

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
Washington, D.C. 20549

**FORM 10-K**

(Mark One)

**ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2018

or

**TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number: 001-36061

**Benefitfocus, Inc.**

(Exact name of registrant as specified in its charter)

**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**46-2346314**  
(I.R.S. Employer  
Identification No.)

**100 Benefitfocus Way**  
**Charleston, South Carolina 29492**  
(Address of principal executive offices and zip code)

**(843) 849-7476**  
(Registrant's telephone number, including area code)

**Securities registered pursuant to Section 12(b) of the Act:**

<u>Title of each class</u>	<u>Name of each exchange of which registered</u>
Common Stock, \$0.001 Par Value	Nasdaq Global Market

**Securities registered pursuant to Section 12(g) of the Act:**

**None**

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes  No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes  No

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company, or emerging growth company. See the definitions of "large accelerated filer," "accelerated filer," "smaller reporting company" and "emerging growth company" in Rule 12b-2 of the Exchange Act.:

Large accelerated filer  Accelerated filer  Non-accelerated filer  Smaller reporting company  Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes  No

The aggregate market value of the registrant's common stock held by non-affiliates of the registrant on June 30, 2018 (based on the closing sale price of \$33.60 on June 29, the last business date of the registrant's most recently completed second fiscal quarter), was approximately \$547,962,879. Common stock held by each officer and director and by each person known to the registrant who owned 10% or more of the outstanding common stock have been excluded in that such persons may be deemed to be affiliates. This determination of affiliate status is not necessarily a conclusive determination for other purposes.

The number of shares of the registrant's common stock outstanding as of February 22, 2019 was 32,040,894.

**DOCUMENTS INCORPORATED BY REFERENCE**

Portions of the registrant's definitive Proxy Statement for its 2019 Annual Meeting of Stockholders currently scheduled to be held on May 31, 2019 are incorporated by reference into Part III hereof.

**Benefitfocus, Inc.**  
**Form 10-K**  
**For Year Ended December 31, 2018**  
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## PART I

### SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

This Annual Report on Form 10-K contains “forward-looking statements” that involve risks and uncertainties, as well as assumptions that, if they never materialize or prove incorrect, could cause our results to differ materially from those expressed or implied by such forward-looking statements. The statements contained in this Annual Report on Form 10-K that are not purely historical are forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended (“Securities Act”), and Section 21E of the Securities Exchange Act of 1934, as amended (“Exchange Act”). Such forward-looking statements include any expectation of earnings, revenue or other financial items; any statements of the plans, strategies and objectives of management for future operations; risks associated with acquisitions; factors that may affect our operating results; statements about our ability to establish and maintain intellectual property rights; statements about our ability to retain and hire necessary associates and appropriately staff our operations; statements related to future capital expenditures; statements related to future economic conditions or performance; statements as to industry trends; and other matters that do not relate strictly to historical facts or statements of assumptions underlying any of the foregoing. Forward-looking statements are often identified by the use of words such as, but not limited to, “anticipate,” “believe,” “can,” “continue,” “could,” “estimate,” “expect,” “intend,” “may,” “might,” “will,” “plan,” “project,” “seek,” “should,” “target,” “would,” and similar expressions or variations intended to identify forward-looking statements. These statements are based on the beliefs and assumptions of our management based on information currently available to management. Such forward-looking statements are subject to risks, uncertainties and other important factors that could cause actual results and the timing of certain events to differ materially from future results expressed or implied by such forward-looking statements. Factors that could cause or contribute to such differences include, but are not limited to, those discussed in the section titled “Risk Factors” included in Item 1A of Part I of this Annual Report on Form 10-K, and the risks discussed in our other SEC filings. Furthermore, such forward-looking statements speak only as of the date of this report. Except as required by law, we undertake no obligation to update any forward-looking statements to reflect events or circumstances after the date of such statements.

As used in this report, the terms “Benefitfocus, Inc.,” “Benefitfocus,” “Company,” “company,” “we,” “us,” and “our” mean Benefitfocus, Inc. and its subsidiaries unless the context indicates otherwise.

#### ***Item 1. Business.***

##### **Overview**

Benefitfocus provides a leading cloud-based benefits management platform for consumers, employers, insurance carriers, suppliers and brokers. The Benefitfocus Platform simplifies how organizations and individuals transact benefits. Our employer, carrier and supplier customers rely on our platform to manage, scale and exchange benefits data seamlessly. Our solutions drive value for all participants in our benefits ecosystem.

The Benefitfocus multi-tenant platform has a user-friendly interface designed for consumers to access all of their benefits in one place. Our comprehensive solutions support medical benefit plans and non-medical benefits, such as, dental, life, disability insurance, income protection, digital health and financial wellness. As the number of employer benefits plans has increased, with each plan subject to many different business rules and requirements, demand for the Benefitfocus Platform is growing.

Brokers use our platform to manage employer portfolios. This includes delivering strategic insights that improve their employer clients’ benefit experience and demonstrating greater value through access to a larger set of relevant products for employers, which should bring higher broker commissions and profits.

Employers use our solutions to streamline benefits processes and control costs, keep up with challenging and ever-changing regulatory requirements, and offer a greater variety of benefit options to attract, retain and motivate employees. The Benefitfocus Platform enables our employer customers to simplify the management of complex benefits processes, from sales and enrollment to implementation and ongoing administration. It provides their employees with an engaging, highly intuitive and personalized user interface for selecting and managing all of their benefits via a desktop or mobile device.

Insurance carriers and suppliers use our solutions to more effectively market offerings to consumers, simplify billing, and improve the enrollment process. We also provide a network of approximately 2,200 benefit provider data exchange connections, which facilitates the otherwise highly fragmented interaction among employees, employers, brokers and carriers.

Since our initial public offering, we have described our target market as comprising two separate but related market segments – the employer segment and the insurance carrier segment. Within the employer segment, we sell our technology solutions on an annually recurring or multi-year subscription basis to large employers, which we define as those with more than 1,000 employees. Similarly, in our other market segment, we sell our solutions on a subscription basis to insurance carriers, enabling us to expand our overall footprint in the benefits marketplace by aggregating many key constituents, including consumers, employers, and brokers. We believe our presence in both the employer and insurance carrier segments gives us a strong position at the center of the benefits ecosystem. As of December 31, 2018, we served 1,024 large employer customers, an increase from 141 in 2010, and 57 carrier customers, an increase from 29 in 2010.

In 2018, we expanded our economic model to include a transaction-oriented, marketplace solution, known as BenefitsPlace, that aligns employers, brokers, carriers and suppliers around the needs of consumers on our platform from our employer, carrier and broker connections. In this model, our BenefitsPlace partners sell their voluntary benefit offerings through a holistic, multidimensional marketplace. This marketplace is designed to increase the economic value of the consumer lives on our platform by aligning platform products to consumer needs. In exchange for Benefitfocus delivering consumer access, data-driven analysis and operational efficiencies, BenefitsPlace partners pay us a percentage of the transaction value that is transacted on our platform. BenefitsPlace carrier agreements have terms of two to four years and are typically cancellable upon breach of contract or insolvency. BenefitsPlace supplier contracts have terms of one year or less and are generally cancellable upon breach of contract, failure to cure, bankruptcy and termination for convenience.

Our hybrid software-as-a-service, or SaaS, and repeatable transaction-based model provides us significant visibility into our future operating results, which enhances our ability to manage our business. Our company was founded in 2000, and we currently employ approximately 1,450 associates, or employees.

## **Industry Background**

The administration and distribution of benefits to employees is a mainstay of the U.S. economy. Providing these benefits is costly and complex and requires the exchange of information, application of rules, and transfer of funds among a wide variety of constituents, including consumers, employers, insurance carriers, suppliers, brokers, benefits outsourcers, payroll processors, and financial institutions. The size of the HR benefits administration market and the value of benefits transacted are large. According to IBISWorld calculations, in 2017, the market for HR benefits administration in the United States is expected to grow to over \$54 billion. Eastbridge Consulting Group estimates the U.S. in-force premiums were \$42 billion in 2017 for employee-paid life, health and disability products sold at the worksite with premiums paid through payroll.

The variety and complexity of medical and non-medical benefits plans continues to grow. The Benefitfocus 2017 annual market research report, *The State of Employee Benefits 2018*, indicates that a higher proportion of benefits offerings are shifting to high-deductible health plans coupled with health savings accounts. This added complexity places greater potential cost burden on employees and creates a greater need for employers to educate employees on becoming more informed healthcare consumers. To help employees cover added cost burdens, employers are increasingly offering a wider range of non-medical benefits plans, such as critical illness, supplemental income, and financial wellness programs, as well as traditional insurance offerings like dental, life and disability. Current point and legacy systems are inadequate to efficiently manage the complexity, regulation, and the involvement of multiple parties. They are also incapable or inadequate in enabling the purchase of non-medical benefits. These factors are driving the need for an enterprise benefits management system to improve operational efficiency along the entire benefits value chain.

## ***Employer Market***

Currently, we believe there are over 18,000 entities that employ more than 1,000 individuals in the United States. A significant and growing portion of employers' costs is non-salary benefits, such as health insurance, that they provide to their employees. With healthcare and other premiums increasing, senior executives are prioritizing benefits administration in their organizations and searching for ways to contain costs without sacrificing benefits. In addition, the expense burden continues to shift to employees. Employees' contributions to premiums for health insurance have grown from approximately \$318 per employee in 1999 to approximately \$1,186 per employee in 2018. Employers recognize the importance of offering a greater variety of non-medical benefits as a means to attract, motivate, and retain employees. They must maintain relationships with multiple insurance carriers and many other benefits providers, placing a substantial administrative burden on their organizations.

Employers' distribution, management, and administration of employee benefits has historically consisted of error-prone, paper-based processes, and a patchwork of customized software tools, which are costly to maintain, often lack necessary functionality, and fail to address the increasing complexity of the benefits marketplace. As benefits offerings become more complex and employees bear more of the cost of those benefits, HR software solutions that streamline information, simplify choices, and engage employees are increasingly in demand. Employees desire tailored, dynamic, and interactive communication of critical benefits information as they become accustomed to receiving personalized content through various consumer applications on a range of devices.

Legacy HR systems were generally designed as extensions of enterprise resource planning, or ERP, systems, built for back-office responsibilities like finance and accounting. As a result, these systems lack functionality and ease-of-use for employees. Many legacy HR systems were not designed to integrate with the broader benefits ecosystem, including brokers, carriers, and wellness providers, or have the ability to transact non-medical benefits. This results in expensive, error-prone, and incomplete experiences for employers and employees. Benefits outsourcers have attempted to compensate for the shortcomings of legacy HR systems, but they have generally lacked adequate technology solutions necessary to keep up with the rapidly evolving benefits landscape. As a result, employees are often not provided with the appropriate functionality and information required to select and manage their benefits effectively.

Modern technology, changing communication patterns, and a constantly evolving benefits ecosystem have impacted the employee-employer relationship. HR executives continue to search for effective strategies to increase efficiency and contain costs, while increasing employee engagement and being an employer of choice. Employers are increasingly interested in SaaS solutions that can help capture and analyze benefits data and provide more choice for their employees to improve productivity and satisfaction. In order to manage the distribution and administration of benefits effectively, employers need an integrated platform, capable of handling all benefits in one place and providing a highly personalized experience for employees.

## ***Insurance Carrier Market***

The employee benefits market consists of a myriad of medical insurance carriers and products. According to the U.S. Bureau of Labor Statistics, the single largest benefit provided to employees in the United States is healthcare insurance, often encompassing more than 90% of all insurance benefits spending by employers.

Large, national insurance carriers also offer numerous individual health plans of different types, including health maintenance organizations, preferred provider organizations, point-of-service plans, and high deductible health plans, across the 50 states, as well as life and ancillary benefits plans. Each carrier offers a complex variety of medical insurance and non-medical benefits, encompassing life and ancillary plans, with each plan requiring multiple decisions to address the specific needs of employers and their individual employees. Despite widespread carrier consolidation, numerous disparate systems remain in place, with many large carriers operating on multiple IT systems. Carriers often rely on manual processes and siloed software applications to bridge gaps in legacy administration systems. Even as carriers attempt to modernize and keep up with evolving industry practices and a changing regulatory landscape, they have difficulty connecting with the broader healthcare system.

The effective delivery and management of employee benefits depends on the timely, continuous exchange of accurate data among carriers, their employer customers, and individual members. Legacy benefits management systems often lack important functionality such as web and mobile self-service capabilities and real-time data exchange. Critical carrier processes, including member enrollment, billing, communications, and retail marketing have often been under-optimized or neglected by legacy systems, and carriers have devoted significant internal resources to cover technology gaps. In addition, healthcare reform mandates and the rise of exchanges have increased focus on carriers' retail distribution capabilities, which require additional investment.

Governmental oversight, punctuated with the Patient Protection and Affordable Care Act, or PPACA, has led to an increasingly dynamic regulatory framework under which health benefits are delivered, accessed and maintained. Despite uncertainty regarding the long-term viability of PPACA, we expect digital transformation of healthcare benefits to continue in the form of public and private exchanges – online marketplaces that allow insurance carriers to compete directly for new members. We expect private exchanges will be less rigid, promoting both health and non-health benefits, with substantially fewer rules around the types of benefits offered. As medical insurance carriers continue to bolster their retail distribution capabilities, we believe they will require consolidation of technology solutions to improve operational efficiency and attract additional members through private exchanges.

## **The Benefitfocus Solutions**

We provide a multi-tenant cloud-based benefits management platform for consumers, employers, insurance carriers, suppliers and brokers. The Benefitfocus Platform simplifies how organizations and individuals transact benefits.

We believe our solutions help employers and clients of brokers in the following important ways:

*Simplify Benefits Enrollment.* Our solutions reduce the complexity of benefits enrollment by integrating all plan information in one place and presenting it to employees in an organized and easy-to-understand manner. Employees shop and enroll using a highly intuitive and engaging consumer-oriented interface.

*Purchase non-medical benefits.* Our platform includes a holistic, multidimensional marketplace whereby carriers and suppliers sell non-medical products to consumers.

*Reduce Cost and Increase ROI.* Our solutions automate the benefits management process and reduce the cost associated with clerical errors and covering ineligible employees and dependents. Our solutions also include advanced analytics that enable employers and employees to quickly gather, report, and forecast benefit costs.

*Attract, Retain, and Motivate Employees.* Our solutions help employers attract, retain, and motivate top talent by delivering benefits information through a highly intuitive and engaging user interface. We believe that when employees understand the value of their benefits, they are more likely to be satisfied with and engaged in their jobs.

*Streamline HR Processes.* Our solutions eliminate the time-consuming and labor-intensive, often paper-based, processes associated with managing employee benefits plans, making HR professionals more efficient. Employers and HR professionals can efficiently enroll users or update information, and communicate or make changes to plans in real-time.

*Integrate Seamlessly with Related Systems.* Our solutions can be easily and securely integrated with a variety of related systems, including carrier membership and billing, payroll and HR, banking, and other third-party administration. We provide a network of approximately 2,200 benefit provider data exchange connections through industry standards interfaces that are configurable to accommodate a variety of needs. Our open architecture further extends our functionality by allowing third parties to develop and offer apps and services on our platform.

We believe our solutions help insurance carriers and suppliers in the following important ways:

*Bolster Retail Distribution Capabilities Through Marketplaces.* Our solutions help carriers and suppliers respond to an evolving marketplace in which retail distribution capabilities are increasingly important to attracting and retaining new members. Our platform offers carriers a lower cost direct sales channel to employer groups and individuals. We offer the ability to sell both healthcare and non-healthcare benefit products in an online shopping environment that serves as an alternative to government-sponsored public exchanges.

*Attract and Maintain Membership.* Our solutions allow carriers to maximize sales capacity and efficiency by communicating directly with their employer customers and individual members.

*Reduce Administrative Costs.* The Benefitfocus Platform allows carriers to consolidate IT systems, automate and simplify various aspects of the benefits administration process, such as enrollment, plan changes, eligibility updates, and billing, from one centralized location.

*Facilitate Real-Time Data Exchange.* Our solutions simplify interactions and data exchange, and foster collaboration among carriers, suppliers, brokers employers and consumers. This allows carriers to rapidly tailor and offer new benefits packages.

## **Our Growth Strategy**

We believe BenefitsPlace can transform how employers, brokers and carriers deliver value for employees and their families. With more than 40 industry-leading products offered by the industry's marquee brands, employers can now seamlessly package a rich benefits offering that addresses health, wealth and lifestyle needs.

We intend to strengthen our position as a leading cloud-based benefits management platform for buyers and sellers, working closely with brokers as partner in the ecosystem. Key elements of our growth strategy include the following:

*Expand our Customer Base.* We believe that our current customer base represents a small fraction of our targeted users that could benefit from our subscription solutions. In order to reach new customers in our existing markets, we are aggressively investing in our sales and marketing resources and our channel marketing strategy, including in ways intended to expand existing relationships and foster organic growth opportunities through brokers.

*Further Develop our Partner Ecosystem.* We believe we have a large opportunity to efficiently grow our customer base through our partners. To increase the number of consumers on our platform, we have established strong relationships with key participants in the benefits market, including Mercer Health & Benefits, LLC ("Mercer"), SAP and SuccessFactors. We have also eliminated previous friction and improved our outreach to key constituents within the benefits industry, like brokers. One such example is the introduction of our Premier Broker program in 2018.

*Deepen our Relationships with our Existing Customer Base.* We are deepening our employer relationships by continuing to provide a unified platform with a growing list of additional solutions to manage increasingly complex benefits processes and simplify the distribution and administration of employee benefits. We are expanding our carrier relationships through both the upsell of additional software products, increased adoption across our carriers' member populations and providing access to our multidimensional marketplace.

*Extend our Suite of Applications and Continue our Technology Leadership.* We are extending the number, range, and functionality of our benefits solutions. We have also extended the functionality of our products through mobile solutions. We intend to continue our collaboration with customers and partners, so we can respond quickly to evolving market needs with innovative capabilities that support our leadership position.

*Facilitate the purchase of non-medical benefits.* We believe that our current BenefitsPlace portfolio of products represents a fraction of the number and variety of products that we expect will be offered on

our multidimensional marketplace. We also believe we have a significant opportunity to drive higher employer placement of BenefitsPlace products and increase consumer engagement in purchasing BenefitsPlace products throughout an entire calendar year.

*Target New Markets.* We believe substantial demand for our solutions exists in markets and geographies beyond our current focus. We intend to leverage opportunities we believe will arise from the complexities of changing government regulation and increased enrollment impacting both Medicare and Medicaid. We also plan to grow our sales capability internationally by expanding our direct sales force and collaborating with strategic partners in new, international locations.

*Selectively Pursue Strategic Acquisitions and Investments.* We might pursue acquisitions of, or investments in, complementary businesses and technologies that align with our overall growth strategy. We believe that a selective acquisition and investment strategy could enable us to gain new customers, accelerate our expansion into new markets, and enhance our product capabilities.

## **The Benefitfocus Portfolio of Products**

*BenefitsPlace* is our transaction-oriented, marketplace solution, connecting employers, brokers, insurance carriers, suppliers and consumers on a single platform. BenefitsPlace includes access to a variety of leading voluntary benefit products that support income protection, digital health, and financial well-being. BenefitsPlace partners provide products that fit into three distinct categories:

- *Health.* Products in the health category improve access to affordable, high-quality care and may act as a supplement to the traditional employer-funded health and welfare benefits. Partner-provided products in this category include consumer-directed healthcare accounts, long-term care insurance, prescription drug discount programs, services to help population health and wellness services and enrollment, and guidance services for free state health insurance plans.
- *Wealth.* Products in the wealth category provide options for consumers to protect their income in case of a medical emergency, manage their finances and decrease risk to financial debt. Partner products provided in this category include accident, hospital indemnity and critical illness insurance, short-term and long-term disability, financial wellness services, student loan services, and retirement and savings accounts such as IRA, 401(k), 529 and personal loan services.
- *Lifestyle.* Products in the lifestyle category provide options that address the individual needs of consumers to improve the quality of their day-to-day life. Partner products provided in this category include identity theft protection, virtual college counseling assistance, pet insurance and savings plans, and same-day delivery services for grocery and household items.

BenefitsPlace adds value to all participants that participate on the platform.

- Insurance carriers and specialty providers join BenefitsPlace as BenefitsPlace sellers. Sellers must meet a standard set of integration, quality, security, and financial standards to participate in BenefitsPlace. This ensures products are composed of marquee, industry-leading products. Sellers can expand their distribution channels and grow their reach to consumers.
- Brokers work with BenefitsPlace advisors to understand the types of products available through the Benefitfocus Marketplace. With the use of data-driven insights, brokers have greater visibility into the status of their customers and participation levels of BenefitsPlace products, thereby helping activate their customers' benefits strategy.
- Employers can design a strategic benefits portfolio, without the traditional constraints of administration and integration inefficiencies. BenefitsPlace products include pre-built integrations, seller-provided content and communication materials, and a consistent set of system configurations and settings within Benefitfocus Marketplace.
- Consumers gain access to BenefitsPlace products through our carrier and employer subscription-based enrollment products, eEnrollment and Benefitfocus Marketplace. With an insight-driven, guided consumer retail experience that includes decision-support tools, educational information, and mobile access, consumers can select the best products for their individual needs all year long.



## Products for Insurance Carriers

- *eEnrollment* provides a single, privately labeled platform for carriers to automate enrollment across all segments of their commercial group business. It includes benefits administration tools for brokers employers, supports complex business rules, such as eligibility and rating criteria and provides operational efficiency by transmitting eligibility and enrollment data to carrier membership systems. eEnrollment also offers consumers a retail-like benefit enrollment experience with decision support tools, educational videos and content libraries that help consumers make informed benefit elections year round.
- *eBilling* is an electronic invoice presentment and payment solution, or EIPP, privately labeled for carriers. It consolidates invoices from multiple insurance products so employers and individuals receive one invoice that can be viewed and paid electronically. eBilling automates the synchronization of billing and membership data to improve the accuracy of billing processes and provides options to simplify bill payment, such as scheduled one-time and/or recurring payments.
- *eExchange* is a solution that bridges the integration gap between carrier and employer systems, allowing a seamless exchange of data between the two. Our customers use eExchange to consume eligibility and enrollment data from multiple, third-party systems, convert data from one format to another, and manage the flow of employee data between carriers and employers.
- *eSales* gives carriers and brokers tools to organize and proactively manage accounts, track leads, generate quotes, and create proposals for multiple products. eSales allows carriers to define their own market segments and configure them with unique workflows and business rules. It also enables greater data accuracy by automatically incorporating updated products, options and pricing for the most current rates and quotes. Carriers purchase eSales to increase productivity in their sales force.
- *Core & Advanced Analytics* is our data analytics solution for use by carriers and their self-insured employer customers. Core & Advanced Analytics is a privately-labeled analytics solution that helps carriers and their self-insured employers identify cost drivers, recognize trends, and predict future risks and costs. Additional analytical capabilities help create “what-if” scenarios to model different variables, such as co-pay, deductibles, benefits, inflation, and member populations.

## Products for Employers

- *Benefitfocus Marketplace* is a cloud-based benefits management portal that streamlines online enrollment, employee communication, and benefits administration. Benefitfocus Marketplace presents employees with all of the plans their employers offer with access to animated videos, educational benefits information and live chat sessions as they explore their benefit options. As employees shop for the plans that best fit their individual needs, a virtual shopping cart keeps a running tally of the employees’ out-of-pocket costs. The Benefitfocus Marketplace is available on a desktop, tablet or mobile phone.
- *Core & Advanced Analytics* is our data analytics solution that helps employers make more informed, data-driven decisions about their benefits offerings. This product aggregates benefit cost and claims data from relevant sources and allows customers to analyze, forecast, and monitor costs. Core & Advanced Analytics enables employers and their advisors to identify cost drivers, recognize trends, and predict future risks and costs. Additional analytical capabilities create “what-if” scenarios to model different variables, such as co-pays, deductibles, benefits, inflation, and member populations.
- *ACA Management & Reporting* is our solution that helps employers manage ACA compliance by consolidating and automating IRS reporting. Additionally, Benefitfocus is an approved transmitter, allowing us to electronically file required ACA compliance documents with the Internal Revenue Service on behalf of our customers.
- *Consolidated Billing & Payment* is a comprehensive application that synchronizes enrollment and billing information to streamline the monthly billing process, automate adjustments and increase accuracy of payments. Consolidated Billing & Payment gives employers the ability to automate or schedule single-invoice payments to all of their benefit providers. Employers can drill down by employee to see coverage level and plan, or focus in by vendor, benefit type or internal cost control center to gain more insight into cost drivers.

- *Consumer-Directed Healthcare Accounts* is our solution designed to provide employers and their employees with a seamless enrollment and account management experience for their health savings accounts, or HSAs, or similar medical payment products within Benefitfocus Marketplace.
- *COBRA Administration* is our solution for employers that simplifies management of COBRA, or the Consolidated Omnibus Budget Reconciliation Act, benefits. COBRA Administration automates required communication, enrollment, fulfillment and payment processing within Benefitfocus Marketplace.

### **Products for Brokers**

Brokers use the Benefitfocus Platform to manage the portfolios of their employer clients. This includes delivering strategic insights that improve their employer clients' benefit experience and demonstrating greater value through access to a larger set of relevant products for employers.

- *Advanced Analytics* aggregates benefit cost and claims data from relevant sources, identifies cost drivers, recognizes trends, and predicts future risks and costs. Additional analytical capabilities create "what-if" scenarios to model different variables, such as co-pays, deductibles, benefits, inflation, and member populations. Brokers purchase Advanced Analytics to facilitate the design of better informed, data-driven benefit strategies for their customers.
- *BenefitsPlace* includes consultative support for brokers through BenefitsPlace advisors. This helps brokers understand the types of products available and optimize their customers' Benefitfocus Marketplace experience. With the use of data-driven insights, brokers have greater visibility into the status of their customers and participation levels of BenefitsPlace product participation, thereby helping activate their customers' benefits strategy.
- *Premier Broker Program* is designed to foster a collaborative, mutually beneficial partnership with the broker community to accelerate their growth and deliver world-class support to our mutual customers. Premier brokers can take advantage of sales and marketing support, discounts for new clients and exclusive rewards such as:
  - High-touch sales and marketing support with a collaborative team of sales and technology advisors, as well as priority access to marketing materials including Benefitfocus' State of Employee Benefits research, thought leadership content and product promotions;
  - On-demand client success metrics through our One Place 365 Broker Support Portal, an interactive dashboard that provides comprehensive insight into implementations, renewals and ongoing projects for all broker clients using Benefitfocus technology; and
  - Networking opportunities and local Benefitfocus Community events. Brokers receive discounted attendance to One Place, our annual user conference, and are invited to our platform sellers conference.

### **Professional Services and Customer Support**

- *Implementation Services.* We provide implementation services to our customers in order to help ensure seamless deployment and effective utilization of our solutions. Our carrier and employer implementation teams and third-party system integrators in our Benefitfocus Implementation Program follow an end-to-end approach from project planning to customer training and technical support.
- *Benefits Service Center.* We provide employers with expanded support services where our benefits specialists help customers' employees understand benefit offerings, navigate the enrollment process, and find answers to frequently asked HR questions. Our Benefits Service Center acts as an extension of our customers' benefits team and provides employees with personalized, guided support. Additional services, such as fulfillment, dependent verification, and HR administration, are available to meet unique organizational needs.

## Customers

Our customers include employers of all sizes across a variety of industries and some of the nation's largest insurance carriers and aggregators. The following is a list of some of our significant employer and carrier customers.

### Employer Customers

American Eagle Outfitters Inc.  
Amerigas Propane, Inc.  
Brookdale Senior Living Inc.  
California Institute of Technology  
Carolinas HealthCare System  
Fender Musical Instruments Corporation  
Hard Rock Café International (USA), Inc.  
Rush University Medical Center  
SAP America Inc.  
University of Alabama – Birmingham  
Zions Bancorporation

### Carrier Customers

American Family Life Assurance Company of Columbus  
American Heritage Life Insurance Company  
BlueChoice HealthPlan of South Carolina, Inc.  
Blue Cross of Idaho Health Service, Inc.  
Blue Cross and Blue Shield of Kansas City  
Blue Cross and Blue Shield of South Carolina, Inc.  
CIGNA  
Transamerica Corporation  
Wellmark, Inc.

BenefitsPlace sellers include some of the nation's leading insurance carriers and suppliers to help protect consumers health, wealth and lifestyle. The following is a list of some of our significant carrier and supplier sellers.

Aetna  
Aflac  
Allstate Benefits  
BrightDime  
CIGNA

InfoArmor  
MetLife  
SoFi  
The Hartford  
Transamerica Corporation

During the years ended December 31, 2018, 2017 and 2016, one customer accounted for 13%, 11% and 12% of total revenue. No other customer accounted for more than 10% of our total revenue.

## Sales and Marketing

We sell our software solutions through our direct sales organization. Our direct sales team comprises employer-focused and carrier-focused field sales professionals who are organized primarily by geography and account size.

We generate customer leads, accelerate sales opportunities and build brand awareness through our marketing programs and strategic relationships. Our marketing programs target HR, benefits, and finance executives, technology professionals, key brokers, and senior business leaders. Our principal marketing programs include:

- use of our website to provide application and company information, as well as learning opportunities for potential customers;
- sales development representatives who respond to incoming leads through digital and advertising programs and convert them into new sales opportunities;
- participation in, and sponsorship of, user conferences, executive events, trade shows and industry events, including our annual user and partner conference, One Place, and our annual platform sellers conference;
- integrated marketing campaigns, including direct email, online web advertising, blogs, webinars and industry reports, including State of Employee Benefits; and
- public relations, analyst relations and social media initiatives.

We also sell our software solutions through strategic partners including Mercer and SAP SE.

## **Technology Infrastructure and Operations**

As an enterprise cloud software vendor, we have always deployed our solutions using a SaaS model. Our customers access our software via application integrations, web browsers, and/or mobile devices, rather than by installing software on their premises. Through our multi-tenant architecture, our customers access a single software instance with multiple possible configurations enabled by our metadata-driven framework. The multi-tenant approach provides significant operating economies through aligned, shared computational services and processes as it helps us to reduce our fixed cost base and minimize unused capacity on our hardware. In addition, our software architecture gives us an advantage over legacy system vendors, who may be using a less flexible architecture that would require significant time and labor expense to address varied capability needs.

We host our applications and serve all of our customers from two redundant, co-located, private cloud data centers in separate locations. We rely on third-party vendors to operate these data centers, which are designed to host mission-critical computer systems and have industry-standard measures in place to minimize service interruptions. Our technical operations staff manages the technology stacks supporting the Benefitfocus Platform and uses automated monitoring tools throughout our system to detect unusual events or malfunctions that could interfere with our customers' or partners' use of the Benefitfocus Platform. We monitor application health by verifying that all applications, interfaces and supporting middleware are operational. If our monitoring detects anomalous situations, our dedicated network operations staff respond immediately to diagnose the situation, communicate status, and resolve the matter. We take the security of our data, systems and operations very seriously, and minimize risk at every level of technology selection through software architecture, systems administration, and operational controls and procedures.

## **Compliance and Certifications**

We obtain third-party examinations of our controls relating to security and data privacy. Certain examinations are conducted under Statement on Standards for Attestation Engagements, or SSAE, No. 16 (Reporting on Controls at a Service Organization). In particular, we obtain Service Organization Controls, or SOC, reports known as SOC 1 Type II and SOC 2 Type II audits that test the design and operating effectiveness of controls over a period of time. An independent auditor conducts these examinations annually and addresses, among other areas, our physical and environmental safeguards for production data centers, data availability and procedures covering integrity, change management, and logical security.

On an annual basis, we complete an internal audit of compliance against the Payment Card Industry Data Security Standards, or PCI-DSS, applicable to Level 1 service providers. These standards focus on application and network security controls for companies that transmit and store credit card data on behalf of clients. Benefitfocus meets PCI compliance requirements as a Level 1 service provider and submits its Report on Compliance and Attestation of Compliance documenting this assessment to the four major credit card brands annually.

In addition to PCI-DDS, Benefitfocus meets all applicable security requirements required by the National Automated Clearinghouse Association, or NACHA, for third-party service providers, as well as all requirements for Covered Entities as required by HIPAA. We validate both NACHA and HIPAA compliance annually through internal audits.

## **Competition**

While we do not believe any single competitor offers similarly expansive benefits administration solutions, we face competition from various sources, many of which have greater resources than us. We have historically described our competition in our two market segments, carrier and employer. In 2018, we made a strategic shift to include a transaction-based model with the introduction of BenefitsPlace. We believe that sources of competition are similar to those that we faced prior to the shift, which include:

- ERP software companies, including Oracle (PeopleSoft), Infor (Lawson) and Workday each offering a cloud-based benefits administration software solution;
- HR outsourcing companies, such as Willis Towers Watson;

- payroll service providers, such as ADP who expanded their core payroll services to include some form of cloud-based benefits administration services; and
- insurance carriers that have invested in internally developed benefit management solutions;
- member services companies, including those providing web-based subscriber enrollment and claims adjudication services, such as Trizetto (acquired by Cognizant) and DST Health Solutions;
- brokers and consultants who have influence over benefits offerings; and
- various niche software vendors.

We believe that competition for benefits administration solutions is based primarily on the following factors:

- capability for customization through configuration, integration, security, scalability, and reliability of applications;
- competitive and understandable pricing;
- breadth and depth of application functionality;
- access to broad offering of non-medical benefits;
- size of customer base and level of user adoption;
- extensive data exchange network;
- cloud-based delivery model;
- dynamic communication capabilities with contextual media, animation, and acknowledgement tools;
- ability to integrate with legacy enterprise infrastructures and third-party applications;
- domain expertise in benefits and healthcare consumerism;
- extensive base of rules and event-driven benefit eligibility and enrollment;
- accessible on any browser or mobile device;
- modern and adaptive technology platform;
- clearly defined implementation timeline;
- customer-branding and styling;
- data exchange standardization; and
- ability to innovate and respond to customer and legislative needs rapidly.

We believe that we compete effectively based upon all of these criteria, and that we are likely to continue to retain a high percentage of our customers from year to year. Nonetheless, we believe that the increasing acceptance of automated solutions in the healthcare marketplace and the adoption of more sophisticated technology and continuing legislative reform will result in increased competition, including potentially from large software companies with greater resources than ours. Other companies might develop superior or more economical service offerings that our customers could find more attractive than our offerings. Moreover, the regulatory landscape might shift in a direction that is more strategically advantageous to competitors.

## **Research and Development**

Our ability to compete depends, in large part, on our continuous commitment to rapidly introduce new applications, technologies, features, and functionality. We deliver multiple software releases per year, updating the Benefitfocus Platform to leverage advances in cloud computing, mobile applications, and data management. Our research and development team is responsible for the design and development of our applications. We follow state-of-the-art practices in software development using modern programming languages, data storage systems, and other tools. We use both commercial and

open source products, following a “best tool for the job” philosophy in product selection. Our software has a multi-tiered architecture that ensures flexibility to add or modify features quickly in response to changing market dynamics, customer needs, or regulatory requirements.

Our research and development expenses were \$47.9 million, \$49.5 million and \$56.6 million for the years December 31, 2018, 2017 and 2016, respectively.

## **Intellectual Property**

We rely on a combination of patent, trade secret, copyright, and trademark laws, license agreements, confidentiality procedures, confidentiality and nondisclosure agreements, and technical measures to protect the intellectual property used in our business. We generally enter into confidentiality and nondisclosure agreements with our associates, consultants, vendors, and customers. We also seek to control access to and distribution of our software, documentation, and other proprietary information.

We use numerous trademarks for our products and services, and “Benefitfocus”, “HR InTouch”, “HR InTouch Marketplace”, “All Your Benefits. One Place.”, and “All Your Benefits. In Your Pocket.” are registered marks of Benefitfocus in the United States. Through claimed common law trademark protection, we also protect other Benefitfocus marks which identify our services, such as Benefitfocus eEnrollment, Benefitfocus eBilling, Benefitfocus eExchange, and Benefitfocus eSales, and we have reserved numerous domain names, including “benefitfocus.com”. We also have registered trademarks and pending trademark applications in foreign jurisdictions such as Australia, Canada, India, Israel, Ireland, New Zealand, South Africa, and the United Kingdom.

We have been granted eight U.S. patents (utility patents) and have two U.S. patent applications (all for utility patents) pending. Our patents provide protections up to 2034. We also have three Chinese, two Japanese, Australian, Taiwanese, and Hong Kong, and one Canadian patents and a number of pending patent applications.

We also rely on certain intellectual property rights that we license from third parties. Although we believe that alternative technologies are generally available to replace such licenses, these third-party technologies may not continue to be available to us on commercially reasonable terms.

Although we rely on intellectual property rights, including trade secrets, patents, copyrights, and trademarks, as well as contractual protections to establish and protect our proprietary rights, we believe that factors such as the technological and creative skills of our personnel, creation of new modules, features and functionality, and frequent enhancements to our applications are more essential to establishing and maintaining our technology leadership position.

The steps we have taken to protect our copyrights, trademarks, and other intellectual property may not be adequate, and the potential exists that third parties could infringe, misappropriate, or misuse our intellectual property. If this were to occur, it could harm our reputation and adversely affect our competitive position or operations. In addition, laws of other jurisdictions may not protect our intellectual property and proprietary rights from unauthorized use or disclosure in the same manner as the United States. The risk of unauthorized use of our proprietary and intellectual property rights may increase as our company expands outside of the United States.

## **Government Regulation**

### ***Introduction***

The employee benefits industry is required to comply with extensive and complex U.S. laws and regulations at the federal and state levels. Although many regulatory and governmental requirements do not directly apply to our business, our customers are required to comply with a variety of U.S. laws, and we may be impacted by these laws as a result of our contractual obligations. For many of these laws, there is little history of regulatory or judicial interpretation upon which to rely.

### ***Requirements of PPACA***

Our business could be affected by changes in healthcare spending. PPACA and subsequent laws and regulations regarding the market for healthcare services have changed how healthcare services are covered, delivered, and reimbursed. PPACA, as enacted, expanded coverage of uninsured individuals by requiring states to expand Medicaid coverage significantly and to establish health insurance exchanges to facilitate the purchase of health insurance policies by individuals and small employers. The law also provided subsidies to states to create non-Medicaid plans for certain low-income residents. The requirement for states to expand Medicaid was subsequently repealed, and insurers have experienced mixed results providing services through the exchanges, leading many to exit this market. Increased volatility following the repeal of the individual mandate in late 2017 has led to additional uncertainty in the insurance market.

A significant goal of PPACA and subsequent reform efforts has been to move away from fee for service payments and toward capitated payments to make providers more accountable for the cost and quality of care provided. While many of the provisions of PPACA will not be directly applicable to us, PPACA, as currently implemented, might affect the business of many of our customers. Carriers and large employers might experience changes in the numbers of individuals they insure as a result of Medicaid expansion and the creation of state and national exchanges, though it is unclear how many states will decline to implement the Medicaid expansion or adopt state-specific exchanges.

Following the creation of the Medicare Shared Savings Program, Medicare and many commercial third party payors began implementing accountable care models in which groups of providers known as Accountable Care Organizations ("ACO") assume some amount of risk for the cost of care provided to groups of individuals. Also, CMS continues to test demonstration programs to bundle acute care and post-acute care reimbursement to hold providers accountable for costs across a broader continuum of care. These reimbursement methodologies and similar programs are likely to continue and expand, both in public and commercial health plans, and will likely impact the business of our customers.

As has been the case since 2010, the long-term viability of PPACA remains in doubt, and we expect that the current Congress and White House will continue to seek ways to modify, repeal, or otherwise invalidate all, or certain provisions of PPACA. For instance, on January 20, 2017, President Trump issued an executive order stating that the U.S. federal government's policy is to seek the prompt repeal of PPACA, and directing the heads of all executive departments and agencies to minimize the economic and regulatory burdens of PPACA to the maximum extent permitted by law. Also, the December 2017 revisions to the tax code eliminated PPACA's individual mandate, which could serve as a basis for continued challenges to the constitutionality of the law and cause further disruption to the insurance markets. Should Congress or the courts modify, repeal, or otherwise invalidate PPACA or any parts of its provisions, the business of our customers could be substantially affected.

### ***Requirements Regarding the Confidentiality, Privacy and Security of Personal Information***

*HIPAA and Other Privacy and Security Requirements.* Numerous U.S. federal and state laws and regulations apply to the privacy and security of personal health information. In particular, regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996, or HIPAA, establish privacy and security standards that limit the use and disclosure of protected health information and require the implementation of administrative, physical and technical safeguards to ensure the confidentiality, integrity, availability, and privacy of protected health information. Health plans, healthcare clearinghouses and most healthcare providers are considered "Covered Entities" subject to HIPAA.

With respect to our operations as a healthcare clearinghouse, we are directly subject to the Privacy Rule and the Security Rule. In addition, our carrier customers, or payors, are considered to be Covered

Entities and are required to enter into written agreements with us, known as Business Associate Agreements, under which we are considered to be a Business Associate and that require us to safeguard protected health information and restrict how we may use and disclose such information. The Privacy Rule extensively regulates the use and disclosure of protected health information by Covered Entities and their Business Associates. For example, the Privacy Rule permits Covered Entities and their Business Associates to use and disclose protected health information for treatment and to process claims for payment, but other uses and disclosures, such as marketing communications, require written authorization from the individual or must meet an exception specified under the Privacy Rule. The Privacy Rule also provides patients with rights related to understanding and controlling how their health information is used and disclosed. To the extent permitted by the Privacy Rule and our contracts with our customers, we may use and disclose protected health information to perform our services and for other limited purposes, such as creating de-identified information. Determining whether data has been sufficiently de-identified to comply with the Privacy Rule and our contractual obligations may require complex factual and statistical analyses and may be subject to interpretation. The Security Rule requires Covered Entities and their Business Associates to implement and maintain administrative, physical and technical safeguards to protect the security of protected health information that is electronically transmitted or electronically stored.

If we are unable to properly protect the privacy and security of health information entrusted to us, we could be found to have breached our contracts with our customers. Further, if we fail to comply with the Privacy Rule, Security Rule, or Breach Notification Rule while acting as a Covered Entity or Business Associate, we could face civil penalties of up to \$57,051 per violation and a maximum civil penalty of \$1,711,533 in a calendar year for violations of the same requirement, in addition to criminal penalties. Recently, the U.S. Department of Health and Human Services Office for Civil Rights, which enforces HIPAA, appears to have increased its enforcement activities. Additionally, state attorneys general may bring civil actions seeking either injunctions or damages in response to violations of HIPAA that threaten the privacy of state residents.

There are additional privacy and data security legal regimes at the federal and state level. For example, the Federal Trade Commission, or FTC, regularly brings privacy and data enforcement actions under Section 5 of the Federal Trade Commission Act, alleging that certain activities constitute unfair or deceptive trade practices. The states have similar laws that prohibit unfair or deceptive trade practices. There are also state data security laws and state laws that regulate the use and disclosure of health information, among others. Further, by regulation, the FTC's Red Flags Rule requires some financial institutions and creditors, which may include some of our customers, to implement identity theft prevention programs to detect, prevent and mitigate identity theft in connection with customer accounts. We may be required to apply additional resources to our existing processes to assist our affected customers in complying with this rule.

We have implemented and maintain physical, technical and administrative safeguards, including written policies and procedures, intended to protect all personal data, including protected health information, and have processes in place to assist us in complying with all applicable laws and regulations regarding the protection of this data and properly responding to any data breaches or incidents.

*Data Breach Notification Laws.* There are numerous federal and state laws that generally require notice to affected individuals, regulators, and sometimes the media or credit reporting agencies in the event of a data breach impacting personal information. For example, at the federal level, the HIPAA Breach Notification Rule mandates notification of breaches affecting protected health information to affected individuals and regulators under conditions set forth in the Rule. Covered Entities must report breaches of unsecured protected health information to affected individuals without unreasonable delay, but not to exceed 60 days of discovery of the breach by a Covered Entity or its agents. Notification must also be made to HHS and, in certain circumstances involving large breaches, to the media. Business Associates must report breaches of unsecured protected health information to Covered Entities within 60 days of discovery of the breach by the Business Associate or its agents. All states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have enacted data breach notification laws. While some of these breach notification laws contain an exception for entities subject to HIPAA, other laws do not, and may impose notification obligations in addition to, or inconsistent with, the HIPAA Breach Notification Rule when a data breach implicates protected health information.



## ***HIPAA Administrative Simplification***

HIPAA also mandated a package of interlocking administrative simplification rules to establish standards and requirements for the electronic transmission of certain healthcare claims and payment transactions. These regulations are intended to encourage electronic commerce in the healthcare industry and apply directly to Covered Entities. Some of our businesses, including our healthcare clearinghouse operations, are considered Covered Entities under HIPAA and its implementing regulations.

*Transaction Standards.* The standard transaction regulations established under HIPAA, or Transaction Standards, mandate certain format and data content standards for the most common electronic healthcare transactions, using technical standards promulgated by recognized standards publishing organizations. These transactions include healthcare claims, enrollment, payment and eligibility. The Transaction Standards are applicable to that portion of our business involving the processing of healthcare transactions among payors, providers, patients and other healthcare industry constituents. Failure to comply with the Transaction Standards may subject us to civil and potentially criminal penalties and breach of contract claims. The Centers for Medicare and Medicaid Services, or CMS, is responsible for enforcing the Transaction Standards.

Payors who are unable to exchange data in the required standard formats can achieve Transaction Standards compliance by contracting with a clearinghouse to translate between standard and non-standard formats. As a result, use of a clearinghouse has allowed numerous payors to establish compliance with the Transaction Standards independently and at different times, reducing transition costs and risks. In addition, the standardization of formats and data standards envisioned by the Transaction Standards has only partially occurred. However, PPACA requires HHS to establish operating rules to promote uniformity in the implementation of each standardized electronic transaction. We cannot provide assurance regarding how the CMS will enforce the Transaction Standards. We have modified our systems and processes to implement the Transaction Standards and we continue to work with payors, healthcare information system vendors and other healthcare constituents to maintain our implementation of the Transaction Standards.

*Health Plan and Other Entity Identifiers.* HHS has promulgated regulations implementing the establishment of a unique health plan identifier, or HPID. Similar to a provider's national provider identifier, the HPID provides an identification system for health plans to use for electronic transactions. HHS has also promulgated regulations implementing another entity identifier, or OEID, that serves as an identifier for entities that are not health plans, health care providers or individuals. These other entities, which include third-party administrators, transaction vendors, and clearinghouses, are not required to obtain an OEID, but they could obtain and use one if they needed to be identified in standardized transactions. The implementation of the enforcement of the HPID and OEID process has been indefinitely delayed by HHS, and if implemented its impact on our business is unclear at this time.

## ***Financial Services Related Laws and Rules***

Financial services and electronic payment processing services are subject to numerous laws, regulations and industry standards, some of which might impact our operations and subject us, our vendors and our customers to liability as a result of the payment distribution and processing solutions we offer. Although we do not act as a bank, we offer solutions that involve banks, or vendors who contract with banks and other regulated providers of financial services. As a result, we might be impacted by banking and financial services industry laws, regulations and industry standards, such as licensing requirements, solvency standards, requirements to maintain the privacy and security of nonpublic personal financial information and Federal Deposit Insurance Corporation deposit insurance limits. In addition, our patient billing and payment distribution and processing solutions might be impacted by payment card association operating rules, certification requirements and rules governing electronic funds transfers. If we fail to comply with applicable payment processing rules or requirements, we might be subject to fines and changes in transaction fees and may lose our ability to process credit and debit card transactions or facilitate other types of billing and payment solutions. Moreover, payment transactions processed using the Automated Clearing House Network, or ACH, are subject to network operating rules promulgated by the National Automated Clearing House Association and to various federal laws regarding such operations, including laws pertaining to electronic funds transfers, and these rules and laws might impact our billing and payment solutions. Further, our solutions might impact the ability of our

payor customers to comply with state prompt payment laws. These laws require payors to pay healthcare claims meeting the statutory or regulatory definition of a “clean claim” within a specified time frame.

## **Banking Regulation**

The Goldman Sachs Group, affiliates of which owned approximately 11.8% of the voting and economic interest in our business as of December 31, 2018, is regulated as a bank holding company and a financial holding company under the Bank Holding Company Act of 1956, as amended, or the BHC Act. Due to the size of its voting and economic interest, we are deemed to be controlled by The Goldman Sachs Group and are therefore considered to be a non-bank “subsidiary” of The Goldman Sachs Group under the BHC Act. As a result, although we do not engage in banking operations, we are subject to regulation, supervision, examination and potential enforcement action by the Board of Governors of the Federal Reserve System, or the Federal Reserve, and to most banking laws, regulations and orders that apply to The Goldman Sachs Group. In addition, certain restrictions applicable to Goldman Sachs under the BHC Act apply to the Company as well, and we may be subject to regulatory oversight and examination because we are a technology service provider to regulated financial institutions. The bank regulatory framework is intended primarily to protect the safety and soundness of depository institutions, the federal deposit insurance system, and depositors rather than our stockholders. Because of The Goldman Sachs Group’s status as a bank holding company and a financial holding company, we have agreed to certain covenants for the benefit of The Goldman Sachs Group that are intended to facilitate its compliance with the BHC Act.

In addition, the Volcker Rule, which was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, or the Dodd-Frank Act, in relevant part, restricts banking entities from proprietary trading (subject to certain exemptions) and from acquiring or retaining any equity, partnership or other interests in, or sponsoring, a private equity fund, subject to satisfying certain conditions, and from engaging in certain transactions with funds. In 2017, President Trump issued an executive order directing the review of existing financial regulations. In May 2018, Congress passed the Economic Growth, Regulatory Relief and Consumer Protection Act. This legislation provides regulatory relief for certain financial institutions. These and other legislative and regulatory initiatives could change the regulation or operations of the financial services industry.

