**FeedOtter Application Terms of Service**Updated: August 8, 2022

This TERMS OF SERVICE (this “Agreement“) is made between FeedOtter LLC (“FeedOtter”) and you, or, if you represent an entity or other organization, that entity or organization (in either case “You” or “Your”).

FeedOtter provides certain marketing software services, tools, analytics, and other functionality (collectively, the “Services”) through the web site located at http://www.feedotter.com (the “Site”). Messages and communications sent through the Site (“Communications”), application programming interfaces made available by FeedOtter (“APIs”), and such other sites or methods as may be designated by FeedOtter (the Site, Communications, APIs, and any other methods designated by FeedOtter, (collectively, the “Platform”).

All access to and use of the Services available through the Platform is subject to the terms of this Agreement. If You have placed or later place an Order Form (whether through the Platform, by email, phone or otherwise) with FeedOtter (Your “Order”) seeking to access and use certain of the Services, and if FeedOtter accepts that Order, then Your access to and use of the Services is also subject to the terms of that Order.

In addition to the terms of this Agreement and any accepted Order, Your access to and use of the Platform and Services is subject to FeedOtter’s then-current policies relating to the Platform and Services, including, without limitation, the FeedOtter Privacy Policy (<https://www.feedotter.com/legal/privacy-policy/>) (the “Privacy Policy”). You are responsible for compliance with this policy and all other FeedOtter policies applicable to the access and use of the Services provided through the Platform or Services.

PLEASE CAREFULLY READ THIS AGREEMENT. BY SUBMITTING AN ORDER or by ACCESSING OR USING THE PLATFORM OR SERVICES, YOU agree THAT YOU HAVE READ AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT.

This Agreement is entered into as of the earlier of the date You first submit an Order relating to the Services or first access or use the Services or Platform (the “Effective Date”). If any terms of the Order conflict with any terms within this Agreement, then the terms within the Order shall supersede those within this Agreement.

**1. Definitions.** Terms used in this Agreement will have the definitions given in this Agreement or, if not defined in this Agreement, will have their plain English meaning as commonly interpreted in the United States.

**2. Access to the Services.** Upon receipt of your Order by FeedOtter, the rights granted to You under this Agreement entitle You to access and use the Services through an account (Your “Account”). You will be permitted to establish the number of unique user identification and password combinations applicable to Your Account as set forth in each applicable Order (each, an “Account ID”). Each Account ID is personal in nature and may be used only by You or, if You are an organization, by individual employee within Your organization (each individual, as applicable, a “User” of the Account). You are solely responsible for all use of the Services by each User and for compliance by each User with the applicable terms of this Agreement and upon a User’s access to the Platform the agree to be bound by the terms of this Agreement. You will ensure the security and confidentiality of each Account ID and will notify FeedOtter immediately if any Account ID is lost, stolen or otherwise compromised. You acknowledge that You are responsible for all costs, fees, liabilities or damages incurred through use of each Account ID (whether lawful or unlawful) and that any Services ordered or transactions completed through Your Account or under any Account ID (including without limitation the configuration of the Services provided through the Account) will be deemed to have been completed by You. FeedOtter will not be liable for the foregoing obligations or the failure by You to fulfill those obligations.

**3. Subscription and License.** Subject to this Agreement, during the Term of this Agreement FeedOtter grants You a non-transferable, non-sublicensable, non-exclusive subscription and license to access and use the Services through the Platform. All access to the Services will be solely by You for Your own use in connection with Your own business purposes or, if You are an entity or other organization, solely by Your employees and contractors for use on Your behalf in connection with Your business purposes. In all cases, Your rights to access and use the Services and Platform are non-exclusive, non-transferable, and non-sublicensable. You understand that FeedOtter may from time to time, in its sole discretion, update, change, revise, suspend or discontinue the Services (or any portion thereof) with or without notice.

**4. Term.** Except as otherwise provided for in any related Order Form, Customer shall select a Subscription Term as part of its online initial or renewal subscription process, as the case may be. Subject to any different renewal Subscription Term that may be set forth in the Order Form, if any, and until terminated or modified in accordance with this TOS, Customer’s Subscription Term will automatically renew for additional Subscription Terms equal to the initial Subscription Term following the end of each Subscription Term.  Customer may terminate this TOS and all related Order Forms (i) upon thirty (30) days prior written notice to FeedOtter.

