILITY OF THE SOFTWARE & MATERIALS, OR MODIFY THEM, AT ANY TIME, WITHOUT OBLIGATION TO ANYONE.

**8. INDEMNIFICATION.** At DGI’s request, you agree to defend, indemnify and hold harmless DGI from all liabilities, claims and expenses, including attorneys’ fees, arising from any breach of this License by you and/or your use or misuse of the Software & Materials.

**8. Export Restrictions and Reservation of Rights.** Customer certifies that neither the Software nor the Confidential Information nor any portion thereof will be exported to any country in violation of any applicable laws including, without limitation, the United States Export Administration Act and regulations thereunder, as applicable.

**9. Term and Termination.** This Agreement will continue in effect for so long as Customer is engaged in testing as specified above. Customer agrees to discontinue the testing as specified above upon request by an authorized representative of DGI. Following termination of this Agreement for any reason, the provisions of this Agreement with respect to non-disclosure and limited use of the Software, indemnification, and warranty and liability disclaimers, will survive. Upon termination of this Agreement, Customer shall cease using, and upon request, return to DGI all materials, data, documentation and information constituting or relating to the Software, including all copies and regardless of the form or media on which same is contained. At the request of DGI, Customer shall certify that the terms of this Section have been complied with.



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**10. Entire Agreement and Governing Law.** This Agreement: (a) constitutes the entire Agreement with respect to the Software. It supersedes all prior or contemporaneous oral or written agreements concerning the Software and; (b) may not be amended except by the written agreement signed by authorized representatives of both parties; (c) will be governed by and in accordance with the laws of the State of Utah as applied to agreements and to be performed entirely within Utah with Utah residents, and is not governed by the United Nations Convention on Contracts for the International Sale of Goods, the application of which is expressly excluded. The parties agree that any litigation relating in any way to this Agreement shall be filed and initiated in and only in Salt Lake City, Utah, and the parties consent to personal jurisdiction and venue in the Federal and State Courts in Salt Lake City, Utah.

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed and do each hereby warrant and represent that their respective signatory whose signature appears below has been and is on the date of this Agreement duly authorized by all necessary and appropriate corporate action to execute this Agreement.

**Digital Gateway, Inc.**

**Customer**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_