Under the current legislation, we will continue to be deemed to be controlled by The Goldman Sachs Group for purposes of the BHC Act and, therefore, we will continue to be subject to regulation by the Federal Reserve and to the BHC Act, as well as certain other banking laws, regulations and orders that apply to The Goldman Sachs Group. We will remain subject to this regulatory regime until The Goldman Sachs Group is no longer deemed to control us for bank regulatory purposes, which we do not generally have the ability to control and which will not occur until The Goldman Sachs Group has significantly reduced its voting and economic interest in us. We cannot predict the ownership level at which the Federal Reserve would consider us no longer controlled by The Goldman Sachs Group, but it could be less than 10%.

The Goldman Sachs Group and its subsidiaries, including Benefitfocus, generally may conduct only activities that are authorized for a bank holding company or a “financial holding company” under the BHC Act. The scope of services we may provide to our customers is limited under the BHC Act to those which are (i) financial in nature or incidental to financial activities (including data processing services such as those that we provide with our software solutions) or (ii) complementary to a financial activity and which do not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally. We believe that our current and anticipated business activities are permitted under the BHC Act.

Any failure of The Goldman Sachs Group to maintain its status as a financial holding company could result in substantial limitations on our activities and our growth. In particular, our permissible activities could be further restricted to only those that constitute banking or activities closely related to banking. The Goldman Sachs Group’s loss of its financial holding company status could be caused by several factors, including any failure by The Goldman Sachs Group’s bank subsidiaries to remain sufficiently capitalized, by any examination downgrade of one of The Goldman Sachs Group’s bank subsidiaries, or by any failure of one of The Goldman Sachs Group’s bank subsidiaries to maintain a satisfactory rating under the Community Reinvestment Act. In addition, The Goldman Sachs Group is required to remain “well capitalized” and “well managed” to maintain its status as a financial holding company. We have no ability to prevent such occurrences from happening.

The Federal Reserve has broad enforcement authority over us, including the power to prohibit us from conducting any activity that, in the Federal Reserve's opinion, is unauthorized or constitutes an unsafe or unsound practice in conducting our business. The Federal Reserve may approve, deny or refuse to act upon applications or notices for The Goldman Sachs Group and its subsidiaries to conduct new activities, acquire or divest businesses or assets, or reconfigure existing operations. The Federal Reserve may also impose substantial fines and other penalties for violations of applicable banking laws, regulations and orders. We do not believe that any of our current or anticipated business activities will require Federal Reserve approval.

There are limits on the ability of The Goldman Sachs Group's bank subsidiaries to extend credit to or conduct other transactions with us. In general, any loans to us from a bank subsidiary of The Goldman Sachs Group must be on market terms and secured by designated amounts of specified collateral and are limited to 10% of the lending bank's capital stock and surplus. The Dodd-Frank Act places certain additional restrictions on transactions between us and The Goldman Sachs Group, which we do not believe are material to us.

## Corporate Information

We were incorporated in June 2000 as Benefitfocus.com, Inc., a South Carolina corporation. In September 2013, we reincorporated in Delaware as Benefitfocus, Inc. Our principal executive offices are located at 100 Benefitfocus Way, Charleston, South Carolina 29492, and our phone number is (843) 849-7476. Our website address is [www.benefitfocus.com](http://www.benefitfocus.com). The information on, or that can be accessed through, our website is not part of this report. We currently employ approximately 1,450 associates.

## Available Information

Our annual reports on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and amendments to those reports filed or furnished pursuant to Section 13(a) or 15(d) of the Exchange Act, are available free of charge on our website at [www.benefitfocus.com](http://www.benefitfocus.com) as soon as reasonably practicable after electronically filing or furnishing such material to the Securities and Exchange Commission. The Securities and Exchange Commission maintains a website ([www.sec.gov](http://www.sec.gov)) that includes our reports, proxy statements and other information.

## Executive Officers

The following table sets forth information concerning our executive officers as of February 26, 2019:

<u>Name</u>	<u>Age</u>	<u>Position</u>
Raymond A. August	57	President and Chief Executive Officer
Mason R. Holland, Jr.	54	Executive Chairman, Director
Jonathon E. Dussault	45	Chief Financial Officer, Treasurer
James P. Restivo	58	Chief Technology Officer

### *Raymond A. August—President and Chief Executive Officer*

Ray August has been our President and Chief Executive Officer since January 2018 and a director since April 2018. Prior to that, Mr. August served as our Chief Operating Officer since August 2014 and was promoted to the title of President and Chief Operating Officer in March 2015. Prior to joining Benefitfocus, Mr. August served as the General Manager of the Financial Services Group of Computer Sciences Corp. (now DXC Technology Co. (NYSE: DXC)), or CSC, since October 2012. From March 2008 to September 2012, he served as President of CSC Financial Services Group. Since July 2013 he has served as a member of the Executive Advisory council for Arthur Ventures Private Equity Fund. Mr. August earned a B.S. in Accounting and Management Science from the University of South Carolina and is a Certified Public Accountant.

*Mason R. Holland, Jr.—Executive Chairman of the Board*

Mason Holland, one of our founders, has been our Executive Chairman and a member of the board of directors since our founding in June 2000. Mr. Holland is responsible for the coordination of strategic partnerships with industry leaders and client relations. Mr. Holland founded American Pensions, Inc. in 1988, serving as its Chairman and President from 1988 to 2003. Mr. Holland also has established and operated a number of other business entities throughout his 30 plus year career, including a real estate development firm established in 1989 and still operational and a jet aircraft manufacturer for which he served as lead investor, chief executive officer and board chairman from 2009 to 2014. Mr. Holland attended Old Dominion University in Norfolk, Virginia.

*Jonathon E. Dussault—Chief Financial Officer*

Jonathon Dussault has been our Chief Financial Officer since August 2017. He also serves as our Treasurer. Prior to that, since July 2014, Mr. Dussault served as Senior Vice President and Senior Finance Officer of WEX Health, Inc. (formerly Evolution1, Inc.), a leading provider of health savings account cloud-based technology and payment solutions for the healthcare industry and a subsidiary of global payments processing company, WEX Inc. (NYSE: WEX). Prior to that, beginning in April 2003, Mr. Dussault served in multiple roles at Evolution1, most recently as Chief Financial Officer, from December 2011 until its acquisition by WEX. From April 2003 to July 2010, Mr. Dussault also was Vice President of Corporate Development at Women's Health USA, Inc. and, prior to that, was responsible for financial planning and analysis at Open Solutions, Inc. Mr. Dussault began his career at Arthur Andersen LLP. He holds a B.S. in accounting from Babson College and earned his CPA certification in Massachusetts.

*James P. Restivo—Chief Technology Officer*

James Restivo has been our Chief Technology Officer since January 2016. Prior to joining Benefitfocus, Mr. Restivo served as Vice President, Chief Technology Officer of Dodge Data & Analytics LLC beginning in February 2015. From December 2012 to September 2014, Mr. Restivo served as Vice President, Chief Technology Officer of Smarter Workforce at International Business Machines Corporation, or IBM (NYSE: IBM). Prior to that, beginning in October 2006, Mr. Restivo served as Chief Technology Officer of Kenexa Corporation where he managed global public Human Capital Management R&D, SaaS operations and information security before the company was purchased by IBM. Mr. Restivo received a B.S. in computer science, applied mathematics and statistics from Stony Brook University and an M.S. from the Massachusetts Institute of Technology in computer science.

As of December 31, 2018, we had approximately 1,450 full-time associates. None of our associates is represented by a labor union, and we consider our current relations with our associates to be good.

## Item 1A. RISK FACTORS.

*Investing in our common stock involves a high degree of risk. You should consider carefully the risks and uncertainties described below, together with all of the other information in this Annual Report on Form 10-K, including the consolidated financial statements and the related notes, before deciding to invest in shares of our common stock. If any of the following risks were to materialize, our business, financial condition, results of operations, and future growth prospects could be materially and adversely affected. In that event, the market price of our common stock could decline and you could lose part or all of your investment in our common stock.*

### Risks Related to Our Business

***We have had a history of losses, and we might not be able to achieve or sustain profitability.***

We experienced net losses of \$52.6 million, \$50.3 million, and \$40.3 million, for the years ended December 31, 2018, 2017, and 2016, respectively. We cannot predict if we will achieve sustained profitability in the near future or at all. We expect to make significant future expenditures to develop and expand our business. In addition, as a public company, we incur significant legal, accounting, and other expenses that we would not incur as a private company. These expenditures make it harder for us to achieve and maintain future profitability. Our recent growth in revenue and number of customers might not be sustainable, and we might not achieve sufficient revenue to achieve or maintain profitability. We could incur significant losses in the future for a number of reasons, including the other risks described in this Annual Report on Form 10-K, and we may encounter unforeseen expenses, difficulties, complications and delays and other unknown events. Accordingly, we might not be able to achieve or maintain profitability and we may incur significant losses for the foreseeable future.

***Our quarterly operating results have fluctuated in the past and might continue to fluctuate, causing the value of our common stock to decline substantially.***

Our quarterly operating results might fluctuate due to a variety of factors, many of which are outside of our control. As a result, comparing our operating results on a period-to-period basis might not be meaningful. You should not rely on our past results as indicative of our future performance. Moreover, our stock price might be based on expectations of future performance that are unrealistic or that we might not meet and, if our revenue or operating results fall below the expectations of investors or securities analysts, the price of our common stock could decline substantially. For example, on August 4, 2017, the first trading day after we publicly announced our operating results for the second quarter ended June 30, 2017, our stock price dropped \$7.10 per share, or approximately 20.5%, to \$27.50.

Our operating results have varied in the past. In addition to other risk factors listed in this section, some of the important factors that may cause fluctuations in our quarterly operating results include:

- our ability to hire and retain qualified personnel, including the rate of expansion of our sales force;
- the extent to which our products and services achieve or maintain market acceptance, including through brokers;
- changes in the regulatory environment related to benefits and healthcare;
- our ability to introduce new products and services and enhancements to our existing products and services on a timely basis;
- new competitors and the introduction of enhanced products and services from competitors;
- the financial condition of our current and potential customers;
- changes in customer budgets and procurement policies;
- the amount and timing of our investment in research and development activities;
- technical difficulties with our products or interruptions in our services;
- regulatory compliance costs;

- the timing, size, and integration success of potential future acquisitions; and
- unforeseen legal expenses, including litigation and settlement costs.

In addition, a significant portion of our operating expense is relatively fixed in nature, and planned expenditures are based in part on expectations regarding future revenue. Accordingly, unexpected revenue shortfalls might decrease our gross margins and could cause significant changes in our operating results from quarter to quarter. If this occurs, the trading price of our common stock could fall substantially, either suddenly or over time.

***Changes in and interpretations of accounting principles regarding revenue recognition and accounting for leases and their implementation could have an adverse impact on our reported financial results.***

We prepare our financial statements in accordance with GAAP. These rules are subject to interpretation by the SEC and various bodies formed to interpret and create appropriate accounting principles. Changes in these rules or their interpretation could have a negative impact on our reported financial results and may retroactively affect previously reported transactions. For example, in May 2014, FASB, issued an accounting standards update on revenue recognition, which supersedes nearly all existing revenue recognition guidance under GAAP. The new standard was effective for us beginning January 1, 2018. Compared to amounts previously reported, the adoption of the new revenue recognition guidance decreased our revenue and increased our net loss in 2017 and, for 2016, increased revenue and increased our net loss. The effects of the new accounting standard are described in Note 2 to our consolidated financial statements appearing elsewhere in this Annual Report on Form 10-K.

In addition, in February 2016, FASB issued an accounting standards update on leases, requiring lessees, among other things, to recognize lease assets and lease liabilities on the balance sheet for those leases classified as operating leases under previous authoritative guidance. This update, which will be effective beginning January 1, 2019, also introduces new disclosure requirements for leasing arrangements. We are continuing to evaluate the effect of adoption of this update on our consolidated financial statements, however we expect operating expenses to increase and interest expense to decrease as the result of changes to the accounting treatment of our build-to-suit lease.

Implementation of these new standards, and any future accounting pronouncements, implementation guidelines, or interpretations, could have an adverse impact on our reported financial results, require that we make significant changes to our systems, processes and controls, or the way we conduct our business. In addition, we are expending considerable effort and resources implementing both of these accounting updates, which in and of itself could have negative impact on our results of operations.

***Because we recognize revenue and expense relating to monthly subscriptions and professional services over varying periods, downturns or upturns in sales are not immediately reflected in full in our operating results.***

As a SaaS company, under Topic 606, we recognize our subscription revenue monthly for the term of our contracts and therefore a shortfall in demand for our software solutions and professional services or a decline in new or renewed contracts in any one quarter might not significantly reduce our revenue for that quarter, but could negatively affect our revenue in future quarters. Accordingly, the effect of significant downturns in new or renewed sales of our products and services might not be reflected in full in our results of operations until future periods.

Our revenue recognition model also makes it difficult for us to rapidly increase our revenue through additional sales in any period, because revenue from new customers has to be recognized over the applicable term of the contracts or the estimated expected life of the customer relationship period.

***We depend on our senior management team, and the loss of one or more key associates or an inability to attract and retain highly skilled associates could adversely affect our business.***

Our success depends largely upon the continued services of our key executive officers and other associates. We also rely on our leadership team in the areas of research and development, marketing, services, finance, and general and administrative functions, and on mission-critical individual contributors in sales and research and development. From time to time, there may be changes in our executive management team resulting from the hiring or departure of executives, which could disrupt our business. For example: in 2017, we hired a new Chief Financial Officer and an Executive Vice President of Global Sales; effective January 1, 2018, our Chief Executive Officer became Senior Advisor for Innovation, but remained on our Board of Directors, and our Chief Operating Officer became our Chief Executive Officer; in March 2018, our Senior Advisor for Innovation resigned from employment and our Board, effective April 1, 2018, for personal reasons; and in July 2018, we hired an Executive Vice President, Global Operations. The loss of one or more of our executive officers or key associates could have a serious adverse effect on our business.

To continue to execute our growth strategy, we also must attract and retain highly skilled personnel. Competition is intense for sales people and for engineers with high levels of experience in designing and developing software and Internet-related services. We might not be successful in maintaining our unique culture and continuing to attract and retain qualified personnel. We have from time to time in the past experienced, and we expect to continue to experience in the future, difficulty in hiring and retaining highly skilled personnel with appropriate qualifications. The pool of qualified personnel with SaaS experience and/or experience working with the benefits market is limited overall and specifically in Charleston, South Carolina, where our principal office is located. In addition, many of the companies with which we compete for experienced personnel have greater resources than we have and are located in geographic areas, like Silicon Valley, that may attract more qualified technology workers.

In addition, in making employment decisions, particularly in the Internet and high-technology industries, job candidates often consider the value of the equity awards they are to receive in connection with their employment. Volatility in the price of our stock might, therefore, adversely affect our ability to attract or retain highly skilled personnel. Furthermore, the requirement to expense certain stock awards might discourage us from granting the size or type of stock awards that job candidates require to join our company. If we fail to attract new personnel or fail to retain and motivate our current personnel, our business and future growth prospects could be severely harmed.

***We operate in a highly competitive industry, and if we are not able to compete effectively, our business and operating results will be harmed.***

The benefits management software market is highly competitive and is likely to attract increased competition, which could make it hard for us to succeed. Small, specialized providers continue to become more sophisticated and effective. In addition, large, well-financed, and technologically sophisticated software companies might focus more on our market. The size and financial strength of these entities is increasing as a result of continued consolidation in both the IT and healthcare industries. We expect large integrated software companies to become more active in our market, both through acquisitions and internal investment. In addition, insurance carriers may seek to bring certain of their benefits software solutions in-house, whether through acquisitions or internal investment. For example, Aetna, a customer of ours, owns bswift, a provider of insurance exchange technology solutions and benefits administration technology solutions and services. If Aetna were to decide to use bswift's solution in place of any portion of the solutions we currently provide to them, then our business and operating results could be materially and adversely affected. As costs fall and technology improves, increased market saturation might change the competitive landscape in favor of our competitors.

Some of our current large competitors have greater name recognition, longer operating histories, and significantly greater resources than we do. As a result, our competitors might be able to respond more quickly and effectively than we can to new or changing opportunities, technologies, standards, or

customer requirements. In addition, current and potential competitors have established, and might in the future establish, cooperative relationships with vendors of complementary products, technologies, or services to increase the availability of their products in the marketplace. Accordingly, new competitors or alliances might emerge that have greater market share, a larger customer base, more widely adopted proprietary technologies, greater marketing expertise, greater financial resources, and larger sales forces than we have, which could put us at a competitive disadvantage. Further, in light of these advantages, even if our products and services are more effective than those of our competitors, current or potential customers might accept competitive offerings in lieu of purchasing our offerings. Increased competition is likely to result in pricing pressures, which could negatively impact our sales, profitability, or market share. In addition to new niche vendors, who offer standalone products and services, we face competition from existing enterprise vendors, including those currently focused on software solutions that have information systems in place with potential customers in our target market. These existing enterprise vendors might promise products or services that offer ease of integration with existing systems and which leverage existing vendor relationships. In addition, large insurance carriers often have internal technology staffs and proprietary software for benefits management, making them less likely to buy our solutions.

***The market for our products and services is immature and volatile, and if it does not develop or if it develops more slowly than we expect, the growth of our business will be harmed.***

The cloud-based benefits management software market is relatively new and unproven, and it is uncertain whether it will achieve and sustain high levels of demand and market acceptance. Our success will depend to a substantial extent on the willingness of employers, carriers, consumers and brokers to increase their use of benefits management software. Many employers and carriers have invested substantial personnel and financial resources to integrate internally developed solutions or traditional enterprise software into their businesses for benefits management, and therefore might be reluctant or unwilling to migrate to our cloud-based solutions, including BenefitsPlace. Furthermore, some businesses might be reluctant to use cloud-based solutions because they have concerns about the security of their data and the reliability of the technology delivery model associated with these solutions. If employers, carriers, consumers and brokers do not perceive the benefits of our solutions, then our market might not develop at all, or it might develop more slowly than we expect, either of which could significantly adversely affect our operating results. In addition, we might make errors in predicting and reacting to relevant business trends, which could harm our business. If any of these risks occur, it could materially adversely affect our business, financial condition or results of operations.

***The SaaS pricing model is evolving and our failure to manage its evolution and demand could lead to lower than expected revenue and profit.***

We derive most of our revenue growth from subscription offerings and, specifically, SaaS offerings. This business model depends heavily on achieving economies of scale because the initial upfront investment is costly and the associated revenue is recognized on a ratable basis. If we fail to achieve appropriate economies of scale or if we fail to manage or anticipate the evolution and demand of the SaaS pricing model, then our business and operating results could be adversely affected.

***If we do not continue to innovate and provide products and services that are useful to consumers, employers, insurance carriers, and brokers and provide high quality support services, we might not remain competitive, and our revenue and operating results could suffer.***

Our success depends in part on providing products and services that consumers, employers, insurance carriers, and brokers will use to manage benefits. We must continue to invest significant resources in research and development in order to enhance our existing products and services and introduce new high quality products and services that customers will want. If we are unable to predict user preferences or industry changes, or if we are unable to modify our products and services on a timely basis, we might lose customers. Our operating results would also suffer if our innovations are not responsive to the needs of our customers, are not appropriately timed with market opportunity, or are not effectively brought to market. As technology continues to develop, our competitors might be able to offer



results that are, or that are perceived to be, substantially similar to or better than those generated by us. This would force us to compete on additional product and service attributes and to expend significant resources in order to remain competitive.

In addition, we may experience difficulties with software development, industry standards, design, or marketing that could delay or prevent our development, introduction, or implementation of new solutions and enhancements. The introduction of new solutions by competitors, the emergence of new industry standards, or the development of entirely new technologies to replace existing offerings could render our existing or future solutions obsolete.

Our success also depends on providing high quality support services to resolve any issues related to our products and services. High quality education and customer support is important for the successful marketing and sale of our products and services and for the renewal of existing customers. If we do not help our customers quickly resolve issues and provide effective ongoing support, our ability to sell additional products and services to existing customers would suffer and our reputation with existing or potential customers would be harmed.

***If we are unable to retain our existing customers, our revenue and results of operations would be adversely affected.***

We sell our products and services pursuant to agreements that are generally one year for employers and three to five years for carriers. While our employer contracts generally automatically renew on an annual basis, our carrier customers have no obligation to renew their contracts after their contract period expires, and these contracts might not be renewed on the same or on more profitable terms if at all. Additionally, some of our carrier customers are able to terminate their respective contracts without cause or for convenience, although generally our carrier contracts are only cancellable by the carrier in an instance of our uncured breach. As a result, our ability to grow depends in part on the continuance and renewal of our carrier contracts. We may not be able to accurately predict future trends in customer renewals, and our customers' renewal rates may decline or fluctuate because of several factors, including their level of satisfaction or dissatisfaction with our services, the cost of our services, the cost of services offered by our competitors, consolidations or reductions in our customers' spending levels. If our carrier customers terminate or do not renew their contracts for our services, renew on less favorable terms, or do not purchase additional functionality or products, our revenue may grow more slowly than expected or decline, and our profitability and gross margins may be harmed.

***A significant amount of our revenue is derived from our largest customers, and any reduction in revenue from any of these customers would reduce our revenue and net income.***

Our ten largest customers by revenue accounted for approximately 42%, 42% and 43% of our consolidated revenue in each of 2018, 2017 and 2016, respectively. Our largest customer by revenue accounted for approximately 13%, 11% and 12% of our revenue in 2018, 2017 and 2016, respectively. In addition, one customer represented 12% of our accounts receivable at December 31, 2017. If any of our large customers or strategic partners decides not to renew its contracts with us, or to renew on less favorable terms, our business, revenues, reputation, and our ability to obtain new customers could be materially and adversely affected.

***Failure to adequately and effectively expand our direct sales force will impede our growth.***

We believe that our future growth will depend on the development of our direct sales force and its ability to obtain new customers and to manage our existing customer base. Identifying and recruiting qualified personnel and training them in the use of our software requires significant time, expense, and attention. It can take six months or longer before a new sales representative is fully trained and productive. Our business may be adversely affected if our efforts to expand and train our direct sales force do not generate a corresponding increase in revenues. For example, reduction of our sales force in 2016 negatively impacted sales, and as a result, revenue going forward. In particular, if we are unable to hire and develop sufficient numbers of productive direct sales personnel or if new direct sales personnel

are unable to achieve desired productivity levels in a reasonable period of time, sales of our products and services will suffer and our growth will be impeded.

***Our growth depends in part on the success of our strategic relationships with third parties, including brokers.***

In order to grow our business, we anticipate that we will continue to depend on our relationships with third parties including resellers such as Mercer Health and Benefits LLC, or Mercer, and SAP SE, and other referral sources such as brokers, consultants, specialty benefits providers, insurance carriers, technology and content providers, and third-party system integrators. Identifying partners, negotiating and documenting relationships with them, and developing referral sources requires significant time and resources. Our expanded relationship with and February 2015 sale of stock to Mercer increases our reliance on it and related risks, including Mercer's competitors being less likely to do business with us. Our competitors might be effective in providing incentives to third parties to favor their products or services or to prevent or reduce subscriptions to our products and services. In addition, acquisitions of our partners by our competitors could result in a decrease in the number of our current and potential customers, as our partners may no longer facilitate the adoption of our applications by potential customers. If we are unsuccessful in establishing or maintaining our relationships with third parties, our ability to compete in the marketplace or to grow our revenue could be impaired and our operating results may suffer. Even if we are successful, we cannot assure you that these relationships will result in increased customer use of our applications or increased revenue.

***If the number of individuals covered by our employer and carrier customers decreases or the number of products or services to which our employer and carrier customers subscribe or their employees purchase decreases, our revenue will decrease.***

Under most of our customer contracts, we base our fees on the number of individuals to whom our customers provide benefits and the number of products or services subscribed to by our customers or purchased by their employees. Many factors may lead to a decrease in the number of individuals covered by our customers and the number of products or services subscribed to by our customers, including:

- failure of our customers to adopt or maintain effective business practices;
- changes in the nature or operations of our customers;
- government regulations; and
- increased competition or other changes in the benefits marketplace.

If the number of individuals covered by our customers or the number of products or services subscribed to by our customers decreases for any reason, our revenue will likely decrease.

***Failure to manage our continued growth effectively could increase our expenses, decrease our revenue, and prevent us from implementing our business strategy.***

We have been experiencing continued growth, which could put a strain on our business. To manage this and our anticipated future growth effectively, we must continue to maintain and enhance our IT infrastructure, financial and accounting systems, and controls. We also must attract, train, and retain a significant number of qualified sales and marketing personnel, customer support personnel, professional services personnel, software engineers, technical personnel, and management personnel. Failure to effectively manage our growth could lead us to over-invest or under-invest in development and operations, result in weaknesses in our infrastructure, systems, or controls, give rise to operational mistakes, losses, loss of productivity or business opportunities, and result in loss of employees and reduced productivity of remaining employees. Our growth could require significant capital expenditures and might divert financial resources from other projects such as the development of new products and services. If our management is unable to effectively manage our growth, our expenses might increase more than expected, our revenue could decline or might grow more slowly than expected, and we might

be unable to implement our business strategy. The quality of our products and services might suffer, which could negatively affect our reputation and harm our ability to retain and attract customers.

***Economic uncertainties or downturns in the general economy or the industries in which our customers operate could disproportionately affect the demand for our solutions and negatively impact our results of operations.***

General worldwide economic conditions have experienced significant downturns in the past, and market volatility and uncertainty remain widespread, including as a result of statements and actions of the current U.S. presidential administration. All of this makes it extremely difficult for our customers and us to accurately forecast and plan future business activities. In addition, these conditions could cause our customers or prospective customers to decrease headcount, benefits, or HR budgets, which could decrease corporate spending on our products and services, resulting in delayed and lengthened sales cycles, a decrease in new customer acquisition, and/or loss of customers. Furthermore, during challenging economic times, our customers may have difficulty gaining timely access to sufficient credit or obtaining credit on reasonable terms, which could impair their ability to make timely payments to us and adversely affect our revenue. If that were to occur, our financial results could be harmed. Further, challenging economic conditions might impair the ability of our customers to pay for the products and services they already have purchased from us and, as a result, our write-offs of accounts receivable could increase. We cannot predict the timing, strength, or duration of any economic slowdown or recovery. If the condition of the general economy or markets in which we operate worsens, our business could be harmed.

***If we fail to maintain awareness of our brand cost-effectively, our business might suffer.***

We believe that maintaining awareness of our brand in a cost-effective manner is critical to continuing the widespread acceptance of our existing solutions and is an important element in attracting new customers. Furthermore, we believe that the importance of brand recognition will increase as competition in our market increases. Successful promotion of our brand will depend largely on the effectiveness of our marketing efforts and on our ability to provide reliable and useful services at competitive prices. Our efforts to build, maintain and market changes to our brand nationally have involved significant expenses. Brand promotion activities may not yield increased revenue, and even if they do, any increased revenue may not offset the expenses we incur in maintaining our brand. If we fail to successfully maintain our brand, or incur substantial expenses in an unsuccessful attempt to maintain our brand, we may fail to attract enough new customers or retain our existing customers to the extent necessary to realize a sufficient return on our brand-building efforts, and our business could suffer.

***We might not be able to utilize a significant portion of our net operating loss or other tax credit carryforwards, which could adversely affect our profitability.***

As of December 31, 2018, we had federal and state net operating loss carryforwards due to prior period losses, which if not utilized will begin to expire in 2019 for federal and state purposes. We also have South Carolina jobs tax credit and headquarters tax credit carryforwards, which if not utilized will begin to expire in 2020. These tax credit carryforwards could expire unused and be unavailable to offset future income tax liabilities, which could adversely affect our profitability.

In addition, under Section 382 of the Internal Revenue Code of 1986, as amended, or the Code, our ability to utilize net operating loss carryforwards or other tax attributes in any taxable year may be limited if we experience an “ownership change”. A Section 382 “ownership change” generally occurs if one or more stockholders or groups of stockholders who own at least 5% of our stock increase their ownership by more than 50 percentage points over their lowest ownership percentage within a rolling three-year period. Similar rules might apply under state tax laws. Future issuances of our stock could cause an “ownership change”. It is possible that an ownership change, or any future ownership change, could have a material effect on the use of our net operating loss carryforwards or other tax attributes, which could adversely affect our profitability.

***We might be unable to adequately protect, and we might incur significant costs in enforcing, our intellectual property and other proprietary rights.***

Our success depends in part on our ability to enforce our intellectual property and other proprietary rights. We rely on a combination of trademark, trade secret, copyright, patent, and unfair competition laws, as well as license and access agreements and other contractual provisions, to protect our intellectual property and other proprietary rights. In addition, we attempt to protect our intellectual property and proprietary information by requiring employees and consultants to enter into confidentiality, noncompetition, and assignment of inventions agreements. Our attempts to protect our intellectual property might be challenged by others or invalidated through administrative process or litigation. While we have a number of patents granted in the United States and other jurisdictions including China, Japan, Australia, Taiwan, Hong Kong and Canada, as well as a number of applications pending, we might not be able to obtain meaningful patent protection for our software. In addition, if any patents are issued in the future, they might not provide us with any competitive advantages, or might be successfully challenged by third parties. Agreement terms that address non-competition are difficult to enforce in many jurisdictions and might not be enforceable in certain cases. To the extent that our intellectual property and other proprietary rights are not adequately protected, third parties might gain access to our proprietary information, develop and market products or services similar to ours, or use trademarks similar to ours, each of which could materially harm our business. Existing U.S. federal and state intellectual property laws offer only limited protection. Moreover, the laws of other countries in which we might in the future conduct operations or contract for services might afford little or no effective protection of our intellectual property. The failure to adequately protect our intellectual property and other proprietary rights could materially harm our business.

In addition, if we resort to legal proceedings to enforce our intellectual property rights or to determine the validity and scope of the intellectual property or other proprietary rights of others, the proceedings could be burdensome and expensive, even if we were to prevail. Any litigation that is necessary in the future could result in substantial costs and diversion of resources and could have a material adverse effect on our business, operating results or financial condition.

***We might be sued by third parties for alleged infringement of their proprietary rights.***

The software and Internet industries are characterized by the existence of a large number of patents, trademarks, and copyrights and by frequent litigation based on allegations of infringement or other violations of intellectual property rights. We have received in the past, and might receive in the future, communications from third parties claiming that we have infringed the intellectual property rights of others. Our technologies might not be able to withstand any third-party claims or rights against their use. Any intellectual property claims, with or without merit, could be time-consuming and expensive to resolve, divert management attention from executing our business plan, and require us to pay monetary damages or enter into royalty or licensing agreements. In addition, many of our contracts contain warranties with respect to intellectual property rights, and most require us to indemnify our clients for third-party intellectual property infringement claims, which would increase the cost to us of an adverse ruling on such a claim.

Moreover, any settlement or adverse judgment resulting from such a claim could require us to pay substantial amounts of money or obtain a license to continue to use the software or information that is the subject of the claim, or otherwise restrict or prohibit our use of it. We might not be able to obtain a license on commercially reasonable terms, if at all, from third parties asserting an infringement claim; we might not be able to develop alternative technology on a timely basis, if at all; and we might not be able to obtain a license to use a suitable alternative technology to permit us to continue offering, and our clients to continue using, our affected services. Accordingly, an adverse determination could prevent us from offering our services to others.

***Any future litigation against us could be costly and time-consuming to defend.***

We may become subject, from time to time, to legal proceedings and claims that arise in the ordinary course of business such as claims brought by our clients in connection with commercial disputes, employment claims made by our current or former associates, or purported securities class actions. Litigation might result in substantial costs and may divert management's attention and resources, which might seriously harm our business, overall financial condition, and operating results. Insurance might not cover such claims, might not provide sufficient payments to cover all the costs to resolve one or more such claims, and might not continue to be available on terms acceptable to us. A claim brought against us that is uninsured or underinsured could result in unanticipated costs, thereby reducing our operating results and leading analysts or potential investors to reduce their expectations of our performance, which could reduce the trading price of our stock.

***Acquisitions could prove difficult to integrate, disrupt our business, dilute stockholder value, and adversely affect our operating results and the value of our common stock.***

As part of our business strategy, we might acquire, enter into joint ventures with, or make investments in complementary companies, services, and technologies in the future. For example, in February 2019, we acquired certain assets of Connecture, Inc. We spent considerable time, effort, and money pursuing this acquisition, our first in years, and need now to successfully integrate it into our business. Acquisitions and investments involve numerous risks, including:

- difficulties in identifying and acquiring products, technologies or businesses that will help our business;
- difficulties in integrating operations, technologies, services and personnel;
- diversion of financial and managerial resources from existing operations;
- risk of entering new markets in which we have little to no experience; and
- delays in customer purchases due to uncertainty and the inability to maintain relationships with customers of the acquired businesses.

If we fail to properly evaluate acquisitions or investments, we might not achieve the anticipated benefits of any such acquisitions, we might incur costs in excess of what we anticipate, and management resources and attention might be diverted from other necessary or valuable activities.

***Future sales to customers outside the United States or with international operations might expose us to risks inherent in international sales which, if realized, could adversely affect our business.***

An element of our growth strategy is to expand internationally. Operating in international markets requires significant resources and management attention and will subject us to regulatory, economic, and political risks that are different from those in the United States. Because of our limited experience with international operations, our international expansion efforts might not be successful in creating demand for our products and services outside of the United States or in effectively selling our solutions in the international markets we enter. In addition, we will face risks in doing business internationally that could adversely affect our business, including:

- unstable regional political and economic conditions, such as those caused by statements and actions by the current U.S. presidential administration and the U.K. exit from the European Union;
- the need to localize and adapt our solutions for specific countries, including translation into foreign languages and associated expenses;
- data privacy laws which require that customer data be stored and processed in a designated territory;

- difficulties in staffing and managing foreign operations;
- different pricing environments, longer sales cycles and longer accounts receivable payment cycles and collections issues;
- new and different sources of competition;
- weaker protection for intellectual property and other legal rights than in the United States and practical difficulties in enforcing intellectual property and other rights outside of the United States;
- laws and business practices favoring local competitors;
- compliance challenges related to the complexity of multiple, conflicting and changing governmental laws and regulations, including employment, tax, privacy, and data protection laws and regulations;
- increased financial accounting and reporting burdens and complexities;
- restrictions on the transfer of funds; and
- adverse tax consequences.

If we denominate our international contracts in local currencies, fluctuations in the value of the U.S. dollar and foreign currencies might impact our operating results when translated into U.S. dollars.

***If we are required to collect sales and use taxes in additional jurisdictions, we might be subject to liability for past sales and our future sales may decrease.***

We might lose sales or incur significant expenses if states successfully impose broader guidelines on state sales and use taxes. A successful assertion by one or more states requiring us to collect sales or other taxes on the licensing of our software or sale of our services could result in substantial tax liabilities for past transactions and otherwise harm our business. In addition, each state has different rules and regulations governing sales and use taxes, and these rules and regulations are subject to varying interpretations that change over time. We review these rules and regulations periodically and, when we believe we are subject to sales and use taxes in a particular state, voluntarily engage state tax authorities in order to determine how to comply with their rules and regulations. We cannot assure you that we will not be subject to sales and use taxes or related penalties for past sales in states where we currently believe no such taxes are required.

Vendors of services, like us, are typically held responsible by taxing authorities for the collection and payment of any applicable sales and similar taxes. If one or more taxing authorities determines that taxes should have, but have not, been paid with respect to our services, we might be liable for past taxes in addition to taxes going forward. Liability for past taxes might also include substantial interest and penalty charges. Our customer contracts typically provide that our customers must pay all applicable sales and similar taxes. Nevertheless, our customers might be reluctant to pay back taxes and might refuse responsibility for interest or penalties associated with those taxes. If we are required to collect and pay back taxes and the associated interest and penalties, and if our clients fail or refuse to reimburse us for all or a portion of these amounts, we will incur unplanned expenses that may be substantial. Moreover, imposition of such taxes on us going forward will effectively increase the cost of our software and services to our customers and might adversely affect our ability to retain existing customers or to gain new customers in the areas in which such taxes are imposed.

## **Risks Related to Our Products and Services Offerings**

***If our security measures are breached or fail, and unauthorized persons gain access to customers' and consumers' data, our products and services might be perceived as not being secure, customers and consumers might curtail or stop using our products and services, and we might incur significant liabilities.***

Our products and services involve the storage and transmission of customers' and consumers' confidential information, which may include sensitive individually identifiable information that is subject to

stringent legal and regulatory obligations. Because of the sensitivity of this information, security features of our software are very important. If our security measures are breached or fail and/or are bypassed as a result of third-party action, inadvertent disclosures through technological or human error (including employee error), malfeasance, hacking, ransomware, social engineering (including phishing schemes), computer viruses, malware, or otherwise, someone might be able to acquire or obtain unauthorized access to our customers' confidential information and/or patient data or other personal information. As a result, our reputation could be damaged, our business might suffer, information might be lost, and we could face damages for contract breach, penalties for violation of applicable laws or regulations, costly litigation or government investigations, and significant costs for remediation and remediation efforts to prevent future occurrences.

In addition, we rely on various third parties, including employers' HR departments, carriers, and other third-party service providers and consumers themselves, as users of our system for key activities to protect and promote the security of our systems and the data and information accessible within them, such as administration of enrollment, consumer status changes, claims, and billing. Our customers might authorize or enable third parties to access their information and data that is stored on our systems. Because we do not control such access, we cannot ensure the complete integrity or security of such data in our systems. On occasion, people have failed to adhere to appropriate data security practices. For example, employers sometimes have failed to terminate the login/password of former employees, or permitted current employees to share login/passwords. When we become aware of such security incidents, we work with employers to terminate inappropriate access and provide additional instruction in order to avoid the reoccurrence of such problems. Although to date these security incidents have not resulted in claims against us or in material harm to our business, failures to perform these activities might result in claims against us, which could expose us to significant expense, legal liability, and harm to our reputation, which might result in loss of business.

Because techniques used to obtain unauthorized access or to sabotage systems change frequently and often are not recognized until launched against a target, we might not be able to anticipate these techniques or to implement adequate preventive measures. If an actual or perceived breach of our security, or the security of third parties that we rely on, occurs, the market perception of the effectiveness of our security measures could be harmed and we could lose sales and customers. Any significant violations of data privacy or security laws could result in the loss of business, litigation and regulatory investigations and penalties or settlements that could damage our reputation and adversely impact our results of operations and financial condition. In addition, our customers might authorize or enable third parties to access their information and data that is stored on our systems. Because we do not control such access, we cannot ensure the complete integrity or security of such data in our systems.

***Failure by our customers to obtain proper permissions and waivers might result in claims against us or may limit or prevent our use of data, which could harm our business.***

We require our customers to provide necessary notices and to obtain necessary permissions and waivers for use and disclosure of information on the Benefitfocus Platform, and we require contractual assurances from them that they have done so and will do so. If, however, despite these requirements and contractual obligations, our customers do not obtain necessary permissions and waivers, then our use and disclosure of information that we receive from them or on their behalf might be limited or prohibited by state or federal privacy laws or other laws. This could impair our functions, processes and databases that reflect, contain, or are based upon such data and might prevent use of such data. In addition, this could interfere with, or prevent creation or use of, rules, analyses, or other data-driven activities that benefit us and our business. Moreover, we might be subject to claims or liability for use or disclosure of information by reason of lack of valid notices, agreements, permissions or waivers. These claims or liabilities could subject us to unexpected costs and adversely affect our operating results.

***Our proprietary software might not operate properly, which could damage our reputation, give rise to claims against us, or divert application of our resources from other purposes, any of which could harm our business and operating results.***

Proprietary software development is time-consuming, expensive, and complex. Unforeseen difficulties can arise. We might encounter technical obstacles, and it is possible that we discover problems that prevent our proprietary applications from operating properly. If they do not function reliably or fail to achieve customer expectations in terms of performance, customers could assert liability claims against us and/or attempt to cancel their contracts with us. This could damage our reputation and impair our ability to attract or maintain customers.

Moreover, benefits management software as complex as ours has in the past contained, and may in the future contain, or develop, undetected defects or errors. Material performance problems or defects in our products and services might arise in the future. Errors might result from the interface of our services with legacy systems and data, which we did not develop and the function of which is outside of our control. Defects or errors might arise in our existing or new software or service processes. Because changes in employer, carrier, and legal requirements and practices relating to benefits are frequent, we are continuously discovering defects and errors in our software and service processes compared against these requirements and practices. Undiscovered vulnerabilities could expose our software to unscrupulous third parties who develop and deploy software programs that could attack our software or result in unauthorized access to, acquisition of, or disclosure of customer data. Defects and errors and any failure by us to identify and address them could result in loss of revenue or market share, liability to customers or others, failure to achieve market acceptance or expansion, diversion of development and other resources, injury to our reputation, and increased service and maintenance costs. Defects or errors in our product or service processes might discourage existing or potential customers from purchasing services from us. Correction of defects or errors could prove to be impossible or impracticable. The costs incurred in correcting any defects or errors or in responding to resulting claims or liability might be substantial and could adversely affect our operating results.

In addition, customers that rely on our products and services to collect, manage, and report benefits data might have a greater sensitivity to service errors and security vulnerabilities than customers of software products in general. We market and sell services that, among other things, provide information to assist care providers in tracking and treating ill patients. Any operational delay in or failure of our software service processes might result in the disruption of patient care and could cause harm to our business and operating results.

Our customers might assert claims against us in the future alleging that they suffered damages due to a defect, error, or other failure of our product or service processes. A product liability claim or errors or omissions claim could subject us to significant legal defense costs and adverse publicity regardless of the merits or eventual outcome of such a claim.

***Various events could interrupt customers' access to the Benefitfocus Platform, exposing us to significant costs.***

The ability to access the Benefitfocus Platform is critical to our customers. Our operations and facilities are vulnerable to interruption and/or damage from a number of sources, many of which are beyond our control, including, without limitation: (i) power loss and telecommunications failures, (ii) fire, flood, hurricane, and other natural disasters, (iii) software and hardware errors, failures or crashes in our own systems or in other systems, (iv) computer viruses, denial-of-service attacks, hacking and similar disruptive problems in our own systems and in other systems, and (v) civil unrest, war, and/or terrorism. We have implemented various measures to protect against interruptions of customers' access to our platform. If customers' access is interrupted because of problems in the operation of our facilities, we could be exposed to significant claims by customers, particularly if the access interruption is associated with problems in the timely delivery of funds due to customers or medical information relevant to patient care. Our plans for disaster recovery and business continuity rely on third-party providers of related services. If those vendors fail us at a time when our systems are not operating correctly, we could incur a



loss of revenue and liability for failure to fulfill our obligations. Any significant instances of system downtime could negatively affect our reputation and ability to retain customers and sell our services, which would adversely impact our revenue.

In addition, retention and availability of patient care and physician reimbursement data are subject to federal and state laws governing record retention, accuracy, and access. Some laws impose obligations on our customers and on us to produce information for third parties and to amend or expunge data at their direction. Our failure to meet these obligations might result in liability, which could increase our costs and reduce our operating results.

***We rely on data center providers, Internet infrastructure, bandwidth providers, third-party computer hardware and software, other third parties, and our own systems for providing services to our customers, and any failure or interruption in the services provided by these third parties or our own systems could expose us to litigation and negatively impact our relationships with customers, adversely affecting our brand and our business.***

We serve all our customers from two data centers, one located in Raleigh, North Carolina and the other located in Charlotte, North Carolina. While we control and have access to our servers, we do not control the operation of these facilities. The owners of our data center facilities have no obligation to renew their agreements with us on commercially reasonable terms, or at all. If we are unable to renew these agreements on commercially reasonable terms, or if one of our data center operators is acquired, we may be required to transfer our servers and other infrastructure to new data center facilities, and we may incur significant costs and possible service interruption in connection with doing so. Problems faced by our third-party data center locations, with the telecommunications network providers with whom we or they contract, or with the systems by which our telecommunications providers allocate capacity among their customers, including us, could adversely affect the experience of our customers. Our third-party data centers operators could decide to close their facilities without adequate notice. In addition, any financial difficulties, such as bankruptcy faced by our third-party data centers operators or any of the service providers with whom we or they contract may have negative effects on our business, the nature and extent of which are difficult to predict.

In addition, our ability to deliver our web-based services depends on the development and maintenance of the infrastructure of the Internet by third parties. This includes maintenance of a reliable network backbone with the necessary speed, data capacity, bandwidth capacity, and security. Our services are designed to operate without interruption in accordance with our service level commitments. However, we have experienced and expect that we will experience future interruptions and delays in services and availability from time to time. In the event of a catastrophic event with respect to one or more of our systems, we may experience an extended period of system unavailability, which could negatively impact our relationship with customers. To operate without interruption, both we and our service providers must guard against:

- damage from fire, power loss, natural disasters and other force majeure events outside our control;
- communications failures;
- software and hardware errors, failures, and crashes;
- security breaches, computer viruses, hacking, denial-of-service attacks, and similar disruptive problems; and
- other potential interruptions.

We also rely on computer hardware purchased or leased and software licensed from third parties in order to offer our services, including software from Oracle Corporation and Microsoft Corporation, and routers and network equipment from Cisco, Dell and Hewlett-Packard Company. This hardware and software is generally commercially available on varying terms. However, it is possible that this hardware and software might not continue to be available on commercially reasonable terms, or at all. Any loss of

the right to use any of this hardware or software could result in delays in the provisioning of our services until equivalent technology is either developed by us, or, if available, is identified, obtained and integrated.

We exercise limited control over third-party vendors, which increases our vulnerability to problems with technology and information services they provide. Interruptions in our network access and services might in connection with third-party technology and information services reduce our revenue, cause us to issue refunds to customers for prepaid and unused subscription services, subject us to potential liability, or adversely affect our renewal rates. Although we maintain insurance for our business, the coverage under our policies might not be adequate to compensate us for all losses that may occur. In addition, we might not be able to continue to obtain adequate insurance coverage at an acceptable cost, if at all.

***The use of open source software in our products and solutions may expose us to additional risks and harm our intellectual property rights.***

Some of our products and solutions use or incorporate software that is subject to one or more open source licenses. Open source software is typically freely accessible, usable, and modifiable. Certain open source software licenses require a user who intends to distribute the open source software as a component of the user's software to disclose publicly part or all of the source code to the user's software. In addition, certain open source software licenses require the user of such software to make any derivative works of the open source code available to others on potentially unfavorable terms or at no cost.

The terms of many open source licenses to which we are subject have not been interpreted by U.S. or foreign courts. Accordingly, there is a risk that those licenses could be construed in a manner that imposes unanticipated conditions or restrictions on our ability to commercialize our solutions. In that event, we could be required to seek licenses from third parties in order to continue offering our products or solutions, to re-develop our products or solutions, to discontinue sales of our products or solutions, or to release our proprietary software code under the terms of an open source license, any of which could harm our business. Further, given the nature of open source software, it may be more likely that third parties might assert copyright and other intellectual property infringement claims against us based on our use of these open source software programs.

While we monitor the use of all open source software in our products, solutions, processes, and technology and try to ensure that no open source software is used in such a way as to require us to disclose the source code to the related product or solution when we do not wish to do so, it is possible that such use may have inadvertently occurred in deploying our proprietary solutions. In addition, if a third-party software provider has incorporated certain types of open source software into software we license from such third party for our products and solutions without our knowledge, we could, under certain circumstances, be required to disclose the source code to our products and solutions. This could harm our intellectual property position and our business, results of operations, and financial condition.

## **Risks Related to Regulation**

***Government regulation of the areas in which we operate creates risks and challenges with respect to our compliance efforts and our business strategies.***

The employee benefits industry is highly regulated and is subject to changing political, legislative, regulatory, and other influences. Deregulatory efforts following the 2016 election cycle are ongoing and are likely to continue to impact the regulatory environment in our industry. Existing and new laws and regulations affecting the employee benefits industry could create unexpected liabilities for us, cause us to incur additional costs and restrict our operations. These laws and regulations are complex and their application to specific services and relationships are not clear. In particular, many existing laws and regulations affecting employee benefits, when enacted, did not anticipate the services that we provide, and these laws and regulations might be applied to our services in ways that we do not anticipate. Our failure to accurately anticipate the application of these laws and regulations, or our failure to comply,

could create liability for us, result in adverse publicity, and negatively affect our business. Some of the risks we face from the regulation of employee benefits are as follows:

- **PPACA.** Health benefits are obtained, delivered, accessed, and maintained under an increasingly intricate and uncertain statutory and regulatory framework. In particular, ongoing efforts to repeal part or all of the Patient Protection and Affordable Care Act (“PPACA”) have created uncertainty in the healthcare industry broadly. Although many of the provisions of PPACA do not directly apply to us, PPACA and continued efforts to repeal or modify the law may affect the business of many of our customers. For instance, carriers and large employers might experience changes in the numbers of individuals they insure as a result of the elimination of the penalty associated with PPACA’s individual mandate, possible repeal of guaranteed issue, and flux in the state and national exchanges under PPACA. Although we are unable to predict with any reasonable certainty or otherwise quantify the likely impact of PPACA and related repeal efforts and deregulatory initiatives on our business model, financial condition, or results of operations, changes in the business of our customers and the number of individuals they insure may negatively impact our business.
- **False Claims Act and Related Laws.** There are numerous federal and state laws that forbid submission of false information or the failure to disclose certain information in connection with submission and payment of claims for reimbursement from the government. In some cases, these laws also forbid abuse of existing systems for such submission and payment. In addition, federal and state laws prohibit kickbacks in association with the provision of healthcare services. Many of these state laws pertain to all payors, not just items or services paid for by the federal government. Although our business operations are generally not subject to these laws and regulations, any contract we have with a government entity requires us to comply with these laws and regulations. Any failure of our services to comply with these laws and regulations could result in substantial liability, including but not limited to criminal liability, could adversely affect demand for our services, and could force us to expend significant capital, research and development, and other resources to address the failure. Any determination by a court or regulatory agency that our services with government clients violate these laws and regulations could subject us to civil or criminal penalties, invalidate all or portions of some of our government client contracts, require us to change or terminate some portions of our business, require us to refund portions of our services fees, cause us to be disqualified from serving not only government clients but also all clients doing business with government payers, and have an adverse effect on our business.
- **HIPAA and Other Privacy and Security Requirements.** There are numerous U.S. federal and state laws and regulations related to the privacy and security of personal health information. In particular, regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996, or HIPAA, established privacy and security standards that limit the use and disclosure of protected health information, and require the implementation of administrative, physical, and technological safeguards to ensure the confidentiality, integrity, availability, and privacy of protected health information. Health plans, healthcare clearinghouses, and most providers are “Covered Entities” subject to HIPAA. With respect to our operations as a healthcare clearinghouse, we are directly subject to the privacy regulations established under HIPAA, or the Privacy Rule, and the security regulations established under HIPAA, or the Security Rule. In addition, our carrier customers, or payors, are considered to be Covered Entities and are required to enter into written agreements with us, known as Business Associate Agreements, under which we are considered to be a “Business Associate” and that require us to safeguard protected health information and restrict how we may use and disclose such information. Both Covered Entities and Business Associates are subject to direct oversight and audit by the Department of Health and Human Services.