**5. Software.** Any software, code, or APIs available on or accessible through the Platform or Services (collectively, “Software”) is protected by IPR (as defined in Sections 7 and 11 of this Agreement). You are granted no licenses or rights, whether by implication, estoppel, or otherwise, in or to any Software or any IPR therein or related thereto, and You may not modify, reproduce, perform, display, create derivative works from, republish, post, transmit, participate in the transfer or sale of, distribute, or in any way exploit any portion of the Software without the prior written permission of FeedOtter. The parties hereto are independent parties, not agents, employees, or employers of the other or joint ventures, and neither acquires hereunder any right or ability to bind or enter into any obligation on behalf of the other.

**6. Third-Party Services.** The Services may include services (“Third Party Services”) developed, provided or maintained by third-party service providers (each a “Third Party Provider”). FeedOtter has no control over, is not responsible for, and does not provide support or maintenance for, any Third Party Services. In addition to the terms of this Agreement, Your access to and use of any Third Party Services is also subject to any other agreement separate from this Agreement that You may enter into (or may have entered into) relating to those Third Party Services, if applicable (each, a “Third Party Service Agreement”). Any Third Party Service Agreements you enter into as they relate to your use of the Platform will need to comply with the terms of this Agreement. Third Party Services provided through the use of the Platform may be subject to additional Fees as set forth on the Platform. Notwithstanding the terms of any Third Party Services Agreement, FeedOtter or the Third Party Provider may change, modify or discontinue any Third Party Service at any time and without notice to You. Except as expressly set forth in this Agreement or any Third Party Service Agreement, You are granted no licenses or rights, whether by implication, estoppel, or otherwise, in or to any Third Party Services.

**7. Restrictions.** You acknowledge that the Services, Platform, Software, and the databases, software, hardware and other technology used by or on behalf of FeedOtter to provide the Services and operate the Platform and their structure, organization, coordination, and underlying data, information, and source code (collectively, the “Technology”) constitute valuable IPR of FeedOtter. You will not, and will not permit any third party to: (1) access or use the Technology, in whole or in part, except as expressly provided in this Agreement; (2) use the Technology in any unlawful manner or in any other manner that could damage, disable, overburden or impair the Technology; (3) use automated scripts or other automated means to collect information from or otherwise access or interact with the Technology; (4) alter, modify, reproduce, create derivative works of the Technology; (5) distribute, sell, resell, lend, loan, lease, license, sublicense or transfer any of Your rights to access or use the Technology; (6) provide the Services, or use the Platform to provide services, to third parties or otherwise make the Technology or access thereto available to any third party, except as expressly permitted under this Agreement; (6) reverse engineer, disassemble, decompile, or otherwise attempt to derive the source code or method of operation of or any trade secrets embodied in the Technology; (7) access or attempt to access the Platform other than through the APIs or other published interfaces for the Platform; (8) attempt to circumvent or overcome any technological protection measures intended to restrict access to any portion of the Technology; (9) use the Technology for purposes of monitoring availability, performance or functionality, or for any other benchmarking or competitive purposes; (10) obscure or alter the identification of the origin of any data transmitted through the Services; or (11) interfere in any manner with the operation or hosting of the Technology, or attempt to gain unauthorized access to the Technology. You will not allow any access to or use of the Technology by anyone other than Your Authorized Users and all such use will be consistent with the terms, conditions and restrictions set forth in this Agreement.

**8. Fees and Payment.** You agree to pay FeedOtter all fees set forth in each Order and any fees otherwise specified on the Platform or through the Services (“Fees”). All Fees will be billed as indicated in each Order or on the Platform. If the applicable Order does not specify any applicable billing terms, the initial payment of Fees specified under that Order for each period in Your subscription will be due and payable by You in advance on or before the Effective Date and again on or before the completion of each subsequent period under this Agreement in advance of any renewal periods. If You have specified credit card or direct withdrawal from a bank account as an applicable payment mechanism under this Agreement, You grant FeedOtter the right to charge the credit card or debit the bank account provided to FeedOtter for all Fees incurred under this Agreement. All Fees will be non-refundable once paid to FeedOtter (including upon any termination or suspension of this Agreement). Until paid in full, all past due amounts will bear an additional charge of the lesser of 1½% per month or the maximum amount permitted under applicable law. FeedOtter may change any portion of the Fees by posting the changes to the Platform or otherwise notifying You through the Services of the change, such changes to take effect at the beginning of the next period of this Agreement. If FeedOtter requires use of collection agencies, attorneys, or courts of law for collection on Your account, You will be responsible for those expenses. You will be responsible for all use, sales, and other taxes imposed on the Services provided under this Agreement.