Violations of HIPAA might result in civil fines of up to \$57,051 per violation and a maximum civil penalty of \$1,711,533 in a calendar year for violations of the same requirement, as well as criminal penalties. The U.S. Department of Health and Human Services’ Office for Civil Rights

("OCR"), which enforces HIPAA, appears to have increased its enforcement activities. OCR also operates a formal HIPAA audit program. The audits are intended to assess compliance with HIPAA by both Covered Entities and Business Associates and are conducted by OCR with assistance from third-party vendors. Issues identified during the audits may result in agency-imposed corrective action plans or civil monetary penalties. Additionally, state attorneys general may bring civil actions seeking either injunctions or damages in response to violations of HIPAA that threaten the privacy of state residents.

We might not be able to adequately address the business risks created by HIPAA implementation and enforcement. Furthermore, we are unable to predict what changes to HIPAA or other laws or regulations might be made in the future or how those changes could affect our business or the costs of compliance. Noncompliance may result in litigation and high-dollar fines or settlements.

Some payors and clearinghouses interpret HIPAA transaction requirements differently than we do. Where payors or clearinghouses require conformity with their interpretations as a condition of a successful transaction, we seek to comply with their interpretations.

In addition to the Privacy Rule and Security Rule, most states have enacted patient confidentiality laws that protect against the disclosure of confidential medical and/or health information, and many states have adopted or are considering further legislation in this area, including privacy safeguards, security standards, and data security breach notification requirements. Such state laws, if more stringent than HIPAA requirements, are not preempted by the federal requirements, and we are required to comply with them. Failure by us to comply with any state standards regarding patient privacy may subject us to penalties, including civil monetary penalties and, in some circumstances, criminal penalties. Such failure may injure our reputation and adversely affect our ability to retain customers and attract new customers.

- **Personal Privacy and Consumer Protection.** There are numerous U.S. federal and state laws and regulations that have been adopted or are being considered regarding the collection, retention, use, and disclosure of personal information. In addition to HIPAA, we might be subject to various laws, rules and regulations related to privacy and information security such as those promulgated under the Gramm-Leach-Bliley Act and various state laws regulating the use and security of personal information. Those laws, rules, and regulations include requirements such as reasonable and appropriate safeguards to protect personal information, or providing appropriate notice to consumers about how their personal information will be used or disclosed. In addition, U.S. state legislatures have been actively enacting new laws addressing data security, security breach notification, and privacy, including the California Consumer Privacy Act of 2018. These areas may present implementation challenges and could be an enforcement priority for the state regulators generating increased lawsuits by consumers and other individuals. Our management believes that we are currently operating in compliance with these regulations. However, continued compliance with these evolving laws, rules and regulations regarding the privacy, security and protection of our customers' data, or the implementation of any additional privacy rules and regulations, could result in higher compliance and technology costs for us.
- **Medicare and Medicaid Regulatory Requirements.** We have contracts with insurance carriers who offer Medicare Managed Care (also known as Medicare Advantage or Medicare Part C) and Medicaid Managed Care benefits plans. We also have contracts with insurance carriers who offer Medicare prescription drug benefits (also known as Medicare Part D) plans. The activities of the Medicare plans are regulated by the Centers for Medicare & Medicaid Services, or CMS, the federal agency that provides oversight of the Medicare and Medicaid programs. The Medicaid Managed Care plans are regulated by both CMS and the individual states where the plans are offered. Some of the activities that we might perform, such as the enrollment of beneficiaries, may be subject to CMS and/or state regulation, and such regulations may force us to change the way we do business or otherwise restrict our ability to

provide services to such plans. Moreover, the regulatory environment with respect to these programs has become, and will likely continue to become, increasingly complex.

- **Financial Services-Related Laws and Rules.** Financial services and electronic payment processing services are subject to numerous laws, regulations and industry standards, some of which might impact our operations and subject us, our vendors, and our customers to liability as a result of the payment distribution and processing solutions we offer. Although we do not act as a bank, we offer solutions that involve banks, or vendors who contract with banks and other regulated providers of financial services. As a result, we might be impacted by banking and financial services industry laws, regulations, and industry standards, such as licensing requirements, solvency standards, requirements to maintain the privacy and security of nonpublic personal financial information, and Federal Deposit Insurance Corporation deposit insurance limits. In addition, our patient billing and payment distribution and processing solutions might be impacted by payment card association operating rules, certification requirements, and rules governing electronic funds transfers. If we fail to comply with applicable payment processing rules or requirements, we might be subject to fines and changes in transaction fees and may lose our ability to process credit and debit card transactions or facilitate other types of billing and payment solutions. Moreover, payment transactions processed using the Automated Clearing House are subject to network operating rules promulgated by the National Automated Clearing House Association and to various federal laws regarding such operations, including laws pertaining to electronic funds transfers, and these rules and laws might impact our billing and payment solutions. Further, our solutions might impact the ability of our payor customers to comply with state prompt payment laws. These laws require payors to pay healthcare claims meeting the statutory or regulatory definition of a “clean claim” within a specified time frame.
- **Insurance Broker Laws.** Insurance laws in the United States are often complex, and states have broad authority to adopt regulations regarding brokerage activities. Our business's regulatory oversight generally also includes activity governing the selection and payment of insurance products and the licensing of insurance brokers and our wholly owned subsidiary, BenefitStore, Inc., is an insurance agency. Our continuing ability to provide insurance brokerage related services in the jurisdictions in which we operate depends on our compliance with the rules and regulations promulgated from time to time by the regulatory authorities in each of these jurisdictions.
- **ERISA.** The Employee Retirement Income Security Act of 1974, as amended, or ERISA, regulates how employee benefits are provided to or through certain types of employer-sponsored health benefits plans. ERISA is a set of laws and regulations that is subject to periodic interpretation by the U.S. Department of Labor as well as the federal courts. In some circumstances, and under certain customer contracts, we might be deemed to have assumed duties that make us an ERISA fiduciary, and thus be required to carry out our operations in a manner that complies with ERISA in all material respects. We believe that our current operations do not render us subject to ERISA fiduciary obligations, and therefore that we are in material compliance with ERISA and that any such compliance does not currently have a material adverse effect on our operations. However, there can be no assurance that continuing ERISA compliance efforts or any future changes to ERISA will not have a material adverse effect on us.
- **Third-Party Administrator Laws.** Numerous states in which we do business have adopted regulations governing entities engaged in third-party administrator, or TPA, activities. TPA regulations typically impose requirements regarding enrollment into benefits plans, claims processing and payments, and the handling of customer funds. Although we do not believe we are currently acting as a TPA, changes in state regulations could result in us being obligated to comply with such regulations, which might require us to obtain licenses to provide TPA services in such states.

***We are subject to banking regulations that may limit our business activities.***

The Goldman Sachs Group, affiliates of which owned approximately 11.8% of the voting and economic interest in our business at December 31, 2018, is regulated as a bank holding company and a financial holding company under the Bank Holding Company Act of 1956, as amended, or BHC Act. The BHC Act imposes regulations and requirements on The Goldman Sachs Group and on any company that is deemed to be controlled by The Goldman Sachs Group under the BHC Act and the regulations of the Board of Governors of the Federal Reserve System, or the Federal Reserve. Due to the size of its voting and economic interest, we might still be deemed to be controlled by The Goldman Sachs Group and are therefore considered to be a non-bank “subsidiary” of The Goldman Sachs Group under the BHC Act. We will remain subject to this regulatory regime until The Goldman Sachs Group is no longer deemed to control us for purposes of the BHC Act, which we do not generally have the ability to control and which will not occur until The Goldman Sachs Group has significantly reduced its voting and economic interest in us.

As a controlled non-bank subsidiary of The Goldman Sachs Group, we are restricted from engaging in activities that are not permissible under the BHC Act, or the rules and regulations promulgated thereunder. Permitted activities for a bank holding company or any controlled non-bank subsidiary generally include activities that the Federal Reserve has previously determined to be closely related to banking, financial in nature or incidental or complementary to financial activities, including data processing services such as those that we provide with our software solutions. Restrictions placed on The Goldman Sachs Group as a result of supervisory or enforcement actions under the BHC Act or otherwise may restrict us or our activities in certain circumstances, even if these actions are unrelated to our conduct or business. Further, as a result of being subject to regulation and supervision by the Federal Reserve, we may be required to obtain the prior approval of the Federal Reserve before engaging in certain new activities or businesses, whether organically or by acquisition. The Federal Reserve could exercise its power to restrict us from engaging in any activity that, in the Federal Reserve’s opinion, is unauthorized or constitutes an unsafe or unsound business practice. To the extent that these regulations impose limitations on our business, we could be at a competitive disadvantage because some of our competitors are not subject to these limitations.

Additionally, any failure of The Goldman Sachs Group to maintain its status as a financial holding company could result in further limitations on our activities and our growth. In particular, our permissible activities could be restricted to only those that constitute banking or activities closely related to banking. The Goldman Sachs Group’s loss of its financial holding company status could be caused by several factors, including any failure by The Goldman Sachs Group’s bank subsidiaries to remain sufficiently capitalized, by any examination downgrade of one of The Goldman Sachs Group’s bank subsidiaries, or by any failure of one of The Goldman Sachs Group’s bank subsidiaries to maintain a satisfactory rating under the Community Reinvestment Act. In addition, The Goldman Sachs Group is required to remain “well capitalized” and “well managed” in order to maintain its status as a financial holding company. We have no ability to prevent such occurrences from happening.

As a non-bank subsidiary of a bank holding company, we are subject to examination by the Federal Reserve and required to provide information and reports for use by the Federal Reserve under the BHC Act. In addition, we may be subject to regulatory oversight and examination because we are a technology service provider to regulated financial institutions. The Federal Reserve may also impose substantial fines and other penalties for violations of applicable banking laws, regulations and orders. Further, The Dodd-Frank Act, including the Volcker Rule, and related financial regulatory reform has resulted in the issuance of numerous regulations designed to increase and strengthen the regulation of bank holding companies, including The Goldman Sachs Group and its affiliates. The Volcker Rule, in relevant part, restricts banking entities from proprietary trading (subject to certain exemptions) and from acquiring or retaining any equity, partnership or other interests in, or sponsoring, a private equity fund, subject to satisfying certain conditions, and from engaging in certain transactions with funds.

We have agreed to certain covenants that are intended to facilitate The Goldman Sachs Group’s compliance with the BHC Act, but that may impose certain obligations on our company. In particular, The

Goldman Sachs Group has rights to conduct audits on, and access certain information of, our company and certain rights to review the policies and procedures that we implement to comply with the laws and regulations that relate to our activities. In addition, we are obligated to provide The Goldman Sachs Group with notice of certain events and business activities and cooperate with The Goldman Sachs Group to mitigate potential adverse consequences resulting therefrom.

***Potential regulatory requirements placed on our software, services, and content could impose increased costs on us, delay or prevent our introduction of new service types, and impair the function or value of our existing service types.***

Our products and services are and are likely to continue to be subject to increasing regulatory requirements in a number of ways. As these requirements proliferate, we must change or adapt our products and services to comply. Changing regulatory requirements might render our services obsolete or might block us from accomplishing our work or from developing new services. This might in turn impose additional costs upon us to comply or to further develop our products and services. It might also make introduction of new product or service types more costly or more time-consuming than we currently anticipate. It might even prevent introduction by us of new products or services or cause the continuation of our existing products or services to become unprofitable or impossible.

***Potential government subsidy of services similar to ours, or creation of a single payor system, might reduce customer demand.***

Recently, entities including brokers and U.S. federal and state governments have offered to subsidize adoption of online benefits platforms or clearinghouses. In addition, federal regulations have been changed to permit such subsidy from additional sources subject to certain limitations. To the extent that we do not qualify or participate in such subsidy programs, demand for our services might be reduced, which may decrease our revenue. In addition, prior proposals regarding healthcare reform have included the concept of creation of a single payor for healthcare insurance. This kind of consolidation of critical benefits activity could negatively impact the demand for our services.

***Our services present the potential for embezzlement, identity theft, or other similar illegal behavior by our associates with respect to third parties.***

Among other things, certain services offered by us involve collecting payment information from individuals, and this frequently includes check and credit card information. Even though we do not handle direct payments, our services also involve the use and disclosure of personal and business information that could be used to impersonate third parties, commit identity theft, or otherwise gain access to their data or funds. If any of our associates take, convert, or misuse such funds, documents, or data, we could be liable for damages, and our business reputation could be damaged or destroyed. Moreover, if we fail to adequately prevent third parties from accessing personal and/or business information and using that information to commit identity theft, we might face legal liabilities and other losses than can have a negative impact on our business.

#### **Risks Related to Our Indebtedness**

***We recently incurred substantial indebtedness that may decrease our business flexibility, access to capital and/or increase our borrowing costs, and we may still incur substantially more debt, which may adversely affect our operations and financial results.***

In December 2018, we issued \$240 million aggregate principal of 1.25% convertible senior notes (the “Notes”) due December 15, 2023, unless earlier repurchased by us or converted by the holder pursuant to their terms. The Notes may limit our ability to borrow additional funds for working capital, capital expenditures, acquisitions or other general business purposes; limit our ability to use our cash flow or obtain additional financing for future working capital, capital expenditures, acquisitions or other general business purposes; require us to use a substantial portion of our cash flow from operations to make debt service payments; limit our flexibility to plan for or react to, changes in our business and industry; place us at a competitive disadvantage compared to our less leveraged competitors; and increase our vulnerability to the impact of adverse economic and industry conditions. Further, the indenture governing the Notes does not restrict our ability to incur additional indebtedness and we and our subsidiaries may incur substantial additional indebtedness in the future, subject to the restrictions contained in any future debt instruments existing at the time, some of which may be secured indebtedness.

***Servicing our debt requires a significant amount of cash, and we might not have or be able to obtain sufficient cash to pay our substantial debt.***

As of December 31, 2018, we had \$240 million aggregate principle of Notes outstanding. We also had the ability to borrow an aggregate of \$77.3 million under our current credit facility, all of which would be secured debt. Our ability to make scheduled payments of the principal of, to pay interest on or to refinance our indebtedness, depends on our future performance, which is subject to economic, financial, competitive and other factors beyond our control. Our business might not continue to generate cash flow from operations in the future sufficient to service our debt timely. In addition, our ability to repurchase or to pay cash upon conversion of the Notes may be limited by law, regulatory authority or agreements governing our future indebtedness. If we are unable to generate sufficient cash to service our debt, we may be required to adopt one or more alternatives, such as selling assets, restructuring debt or obtaining additional equity capital on terms that may be onerous or highly dilutive. In addition, our ability to refinance our indebtedness will depend on the capital markets and our financial condition at such time. We might not be able to engage in any of these activities or engage in these activities on desirable terms, which could result in a default and acceleration of our debt obligations.

***The conditional conversion feature of the Notes, if triggered, and any required repurchase of the Notes may adversely affect our financial condition and operating results.***

In the event any conditional conversion feature of the Notes is triggered, holders of the Notes will be entitled to convert the Notes at any time during specified periods at their option. In addition, holders of the Notes have the right to require us to repurchase their Notes upon the occurrence of a fundamental change. If one or more holders elect to convert their Notes (and unless we elect to satisfy our conversion obligation by delivering solely shares of our common stock, other than paying cash in lieu of delivering any fractional share), or if we are required to repurchase the Notes due to a fundamental change, we would be required to settle a portion or all of our conversion obligation through the payment of cash or repurchase the Notes with cash, both of which could adversely affect our liquidity. In addition, even if holders do not elect to convert their Notes upon a conditional conversion feature being triggered, we could be required under applicable accounting rules to reclassify all or a portion of the outstanding principal of the Notes as a current rather than long-term liability, which would result in a material reduction of our net working capital.

***The Notes are effectively subordinated to our secured debt and any liabilities of our subsidiaries.***

The Notes rank senior in right of payment to any of our indebtedness that is expressly subordinated in right of payment to the Notes; equal in right of payment to any of our liabilities that are not so subordinated; effectively junior in right of payment to any of our senior, secured indebtedness to the extent of the value of the assets securing such indebtedness; and structurally junior to all indebtedness and other liabilities (including trade payables) of our subsidiaries. In the event of our bankruptcy, liquidation, reorganization or other winding up, our assets that secure debt ranking senior or equal in right of payment to the Notes will be available to pay obligations on the Notes only after the senior, secured



debt has been repaid in full from these assets. There might not be sufficient assets remaining to pay amounts due on any or all of the Notes then outstanding. The indenture governing the Notes does not prohibit us from incurring additional senior debt or secured debt, nor does it prohibit any of our subsidiaries from incurring additional liabilities. All or indebtedness, including the Notes, must be repaid before our stockholders would receive anything in a liquidation.

***If we fail to meet our current credit facility's financial covenants, our business and financial condition could be adversely affected.***

Our current credit facility contains financial covenants, including covenants related to financial liquidity and EBITDA. If at any point we fail to comply with the financial covenants, the lenders can demand immediate repayment of our outstanding balance and deny future borrowings under the credit facility. This could have a negative impact on our liquidity, thereby reducing the availability of cash flow for other purposes and adversely affecting our business.

***We may still incur substantially more debt or take other actions that would diminish our ability to make payments on the Notes when due.***

We and our subsidiaries may incur substantial additional debt in the future, some of which may be secured debt. We are not restricted under the terms of the indenture governing the Notes from incurring additional debt, securing existing or future debt, recapitalizing our debt or taking a number of other actions that could have the effect of diminishing our ability to make payments on the Notes when due. Furthermore, the indenture prohibits us from engaging in certain mergers or acquisitions unless, among other things, the surviving entity assumes our obligations under the Notes and the indenture. These and other provisions in the indenture could deter or prevent a third party from acquiring us even when the acquisition may be favorable to holders of the Notes.

***The conversion of the Notes will dilute the ownership interest of existing stockholders, including holders who had previously converted their Notes, or may otherwise depress the price of our common stock.***

The conversion of some or all of the Notes will dilute the ownership interests of existing stockholders to the extent we deliver shares of our common stock upon conversion of the Notes. The Notes may become in the future convertible at the option of the holders of the Notes prior to December 15, 2023 under certain circumstances as provided in the indenture governing the Notes. Any sales in the public market of the common stock issuable upon such conversion could adversely affect prevailing market prices of our common stock. In addition, the existence of the Notes may encourage short selling by market participants because the conversion of the Notes could be used to satisfy short positions, or anticipated conversion of the Notes into shares of our common stock could depress the price of our common stock.

***The capped call transactions we entered into in connection with the issuance of the Notes might not turn out to be effective in reducing dilution, and might adversely affect the value of our common stock.***

In connection with the Notes, we paid approximately \$33 million to enter into capped call transactions with certain purchasers or their affiliates (the "Option Counterparties"). The capped call transactions are expected generally to reduce the potential dilution upon conversion of the Notes and/or offset any cash payments we are required to make in excess of the principal amount of converted Notes, as the case may be, with such reduction and/or offset subject to a cap. If our stock is above \$89.98 per share upon conversion of the Notes, the capped calls will not completely eliminate the dilution from Note conversion. Furthermore, if our stock price is less than \$53.17 upon conversion of the Notes, the capped calls will have no effect and we will get no benefit from the cash we paid to enter into the capped calls.

In connection with establishing their initial hedges of the capped call transactions, the Option Counterparties entered into various derivative transactions with respect to our common stock. This activity could have increased (or reduced the size of any decrease in) the market price of our common stock or the Notes at that time.

In addition, the Option Counterparties may modify their hedge positions by entering into or unwinding derivatives with respect to our common stock and/or purchasing or selling our common stock or other securities of ours in secondary market transactions prior to the maturity of the Notes (and are likely to do so during any observation period related to a conversion of Notes or following any repurchase of Notes by us on any fundamental change repurchase date or otherwise). This activity could also cause or avoid an increase or decrease in the price of our common stock or the Notes.

The potential effect, if any, of these transactions and activities on the price of our common stock or the Notes will depend in part on the market conditions and cannot be ascertained at this time. Any of these activities could adversely affect the value of our common stock.

***The accounting method for convertible debt securities that may be settled in cash, such as the Notes, could have a material effect on our reported financial results.***

In May 2008, the Financial Accounting Standards Board (“FASB”) issued Staff Position No. APB 14-1, Accounting for Convertible Debt Instruments That May Be Settled in Cash Upon Conversion (Including Partial Cash Settlement), which has subsequently been codified as ASC 470-20, Debt with Conversion and Other Options. Under ASC 470-20, an entity must separately account for the liability and equity components of the convertible debt instruments (such as the Notes) that may be settled entirely or partially in cash upon conversion in a manner that reflects the issuer’s economic interest cost. The effect of ASC 470-20 on the accounting for the Notes is that the equity component is required to be included in the additional paid-in capital section of stockholders’ equity on our consolidated balance sheet, and the value of the equity component would be treated as original issue discount for purposes of accounting for the debt component of the Notes. As a result, we will be required to record a greater amount of non-cash interest expense in current periods presented as a result of the amortization of the discounted carrying value of the Notes to their face amount over the term of the Notes. We will report lower net income in our financial results because ASC 470-20 will require interest to include both the current period’s amortization of the debt discount and the instrument’s coupon interest, which could adversely affect our reported or future financial results, the trading price of our common stock and the trading price of the Notes.

In addition, under certain circumstances, convertible debt instruments (such as the Notes) that may be settled entirely or partly in cash are currently accounted for utilizing the treasury stock method, the effect of which is that the shares issuable upon conversion of the Notes are not included in the calculation of diluted earnings per share except to the extent that the conversion value of the Notes exceeds their principal amount. Under the treasury stock method, for diluted earnings per share purposes, the transaction is accounted for as if the number of shares of common stock that would be necessary to settle such excess, if we elected to settle such excess in shares, are issued. We cannot be sure that the accounting standards in the future will continue to permit the use of the treasury stock method. If we are unable to use the treasury stock method in accounting for the shares issuable upon conversion of the Notes, then our diluted earnings per share would be adversely affected.

**Risks Related to Ownership of Our Common Stock**

***Our stock price may be volatile or may decline regardless of our operating performance, and you may not be able to resell your shares at or above the price at which you purchase it.***

The stock market historically has experienced extreme price and volume fluctuations. As a result of this volatility, you might not be able to sell your common stock at or above the price at which you purchase it. From our IPO in September 2013 through December 31, 2018, the per share trading price of our common stock has been as high as \$77.00 and as low as \$19.58. It might continue to fluctuate significantly in response to various factors, some of which are beyond our control. These factors include:

- our operating performance and the operating performance of similar companies;
- the overall performance of the equity markets;
- changes in laws or regulations relating to the sale of health insurance;
- announcements by us or our competitors of acquisitions, business plans, or commercial relationships;
- any major change in our management;
- threatened or actual litigation;
- publication of research reports or news stories about us, our competitors, or our industry, or positive or negative recommendations or withdrawal of research coverage by securities analysts;
- large volumes of sales of our shares of common stock by existing stockholders; and
- general political and economic conditions.

In addition, the stock market in general, and the market for Internet-related companies in particular, has experienced extreme price and volume fluctuations that have often been unrelated or disproportionate to the operating performance of those companies. These fluctuations might be even more pronounced in the relatively new trading market for our stock. Additionally, securities class action litigation has often been instituted against companies following periods of volatility in the overall market and in the market price of a company's securities. This litigation, if instituted against us, could result in substantial costs, divert our management's attention and resources, and harm our business, operating results, and financial condition.

***Conversion of the Notes will dilute the ownership interest of existing stockholders, including holders who had previously converted their Notes, or may otherwise depress the price of our common stock.***

The conversion of some or all of the convertible Notes will dilute the ownership interests of existing stockholders to the extent we deliver shares upon conversion of any of the Notes. The Notes may become in the future convertible at the option of their holders prior to their scheduled terms under certain circumstances. Any sales in the public market of the common stock issuable upon such conversion could adversely affect prevailing market prices of our common stock. In addition, the existence of the Notes may encourage short selling by market participants because the conversion of the Notes could be used to satisfy short positions, or anticipated conversion of the Notes into shares of our common stock could depress the price of our common stock.

***The capped call transactions entered into when we issued the convertible notes may affect the value of our common stock.***

In connection with the pricing of the Notes, we entered into capped call transactions with the option counterparties. The capped call transactions are expected generally to reduce the potential dilution upon conversion of the Notes and/or offset any cash payments we are required to make in excess of the principal amount of converted Notes, as the case may be, with such reduction and/or offset subject to a cap. In connection with establishing their initial hedges of the capped call transactions, the option counterparties or their respective affiliates entered into various derivative transactions with respect to our common stock concurrently with or shortly after the pricing of the Notes. The option counterparties or their respective affiliates may modify their hedge positions by entering into or unwinding derivatives with respect to our common stock and/or purchasing or selling our common stock or other securities of ours in secondary market transactions prior to the maturity of the Notes (and are likely to do so during any observation period related to a conversion of Notes). This activity could cause or avoid an increase or a decrease in the market price of our common stock. The capped call transactions may affect the value of the Notes and our common stock.

***Our stock price could decline due to the large number of outstanding shares of our common stock and those underlying the Notes eligible for future sale.***

Sales of a substantial number of shares of our common stock in the public market or the market perception that such sales and issuances may occur could reduce the market price of our common stock and impair our ability to raise capital through the sale of additional common stock or equity-linked securities at a time and price that we deem appropriate.

As of December 31, 2018, we had an aggregate of 32,017,773 shares of common stock outstanding. As of December 31, 2018, there also were outstanding options and restricted stock units to purchase 2,407,497 shares of our common stock that, if exercised or vested, as applicable, will result in these additional shares becoming available for sale subject in some cases to Rule 144. We have also registered an aggregate of 9,099,766 shares of our common stock that we may issue or sell under our stock plans. These shares can be freely sold in the public market upon issuance, unless they are held by “affiliates”, as that term is defined in Rule 144 of the Securities Act. In addition, a substantial number of shares of our common stock is reserved for issuance upon conversion of the Notes. If a large number of these shares are sold in the public market, the sales could reduce the trading price of our common stock.

***We might require additional capital to support business growth.***

We intend to continue to make investments to support our business growth and might require additional funds to respond to business challenges or opportunities, including the need to develop new products and services or enhance our existing services, enhance our operating infrastructure, and acquire complementary businesses and technologies. Accordingly, we might need to engage in equity or additional debt financings to secure additional funds. If we raise additional funds through further issuances of equity or convertible debt securities, our existing stockholders could suffer significant dilution, and any new equity securities we issue could have rights, preferences and privileges superior to those of holders of our common stock. Any additional debt financing secured by us could involve restrictive covenants relating to our capital-raising activities and other financial and operational matters, which might make it more difficult for us to obtain additional capital and to pursue business opportunities, including potential acquisitions. In addition, we might not be able to obtain additional financing on terms favorable to us, if at all. If we are unable to obtain adequate financing or financing on terms satisfactory to us when we require it, our ability to continue to support our business growth and to respond to business challenges could be significantly limited.

***We do not currently intend to pay dividends on our common stock and, consequently, your ability to achieve a return on your investment will depend on appreciation in the price of our common stock.***

We have never declared or paid any cash dividends on our common stock and do not currently intend to do so for the foreseeable future. We currently intend to invest our future earnings, if any, to fund our growth. Therefore, you are not likely to receive any dividends on your common stock for the foreseeable future, and the success of an investment in shares of our common stock will depend upon future appreciation in its value, if any. There is no guarantee that shares of our common stock will appreciate in value or even maintain the price at which our stockholders purchased their shares.

***A limited number of stockholders will have the ability to influence the outcome of director elections and other matters requiring stockholder approval.***

As of December 31, 2018, our directors, executive officers, and their affiliated entities beneficially owned approximately 21.1% of our outstanding common stock. In particular, GS Capital Partners VI Parallel, L.P., GS Capital Partners VI Offshore Fund, L.P., GS Capital Partners VI Fund, L.P., and GS Capital Partners VI GmbH & Co. KG, which are affiliates of Goldman, Sachs & Co. and which we refer to as the Goldman Funds, collectively beneficially owned approximately 11.8%. These stockholders, if they act together, could exert substantial influence over matters requiring approval by our stockholders,

including the election of directors, amendment of our certificate of incorporation and bylaws, and the approval of mergers or other business combination transactions.

***Our business is subject to changing regulations regarding corporate governance, disclosure controls, internal control over financial reporting, and other compliance areas that will increase both our costs and the risk of noncompliance.***

As a public company, we are subject to the reporting requirements of the Securities Exchange Act of 1934, or the Exchange Act, the Sarbanes-Oxley Act of 2002, or the Sarbanes-Oxley Act, the Dodd-Frank Act, and the rules and regulations of our stock exchange. The requirements of these rules and regulations increase our legal, accounting, and financial compliance costs, make some activities more difficult, time-consuming, and costly, and may also place undue strain on our personnel, systems, and resources.

The Sarbanes-Oxley Act requires, among other things, that we maintain effective disclosure controls and procedures and internal control over financial reporting. Commencing with our fiscal year ending December 31, 2014, we performed system and process evaluation and testing of our internal control over financial reporting to allow management to report on the effectiveness of our internal control over financial reporting, as required by Section 404 of the Sarbanes-Oxley Act. We also are required to disclose changes made to our internal controls and procedures on a quarterly basis. Our ongoing compliance with Section 404 of the Sarbanes-Oxley Act will require that we incur substantial accounting expense and expend significant management efforts.

In addition, as of December 31, 2018, we no longer qualified as an “emerging growth company” as defined in the Jumpstart Our Business Startups Act of 2012, or the JOBS Act. Accordingly, our independent registered public accounting firm is required to formally attest to the effectiveness of our internal control over financial reporting pursuant to Section 404 of the Sarbanes-Oxley Act in this Annual Report on Form 10-K. We are also required to include additional information regarding executive compensation and include a nonbinding advisory vote on executive compensation in our 2019 proxy statement. These additional reporting requirements, among others, may increase our legal and financial compliance costs and cause management and other personnel to divert attention from operational and other business matters to devote substantial time to public company reporting requirements. In addition, if we are not able to comply with changing legal requirements in a timely manner, the market price of our stock could decline and we could be subject to sanctions or investigations by the stock exchange on which our common stock is listed, the SEC, or other regulatory authorities, which would require additional financial and management resources.

***Failure to develop and maintain adequate financial controls could cause us to have material weaknesses, which could adversely affect our operations and financial position.***

As previously reported, in the first quarter of 2014, we identified a material weakness in internal controls over the accounting for leasing transactions which resulted in the identification of a material error in the accounting for our headquarters lease executed in May 2005. We might in the future discover other material weaknesses that require remediation. In addition, an internal control system, no matter how well-designed, cannot provide absolute assurance that misstatements due to error or fraud will not occur or that all control issues and instances of fraud will be detected. If we are not able to comply with the requirements of Section 404 of the Sarbanes-Oxley Act in a timely manner, or if we are unable to maintain proper and effective internal controls, we might not be able to produce timely and accurate financial statements. If that were to happen, the market price of our stock could decline and we could be subject to sanctions or investigations by the stock exchange on which our common stock is listed, the SEC, or other regulatory authorities.

Any failure to develop or maintain effective controls, or any difficulties encountered in their implementation or improvement, could harm our operating results or cause us to fail to meet our reporting obligations. Any failure to implement and maintain effective internal controls also could adversely affect

the results of periodic management evaluations regarding the effectiveness of our internal control over financial reporting that we are required to include in our periodic reports filed with the SEC under Section 404 of the Sarbanes-Oxley Act. Ineffective disclosure controls and procedures or internal control over financial reporting could also cause investors to lose confidence in our reported financial and other information, which would likely have a negative effect on the trading price of our common stock. Implementing any appropriate changes to our internal controls may require specific compliance training of our directors, officers, and employees, entail substantial costs in order to modify our existing accounting systems, and take a significant period of time to complete. Such changes may not be effective, however, in maintaining the adequacy of our internal controls, and any failure to maintain that adequacy, or consequent inability to produce accurate financial statements on a timely basis, could increase our operating costs and could materially impair our ability to operate our business. In the event that we are not able to demonstrate compliance with Section 404 of the Sarbanes-Oxley Act in a timely manner, that our internal controls are perceived as inadequate, or that we are unable to produce timely or accurate financial statements, investors may lose confidence in our operating results and our stock price could decline.

***Provisions in our restated certificate of incorporation and amended and restated bylaws and Delaware law might discourage, delay, or prevent a change in control of our company or changes in our management and, therefore, depress the trading price of our common stock.***

Provisions of our certificate of incorporation and bylaws and Delaware law might discourage, delay, or prevent a merger, acquisition, or other change in control that stockholders consider favorable, including transactions in which you might otherwise receive a premium for your shares of our common stock. These provisions might also prevent or frustrate attempts by our stockholders to replace or remove our management. These provisions include:

- limitations on the removal of directors;
- advance notice requirements for stockholder proposals and nominations;
- limitations on the ability of stockholders to call special meetings;
- the inability of stockholders to act by written consent;
- the inability of stockholders to cumulate votes at any election of directors;
- the classification of our board of directors into three classes with only one class, representing approximately one-third of our directors, standing for election at each annual meeting; and
- the ability of our board of directors to make, alter or repeal our bylaws.

Our Board of Directors has the ability to designate the terms of and issue new series of preferred stock without stockholder approval. In addition, Section 203 of the Delaware General Corporation Law prohibits a publicly held Delaware corporation from engaging in a business combination with an interested stockholder, generally a person which together with its affiliates owns, or within the last three years has owned, 15% of our voting stock, for a period of three years after the date of the transaction in which the person became an interested stockholder, unless the business combination is approved in a prescribed manner.

The existence of the foregoing provisions and anti-takeover measures could limit the price that investors are willing to pay in the future for shares of our common stock. They could also deter potential acquirers of our company, thereby reducing the likelihood that you could receive a premium for your common stock in an acquisition.

***If securities or industry analysts do not publish research or reports about our business, or publish inaccurate or unfavorable research or reports about our business, our stock price and trading volume could decline.***

The trading market for our common stock depends, to some extent, on the research and reports that securities or industry analysts publish about us and our business. We do not have any control over these

analysts. If one or more of the analysts who cover us downgrade our common stock or change their opinion of our common stock, our stock price would likely decline. If one or more of these analysts cease coverage of our company or fail to regularly publish reports on us, we could lose visibility in the financial markets, which could cause our stock price or trading volume to decline.

***Item 1B. Unresolved Staff Comments.***

None.

***Item 2. Properties.***

As of December 31, 2018, we occupied approximately 289,000 square feet on the Daniel Island Executive Center campus in Charleston, South Carolina. This office space is leased under leases expiring in 2031. As of December 31, 2018, we also leased facilities in Greenville, South Carolina; New York City, New York; Tulsa, Oklahoma; and Salt Lake City, Utah.

We believe that our current and planned facilities are sufficient for our needs. We may add other facilities or expand existing facilities as we expand our associate base and geographic markets in the future, and we believe that suitable additional space will be available as needed to accommodate any such expansion of our operations.

***Item 3. Legal Proceedings.***

From time to time, we might become involved in legal or regulatory proceedings arising in the ordinary course of our business. We are not currently a party to any material litigation or regulatory proceeding and we are not aware of any pending or threatened litigation or regulatory proceeding against us that could have a material adverse effect on our business, operating results, financial condition or cash flows.

***Item 4. Mine Safety Disclosures.***

Not applicable.

## PART II

### **Item 5. Market for Registrant’s Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.**

#### **Market Information for Common Stock**

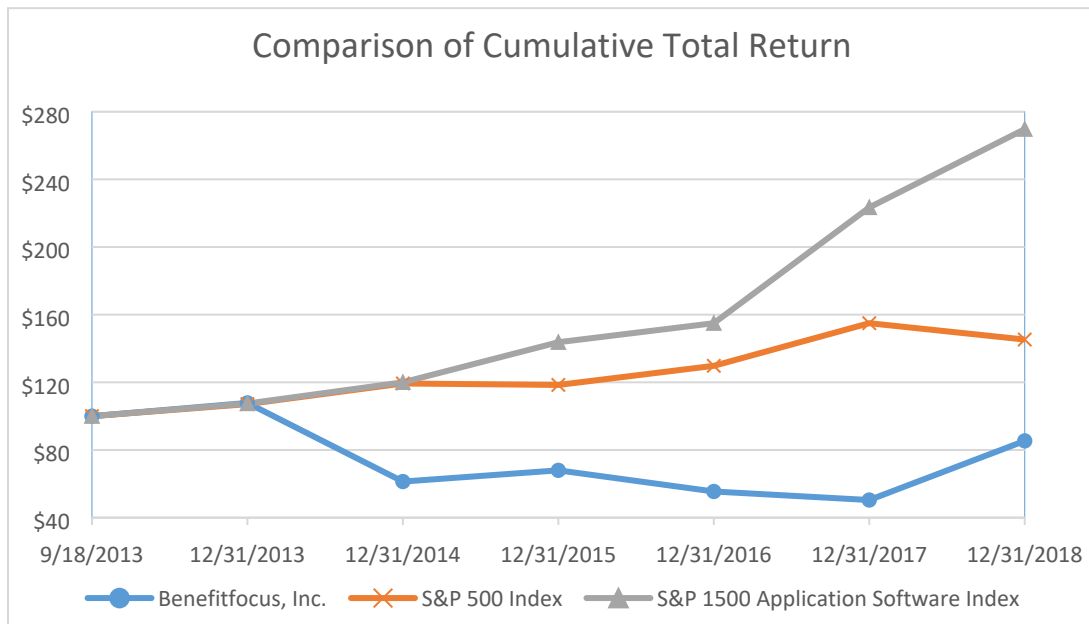
Our common stock has been listed on the Nasdaq Global Market under the symbol “BNFT” since September 18, 2013. Prior to that date, there was no public trading market for our common stock.

As of December 31, 2018, we had 51 holders of record of our common stock. The actual number of stockholders is greater than this number of record holders and includes stockholders who are beneficial owners, but whose shares are held in street name by brokers and other nominees. This number of holders of record also does not include stockholders whose shares may be held in trust by other entities.

#### **Stock Performance Graph**

The following shall not be deemed “filed” for purposes of Section 18 of the Exchange Act, or incorporated by reference into any of our other filings under the Exchange Act or the Securities Act of 1933, as amended, except to the extent we specifically incorporate it by reference into such filing.

This chart compares the cumulative total return on our common stock with that of the S&P 500 Index and the S&P 1500 Application Software Index. The chart assumes \$100 was invested at the close of market on September 18, 2013, in the common stock of Benefitfocus, Inc., the S&P 500 Index and the S&P 1500 Application Software Index, and assumes the reinvestment of any dividends. The stock price performance on the following graph is not necessarily indicative of future stock price performance.



Company / Index	Base Period						
	9/18/2013	12/31/2013	12/31/2014	12/31/2015	12/31/2016	12/31/2017	12/31/2018
Benefitfocus, Inc.	\$ 100.00	\$ 107.82	\$ 61.33	\$ 67.96	\$ 55.46	\$ 50.42	\$ 85.38
S&P 500 Index	\$ 100.00	\$ 107.12	\$ 119.32	\$ 118.45	\$ 129.75	\$ 154.95	\$ 145.28
S&P 1500 Application Software Index	\$ 100.00	\$ 107.46	\$ 120.00	\$ 143.70	\$ 154.95	\$ 223.38	\$ 269.66



### ***Equity Compensation Plans***

The information required by Item 5 of Form 10-K regarding equity compensation plans is incorporated herein by reference to Part III "Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters".

**Item 6. Selected Financial Data.**

**CONSOLIDATED SELECTED FINANCIAL DATA**

The following selected consolidated financial data for the years December 31, 2018, 2017, 2016, 2015 and 2014 and the selected consolidated balance sheet data as of December 31, 2018, 2017, 2016, 2015, and 2014 are derived from our audited consolidated financial statements. As noted below and discussed elsewhere in this filing, we adopted Topic 606 in 2018 with an effective date of January 1, 2016. Our historical results are not necessarily indicative of the results to be expected in the future. The selected consolidated financial data should be read together with “Management’s Discussion and Analysis of Financial Condition and Results of Operations”, our consolidated financial statements, related notes, and other financial information included elsewhere in this Annual Report on Form 10-K.

**Consolidated Statement of Operations Data**

	Year Ended December 31,				
	2018	2017	2016	*2015	*2014
		*as adjusted	*as adjusted		
	(in thousands, except share and per share data)				
Revenue <sup>(1)</sup>	\$ 258,721	\$ 236,842	\$ 236,523	\$ 185,143	\$ 137,420
Cost of revenue <sup>(2)</sup>	129,277	127,382	123,308	102,851	87,470
Gross profit	129,444	109,460	113,215	82,292	49,950
Operating expenses:					
Sales and marketing <sup>(2)</sup>	78,179	70,583	56,311	58,589	48,467
Research and development <sup>(2)</sup>	47,902	49,549	56,610	52,250	41,729
General and administrative <sup>(2)</sup>	43,062	27,268	32,750	25,727	18,657
Total operating expenses	169,143	147,400	145,671	136,566	108,853
Loss from operations	(39,699)	(37,940)	(32,456)	(54,274)	(58,903)
Total other expense, net	(12,900)	(12,339)	(7,873)	(7,785)	(4,251)
Loss before income taxes	(52,599)	(50,279)	(40,329)	(63,059)	(63,154)
Income tax expense (benefit)	28	15	17	25	25
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)	\$ (62,084)	\$ (63,179)
Net loss per common share--basic and diluted	\$ (1.66)	\$ (1.62)	\$ (1.36)	\$ (2.19)	\$ (2.51)
Weighted-average common shares outstanding--basic and diluted	31,756,415	31,052,378	29,589,857	28,344,680	25,207,099
<b>Other Financial Data</b>					
Adjusted EBITDA <sup>(3)</sup>	\$ 10,340	\$ (4,979)	\$ (1,385)	\$ (32,160)	\$ (43,844)

(1) In the first quarter of 2015, we decreased the estimated expected life of our customer relationships for both employer and carrier customers from 10 to 7 years. This change shortened the term over which we will recognize our deferred revenue and results in more revenue recognized in each period after the change.

(2) Cost of revenue and operating expenses include stock-based compensation expense as follows:

	Year Ended December 31,				
	2018	2017	2016	*2015	*2014
		*as adjusted	*as adjusted		
	(in thousands)				
Cost of revenue	\$ 5,164	\$ 2,508	\$ 2,799	\$ 1,950	\$ 986
Sales and marketing	6,764	4,953	3,212	2,861	1,395
Research and development	5,510	2,990	4,533	2,399	1,376
General and administrative	11,430	5,686	7,544	3,244	1,831

(3) We define adjusted EBITDA as net loss before net interest and other expense, taxes, and depreciation and amortization expense, adjusted to eliminate stock-based compensation expense and expense related to the impairment of goodwill and intangible assets, transaction costs

expensed, and costs not core to our business. See "Adjusted EBITDA" below for more information and for a reconciliation of adjusted EBITDA to net loss, the most directly comparable financial measure calculated and presented in accordance with GAAP.

### Our Segments

	Year Ended December 31,				
	2018	2017	2016	*2015	*2014
		<i>*as adjusted</i>	<i>*as adjusted</i>		
	(in thousands)				
Revenue from external customers by segment:					
Employer	\$ 169,800	\$ 153,481	\$ 149,776	\$ 94,842	\$ 62,016
Carrier	88,921	83,361	86,747	90,301	75,404
Total net revenue from external customers	<u>\$ 258,721</u>	<u>\$ 236,842</u>	<u>\$ 236,523</u>	<u>\$ 185,143</u>	<u>\$ 137,420</u>
Gross profit by segment					
Employer	\$ 75,397	\$ 58,347	\$ 61,951	\$ 33,655	\$ 16,186
Carrier	54,047	51,113	51,264	48,637	33,764
Total gross profit by segment	<u>\$ 129,444</u>	<u>\$ 109,460</u>	<u>\$ 113,215</u>	<u>\$ 82,292</u>	<u>\$ 49,950</u>

### Consolidated Balance Sheet Data

	As of December 31,				
	2018	2017	2016	*2015	*2014
		<i>*as adjusted</i>	<i>*as adjusted</i>		
	(in thousands)				
Cash and cash equivalents	\$ 190,928	\$ 55,335	\$ 56,853	\$ 48,074	\$ 51,074
Marketable securities	–	–	2,007	40,448	5,135
Accounts receivable, net	21,077	30,091	32,966	29,698	21,311
Total assets	313,939	192,003	216,555	182,119	140,018
Deferred revenue, total	45,863	55,027	56,949	93,529	94,510
Total liabilities	324,149	200,722	194,832	200,128	182,841
Common stock	32	31	30	29	26
Additional paid-in capital	403,631	352,496	332,254	310,304	223,409
Total stockholders' equity (deficit)	(10,210)	(8,719)	21,723	(18,009)	(42,823)

\* The summary consolidated financial data for the years ended December 31, 2018, 2017, and 2016 and as of December 31, 2018, 2017, and 2016 reflects the adoption of Accounting Standards Update ("ASU") No. 2014-09, Revenue from Contracts with Customers ("Topic 606"). See Note 2 of the notes to consolidated financial statements for a summary of adjustments. The summary consolidated financial data for the years ended December 31, 2015 and 2014 and as of December 31, 2015 and 2014 does not reflect the adoption of Topic 606.

### Adjusted EBITDA

Within this Annual Report on Form 10-K we use adjusted EBITDA to provide investors with additional information regarding our financial results. Adjusted EBITDA is a non-GAAP financial measure. We have provided below a reconciliation of this measure to the most directly comparable GAAP financial measure, which for adjusted EBITDA is net loss.

We have included adjusted EBITDA in this Annual Report on Form 10-K because it is a key measure used by our management and board of directors to understand and evaluate our core operating performance and trends, to prepare and approve our annual budget, and to develop short- and long-term operational plans. In particular, we believe that the exclusion of the expenses eliminated in calculating adjusted EBITDA can provide a useful measure for period-to-period comparisons of our core business. Accordingly, we believe that adjusted EBITDA provides useful information to investors and others in understanding and evaluating our operating results.

Our use of adjusted EBITDA as an analytical tool has limitations, and you should not consider it in isolation or as a substitute for analysis of our financial results as reported under GAAP. Some of these limitations are:

- although depreciation and amortization are non-cash charges, the assets being depreciated and amortized might have to be replaced in the future, and adjusted EBITDA does not reflect cash capital expenditure requirements for such replacements or for new capital expenditure requirements;
- adjusted EBITDA does not reflect changes in, or cash requirements for, our working capital needs;
- adjusted EBITDA does not reflect the potentially dilutive impact of stock-based compensation;
- adjusted EBITDA does not reflect interest or tax payments that would reduce the cash available to us; and
- other companies, including companies in our industry, might calculate adjusted EBITDA or similarly titled measure differently, which reduces their usefulness as comparative measures.

Because of these and other limitations, you should consider adjusted EBITDA alongside other GAAP-based financial performance measures, including various cash flow metrics, gross profit, net loss and our other GAAP financial results. The following table presents a reconciliation of adjusted EBITDA to net loss for each of the periods indicated:

	Year Ended December 31,				
	2018	2017	2016	*2015	*2014
		*as adjusted	*as adjusted		
(in thousands)					
<b>Reconciliation from Net Loss to Adjusted EBITDA:</b>					
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)	\$ (62,084)	\$ (63,179)
Depreciation	11,721	12,391	9,959	8,791	6,931
Amortization of software development costs	3,944	3,257	2,857	2,587	2,257
Amortization of acquired intangible assets	150	258	257	286	305
Interest income	(250)	(182)	(138)	(188)	(77)
Interest expense on building lease financing obligations	7,471	7,450	6,826	7,092	3,624
Interest expense on other borrowings	5,685	4,931	1,095	877	682
Income tax expense	28	15	17	25	25
Stock-based compensation expense	28,868	16,137	18,088	10,454	5,588
Transaction costs expensed	507	-	-	560	708
Costs not core to our business	4,843	1,058	-	-	-
Total net adjustments	\$ 62,967	\$ 45,315	\$ 38,961	\$ 30,484	\$ 20,043
Adjusted EBITDA	<u>\$ 10,340</u>	<u>\$ (4,979)</u>	<u>\$ (1,385)</u>	<u>\$ (31,600)</u>	<u>\$ (43,136)</u>

- \* The summary consolidated financial data for the years ended December 31, 2018, 2017, and 2016 and as of December 31, 2018, 2017, and 2016 reflects the adoption of Topic 606. See Note 2 of the notes to consolidated financial statements for a summary of adjustments. The summary consolidated financial data for the years ended December 31, 2015 and 2014 and as of December 31, 2015 and 2014 does not reflect the adoption of Topic 606.

## **Item 7. Management’s Discussion and Analysis of Financial Condition and Results of Operations.**

### **MANAGEMENT’S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS**

*You should read the following discussion and analysis of our financial condition and results of operations together with our consolidated financial statements and the related notes and other financial information included elsewhere in this Annual Report on Form 10-K. Some of the information contained in this discussion and analysis or set forth elsewhere in this report including information with respect to our plans and strategy for our business, includes forward-looking statements that involve risks and uncertainties. You should review the “Risk Factors” section of this report beginning on page 19 for a discussion of important factors that could cause actual results to differ materially from the results described in or implied by the forward-looking statements contained in the following discussion and analysis.*

#### **Overview**

Benefitfocus provides a leading cloud-based benefits management platform for consumers, employers, insurance carriers, suppliers and brokers. The Benefitfocus Platform simplifies how organizations and individuals transact benefits. Our employer, carrier and supplier customers rely on our platform to manage, scale and exchange benefits data seamlessly. Our solutions drive value for all participants in our benefits ecosystem.

The Benefitfocus multi-tenant platform has a user-friendly interface designed for consumers to access all of their benefits in one place. Our comprehensive solutions support medical benefit plans and non-medical benefits, such as, dental, life, disability insurance, income protection, digital health and financial wellness. As the number of employer benefits plans has increased, with each plan subject to many different business rules and requirements, demand for the Benefitfocus Platform is growing.

Since our initial public offering, we have described our target market as comprising two separate but related market segments – the employer segment and the insurance carrier segment. Within the employer segment, we sell our technology solutions on an annually recurring or multi-year subscription basis to large employers, which we define as those with more than 1,000 employees. Similarly, in our other market segment, we sell our solutions on a subscription basis to insurance carriers, enabling us to expand our overall footprint in the benefits marketplace by aggregating many key constituents, including consumers, employers, and brokers. We believe our presence in both the employer and insurance carrier segments gives us a strong position at the center of the benefits ecosystem.

In 2018, we expanded our economic model to include a transaction-oriented, marketplace solution, known as BenefitsPlace, that aligns employers, brokers, carriers and suppliers around the needs of consumers on our platform from our employer, carrier and broker connections. In this model, our BenefitsPlace partners sell their voluntary benefit offerings through a holistic, multidimensional marketplace. This marketplace is designed to increase the economic value of the consumer lives on our platform by aligning platform products to consumer needs. In exchange for Benefitfocus delivering consumer access, data-driven analysis and operational efficiencies, BenefitsPlace partners pay us a percentage of the transaction value that is transacted on our platform. BenefitsPlace carrier agreements have terms of two to four years and are typically cancellable upon breach of contract or insolvency. BenefitsPlace supplier contracts have terms of one year or less and are generally cancellable upon breach of contract, failure to cure, bankruptcy and termination for convenience.

We classify our revenue into two streams – software services revenue and professional services revenue. Software services revenue primarily consists of monthly subscription fees and BenefitsPlace transactional revenue. Monthly subscription fees are paid to us by our employer and insurance carrier customers for access to, and usage of, cloud-based benefits software solutions for a specified contract term. Subscription fees are generally charged based on the number of employees or subscribers with access to the solution. Software services revenue also includes BenefitsPlace transactional revenue, which is generated from the value of the policies or products enrolled in through our marketplace. BenefitsPlace carrier revenue is generally recognized over the policy period of the enrolled products. In arrangements where we sell policies to employees of our customers as the broker, we earn insurance broker commissions. Revenue from insurance broker commissions and BenefitsPlace supplier transactions is

generally recognized at the time when open enrollment is complete and the orders for policies are transferred to the supplier. Software services revenue accounted for approximately 78%, 78%, and 79% of our total revenue during the years ended December 31, 2018, 2017 and 2016, respectively.

Our professional services revenue stream is largely derived from the implementation of our customers onto our platform, which typically includes discovery, configuration and deployment, integration, testing, and training. We also provide customer support services and customized media content that supports our customers' effort to educate and communicate with consumers. Professional services revenue accounted for approximately 22%, 22%, and 21% of our total revenue during the years ended December 31, 2018, 2017 and 2016, respectively.

Expanding our customer base is a key element of our growth strategy. Historically we have measured our expansion by describing the growth in the number of large employer customers utilizing our solutions, which grew at a 28% compound annual growth rate from 141 as of December 31, 2010 to 1,024 as of December 31, 2018. With the addition of our transactional revenue model, we believe that the number of large employer customers no longer fully describes the revenue opportunity of our customer base. As described in "Key Financial and Operating Performance Metrics" below, we are introducing a new key metric, net benefit eligible lives, and discontinuing disclosure of our current key metric, number of large employer customers.

We believe that our continued innovation and new solutions, such as BenefitsPlace, extend the functionality of our mobile offerings, more robust data analytics capabilities and our ability to quickly respond to evolving market needs with innovative capabilities will help us attract additional net benefit eligible lives to our platform through new employer customers, partners and brokers and increase our revenue from existing customers and relationships.

We believe that there is a substantial market for our services, and we have been investing in growth over the past several years. In particular, we have continued to invest in technology and services to better serve our larger employer customers, which we believe are an important source of growth for our business. We have also substantially increased our marketing and sales efforts and expect those increased efforts to continue. As we have invested in growth, we have had operating losses in each of the last eight years, and expect our operating losses to continue for at least the next year. Due to the nature of our customer relationships, which have been stable in spite of some customer losses over the past years, and our hybrid subscription and transaction-based financial model, we believe that our current investment in growth should lead to substantially increased revenue, which will allow us to achieve profitability in the relatively near future. Of course, our ability to achieve profitability will continue to be subject to many factors beyond our control.

## Key Financial and Operating Performance Metrics

We regularly monitor a number of financial and operating metrics in order to measure our current performance and project our future performance. These metrics help us develop and refine our growth strategies and make strategic decisions. We discuss revenue, gross margin, and the components of operating loss, as well as segment revenue and segment gross profit, in “Management’s Discussion and Analysis of Financial Condition and Results of Operations—Components of Operating Results”. In addition, we utilize other key metrics as described below.

In 2018, we expanded our economic model to include BenefitsPlace, our transaction-oriented, marketplace solution. We describe this strategy in more detail in “Business—Overview”. This shift increases the focus on the transactions that occur on our platform. A key component of the success of this strategy is the number of consumer lives on our platform. We believe this metric is more meaningful to our business going forward, so we are discontinuing use of the metric of number of large employer and carrier customers.

We have added a new operating metric, net benefit eligible lives, that we believe is highly correlated to our subscription revenue and is the foundation of our transaction revenue opportunity.

### Number of Large Employer and Carrier Customers

Since our initial public offering, we believed the number of large employer and carrier customers was a key indicator of our market penetration, growth, and future revenue. As a result of the shift in our economic model, we believe that the number of large employer and carrier customers will no longer be a meaningful metric. Accordingly, we are discontinuing use of this metric after December 31, 2018.

We generally define a customer as an entity with an active software services contract as of the measurement date. The following table sets forth the number of large employer and carrier customers for the periods indicated:

	Year Ended December 31,		
	2018	2017	2016
Number of customers:			
Large employer	1,024	920	833
Carrier	57	54	53

### Net Benefit Eligible Lives

We are focused on driving revenue growth from adding lives to our platform and driving incremental transaction revenue. We believe the number of net benefit eligible lives is a key indicator of our market penetration, growth and future revenue. We believe net benefit eligible lives is highly correlated to our subscription revenue and is the foundation of our transaction revenue opportunity. We define a net benefit eligible life as a carrier or employer enrollment subscription with standard contracting, plus their estimated dependents, as of the measurement date. This definition excludes lives from other subscription-related contracts.

	December 31,	September 30,	June 30,	March 31,	As of December 31,	September 30,	June 30,	March 31,	December 31,
	2018	2018	2018	2018	2017	2017	2017	2017	2016
Net benefit eligible lives	13.3	13.2	12.3	11.8	11.2	10.8	10.7	10.5	10.2

(in millions)

### Software Services Revenue Retention Rate

We believe that our ability to retain our customers and expand the revenue they generate for us over time is an important component of our growth strategy and reflects the long-term value of our customer relationships. We measure our performance on this basis using a metric we refer to as our software services revenue retention rate. We calculate this metric for a particular period by establishing the group of our customers that had active contracts for a given period. We then calculate our software

services revenue retention rate by taking the amount of software services revenue we recognized for this group in the subsequent comparable period (for which we are reporting the rate) and dividing it by the software services revenue we recognized for the group in the prior period.

Our software services revenue retention rate exceeded 95% for the years ended December 31, 2018 and 2017. Because we adopted the revenue accounting rules prescribed by Topic 606 as of January 1, 2016, we do not have revenue by customer for 2015 under Topic 606, which is required for the calculation of this metric for 2016. When we recognized revenue in 2016 under Topic 605, our software services revenue exceeded 95% for that year.

### **Adjusted EBITDA**

Adjusted EBITDA represents our earnings before net interest and other expense, taxes, and depreciation and amortization expense, adjusted to eliminate stock-based compensation and impairment of goodwill and intangible assets and costs not core to our business. Adjusted EBITDA is not a measure calculated in accordance with United States generally accepted accounting principles, or GAAP. Please refer to “Selected Consolidated Financial Data—Adjusted EBITDA” in this report for a discussion of the limitations of adjusted EBITDA and reconciliation of adjusted EBITDA to net loss, the most comparable GAAP measurement, respectively, for 2018, 2017 and 2016.

### **Components of Operating Results**

#### **Revenue**

We derive the majority of our revenue from software services fees, which consist primarily of monthly subscription fees paid to us by our employer and carrier customers for access to, and usage of, our cloud-based benefits software solutions for a specified contract term. Software services revenue also includes transactional revenue from both insurance broker commissions from the sale of voluntary and ancillary benefits policies to employees of our customers and from transaction revenue from life and ancillary insurance carriers and specialty providers. We also derive revenue from professional services fees, which primarily include fees related to the implementation of our customers onto our platform. Our professional services typically include discovery, configuration and deployment, integration, testing, and training.

The following table sets forth a breakdown of our revenue between software services and professional services for the periods indicated (in thousands):

	Year Ended December 31,		
	2018	2017	2016
Software services	\$ 202,348	\$ 184,891	\$ 186,158
Professional services	56,373	51,951	50,365
Total revenue	<u>\$ 258,721</u>	<u>\$ 236,842</u>	<u>\$ 236,523</u>

We recognize revenues when control of these services is transferred to customers, in an amount that reflects the consideration we expect to be entitled to in exchange for those services. Taxes collected from customers relating to services and remitted to governmental authorities are excluded from revenues.

We determine revenue recognition through the following steps:

- Identification of each contract with a customer;
- Identification of the performance obligations in the contract;
- Determination of the transaction price;
- Allocation of the transaction price to the performance obligations in the contract; and
- Recognition of revenue when, or as, performance obligations are satisfied.

#### **Software Services Revenues**

Software services revenues primarily consist of monthly subscription fees paid to us by our employer and insurance carrier customers for access to, and usage of, cloud-based benefits software solutions for a specified contract term. Fees are generally charged based on the number of employees or subscribers with access to the solution. Software services revenue also includes BenefitsPlace



transactional revenue, which is generated from the value of the policies or products enrolled in through our marketplace.

Software services revenues are generally recognized on a ratable basis over the contract term beginning on the date the software services are made available to the customer. Our software service contracts are generally three years for both carrier and employer customers. BenefitsPlace carrier revenue is generally recognized over the policy period of the enrolled products. Revenue from insurance broker commissions and BenefitsPlace supplier transactions is recognized at the point when the orders for the policies are received and transferred to the insurance carrier or supplier, and is reduced by estimates for risk from premium collection, policy cancellation and termination.

#### *Professional Services Revenues*

Professional services revenues primarily consist of fees related to the implementation of software products purchased by customers. Professional services typically include discovery, configuration and deployment, integration, testing, and training. Fees from consulting services, support services and training are also included in professional services revenue.

Revenue from implementation services with customers in the Carrier segment are generally recognized over the contract term of the associated software services contract, including any extension periods representing a material right. We utilize estimates of hours as a measure of progress to determine revenue for certain types of arrangements.

Revenues from implementation services with customers in the Employer segment are generally recognized as those services are performed.

Revenues from support and training fees are recognized over the service contract period.

#### *Contracts with Multiple Performance Obligations*

Certain of our contracts with customers contain multiple performance obligations. For these contracts, the individual performance obligations are accounted for separately if they are distinct. The transaction price is allocated to the separate performance obligations based on their relative standalone selling prices. We determine the standalone selling prices based on its overall pricing objectives, taking into consideration market conditions and other factors, including the value of its contracts, the software services sold, customer size and complexity, and the number and types of users within the contracts.

#### *Reclassifications*

In conjunction with the adoption of the new revenue recognition accounting standard described below, we reclassified revenue and associated cost of revenue from support and video services from software services to professional services. This reclassification is reflected in all periods presented.

#### *Adoption of Revenue Accounting Standard*

We adopted the new accounting standard for revenue recognition, Topic 606, on January 1, 2018. We applied the full retrospective transition method to all contracts that were not completed as of January 1, 2016. As such, all periods presented are on the same basis of revenue accounting.

The adoption of Topic 606 significantly affected the accounting for revenue from certain professional services in the Carrier segment and insurance broker commission revenue included in software services revenue in the Employer segment. We describe the effects of adoption of Topic 606 in more detail in Note 2 of our consolidated financial statements included elsewhere in this Annual Report on Form 10-K.

#### **Overhead Allocation**

Expenses associated with our facilities, security, information technology, and depreciation and amortization, are allocated between cost of revenue and operating expenses based on employee headcount determined by the nature of work performed.

## **Cost of Revenue**

Cost of revenue primarily consists of salaries and other personnel-related costs, including benefits, bonuses, and stock-based compensation, for employees, whom we refer to as associates, providing services to our customers and supporting our SaaS platform infrastructure. Additional expenses in cost of revenue include co-location facility costs for our data centers, depreciation expense for computer equipment directly associated with generating revenue, infrastructure maintenance costs, professional fees, amortization expenses associated with capitalized software development costs, allocated overhead, and other direct costs.

We expense cost of revenue associated with fulfilling performance obligations as we incur the costs. Costs that relate directly to a customer contract that are not related to satisfying a performance obligation are capitalized and amortized to cost of revenue expense over the estimate period of benefit of the contract asset, which is generally five years.

We plan to continue to expand our capacity to support our growth, which will result in higher cost of revenue in absolute dollars. However, we expect cost of revenue as a percentage of revenue to decline and gross margins to increase primarily from the growth of the percentage of our revenue from large employers and the realization of economies of scale driven by retention of our customer base.

## **Operating Expenses**

Operating expenses consist of sales and marketing, research and development, and general and administrative expenses. Salaries and personnel-related costs are the most significant component of each of these expense categories. We expect to continue to hire new associates in these areas in order to support our anticipated revenue growth; however, we expect to decrease our operating expenses, as a percentage of revenue, if and as we achieve economies of scale.

*Sales and marketing expense.* Sales and marketing expense consists primarily of salaries and other personnel-related costs, including benefits, bonuses, stock-based compensation, and commissions for our sales and marketing associates. Costs to obtain a contract that are incremental, such as sales commissions, are capitalized and amortized to expense over the estimated period of benefit of the asset, which is generally four to five years. Additional expenses include advertising, lead generation, promotional event programs, corporate communications, travel, and allocated overhead. For instance, our most significant promotional event is One Place, which we hold annually. We expect our sales and marketing expense to increase, in absolute dollars, in the foreseeable future as we further increase the number of our sales and marketing professionals and expand our marketing activities in order to continue to grow our business.

*Research and development expense.* Research and development expense consists primarily of salaries and other personnel-related costs, including benefits, bonuses, and stock-based compensation for our research and development associates. Additional expenses include costs related to the development, quality assurance, and testing of new technology, and enhancement of our existing platform technology, consulting, travel, and allocated overhead. We believe continuing to invest in research and development efforts is essential to maintaining our competitive position. We expect our research and development expense to decrease, as a percentage of revenue, if and as we achieve economies of scale.

*General and administrative expense.* General and administrative expense consists primarily of salaries and other personnel-related costs, including benefits, bonuses, and stock-based compensation for administrative, finance and accounting, information systems, legal, and human resource associates. Additional expenses include consulting and professional fees, insurance and other corporate expenses, and travel. We expect our general and administrative expenses to increase in absolute terms as a result of ongoing public company costs, including those associated with compliance with the Sarbanes-Oxley Act and other regulations governing public companies, increased costs of directors' and officers' liability insurance, and increased professional services expenses, particularly associated with the adoption of new accounting standards.

## Other Income and Expense

Other income and expense consists primarily of interest income and expense and gain (loss) on disposal of property and equipment. Interest income represents interest received on our cash and cash equivalents and marketable securities. Interest expense consists primarily of the interest incurred on outstanding borrowings under our financing obligations, capital leases and credit facility.

## Income Tax Expense

Income tax expense consists of U.S. federal and state income taxes. We incurred minimal income tax expense for 2018, 2017, and 2016. Net operating loss carryforwards for federal income tax purposes were approximately \$287.7 million at December 31, 2018. State net operating loss carryforwards were approximately \$285.4 million at December 31, 2018. Federal and state net operating loss carryforwards will expire at various dates beginning in 2022, if not utilized. Valuation allowances are recorded to reduce deferred tax assets to the amount we believe is more likely than not to be realized.

## Results of Operations

### Consolidated Statements of Operations Data

The following table sets forth our consolidated statements of operations data for each of the periods indicated (in thousands).

	Year Ended December 31,		
	2018	2017	2016
Revenue	\$ 258,721	\$ 236,842	\$ 236,523
Cost of revenue <sup>(1)</sup>	129,277	127,382	123,308
Gross profit	129,444	109,460	113,215
Operating expenses:			
Sales and marketing <sup>(1)</sup>	78,179	70,583	56,311
Research and development <sup>(1)</sup>	47,902	49,549	56,610
General and administrative <sup>(1)</sup>	43,062	27,268	32,750
Total operating expenses	169,143	147,400	145,671
Loss from operations	(39,699)	(37,940)	(32,456)
Other income (expense):			
Interest income	250	182	138
Interest expense on building lease financing obligations	(7,471)	(7,450)	(6,826)
Interest expense on other borrowings	(5,685)	(4,931)	(1,095)
Other expense	6	(140)	(90)
Total other expense, net	(12,900)	(12,339)	(7,873)
Loss before income taxes	(52,599)	(50,279)	(40,329)
Income tax expense	28	15	17
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)

(1) Cost of revenue and operating expenses include stock-based compensation expense as follows (in thousands):

	Year Ended December 31,		
	2018	2017	2016
Cost of revenue	\$ 5,164	\$ 2,508	\$ 2,799
Sales and marketing	6,764	4,953	3,212
Research and development	5,510	2,990	4,533
General and administrative	11,430	5,686	7,544

The following table sets forth our consolidated statements of operations data as a percentage of revenue for each of the periods indicated (as a percentage of revenue).

	Year Ended December 31,		
	2018	2017	2016
Revenue	100.0 %	100.0 %	100.0 %
Cost of revenue	50.0	53.8	52.1
Gross profit	50.0	46.2	47.9
Operating expenses:			
Sales and marketing	30.2	29.8	23.8
Research and development	18.5	20.9	23.9
General and administrative	16.6	11.5	13.8
Total operating expenses	65.4	62.2	61.6
Loss from operations	(15.3)	(16.0)	(13.7)
Other income (expense):			
Interest income	0.1	0.1	0.1
Interest expense on building lease financing obligations	(2.9)	(3.1)	(2.9)
Interest expense on other borrowings	(2.2)	(2.1)	(0.5)
Other expense	-	(0.1)	-
Total other expense, net	(5.0)	(5.2)	(3.3)
Loss before income taxes	(20.3)	(21.2)	(17.1)
Income tax expense	-	-	-
Net loss	(20.3) %	(21.2) %	(17.1) %

### Our Segments

The following table sets forth segment results for revenue and gross profit for the periods indicated (in thousands):

	Year Ended December 31,		
	2018	2017	2016
Revenue from external customers by segment:			
Employer	\$ 169,800	\$ 153,481	\$ 149,776
Carrier	88,921	83,361	86,747
Total net revenue from external customers	\$ 258,721	\$ 236,842	\$ 236,523
Gross profit by segment			
Employer	\$ 75,397	\$ 58,347	\$ 61,951
Carrier	54,047	51,113	51,264
Total gross profit by segment	\$ 129,444	\$ 109,460	\$ 113,215

### Comparison of Years Ended December 31, 2018 and 2017

#### Revenue

	Year Ended December 31,					
	2018		2017		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Software services	\$ 202,348	78.2 %	\$ 184,891	78.1 %	\$ 17,457	9.4 %
Professional services	56,373	21.8	51,951	21.9	4,422	8.5
Total revenue	\$ 258,721	100.0 %	\$ 236,842	100.0 %	\$ 21,879	9.2 %

Growth in software services revenue was primarily attributable to an increase in software subscription revenue of \$9.2 million as a result of increases in net benefit eligible lives at existing customers (which we call volume increases), and also to existing customers purchasing additional products, as well as to the net addition of new customers. Software subscription revenue included an increase of \$1.1 million related to a change in estimated revenue from an employer customer contract. Additionally, transactional revenue from new insurance broker commissions and product enrollments in 2018 contributed an increase of \$7.6 million.

The increase in professional services revenue was attributable to an increase in support revenue from newly activated customers of \$2.2 million, an increase in customer-specific enhancements of \$2.2 million, and an increase in implementation revenue of \$1.9 million. These increases were partially offset by a reduction in non-recurring consulting revenue of \$1.7 million.

### Segment Revenue

	Year Ended December 31,					
	2018		2017		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Employer	\$ 169,800	65.6 %	\$ 153,481	64.8 %	\$ 16,319	10.6 %
Carrier	88,921	34.4	83,361	35.2	5,560	6.7
Total revenue	\$ 258,721	100.0 %	\$ 236,842	100.0 %	\$ 21,879	9.2 %

Growth in our employer revenue was primarily attributable to a \$12.4 million increase in our employer software services revenue, driven primarily by an increase in software subscription revenue of \$8.0 million as well as an increase in new insurance broker commissions from enrollments in 2018 of \$3.2 million, and a decline in the sales returns and allowance of \$1.1 million. Additionally, employer professional services revenue increased \$3.9 million primarily from a \$2.2 million increase in support revenue and a \$3.3 million increase in implementation revenue, partially offset by decreases in non-recurring consulting revenue of \$1.7 million.

The increase in carrier revenue was primarily attributable to a \$4.4 million increase in transactional revenue from carrier and supplier contracts. Software services revenue also increased \$1.0 million from net volume and contractual rate increases. Additionally, an increase in professional services revenue of \$2.3 million from customer-specific enhancement revenue was partially offset by a decrease in implementation professional services revenue of \$1.4 million.

### Cost of Revenue

	Year Ended December 31,					
	2018		2017		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Cost of revenue	\$ 129,277	50.0 %	\$ 127,382	53.8 %	\$ 1,895	1.5 %

The increase in cost of revenue in absolute terms was primarily attributable to an increase in salaries and personnel-related costs to support an increased number of customers and volume, as well as professional fees associated with third-party deliveries. This increase included an increase in stock-based compensation of \$2.7 million. Cost of revenue as a percentage of revenue has continued to decrease as a result of economies of scale as our revenues have grown.

### Gross Profit

	Year Ended December 31,					
	2018		2017		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Software services	\$ 136,344	67.4 %	\$ 121,879	65.9 %	\$ 14,465	11.9 %
Professional services	(6,900)	(12.2)	(12,419)	(23.9)	5,519	(44.4)
Gross profit	\$ 129,444	50.0 %	\$ 109,460	46.2 %	\$ 19,984	18.3 %

The increase in software services gross profit was driven by a \$17.5 million, or 9.4%, increase in software services revenue. This increase was partially offset by a \$3.0 million, or 4.7%, increase in software services cost of revenue. Software services cost of revenue included \$3.0 million and \$1.3 million of stock-based compensation expense for the years ended December 31, 2018 and 2017, respectively, and \$10.0 million and \$9.6 million of depreciation and amortization for the years ended December 31, 2018 and 2017, respectively.

The improvement in professional services gross loss was driven by a \$4.4 million, or 8.5%, increase in professional services revenue and a decrease in professional services cost of revenue of \$1.1 million. Professional services cost of revenue included \$2.2 million and \$1.2 million of stock-based compensation expense for the years ended December 31, 2018 and 2017, respectively. In addition, professional services cost of revenue included \$1.9 million and \$2.2 million in depreciation and amortization for the years ended December 31, 2018 and 2017, respectively.

### Segment Gross Profit

	Year Ended December 31,					
	2018			2017		
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Employer	\$ 75,397	44.4 %	\$ 58,347	38.0 %	\$ 17,050	29.2 %
Carrier	54,047	60.8	51,113	61.3	2,934	5.7
Gross profit	\$ 129,444	50.0 %	\$ 109,460	46.2 %	\$ 19,984	18.3 %

The increase in employer gross profit was driven by a \$16.3 million, or 10.6%, increase in employer revenue and by a \$0.7 million decrease in employer cost of revenue as we continued to achieve economies of scale. The decrease in cost of revenue was primarily attributable to decreased third-party costs. Our employer cost of revenue included \$3.7 million and \$1.9 million of stock-based compensation expense for the years ended December 31, 2018 and 2017, respectively. In addition, our employer cost of revenue included \$7.4 million and \$7.3 million of depreciation and amortization for the years ended December 31, 2018 and 2017, respectively.

The carrier gross profit was comprised of \$5.6 million increase in carrier revenue partially offset by a \$2.6 million increase in carrier cost of revenue. Our carrier cost of revenue included \$1.5 million and \$0.6 million of stock-based compensation expense for the years ended December 31, 2018 and 2017, respectively. In addition, carrier cost of revenue included \$4.5 million and \$4.5 million in depreciation and amortization for the years ended December 31, 2018 and 2017, respectively.

### Operating Expenses

	Year Ended December 31,					
	2018			2017		
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Sales and marketing	\$ 78,179	30.2 %	\$ 70,583	29.8 %	\$ 7,596	10.8 %
Research and development	\$ 47,902	18.5 %	\$ 49,549	20.9 %	\$ (1,647)	(3.3) %
General and administrative	\$ 43,062	16.6 %	\$ 27,268	11.5 %	\$ 15,794	57.9 %

The increase in sales and marketing expense was primarily attributable to a \$7.4 million increase in salaries and personnel-related costs due to hires of sales and marketing associates and higher variable compensation. As discussed above in "Components of Operating Results-Operating Expenses", certain sales commissions are capitalized and amortized over a period generally equal to four to five years.

The decrease in research and development expense reflects continued cost efficiencies during 2018 as contracted services and professional fees decreased by \$2.0 million. An additional decrease of \$1.3 million is attributable to an increase in the amount of software development costs capitalized. These decreases were partially offset by an increase in salaries and personnel-related costs of \$1.8 million primarily attributable to an increase in stock-based compensation.

The increase in general and administrative expense included an increase in salary and personnel-related costs of \$8.9 million, including an increase in stock-based compensation of \$5.8 million. The remaining increase was primarily attributable to professional fees incurred in connection with implementing new accounting standards and costs associated with preparing for our first year of Sarbanes-Oxley 404(b) audit requirements, as well as transaction costs expensed, primarily in connection with a secondary stock offering during the second quarter of 2018.

## Stock-based Compensation

Cost of revenue and operating expenses include an aggregate of \$28.9 million and \$16.1 million of stock-based compensation for the years ended December 31, 2018 and 2017, respectively, representing an increase of \$12.8 million, or a 79.5% increase. The increase is primarily attributable to expense from performance-based awards granted in 2018 that are expected to vest.

## Comparison of Years Ended December 31, 2017 and 2016

### Revenue

	Year Ended December 31,					
	2017		2016		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Software services	\$ 184,891	78.1 %	\$ 186,158	78.7 %	\$ (1,267)	(0.7) %
Professional services	51,951	21.9	50,365	21.3	1,586	3.1
Total revenue	\$ 236,842	100.0 %	\$ 236,523	100.0 %	\$ 319	0.1 %

Software services revenue decreased as an increase in software subscription revenue of \$3.6 million was more than offset by decreases in insurance broker commissions of \$3.4 million and non-recurring software services of \$0.9 million and an unfavorable increase in the sales returns and allowance of \$1.2 million.

The increase in professional services revenue was attributable to increases in consulting and support services and customer-specific enhancements, partially offset by a decrease in implementation revenue for newly activated customers.

### Segment Revenue

	Year Ended December 31,					
	2017		2016		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Employer	\$ 153,481	64.8 %	\$ 149,776	63.3 %	\$ 3,705	2.5 %
Carrier	83,361	35.2	86,747	36.7	(3,386)	(3.9)
Total revenue	\$ 236,842	100.0 %	\$ 236,523	100.0 %	\$ 319	0.1 %

Growth in our employer revenue was primarily attributable to a \$3.8 million increase in our employer professional services revenue driven by consulting, support services and customer-specific enhancements. Employer software services was unchanged as increases in software subscriptions of \$5.2 million were offset by decreases in insurance broker commissions of \$3.4 million and non-recurring software services of \$1.0 million and an unfavorable increase in sale returns and allowance of \$1.3 million.

The decrease in carrier revenue was attributable to a \$1.2 million decrease in software services revenue and \$2.2 million decrease professional services revenue. The decrease in software services revenue was primarily attributable to a decrease in software subscription revenue of \$1.6 million, partially offset by an increase in transactional revenue from product enrollments of \$0.8 million. The professional services revenue decrease was primarily driven by a decrease in implementation revenue of \$3.1 million, partially offset by increases in customer-specific enhancements and consulting with new customers.

### Cost of Revenue

	Year Ended December 31,					
	2017		2016		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Cost of revenue	\$ 127,382	53.8 %	\$ 123,308	52.1 %	\$ 4,074	3.3 %

The increase in cost of revenue in absolute terms was primarily attributable to an increase in salaries and personnel-related costs to support an increased number of customers and volume, as well

as professional fees associated with third-party deliveries. This increase was partially offset by a decrease in stock-based compensation of \$0.3 million.

### Gross Profit

	Year Ended December 31,					
	2017			2016		
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Period-to-Period Change Amount	Percentage
	(in thousands)					
Software services	\$ 121,879	65.9 %	\$ 125,010	67.2 %	\$ (3,131)	(2.5) %
Professional services	(12,419)	(23.9)	(11,795)	(23.4)	(624)	5.3
Gross profit	\$ 109,460	46.2 %	\$ 113,215	47.9 %	\$ (3,755)	(3.3) %

The decrease in software services gross profit was driven by a \$1.3 million decrease in software services revenue and a \$1.9 million, or 3.0%, increase in software services cost of revenue. The increase in cost of revenue was primarily attributable to an increase professional fees associated with third-party deliveries. Software services cost of revenue included \$1.3 million and \$1.4 million of stock-based compensation expense for the years ended December 31, 2017 and 2016, and \$9.6 million and \$8.3 million of depreciation and amortization for the years ended December 31, 2017 and 2016, respectively.

The increase in professional services gross loss was driven by a \$1.6 million increase in professional services revenue more than offset by a \$2.2 million increase in professional services cost of revenue. The increase in cost of revenue is primarily attributable to an increase in contracted services. Professional services cost of revenue included \$1.2 million and \$1.4 million of stock-based compensation expense for the years ended December 31, 2017 and 2016, respectively. In addition, professional services cost of revenue included \$2.2 million and \$1.8 million in depreciation and amortization for the years ended December 31, 2017 and 2016, respectively.

### Segment Gross Profit

	Year Ended December 31,					
	2017			2016		
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Period-to-Period Change Amount	Percentage
	(in thousands)					
Employer	\$ 58,347	38.0 %	\$ 61,951	41.4 %	\$ (3,604)	(5.8) %
Carrier	51,113	61.3	51,264	59.1	(151)	(0.3)
Gross profit	\$ 109,460	46.2 %	\$ 113,215	47.9 %	\$ (3,755)	(3.3) %

The decrease in employer gross profit was driven by a \$3.7 million increase in employer revenue more than offset by a \$7.3 million, or 8.3%, increase in employer cost of revenue. The increase in cost of revenue was primarily attributable to increased personnel-related costs to support our customer base as well as increased depreciation and amortization, technology infrastructure costs and security-related costs. Our employer cost of revenue included \$1.9 million and \$2.0 million of stock-based compensation expense for the years ended December 31, 2017 and 2016, respectively. In addition, our employer cost of revenue included \$7.3 million and \$6.0 million of depreciation and amortization for the years ended December 31, 2017 and 2016, respectively.

The carrier gross profit was flat as a \$3.4 million decrease in carrier revenue was accompanied by a \$3.2 million decrease in carrier cost of revenue. The decrease in cost of revenue was attributable to operational efficiencies achieved in supporting our carrier customers and a decrease in customer-specific development, as opposed to platform enhancements and development. Our carrier cost of revenue included \$0.6 million and \$0.8 million of stock-based compensation expense for the years ended December 31, 2017 and 2016, respectively. In addition, our carrier cost of revenue included \$4.5 million and \$4.1 million in depreciation and amortization for the years ended December 31, 2017 and 2016, respectively.



## Operating Expenses

	Year Ended December 31,					
	2017		2016		Period-to-Period Change	
	Amount	Percentage of Revenue	Amount	Percentage of Revenue	Amount	Percentage
	(in thousands)					
Sales and marketing	\$ 70,583	29.8 %	\$ 56,311	23.8 %	\$ 14,272	25.3 %
Research and development	\$ 49,549	20.9 %	\$ 56,610	23.9 %	\$ (7,061)	(12.5) %
General and administrative	\$ 27,268	11.5 %	\$ 32,750	13.8 %	\$ (5,482)	(16.7) %

The increase in sales and marketing expense was attributable to \$9.6 million higher salaries and personnel-related costs as we continued to invest in our direct sales channel. We increased the number sales associates during 2017, including hiring our Executive Vice-President, Global Sales. This increase included \$1.7 million increase in stock-based compensation. Additionally, travel-related expenses increased \$2.6 million and marketing expense, professional fees, technology infrastructure costs and other operating costs increased by \$1.8 million.

The decrease in research and development expense reflects a \$3.5 million decrease in salaries and personnel-related costs as the result of a decrease in the number of associates engaged in research and development activities. This decrease includes a \$1.5 million decrease in stock-based compensation. Additionally, costs related to contracted services decreased \$3.2 million.

The decrease in general and administrative expense was partly attributable to a \$2.9 million decrease in salaries and personnel-related costs, which includes a decrease in stock-based compensation expense of \$1.9 million. Sales tax expense decreased \$1.3 million related to resolving liabilities in certain states. We experienced additional decreases in professional and consulting fees of \$1.0 million attributable to discontinuing the use of certain consultants during 2017 and a decrease in bad debt expense of \$0.6 million.

## Critical Accounting Policies and Significant Judgments and Estimates

Our management's discussion and analysis of our financial condition and results of operations is based on our consolidated financial statements, which have been prepared in accordance with GAAP. The preparation of these consolidated financial statements requires us to make estimates and assumptions that affect the reported amounts of assets and liabilities, disclosure of contingent assets and liabilities at the date of the consolidated financial statements, and the reported amounts of revenue and expenses. In accordance with GAAP, we base our estimates on historical experience and on various other assumptions that we believe reasonable under the circumstances. Actual results might differ from these estimates under different assumptions or conditions.

While our significant accounting policies are more fully described in Note 2 to our consolidated financial statements appearing elsewhere in this Annual Report on Form 10-K, we believe the following accounting policies are critical to the process of making significant judgments and estimates in the preparation of our consolidated financial statements.

### Revenue Recognition and Deferred Revenue

We derive our revenue primarily from fees for software services and professional services sold to employers and insurance carriers. Revenues are recognized when control of these services is transferred to customers, in an amount that reflects the consideration we expect to be entitled to in exchange for those services. We also generate transactional revenue from the value of the policies or products enrolled through our marketplace.

We determine revenue recognition through the following steps:

- Identification of each contract with a customer;
- Identification of the performance obligations in the contract;
- Determination of the transaction price;
- Allocation of the transaction price to the performance obligations in the contract; and
- Recognition of revenue when, or as, performance obligations are satisfied.

The following are some significant judgments estimates involved in the recognition of revenue:

- Determination of standalone selling prices based on our overall pricing objectives, taking into consideration market conditions and other factors, including the value of our contracts, the software services sold, customer size and complexity, and the number and types of users under the contracts;
- Allocation of transaction price to the separate performance obligations based on their relative standalone selling prices;
- Estimation of hours or lives as a measure of progress; and
- Reduction of revenue for risks from collectability, policy cancellation and termination.

### ***Convertible Senior Notes***

We calculated the fair value of the liability portion of the convertible senior notes using an implied interest rate. The rate was estimated based on market data available for publicly traded, senior unsecured corporate bonds issued by companies in the same industry and with similar maturity, assuming no conversion option. Assumptions used in the estimate represent what market participants would use in pricing the equity component, including market interest rates, credit standing, and yield curves.

### ***Accounts Receivable and Allowances for Doubtful Accounts and Returns***

We state accounts receivable at realizable value, net of an allowance for doubtful accounts and estimated returns. We maintain the allowance for doubtful accounts for estimated losses expected to result from the inability of some customers to make payments as they become due. We base our estimated allowance on our analysis of past due amounts and ongoing credit evaluations. Historically, our actual collection experience has not varied significantly from our estimates, due primarily to our credit and collection policies and the financial strength of our customers.

The allowances for returns are accounted for as reductions of revenue and are estimated based on the Company's periodic assessment of historical experience and trends. The Company considers factors such as the time lag since the initiation of revenue recognition, historical reasons for adjustments, new customer volume, complexity of billing arrangements, timing of software availability, and past due customer billings.

### ***Stock-Based Compensation***

We currently issue restricted stock units under our stock plans. Stock-based awards granted to associates, directors, and non-associate third parties are measured at fair value at each grant date. We recognize stock-based compensation expense, net of forfeitures, ratably over the requisite service period of the option award. Restricted stock unit awards generally vest 25% on each anniversary of the grant date over 4 years, however we have granted awards that vest immediately as well as awards that vest annually over 3 years and 5 years.

As part of our management incentive program, we granted performance restricted stock units, which have vesting terms that are dependent upon the achievement of certain financial performance targets. Compensation expense for performance restricted stock units, which are accounted for as equity awards, is recognized over the requisite service period when it is probable that the award will vest. Significant judgment is involved in assessing the probability of achieving performance measures.

We determined fair value for restricted stock unit awards based on the closing price of our common stock on the date of grant or, if not a trading day, the trading day following the grant date.

Based upon the closing stock price of \$45.72 on December 31, 2018, the aggregate intrinsic value of outstanding options to purchase shares of our common stock as of December 31, 2018 was \$8.4 million, all of which was related to vested options. The aggregate intrinsic value of outstanding restricted stock units that are expected to vest as of December 31, 2018 was \$92.2 million, of which all were unvested.

## **Liquidity and Capital Resources**

### ***Sources of Liquidity***

As of December 31, 2018, our primary sources of liquidity were our cash and cash equivalents totaling \$190.9 million, \$21.1 million in accounts receivables, net of allowance, and unused availability under a revolving line of credit of \$77.3 million, without taking into account the borrowing base limit. The terms of our revolving line of credit are described in Note 8 of our consolidated financial statements included elsewhere in this Annual Report on Form 10-K.

In December 2018, we issued \$240 million aggregate principal amount of 1.25% convertible senior notes due December 15, 2023, unless earlier purchased by us or converted by the holder pursuant to their terms. Interest is payable semiannually in arrears on June 15 and December 15 of each year. Upon conversion, we will pay or deliver, as the case may be, cash, shares of our common stock or a combination, at our election. The convertible senior notes have an initial conversion rate of 18.8076 shares of common stock per \$1,000 principal amount. This represents an initial effective conversion price of approximately \$53.17 per share of common stock, with an aggregate of 4,513,824 shares issuable upon conversion. The terms of the convertible senior notes are described in Note 7 of our consolidated financial statements included elsewhere in this Annual Report on Form 10-K.

In December 2018, we amended our revolving line of credit agreement. The amendment altered definitions and amended sections of the agreement to allow for the convertible senior note financing. Additionally, in March 2018, we amended our revolving line of credit agreement. The amendment altered definitions to accommodate our adoption of Topic 606.

We are bound by customary affirmative and negative covenants in connection with the revolving line of credit, including financial covenants related to liquidity and EBITDA. In the event of a default, the lenders may declare all obligations immediately due and stop advancing money or extending credit under the line of credit. The line of credit is collateralized by substantially all of our tangible and intangible assets, including intellectual property and the equity of our subsidiaries. As of December 31, 2018, there were no amounts outstanding or due under the revolving line of credit.

Our cash flows from operations has improved in recent years and turned positive for the year ended December 31, 2018. We expect this trend to continue in at least the near term as we continue to achieve economies of scale.

Based on our current level of operations and anticipated growth, we believe our future cash flows from operating activities and existing cash balances will be sufficient to meet our cash requirements for at least the next 12 months.

Going forward, we may access capital markets to raise additional equity or debt financing for various business reasons, including required debt payments and acquisitions. The timing, term, size, and pricing of any such financing will depend on investor interest and market conditions, and there can be no assurance that we will be able to obtain any such financing on favorable terms or at all.

### ***Operating and Capital Expenditure Requirements***

We believe that our existing cash and cash equivalents balances, cash generated from operations, and our ability to draw on the revolving line of credit will be sufficient to meet our anticipated cash requirements through at least the next 12 months. Our future capital requirements will depend on many factors, including our customer growth rate, subscription renewal activity, the timing and extent of development efforts, the expansion of sales and marketing activities, the introduction of new and enhanced services offerings, and the continuing market acceptance of our services. We might require additional capital beyond our currently anticipated amounts. If our available cash and cash equivalents balances are insufficient to satisfy our liquidity requirements, we may seek to sell equity or convertible debt securities or enter into an additional credit facility. The sale of equity and convertible debt securities may result in dilution to our stockholders and those securities may have rights senior to those of our common shares. If we raise additional funds through the issuance of convertible debt securities, these securities could contain covenants that would restrict our operations. Additional capital might not be available on reasonable terms, or at all.

## Contractual Obligations and Commitments

Our principal commitments consist of obligations under our outstanding credit facility, non-cancelable leases for our office space and computer equipment and purchase commitments for our co-location and other support services. The following table summarizes these contractual obligations at December 31, 2018. Future events could cause actual payments to differ from these estimates.

Contractual Obligations	Payment due by period				
	Total	Less than 1 year	1-3 years	3-5 years	More than 5 years
	(in thousands)				
Long-term debt--Convertible senior notes	\$ 240,000	\$ -	\$ -	\$ 240,000	\$ -
Long-term debt--Revolving line of credit (1)	-	-	-	-	-
Operating lease obligations	12,973	1,350	2,041	2,068	7,514
Capital lease obligations	47,426	5,542	7,038	6,269	28,577
Financing obligations, build-to-suit leases	102,300	6,550	13,696	14,530	67,524
Financing obligations, other	4,167	1,952	1,974	241	-
Purchase commitments	276	276	-	-	-
<b>Total</b>	<b>\$ 407,142</b>	<b>\$ 15,670</b>	<b>\$ 24,749</b>	<b>\$ 263,108</b>	<b>\$ 103,615</b>

(1) Repayment of the revolving line of credit is due at end of the term in 2020. Early repayment is allowed. Interest is paid monthly.

In December 2018, we issued \$240 million of convertible senior notes that pay interest at 1.25% and mature December 2023. The terms of the notes are disclosed in more detail in Note 2 of our consolidated financial statements included elsewhere in this Annual Report on Form 10-K.

Borrowing limit under our revolving line of credit agreement is \$95.0 million. The agreement terminates on February 20, 2020. Borrowing capacity under this agreement is subject to a borrowing base limit that is a function of our monthly recurring revenue as adjusted to reflect lost customer revenue during the previous three calendar months. Therefore, credit available under our line of credit may be less than the \$95.0 million borrowing limit. Advances under the revolving line of credit agreement bear interest at the prime rate as published in the Wall Street Journal plus a margin based on the Company's liquidity that ranges between 0.75% and 1.25%. The Company is charged an unused line fee under this arrangement at a rate based on its liquidity of 0.300% to 0.375% per year. Any outstanding principal is due at the end of the term. Available credit was \$77.3 million as of December 31, 2018.

In December 2016, we entered into a cancellable lease agreement to build additional office space on our headquarters campus. In March 2018, our landlord extended certain terms of the agreement. Under this agreement and extension, we may commence construction on or about April 1, 2019 for a target lease commencement date of July 1, 2020. We can terminate the agreement prior to April 1, 2019 subject to reimbursing the lessor for reasonable pre-agreed out-of-pocket expenses. Annual rent obligation for the first year is \$4.4 million and increases 2% each subsequent year during the 15-year lease term. We can renew the lease for five, one-year terms. The aggregate minimum lease payments are approximately \$75.8 million and are not reflected in the contractual obligations table above.

## Off-Balance Sheet Arrangements

As of December 31, 2018, other than as disclosed in Note 7 and 16, we did not have any off-balance sheet arrangements, as defined in Item 303(a)(4)(ii) of SEC Regulation S-K, such as the use of unconsolidated subsidiaries, structured finance, or special purpose entities. We are not the primary beneficiary of, nor do we have a controlling financial interest in, any variable interest entity. Accordingly, we have not consolidated any variable interest entities.

## Recent Accounting Pronouncements

In June 2016, the FASB ASU No. 2016-13, "Measurement of Credit Losses on Financial Instruments." The purpose of this ASU is to require a financial asset measured at amortized cost basis to be presented at the net amount expected to be collected. Credit losses relating to available-for-sale debt securities should be recorded through an allowance for credit losses. This ASU is effective for interim and annual reporting periods beginning after December 15, 2019. We are currently evaluating the impact of this guidance on our consolidated financial statements.

In February 2016, the FASB issued ASU No. 2016-02 "Leases (Topic 842)". The amendments in this update require lessees, among other things, to recognize lease assets and lease liabilities on the balance sheet for those leases classified as operating leases under previous authoritative guidance. This update also introduces new disclosure requirements for leasing arrangements and is effective for us beginning January 1, 2019. We will apply Topic 842 without presenting comparative period financial statements, thus will recognize a cumulative-effect adjustment to the opening balance of retained earnings in 2019. We plan to utilize the following additional significant transition elections:

- Elect the package of three practical expedients to not reassess:
  - whether any expired or existing contracts are or contain a lease;
  - the classification of any expired or existing leases; and
  - the treatment of initial direct costs.
- Adopt a policy to not separate lease and associated nonlease components for all classes of assets. We will apply this policy to all existing leases on transition as well as new leases going forward.

We are continuing to evaluate the effect of adoption of this standard on our consolidated financial statements. We expect our consolidated financial statements to be significantly affected by the following:

- Assets and related financing obligations for our existing build-to-suit lease arrangements will be derecognized with a cumulative adjustment to retained earnings. These leases will be transitioned to the new standard based on a proforma analysis of the lease balances as of the transition date as if they had been a lease under ASC 840. Based on this analysis, the land component of these leases will be combined with the remainder of the lease obligation. Currently, this obligation is accounted for separately and recognized as part of facility expense. The following impacts are expected on our consolidated financial statements:
  - Operating expenses will increase as depreciation expense related to the buildings will increase as a result of shortening the period of depreciation from the estimated life of the asset to the expected term of the lease.
  - Interest expense will decrease as a result of a discount rate that is lower than the rate required for build-to-suit accounting.
- Lease liabilities and right-of-use, or ROU, assets related to existing operating lease obligations (including lease and associated non-lease components) will be recorded on the balance sheet.
- Lease liabilities and ROU assets will be recorded related to payment obligations for nonlease components (e.g. common area maintenance and equipment maintenance) associated with existing capital lease components.

Total net cash flows will not be impacted by adoption of the new lease standard; however, classification of some transactions are expected to move between operating, investing and financing activities.

We are evaluating other accounting standards and exposure drafts that have been issued or proposed by the FASB or other standards setting bodies that do not require adoption until a future date to determine whether adoption will have a material impact on our consolidated financial statements.

### ***Item 7A. Quantitative and Qualitative Disclosures About Risk.***

Market risk is the risk of loss to future earnings, values or future cash flows that may result from changes in the price of a financial instrument. The value of a financial instrument might change as a result of changes in interest rates, exchange rates, commodity prices, equity prices and other market changes. We do not use derivative financial instruments for speculative, hedging or trading purposes, although in the future we might enter into exchange rate hedging arrangements to manage the risks described below.

#### ***Interest Rate Risk***

We are exposed to market risk related to changes in interest rates. Borrowings under the revolving line of credit agreement, which was entered into in February 2015 and subsequently amended, bear interest at rates that are variable. Increases in the Prime Rate would increase the interest rate on borrowings under the revolving line of credit.

Changes in interest rates may also impact gains or losses from the conversion of our outstanding convertible senior notes. In December 2018, we issued \$240 million in aggregate principal amount of our 1.25% convertible senior notes due 2023, or the Notes. Upon certain events and/or if certain conditions are met, the Notes can be redeemed into cash, or converted into cash, shares or combination of cash and shares. Upon conversion or redemption, we are required to record a gain or loss for the difference between the fair value of the debt to be extinguished and its corresponding net carrying value. The fair value of the debt to be extinguished depends on our then-current incremental borrowing rate. If our incremental borrowing rate at the time of conversion is higher or lower than the implied interest rate of the Notes, we will record a gain or loss in our consolidated statement of operations during the period in which the Notes are converted. The implicit interest rate for the notes is 7.30%. An incremental borrowing rate that is a hypothetical 100 basis points lower than the implicit interest rate upon conversion of \$240 million aggregate principal amount of the Notes would result in a loss of approximately \$2.4 million.

#### ***Interest Rate Sensitivity***

We are subject to interest rate risk in connection with borrowings under the revolving line of credit agreement, which are subject to a variable interest rate. At December 31, 2018, there were no amounts due under the agreement. Any debt we incur in the future may also bear interest at variable rates.

#### ***Inflation Risk***

We do not believe that inflation has had a material effect on our business, financial condition, or results of operations. We continue to monitor the impact of inflation in order to minimize its effects through pricing strategies, productivity improvements and cost reductions. If our costs were to become subject to significant inflationary pressures, we may not be able to fully offset such higher costs through price increases. Our inability or failure to do so could harm our business, financial condition, and results of operations.

### ***Item 8. Financial Statements and Supplementary Data.***

The information required by this Item is set forth in the Consolidated Financial Statements and Notes thereto beginning at page F-1 of this Report.