**9. Termination.** This Agreement may be terminated at any time by either party upon thirty (30) days written notice. Additionally, either party, at any time may terminate this Agreement upon any material breach by the other party of this Agreement that remains uncured 30 days after such party delivers written notice to the other party of such breach. FeedOtter may also terminate this Agreement upon notice to You if FeedOtter, in its sole discretion, ceases to make any portion of the Services generally commercially available. Upon termination or expiration of this Agreement for any reason: (a) all rights and subscriptions granted to You under this Agreement will terminate; (b) You will immediately cease all use of and access to the Platform, Services, and any Software; (c) all unpaid Fees actually incurred then owed by You at the time of termination will become immediately due and payable; (d) in the event that any Fees have been paid in advance for the Software beyond the effective date of the Termination FeedOtter shall refund a pro-rata amount of paid, but unearned, Fees within 90 days of the effective date of the Termination; and (e) each party will immediately either return to the other party or, at such party’s discretion, destroy all Confidential Information (as defined below) of the other party, and other information related to this Agreement in the other party’s possession or control. The following Sections will survive any expiration or termination of this Agreement for any reason: 7 (Restrictions), 8 (Fees and Payment), 9 (Termination), 10 (Ownership), 11.3 (Warranties and Disclaimer: Disclaimer), 12 (Indemnity), 13 (Limitation on Liability), 14 (Data Privacy), 15 (Confidentiality), 18 (Notices), 19 (Governing Law) and 20 (General).

**10. Ownership.** Each party retains all right, title and interest, including, without limitation, all IPR (as defined below), in the case of FeedOtter, to the Platform, Services, Technology, any Software, and any additions, improvements, updates, and modifications thereto. Each party acknowledges that it is not receiving any ownership interest in or to any of the foregoing from the other party, and no right or license is granted to the other party to use them except as set forth under this Agreement. Each party’s name, logo and the product and service names are trademarks of such party (or its third party providers), and no right or license is granted to the other party to use them. For purposes of this Agreement, “IPR” means any and all intellectual property rights, proprietary rights, and any and all other legal rights protecting data, information or intangible property throughout the world, including, without limitation, any and all copyrights, trademarks, service marks, trade secrets, patent rights, rights in data and databases, and contract rights.

**11. Warranties and Disclaimer.**

**11.1 By FeedOtter.** FeedOtter represents and warrants to You that (a) FeedOtter has the legal right and authority to enter into this Agreement; (b) FeedOtter has the legal right and authority to perform all obligations under this Agreement and to grant the rights and licenses described in this Agreement; (c) the Platform, Services, Technology and all other FeedOtter products, and any other data, information or content FeedOtter provides under this Agreement, shall not infringe upon any third party intellectual property or proprietary right; (d) FeedOtter shall be in compliance with all applicable laws, rules, and regulations FeedOtter’s sole obligation and Your sole and exclusive remedy in the event of any failure by FeedOtter to comply with the foregoing sentence will be for FeedOtter to, at FeedOtter’s option, to extend to You the the time, if any, You have actually paid for the affected Services during the month in which the failure occurred extending the Term of the agreement that amount of time for which your access to the Services was affected.

**11.2 By You.** You hereby represent, warrant, and covenant for the benefit of FeedOtter that: (a) You have the legal right and authority to enter into this Agreement, and, if You are accepting this Agreement on behalf of a company or other entity, to bind the company or other entity to the terms of this Agreement; (b) You have the legal right and authority to perform Your obligations under this Agreement and to grant the rights and licenses described in this Agreement and in any applicable additional agreement You enter into in connection with any of the Services; and (c) You will comply with all laws, rules, and regulations applicable to Your use of and access to the Platform and Services or regarding your business, products or services.