### ***Item 9. Changes in and Disagreements With Accountants on Accounting and Financial Disclosures.***

None.

### ***Item 9A. Controls and Procedures.***

#### ***Evaluation of Disclosure Controls and Procedures***

Under the supervision and with the participation of our management, including our President and Chief Executive Officer and our Chief Financial Officer, we conducted an evaluation of the effectiveness

of the design and operation of our disclosure controls and procedures, as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act, as of the end of the period covered by this report.

In designing and evaluating our disclosure controls and procedures, management recognizes that any disclosure controls and procedures, no matter how well designed and operated, can provide only reasonable assurance of achieving the desired control objectives. In addition, the design of disclosure controls and procedures must reflect the fact that there are resource constraints and that management is required to apply its judgment in evaluating the benefits of possible controls and procedures relative to their costs.

Based on their evaluation, our President and Chief Executive Officer and our Chief Financial Officer concluded that as of December 31, 2018 our disclosure controls and procedures are designed to, and are effective to, provide assurance at a reasonable level that the information we are required to disclose in reports that we file or submit under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in SEC rules and forms, and that such information is accumulated and communicated to our management, including our President and Chief Executive Officer and our Chief Financial Officer, as appropriate, to allow timely decisions regarding required disclosures as of December 31, 2018.

#### *Management's Annual Report on Internal Control Over Financial Reporting*

Our management, including our President and Chief Executive Officer and our Chief Financial Officer, is responsible for establishing and maintaining adequate internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act). Internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with U.S. GAAP. Our internal control over financial reporting includes those policies and procedures that: (i) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of our assets; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with U.S. GAAP, and that our receipts and expenditures are being made only in accordance with authorizations of our management and directors; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of our assets that could have a material effect on the financial statements.

Under the supervision and with the participation of our management, including our President and Chief Executive Officer and our Chief Financial Officer, we conducted an evaluation of the effectiveness of our internal control over financial reporting as of December 31, 2018, based on the Internal Control—Integrated Framework (2013) issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) (2013 Framework). Based on this evaluation under the 2013 Framework, our President and Chief Executive Officer and our Chief Financial Officer have concluded that our internal control over financial reporting was effective as of December 31, 2018.

#### *Changes in Internal Control Over Financial Reporting*

No change in internal control over financial reporting occurred during the most recent fiscal quarter with respect to our operations, which has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

#### *Attestation Report of Registered Public Accounting Firm*

Our independent registered public accounting firm, Ernst & Young, LLP, has issued an attestation report on the effectiveness of our internal controls over financial reporting as of December 31, 2018, which appears on page F-3 of this Report.

#### **Item 9B. Other Information.**

None.

## PART III

### **Item 10. Directors, Executive Officers and Corporate Governance.**

Information required by this Item concerning our directors is incorporated by reference from the sections captioned “Election of Directors” and “Corporate Governance Matters” contained in our proxy statement related to the 2019 Annual Meeting of Stockholders currently scheduled to be held on May 31, 2019 which we intend to file with the Securities and Exchange Commission within 120 days of the end of our 2018 fiscal year pursuant to General Instruction G(3) of Form 10-K.

Our board of directors has determined that of the members of the Audit Committee, Messrs. Pelzer, Swad and Dennerline are independent within the meaning of the Nasdaq Stock Market listing rules and meet the additional test for independence for audit committee members imposed by Securities and Exchange Commission regulation and the Nasdaq Stock Market listing rules. Our board has also determined that Mr. Pelzer is an “audit committee financial expert” as defined in Item 407(d)(5)(ii) of Regulation S-K.

We have adopted a code of ethics relating to the conduct of our business by all of our employees, officers, and directors, as well as a code of conduct specifically for our principal executive officer and senior financial officers. Each of these policies is posted on our website, [www.benefitfocus.com](http://www.benefitfocus.com).

The information required by this Item concerning our executive officers is set forth at the end of Part I of this Annual Report on Form 10-K.

The information required by this Item concerning compliance with Section 16(a) of the United States Securities Exchange Act of 1934, as amended, is incorporated by reference from the section of the proxy statement captioned “Section 16(a) Beneficial Ownership Reporting Compliance”.

### **Item 11. Executive Compensation.**

The information required by this Item is incorporated by reference to the information under the sections captioned “Executive Compensation,” “Director Compensation” and “Compensation Committee Interlocks and Insider Participation” in the proxy statement.

### **Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.**

The following table sets forth the indicated information as of December 31, 2018 with respect to our equity compensation plans:

Plan Category	Number of securities to be issued upon exercise of outstanding options, warrants and rights	Weighted-average exercise price of outstanding options, warrants and rights	Number of securities remaining available for future issuance under equity compensation plans
<b>Equity compensation plans approved by security holders</b>			
2016 Employee Stock Purchase Plan	-	\$ -	125,374
Amended and Restated 2012 Stock Plan	2,343,935	\$ 0.82	1,731,799
Amended and Restated 2000 Stock Option Plan	63,562	\$ 5.00	-
<b>Total</b>	<b>2,407,497</b>	<b>\$ 0.93</b>	<b>1,857,173</b>

Our equity compensation plans consist of the Benefitfocus, Inc. 2016 Employee Stock Purchase Plan, Amended and Restated 2012 Stock Plan, and the Amended and Restated 2000 Stock Option Plan, which were approved by our stockholders. We do not have any equity compensation plans or arrangements that have not been approved by our stockholders.



The other information required by this Item is incorporated by reference to the information under the section captioned “Security Ownership of Certain Beneficial Owners and Management” contained in the proxy statement.

***Item 13. Certain Relationships and Related Transactions, and Director Independence.***

The information required by this Item is incorporated by reference to the information under the section captioned “Certain Relationships and Related Party Transactions” and “Corporate Governance Matters” in the proxy statement.

***Item 14. Principal Accounting Fees and Services.***

The information required by this Item is incorporated by reference to the information under the section captioned “Audit Committee Report” in the proxy statement.

## PART IV

### **Item 15. Exhibits, Financial Statement Schedules.**

#### **(a) 1. Financial Statements.**

The following statements are filed as part of this Annual Report on Form 10-K:

#### **AUDITED CONSOLIDATED FINANCIAL STATEMENTS**

<a href="#">Report of Independent Registered Public Accounting Firm</a>	F-2
<a href="#">Consolidated Balance Sheets as of December 31, 2018 and 2017</a>	F-4
<a href="#">Consolidated Statements of Operations and Comprehensive Loss for the Years Ended December 31, 2018, 2017 and 2016</a>	F-5
<a href="#">Consolidated Statements of Changes in Stockholders' Equity (Deficit) for the Years Ended December 31, 2018, 2017 and 2016</a>	F-6
<a href="#">Consolidated Statements of Cash Flows for the Years Ended December 31, 2018, 2017 and 2016</a>	F-7
<a href="#">Notes to Consolidated Financial Statements</a>	F-8
<b>2. Financial Statement Schedules.</b>	
<a href="#">Schedule II-Valuation and Qualifying Accounts</a>	F-37

Schedules not listed above have been omitted because the information required to be set forth therein is not applicable or is shown in the financial statements or notes thereto.

#### **(b) Exhibits.**

Exhibit Number	Exhibit Title	Incorporated by Reference (Unless Otherwise Indicated)			
		Form	File	Exhibit	Filing Date
3.1	<a href="#">Restated Certificate of Incorporation of Benefitfocus, Inc.</a>	10-Q	—	3.1.3	November 12, 2013
3.2	<a href="#">Amended and Restated Bylaws of Benefitfocus, Inc.</a>	8-K	—	3.2.1	September 19, 2016
4.1	<a href="#">Specimen Certificate for Common Stock.</a>	S-1/A	333-190610	4.1	September 5, 2013
4.2	<a href="#">Form of Second Amended and Restated Investors' Rights Agreement, dated, 2013, by and among Benefitfocus, Inc. and certain stockholders named therein.</a>	S-1/A	333-190610	4.3	September 16, 2013
4.2.1	<a href="#">First Amendment to Second Amended and Restated Investors' Rights Agreement, dated February 24, 2015, by and among Benefitfocus, Inc. and certain stockholders named therein.</a>	10-K	—	4.3.1	February 27, 2015

4.3	<a href="#">Indenture of Benefitfocus, Inc. and U.S. National Bank, as Trustee, dated as of December 27, 2018.</a>	8-K	—	4.1	December 28, 2018
4.4	<a href="#">Form of 1.25% Convertible Senior Notes due 2023 (included in Exhibit 4.3).</a>	8-K	—	4.1	December 28, 2018
10.1	<a href="#">Form of Second Amended and Restated Voting Agreement, dated, 2013, by and among Benefitfocus, Inc., and certain stockholders named therein.</a>	S-1/A	333-190610	10.2	September 5, 2013
10.2	<a href="#">Amended and Restated 2000 Stock Option Plan.#</a>	S-1	333-190610	10.3	August 14, 2013
10.3	<a href="#">Form of Grant Notice and Stock Option Agreement under the Amended and Restated 2000 Stock Option Plan.#</a>	S-1	333-190610	10.5	August 14, 2013
10.4	<a href="#">Benefitfocus, Inc. Amended and Restated 2012 Stock Plan.#</a>	DEF 14A	—	—	April 25, 2014
10.5	<a href="#">Form of Grant Notice and Stock Option Agreement under the 2012 Stock Plan, as amended.#</a>	S-1	333-190610	10.6	August 14, 2013
10.6	<a href="#">Form of Management Incentive Bonus Program.#</a>	S-1	333-190610	10.7	August 14, 2013
10.6.1	<a href="#">Benefitfocus, Inc. Management Incentive Bonus Program.#</a>	DEF 14A	—	—	April 25, 2014
10.7	<a href="#">Employment Agreement, dated January 19, 2007, by and between Benefitfocus.com, Inc. and Mason R. Holland, Jr.#</a>	S-1	333-190610	10.8	August 14, 2013
10.8	<a href="#">Form of Employment Agreement.#</a>	S-1	333-190610	10.11	August 14, 2013
10.9	<a href="#">Form of Indemnification Agreement.#</a>	S-1	333-190610	10.12	August 14, 2013
10.10	<a href="#">Lease between Daniel Island Executive Center, LLC and Benefitfocus.com, Inc., dated as of January 1, 2009, as amended.</a>	S-1	333-190610	10.13	August 14, 2013
10.10.1	<a href="#">Third Amendment to Lease between Daniel Island Executive Center, LLC and Benefitfocus.com, Inc., dated as of December 12, 2016.</a>	8-K	—	10.13.1	December 14, 2016
10.11	<a href="#">Lease between Daniel Island Executive Center, LLC and Benefitfocus.com, Inc., dated as of May 31, 2005.</a>	S-1	333-190610	10.14	August 14, 2013

10.11.1	<a href="#">First Amendment to Lease between Daniel Island Executive Center, LLC and Benefitfocus.com, Inc., dated as of December 12, 2016.</a>	8-K	—	10.14.1	December 14, 2016
10.12	<a href="#">Master Business Agreement between Aetna Life Insurance Company and Benefitfocus.com, Inc., dated as of November 28, 2006.+</a>	S-1	333-190610	10.15	August 14, 2013
10.13	<a href="#">Lease between DIEC II, LLC and Benefitfocus.com, Inc., dated as of December 13, 2013.</a>	10-K	—	10.19	March 21, 2014
10.13.1	<a href="#">Amendment to Lease between DIEC II, LLC and Benefitfocus.com, Inc., dated as of December 12, 2016.</a>	8-K	—	10.16.1	December 14, 2016
10.14	<a href="#">Form of Independent Director Compensation Agreement.</a>	8-K	—	10.21	June 23, 2014
10.15	<a href="#">Securities Purchase Agreement, dated as of February 24, 2015, by and among Benefitfocus, Inc. and Mercer LLC.</a>	10-K	—	10.20	February 27, 2015
10.16	<a href="#">Right of First Offer Agreement, dated as of February 24, 2015, by and among Benefitfocus, Inc., Mercer LLC, GS Capital Partners VI Parallel, L.P., GS Capital Partners VI GmbH &amp; Co. KG, GS Capital Partners VI Fund, L.P., GS Capital Partners VI Offshore Fund, L.P., Oak Investment Partners XII, Limited Partnership and certain stockholders named therein.</a>	10-K	—	10.21	February 27, 2015

10.17	<a href="#">Employment Agreement, dated June 25, 2014, by and between Benefitfocus.com, Inc. and Ray August.#</a>	8-K	—	10.22	April 8, 2015
10.17.1	<a href="#">First Amendment to Employment Agreement, dated November 20, 2017, by and between Benefitfocus.com, Inc. and Raymond A. August.#</a>	10-K	—	10.18.1	March 15, 2018
10.18	<a href="#">Senior Secured Credit Facility, dated as of February 20, 2015, by and among Benefitfocus, Inc., Benefitfocus.com, Inc., Benefit Informatics, Inc., BenefitStore, Inc., several lenders, Silicon Valley Bank, as administrative agent, issuing lender and swingline lender and Comerica Bank, as documentation agent.</a>	10-Q	—	10.23	May 6, 2015
10.18.1	<a href="#">First Amendment Agreement, dated as of June 16, 2015, by and among Benefitfocus, Inc., Benefitfocus.com, Inc., Benefit Informatics, Inc., BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.</a>	8-K	—	10.25	June 16, 2015
10.18.2	<a href="#">Second Amendment Agreement, dated as of December 18, 2015, by and among Benefitfocus, Inc., Benefitfocus.com, Inc., Benefit Informatics, Inc., BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.</a>	10-K	—	10.23	February 25, 2016
10.18.3	<a href="#">Third Amendment Agreement, dated as of March 24, 2016, by and among Benefitfocus, Inc., Benefitfocus.com, Inc., BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.</a>	8-K	—	10.26	March 29, 2016

10.18.4	<a href="#">Fourth Amendment Agreement, dated as of October 28, 2016, by and among Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.+</a>	8-K	—	10.29	October 31, 2016
10.18.5	<a href="#">Fifth Amendment Agreement, dated as of December 12, 2016, by and among Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.</a>	8-K	—	10.32	December 14, 2016
10.18.6	<a href="#">Sixth Amendment Agreement, dated as of April 26, 2017, by and among Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.+</a>	10-Q	—	10.20.6	April 28, 2017
10.18.7	<a href="#">Seventh Amendment Agreement, dated as of March 29, 2018, by and among Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.+</a>	8-K	—	10.19.7	April 2, 2018
10.18.8	<a href="#">Eighth Amendment Agreement, dated as of December 19, 2018, by and among Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., several banks and other financial institutions or entities and Silicon Valley Bank, as administrative agent and collateral agent for lenders.++</a>				Filed herewith
10.19	<a href="#">Guarantee and Collateral Agreement, dated as of February 20, 2015, made by Benefitfocus, Inc., Benefitfocus.com, Inc., Benefit Informatics, Inc., BenefitStore, Inc., and other grantors, in favor of Silicon Valley Bank, as administrative agent.</a>	10-Q	—	10.24	May 6, 2015

10.20	<a href="#">Benefitfocus, Inc. 2016 Employee Stock Purchase Plan.#</a>	DEF14A	—	—	April 22, 2016
10.21	<a href="#">Waiver to Credit Agreement, dated as of September 1, 2016, by and among the Benefitfocus, Inc., Benefitfocus.com, Inc. and BenefitStore, Inc., the several banks and other financial institutions or entities party thereto and Silicon Valley Bank, as administration agent and collateral agent for the lenders.</a>	8-K	—	10.28	September 1, 2016
10.22	<a href="#">Lease between DIEC II, LLC and Benefitfocus.com, Inc., dated as of December 12, 2016.</a>	8-K	—	10.31	December 14, 2016
10.23	<a href="#">Employment Agreement, dated June 30, 2017, by and between Benefitfocus.com and Jonathon Dussault.#</a>	10-Q	—	10.29	August 8, 2017
10.24	<a href="#">Form of Call Option Transaction Notice.</a>	8-K	—	10.1	December 28, 2018
10.25	<a href="#">Employment Agreement, dated June 30, 2017, by and between Benefitfocus.com and James Restivo.#</a>				Filed herewith
21.1	<a href="#">List of Subsidiaries of Registrant.</a>	—	—	—	Filed herewith
23.1	<a href="#">Consent of Ernst &amp; Young LLP.</a>	—	—	—	Filed herewith
31.1	<a href="#">Certification of the President and Chief Executive Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</a>	—	—	—	Filed herewith
31.2	<a href="#">Certification of the Chief Financial Officer pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</a>	—	—	—	Filed herewith
32.1	<a href="#">Certification of the President and Chief Executive Officer, and the Chief Financial Officer pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.</a>	—	—	—	Filed herewith
101.INS	XBRL Instance Document.	—	—	—	Filed herewith
101.SCH	XBRL Taxonomy Extension Schema Document.	—	—	—	Filed herewith
101.CAL	XBRL Taxonomy Extension Calculation Linkbase Document.	—	—	—	Filed herewith
101.DEF	XBRL Taxonomy Extension Definition Linkbase Document.	—	—	—	Filed herewith
101.LAB	XBRL Taxonomy Extension Label Linkbase Document.	—	—	—	Filed herewith

101.PRE XBRL Taxonomy Extension — — — Filed herewith  
Presentation Linkbase  
Document.

- 
- # Management contract or compensatory plan.
  - + The registrant has received confidential treatment with respect to portions of this exhibit. Those portions have been omitted from the exhibit and filed separately with the SEC.
  - ++ The registrant has requested confidential treatment with respect to portions of this exhibit. Those portions have been omitted from the exhibit and filed separately with the SEC.

**Item 16. Form 10-K Summary.**

None.



## SIGNATURES

Pursuant to the requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

### Benefitfocus, Inc.

Date: February 26, 2019

By: /s/ Jonathon E. Dussault  
Jonathon E. Dussault  
Chief Financial Officer

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed by the following persons on behalf of the Registrant and in the capacities and on the dates indicated.

<u>Signature</u>	<u>Capacity</u>	<u>Date</u>
<u>/s/ Mason R. Holland, Jr.</u> Mason R. Holland, Jr.	Chairman of the Board of Directors	February 26, 2019
<u>/s/ Raymond A. August</u> Raymond A. August	President and Chief Executive Officer (principal executive officer)	February 26, 2019
<u>/s/ Jonathon E. Dussault</u> Jonathon E. Dussault	Chief Financial Officer (principal financial and accounting officer)	February 26, 2019
<u>/s/ Douglas A. Dennerline</u> Douglas A. Dennerline	Director	February 26, 2019
<u>/s/ Joseph P. DiSabato</u> Joseph P. DiSabato	Director	February 26, 2019
<u>/s/ A. Lanham Napier</u> A. Lanham Napier	Director	February 26, 2019
<u>/s/ Francis J. Pelzer V</u> Francis J. Pelzer V	Director	February 26, 2019
<u>/s/ Stephen M. Swad</u> Stephen M. Swad	Director	February 26, 2019
<u>/s/ Ana M. White</u> Ana M. White	Director	February 26, 2019

**BENEFITFOCUS, INC.**  
**INDEX TO CONSOLIDATED FINANCIAL STATEMENTS**

**AUDITED CONSOLIDATED FINANCIAL STATEMENTS**

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<b>CONSOLIDATED FINANCIAL STATEMENT SCHEDULE</b>	
<a href="#">Schedule II-Valuation and Qualifying Accounts</a>	F-37

## Report of Independent Registered Public Accounting Firm

To the Stockholders and the Board of Directors of Benefitfocus, Inc.

### Opinion on the Financial Statements

We have audited the accompanying consolidated balance sheets of Benefitfocus, Inc. (the Company) as of December 31, 2018 and 2017, the related consolidated statements of operations and comprehensive loss, changes in stockholders' equity (deficit) and cash flows for each of the three years in the period ended December 31, 2018, and the related notes and the financial statement schedule listed in the Index at Item 15(a)(2) (collectively referred to as the "consolidated financial statements"). In our opinion, the consolidated financial statements present fairly, in all material respects, the financial position of the Company at December 31, 2018 and 2017, and the results of its operations and its cash flows for each of the three years in the period ended December 31, 2018, in conformity with U.S. generally accepted accounting principles.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States) (PCAOB), the Company's internal control over financial reporting as of December 31, 2018, based on criteria established in Internal Control-Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (2013 framework) and our report dated February 26, 2019 expressed an unqualified opinion thereon.

### Adoption of New Accounting Standards

As discussed in Note 2 to the consolidated financial statements, the Company changed its method for accounting for revenue recognition from contracts with customers due to the adoption of ASU No. 2014-09, *Revenue from Contracts with Customers (Topic 606)*, as amended, using the full retrospective adoption method.

### Basis for Opinion

These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on the Company's financial statements based on our audits. We are a public accounting firm registered with the PCAOB and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audits in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or fraud. Our audits included performing procedures to assess the risks of material misstatement of the financial statements, whether due to error or fraud, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statements. We believe that our audits provide a reasonable basis for our opinion.

/s/ Ernst & Young LLP

We have served as the Company's auditor since 2008.

Raleigh, North Carolina  
February 26, 2019

## Report of Independent Registered Public Accounting Firm

To the Stockholders and the Board of Directors of Benefitfocus, Inc.

### Opinion on Internal Control Over Financial Reporting

We have audited Benefitfocus, Inc.'s internal control over financial reporting as of December 31, 2018, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (2013 Framework) (the COSO criteria). In our opinion, Benefitfocus, Inc. (the Company) maintained, in all material respects, effective internal control over financial reporting as of December 31, 2018, based on the COSO criteria.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States) (PCAOB), the consolidated balance sheets of Benefitfocus, Inc. as of December 31, 2018 and 2017, the related consolidated statements of operations and comprehensive loss, changes in stockholders' equity (deficit) and cash flows for each of the three years in the period ended December 31, 2018, and the related notes and the financial statement schedule listed in the Index at Item 15(a)(2) and our report dated February 26, 2019 expressed an unqualified opinion thereon.

### Basis for Opinion

The Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting included in the accompanying Management's Annual Report on Internal Controls Over Financial Reporting. Our responsibility is to express an opinion on the Company's internal control over financial reporting based on our audit. We are a public accounting firm registered with the PCAOB and are required to be independent with respect to the Company in accordance with the U.S. federal securities laws and the applicable rules and regulations of the Securities and Exchange Commission and the PCAOB.

We conducted our audit in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects.

Our audit included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, testing and evaluating the design and operating effectiveness of internal control based on the assessed risk, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

### Definition and Limitations of Internal Control Over Financial Reporting

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

/s/ Ernst & Young LLP  
Raleigh, North Carolina  
February 26, 2019

**BENEFITFOCUS, INC.**  
**CONSOLIDATED BALANCE SHEETS**  
(in thousands, except share and per share data)

	As of December 31,	
	2018	2017
<b>Assets</b>		
Current assets:		
Cash and cash equivalents	\$ 190,928	\$ 55,335
Accounts receivable, net	21,077	30,091
Contract, prepaid and other current assets	16,667	15,859
Total current assets	228,672	101,285
Property and equipment, net	69,965	72,681
Intangible assets, net	-	150
Goodwill	1,634	1,634
Deferred contract costs and other non-current assets	13,668	16,253
Total assets	<u>\$ 313,939</u>	<u>\$ 192,003</u>
<b>Liabilities and stockholders' deficit</b>		
Current liabilities:		
Accounts payable	\$ 8,687	\$ 4,260
Accrued expenses	11,461	9,110
Accrued compensation and benefits	17,269	14,250
Deferred revenue, current portion	36,540	43,804
Revolving line of credit, current portion	-	24,000
Financing and capital lease obligations, current portion	4,486	3,423
Total current liabilities	78,443	98,847
Deferred revenue, net of current portion	9,323	11,223
Convertible senior notes	176,692	-
Revolving line of credit, net of current portion	-	32,246
Financing and capital lease obligations, net of current portion	57,116	55,597
Other non-current liabilities	2,575	2,809
Total liabilities	324,149	200,722
Commitments and contingencies		
Stockholders' deficit:		
Preferred stock, par value \$0.001, 5,000,000 shares authorized, no shares issued and outstanding at December 31, 2018 and December 31, 2017	-	-
Common stock, par value \$0.001, 50,000,000 shares authorized, 32,017,773 and 31,307,989 shares issued and outstanding at December 31, 2018 and December 31, 2017, respectively	32	31
Additional paid-in capital	403,631	352,496
Accumulated deficit	(413,873)	(361,246)
Total stockholders' deficit	(10,210)	(8,719)
Total liabilities and stockholders' deficit	<u>\$ 313,939</u>	<u>\$ 192,003</u>

The accompanying notes are an integral part of the Consolidated Financial Statements.

**BENEFITFOCUS, INC.**  
**CONSOLIDATED STATEMENTS OF OPERATIONS AND COMPREHENSIVE LOSS**  
(in thousands, except share and per share data)

	Year Ended December 31,		
	2018	2017	2016
Revenue	\$ 258,721	\$ 236,842	\$ 236,523
Cost of revenue	129,277	127,382	123,308
Gross profit	129,444	109,460	113,215
Operating expenses:			
Sales and marketing	78,179	70,583	56,311
Research and development	47,902	49,549	56,610
General and administrative	43,062	27,268	32,750
Total operating expenses	169,143	147,400	145,671
Loss from operations	(39,699)	(37,940)	(32,456)
Other income (expense):			
Interest income	250	182	138
Interest expense on building lease financing obligations	(7,471)	(7,450)	(6,826)
Interest expense on other borrowings	(5,685)	(4,931)	(1,095)
Other income (expense)	6	(140)	(90)
Total other expense, net	(12,900)	(12,339)	(7,873)
Loss before income taxes	(52,599)	(50,279)	(40,329)
Income tax expense	28	15	17
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)
Comprehensive loss	\$ (52,627)	\$ (50,294)	\$ (40,346)
Net loss per common share:			
Basic and diluted	\$ (1.66)	\$ (1.62)	\$ (1.36)
Weighted-average common shares outstanding:			
Basic and diluted	31,756,415	31,052,378	29,589,857

The accompanying notes are an integral part of the Consolidated Financial Statements.

**BENEFITFOCUS, INC.**  
**CONSOLIDATED STATEMENTS OF CHANGES IN STOCKHOLDERS' EQUITY (DEFICIT)**  
(in thousands, except share and per share data)

	Common Stock, \$0.001 Par Value		Additional	Accumulated	Total
	Shares	Par Value	Paid-in Capital	Deficit	Stockholders' Equity (Deficit)
Balance, December 31, 2015 (as previously reported)	29,194,332	\$ 29	\$ 310,304	\$ (328,342)	\$ (18,009)
Cumulative effect adjustment from adoption of revenue recognition standard	–	–	(2,805)	58,127	55,322
Balance, January 1, 2016	29,194,332	\$ 29	\$ 307,499	\$ (270,215)	\$ 37,313
Exercise of stock options	944,706	1	6,869	–	6,870
Issuance of common stock upon vesting of restricted stock units, net of shares surrendered for taxes	289,976	–	(202)	–	(202)
Stock-based compensation expense	–	–	18,088	–	18,088
Net loss	–	–	–	(40,346)	(40,346)
Balance, December 31, 2016	30,429,014	\$ 30	\$ 332,254	\$ (310,561)	\$ 21,723
Cumulative effect adjustment from adoption of new accounting standard	–	–	391	(391)	–
Exercise of stock options	463,870	1	3,457	–	3,458
Issuance of common stock upon vesting of restricted stock units	406,936	–	–	–	–
Issuance of common stock under Employee Stock Purchase Plan, or ESPP	8,169	–	257	–	257
Stock-based compensation expense	–	–	16,137	–	16,137
Net loss	–	–	–	(50,294)	(50,294)
Balance, December 31, 2017	31,307,989	\$ 31	\$ 352,496	\$ (361,246)	\$ (8,719)
Exercise of stock options	29,908	–	186	–	186
Issuance of common stock upon vesting of restricted stock units	663,419	1	(1)	–	–
Issuance of common stock under Employee Stock Purchase Plan, or ESPP	16,457	–	526	–	526
Purchase of convertible note capped call hedge	–	–	(33,024)	–	(33,024)
Equity component of convertible notes	–	–	56,950	–	56,950
Stock-based compensation expense	–	–	26,498	–	26,498
Net loss	–	–	–	(52,627)	(52,627)
Balance, December 31, 2018	<u>32,017,773</u>	<u>\$ 32</u>	<u>\$ 403,631</u>	<u>\$ (413,873)</u>	<u>\$ (10,210)</u>

The accompanying notes are an integral part of the Consolidated Financial Statements.

**BENEFITFOCUS, INC.**  
**CONSOLIDATED STATEMENTS OF CASH FLOWS**  
(in thousands)

	Year Ended December 31,		
	2018	2017	2016
<b>Cash flows from operating activities</b>			
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)
Adjustments to reconcile net loss to net cash and cash equivalents used in operating activities:			
Depreciation and amortization	15,815	15,906	13,073
Stock-based compensation expense	28,868	16,137	18,088
Interest accrual on financing obligations	7,521	7,500	6,827
Loss on disposal or impairment of property and equipment	7	157	141
Provision for doubtful accounts	364	75	667
Changes in operating assets and liabilities:			
Accounts receivable, net	8,650	2,800	(3,936)
Accrued interest on short-term investments	-	7	220
Contract, prepaid and other current assets	(570)	4,519	(6,716)
Deferred costs and other non-current assets	3,137	5,538	3,816
Accounts payable and accrued expenses	6,566	(3,015)	(859)
Accrued compensation and benefits	649	(3,097)	(3,337)
Deferred revenue	(9,165)	(1,922)	(12,537)
Other non-current liabilities	(234)	(248)	2,073
Net cash and cash equivalents provided by (used in) operating activities	<u>8,981</u>	<u>(5,937)</u>	<u>(22,826)</u>
<b>Cash flows from investing activities</b>			
Purchases of short-term investments held to maturity	-	-	(2,004)
Proceeds from short-term investments held to maturity	-	2,000	40,225
Purchases of property and equipment	(8,290)	(8,279)	(12,705)
Net cash and cash equivalents (used in) provided by investing activities	<u>(8,290)</u>	<u>(6,279)</u>	<u>25,516</u>
<b>Cash flows from financing activities</b>			
Draws on revolving line of credit	115,000	105,000	84,000
Payments on revolving line of credit	(171,246)	(89,000)	(74,000)
Proceeds from issuance of convertible notes	240,000	-	-
Payments of debt issuance costs and deferred financing costs	(6,000)	-	(379)
Purchase of convertible note capped call hedge	(33,024)	-	-
Proceeds from exercises of stock options and ESPP	712	3,715	6,870
Remittance of taxes upon vesting of restricted stock units	-	-	(202)
Payments on financing and capital lease obligations	(10,540)	(9,017)	(10,200)
Net cash and cash equivalents provided by financing activities	<u>134,902</u>	<u>10,698</u>	<u>6,089</u>
<b>Net increase (decrease) in cash and cash equivalents</b>	<b>135,593</b>	<b>(1,518)</b>	<b>8,779</b>
Cash and cash equivalents, beginning of year	55,335	56,853	48,074
<b>Cash and cash equivalents, end of year</b>	<b><u>\$ 190,928</u></b>	<b><u>\$ 55,335</u></b>	<b><u>\$ 56,853</u></b>
<b>Supplemental disclosure of non-cash investing and financing activities</b>			
Property and equipment purchases in accounts payable and accrued expenses	<u>\$ 244</u>	<u>\$ 389</u>	<u>\$ 699</u>
Property and equipment purchased with financing and capital lease obligations	<u>\$ 4,810</u>	<u>\$ -</u>	<u>\$ 28,032</u>
Post contract support purchased with financing obligations	<u>\$ 790</u>	<u>\$ -</u>	<u>\$ 1,048</u>
Debt issuance costs included in accounts payable and accrued expenses	<u>\$ 358</u>	<u>\$ -</u>	<u>\$ -</u>
<b>Supplemental disclosure of cash flow information</b>			
Income taxes paid	<u>\$ 28</u>	<u>\$ 14</u>	<u>\$ 7</u>
Interest paid	<u>\$ 11,884</u>	<u>\$ 10,911</u>	<u>\$ 6,655</u>

The accompanying notes are an integral part of the Consolidated Financial Statements



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## **1. Organization and Description of Business**

Benefitfocus, Inc. (the “Company”) provides a leading cloud-based benefits management platform for consumers, employers, insurance carriers, suppliers and brokers that is designed to simplify how organizations and individuals transact benefits. The financial statements of the Company include the financial position and operations of its wholly owned subsidiaries, Benefitfocus.com, Inc. and BenefitStore, Inc.

## **2. Summary of Significant Accounting Policies**

### **Principles of Consolidation**

These consolidated financial statements have been prepared in accordance with U.S. generally accepted accounting principles (“GAAP”). The consolidated financial statements include the accounts of the Company and its wholly owned subsidiaries. All intercompany accounts and transactions have been eliminated in consolidation. The Company is not the primary beneficiary of, nor does it have a controlling financial interest in, any variable interest entity. Accordingly, the Company has not consolidated any variable interest entity.

### **Use of Estimates**

The preparation of financial statements in conformity with GAAP requires the Company to make estimates and assumptions that affect the reported amounts in the consolidated financial statements and accompanying notes. Such estimates include revenue recognition and related reserves, allowances for doubtful accounts and returns, valuations of deferred income taxes, long-lived assets, warrants, capitalizable software development costs and the related amortization, stock-based compensation, the determination of the useful lives of assets, and the impairment assessment of acquired intangibles and goodwill. Determination of these transactions and account balances are based on the Company’s estimates and judgments. These estimates are based on the Company’s knowledge of current events and actions it may undertake in the future as well as on various other assumptions that it believes to be reasonable. Actual results could differ materially from these estimates.

### **Revenue and Deferred Revenue**

The Company derives its revenues primarily from fees for software services and professional services sold to employers and insurance carriers. Revenues are recognized when control of these services is transferred to customers, in an amount that reflects the consideration the Company expects to be entitled to in exchange for those services. Taxes collected from customers relating to services and remitted to governmental authorities are excluded from revenues.

The Company determines revenue recognition through the following steps:

- Identification of each contract with a customer;
- Identification of the performance obligations in the contract;
- Determination of the transaction price;
- Allocation of the transaction price to the performance obligations in the contract; and
- Recognition of revenue when, or as, performance obligations are satisfied.

#### *Software Services Revenues*

Software services revenues primarily consist of monthly subscription fees paid to the Company by its employer and insurance carrier customers for access to, and usage of, cloud-based benefits software solutions for a specified contract term. Fees are generally charged based on the number of employees or

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subscribers with access to the solution. Software services revenue also includes certain other revenue which is generated from the value of policies or products enrolled in through the Company's marketplace.

Software services revenues are generally recognized on a ratable basis over the contract term beginning on the date the software services are made available to the customer. The Company's software service contracts are generally three years for both carrier and employer customers. Revenue from insurance broker commissions and supplier transactions is recognized at a point in time when the orders for the policies are received and transferred to the insurance carrier or supplier, and is reduced by estimates for risks from collectability, policy cancellation and termination.

*Professional Services Revenues*

Professional services revenues primarily consist of fees related to the implementation of software products purchased by customers. Professional services typically include discovery, configuration and deployment, integration, testing, and training. Fees from consulting services, support services and training are also included in professional services revenue.

Revenue from implementation services with customers in the Carrier segment are generally recognized over the contract term of the associated software services contract, including any extension periods representing a material right. In certain arrangements, the Company utilizes estimates of hours as a measure of progress to determine revenue.

Revenues from implementation services with customers in the Employer segment are generally recognized as those services are performed.

Revenues from support and training fees are recognized over the service period.

*Contracts with Multiple Performance Obligations*

Certain of the Company's contracts with customers contain multiple performance obligations. For these contracts, the individual performance obligations are accounted for separately if they are distinct. The Company allocates the transaction price to the separate performance obligations based on their relative standalone selling prices. The Company determines the standalone selling prices based on its overall pricing objectives, taking into consideration market conditions and other factors, including the value of its contracts, the software services sold, customer size and complexity, and the number and types of users under the contracts.

*Practical Expedients Elected*

In addition to practical expedients disclosed elsewhere in the notes to consolidated financial statements, the Company has elected to use the practical expedient not to adjust the promised amount of consideration for the effects of a significant financing component for contracts in which the period between transferring a service to a customer and when the customer pays for that service is one year or less.

**Contract Costs**

The Company capitalizes costs to obtain contracts that are considered incremental and recoverable, such as sales commissions. Payments of sales commissions generally include multiple payments. The Company capitalizes only those payments made within an insignificant time from the contract inception, typically three months or less. Subsequent payments are expensed as incurred. The capitalized costs are amortized to sales and marketing expense over the estimated period of benefit of the asset, which is generally four to five years. The Company has elected to use the practical expedient to expense the costs to obtain a contract when the amortization period is less than one year. The balance of deferred costs related to obtaining contracts included in deferred contract costs and other non-current assets was \$7,506 and \$7,376 as of December 31, 2018 and 2017, respectively. Sales and marketing expense

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includes \$4,217, \$4,488 and \$4,348 of amortization for the years ended December 31, 2018, 2017 and 2016, respectively.

The Company capitalizes contract fulfillment costs directly associated with customer contracts that are not related to satisfying performance obligations. The costs are amortized to cost of revenue expense over the estimated period of benefit, which is generally five years. The balance of deferred fulfillment costs included in deferred contract costs and other non-current assets was \$5,235 and \$8,060 as of December 31, 2018 and 2017, respectively. Cost of revenue expense includes \$3,480, \$3,525 and \$3,187 of amortization for the years ended December 31, 2018, 2017 and 2016, respectively.

### **Cost of Revenue**

Cost of revenue primarily consists of employee compensation, professional services, data center co-location costs, networking expenses, depreciation expense for computer equipment directly associated with generating revenue, amortization expense for capitalized software development costs, and infrastructure maintenance costs. In addition, the Company allocates a portion of overhead, such as facilities and security costs, additional depreciation and amortization expense, and employee benefit costs, to cost of revenue based on headcount.

### **Cash and Cash Equivalents**

Cash and cash equivalents consist of bank checking accounts and money market accounts. The Company considers all highly liquid investments with original maturities of three months or less at the time of purchase to be cash equivalents.

### **Marketable Securities**

Marketable securities consist of short-term investments in corporate bonds, commercial paper, and various U.S. government backed securities. To reflect its intention, the Company classifies its marketable securities as held-to-maturity at the time of purchase. As a result, the marketable securities are recorded at amortized cost and any gains or losses realized upon maturity are reported in other expense, net in the consolidated statements of operations and comprehensive loss.

### **Concentrations of Credit Risk**

The Company's financial instruments that are exposed to concentrations of credit risk consist primarily of cash equivalents, marketable securities and accounts receivable. All of the Company's cash and cash equivalents are held at financial institutions that management believes to be of high credit quality. The bank deposits of the Company might, at times, exceed federally insured limits and are generally uninsured and uncollateralized. The Company has not experienced any losses on cash and cash equivalents to date.

To manage credit risk related to marketable securities, the Company invests in various types of highly rated corporate bonds, commercial paper, and various U.S. government backed securities with maturities of less than two years. The weighted average maturity of the portfolio of investments must not exceed nine months, per the Company's investment policy.

To manage accounts receivable risk, the Company evaluates the creditworthiness of its customers and maintains an allowance for doubtful accounts. Accounts receivable were unsecured and were derived from revenue earned from customers located in the United States. Accounts receivable from one customer represented approximately 12% of the total accounts receivable at December 31, 2017, and approximately 13%, 11% and 12% of total revenue for the year ended December 31, 2018, 2017 and 2016, respectively. The revenue is attributable to the Company's Employer segment.

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**Accounts Receivable and Allowance for Doubtful Accounts and Returns**

Accounts receivable are stated at realizable value, net of allowances for doubtful accounts and estimated returns. The Company utilizes the allowance method to provide for doubtful accounts based on management's evaluation of the collectability of amounts due, and other relevant factors. Bad debt expense is recorded in general and administrative expense on the consolidated statements of operations and comprehensive loss. The Company's estimate is based on historical collection experience and a review of the current status of accounts receivable. Historically, actual write-offs for uncollectible accounts have not significantly differed from the Company's estimates. The Company removes recorded receivables and the associated allowances when they are deemed permanently uncollectible. However, higher than expected bad debts may result in future write-offs that are greater than the Company's estimates. The allowance for doubtful accounts was \$392 and \$654 as of December 31, 2018 and 2017, respectively.

The allowances for returns are accounted for as reductions of revenue and are estimated based on the Company's periodic assessment of historical experience and trends. The Company considers factors such as the time lag since the initiation of revenue recognition, historical reasons for adjustments, new customer volume, delivery issues or delays, and past due customer billings. The allowance for returns was \$3,191 and \$2,877 as of December 31, 2018 and 2017, respectively.

**Property and Equipment and Capitalized Software Development Costs**

Property and equipment, including capitalized software development costs, are stated at cost less accumulated depreciation and amortization. Expenditures for major additions and improvements are capitalized. Depreciation and amortization are recognized over the estimated useful lives of the related assets using the straight-line method.

The estimated useful lives for significant property and equipment categories are generally as follows:

Buildings	30 years
Computers and related equipment	3-5 years
Purchased software and licenses	1-7 years
Developed software	3 years
Furniture and fixtures	7 years
Leasehold improvements	Lesser of estimated useful life of asset or lease term
Other equipment	5-12 years
Vehicles	5 years

Useful lives of significant assets are periodically reviewed and adjusted prospectively to reflect the Company's current estimates of the respective assets' expected utility. Costs associated with maintenance and repairs are expensed as incurred.

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The Company capitalizes certain costs related to its software developed or obtained for internal use. Costs related to preliminary project activities and post-implementation activities are expensed as incurred. Internal and external costs incurred during the application development stage, including upgrades and enhancements representing modifications that will result in significant additional functionality, are capitalized. Software maintenance and training costs are expensed as incurred. Capitalized costs are recorded as part of property and equipment and are amortized on a straight-line basis over the software's estimated useful life which is three years. The Company evaluates these assets for impairment whenever events or changes in circumstances occur that could impact the recoverability of these assets.

**Identifiable Intangible Assets**

Identifiable intangible assets with finite lives are recorded at their fair values at the date of acquisition and are amortized on a straight-line basis over their respective estimated useful lives, which is the period over which the asset is expected to contribute directly or indirectly to future cash flows.

**Impairment of Long-Lived Assets and Goodwill**

The Company reviews long-lived assets and definite-lived intangible assets for impairment whenever events or changes in circumstances indicate the carrying amount of an asset might not be recoverable. Recoverability of the long-lived asset is measured by a comparison of the carrying amount of the asset or asset group to future undiscounted net cash flows expected to be generated. If such assets are not recoverable, the impairment to be recognized, if any, is measured as the amount by which the carrying amount of the assets exceeds the estimated fair value (discounted cash flow) of the assets or asset group. Assets held for sale are reported at the lower of the carrying amount or fair value, less costs to sell.

Goodwill represents the excess of the aggregate of the fair value of consideration transferred in a business combination over the fair value of assets acquired, net of liabilities assumed. Goodwill is not amortized; rather, goodwill is tested for impairment at the reporting unit level as of October 31 of each year, or more frequently if an event occurs or circumstances change that would more likely than not reduce the fair value of a reporting unit below its carrying value.

The Company performs a qualitative assessment to determine whether it is more likely than not that the fair value of a reporting unit is less than its carrying value before testing goodwill for impairment for each reporting unit. The reporting units are determined by the components of the Company's operating segments that constitute a business for which both (1) discrete financial information is available and (2) segment management regularly reviews the operating results of that component. If it is more likely than not that the fair value of a reporting unit is less than its carrying value, the Company performs the impairment test by applying a fair-value-based test. The Company compares the fair value of a reporting unit to its carrying value. If the carrying value of the net assets assigned to the reporting unit exceeds the fair value of our reporting unit, an impairment loss is recorded equal to the difference.

The Company has identified two reporting units, Employer and Carrier. To determine the fair value of the Company's reporting units, the Company has used a discounted cash flow analysis, which requires significant assumptions and estimates about future operations. Significant judgments inherent in this analysis include the determination of an appropriate discount rate, estimated terminal value and the amount and timing of expected future cash flows. The Company may also determine fair value of its reporting units using a market approach by applying multiples of earnings of peer companies to its operating results.

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**Debt Issuance Costs**

Debt issuance costs related to the convertible senior note financing have been recorded as a reduction of the carrying amount of the debt and are amortized to interest expense using the effective interest method.

Debt issuance costs related to the revolving line of credit have been recorded in other non-current assets and are amortized to interest expense over the remaining life of the agreement.

**Financing Obligations**

In its build-to-suit lease arrangements where the Company is involved in the construction of its buildings, the Company is deemed the owner for accounting purposes during the construction period. The Company records an asset for the amount of the total project costs in Property and Equipment, net and the related financing obligation in Financing and Capital Lease Obligations on the Consolidated Balance Sheet. Once construction is complete, the Company determines if the asset qualifies for sale-leaseback accounting treatment. If the arrangement does not qualify for sale-lease back treatment, the Company continues to reduce the obligation over the lease term as payments are made and depreciates the asset over its useful life. The Company does not report rent expense for the portion of the rent payment determined to be related to the assets that it owns for accounting purposes. Rather, this portion of the rent payment under the lease is recognized as a reduction of the financing obligation and as interest expense.

Financing obligations also include liabilities for the purchase of software licenses.

**Advertising**

The Company expenses advertising costs as they are incurred. Direct advertising costs for the years ended December 31, 2018, 2017 and 2016 were \$391, \$168 and \$635, respectively.

**Comprehensive Loss**

The Company's net loss equals comprehensive loss for all periods presented.

**Stock-Based Employee Compensation**

Stock-based employee compensation is measured based on the grant-date fair value of the awards and recognized in the Consolidated Statements of Operations and Comprehensive Loss over the period during which the award holder is required to perform services in exchange for the award, which is the vesting period. Compensation expense is recognized over the vesting period of the applicable award using the straight-line method. Compensation expense related to performance-based restricted stock units, which are accounted for as equity awards, is recognized when it is probable that the performance measure will be met. Compensation costs related to restricted stock units ("RSUs") is based on the market price on the grant date. The Company uses the Black-Scholes option pricing model for estimating the fair value of stock options. The use of the option valuation model requires the input of subjective assumptions, including the expected life of the option and the expected stock price volatility. Additionally, prior to January 1, 2017, the recognition of stock-based compensation expense required the estimation of the number of options and RSUs that will ultimately vest and the number of options and RSUs that will ultimately be forfeited. Starting January 1, 2017, the Company recognizes the effect of forfeitures as they occur. The recognition of stock-based compensation expense associated with performance-based restricted stock units requires the estimation of the probability of achieving performance measures.

The Company adopted the guidance in Accounting Standards Update ("ASU") 2016-09, "Compensation - Stock Compensation (Topic 718) - Improvements to Employee Share-Based Payment Accounting," on January 1, 2017. Under this ASU, entities are permitted to make an accounting policy election to either estimate forfeitures on share-based payment awards, as previously required, or to recognize forfeitures as they occur. The Company has elected to recognize forfeitures as they occur and

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the impact of that change in accounting policy has been recorded as a \$391 cumulative effect adjustment to its accumulated deficit as of January 1, 2017.

**Income Taxes**

The Company uses the asset and liability method for income tax accounting. This method requires the recognition of deferred tax assets and liabilities for the expected future tax consequences of temporary differences between the financial reporting and tax basis of assets and liabilities, as well as for operating loss and tax credit carryforwards. Deferred tax assets and liabilities are measured using the tax rates that are expected to apply to taxable income for the years in which those tax assets and liabilities are expected to be realized or settled. Valuation allowances are recorded to reduce deferred tax assets to the amount the Company believes is more likely than not to be realized. The tax benefits of uncertain tax positions are recognized only when the Company believes it is more likely than not that the tax position will be upheld on examination by the taxing authorities based on the merits of the position. The Company recognizes interest and penalties, if any, related to unrecognized income tax benefits in income tax expense. Income tax effects related to settlements of share-based payment awards are reported in earnings as an increase or decrease to income tax expense (benefit), net. Additionally, income tax-related cash flows resulting from share-based payments are reported as operating activities in the statement of cash flows.

**Basic and Diluted Net Loss per Common Share**

Basic net loss per share attributable to common stockholders is computed by dividing the net loss attributable to common stockholders by the weighted-average number of shares of common stock outstanding during the period. Diluted net loss per share is computed by giving effect to all potential shares of common stock, including outstanding stock options, outstanding warrants, common stock related to unvested restricted stock units and convertible senior notes to the extent dilutive, and common stock issuable pursuant to the ESPP. Basic and diluted net loss per share was the same for each period presented, as the inclusion of all potential common shares outstanding would have been anti-dilutive.

**Recent Accounting Pronouncements**

***Recently Adopted Accounting Standards***

*Goodwill Impairment*

In January 2017, the Financial Accounting Standards Board ("FASB") issued Accounting Standards Update ("ASU") No. 2017-04, "Simplifying the Test for Goodwill Impairment." The ASU eliminates Step 2 from the goodwill impairment test and an entity should recognize an impairment charge for the amount by which the carrying amount of goodwill exceeds the reporting unit's fair value, not to exceed the carrying amount of goodwill. The Company adopted this guidance for its goodwill impairment test performed as of October 31, 2018. Adoption did not have any impact on the Company's consolidated financial statements.

*Cloud Computing Arrangements*

In August 2018, the FASB issued Accounting Standards Update ("ASU") 2018-15, "Intangibles - Goodwill and Other - Internal-Use Software (Subtopic 350-40): Customer's Accounting for Implementation Costs Incurred in a Cloud Computing Arrangement that is a Service Contract." The ASU allows companies to capitalize implementation costs incurred in a hosting arrangement that is a service contract over the term of the arrangement, including periods covered by renewal options that are reasonably certain to be exercised. The Company early adopted this standard on a prospective basis in the quarter ended September 30, 2018. There was no impact on the Company's consolidated financial statements upon adoption.

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*Revenue from Contracts with Customers*

On January 1, 2018, the Company adopted ASU No. 2014-09, "Revenue from Contracts with Customers (Topic 606)," applying the full retrospective transition method to all contracts that were not completed as of January 1, 2016, the initial date of application.

The adoption of Topic 606 significantly affected the accounting for revenue from certain professional services in the Carrier segment and insurance broker commission revenue included in software services revenue in the Employer segment.

Prior to the adoption of Topic 606, the Company recognized revenue from certain professional services in the Carrier segment over the customer relationship period. Under Topic 606, revenue from certain of these services are recognized over the contract term of the associated software services contract, including any extension periods representing a material right, which can be shorter than the customer relationship period. The financial statement impact of this change is a reduction to the deferred revenue balance as of the date of adoption.

Also prior to the adoption of Topic 606, the Company recognized insurance broker commission revenue over the policy period. Under Topic 606, the revenue related to broker commissions is recognized when the performance obligation has been satisfied, which is when the orders for the policies are received and transferred to the insurance carrier. As a result, software services revenue from these arrangements in the Employer segment is recognized in the aggregate and earlier under Topic 606 in comparison to the previous treatment. The financial statement impact of this change is reductions to balances of deferred revenue and increases in contract asset balances reported in other non-current assets.

Additionally, prior to the adoption of Topic 606, the Company recognized revenue from implementation services fees that are paid in advance in the Employer segment either when the associated software services are made available to the customer or over the customer relationship period. Under the new standard, revenue from these fees are recognized as the services are provided on a percentage of completion basis. The financial statement impact of this change is revenue from these fees being recognized sooner under the new standard.

In connection with the adoption of Topic 606, the Company is required to capitalize costs associated with obtaining and fulfilling a contract. Contract assets recognized for costs to obtain a contract consist primarily of sales commissions associated with obtaining contracts in the Carrier segment. These assets are amortized to sales and marketing expense over the estimated period of benefit of the asset, which is generally four to five years. Contract assets recognized for costs to fulfill a contract consist primarily of internal costs related to implementing products in the Carrier segment. These assets are amortized to cost of revenue expense over the estimated period of benefit, which is generally five years.

The Company used the practical expedient for contracts that were completed by January 1, 2016, the initial date of application of Topic 606, that allows for the use of the transaction price at the date the contract was completed for contracts restated in comparative reporting periods, rather than estimating the variable consideration amount in each comparative reporting period.



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The following tables show the amounts by which financial statement lines were affected by the adoption of Topic 606.

<b>Financial Statement Line Item</b>	<b>As of December 31, 2017</b>		
	<b>As previously reported</b>	<b>Adjustments</b>	<b>As adjusted</b>
<b>Consolidated Balance Sheet:</b>			
Accounts receivable, net	\$ 30,156	\$ (65)	\$ 30,091
Contract, prepaid and other current assets	4,337	11,522	15,859
Deferred contract costs and other non-current assets	816	15,437	16,253
Accrued expenses	9,136	(26)	9,110
Deferred revenue, current portion	38,821	4,983	43,804
Deferred revenue, net of current portion	19,898	(8,675)	11,223
Additional paid-in capital	355,301	(2,805)	352,496
Accumulated deficit	(394,663)	33,417	(361,246)

<b>Financial Statement Line Item</b>	<b>Year Ended December 31, 2017</b>		
	<b>As previously reported</b>	<b>Adjustments</b>	<b>As adjusted</b>
<b>Consolidated Statement of Operations and Comprehensive Loss:</b>			
Revenue	\$ 256,735	\$ (19,893)	\$ 236,842
Cost of revenue	124,156	3,226	127,382
Sales and marketing	69,280	1,303	70,583
Loss from operations	(13,518)	(24,422)	(37,940)
Net loss and comprehensive loss	(25,872)	(24,422)	(50,294)
Net loss per common share: Basic and diluted	\$ (0.83)	\$ (0.79)	\$ (1.62)

<b>Financial Statement Line Item</b>	<b>Year Ended December 31, 2016</b>		
	<b>As previously reported</b>	<b>Adjustments</b>	<b>As adjusted</b>
<b>Consolidated Statement of Operations and Comprehensive Loss:</b>			
Revenue	\$ 233,335	\$ 3,188	\$ 236,523
Cost of revenue	120,681	2,627	123,308
Sales and marketing	55,488	823	56,311
Research and development	56,584	26	56,610
Loss from operations	(32,168)	(288)	(32,456)
Net loss and comprehensive loss	(40,058)	(288)	(40,346)
Net loss per common share: Basic and diluted	\$ (1.35)	\$ (0.01)	\$ (1.36)

Cash provided by, or used in, operating, investing and financing activities were not affected by the adoption of Topic 606.

**Accounting Standards Not Yet Adopted**

In August 2018, the FASB issued ASU 2018-13, "Fair Value Measurement (Topic 820): Disclosure Framework - Changes to the Disclosure Requirements for Fair Value Measurement." The ASU modifies the disclosure requirements required for fair value measurements. This ASU is effective for the Company for the interim and annual reporting periods starting January 1, 2020. Early adoption is permitted. The Company does not expect this guidance to have a material impact on its consolidated financial statements.

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In June 2016, the FASB issued ASU No. 2016-13, "Financial Instruments – Credit Losses (Topic 326): Measurement of Credit Losses on Financial Instruments." The purpose of this ASU is to require a financial asset measured at amortized cost basis to be presented at the net amount expected to be collected. Credit losses relating to available-for-sale debt securities should be recorded through an allowance for credit losses. This ASU is effective for interim and annual reporting periods starting January 1, 2020. The Company is currently evaluating the impact of this guidance on its consolidated financial statements.

In February 2016, the FASB issued ASU No. 2016-02, "Leases (Topic 842)." The amendments in this update require lessees, among other things, to recognize lease assets and lease liabilities on the balance sheet for those leases classified as operating leases under previous authoritative guidance. Topic 842 introduces new disclosure requirements for leasing arrangements and is effective for the Company beginning January 1, 2019. The Company will apply Topic 842 without presenting comparative period financial statements, thus will recognize a cumulative-effect adjustment to the opening balance of retained earnings as of January 1, 2019. The Company plans to utilize the following additional significant transition elections:

- Elect the package of three practical expedients to not reassess:
  - whether any expired or existing contracts are or contain a lease;
  - the classification of any expired or existing leases; and
  - the treatment of initial direct costs.
- Adopt a policy to not separate lease and associated nonlease components for all classes of assets. The Company will apply this policy to all existing leases on transition as well as new leases going forward.

The Company is continuing to evaluate the effect of adoption of this standard on its consolidated financial statements. The Company expects its consolidated financial statements to be significantly affected by the following:

- Assets and related financing obligations for the Company's existing build-to-suit lease arrangements will be derecognized with a cumulative adjustment to retained earnings. These leases will be transitioned to the new standard based on a proforma analysis of the lease balances as of the transition date as if they had been a lease under ASC 840. Based on this analysis, the land component of these leases will be combined with the remainder of the lease obligation. Currently, this obligation is accounted for separately and recognized as part of facility expense. The following impacts are expected on the Company's consolidated financial statements:
  - Operating expenses will increase as depreciation expense related to the buildings will increase as function of shortening the period of depreciation from the estimated life of the asset to the expected term of the lease.
  - Interest expense will decrease as a result of a discount rate that is lower than the rate required for build-to-suit accounting.
- Lease liabilities and right-of-use, or ROU, assets related to existing operating lease obligations (including lease and associated non-lease components) will recorded on the balance sheet.
- Lease liabilities and ROU assets will be recorded related to payment obligations for nonlease components (e.g. common area maintenance and equipment maintenance) associated with existing capital lease components.

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Total net cash flows will not be impacted by adoption of the new lease standard; however, classification of some transactions are expected to move between operating, investing and financing activities.

**3. Net Loss Per Common Share**

Diluted loss per common share is the same as basic loss per common share for all periods presented because the effects of potentially dilutive items were anti-dilutive given the Company's net loss. The following common share equivalent securities have been excluded from the calculation of weighted-average common shares outstanding because the effect is anti-dilutive for the periods presented:

<b>Anti-Dilutive Common Share Equivalents</b>	<b>Year Ended December 31,</b>		
	<b>2018</b>	<b>2017</b>	<b>2016</b>
Restricted stock units	2,174,250	1,937,014	1,467,811
Stock options	233,247	263,155	727,559
Convertible senior notes	4,513,824	-	-
Warrant to purchase common stock	-	-	580,813
Employee Stock Purchase Plan	-	7,039	3,964
Total anti-dilutive common share equivalents	<u>6,921,321</u>	<u>2,207,208</u>	<u>2,780,147</u>

In connection with its issuance of the convertible senior notes in December 2018, the Company paid \$33,024 to enter into capped call option agreements to reduce the potential dilution to holders of the Company's common stock upon conversion of the convertible senior notes. The capped call option agreements are excluded from the calculation of diluted net loss per share attributable to common stockholders as their effect is antidilutive.

Basic and diluted net loss per common share is calculated as follows:

	<b>Year Ended December 31,</b>		
	<b>2018</b>	<b>2017</b>	<b>2016</b>
<b>Numerator:</b>			
Net loss	\$ (52,627)	\$ (50,294)	\$ (40,346)
Net loss attributable to common stockholders	<u>\$ (52,627)</u>	<u>\$ (50,294)</u>	<u>\$ (40,346)</u>
<b>Denominator:</b>			
Weighted-average common shares outstanding, basic and diluted	<u>31,756,415</u>	<u>31,052,378</u>	<u>29,589,857</u>
Net loss per common share, basic and diluted	<u>\$ (1.66)</u>	<u>\$ (1.62)</u>	<u>\$ (1.36)</u>

**4. Fair Value Measurement**

The carrying amounts of certain of the Company's financial instruments, including cash and cash equivalents, net accounts receivable, accounts payable and other accrued liabilities, and accrued compensation and benefits, approximate fair value due to their short-term nature. The carrying value of the Company's financing obligations and revolving line of credit approximates fair value, considering the borrowing rates currently available to the Company for financing obligations with similar terms and credit risks.

The Company uses a three-tier fair value hierarchy to classify and disclose all assets and liabilities measured at fair value on a recurring basis, as well as assets and liabilities measured at fair value on a non-recurring basis, in periods subsequent to their initial measurement. The hierarchy requires the

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Company to use observable inputs when available, and to minimize the use of unobservable inputs when determining fair value. The three tiers are defined as follows:

- Level 1.** Quoted prices (unadjusted) in active markets for identical assets or liabilities.
- Level 2.** Other inputs that are directly or indirectly observable in the marketplace.
- Level 3.** Unobservable inputs for which there is little or no market data, which require the Company to develop its own assumptions.

**Assets and Liabilities Measured at Fair Value on a Recurring Basis**

The Company evaluates its financial assets and liabilities subject to fair value measurements on a recurring basis to determine the appropriate level to classify them for each reporting period. This determination requires significant judgments to be made.

The following tables present information about the Company's assets and liabilities that are measured at fair value on a recurring basis using the above categories, as of December 31, 2018 and 2017.

Description	December 31, 2018			
	Level 1	Level 2	Level 3	Total
Cash Equivalents:				
Money market mutual funds <sup>(1)</sup>	\$ 182,748	\$ -	\$ -	\$ 182,748
Total assets	<u>\$ 182,748</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ 182,748</u>

Description	December 31, 2017			
	Level 1	Level 2	Level 3	Total
Cash Equivalents:				
Money market mutual funds <sup>(1)</sup>	\$ 46,730	\$ -	\$ -	\$ 46,730
Total assets	<u>\$ 46,730</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ 46,730</u>

- (1) Money market mutual funds are classified as cash equivalents in the Company's consolidated balance sheets. As short-term, highly liquid investments readily convertible to known amounts of cash, with remaining maturities of three months or less at the time of purchase, the Company's cash equivalent money market funds have carrying values that approximate fair value.

**5. Property and Equipment**

Property and equipment consists of the following as of December 31:

	2018	2017
Buildings, leased	\$ 48,558	\$ 48,558
Computers and related equipment	38,183	35,728
Purchased software and licenses	30,702	27,317
Developed software	36,713	30,624
Furniture and fixtures	6,773	6,669
Leasehold improvements	4,633	4,289
Other equipment	2,313	2,260
Vehicles	146	146
Total property and equipment, at cost	<u>168,021</u>	<u>155,591</u>
Accumulated depreciation and amortization	(98,056)	(82,910)
Property and equipment, net	<u>\$ 69,965</u>	<u>\$ 72,681</u>

Depreciation and amortization expense on property and equipment was \$15,665, \$15,648 and \$12,816, for the years ended December 31, 2018, 2017 and 2016, respectively. Property and equipment includes fixed assets acquired under capital lease agreements of \$31,148 and \$35,761 for the years ended December 31, 2018 and 2017. Accumulated depreciation of assets under capital leases totaled

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\$6,216 and \$9,633 as of December 31, 2018 and 2017, respectively. Amortization of assets under capital leases is included in depreciation expense.

The Company capitalized software development costs of \$6,090 and \$4,482 for the years ended December 31, 2018 and 2017, respectively. Amortization of capitalized software development costs totaled \$3,944, \$3,257 and \$2,857 during the years ended December 31, 2018, 2017 and 2016, respectively. The net book value of capitalized software development costs was \$9,806 and \$7,660 at December 31, 2018, and 2017, respectively.

**6. Goodwill and Intangible Assets**

The Company's goodwill balance of \$1,634 is solely attributable to the Employer reporting unit. The gross carrying amount and accumulated impairment losses were \$3,304 and \$(1,670), respectively, for the beginning and ending balances in all periods presented. There were no changes in the carrying amount of goodwill in the years ended December 31, 2018 and 2017.

Information regarding the Company's acquisition-related intangible assets is as follows:

	As of December 31, 2018			Weighted-Average Remaining Useful Life (in years)
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount	
Trademarks	\$ 240	\$ (240)	\$ -	-
Customer agreements	2,060	(2,060)	-	-
Non-compete agreements	126	(126)	-	-
Total	<u>\$ 2,426</u>	<u>\$ (2,426)</u>	<u>\$ -</u>	<u>-</u>

	As of December 31, 2017			Weighted-Average Remaining Useful Life (in years)
	Gross Carrying Amount	Accumulated Amortization	Net Carrying Amount	
Trademarks	\$ 240	\$ (240)	\$ -	-
Customer agreements	2,060	(1,910)	150	0.6
Non-compete agreements	126	(126)	-	-
Total	<u>\$ 2,426</u>	<u>\$ (2,276)</u>	<u>\$ 150</u>	<u>0.6</u>

Amortization expense of acquisition-related intangible assets for the years ended December 31, 2018, 2017 and 2016 was \$150, \$258 and \$257, respectively. As of December 31, 2018, the acquisition-related intangible assets were fully amortized. There were no impairments of intangible assets during the years ended December 31, 2018, 2017 and 2016.

**7. Convertible Senior Notes**

In December 2018, the Company issued \$240,000 aggregate principal amount of 1.25% convertible senior notes ("Notes") due December 15, 2023, unless earlier repurchased by the Company or converted by the holder pursuant to their terms. Interest is payable semiannually in arrears on June 15 and December 15 of each year, commencing on June 15, 2019.

The Notes are governed by an Indenture between the Company, as issuer, and U.S. Bank, National Association, as trustee. The Notes are unsecured and rank: senior in right of payment to the Company's future indebtedness that is expressly subordinated in right of payment to the Notes; equal in right of payment to the Company's unsecured indebtedness that is not so subordinated; effectively junior in right of payment to any of the Company's senior, secured indebtedness to the extent of the value of the assets

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securing such indebtedness; and structurally junior to all indebtedness and other liabilities incurred by the Company's subsidiaries.

Upon conversion, the Company will pay or deliver, as the case may be, cash, shares of the Company's common stock or a combination of cash and shares of common stock, at the Company's election.

The Notes have an initial conversion rate of 18.8076 shares of common stock per \$1 principal amount of Notes. This represents an initial effective conversion price of approximately \$53.17 per share of common stock and 4,513,824 shares issuable upon conversion. Throughout the term of the Notes, the conversion rate may be adjusted upon the occurrence of certain events. Holders of the Notes will not receive any cash payment representing accrued and unpaid interest, if any, upon conversion of a Note, except in limited circumstances. Accrued but unpaid interest will be deemed to be paid by cash, shares of the Company's common stock or a combination of cash and shares of the Company's common stock paid or delivered, as the case may be, to the holder upon conversion of Notes.

Prior to the close of business on September 14, 2023, the Notes will be convertible at the option of holders during certain periods, only upon satisfaction of certain conditions set forth below. On or after September 15, 2023, until the close of business on the second scheduled trading day immediately preceding the maturity date, holders may convert all or any portion of their Notes at the conversion price at any time regardless of whether the conditions set forth below have been met.

Holders may convert all or a portion of their Notes prior to the close of business on September 14, 2023, in multiples of \$1 principal amount, only under the following circumstances:

- during any calendar quarter commencing after the calendar quarter ending on March 31, 2019 (and only during such calendar quarter), if the last reported sales price of the common stock for at least 20 trading days (whether or not consecutive) during a period of 30 consecutive trading days ending on, and including, the last trading day of the immediately preceding calendar quarter is greater than or equal to 130% of the conversion price on each applicable trading day;
- during the five business day period after any five consecutive trading day period, or the Notes measurement period, in which the "trading price" (as defined in the Indenture) per \$1 principal amount of notes for each trading day of the Notes measurement period was less than 98% of the product of the last reported sale price of the Company's common stock and the conversion rate on each such trading day;
- if the Company calls any or all of the Notes for redemption, at any time prior to the close of business on September 14, 2023; or
- upon the occurrence of specified corporate events.

As of December 31, 2018, the Notes are not yet convertible.

Based on market data available for publicly traded, senior, unsecured corporate bonds issued by companies in the same industry and with similar maturity, the Company estimated the implied market interest rate of its Notes to be approximately 7.30%, assuming no conversion option. Assumptions used in the estimate represent what market participants would use in pricing the liability component of the Notes, including market interest rates, credit standing, and yield curves, all of which are defined as Level 2 observable inputs. The estimated implied interest rate was applied to the Notes, which resulted in a fair value of the liability component of \$181,500 upon issuance, calculated as the present value of future contractual payments based on the \$240,000 aggregate principal amount. The excess of the principal amount of the liability component over its carrying amount, or the debt discount, is amortized to interest expense over the term of the Notes. The \$58,500 difference between the gross proceeds received from issuance of the Notes of \$240,000 and the estimated fair value of the liability component represents the equity component of the Notes and was recorded in additional paid-in capital. The equity component is not remeasured as long as it continues to meet the conditions for equity classification.

In accounting for the transaction costs related to the issuance of the Notes, the Company allocated the total amount incurred to the liability and equity components in proportion to the allocation of proceeds. Transaction costs attributable to the liability component, totaling \$4,808, are being amortized to expense

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over the term of the Notes, and transaction costs attributable to the equity component, totaling \$1,550, and were included with the equity component in shareholders' equity.

The Notes consist of the following as of December 31:

	2018	2017
Liability Component:		
Principal	\$ 240,000	\$ -
Less: debt discount, net of amortization	(63,308)	-
Net carrying amount	\$ 176,692	\$ -
Equity component (a)	56,950	-

- (a) Recorded in the consolidated balance sheet within additional paid-in capital, net of \$1,550 transaction costs in equity.

The following table sets forth total interest expense recognized related to the Notes:

	Year Ended December 31,	
	2018	2017
1.25% coupon	\$ 42	\$ -
Amortization of debt discount and transaction costs	-	-
	\$ 42	\$ -

As of December 31, 2018, the fair value of the Notes, which was determined based on inputs that are observable in the market or that could be derived from, or corroborated with, observable market data, quoted price of the Notes in an over-the-counter market (Level 2), and carrying value of debt instruments (carrying value excludes the equity component of the Company's convertible notes classified in equity) were as follows:

	December 31, 2018		December 31, 2017	
	Fair Value	Carrying Value	Fair Value	Carrying Value
Convertible senior notes	\$ 254,400	\$ 176,692	\$ -	\$ -

In connection with the issuance of the Notes, the Company entered into capped call transactions with certain counterparties affiliated with the initial purchasers and others. The capped call transactions are expected to reduce potential dilution of earnings per share upon conversion of the Notes. Under the capped call transactions, the Company purchased capped call options that in the aggregate relate to the total number of shares of the Company's common stock underlying the Notes, with an initial strike price of approximately \$53.17 per share, which corresponds to the initial conversion price of the Notes and is subject to anti-dilution adjustments substantially similar to those applicable to the conversion rate of the Notes, and have a cap price of approximately \$89.98. The cost of the purchased capped calls of \$33,024 was recorded to stockholders' deficit and will not be re-measured. The capped call will not be re-measured provided it continues to meet the conditions for equity classification.

Based on the closing price of our common stock of \$45.72 on December 31, 2018, the if-converted value of the Notes was less than their respective principal amounts.

## 8. Revolving Line of Credit

In February 2015, the Company executed a loan and security agreement with a syndicate of lenders led by Silicon Valley Bank for a senior revolving credit agreement ("Senior Revolver") to replace its then current revolving line of credit. Debt issuance fees of \$591 were capitalized in the Company's balance sheet and are amortized over the life of the Senior Revolver.

The Senior Revolver had an original borrowing limit of \$60,000 and an original term of three years. Borrowing capacity under the Senior Revolver is subject to a borrowing base limit that is a function of the Company's monthly recurring revenue as adjusted to reflect lost customer revenue during the previous three calendar months. Therefore, credit available under the Senior Revolver may be less than the borrowing limit. Interest is payable monthly. Advances under the Senior Revolver bear interest at the prime rate as published in the Wall Street Journal plus a margin based on the Company's liquidity, which

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originally ranged between 1.0% and 1.5%. The Company is charged an unused line fee under this arrangement at a rate based on its liquidity, which was originally 0.300% to 0.375% per year. Any outstanding principal is due at the end of the term.

In 2016, the Company amended its Senior Revolver agreement. The amendments, among other things, increased the borrowing capacity to \$95,000, extended the termination date of the facility to February 20, 2020, added Goldman Sachs Lending Partners LLC to the lending syndicate and revised certain covenants including those related to accounts receivable, Minimum Consolidated EBITDA requirements, Indebtedness, permitted Indebtedness and certain capital expenditure limits. Additionally, the amendments altered definitions in the Senior Revolver agreement, including Alternate Base Rate, Applicable Margin, Consolidated EBITDA, Liquidity and Commitment Fee Rate. As a result of certain of these definitional changes, the Alternate Base Rate was modified to be the prime rate as published in the Wall Street Journal plus a margin based on our liquidity that ranges between 0.75% and 1.25%. The amendments further waived any default that may have occurred as a result of certain Indebtedness previously incurred by the Company and the disclosure to the lenders of registered Intellectual Property. In connection with the amendments, debt issuance fees of \$379 were capitalized in the Company's balance sheet and are being amortized over the remaining life of the Senior Revolver.

The Company further amended its Senior Revolver agreement in April 2017 to adjust terms in the agreement to accommodate changes in its business.

In March 2018, the Company amended its Senior Revolver to modify certain terms and requirements to account for the Company's adoption of Topic 606. The Company amended its Senior Revolver again in December 2018. The amendment altered definitions and amended sections of the agreement to allow for transactions required to administer the convertible senior note financing.

The Company is bound by customary affirmative and negative covenants in connection with the Senior Revolver agreement, including financial covenants related to liquidity and EBITDA. In the event of a default, the lenders may declare all obligations immediately due and stop advancing money or extending credit under the line of credit. The line of credit is collateralized by substantially all of the Company's tangible and intangible assets, including intellectual property and the equity of subsidiaries.

During the years ended December 31, 2018, 2017 and 2016, the Company borrowed an aggregate of \$115,000, \$105,000 and \$84,000, respectively, under the Senior Revolver for general operating purposes and repaid an aggregate of \$171,246, \$89,000 and \$74,000, respectively. As of December 31, 2018, there were no amounts outstanding under the Senior Revolver and the amount available to borrow was \$77,264.

## **9. Commitments and Contingencies**

The Company leases three buildings on its Charleston, South Carolina campus. One leasing arrangement is accounted for as a capital lease. The remaining two lease agreements are accounted for as build-to-suit, failed sale-leaseback arrangements. Accordingly, the Company recognized liabilities for the lease payments related to these two buildings, which have been recorded as financing obligations. A portion of the lease payment for these two leases has been allocated to land and is accounted for using operating lease accounting. Information regarding these three leases is incorporated in the following disclosures.

### ***Operating Lease Commitments***

The Company leases office facilities under various non-cancelable operating lease agreements with original lease periods expiring between 2019 and 2023. Some of the leases provide for renewal terms at the Company's option. Certain future minimum lease payments due under these operating lease agreements contain free rent periods or escalating rent payment provisions. These leases generally do not contain purchase options. Rent expense on these operating leases is recognized over the term of the



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lease on a straight-line basis. Operating lease commitments include rent for land associated with the Company's build-to-suit leases expiring through 2031.

In December 2016, the Company amended its three leases for buildings on its Charleston, South Carolina campus. As a result, one lease, that was previously accounted for as an operating lease was classified as a capital lease at the end of 2016.

Rent expense totaled \$2,063, \$1,605, and \$4,403 for the years ended December 31, 2018, 2017, and 2016, respectively.

Future minimum lease payments are as follows:

Year Ending December 31,	Operating Leases
2019	\$ 1,350
2020	1,042
2021	999
2022	1,022
2023	1,046
Thereafter	7,514
Total minimum lease payments	<u>\$ 12,973</u>

***Financing and Capital Lease Obligations***

The Company has entered into various purchase arrangements to obtain property and equipment for operations that are accounted for as capital leases. Certain purchase arrangements contain payments for licenses, which the Company records as financing obligations. These arrangements have original terms ranging from 3 to 5 years with interest rates ranging from 0.5% to 15.0%. The leases are secured by the underlying leased property and equipment.

In December 2016, the Company amended a lease agreement for office space that had been previously accounted for as an operating lease. The amendment extended the term of the lease by 15 years from the amendment date. This modification required the Company to evaluate the lease as if it were a new lease. Upon evaluation, the lease was classified as a capital lease because the present value of the lease payments exceeded 90% of the fair value of the leased asset. Aggregate payments under this lease are \$48,600, including executory costs of \$5,938. As of December 31, 2018, capital lease obligations include amounts under this lease of \$20,325. Details of the lease extension are disclosed under "Contractual Commitments" below.

Financing obligations were \$37,544 and \$34,233, as of December 31, 2018 and 2017, respectively, and consist primarily of obligations for build-to-suit lease arrangements. The aggregate amount of future minimum payments for financing obligations was \$106,467 at December 31, 2018 which includes aggregate payments of \$102,300 related to build-to-suit arrangements. Details of the build-to-suit lease arrangements are disclosed in Note 16.

Financing obligations are allocated as follows:

	As of December 31,	
	2018	2017
Buildings, build-to-suit	\$ 33,814	\$ 32,652
Software and support	3,730	1,581
Total financing obligations	<u>\$ 37,544</u>	<u>\$ 34,233</u>
Less: current portion	(1,678)	(1,283)
Financing obligations, net of current portion	<u>\$ 35,866</u>	<u>\$ 32,950</u>

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Future minimum lease payments are as follows:

Year Ending December 31,	Capital Leases	Financing Obligations
2019	\$ 5,542	\$ 8,502
2020	3,777	8,166
2021	3,261	7,504
2022	3,089	7,278
2023	3,180	7,493
Thereafter	28,577	67,524
Total minimum lease and financing obligation payments	47,426	\$ 106,467
Less: executory costs	(5,147)	
Less: imputed interest	(18,221)	
Less: current portion	(2,808)	
Capital lease obligations, net of current portion	<u>\$ 21,250</u>	

**Contractual Commitments**

In connection with a 2013 lease for office space on its Charleston, South Carolina campus, the Company entered into an option to lease space in two additional adjacent buildings. The option term was 36 months and required the Company to incur costs annually prior to the exercise of the option in the amount of up to \$466 per year. If the Company terminated the option or did not exercise the option prior to expiration it would incur termination fees pro-rated through the dates of termination or expiration. The maximum liability for termination fees was \$757. During the year ended December 31, 2016, the Company determined that the options would expire unexercised and expensed the full amount of the termination fees.

On December 12, 2016, the Company executed an amendment to each of three lease agreements for office space on its Charleston, South Carolina campus. The amendments extended the term of the leases to December 31, 2031. The amendments also provided for the following:

- extending from December 13, 2016 to December 31, 2018 the term of an option that allows the Company to require the lessors to build a two-story building, including potentially for a welcome center, of approximately 18,500 square feet on its campus (“Building 5”) for the Company to lease;
- waiving accrued and future carrying costs and termination fees otherwise payable to the lessors by the Company under the existing option in the amount of \$1,223; and
- contingent upon construction of Building 4 described below, reducing the annual rent increases from 3% to 2% for the Company’s Customer Success Center, a 145,800 square foot building on its campus which it first occupied on January 1, 2015.

The waived carrying and termination fees in the amount of \$1,223 is being amortized over the 15-year term of the extension as a reduction of interest and rent expense.

On December 12, 2016, the Company also executed a lease agreement pursuant to which the lessor will construct a building of approximately 145,800 square feet on its campus for the Company to accommodate anticipated future growth (“Building 4”). Through an extension by the landlord, the target commencement date of the lease is July 1, 2020 with a term of 15 years. Under the terms of the lease, the Company agrees to commence construction on or about April 1, 2019, but can terminate the lease prior to that time, subject to the payment of reasonable, documented, and agreed-to out-of-pocket costs with respect to the lease and building to date. If the Company delays beginning construction past December 31, 2019, the lessor may terminate the lease. The Company may renew the lease upon 365 days’ notice to the lessor for five additional one-year terms, provided that the Company is not in default at the time of its request. Significant terms of the lease for Building 4 include annual rent for the first year of the lease of \$30.05 per square foot of rentable area with annual rent increases of 2% of the rent paid for the preceding lease year. If the Company exercises its option to cause the construction of Building 5, the

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term of the lease will reset to 15 years from the date the Company begins paying rent for Building 5. The Company will begin to capitalize costs associated with the construction of Building 4 when construction has commenced.

The Company also has \$276 of non-cancellable contractual commitments as of December 31, 2018 related to the purchase of software and maintenance. These commitments are not accrued in the consolidated balance sheet of the Company.

***Legal Contingencies***

The Company may become a party to a variety of legal proceedings that arise in the normal course of business. While the results of such normal course legal proceedings cannot be predicted with certainty, management believes, based on current knowledge, that the final outcome of any matters will not have a material adverse effect on the Company's business, financial position, results of operations or cash flows.

**10. Stock-Based Compensation**

**Employee Stock-based Compensation Plan**

The Company maintains the Amended and Restated Benefitfocus.com, Inc. 2000 Stock Option Plan (the "2000 Plan") and the Benefitfocus.com, Inc. Amended and Restated 2012 Stock Plan, (the "2012 Plan"), pursuant to which the Company has reserved 4,139,296 shares of its common stock for issuance to its employees, directors and non-employee third parties. The 2012 Plan, effective on January 31, 2012, serves as the successor to the 2000 Plan and permits the granting of incentive stock options, non-statutory stock options, stock bonuses, stock purchase rights, stock appreciation rights, and restricted stock units and awards. No new awards can be issued under the 2000 Plan after the effective date of the 2012 Plan. Outstanding awards under the 2000 Plan continue to be subject to the terms and conditions of the 2000 Plan. Shares available for grant under the 2000 Plan, which were reserved but not issued or subject to outstanding awards under the 2000 Plan as of the effective date, were added to the reserves of the 2012 Plan. As of December 31, 2018, the Company had 1,731,799 shares allocated to the 2012 Plan, but not yet issued.

The Company has issued two types of awards under these plans: stock options and restricted stock units ("RSUs"). The following table sets forth the number of awards outstanding for each award type is as follows:

<b>Award type</b>	<b>Outstanding at December 31,</b>		
	<b>2018</b>	<b>2017</b>	<b>2016</b>
Restricted stock units	2,174,250	1,937,014	1,467,811
Stock options	233,247	263,155	727,559

The grant date value of RSUs is equal to the closing price of the Company's stock on the date of grant, or, if not a trading day, the closing price of the previous trading day. Stock options are granted at exercise prices not less than the estimated fair market value of the Company's common stock at the date of grant. Generally, the Company issues previously unissued shares for the exercise of stock options or exchange of RSUs; however, previously acquired shares may be reissued to satisfy future issuances. The standard vesting period for RSU and option awards is over four years however vesting periods range from one to five years. Some RSUs vest immediately upon grant. The options expire 10 years from the grant date. Compensation expense for the fair value of the stock-based awards at their grant date is recognized ratably over the vesting period.

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Compensation expense related to stock-based awards is included in the following line items in the accompanying consolidated statements of operations and comprehensive loss for the years ended December 31:

	2018	2017	2016
Cost of revenue	\$ 5,164	\$ 2,508	\$ 2,799
Sales and marketing	6,764	4,953	3,212
Research and development	5,510	2,990	4,533
General and administrative	11,430	5,686	7,544
	<u>\$ 28,868</u>	<u>\$ 16,137</u>	<u>\$ 18,088</u>

The total compensation cost related to non-vested awards not yet recognized as of December 31, 2018 was \$43,842 and will be recognized over a weighted-average period of approximately 2.59 years.

**Restricted Stock Units**

During 2018, the Company granted RSUs under the 2012 Plan. Restricted stock units granted to employees vest in equal annual installments over terms that range from immediate vesting at grant to 4 years. The fair value of the stock at the time of grant is amortized based on a straight-line basis over the vesting period.

The summary of unvested restricted stock units is as follows:

	Restricted stock units	Weighted average grant date fair value
Unvested at December 31, 2017	1,937,014	\$ 30.90
Granted	1,664,652	31.96
Forfeited	(763,997)	29.38
Vested	(663,419)	33.01
Unvested at December 31, 2018	<u>2,174,250</u>	<u>\$ 31.61</u>

As of December 31, 2018, the number and intrinsic value of restricted stock units expected to vest was 2,015,771 and \$92,161, respectively. The aggregate fair value of restricted stock units vested during the years ended December 31, 2018, 2017 and 2016 was \$18,623, \$12,137 and \$10,311, respectively.

Included in the grants of 2018 restricted stock units are performance restricted stock units for which vesting is contingent upon meeting various financial targets to support growth initiatives. The Company granted 857,827 performance restricted stock units to officers and certain employees with an aggregate grant-date fair value of \$28,589. The actual number of shares issued upon vesting could range from 0% to 100%. As of December 31, 2018, there were 818,975 performance restricted stock units outstanding with a weighted average grant-date fair value of \$33.32 per unit, of which 650,190 units with a weighted average grant-date fair value of \$33.26 per unit were expected to vest.

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**Stock Options**

The following is a summary of the option activity for the year ended December 31, 2018:

	Number of Options	Weighted- Average Exercise Price	Weighted- Average Remaining Contractual Term (in years)	Aggregate Intrinsic Value
Outstanding balance at December 31, 2017	263,155	\$ 9.22		
Granted	-	-		
Exercised	(29,908)	6.22		
Forfeited or expired	-	-		
Outstanding balance at December 31, 2018	<u>233,247</u>	\$ 9.60	3.2	\$ 8,425
Exercisable at December 31, 2018	<u>233,247</u>	\$ 9.60	3.2	\$ 8,425
Vested and expected to vest at December 31, 2018	<u>233,247</u>	\$ 9.60	3.2	\$ 8,425

The aggregate intrinsic value of employee options exercised during the years ended December 31, 2018, 2017, and 2016 was \$915, \$10,829 and \$21,117, respectively.

No stock options were granted during the years ended December 31, 2018, 2017 and 2016.

**11. Stockholders' Deficit**

**Preferred stock**

The Company has 5,000,000 shares of preferred stock authorized all of which is undesignated.

**Common Stock**

The holders of common stock are entitled to one vote for each share. The voting, dividend and liquidation rights of the holders of common stock are subject to and qualified by the rights, powers and preferences of the holders of preferred stock.

The Company maintains the Benefitfocus, Inc. 2016 Employee Stock Purchase Plan ("ESPP") pursuant to which the Company has reserved 125,374 shares of its common stock for purchase by its employees who meet certain criteria. Under the ESPP, eligible employees may purchase the Company's common stock through accumulated payroll deductions. Options to purchase shares are granted twice yearly on or about January 1 and July 1 and exercisable on or about the succeeding June 30 and December 31, respectively, of each year. Shares are purchased at acquisition prices equal to 95% of the fair market value of the Company's common stock at the purchase date. No participant may purchase more than \$12 worth of the Company's common stock in a six-month offering period.

At December 31, 2018, the Company had reserved a total of 4,264,670 of its authorized 50,000,000 shares of common stock for future issuance as follows:

Outstanding stock options	233,247
Restricted stock units	2,174,250
Available for future issuance under stock award plans	1,731,799
Available for future issuance under ESPP	<u>125,374</u>
Total common shares reserved for future issuance	<u>4,264,670</u>

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**12. Revenue**

*Disaggregation of Revenue*

The following tables provide information about disaggregation of revenue by service line and includes a reconciliation of disaggregated revenue with reportable segments:

	Year ended December 31, 2018		
Service line:	Employer	Carrier	Total
Software services	\$ 129,643	\$ 72,705	\$ 202,348
Professional services	40,157	16,216	56,373
<b>Total</b>	<b>\$ 169,800</b>	<b>\$ 88,921</b>	<b>\$ 258,721</b>

	Year ended December 31, 2017		
Service line:	Employer	Carrier	Total
Software services	\$ 117,236	\$ 67,655	\$ 184,891
Professional services	36,245	15,706	51,951
<b>Total</b>	<b>\$ 153,481</b>	<b>\$ 83,361</b>	<b>\$ 236,842</b>

	Year ended December 31, 2016		
Service line:	Employer	Carrier	Total
Software services	\$ 117,342	\$ 68,816	\$ 186,158
Professional services	32,434	17,931	50,365
<b>Total</b>	<b>\$ 149,776</b>	<b>\$ 86,747</b>	<b>\$ 236,523</b>

*Contract Balances*

The following table provides information about contract assets and contract liabilities from contracts with customers:

	Balance at Beginning of Period	Balance at End of Period
<b>As of December 31, 2018</b>		
Contract assets	\$ 11,522	\$ 12,798
Contract liabilities:		
Deferred revenue	\$ 55,027	\$ 45,863
 <b>As of December 31, 2017</b>		
Contract assets	\$ 15,929	\$ 11,522
Contract liabilities:		
Deferred revenue	\$ 56,949	\$ 55,027

The Company recognizes payments from customers based on contractual billing schedules. Accounts receivable are recorded when the right to consideration becomes unconditional. Contract assets include amounts related to the Company's contractual right to consideration for completed performance objectives not yet invoiced. Contract liabilities include payments received in advance of performance under the contract and are recognized as revenue when earned under the contract. The Company had no asset impairment charges related to contract assets during the years ended December 31, 2018 and 2017.

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Contract assets are largely comprised of unbilled software services revenue from insurance broker commissions. The performance obligation for this revenue is satisfied when the order is received. Amounts are recorded as accounts receivable when the right to consideration becomes unconditional which generally occurs over the period of underlying insurance policy. Payments from insurance broker commissions are typically received monthly in arrears.

The following tables show the significant changes in contract asset balances:

<b>Contract Assets</b>	<b>Year ended December 31,</b>	
	<b>2018</b>	<b>2017</b>
Transferred to receivables from contract assets	\$ 20,560	\$ 19,512
Revenue recognized from performance obligations satisfied but not billed	\$ 21,836	\$ 15,106

Revenue recognized during the years ended December 31, 2018 and 2017 that was included in the deferred revenue balance at the beginning of the periods was \$33,421 and \$25,238, respectively.

The Company recorded favorable transaction price adjustments to software services revenue from performance obligations satisfied or partially satisfied in previous periods of \$1,161 during the year ended December 31, 2018. There were no such adjustments during the ended December 31, 2017.

*Performance Obligations*

As of December 31, 2018, the aggregate amount of the Company's performance obligations that are unsatisfied or partially unsatisfied were approximately \$216,000, of which a majority are expected to be satisfied within the next three years. The Company excludes from its population of performance obligations contracts with original durations of one year or less, contract renewal periods that renew automatically, and amounts of variable consideration that are allocated to wholly unsatisfied distinct service that forms part of a single performance obligation and meets certain variable allocation criteria.

**13. Employee Benefit Plan**

The Company maintains a qualified defined contribution plan under Section 401(k) of the U.S. Internal Revenue Code (the "401(k) Plan") covering substantially all employees. Employees are eligible to participate in the 401(k) Plan after one day of service and upon attainment of age 21, and may elect to defer an amount or percentage of their annual compensation up to amounts prescribed by law. The Company makes discretionary matching contributions to employee plan accounts. During each of the years ended December 31, 2018, 2017 and 2016, the Company matched 50% of the employees' contribution, with the match limited to 3% of qualifying compensation. Employee vesting in matching company contributions occurs at a rate of 20% per year after one year of service. During the years ended December 31, 2018, 2017, and 2016, employer matching contributions were \$3,162, \$3,020 and \$2,649, respectively.

**14. Income Taxes**

The Company files income tax returns in the U.S. for federal and various state jurisdictions. The Company is subject to U.S. federal income tax examination for calendar tax years 2014 through 2017 as well as state income tax examinations for various years depending on statutes of limitations of those jurisdictions.

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The following summarizes the components of income tax expense for the years ended December 31:

Current:	2018	2017	2016
Federal	\$ -	\$ -	\$ -
State and local	28	15	17
Total current expense	<u>\$ 28</u>	<u>\$ 15</u>	<u>\$ 17</u>
Deferred:			
Federal	\$ -	\$ -	\$ -
State and local	-	-	-
Total deferred taxes	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>

Reconciliation between the effect of applying the federal statutory rate and the effective income tax rate used to calculate the Company's income tax provision is as follows for the years ended December 31:

	2018	2017	2016
Federal statutory rate	21.0%	34.0%	34.0%
Effect of:			
State income taxes, net of federal benefit	10.3%	6.6%	6.0%
Change in state tax rates	1.7%	0.4%	2.6%
Change in federal tax rates	0.0%	(67.8%)	0.0%
Change in valuation allowance	(29.4%)	24.3%	(46.3%)
State tax credits	0.3%	0.4%	4.0%
Stock-based compensation	(2.2%)	3.8%	(0.1%)
Section 162(m)	(0.8%)	(1.2%)	0.0%
Other permanent items	(0.9%)	(0.5%)	(0.2%)
Deferred true-up	0.0%	0.0%	0.0%
Income tax provision effective rate	<u>0.0%</u>	<u>0.0%</u>	<u>0.0%</u>

The significant components of the Company's deferred tax asset and liability were as follows as of December 31:

	2018	2017
Deferred tax assets relating to:		
Net operating loss carryforwards	\$ 82,057	\$ 69,452
Deferred revenue	3,150	7,929
Commissions and incentive accrual	678	547
Deferred rent	433	471
State tax credits	7,936	7,866
Stock-based compensation	4,595	4,060
Compensation and other accruals	-	2,539
Property and equipment and intangible assets	1,138	551
Interest limitation	968	-
Total gross deferred tax assets	100,955	93,415
Deferred tax liabilities		
Compensation and other accruals	\$ (2,366)	\$ (4,322)
Convertible debt	(16,281)	-
Total gross deferred tax liabilities	(18,647)	(4,322)
Deferred tax assets less liabilities	82,308	89,093
Less: valuation allowance	(82,308)	(89,093)
Net deferred tax asset (liability)	<u>\$ -</u>	<u>\$ -</u>

As of December 31, 2018 and 2017, the Company's gross deferred tax was reduced by a valuation allowance of \$82,308 and \$89,093, respectively.



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The valuation allowance decreased by \$6,785 and increased by \$7,832 during the years ended December 31, 2018 and 2017, respectively. The valuation allowance decrease in 2018 resulted primarily from establishing deferred tax liabilities related to tax method changes and convertible debt issuance partially offset by changes in the deferred tax assets related to the net operating loss carryforwards. The increase in the valuation allowance in 2017 resulted primarily from changes in deferred tax assets partially offset by a decrease from the revaluation of the deferred tax assets and liabilities in connection with enactment of the Tax Cuts & Jobs Act (“Tax Reform”) on December 22, 2017. Among other things, the primary provision of Tax Reform impacting the Company is the reduction to the U.S. corporate income tax rate from 34% to 21%.

The Company adopted the revenue accounting rules prescribed by Topic 606 in 2018 with an effective date of January 1, 2016. As a result of this adoption, the Company has restated its deferred tax assets related to net operating loss carryforwards for both federal and state income tax purposes along with the related offsetting valuation allowances.

Net operating loss carryforwards for federal income tax purposes were approximately \$287,686 and \$253,946 at December 31, 2018 and 2017, respectively. State net operating loss carryforwards were \$285,377 and \$221,189 at December 31, 2018 and 2017, respectively. The federal and state net operating loss carryforwards will expire at various dates during 2019 through 2037, if not utilized. Net operating loss carryforwards and credit carryforwards reflected above may be limited due to historical and future ownership changes.

South Carolina jobs tax credit and headquarters tax credit carryovers of \$10,483 and \$10,322 were available at December 31, 2018 and 2017, respectively. Headquarters credits are expected to be used to offset future state income tax license fees. The credits expire in various amounts during 2020 through 2033.

The Company follows FASB ASC 740-10 for accounting for unrecognized tax benefits. As of December 31, 2018, the Company had gross unrecognized tax benefits of \$437.

A reconciliation of the beginning and ending amounts of unrecognized tax benefits is as follows for the years ended December 31:

	2018	2017	2016
Balance at beginning of year	\$ 437	\$ 437	\$ 437
Additions based on tax positions related to the current year	-	-	-
Additions for tax positions in prior years	-	-	-
Reductions for tax positions of prior years	-	-	-
Reductions for tax positions due to lapse of statute	-	-	-
Settlements	-	-	-
Balance at end of year	<u>\$ 437</u>	<u>\$ 437</u>	<u>\$ 437</u>

At December 31, 2018 and 2017, none of the \$437 liabilities for unrecognized tax benefits could impact the Company’s effective tax rate, if recognized. The Company does not expect the unrecognized tax benefits to change within the next twelve months.

**15. Segments and Geographic Information**

Operating segments are defined as components of an enterprise for which discrete financial information is available that is evaluated regularly by the chief operating decision maker (“CODM”) for purposes of allocating resources and evaluating financial performance. The Company’s CODM, the Chief Executive Officer, reviews financial information presented on a consolidated basis, accompanied by information about operating segments, for purposes of allocating resources and evaluating financial performance.

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The Company's reportable segments are based on the type of customer. The Company determined its operating segments to be: Employer, which derives substantially all of its revenue from customers that use the Company's services for the provision of benefits to their employees, and administrators acting on behalf of employers; and Carrier, which derives substantially all of its revenue from insurance companies that provide coverage at their own risk.

Segments are evaluated based on gross profit. The Company does not allocate interest income, interest expense or income tax expense by segment. Accordingly, the Company does not report such information. Additionally, Employer and Carrier segments share the majority of the Company's assets. Therefore, no segment asset information is reported.

	Year Ended December 31,		
	2018	2017	2016
Revenue from external customers by segment:			
Employer	\$ 169,800	\$ 153,481	\$ 149,776
Carrier	88,921	83,361	86,747
Total net revenue from external customers	<u>\$ 258,721</u>	<u>\$ 236,842</u>	<u>\$ 236,523</u>
Depreciation and amortization by segment:			
Employer	\$ 10,232	\$ 10,229	\$ 8,116
Carrier	5,583	5,677	4,957
Total depreciation and amortization	<u>\$ 15,815</u>	<u>\$ 15,906</u>	<u>\$ 13,073</u>
Gross profit by segment			
Employer	\$ 75,397	\$ 58,347	\$ 61,951
Carrier	54,047	51,113	51,264
Total gross profit by segment	<u>\$ 129,444</u>	<u>\$ 109,460</u>	<u>\$ 113,215</u>

Substantially all assets were held and all revenue was generated in the United States during the years ended December 31, 2018, 2017 and 2016.

## 16. Related Parties

### *Related Party Leasing Arrangements*

The Company leases its office space at its Charleston, South Carolina headquarters campus under the terms of three non-cancellable leases from entities with which one of the Company's directors, significant stockholders, and executives as well as another significant stockholder are affiliated. The Company's headquarters building lease and an additional building lease are accounted for as build-to-suit leases and recorded as financing obligations in the Consolidated Balance Sheets. The remaining lease, also for office space, was accounted for as an operating lease during 2016 and periods prior and as a capital lease in 2017 and after. The Company executed an amendment to each of the three lease agreements on December 12, 2016. These amendments extended the term of the leases to December 31, 2031. The leases contain options to renew the leases for five additional years. The arrangements provide for 3.0% fixed annual rent increases. In addition to extending the lease term, the amendment to the lease for the Company's Customer Success Center, a 145,800 square foot building on its campus, which commenced January 1, 2015:

- extended from December 13, 2016 to December 31, 2018 the term of an option that allows the Company to require the lessor to build Building 5 for the Company to lease,
- waived certain accrued and future carrying costs and termination fees payable to the lessor by the Company under the existing option in the amount of \$1,223, and
- reduced the annual rent increases for the Customer Success Center from 3% to 2% contingent upon construction of Building 4.

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On December 12, 2016 and in conjunction with the lease amendments, the Company also executed a cancellable lease agreement with an entity with which one of the Company's directors, significant stockholders, and executives as well as another significant stockholder are affiliated. Pursuant to the agreement the lessor will construct a building of approximately 145,800 square feet on its campus for the Company to accommodate anticipated future growth ("Building 4"). Through an extension provided by the lessor, the target commencement date of the lease is July 1, 2020 with a term of 15 years. Under the terms of the lease, the Company agrees to commence construction on or about April 1, 2019, but can terminate the lease prior to that time, subject to payment of reasonable, documented, and agreed-to out-of-pocket costs with respect to the lease and building to date. If the Company delays beginning construction past December 31, 2019, the lessor may terminate the lease. The Company may renew the lease upon 365 days' notice to the lessor for five additional one-year terms, provided that the Company is not in default at the time of its request. Significant terms of the lease for Building 4 include annual rent for the first year of the lease of \$30.05 per square foot of rentable area with annual rent increases of 2% of the rent paid for the preceding lease year. If the Company exercises its option to cause the construction of Building 5, the term of the lease will reset to 15 years from the date the Company begins paying rent for Building 5.