**11.3 No Warranty of Any Kind.** EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 13, THE PLATFORM, SERVICES, SOFTWARE, AND TECHNOLOGY ARE PROVIDED TO YOU STRICTLY “AS IS” AND “AS AVAILABLE” and EACH PARTY AND ITS THIRD PARTY providers EXPRESSLY DISCLAIM, and you disclaim any reliance on, ANY AND ALL WARRANTIES AND REPRESENTATIONS OF ANY KIND WITH REGARD TO ANY SUBJECT MATTER OF THIS AGREEMENT, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, title or non-infringement. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY EACH PARTY, ITS EMPLOYEES, DISTRIBUTORS, DEALERS, OR AGENTS WILL INCREASE THE SCOPE OF, OR CREATE ANY NEW WARRANTIES IN ADDITION TO, THE WARRANTIES expressly SET FORTH IN THIS SECTION 13.

**12. Indemnity.**

**12.1 By FeedOtter.** FeedOtter will, at its expense, defend You against any claims brought against You by a third party that Your use of the Services in accordance with this Agreement infringes any copyright, trade secret or trademark right. The foregoing obligations of FeedOtter under this Section 14 are conditioned upon You providing FeedOtter with: (a) notice of any such claim within 10 days after You receive written notice thereof; (b) sole control over the defense and settlement of such claim; and (c) reasonable assistance (at FeedOtter’s expense) in the defense and settlement of such claim. If You are, or FeedOtter reasonably believes You may be, enjoined from using the Services, FeedOtter, at FeedOtter’s option and expense, may procure the right for You to continue using the Services, replace or modify the Services so that they become non-infringing, or provide You a refund of all pre-paid amounts applicable to such Services (if any) and terminate this Agreement with respect to such Services. This Section 14.1 constitutes FeedOtter’s sole and exclusive liability, and Your sole and exclusive remedy, for any infringement or misappropriation of any third party IPR by or through the Platform, Services, Technology, or any Software.

 **12.2 By You.** You hereby indemnify, defend, and hold harmless FeedOtter and its affiliates, employees, agents, contractors, assigns, licensees, and successors in interest (“Indemnified Parties”) from any and all claims, losses, liabilities, damages, fees, expenses, and costs (including attorneys’ fees, court costs, damage awards, and settlement amounts) that result from any claim or allegation against any Indemnified Party arising from (a) any breach by You (including by any User or through any Account) or (b) Your access to or use of the Platform, Services, Software, in each case, FeedOtter will provide You with notice of any such claim or allegation, and FeedOtter will have the right to participate in the defense of any such claim at its expense.

**13. Limitation on Liability.** IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES, HOWEVER CAUSED, UNDER ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE), ARISING IN ANY WAY IN CONNECTION WITH OR OUT OF THE USE OF THE PLATFORM, SERVICES or technology, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, INCLUDING, WITHOUT LIMITATION, ANY LOSS OF DATA, OPPORTUNITY, REVENUES OR PROFITS, BUSINESS INTERRUPTION, OR PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES PROVIDED, HOWEVER, THAT SUCH EXCLUSION SHALL NOT APPLY TO ANY CLAIMS, LOSSES, OR DAMAGES ARSING OUT OF THE INDEMNIFICATION OBLIGATIONS AS SET FORTH IN SECTION 12 OF THIS AGREEMENT. A PARTY’S TOTAL CUMULATIVE LIABILITY IN CONNECTION WITH THIS AGREEMENT AND all SERVICES provided under this agreement AND THROUGH THE PLATFORM, WHETHER IN CONTRACT, TORT OR OTHERWISE, WILL NOT EXCEED THE FEES PAID TO FeedOtter HEREUNDER IN THE 1 MONTH PRECEDING ANY SUCH initial occurrence of LIABILITY (OR, IF NO SUCH FEES HAVE BEEN PAID, $10). IN JURISDICTIONS WHERE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES IS NOT PERMITTED, THE PARTIES’ LIABILITY IS LIMITED TO THE MAXIMUM EXTENT PERMITTED BY LAW.

**14. Data Privacy.** FeedOtter does not store personally identifiable information (PII) beyond the email and password you use to login. Billing details are stored securely via Stripe.com. All communications between our server, Third Party Services are conducted via industry standard SSL encryption. FeedOtter never accesses the PII, lead, or contact details stored in your marketing automation software. We only have access to assets such as email templates and high-level organizational information such as list, folder, and program names.