In connection with the cancellable lease for Building 4 and the option for Building 5 described above, the leasing entity meets the criteria to be a variable interest entity. The Company is not the primary beneficiary of the leasing entity, as the activities that are most significant to the leasing entity's economic performance, consisting of financing, development, management, and sale of office facilities, are directed by another party. As such, the Company is not required to consolidate the entity as the primary beneficiary. The lease terms would not include a residual value guarantee, fixed-price purchase option, or similar feature that would obligate the Company to absorb decreases in value or would entitle the Company to participate in increases in the value of Buildings 4 or 5. The Company has not and does not intend to provide financial or other support to the leasing entity. The Company's maximum exposure, assuming the exercise of the option, would consist of rent to be paid over the 15-year term of the lease, construction cost overruns, agreed upon pre-construction costs incurred prior to termination and operating expenses in excess of a certain threshold. The Company's maximum exposure currently cannot be quantified.

Payments related to these agreements were \$10,659, \$10,328, and \$10,417 for the years ended December 31, 2018, 2017 and 2016, respectively. Amounts due to the related parties were recorded as \$833 and \$901 in accrued expenses in the accompanying consolidated balance sheets as of December 31, 2018 and 2017, respectively.

***Other Related Party Expenses***

The Company utilizes the services of various companies that are owned and controlled by an executive who is also a Company director and significant stockholder. The companies provide construction project management services, private air transportation and other services. Expenses related to these companies were \$107, \$20, and \$80 for the years ended December 31, 2018, 2017 and 2016, respectively. No amounts were due to the related parties as of December 31, 2018 and 2017.

During 2018, the Company entered into an agreement to purchase software and services from a company affiliated with a Company director. The aggregate amount of payments due under this contract is \$115. Payments related to this agreement were \$35 for the year ended December 31, 2018. Amounts due to this company were \$35 as of December 31, 2018.

***Related Party Revenues***

The Company entered into a Stock Purchase Agreement with Mercer, a customer, on February 24, 2015 pursuant to which Mercer acquired 2,817,526 shares of the Company's common stock and a warrant to purchase up to an additional 580,813 shares of the Company's common stock. As a result of this transaction, Mercer became a related party by virtue of beneficially owning more than 10% of the voting interest of the Company. At the same time, the Company entered into an amendment of its commercial contract with Mercer. The amendment to the commercial contract, among other things, expanded certain terms and conditions of the existing relationship between the Company and Mercer and

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its affiliates. On August 24, 2017, Mercer's warrant to purchase common stock of the Company expired unexercised resulting in Mercer's beneficial ownership of the Company falling below 10%. Accordingly, as of that date, the Company no longer considers Mercer a related party. As of December 31, 2018, Mercer beneficially owned 8.8% of the Company's outstanding common stock. For the period January 1, 2017 to August 24, 2017, revenue from Mercer was \$17,611. For the year ended December 31, 2016, revenue from Mercer was \$27,663. Revenue from Mercer was reflected in "Revenues," within the accompanying statements of operations.

***Related Party Revolving Line of Credit***

As disclosed in Note 8, the Company amended its Senior Revolver at various times in 2017 and 2018. As part of the amendment in October 2016, Goldman Sachs Lending Partners, LLC was added to the lending syndicate. Goldman Sachs Lending Partners, LLC is an affiliate of The Goldman Sachs Group, Inc., as are the Goldman Sachs funds that owned approximately 11.8% of the Company's outstanding common stock as of December 31, 2018. Goldman Sachs Lending Partners, LLC committed \$10,000 to the revolving commitment and participates in amounts borrowed under the credit facility at a rate of approximately 10.5%.

**17. Selected Quarterly Financial Data (unaudited)**

The following tables set forth selected unaudited quarterly statements of operations data for each of the eight quarters in the years ended December 31, 2018 and 2017.

	Quarter Ended							
	December 31, 2018	September 30, 2018	June 30, 2018	March 31, 2018	December 31, 2017	September 30, 2017	June 30, 2017	March 31, 2017
<b>Consolidated Statements of Operations Data:</b>								
Revenue	\$ 74,771	\$ 61,006	\$ 60,581	\$ 62,363	\$ 67,879	\$ 56,251	\$ 55,089	\$ 57,623
Gross profit	39,358	29,266	29,860	30,960	33,705	24,941	25,393	25,421
Total operating expenses	48,995	37,600	40,915	41,633	37,338	35,888	36,213	37,961
Operating loss	(9,637)	(8,334)	(11,055)	(10,673)	(3,633)	(10,947)	(10,820)	(12,540)
Net loss	\$ (12,966)	\$ (11,598)	\$ (14,261)	\$ (13,802)	\$ (6,855)	\$ (14,006)	\$ (13,850)	\$ (15,583)
Net loss per common share (a)	\$ (0.41)	\$ (0.36)	\$ (0.45)	\$ (0.44)	\$ (0.22)	\$ (0.45)	\$ (0.45)	\$ (0.51)
Weighted-average common shares outstanding--basic and diluted	31,988,033	31,883,029	31,806,972	31,333,348	31,285,263	31,181,141	31,076,995	30,658,468

(a) Quarterly and year-to-date computations of per share amounts are made independently. Therefore, the sum of the per-share amounts for the quarters may not agree with per share amounts for the year.

The quarterly unaudited consolidated financial statements have been prepared on the same basis as the audited consolidated financial statements included in this report and include all adjustments, consisting only of normal recurring adjustments, that we consider necessary for a fair presentation of such information when read in conjunction with our annual audited consolidated financial statements and notes appearing in this report. The operating results for any quarter do not necessarily indicate the results for any subsequent period or for the entire fiscal year.

**18. Subsequent Events**

***Business Combinations***

On February 25, 2019, the Company purchased certain operating assets and liabilities, intellectual property and intangible assets, including the workforce in place, from the commercial business of Connecture, Inc., for \$24,000 in cash. This acquisition will add technology to potentially strengthen the

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Company's platform, expand its customer reach and enhance the value the Company delivers to its carrier customers. The Company has not completed its purchase price allocation.

***Stock-Based Compensation***

During January 2019, the Company granted 35,284 restricted stock units to employees with an aggregate grant date fair value of \$1,710. These restricted stock units generally vest in equal annual installments generally over 3 and 4 years from the grant date. The Company amortizes the fair value of the stock subject to the restricted stock units at the time of grant on a straight-line basis over the period of vesting.

During January and February 2019, stock option exercises and vesting of restricted stock units resulted in the issuance of 23,121 shares of common stock.

Schedule II—Valuation and Qualifying Accounts (in thousands)

	Balance at Beginning of Period	Additions Charged To Expense	Additions Charged Against Revenue	Deductions	Balance at End of Period
Allowance for doubtful accounts and returns:					
Year Ended December 31, 2018	\$ 3,531	\$ 138	\$ 4,813	\$ (4,898)	\$ 3,584
Year Ended December 31, 2017	\$ 4,595	\$ 75	\$ 5,593	\$ (6,732)	\$ 3,531
Year Ended December 31, 2016	\$ 2,585	\$ 667	\$ 5,004	\$ (3,661)	\$ 4,595

	Balance at Beginning of Period	Additions Charged To Costs and Expenses (1)	Deductions	Balance at End of Period
Deferred tax asset valuation allowance:				
Year Ended December 31, 2018 (2)	\$ 89,093	\$ 15,444	\$ (22,229)	\$ 82,308
Year Ended December 31, 2017 (3)(4)	\$ 81,261	\$ 41,904	\$ (34,072)	\$ 89,093
Year Ended December 31, 2016 (5)	\$ 63,252	\$ 18,009	\$ -	\$ 81,261

- (1) Increase in valuation allowance is related to the generation of net operating losses and other deferred tax assets.
- (2) Decrease in valuation on allowances is related to adjustments to deferred revenue and convertible debt issuance.
- (3) Increase in valuation allowance is related to adoption of ASU 2016-09.
- (4) Decrease in valuation on allowances is related to the change in the enacted tax rule.
- (5) Beginning balance has been adjusted for the effects of adoption of Topic 606.

Portions of this exhibit marked [\*] are requested to be treated confidentially.

**EIGHTH AMENDMENT AGREEMENT**

This Eighth Amendment Agreement (this “*Amendment*”) is entered into this 19th day of December 2018, by and among **BENEFITFOCUS, INC.**, a Delaware corporation (the “*Parent*”), **BENEFITFOCUS.COM, INC.**, a South Carolina corporation (“*Benefitfocus.com*”), and **BENEFITSTORE, INC.**, a South Carolina corporation (“*BenefitStore*”, and together with the Parent and Benefitfocus.com, each individually, a “*Borrower*”, and collectively, the “*Borrowers*”), the several banks and other financial institutions or entities party hereto (each a “*Lender*” and, collectively, the “*Lenders*”), and **SILICON VALLEY BANK**, as administrative agent and collateral agent for the Lenders (in such capacity, the “*Administrative Agent*”).

**RECITALS**

**A.** The Borrowers, the Lenders and the Administrative Agent have entered into that certain Credit Agreement dated as of February 20, 2015, as amended pursuant to that certain First Amendment Agreement dated June 16, 2015, pursuant to that certain Second Amendment Agreement dated December 18, 2015, pursuant to that certain Third Amendment Agreement dated March 24, 2016, pursuant to that certain Fourth Amendment Agreement dated October 28, 2016, pursuant to that certain Fifth Amendment Agreement dated December 12, 2016, pursuant to that certain Sixth Amendment Agreement dated April 26, 2017 and pursuant to that Seventh Amendment Agreement dated March 29, 2018 (as amended and as the same may from time to time be further amended, modified, supplemented or restated, the “*Credit Agreement*”), pursuant to which the Lenders have extended credit to the Borrowers for the purposes permitted in the Credit Agreement.

**B.** The Borrowers have requested and the Required Lenders and the Administrative Agent agree to modify and amend certain terms and conditions of the Credit Agreement.

**AGREEMENT**

**NOW, THEREFORE**, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

- 1. Definitions.** Capitalized terms used but not defined in this Amendment shall have the meanings given to them in the Credit Agreement.
- 2. Amendments to Credit Agreement.** The Credit Agreement is hereby amended by deleting the stricken text (indicated textually in the same manner as the following example: ~~stricken-text~~) and adding the double-underlined text (indicated textually in the same manner as the following example: double-underlined text) as set forth in the amended Credit Agreement attached as Exhibit A hereto.
- 3. Conditions Precedent to Effectiveness.** This Amendment shall not be effective until each of the following conditions precedent have been fulfilled to the satisfaction of (and in form and substance satisfactory to, as applicable) the Administrative Agent (such date, the “*Eighth Amendment Effective Date*”):

**3.1** This Amendment shall have been duly executed and delivered by the respective parties hereto. The Administrative Agent shall have received a fully executed copy hereof.

**3.2** All necessary consents and approvals to this Amendment shall have been obtained by the Loan Parties.

**3.3** No Default or Event of Default shall have occurred and be continuing immediately after giving effect to this Amendment.

**3.4** After giving effect to this Amendment and subject to the qualifications set forth in Section 5.1, each of the representations and warranties herein and in the Credit Agreement and the other Loan Documents (i) that is qualified by materiality shall be true and correct, and (ii) that is not qualified by materiality, shall be true and correct in all material respects, in each case, on and as of the Eighth Amendment Effective Date as if made on and as of such date, except to the extent any such representation and warranty expressly relates to an earlier date, in which case such representation and warranty shall have been true and correct in all material respects as of such earlier date.

For purposes of determining compliance with the conditions specified in this Section 3, each Lender that has executed this Amendment shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter either sent (or made available) by the Administrative Agent to such Lender for consent, approval, acceptance or satisfaction, or required thereunder to be consented to or approved by or acceptable or satisfactory to such Lender, unless an officer of the Administrative Agent responsible for the transactions contemplated by the Loan Documents shall have received notice from such Lender prior to the Eighth Amendment Effective Date specifying such Lender's objection thereto and such objection shall not have been withdrawn by notice to the Administrative Agent to that effect on or prior to the Eighth Amendment Effective Date.

#### **4. Limitation of Amendment.**

**4.1** The amendments set forth in **Section 2**, above, are effective for the purposes set forth herein and shall be limited precisely as written and shall not be deemed to (a) be a consent to any amendment, waiver or modification of any other term or condition of any Loan Document, or (b) otherwise prejudice any right or remedy which the Administrative Agent or the Lenders may now have or may have in the future under or in connection with any Loan Document.

**4.2** This Amendment shall be construed in connection with and as part of the Loan Documents and all terms, conditions, representations, warranties, covenants and agreements set forth in the Loan Documents, except as herein amended, are hereby ratified and confirmed and shall remain in full force and effect.

**5. Representations and Warranties.** To induce the Administrative Agent and the Required Lenders to enter into this Amendment, the Borrowers hereby represent and warrant as follows:



**5.1** Immediately after giving effect to this Amendment (a) the representations and warranties contained in the Loan Documents are true, accurate and complete in all material respects as of the date hereof (except to the extent such representations and warranties relate to an earlier date, in which case they are true and correct as of such date), it being understood and agreed that the Borrowers are not required to update Schedules to the Loan Documents except to reflect material changes in the information contained therein since the date on which such Schedules were most recently updated, and (b) no Event of Default has occurred and is continuing;

**5.2** Each Borrower has the power and authority to execute and deliver this Amendment and to perform its obligations under the Credit Agreement, as amended by this Amendment;

**5.3** The execution and delivery by each Borrower of this Amendment and the performance by such Borrower of its obligations under the Credit Agreement, as amended by this Amendment, have been duly authorized;

**5.4** The execution and delivery by each Borrower of this Amendment and the performance by each Borrower of its obligations under the Credit Agreement, as amended by this Amendment, do not and will not contravene (a) any law or regulation binding on or affecting such Borrower, (b) any contractual restriction with a Person binding on such Borrower, (c) any order, judgment or decree of any court or other governmental or public body or authority, or subdivision thereof, binding on such Borrower, or (d) the organizational documents of such Borrower;

**5.5** The execution and delivery by each Borrower of this Amendment and the performance by such Borrower of its obligations under the Credit Agreement, as amended by this Amendment, do not require any order, consent, approval, license, authorization or validation of, or filing, recording or registration with, or exemption by any governmental or public body or authority, or subdivision thereof, binding on such Borrower, except as already has been obtained or made; and

**5.6** This Amendment has been duly executed and delivered by each Borrower and is the binding obligation of such Borrower, enforceable against such Borrower in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, liquidation, moratorium or other similar laws of general application and equitable principles relating to or affecting creditors' rights.

**6. Payment of Costs and Fees.** The Borrower shall pay to the Administrative Agent all costs and all reasonable out-of-pocket expenses in connection with the preparation, negotiation, execution and delivery of this Amendment and any documents and instruments relating hereto (which costs include, without limitation, the reasonable fees and expenses of outside counsel retained by Administrative Agent), in each case, as set forth in Section 10.5 of the Credit Agreement.

**7. No Defenses of Borrowers.** Each Borrower hereby acknowledges and agrees that such Borrower has no offsets, defenses, claims, or counterclaims against the

Administrative Agent or any Lender with respect to the Obligations, or otherwise, and that if such Borrower now has, or ever did have, any offsets, defenses, claims, or counterclaims against the Administrative Agent or any Lender, whether known or unknown, at law or in equity, all of them are hereby expressly WAIVED and such Borrower hereby RELEASES the Administrative Agent and each Lender from any liability thereunder.

**8. Integration.** This Amendment and the Loan Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of this Amendment and the Loan Documents merge into this Amendment and the Loan Documents.

**9. Counterparts.** This Amendment may be executed in any number of counterparts and all of such counterparts taken together shall be deemed to constitute one and the same instrument.

**10. Effect on Loan Documents.**

**10.1** The amendments set forth herein shall be limited precisely as written and shall not be deemed (a) to be a forbearance, waiver, or modification of any other term or condition of the Credit Agreement or of any Loan Documents or to prejudice any right or remedy which the Administrative Agent may now have or may have in the future under or in connection with the Loan Documents; (b) to be a consent to any future consent or modification, forbearance, or waiver to the Credit Agreement or any other Loan Document, or to any waiver of any of the provisions thereof; or (c) to limit or impair the Administrative Agent's right to demand strict performance of all terms and covenants as of any date. The Borrowers, on behalf of each Loan Party, hereby ratify and reaffirm the Borrowers' obligations under the Credit Agreement and each Loan Party's obligations under each other Loan Document to which it is a party and agrees that none of the amendments or modifications to the Credit Agreement set forth in this Amendment shall impair any Loan Party's obligations under the Loan Documents or the Administrative Agent's rights under the Loan Documents. The Borrowers, on behalf of each Loan Party, hereby further ratify and reaffirm the validity and enforceability of all of the Liens heretofore granted, pursuant to and in connection with the Guarantee and Collateral Agreement or any other Loan Document to the Administrative Agent on behalf and for the benefit of the Secured Parties, as collateral security for the obligations under the Loan Documents, in accordance with their respective terms, and acknowledge that all of such Liens, and all collateral heretofore pledged as security for such obligations, continues to be and remain collateral for such obligations (as amended hereby) from and after the date hereof. The Borrowers, on behalf of each Loan Party, acknowledge and agree that the Credit Agreement and each other Loan Document is still in full force and effect and acknowledge as of the date hereof that no Loan Party has any defenses to enforcement of the Loan Documents. The Borrowers, on behalf of each Loan Party, waive any and all defenses to enforcement of the Credit Agreement as amended hereby and each other Loan Document that might otherwise be available as a result of this Amendment. To the extent any terms or provisions of this Amendment conflict with those of the Credit Agreement or other Loan Documents, the terms and provisions of this Amendment shall control.

**10.2** To the extent that any terms and conditions in any of the Loan Documents shall contradict or be in conflict with any terms or conditions of the Credit Agreement, after giving effect to this Amendment, such terms and conditions are hereby deemed modified or amended accordingly to reflect the terms and conditions of the Credit Agreement as modified or amended hereby.

**10.3** This Amendment is a Loan Document.

**11. Acknowledgement of Obligations.** The Loan Parties acknowledge that on and as of the Eighth Amendment Effective Date, all Obligations are payable without defense, offset, counterclaim or recoupment. Each of the Loan Parties, the Administrative Agent, the Issuing Lender and Swingline Lender and each other Lender party hereto does hereby adopt, ratify, and confirm the Credit Agreement, as amended hereby, and acknowledges and agrees that the Credit Agreement, as amended hereby, is and remains in full force and effect, and the Borrower acknowledges and agrees that their Obligations under the Credit Agreement, as amended hereby, are not impaired in any respect by this Amendment.

**12. Reaffirmation.** Each Loan Party hereby reaffirms its obligations under each Loan Document to which it is a party. Each Loan Party hereby further ratifies and reaffirms the validity and enforceability (except as enforceability may be limited by bankruptcy, insolvency, or similar laws affecting creditors' rights generally and general principles of equity) of all of the Liens heretofore granted, pursuant to and in connection with the Guaranty and Collateral Agreement or any other Loan Document to the Administrative Agent on behalf and for the benefit of Secured Parties, as collateral security for the obligations under the Loan Documents (including such obligations as amended hereby) in accordance with their respective terms, and acknowledges that all of such Liens, and all collateral heretofore pledged as security for such obligations, continues to be and remain collateral for such obligations from and after the date hereof.

**13. Severability.** The provisions of this Amendment are severable, and if any clause or provision shall be held invalid or unenforceable in whole or in part in any jurisdiction, then such invalidity or unenforceability shall affect only such clause or provision, or part thereof, in such jurisdiction and shall not in any manner affect such clause or provision in any other jurisdiction, or any other clause or provision in this Amendment in any jurisdiction.

**14. Choice of Law.** Section 10.13 and Section 10.14 of the Credit Agreement are hereby incorporated by reference in their entirety *mutatis mutandis*.

[Signature page follows.]

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be duly executed and delivered as of the date first written above.

BORROWERS:

**BENEFITFOCUS.COM, INC.**

**BENEFITFOCUS, INC.**

By: /s/ Jonathon E. Dussault  
Name: Jonathon E. Dussault  
Title: Chief Financial Officer

By: /s/ Jonathon E. Dussault  
Name: Jonathon E. Dussault  
Title: Chief Financial Officer

**BENEFITSTORE, INC.**

By: /s/ Jonathon E. Dussault  
Name: Jonathon E. Dussault  
Title: Chief Financial Officer

**SILICON VALLEY BANK**, as Administrative Agent and as a Lender

By /s/ Will Deevy  
Name: Will Deevy  
Title: Director

**COMERICA BANK**, as a Lender

By /s/ John Benetti

Name: John Benetti

Title: SVP

**PACIFIC WESTERN BANK**, as a Lender

By: /s/ Stephen J. Berens

Name: Stephen J. Berens

Title: SVP

**GOLDMAN SACHS LENDING PARTNERS LLC, as a Lender**

By /s/ Jamie Minieri  
Name: Jamie Minieri  
Title: Authorized Signator



Exhibit A – Conformed Credit Agreement

**SENIOR SECURED REVOLVING CREDIT FACILITY**

**CREDIT AGREEMENT**

dated as of February 20, 2015,

among

**BENEFITFOCUS, INC.**  
**BENEFITFOCUS.COM, INC.**  
~~**BENEFITINFORMATICS, INC.**~~  
**BENEFITSTORE, INC.**

as the Borrowers,

**THE SEVERAL LENDERS FROM TIME TO TIME PARTIES HERETO,**

**SILICON VALLEY BANK,**

as Administrative Agent, Issuing Lender and Swingline Lender

and

**COMERICA BANK,**

as Documentation Agent

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## **EXHIBITS**

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Exhibit B:	Form of Compliance Certificate
Exhibit C:	Form of Secretary's/Managing Member's Certificate
Exhibit D:	Form of Solvency Certificate
Exhibit E:	Form of Assignment and Assumption
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Exhibit H:	Form of Collateral Information Certificate
Exhibit I:	Form of Notice of Borrowing

## CREDIT AGREEMENT

**THIS CREDIT AGREEMENT** (this “*Agreement*”), dated as of February 20, 2015, is entered into by and among **BENEFITFOCUS, INC.**, a Delaware corporation (the “*Parent*”), **BENEFITFOCUS.COM, INC.**, a South Carolina corporation (“*Benefitfocus.com*”), ~~**BENEFIT INFORMATICS, INC.**, a Delaware corporation (“*Benefit Informatics*”)~~ and **BENEFITSTORE, INC.**, a South Carolina corporation (“*BenefitStore*”), and together with the Parent, Benefitfocus.com and Benefit Informatics, each individually, a “*Borrower*”, and collectively, the “*Borrowers*”), the several banks and other financial institutions or entities from time to time parties to this Agreement (each a “*Lender*” and, collectively, the “*Lenders*”), **SILICON VALLEY BANK**, as the Issuing Lender and the Swingline Lender, **SILICON VALLEY BANK (“SVB”)**, as administrative agent and collateral agent for the Lenders (in such capacity, the “*Administrative Agent*”) and **COMERICA BANK**, as documentation agent (in such capacity, the “*Documentation Agent*”).

### RECITALS:

**WHEREAS**, the Borrowers desire to obtain financing to refinance the Existing Credit Facility (as defined herein), as well as for working capital financing and letter of credit facilities;

**WHEREAS**, the Lenders have agreed to extend a revolving loan facility to the Borrowers, upon the terms and conditions specified in this Agreement, in an aggregate amount not to exceed \$95,000,000, with a letter of credit sub-facility in the aggregate availability amount of \$5,000,000 (as a sublimit of the revolving loan facility) and a swingline sub-facility in the aggregate availability amount of \$5,000,000 (as a sublimit of the revolving loan facility);

**WHEREAS**, each Loan Party has agreed to secure all of its respective Obligations by granting to the Administrative Agent, for the ratable benefit of the Secured Parties, a first priority lien (subject to Liens permitted by the Loan Documents) in substantially all of its respective personal property assets pursuant to the terms of the Guarantee and Collateral Agreement and the other Security Documents; and

**WHEREAS**, each of the Guarantors has agreed to guarantee the Obligations of the Borrowers and to secure its respective Secured Obligations by granting to the Administrative Agent, for the ratable benefit of the Secured Parties, a first priority lien (subject to Liens permitted by the Loan Documents) in substantially all of such Guarantor’s personal property assets pursuant to the terms of the Guarantee and Collateral Agreement and the other Security Documents.

**NOW, THEREFORE**, the parties hereto hereby agree as follows:

### SECTION 1 DEFINITIONS

**1.1 Defined Terms.** As used in this Agreement (including the recitals hereof), the terms listed in this Section 1.1 shall have the respective meanings set forth in this Section 1.1. “**ABR**”: for any day, a rate per annum equal to the higher of (a) the Prime Rate in effect on such day and (b) the Federal Funds Effective Rate in effect for such day plus 0.50%. Any change in the ABR due to a change in the Prime Rate or the Federal Funds Effective Rate shall be effective as of the opening of business on the effective day of such change in the Prime Rate or the Federal Funds Effective Rate. In no event shall the ABR be less than 0.00%.

“**Account Debtor**”: any Person who may become obligated to any Person under, with respect to, or on account of, an Account, chattel paper or general intangible (including a payment intangible). Unless



otherwise stated, the term “Account Debtor,” when used herein, shall mean an Account Debtor in respect of an Account of a Borrower.

“**Accounts**”: all “accounts” (as defined in the UCC) of a Person, including, without limitation, accounts, accounts receivable, monies due or to become due and obligations in any form (whether arising in connection with contracts, contract rights, instruments, general intangibles, or chattel paper), in each case whether arising out of goods sold or services rendered or from any other transaction and whether or not earned by performance, now or hereafter in existence, and all documents of title or other documents representing any of the foregoing, and all collateral security and guaranties of any kind, now or hereafter in existence, given by any Person with respect to any of the foregoing. Unless otherwise stated, the term “Account,” when used herein, shall mean an Account of a Borrower.

“**Administrative Agent**”: SVB, as the administrative agent under this Agreement and the other Loan Documents, together with any of its successors in such capacity.

“**Affected Lender**”: as defined in Section 2.23.

“**Affiliate**”: with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified; provided, that, neither the Administrative Agent nor the Lenders shall be deemed Affiliates of the Loan Parties as a result of the exercise of their rights and remedies under the Loan Documents.

“**Agent Parties**”: as defined in Section 10.2(d)(ii).

“**Agreement**”: as defined in the preamble hereto.

“**Agreement Currency**”: as defined in Section 10.19.

“**Annualized Recurring Revenue Retention Rate**”: a percentage equal to one (1) minus the ratio of the annualized amount of Recurring Revenue Lost during the Measurement Period, divided by Recurring Revenue of the last month of the Measurement Period multiplied by twelve (12). Annualized Recurring Revenue Retention Rate will be adjusted quarterly based on Recurring Revenue Lost during the preceding calendar quarter.

“**Applicable Margin**”:

(a) from the Fourth Amendment Effective Date until November 5, 2016, the percentages set forth in Level I of the pricing grid below; and

(b) from and after November 5, 2016 and on the fifth day of each month thereafter, the Applicable Margin shall be determined from the following pricing grids based upon Liquidity as set forth in the most recent Liquidity Report delivered or required to be delivered pursuant to Section 6.2(g) hereof; provided however if any Transaction Report or other calculation of a component of Liquidity is at any time restated or otherwise revised (including as a result of an audit) or if the information set forth in any Transaction Report or other calculation of a component of Liquidity otherwise proves to be false or incorrect such that the Applicable Margin would have been higher than was otherwise in effect during any period, without constituting a waiver of any Default or Event of Default arising as a result thereof, interest and/or fees due under this Agreement shall be immediately recalculated at such other rate for any applicable periods and shall be due and payable promptly after demand from the Administrative Agent if such other rate would have been higher.

## REVOLVING LOANS AND SWINGLINE LOANS

<u>Level</u>	<u>Liquidity</u>	<u>Revolving Loans</u>	<u>Swingline Loans</u>
I	≥ \$90,000,000	0.75%	0.75%
II	≥ \$60,000,000 but < \$90,000,000	1.00%	1.00%
III	< \$60,000,000	1.25%	1.25%

## LETTER OF CREDIT FEE

<u>Level</u>	<u>Liquidity</u>	<u>Letter of Credit Fees</u>
I	≥ \$90,000,000	0.75%
II	≥ \$60,000,000 but < \$90,000,000	1.00%
III	< \$60,000,000	1.25%

Notwithstanding the foregoing, (a) if the Borrowers fail to deliver a Transaction Report or other calculation of a component of Liquidity as required herein, the Applicable Margin shall be the rates corresponding to Level III in the foregoing tables until such Transaction Report and/or calculation is delivered, and (b) no reduction to the Applicable Margin shall become effective at any time when an Event of Default has occurred and is continuing.

**“Application”**: an application, in such form as the Issuing Lender may specify from time to time, requesting the Issuing Lender to issue a Letter of Credit.

**“Approved Fund”**: any Fund that is administered or managed by (a) a Lender, (b) an Affiliate of a Lender or (c) an entity or an Affiliate of an entity that administers or manages a Lender.

**“ASC 606”**: Accounting Standards Codification (ASC) Topic 606: Revenue from Contracts with Customers issued by the Financial Accounting Standards Board.

**“Assignment and Assumption”**: an assignment and assumption entered into by a Lender and an Eligible Assignee (with the consent of any party whose consent is required by Section 10.6), and accepted by the Administrative Agent, in substantially the form of Exhibit E or any other form (including electronic documentation generated by an electronic platform) approved by the Administrative Agent and reasonably acceptable to the Borrowers.

**“Available Revolving Commitment”**: at any time, an amount equal to (a) (x) the lesser of (i) the Total Revolving Commitments in effect at such time and (ii) the Borrowing Base in effect at such time, less (y) Reserves imposed by the Administrative Agent in its Permitted Discretion from time to time, minus (b) the Total Revolving Extensions of Credit.

**“Available Revolving Increase Amount”**: as of any date of determination, an amount equal to the result of (a) \$40,000,000 minus (b) the aggregate principal amount of Increases to the Revolving Commitments previously made pursuant to Section 2.12. As of the Fourth Amendment Effective Date, the Available Revolving Increase Amount is \$5,000,000.00.

**“Bankruptcy Code”**: Title 11 of the United States Code entitled “Bankruptcy,” as now or hereafter in effect, or any successor thereto.

**“Bank Services”**: any products, credit services and/or financial accommodations previously, now, or hereafter provided to any Group Member by any Bank Services Provider, including any letters of credit (other than any Letters of Credit provided for the account of the Borrowers hereunder), cash management services, credit cards and foreign exchange services, in each case, other than to the extent constituting Specified Swap Agreements, as any such products or services may be identified in such Bank Services Provider’s various agreements related thereto (each, a **“Bank Services Agreement”**).

**“Bank Services Agreement”**: as defined in the definition of “Bank Services.”

**“Bank Services Provider”**: the Administrative Agent, any Lender, or any Affiliate of the foregoing who provides Bank Services to any Group Member.

**“Benefitted Lender”**: as defined in Section 10.7(a).

**“Board”**: the Board of Governors of the Federal Reserve System of the United States (or any successor).

**“Borrower”** or **“Borrowers”**: as defined in the preamble hereto.

**“Borrowing Base”**: the product of (i) four hundred percent (400%), multiplied by (ii) the Borrowers’ monthly Recurring Revenue (as stated within the last month of the applicable Measurement Period) multiplied by (iii) the Borrowers’ Annualized Recurring Revenue Retention Rate.

**“Borrowing Date”**: any Business Day specified by a Borrower in a Notice of Borrowing as a date on which such Borrower requests the relevant Lenders to make Loans hereunder.

**“Business”**: as defined in Section 4.17(b).

**“Business Day”**: a day other than a Saturday, Sunday or other day on which commercial banks in the State of California or the State of New York are authorized or required by law to close.

**“Capital Lease Obligations”**: as to any Person, the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP and, for the purposes of this Agreement, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

**“Capital Stock”**: any and all shares, interests, participations or other equivalents (however designated) of capital stock of a corporation, any and all equivalent ownership interests in a Person (other than a corporation) and any and all warrants, rights or options to purchase any of the foregoing; provided that Permitted Convertible Indebtedness, or other debt securities that are or by their terms may be convertible or exchangeable into or for Capital Stock that is not Disqualified Stock, shall not constitute Capital Stock prior to settlement, conversion or exchange thereof.

**“Cash Collateral Account”**: as defined in Section 6.3(c).

**“Cash Collateralize”**: to pledge and deposit with or deliver to (a) with respect to Obligations in

respect of Letters of Credit, the Administrative Agent, for the benefit of the Issuing Lender and one or more of the Lenders, as applicable, as collateral for L/C Exposure or obligations of the Lenders to fund participations in respect thereof, cash or Deposit Account balances having an aggregate value of at least 105% (110% in the case of any L/C Exposure in respect of a Letter of Credit denominated in a Foreign Currency) of the L/C Exposure or, if the Administrative Agent and the Issuing Lender shall agree in their sole discretion, other credit support, in each case pursuant to documentation in form and substance satisfactory to the Administrative Agent and the Issuing Lender; (b) with respect to Obligations arising under any Bank Services Agreement in connection with Bank Services, the applicable Bank Services Provider, for its own benefit or any of its applicable Affiliates' benefit, as provider of such Bank Services, cash or Deposit Account balances having an aggregate value of at least 105% of the aggregate amount of the Obligations of the Group Members arising under all such Bank Services Agreements evidencing such Bank Services, or, if such Bank Services Provider shall agree in its sole discretion, other credit support pursuant to documentation in form and substance reasonably satisfactory to the Bank Services Provider; or (c) with respect to Obligations in respect of any Specified Swap Agreements, the applicable Qualified Counterparty, as Collateral for such Obligations, cash or Deposit Account balances or, if such Qualified Counterparty shall agree in its sole discretion, other credit support, in each case pursuant to documentation in form and substance satisfactory to such Qualified Counterparty. "**Cash Collateral**" shall have a meaning correlative to the foregoing and shall include the proceeds of such cash collateral and other credit support.

**"Cash Equivalents"**: (a) marketable direct obligations issued by, or unconditionally guaranteed by, the United States Government or issued by any agency thereof and backed by the full faith and credit of the United States, in each case maturing within one year from the date of acquisition; (b) certificates of deposit, time deposits, eurodollar time deposits or overnight bank deposits having maturities of one year or less from the date of acquisition issued by any Lender or by any commercial bank organized under the laws of the United States or any state thereof having combined capital and surplus of not less than \$250,000,000; (c) commercial paper of an issuer rated at least A-1 by S&P or P-1 by Moody's, or carrying an equivalent rating by a nationally recognized rating agency, if both of the two named rating agencies cease publishing ratings of commercial paper issuers generally, and maturing within six months from the date of acquisition; (d) repurchase obligations of any Lender or of any commercial bank satisfying the requirements of clause (b) of this definition, having a term of not more than 30 days, with respect to securities issued or fully guaranteed or insured by the United States government; (e) securities with maturities of one year or less from the date of acquisition issued or fully guaranteed by any state, commonwealth or territory of the United States, by any political subdivision or taxing authority of any such state, commonwealth or territory or by any foreign government, the securities of which state, commonwealth, territory, political subdivision, taxing authority or foreign government (as the case may be) are rated at least A by S&P or A by Moody's; (f) securities with maturities of six months or less from the date of acquisition backed by standby letters of credit issued by any Lender or any commercial bank satisfying the requirements of clause (b) of this definition; (g) money market mutual or similar funds that invest exclusively in assets satisfying the requirements of clauses (a) through (f) of this definition; or (h) money market funds that (i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, as amended, (ii) are rated AAA by S&P and Aaa by Moody's and (iii) have portfolio assets of at least \$5,000,000,000.

**"Casualty Event"**: any damage to or any destruction of, or any condemnation or other taking by any Governmental Authority of any property of the Loan Parties.

**"Certificated Securities"**: as defined in Section 4.19(a).

**"Change of Control"**: (a) at any time, any "person" or "group" (as such terms are used in Sections 13(d) and 14(d) of the Exchange Act but excluding any employee benefit plan of such person or

its Subsidiaries and any person acting in its capacity as trustee, agent or other fiduciary or administrator of any such plan) other than a Permitted Holder shall become, or obtain rights (whether by means of warrants, options or otherwise) to become, the “beneficial owner” (as defined in Rules 13(d)-3 and 13(d)-5 under the Exchange Act), directly or indirectly, of 35% or more of the ordinary voting power for the election of directors of the Parent (determined on a fully diluted basis); (b) during any period of 12 consecutive months, a majority of the members of the board of directors or other equivalent governing body of the Parent cease to be composed of individuals (i) who were members of that board or equivalent governing body on the first day of such period, (ii) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (iii) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body; ~~or~~ (c) except as permitted under Article VII of this Agreement, the Parent shall cease to own and control, of record and beneficially, directly or indirectly, 100% of each class of outstanding Capital Stock of each other Loan Party free and clear of all Liens (except Liens created by the Security Documents and non-consensual Liens permitted by Section 7.3 arising by operation of law; or (d) the occurrence of any “fundamental change” or similar event under any agreement governing Permitted Convertible Indebtedness.

“**Closing Date**”: the date on which all of the conditions precedent set forth in Section 5.1 are satisfied or waived by the Administrative Agent and, as applicable, the Lenders or the Required Lenders.

“**Code**”: the Internal Revenue Code of 1986, as amended from time to time.

“**Collateral**”: all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is purported to be created by any Security Document.

“**Collateral Information Certificate**”: the Collateral Information Certificate to be executed and delivered by the Loan Parties pursuant to Section 5.1, substantially in the form of Exhibit H.

“**Collateral-Related Expenses**”: all reasonable and out-of-pocket costs and expenses of the Administrative Agent paid or incurred in connection with any sale, collection or other realization on the Collateral, including reasonable compensation to the Administrative Agent and its agents and counsel, and reimbursement for all other costs, expenses and liabilities and advances made or incurred by the Administrative Agent in connection therewith (including as described in Section 6.6 of the Guarantee and Collateral Agreement), and all amounts for which the Administrative Agent is entitled to indemnification under the Security Documents and all advances made by the Administrative Agent under the Security Documents for the account of any Loan Party.

“**Commitment Fee**”: as defined in Section 2.9(b).

“**Commitment Fee Rate**”:

(a) from and after the Fourth Amendment Effective Date until November 5, 2016, the percentages set forth in Level I of the pricing grid below; and

(b) from and after November 5, 2016 and on the fifth day of each month thereafter, the Commitment Fee Rate shall be determined from the following grid based upon Liquidity as set forth in the most recent Liquidity Report delivered or required to be delivered pursuant to Section 6.2(g) hereof; provided however if any Transaction Report or other calculation of a component of Liquidity is at any time restated or otherwise revised (including as a result of an audit) or if the information set forth in any

Transaction Report or other calculation of a component of Liquidity otherwise proves to be false or incorrect such that the Commitment Fee Rate would have been higher than was otherwise in effect during any period, without constituting a waiver of any Default or Event of Default arising as a result thereof, the Commitment Fee due under this Agreement shall be immediately recalculated at such other rate for any applicable periods and shall be due and payable promptly after demand from the Administrative Agent if such other rate would have been higher.

<u>Level</u>	<u>Liquidity</u>	<u>Commitment Fee Rate</u>
I	≥ \$90,000,000	0.30000%
II	≥ \$60,000,000 but < \$90,000,000	0.35000%
III	< \$60,000,000	0.37500%

Notwithstanding the foregoing, (a) if the Borrower fails to deliver a Transaction Report or other calculation of a component of Liquidity as required herein, the Commitment Fee Rate shall be the rate corresponding to Level III in the foregoing table until such Transaction Report and/or calculation is delivered, and (b) no reduction to the Commitment Fee Rate shall become effective at any time when an Event of Default has occurred and is continuing.

**“Communications”**: as defined in Section 10.2(d)(ii).

**“Compliance Certificate”**: a certificate duly executed by a Responsible Officer of the Borrowers substantially in the form of Exhibit B.

**“Connection Income Taxes”**: Other Connection Taxes that are imposed on or measured by net income (however denominated) or that are franchise Taxes or branch profits Taxes.

**“Consolidated Capital Expenditures”**: for any period, with respect to the Parent and its consolidated Subsidiaries, the aggregate of all expenditures (whether paid in cash or other consideration or accrued as a liability and including that portion of Capital Lease Obligations which is capitalized on the consolidated balance sheet of the Parent) by such Group Members during such period for the acquisition or leasing (pursuant to a capital lease) of fixed or capital assets or additions to equipment (including replacements, capitalized repairs and improvements during such period) that, in conformity with GAAP, are included in “additions to property, plant or equipment” or comparable items reflected in the consolidated statement of cash flows of the Parent.

**“Consolidated EBITDA”**: with respect to the Parent and its consolidated Subsidiaries for any trailing twelve month period for which a calculation is to be made under this Agreement, (a) the sum, without duplication, of the amounts for such period of (i) Consolidated Net Income, plus (ii) Consolidated Interest Expense, plus (iii) provisions for taxes based on income, plus (iv) total depreciation expense, plus (v) total amortization expense, plus (vi) non-cash compensation expense, plus (vii) the fees, costs and expenses incurred in connection with this Agreement and the other Loan Documents and the transactions hereunder and thereunder, plus (viii) reasonable one-time fees, costs and expenses incurred in connection

with a Permitted Acquisition or a successful offering or issuance of Capital Stock, in each case to the extent approved in writing by the Administrative Agent as an ‘add-back’ to Consolidated EBITDA, plus (ix) other non-cash items reducing Consolidated Net Income (excluding any such non-cash item to the extent that it represents an accrual or reserve for potential cash items in any future period or amortization of a prepaid cash item that was paid in a prior period) approved by the Administrative Agent in writing as an ‘add back’ to Consolidated EBITDA, plus (x) any extraordinary or non-recurring losses, expenses or charges in connection with the transition to ASC 606 or otherwise not to exceed \$2,000,000 in the aggregate for such trailing twelve month period (or such higher amounts as may be approved by the Required Lenders as an ‘add-back’ to Consolidated EBITDA), minus (b) the sum, without duplication of the amounts for such period of (i) other non-cash items increasing Consolidated Net Income for such period (excluding any such non-cash item to the extent it represents the reversal of an accrual or reserve for potential cash item in any prior period), plus (ii) interest income.

**“Consolidated Interest Expense”**: for any period, total interest expense (including that portion of any Capital Lease Obligations that is treated as interest in accordance with GAAP) of the Parent and its consolidated Subsidiaries for such period with respect to all outstanding Indebtedness of such Persons (including all commissions, discounts and other fees and charges owed with respect to letters of credit and bankers’ acceptance financing and net costs under Swap Agreements in respect of interest rates to the extent such net costs are allocable to such period in accordance with GAAP).

**“Consolidated Net Income”**: for any period, the consolidated net income (or loss) of the Parent and its consolidated Subsidiaries, determined on a consolidated basis in accordance with GAAP; provided that there shall be excluded from the calculation of “Consolidated Net Income” (a) the income (or deficit) of any such Person accrued prior to the date it becomes a Subsidiary of a Borrower or is merged into or consolidated with a Borrower or one of its Subsidiaries, (b) the income (or deficit) of any such Person (other than a Subsidiary of a Borrower) in which a Borrower or one of its Subsidiaries has an ownership interest, except to the extent that any such income is actually received by such Borrower or such Subsidiary in the form of dividends or similar distributions, and (c) the undistributed earnings of any Subsidiary of a Borrower to the extent that the declaration or payment of dividends or similar distributions by such Subsidiary is not at the time permitted by the terms of any Contractual Obligation (other than under any Loan Document) or any Requirement of Law applicable to such Subsidiary or any owner of Capital Stock of such Subsidiary.

**“Contractual Obligation”**: as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

**“Control”**: the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. **“Controlling”** and **“Controlled”** have meanings correlative thereto.

**“Control Agreement”**: any account control agreement entered into among the depository institution at which a Loan Party maintains a Deposit Account or the securities intermediary at which a Loan Party maintains a Securities Account, such Loan Party, and the Administrative Agent pursuant to which the Administrative Agent obtains control (within the meaning of the UCC or any other applicable law) over such Deposit Account or Securities Account, and which agreement is otherwise in form and substance reasonably satisfactory to the Administrative Agent.

**“Controlled Account”**: each Deposit Account and Securities Account that is subject to a Control Agreement in form and substance reasonably satisfactory to the Administrative Agent.

**“Debtor Relief Laws”**: the Bankruptcy Code, and all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief Laws of the United States or other applicable jurisdictions from time to time in effect.

**“Default”**: any of the events specified in Section 8.1, whether or not any requirement for the giving of notice, the lapse of time, or both, has been satisfied.

**“Default Rate”**: as defined in Section 2.15(b).

**“Defaulting Lender”**: subject to Section 2.24(b), any Lender that (a) has failed to (i) fund all or any portion of its Loans within two (2) Business Days of the date such Loans were required to be funded hereunder unless such Lender notifies the Administrative Agent and the Borrowers in writing that such failure is the result of such Lender’s determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied, or (ii) pay to the Administrative Agent, the Issuing Lender, the Swingline Lender or any other Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit or Swingline Loans) within two (2) Business Days of the date when due, (b) has notified the Borrowers, the Administrative Agent, the Issuing Lender or the Swingline Lender in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender’s obligation to fund a Loan hereunder and states that such position is based on such Lender’s reasonable determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied), (c) has failed, within three (3) Business Days after written request by the Administrative Agent or the Borrowers, to confirm in writing to the Administrative Agent and the Borrowers that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by the Administrative Agent and the Borrowers), or (d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, or (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets, including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any equity interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender. Any determination by the Administrative Agent that a Lender is a Defaulting Lender under any one or more of clauses (a) through (d) above shall be conclusive and binding absent manifest error, and such Lender shall be deemed to be a Defaulting Lender (subject to Section 2.24(b)) upon delivery of written notice of such determination to the Borrowers, the Issuing Lender, the Swingline Lender and each Lender.

**“Deposit Account”**: any “deposit account” as defined in the UCC with such additions to such term as may hereafter be made.

**“Deposit Account Control Agreement”**: any Control Agreement entered into by the Administrative Agent, a Loan Party and a financial institution holding a Deposit Account of such Loan Party pursuant to which the Administrative Agent is granted “control” (for purposes of the UCC) over such Deposit Account.



**“Discharge of Obligations”**: subject to Section 10.8, the satisfaction of the Obligations (including all such Obligations relating to Bank Services) by the payment in full, in cash (or, as applicable, Cash Collateralization in accordance with the terms hereof or as otherwise may be reasonably satisfactory to the applicable Bank Services Provider) of the principal of and interest on or other liabilities relating to each Loan and any previously provided Bank Services, all fees and all other expenses or amounts payable under any Loan Document (other than contingent indemnification obligations and any other obligations which pursuant to the terms of any Loan Document specifically survive repayment of the Loans for which no claim has been made), and other Obligations under or in respect of Specified Swap Agreements and Bank Services, to the extent (a) no default or termination event shall have occurred and be continuing thereunder, (b) any such Obligations in respect of Specified Swap Agreements have, if required by any applicable Qualified Counterparties, been Cash Collateralized, (c) no Letter of Credit shall be outstanding (or, as applicable, each outstanding and undrawn Letter of Credit has been Cash Collateralized in accordance with the terms hereof or as otherwise may be reasonably satisfactory to the Issuing Lender), (d) no Obligations in respect of any Bank Services are outstanding (or, as applicable, all such outstanding Obligations in respect of Bank Services have been Cash Collateralized in accordance with the terms hereof or as otherwise may be reasonably satisfactory to the applicable Bank Services Provider), and (e) the aggregate Revolving Commitments of the Lenders are terminated.

**“Disposition”**: with respect to any property (including, without limitation, Capital Stock of any of the Subsidiaries of the Parent), any sale, lease, Sale Leaseback Transaction, assignment, conveyance, transfer, encumbrance or other disposition thereof and any issuance of Capital Stock of any of the Subsidiaries of the Parent. The terms **“Dispose”** and **“Disposed of”** shall have correlative meanings.

**“Disqualified Institutions”**: each of (x) those Persons identified by the Borrowers in writing to SVB prior to the date of the Engagement Letter, (y) the Borrowers’ or any of their controlled Affiliates’ competitors identified by the Borrowers in writing to SVB prior to the date of the Engagement Letter and (z), in each case of clauses (x) and (y) above, any such Person’s known Affiliates that are readily identifiable by name (such Persons in clauses (x) and (y), collectively, the **“Primary Disqualified Institutions”**) excluding, in the case of clause (y) above, any affiliate of a competitor that is primarily engaged in, or that advises funds or other investment vehicles that are engaged in, making, purchasing, holding or otherwise investing in commercial loans, bonds and similar extensions of credit or securities in the ordinary course and with respect to which no Primary Disqualified Institution, directly or indirectly, possesses the power to direct or cause the direction of the investment policies of such entity.

**“Disqualified Stock”**: any Capital Stock that, by its terms (or by the terms of any security into which it is convertible, or for which it is exchangeable, in each case at the option of the holder thereof), or upon the happening of any event, matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or redeemable at the option of the holder thereof, in whole or in part, on or prior to the date that is ninety-one (91) days after the date on which the Loans mature. The amount of Disqualified Stock deemed to be outstanding at any time for purposes of this Agreement will be the maximum amount that the Borrowers and their Subsidiaries may become obligated to pay upon maturity of, or pursuant to any mandatory redemption provisions of, such Disqualified Stock or portion thereof, plus accrued dividends.

**“Documentation Agent”**: Comerica Bank, together with any of its successors in such capacity.

**“Dollars”** and **“\$”**: dollars in lawful currency of the United States.

**“Domestic Subsidiary”**: any Subsidiary that is incorporated, organized or otherwise formed under the laws of the United States, any state thereof or the District of Columbia.