**15. Confidentiality.** For purposes of this Agreement, “Confidential Information” means all nonpublic information disclosed or made available under this Agreement that relates to the Technology, the provision or receipt of the Services, or either party’s technology, finances, operations, customers or business. For the avoidance of doubt, (1) the Services, Platform, and Technology are the Confidential Information of FeedOtter. Each party agrees to protect the other party’s Confidential Information with the degree of care that such party uses to protect its own confidential information of like nature, but in no case less than reasonable care. Each party agrees that, except as expressly permitted in this Agreement, it will not at any time during or after the term of this Agreement: (a) disclose any Confidential Information to any third party; (b) permit any third party to examine and/or make copies of any reports, documents or electronic data containing Confidential Information; or (c) use any of the Confidential Information for any reason other than for the purposes of this Agreement. Each party may disclose Confidential Information to personnel having a need to receive the Confidential Information in the performance of their duties under this Agreement, provided, however, that such personnel are informed of the confidentiality obligations hereunder and each party uses its best efforts to ensure their compliance therewith. If either party is required to disclose the other party’s Confidential Information pursuant to any statute, regulation, order, subpoena or document discovery request, it will furnish written notice of such disclosure to the other party as soon as practicable to afford such party the opportunity to seek a protective order and the party required to make such disclosure will reasonably cooperate in such efforts (at the other party’s reasonable expense). In the event of any conflict between the Privacy Policy and the provisions of this Section 17, the provisions of this Section 17 shall control.

**16. Linked Sites.** The Platform and Services may contain links to third-party sites or content that are not under the control of either party. Neither party is responsible for any content on any linked site or content. Neither party may use any of the other party’s marks without prior written consent.

**17. Modifications to the Platform and Services.** FeedOtter reserves the right, at any time, to modify the Platform or Services, by making such modification available through the Platform or by providing other notice to You. Any modification will be effective immediately upon posting on the Platform or such other notice. As applicable, You will be deemed to have agreed to such modification through Your continued use of the Platform or Services.

**18. Notices.** All notices, consents, and other communications provided to the other party will be provided by each party in writing and may be delivered by hand, certified U.S. mail (return receipt requested), overnight delivery service (with confirmation of receipt) or email to the addresses for FeedOtter set forth on the Site and the addresses set forth on the Order form for You. All electronic notices, consents and communications will be deemed to have been received by the addressee upon confirmed receipt or, as applicable, within 24 hours after a party sends notice by email to You.

**19. Governing Law.** The interpretation of the rights and obligations of the parties under this Agreement, including without limitation the Platform, Services and Privacy Policy, and to the extent applicable, any negotiations, arbitrations or other legal proceedings hereunder, will be governed in all respects exclusively by the laws of the State of Delaware, U.S.A.

**20. Additional Terms.** Unless otherwise amended as provided herein, this Agreement, along with any Applicable Order Form, the Privacy Policy, or any amendments thereto, will exclusively govern Your access to and use of the Services and the Platform and is the complete and exclusive statement of the agreement between the parties with respect to the subject matter of this Agreement, and this Agreement or any applicable Order Form entered into supersedes any proposal or prior agreement, oral or written, and any other communications between the parties in relation to the subject matter of this Agreement. Except as expressly set forth in this Agreement, this Agreement may be amended or modified only by a writing signed by both parties. If any provision of this Agreement is held to be unenforceable, that provision will be removed to the extent necessary to comply with the law, replaced by a provision that most closely approximates the original intent and economic effect of the original to the extent consistent with the law, and the remaining provisions will remain in full force. The prevailing party in any lawsuit or proceeding arising from or related to this Agreement will be entitled to receive its reasonable attorneys’ fees, and costs associated with any lawsuit. Except in the case of an acquisition for all, or substantially all of a party’s assets, neither party may not assign this agreement without the express written consent of the other party, which will not be unreasonably withheld. You will be solely responsible, at Your own expense, for acquiring, installing and maintaining all hardware, software and other equipment as may be necessary for You and each User to connect to, access, and use the Services and the Platform. FeedOtter may reference You as a user of the Services and use Your name and logo, as applicable, in listings of users of the Services appearing on the FeedOtter web site and for other marketing and promotional purposes relating to the Services.