[“Eighth Amendment”: the Eighth Amendment Agreement by and among the Borrowers, the Lenders and the Administrative Agent, dated as of December 19, 2018.](#)

**“Eligible Assignee”:** any Person that meets the requirements to be an assignee under Section 10.6(b)(iii), (v) and (vi) (subject to such consents, if any, as may be required under Section 10.6(b)(iii)).

**“Engagement Letter”:** that certain Engagement Letter dated January 16, 2015 by and among the Administrative Agent and the Borrowers.

**“Environmental Laws”:** any and all foreign, Federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees, requirements of any Governmental Authority or other Requirements of Law (including common law) regulating, relating to or imposing liability or standards of conduct concerning protection of human health or the environment, as now or may at any time hereafter be in effect.

**“Environmental Liability”:** any liability, contingent or otherwise (including any liability for damages, costs of environmental remediation, fines, penalties or indemnities), of a Borrower, any other Loan Party or any of their respective Subsidiaries directly or indirectly resulting from or based upon (a) a violation of an Environmental Law, (b) the generation, use, handling, transportation, storage, treatment or disposal of any Materials of Environmental Concern, (c) exposure to any Materials of Environmental Concern, (d) the release or threatened release of any Materials of Environmental Concern into the environment, or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

**“ERISA”:** the Employee Retirement Income Security Act of 1974, including (unless the context otherwise requires) any rules or regulations promulgated thereunder.

**“ERISA Affiliate”:** each business or entity which is, or within the last six years was, a member of a “controlled group of corporations,” under “common control” or an “affiliated service group” with any Loan Party within the meaning of Section 414(b), (c) or (m) of the Code, required to be aggregated with any Loan Party under Section 414(o) of the Code, or is, or within the last six years was, under “common control” with any Loan Party, within the meaning of Section 4001(a)(14) of ERISA.

**“ERISA Event”:** any of (a) a reportable event as defined in Section 4043 of ERISA with respect to a Pension Plan, excluding, however, such events as to which the PBGC by regulation has waived the requirement of Section 4043(a) of ERISA that it be notified within 30 days of the occurrence of such event; (b) the applicability of the requirements of Section 4043(b) of ERISA with respect to a contributing sponsor, as defined in Section 4001(a)(13) of ERISA, to any Pension Plan where an event described in paragraph (9), (10), (11), (12) or (13) of Section 4043(c) of ERISA is reasonably expected to occur with respect to such plan within the following 30 days; (c) a withdrawal by any Loan Party or any ERISA Affiliate thereof from a Pension Plan or the termination of any Pension Plan resulting in liability under Sections 4063 or 4064 of ERISA; (d) the withdrawal of any Loan Party or, to the knowledge of any Loan Party, any ERISA Affiliate thereof in a complete or partial withdrawal (within the meaning of Section 4203 and 4205 of ERISA) from any Multiemployer Plan if there is any potential liability therefore, or the receipt by any Loan Party or, to the knowledge of an Loan Party, any ERISA Affiliate thereof of notice from any Multiemployer Plan that it is in reorganization or insolvency pursuant to Section 4241 or 4245 of ERISA; (e) the filing of a notice of intent to terminate, the treatment of a plan amendment as a termination under Section 4041 or 4041A of ERISA, or the commencement of proceedings by the PBGC to terminate a Pension Plan or Multiemployer Plan; (f) the imposition of liability on any Loan Party or any ERISA Affiliate thereof pursuant to Sections 4062(e) or 4069 of ERISA or by reason of the application of Section 4212(c) of ERISA; (g) the failure by

any Loan Party or any ERISA Affiliate thereof to make any required contribution to a Pension Plan, or the failure to meet the minimum funding standard of Section 412 of the Code with respect to any Pension Plan (whether or not waived in accordance with Section 412(c) of the Code) or the failure to make by its due date a required installment under Section 430 of the Code with respect to any Pension Plan or the failure to make any required contribution to a Multiemployer Plan; (h) the determination that any Pension Plan is considered an at-risk plan or a plan in endangered or critical status within the meaning of Sections 430, 431 and 432 of the Code or Sections 303, 304 and 305 of ERISA; (i) an event or condition which might reasonably be expected to constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; (j) the imposition of any liability under Title I or Title IV of ERISA, other than PBGC premiums due but not delinquent under Section 4007 of ERISA, upon any Loan Party or any ERISA Affiliate thereof; (k) an application for a funding waiver under Section 303 of ERISA or an extension of any amortization period pursuant to Section 412 of the Code with respect to any Pension Plan; (l) the occurrence of a non-exempt prohibited transaction under Sections 406 or 407 of ERISA for which any Loan Party or any Subsidiary thereof may be directly or indirectly liable; (m) the occurrence of an act or omission which could give rise to the imposition on any Loan Party or any ERISA Affiliate thereof of fines, penalties, taxes or related charges under Chapter 43 of the Code or under Sections 409, 502(c), (i) or (1) or 4071 of ERISA; (n) the assertion of a material claim (other than routine claims for benefits) against any Pension Plan or the assets thereof, or against any Loan Party or any Subsidiary thereof in connection with any such Pension Plan; (o) receipt from the IRS of notice of the failure of any Pension Plan to qualify under Section 401(a) of the Code, or the failure of any trust forming part of any Pension Plan to fail to qualify for exemption from taxation under Section 501(a) of the Code; or (p) the imposition of any lien (or the fulfillment of the conditions for the imposition of any lien) on any of the rights, properties or assets of any Loan Party or any ERISA Affiliate thereof, in either case pursuant to Title I or IV, including Section 302(f) or 303(k) of ERISA or to Section 401(a)(29) or 430(k) of the Code.

**“ERISA Funding Rules”**: the rules regarding minimum required contributions (including any installment payment thereof) to Pension Plans, as set forth in Section 412 of the Code and Section 302 of ERISA, with respect to Plan years ending prior to the effective date of the Pension Protection Act of 2006, and thereafter, as set forth in Sections 412, 430, 431, 432 and 436 of the Code and Sections 302, 303, 304 and 305 of ERISA.

**“Event of Default”**: any of the events specified in Section 8.1; provided that any requirement for the giving of notice, the lapse of time, or both, has been satisfied.

**“Exchange Act”**: the Securities Exchange Act of 1934, as amended from time to time and any successor statute.

**“Excluded Foreign Subsidiary”**: in respect of any Loan Party, any Subsidiary of such Loan Party, at any date of determination, (a) that is a “controlled foreign corporation” as defined in Section 957 of the Code, (b) that is a Subsidiary of a “controlled foreign corporation” as defined in Section 957 of the Code, or (c) substantially all of the assets of which are equity interests in a “controlled foreign corporation” as defined in Section 957 of the Code, and in each case, either (a) the pledge of all of the Capital Stock of such Subsidiary as Collateral or (b) the guaranteeing by such Subsidiary of the Obligations, would, in the good faith judgment of the Loan Parties, reasonably be expected to result in material adverse tax consequences to the Loan Parties.

**“Excluded Taxes”**: any of the following Taxes imposed on or with respect to a Recipient or required to be withheld or deducted from a payment to a Recipient, (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in any such case (i) to the extent imposed as a result of such Recipient being organized under the laws of, or having its principal

office or, in the case of any Lender, its applicable lending office located in, the jurisdiction imposing such Tax (or any political subdivision thereof), or (ii) to the extent constituting Other Connection Taxes; (b) in the case of a Lender, U.S. federal withholding Taxes imposed on amounts payable to or for the account of such Lender with respect to an applicable interest in a Loan or Commitment pursuant to a law in effect on the date on which (i) such Lender acquires such interest in the Loan or Commitment (other than pursuant to an assignment request by the Borrower under Section 2.23) or (ii) such Lender changes its lending office, except in each case to the extent that, pursuant to Section 2.20, amounts with respect to such Taxes were payable either to such Lender's assignor immediately before such Lender became a party hereto or to such Lender immediately before it changed its lending office; (c) Taxes attributable to such Recipient's failure to comply with Section 2.20(f); and (d) any U.S. federal withholding Taxes imposed under FATCA.

***“Existing Credit Facility”***: the credit facility described in the Loan and Security Agreement dated as of August 27, 2013, by and between the Existing Lender and certain of the Borrowers, as the same has been amended, restated, supplemented or otherwise modified from time to time prior to the Closing Date.

***“Existing Lender”***: SVB, as the sole lender under the Existing Credit Facility.

***“Facility”***: each of (a) the Revolving Facility, (b) the L/C Facility (which is a sub-facility of the Revolving Facility), and (c) the Swingline Facility (which is a sub-facility of the Revolving Facility).

***“FASB ASC”***: the Accounting Standards certification of the Financial Accounting Standards Board.

***“FATCA”***: (a) Sections 1471 through 1474 of the Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with) and any current or future regulations or official interpretations thereof, (b) any treaty, law, regulation or other official guidance enacted in any other jurisdiction, or relating to an intergovernmental agreement between the United States and any other jurisdiction with the purpose (in either case) of facilitating the implementation of (a) above, or (c) any agreement pursuant to the implementation of paragraphs (a) or (b) above with the United States Internal Revenue Service, the United States government or any governmental or taxation authority in the United States.

***“Federal Funds Effective Rate”***: for any day, the weighted average of the rates on overnight federal funds transactions with members of the Federal Reserve System arranged by federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average of the quotations for the day of such transactions received by the Administrative Agent from three federal funds brokers of recognized standing selected by it. In no event shall the Funds Federal Effective Rate be less than zero.

***“Fee Letter”***: the amended and restated fee letter agreement dated October 11, 2016, by and among the Borrowers and the Administrative Agent, as may be amended, supplemented or otherwise modified from time to time.

***“Flow of Funds Agreement”***: the spreadsheet or other similar statement prepared and certified by the Borrowers, regarding the disbursement of Revolving Loan proceeds on the Closing Date, the funding and the payment of the fees and expenses of the Administrative Agent and the Lenders (including their respective counsel), and such other matters as may be agreed to by the Borrowers, the Administrative Agent and the Lenders.

**“Foreign Currency”**: lawful money of a country other than the United States.

**“Foreign Lender”**: (a) if a Borrower is a U.S. Person, a Lender that is not a U.S. Person, and (b) if a Borrower is not a U.S. Person, a Lender that is resident or organized under the laws of a jurisdiction other than that in which such Borrower is resident for tax purposes.

**“Foreign Subsidiary”**: any Subsidiary that is not a Domestic Subsidiary.

**“Fourth Amendment”**: the Fourth Amendment to Credit Agreement, dated as of October 28, 2016.

**“Fourth Amendment Effective Date”**: as defined in the Fourth Amendment.

**“Fronting Exposure”**: at any time there is a Defaulting Lender, as applicable, (a) with respect to the Issuing Lender, such Defaulting Lender’s L/C Percentage of the outstanding L/C Exposure other than L/C Exposure as to which such Defaulting Lender’s participation obligation has been reallocated to other Lenders or Cash Collateralized in accordance with the terms hereof, and (b) with respect to the Swingline Lender, such Defaulting Lender’s Revolving Percentage of outstanding Swingline Loans made by the Swingline Lender other than Swingline Loans as to which such Defaulting Lender’s participation obligation has been reallocated to other Lenders.

**“Fund”**: any Person (other than a natural Person) that is (or will be) engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in the ordinary course of its activities.

**“GAAP”**: generally accepted accounting principles in the United States as in effect from time to time, except that for purposes of Section 7.1, GAAP shall be determined on the basis of such principles in effect on the date hereof and consistent with those used in the preparation of the most recent audited financial statements referred to in Section 4.1(b). In the event that any “Accounting Change” (as defined below) shall occur and such change results in a change in the method of calculation of financial covenants, standards or terms in this Agreement, then each party to this Agreement agrees to enter into negotiations to amend such provisions of this Agreement so as to reflect equitably such Accounting Changes with the desired result that the criteria for evaluating the Borrowers’ financial condition shall be the same after such Accounting Changes as if such Accounting Changes had not been made. Until such time as such an amendment shall have been executed and delivered by the Borrowers, the Administrative Agent and the Required Lenders, all financial covenants, standards and terms in this Agreement shall continue to be calculated or construed as if such Accounting Changes had not occurred. **“Accounting Changes”** refers to changes in accounting principles required by the promulgation of any rule, regulation, pronouncement or opinion by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants or, if applicable, the SEC.

**“Governmental Approval”**: any consent, authorization, approval, order, license, franchise, permit, certificate, accreditation, registration, filing or notice, of, issued by, from or to, or other act by or in respect of, any Governmental Authority.

**“Governmental Authority”**: the government of the United States of America or any other nation, or of any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank).

**“Group Members”**: the collective reference to the Borrowers and their respective Subsidiaries.

**“Guarantee and Collateral Agreement”**: the Guarantee and Collateral Agreement to be executed and delivered by the Borrowers and each Guarantor, substantially in the form of Exhibit A.

**“Guarantee Obligation”**: as to any Person (the “*guaranteeing person*”), any obligation, including a reimbursement, counterindemnity or similar obligation, of the guaranteeing person that guarantees or in effect guarantees, or which is given to induce the creation of a separate obligation by another Person (including any bank under any letter of credit) that guarantees or in effect guarantees, any Indebtedness, leases, dividends or other obligations (the “*primary obligations*”) of any other third Person (the “*primary obligor*”) in any manner, whether directly or indirectly, including any obligation of the guaranteeing person, whether or not contingent, (i) to purchase any such primary obligation or any property constituting direct or indirect security therefor, (ii) to advance or supply funds (1) for the purchase or payment of any such primary obligation or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (iii) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (iv) otherwise to assure or hold harmless the owner of any such primary obligation against loss in respect thereof; provided that the term Guarantee Obligation shall not include endorsements of instruments for deposit or collection in the ordinary course of business. The amount of any Guarantee Obligation of any guaranteeing person shall be deemed to be the lower of (a) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee Obligation is made and (b) the maximum amount for which such guaranteeing person may be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, unless such primary obligation and the maximum amount for which such guaranteeing person may be liable are not stated or determinable, in which case the amount of such Guarantee Obligation shall be such guaranteeing person’s maximum reasonably anticipated liability in respect thereof as determined by the Borrowers in good faith.

**“Guarantors”**: a collective reference to each Borrower and each Subsidiary of the Borrowers which has become a Guarantor pursuant to the Guarantee and Collateral Agreement.

**“Increase”**: as defined in Section 2.12.

**“Increase Joinder”**: an instrument, in form and substance reasonably satisfactory to the Administrative Agent, by which a Lender becomes a party to this Agreement pursuant to Section 2.12.

**“Indebtedness”**: of any Person at any date, without duplication, (a) all indebtedness of such Person for borrowed money, (b) all obligations of such Person for the deferred purchase price of property or services (other than current trade payables incurred in the ordinary course of such Person’s business), (c) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (d) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (e) all Capital Lease Obligations and all Synthetic Lease Obligations of such Person, (f) all obligations of such Person, contingent or otherwise, as an account party or applicant under or in respect of acceptances, letters of credit, surety bonds or similar arrangements, (g) all obligations of such Person to purchase, redeem, retire, defease or otherwise make any payment in respect of any Capital Stock in such Person or any other Person (including, without limitation, Disqualified Stock), or any warrant, right or option to acquire such Capital Stock, valued, in the case of a redeemable preferred interest, at the greater of its voluntary or involuntary liquidation preference plus accrued and unpaid dividends, (h) all Guarantee Obligations of such Person in respect of obligations of the kind referred to in clauses (a) through (g)

above, (i) all obligations of the kind referred to in clauses (a) through (h) above secured by (or for which the holder of such obligation has an existing right, contingent or otherwise, to be secured by) any Lien on property (including accounts and contract rights) owned by such Person, whether or not such Person has assumed or become liable for the payment of such obligation, and (j) the net obligations of such Person in respect of Swap Agreements. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person's ownership interest in or other relationship with such entity, except to the extent the terms of such Indebtedness expressly provide that such Person is not liable therefor.

**"Indemnified Taxes"**: (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any Obligation of any Loan Party under any Loan Document and (b) to the extent not otherwise described in (a), Other Taxes.

**"Indemnitee"**: as defined in Section 10.5(b).

**"Insolvency Proceeding"**: (a) any case, action or proceeding before any court or other Governmental Authority relating to bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or (b) any general assignment for the benefit of creditors, composition, marshalling of assets for creditors, or other, similar arrangement in respect of any Person's creditors generally or any substantial portion of such Person's creditors, in each case undertaken under U.S. Federal, state or foreign law, including any Debtor Relief Law.

**"Intellectual Property"**: the collective reference to all rights, priorities and privileges relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including copyrights, copyright licenses, patents, patent licenses, trademarks, trademark licenses, technology, know-how and processes, any and all source code, and all rights to sue at law or in equity for any infringement or other impairment thereof, including the right to receive all proceeds and damages therefrom.

**"Intellectual Property Security Agreement"**: an intellectual property security agreement entered into between a Loan Party and the Administrative Agent pursuant to the terms of the Guarantee and Collateral Agreement in form and substance satisfactory to the Administrative Agent, together with each other intellectual property security agreement and supplement thereto, in each case as amended, restated, supplemented or otherwise modified from time to time.

**"Interest Payment Date"**: as to any Loan (including any Swingline Loan), the fifth day (or, if such day is not a Business Day, the immediately succeeding Business Day) of each calendar month to occur while such Loan is outstanding and the final maturity date of such Loan.

**"Interest Rate Agreement"**: with respect to any Person, any interest rate swap agreement, interest rate cap agreement, interest rate collar agreement, interest rate hedging agreement or other similar agreement or arrangement, each of which is (a) for the purpose of hedging the interest rate exposure associated with such Person's operations, (b) approved by Administrative Agent, and (c) not for speculative purposes.

**"Inventory"**: all "inventory," as such term is defined in the UCC, now owned or hereafter acquired by any Loan Party, wherever located, and in any event including inventory, merchandise, goods and other personal property that are held by or on behalf of any Loan Party for sale or lease or are furnished or are to be furnished under a contract of service, or that constitutes raw materials, work in process, finished goods, returned goods, or materials or supplies of any kind used or consumed or to be used or consumed in such Loan Party's business or in the processing, production, packaging, promotion, delivery or shipping of the same, including all supplies and embedded software.

**“Investments”**: as defined in Section 7.8.

**“IRS”**: the Internal Revenue Service, or any successor thereto.

**“ISP”**: with respect to any Letter of Credit, the “International Standby Practices 1998” published by the Institute of International Banking Law & Practice (or such later version thereof as may be in effect at the time of issuance).

**“Issuing Lender”**: as the context may require, (a) SVB or any Affiliate thereof, in its capacity as issuer of any Letter of Credit, and (b) any other Lender that may become an Issuing Lender pursuant to Section 3.12, with respect to Letters of Credit issued by such Lender. The Issuing Lender may, in its discretion, arrange for one or more Letters of Credit to be issued by Affiliates of the Issuing Lender or other financial institutions, in which case the term “Issuing Lender” shall include any such Affiliate or other financial institution with respect to Letters of Credit issued by such Affiliate or other financial institution.

**“Issuing Lender Fees”**: as defined in Section 3.3(a).

**“Judgment Currency”**: as defined in Section 10.19.

**“L/C Advance”**: each L/C Lender’s funding of its participation in any L/C Disbursement in accordance with its L/C Percentage of the L/C Commitment.

**“L/C Commitment”**: as to any L/C Lender, the obligation of such L/C Lender, if any, to purchase an undivided interest in the Issuing Lenders’ obligations and rights under and in respect of each Letter of Credit (including to make payments with respect to draws made under any Letter of Credit pursuant to Section 3.5(b)) in an aggregate principal amount not to exceed the amount set forth under the heading “L/C Commitment” opposite such L/C Lender’s name on Schedule 1.1A or in the Assignment and Assumption or the Increase Joinder pursuant to which such L/C Lender becomes a party hereto, as the same may be changed from time to time pursuant to the terms hereof. The L/C Commitment is a sublimit of the Revolving Commitment and the aggregate amount of the L/C Commitments shall not exceed the amount of the Total L/C Commitments at any time.

**“L/C Disbursements”**: a payment or disbursement made by the Issuing Lender pursuant to a Letter of Credit.

**“L/C Exposure”**: at any time, the sum of (a) the aggregate undrawn amount of all outstanding Letters of Credit at such time, and (b) the aggregate amount of all L/C Disbursements that have not yet been reimbursed or converted into Revolving Loans at such time. The L/C Exposure of any L/C Lender at any time shall equal its L/C Percentage of the aggregate L/C Exposure at such time.

**“L/C Facility”**: the L/C Commitments and the extensions of credit made thereunder.

**“L/C Fee Payment Date”**: as defined in Section 3.3(a).

**“L/C Lender”**: a Lender with an L/C Commitment.

**“L/C Percentage”**: as to any L/C Lender at any time, the percentage of the Total L/C Commitments represented by such L/C Lender’s L/C Commitment, as such percentage may be adjusted as provided in Section 2.23.

**“L/C-Related Documents”**: collectively, each Letter of Credit, all applications for any Letter of



Credit (and applications for the amendment of any Letter of Credit) submitted by a Borrower to the Issuing Lender and any other document, agreement and instrument relating to any Letter of Credit, including any of the Issuing Lender's standard form documents for letter of credit issuances.

**"Lenders"**: as defined in the preamble hereto; provided that unless the context otherwise requires, each reference herein to the Lenders shall be deemed to include the Issuing Lender and the Swingline Lender.

**"Letter of Credit"**: as defined in Section 3.1(a).

**"Letter of Credit Availability Period"**: the period from and including the Closing Date to but excluding the Letter of Credit Maturity Date.

**"Letter of Credit Fees"**: as defined in Section 3.3(a).

**"Letter of Credit Fronting Fees"**: as defined in Section 3.3(a).

**"Letter of Credit Maturity Date"**: the date occurring 15 days prior to the Revolving Termination Date then in effect (or, if such day is not a Business Day, the next preceding Business Day).

**"Lien"**: any mortgage, deed of trust, pledge, hypothecation, collateral assignment, deposit arrangement, encumbrance, lien (statutory or other), charge or other security interest or any preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever (including any conditional sale or other title retention agreement and any capital lease having substantially the same economic effect as any of the foregoing).

**"Liquidity"**: at any time, the sum of (i) the aggregate amount of unrestricted cash and Cash Equivalents (including short term marketable securities) held by the Borrowers and the Guarantors in Deposit Accounts or Securities Accounts maintained with SVB or SVB's Affiliates or another Lender or an Affiliate thereof, or with National Bank of South Carolina ("**NBSC**", provided that the aggregate amounts held in deposit accounts with NBSC shall not exceed \$6,500,000 at any time), and in each case subject to a first priority lien in favor of the Administrative Agent, including, without limitation, pursuant to a Deposit Account Control Agreement with respect to each such Deposit Account or Securities Account Control Agreement with respect to each such Securities Account, plus (ii) the Available Revolving Commitment at such time; provided that, in connection with any calculation of Liquidity required hereunder, at least \$25,000,000 must consist of unrestricted cash and Cash Equivalents (including short term marketable securities) satisfying the requirements of clause (i) above.

**"Liquidity Report"**: a report, in form and substance reasonably satisfactory to the Administrative Agent, delivered by the Borrowers to the Administrative Agent which discloses, as of the date of such report, the amount and composition of Liquidity as of such date.

**"Loan"**: any loan made or maintained by any Lender pursuant to this Agreement.

**"Loan Documents"**: this Agreement, the Security Documents, the Notes, the Fee Letter, the Flow of Funds Agreement, the Solvency Certificate, the Collateral Information Certificate, each L/C-Related Document, each Compliance Certificate, each Transaction Report, each Liquidity Report, each Notice of Borrowing, each Bank Services Agreement, and any agreement creating or perfecting rights in Cash Collateral pursuant to the provisions of Section 3.10, and any amendment, waiver, supplement or other modification to any of the foregoing.

**“Loan Parties”**: each Group Member that is a party to a Loan Document.

**“Material Adverse Effect”**: (a) a material impairment in the perfection or priority of the Administrative Agent’s Lien in the Collateral or in the value of such Collateral; (b) a material adverse change in the business, operations, or condition (financial or otherwise) of all of the Borrowers taken as a whole; or (c) a material impairment of the prospect of repayment of any portion of the Obligations.

**“Materials of Environmental Concern”**: any substance, material or waste that is defined, regulated, governed or otherwise characterized under any Environmental Law as hazardous or toxic or as a pollutant or contaminant (or by words of similar meaning and regulatory effect), any petroleum or petroleum products, asbestos, polychlorinated biphenyls, urea-formaldehyde insulation, molds or fungus, and radioactivity, radiofrequency radiation at levels known to be hazardous to human health and safety.

**“Maximum Rate”**: as defined in Section 10.9.

**“Measurement Period”**: for any period of measurement, the trailing three (3) month period ending as of the then-current measurement date. A measurement period can be either a calendar quarter, or any trailing three (3) calendar month period.

**“Minority Lender”**: as defined in Section 10.1(b).

**“Moody’s”**: Moody’s Investors Service, Inc.

**“Mortgaged Properties”**: the real properties as to which, pursuant to Section 6.12(b) or otherwise, the Administrative Agent, for the benefit of the Secured Parties, shall be granted a Lien pursuant to the Mortgages.

**“Mortgages”**: each of the mortgages, deeds of trust, deeds to secure debt or such equivalent documents hereafter entered into and executed and delivered by one or more of the Loan Parties to the Administrative Agent, in each case, as such documents may be amended, amended and restated, supplemented or otherwise modified, renewed or replaced from time to time and in form and substance reasonably acceptable to the Administrative Agent.

**“Multiemployer Plan”**: a “multiemployer plan” (within the meaning of Section 3(37) of ERISA) to which any Loan Party or any ERISA Affiliate thereof makes, is making, or is obligated or has ever been obligated to make, contributions.

**“Non-Consenting Lender”**: any Lender that does not approve any consent, waiver or amendment that (a) requires the approval of all Affected Lenders in accordance with the terms of Section 10.1 and (b) has been approved by the Required Lenders.

**“Non-Defaulting Lender”**: at any time, each Lender that is not a Defaulting Lender at such time.

**“Note”**: a Revolving Loan Note or a Swingline Loan Note.

**“Notice of Borrowing”**: a notice substantially in the form of Exhibit I.

**“Obligations”**: the unpaid principal of and interest on (including interest accruing after the maturity of the Loans and interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to any Loan Party, whether or not a claim for post-filing or post-petition interest is allowed or allowable in such proceeding) the Loans and all other

obligations and liabilities of the Loan Parties to the Administrative Agent, the Issuing Lender, any other Lender, any Bank Services Provider (in its capacity as provider of Bank Services), and any Qualified Counterparty party to a Specified Swap Agreement, whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, this Agreement, any other Loan Document (including, for the avoidance of doubt, any Bank Services Agreement), the Letters of Credit, any Specified Swap Agreement or any other document made, delivered or given in connection herewith or therewith, whether on account of principal, interest, reimbursement obligations, payment obligations, fees, indemnities, costs, expenses (including all reasonable and documented fees, charges and disbursements of one primary counsel to the Administrative Agent, the Issuing Lender, and the Lenders, or any Bank Services Provider, to the extent that any applicable Bank Services Agreement requires the reimbursement by any applicable Group Member of any such expenses, and any Qualified Counterparty party to a Specified Swap Agreement that are required to be paid by any Loan Party pursuant to such Specified Swap Agreement) or otherwise. For the avoidance of doubt, the Obligations shall not include any obligations arising under any warrants or other equity instruments issued by any Loan Party to any Lender.

**“Operating Documents”**: for any Person as of any date, such Person’s constitutional documents, formation documents and/or certificate of incorporation (or equivalent thereof), as certified (if applicable) by such Person’s jurisdiction of formation as of a recent date, and, (a) if such Person is a corporation, its bylaws or memorandum and articles of association (or equivalent thereof) in current form, (b) if such Person is a limited liability company, its limited liability company agreement (or similar agreement), and (c) if such Person is a partnership, its partnership agreement (or similar agreement), each of the foregoing with all current amendments or modifications thereto.

**“OFAC”**: The Office of Foreign Assets Control of the U.S. Department of the Treasury.

**“Other Connection Taxes”**: with respect to any Recipient, Taxes imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document, or sold or assigned an interest in any Loan or Loan Document).

**“Other Taxes”**: all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Loan Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment (other than an assignment made pursuant to Section 2.23).

**“Overadvance”**: as defined in Section 2.8.

**“Parent”**: as defined in the Preamble hereto.

**“Participant”**: as defined in Section 10.6(d).

**“Participant Register”**: as defined in Section 10.6(d).

**“Patriot Act”**: the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Title III of Pub. L. 107-56, signed into law October 26, 2001.

**“Payoff Letter”**: a letter, in form and substance satisfactory to the Administrative Agent, dated as of a date on or prior to the Closing Date and executed by each of the Existing Lender and the Borrowers that are party to the Existing Credit Facility to the effect that upon receipt by the Existing Lender of the “payoff amount” (however designated) referenced therein, (a) the obligations of the Group Members under the Existing Credit Facility shall be satisfied in full, (b) the Liens held by the Existing Lender under the Existing Credit Facility shall terminate without any further action, and (c) such Borrowers and the Administrative Agent (and their respective counsel and such counsels’ agents) shall be entitled to file UCC-3 amendment statements, USPTO releases, USCRO releases and any other releases necessary to further evidence the termination of such Liens.

**“PBGC”**: the Pension Benefit Guaranty Corporation, or any successor thereto.

**“Pension Plan”**: an employee pension plan (as defined in Section 3(2) of ERISA) other than a Multiemployer Plan subject to the provisions of Title IV of ERISA or Sections 412 and 430 of the Code or Sections 302 and 303 of ERISA and in respect of which any Loan Party or any ERISA Affiliate thereof is (or if such plan were terminated would under Section 4069 of ERISA be deemed to be) a “contributing sponsor” as defined in Section 4001(a)(13) of ERISA.

**“Permitted Acquisition”**: as defined in Section 7.8(l).

**“Permitted Bond Hedge Transaction”**: any call or capped call option (or substantively equivalent derivative transaction) relating to Parent’s common stock (or other securities or property following a merger event, reclassification or other change of the common stock of Parent) purchased by Parent in connection with the issuance of any Permitted Convertible Indebtedness and settled in common stock of Parent (or such other securities or property), cash or a combination thereof (such amount of cash determined by reference to the price of Parent’s common stock or such other securities or property), and cash in lieu of fractional shares of common stock of Parent; provided that (a) the purchase price for such Permitted Bond Hedge Transaction does not exceed the net cash proceeds received by Parent from the sale of the Permitted Convertible Indebtedness in connection with which such Permitted Bond Hedge Transaction was purchased, (b) the other terms, conditions and covenants of each such transaction shall be such as are customary for transactions of such type (as determined by Parent in good faith), and (c) any payments or settlements by a Group Member in respect of such Permitted Bond Hedge Transaction shall only be permitted to the extent permitted under Section 7.6

**“Permitted Convertible Indebtedness”**: senior unsecured Indebtedness of Parent that (a) as of the date of issuance thereof contains terms, conditions, covenants, conversion or exchange rights, redemption rights and offer to repurchase rights, in each case, as are typical and customary for Indebtedness of such type (in each case, as determined by Parent in good faith) and (b) is convertible or exchangeable into shares of common stock of Parent (or other securities or property following a merger event, reclassification or other change of the common stock of Parent), cash or a combination thereof (such amount of cash determined by reference to the price of Parent’s common stock or such other securities or property), and cash in lieu of fractional shares of common stock of Parent; provided that (i) such Permitted Convertible Indebtedness shall have a stated final maturity no earlier than 91 days after February 20, 2020 and shall not be subject to any conditions that could result in such stated final maturity occurring on a date earlier than 91 days after February 20, 2020 (it being understood that any conversion of such Indebtedness (whether into cash, shares of common stock in Parent or any combination thereof), a repurchase of such Indebtedness on account of the occurrence of a “fundamental change” or any redemption of such Indebtedness at the option of Parent shall not be deemed to constitute a change in the stated final maturity thereof), (ii) such Indebtedness shall not be required to be repaid, prepaid, redeemed, repurchased or defeased, whether on one or more fixed dates, upon the occurrence of one or more events or at the option of any holder thereof (except, in each case,

upon any conversion of such Indebtedness (whether into cash, shares of common stock in Parent or any combination thereof), the occurrence of an event of default or a “fundamental change” or following Parent’s election to redeem such Indebtedness) prior to the date that is 91 days after February 20, 2020, (iii) no Subsidiary that is not a Loan Party shall have Guarantee Obligations with respect to obligations of Parent thereunder, (iv) notwithstanding anything in clauses (i) and (ii) above to the contrary, any payments in respect thereof shall only be permitted to the extent permitted by Section 7.6, and (v) such Indebtedness shall include a 30-day customary (as determined by Parent in good faith) cure period with respect to any cross-default or cross-acceleration related to the Obligations.

**“Permitted Discretion”**: the commercially reasonable (from the perspective of a secured lender) credit judgment exercised in good faith, in accordance with customary business practices of the Administrative Agent for comparable secured lending transactions.

**“Permitted Holders”**: GS Capital Partners VI Fund, L.P., GS Capital Partners VI Offshore Fund, L.P., GS Capital Partners VI Parallel, L.P., GS Capital Partners VI GmbH & Co. KG, Oak Investment Partners XII, L.P., Mason R. Holland, Jr., Holland Family Trust, and Shawn A. Jenkins and any of their respective Affiliates and any funds, investment vehicles or partnerships managed, advised or sub-advised by any of them or any of their respective Affiliates but not including any portfolio operating company of any of the foregoing.

**“Permitted Refinancing Indebtedness”**: Indebtedness of any Person (**“Refinancing Indebtedness”**) issued or incurred by such Person (including by means of the extension or renewal of existing Indebtedness) to refinance, refund, extend, renew or replace existing Indebtedness of such Person (**“Refinanced Indebtedness”**); provided that (a) the principal amount of such Refinancing Indebtedness is not greater than the principal amount of such Refinanced Indebtedness plus the amount of any premiums or penalties and accrued and unpaid interest paid thereon and reasonable fees and expenses, in each case associated with such Refinancing Indebtedness, (b) other than Refinancing Indebtedness in respect of Indebtedness permitted pursuant to Sections 7.2(d) and 7.2(e), such Refinancing Indebtedness has a final maturity that is no sooner than, and a weighted average life to maturity that is no shorter than, such Refinanced Indebtedness, (c) if such Refinanced Indebtedness or any Guarantee Obligation thereof or any security therefor are subordinated to the Obligations, such Refinancing Indebtedness and any Guarantee Obligations thereof and any security therefor remain so subordinated on terms no less favorable to the Lenders and the other Secured Parties, (d) the obligors in respect of such Refinanced Indebtedness immediately prior to such refinancing, refunding extension, renewal or replacement are the only obligors on such Refinancing Indebtedness and (e) any Guarantee Obligations which constitute all or a portion of such Refinancing Indebtedness, taken as a whole, are determined in good faith by a Responsible Officer of such Person to be no less favorable to such Person and the Lenders and the other Secured Parties in any material respect than the covenants and events of default or Guarantee Obligations, if any, applicable to such Refinanced Indebtedness.

**“Person”**: any natural Person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

**“Platform”**: as defined in Section 10.2(d)(i).

**“Preferred Stock”**: the preferred Capital Stock of any Loan Party.

**“Prime Rate”**: the rate of interest per annum from time to time published in the money rates section of the Wall Street Journal or any successor publication thereto as the “prime rate” then in effect; provided that if such rate of interest, as set forth from time to time in the money rates section of the Wall Street

Journal, becomes unavailable for any reason as determined by the Administrative Agent, the “Prime Rate” shall mean the rate of interest per annum announced by the Administrative Agent as its prime rate in effect at its principal office (such Administrative Agent announced Prime Rate not being intended to be the lowest rate of interest charged by the Administrative Agent in connection with extensions of credit to debtors). In no event shall the Prime Rate be less than zero.

“**Pro Forma Financial Statements**”: balance sheets, income statements and cash flow statements prepared by the Parent and its consolidated Subsidiaries that give effect (as if such events had occurred on such date) to (a) the Loans and extensions of credit to be made on the Closing Date and the use of proceeds thereof and (b) the payment of fees and expenses in connection with the foregoing, in each case prepared for (i) the month ending December 31, 2014, as if such transactions had occurred on the first date of such month and (ii) on a monthly basis through the Revolving Termination Date, in each case, demonstrating pro forma compliance with the covenants set forth in Section 7.1.

“**Projections**”: as defined in Section 6.2(b).

“**Properties**”: as defined in Section 4.17(a).

“**Protective Overadvance**”: as defined in Section 2.8(b).

“**Qualified Counterparty**”: with respect to any Specified Swap Agreement, any counterparty thereto that, at the time such Specified Swap Agreement was entered into or as of the Closing Date, was the Administrative Agent or a Lender or an Affiliate of the Administrative Agent or a Lender.

“**Recipient**”: the Administrative Agent or a Lender, as applicable.

“**Recurring Revenue**”: the Borrowers’ software services revenue and professional services revenue related to the Benefit Service Center business line as currently classified and presented in the Parent’s consolidated GAAP financial statements (e.g. monthly managed services, testing services, maintenance, license fees, video, voluntary benefits) that in each case meets all of the Borrowers’ representations and warranties set forth in the Loan Documents. Monthly revenue from the Benefitstore business line shall be calculated based on the average trailing twelve months period.

“**Recurring Revenue Lost**”: (i) the total quarterly Recurring Revenue of a customer from the penultimate quarter, for which Recurring Revenue for such customer in the Measurement Period was either zero (0) or less in the last month of the Measurement Period, or (ii) the decrease in Recurring Revenue for a customer from the penultimate quarter to the Measurement Period when such change is both greater than or equal to fifty percent (50%), and Two Hundred Thousand Dollars (\$200,000).

“**Refunded Swingline Loans**”: as defined in Section 2.7(b).

“**Register**”: as defined in Section 10.6(c).

“**Regulation U**”: Regulation U of the Board as in effect from time to time.

“**Related Parties**”: with respect to any Person, such Person’s Affiliates and the partners, directors, officers, employees, agents and advisors of such Person and of such Person’s Affiliates.

“**Replacement Lender**”: as defined in Section 2.23.

“**Required Lenders**”: at any time, (a) if only one Lender holds the Total Revolving Commitments,

such Lender; and (b) if more than one Lender who are not Affiliates of one another holds the Total Revolving Commitments, then at least two unaffiliated Lenders who together hold more than 50% of the Total Revolving Commitments (including, without duplication, the L/C Commitments) then in effect or, if the Revolving Commitments have been terminated, the Total Revolving Extensions of Credit then outstanding; provided that for the purposes of this clause (b), the Revolving Commitments of, and the portion of the Revolving Loans and participations in L/C Exposure and Swingline Loans held or deemed held by, any Defaulting Lender shall be excluded for purposes of making a determination of Required Lenders.

**“Requirement of Law”**: as to any Person, the Operating Documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

**“Reserves”**: as of any date of determination, such amounts as the Administrative Agent may from time to time establish and revise in its Permitted Discretion, reducing the amount of Revolving Loans and other financial accommodations which would otherwise be available to the Borrowers (a) to reflect events, conditions, contingencies or risks which, as determined by the Administrative Agent in its Permitted Discretion, do or are reasonably likely to adversely affect (i) the Collateral or any other property which is security for the Obligations or its value (including without limitation any increase in delinquencies of Accounts), (ii) the assets, business or prospects of any Loan Party, or (iii) the security interests and other rights of the Administrative Agent and the Secured Parties in the Collateral (including the enforceability, perfection and priority thereof); or (b) to reflect the Administrative Agent’s reasonable belief that any collateral report or financial information furnished by or on behalf of the Loan Parties, if any, to the Administrative Agent is or may have been incomplete, inaccurate or misleading in any material respect; or (c) in respect of any state of facts which the Administrative Agent determines constitutes an Event of Default or may, with notice or passage of time or both, constitute an Event of Default.

**“Responsible Officer”**: the chief executive officer, president, chief financial officer, treasurer, controller or comptroller of an applicable Loan Party, but in any event, with respect to financial matters, the chief executive officer, the chief financial officer, treasurer, controller or comptroller of such Loan Party and solely for the purposes of notices given pursuant to Section 2, any other officer or employee of the applicable Loan Party so designated by any of the foregoing officers in a written notice to the Administrative Agent (together with incumbency and other related documentation reasonably requested by the Administrative Agent). Any document delivered hereunder that is signed by a Responsible Officer of a Loan Party shall be conclusively presumed to have been authorized by all necessary corporate, partnership and/or other action on the part of such Loan Party and such Responsible Officer shall be conclusively presumed to have acted on behalf of such Loan Party.

**“Restricted Payments”**: as defined in Section 7.6.

**“Revolving Commitment”**: as to any Lender, the obligation of such Lender, if any, to make Revolving Loans and participate in Swingline Loans and Letters of Credit in an aggregate principal amount not to exceed the amount set forth under the heading “Revolving Commitment” opposite such Lender’s name on Schedule 1.1A or in the Assignment and Assumption or the Increase Joinder pursuant to which such Lender becomes a party hereto, as the same may be changed from time to time pursuant to the terms hereof (including in connection with assignments and Increases permitted hereunder).

**“Revolving Commitment Period”**: the period from and including the Closing Date to the Revolving Termination Date.

**“Revolving Extensions of Credit”**: as to any Revolving Lender at any time, an amount equal to the sum of (a) the aggregate principal amount of all Revolving Loans held by such Lender then outstanding, plus (b) such Lender’s L/C Percentage of the aggregate undrawn amount of all outstanding Letters of Credit at such time, plus (c) such Lender’s L/C Percentage of the aggregate amount of all L/C Disbursements that have not yet been reimbursed or converted into Revolving Loans at such time, plus (d) such Lender’s Revolving Percentage of the aggregate principal amount of Swingline Loans then outstanding.

**“Revolving Facility”**: the Revolving Commitments and the extensions of credit made thereunder.

**“Revolving Lender”**: each Lender that has a Revolving Commitment or that holds Revolving Loans.

**“Revolving Loan Funding Office”**: the office of the Administrative Agent specified in Section 10.2 or such other office as may be specified from time to time by the Administrative Agent as its funding office by written notice to the Borrowers and the Lenders.

**“Revolving Loan Note”**: a promissory note in the form of Exhibit G-1, as it may be amended, supplemented or otherwise modified from time to time.

**“Revolving Loans”**: as defined in Section 2.4(a).

**“Revolving Percentage”**: as to any Revolving Lender at any time, the percentage which such Lender’s Revolving Commitment then constitutes of the Total Revolving Commitments or, at any time after the Revolving Commitments shall have expired or terminated, the percentage which the aggregate principal amount of such Lender’s Revolving Loans then outstanding constitutes of the aggregate principal amount of all Revolving Loans then outstanding; provided that in the event that the Revolving Loans are paid in full prior to the reduction to zero of the Total Revolving Commitments, the Revolving Percentages shall be determined in a manner designed to ensure that the other outstanding Revolving Extensions of Credit shall be held by the Revolving Lenders on a comparable basis.

**“Revolving Termination Date”**: is February 20, 2020.

**“S&P”**: Standard & Poor’s Ratings Services.

**“Sale Leaseback Transaction”**: any arrangement with any Person or Persons, whereby in contemporaneous or substantially contemporaneous transactions a Loan Party sells substantially all of its right, title and interest in any property and, in connection therewith, acquires, leases or licenses back the right to use all or a material portion of such property.

**“Sanctioned Entity”**: (a) a country or a government of a country, (b) an agency of the government of a country, (c) an organization directly or indirectly controlled by a country or its government, or (d) a Person resident in or determined to be resident in a country, in each case, that is subject to a country sanctions program administered and enforced by OFAC.

**“Sanctioned Person”**: a Person named on the list of Specially Designated Nationals maintained by OFAC.

**“SEC”**: the Securities and Exchange Commission, any successor thereto and any analogous Governmental Authority.

**“Secured Obligations”**: as defined in the Guarantee and Collateral Agreement.



**“Secured Parties”**: the collective reference to the Administrative Agent, the Lenders (including the Issuing Lender in its capacity as Issuing Lender and any Swingline Lender in its capacity as Swingline Lender), each Bank Services Provider and any Qualified Counterparties.

**“Securities Account”**: any “securities account” as defined in the UCC with such additions to such term as may hereafter be made.

**“Securities Account Control Agreement”**: any Control Agreement entered into by the Administrative Agent, a Loan Party and a securities intermediary holding a Securities Account of such Loan Party pursuant to which the Administrative Agent is granted “control” (for purposes of the UCC) over such Securities Account.

**“Securities Act”**: the Securities Act of 1933, as amended from time to time and any successor statute.

**“Security Documents”**: the collective reference to (a) the Guarantee and Collateral Agreement, (b) the Mortgages, (c) the Intellectual Property Security Agreements, (d) each Deposit Account Control Agreement, (e) each Securities Account Control Agreement, (f) all other security documents hereafter delivered to the Administrative Agent granting a Lien on any property of any Person to secure the Obligations of any Loan Party arising under any Loan Document, and (g) all financing statements, fixture filings, patent, trademark and copyright filings, assignments, acknowledgments and other filings, documents and agreements made or delivered pursuant to any of the foregoing.

**“Seventh Amendment”**: the Seventh Amendment Agreement by and among the Borrowers, the Lenders and the Administrative Agent, dated as of March 29, 2018.

**“Seventh Amendment Effective Date”**: as defined in the Seventh Amendment.

**“Solvency Certificate”**: the Solvency Certificate, dated the Closing Date, delivered to the Administrative Agent and the Lenders pursuant to Section 5.1(o), which Solvency Certificate shall be in substantially the form of Exhibit D.

**“Solvent”**: when used with respect to any Person, as of any date of determination, (a) the amount of the “fair value” of the assets of such Person will, as of such date, exceed the amount of all “liabilities of such Person, contingent or otherwise,” as of such date, as such quoted terms are determined in accordance with applicable federal and state laws governing determinations of the insolvency of debtors, (b) the “present fair saleable value” of the assets of such Person will, as of such date, be greater than the amount that will be required to pay the liability of such Person on its debts as such debts become absolute and matured, as such quoted terms are determined in accordance with applicable federal and state laws governing determinations of the insolvency of debtors, (c) such Person will not have, as of such date, an unreasonably small amount of capital with which to conduct its business, and (d) such Person will be able to pay its debts as they mature. For purposes of this definition, (i) “debt” means liability on a “claim,” and (ii) “claim” means any (x) right to payment, whether or not such a right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured or (y) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured or unmatured, disputed, undisputed, secured or unsecured.

**“Specified Swap Agreement”**: any Swap Agreement entered into by any Loan Party and any

Qualified Counterparty (or any Person who was a Qualified Counterparty as of the Closing Date or as of the date such Swap Agreement was entered into).

**“Subordinated Debt Document”**: any agreement, certificate, document or instrument executed or delivered by any Loan Party or any of its respective Subsidiaries and evidencing Indebtedness of such Loan Party or such Subsidiary which is either subordinated to the payment of the Obligations or the lien securing such indebtedness is subordinated to the Administrative Agent’s Lien, in each case, in a manner approved in writing by the Administrative Agent, and any renewals, modifications, or amendments thereof which are approved in writing by the Administrative Agent.

**“Subordinated Indebtedness”**: Indebtedness of a Loan Party, the payment of which and/or the lien securing such Indebtedness, is subordinated to the Obligations and/or the Administrative Agent’s Lien, as applicable, pursuant to subordination terms (including payment, lien and remedies subordination terms, as applicable) reasonably acceptable to the Administrative Agent.

**“Subsidiary”**: as to any Person, a corporation, partnership, limited liability company or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise qualified, all references to a **“Subsidiary”** or to **“Subsidiaries”** in this Agreement shall refer to a Subsidiary or Subsidiaries of the Parent.

**“SVB”**: as defined in the preamble hereto.

**“Swap Agreement”**: any agreement with respect to any swap, hedge, forward, future or derivative transaction or option or similar agreement (including without limitation, any Interest Rate Agreement) involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions; provided that no phantom stock or similar plan providing for payments only on account of services provided by current or former directors, officers, employees or consultants of the Borrowers and their Subsidiaries shall be deemed to be a “Swap Agreement.” [For the avoidance of doubt, a Permitted Bond Hedge Transaction shall not constitute a Swap Agreement.](#)

**“Swap Termination Value”**: in respect of any one or more Swap Agreements, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Agreements, (a) for any date on or after the date such Swap Agreements have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) for any date prior to the date referenced in clause (a), the amount(s) determined as the mark-to-market value(s) for such Swap Agreements, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Swap Agreements (which may include a Qualified Counterparty).

**“Swingline Commitment”**: the obligation of the Swingline Lender to make Swingline Loans pursuant to [Section 2.6](#) in an aggregate principal amount at any one time outstanding not to exceed \$5,000,000.

**“Swingline Lender”**: SVB, in its capacity as the lender of Swingline Loans.

**“Swingline Loan Note”**: a promissory note in the form of [Exhibit G-2](#), as it may be amended,

supplemented or otherwise modified from time to time.

“*Swingline Loans*”: as defined in Section 2.6.

“*Swingline Participation Amount*”: as defined in Section 2.7(c).

“*Synthetic Lease Obligation*”: the monetary obligation of a Person under (a) a so-called synthetic, off-balance sheet or tax retention lease or (b) an agreement for the use of property creating obligations that do not appear on the balance sheet of such Person but which, upon the insolvency or bankruptcy of such Person, would be characterized as the indebtedness of such Person (without regard to accounting treatment).

“*Taxes*”: all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

“*Total Credit Exposure*”: is, as to any Lender at any time, the unused Revolving Commitments and Revolving Extensions of Credit of such Lender at such time.

“*Total L/C Commitments*”: at any time, the sum of all L/C Commitments at such time, as the same may be reduced from time to time pursuant to Section 2.10 or 3.5(b). The initial amount of the Total L/C Commitments on the Closing Date is \$5,000,000.

“*Total Revolving Commitments*”: at any time, the aggregate amount of the Revolving Commitments then in effect. The original amount of the Total Revolving Commitments is \$60,000,000. As of the Fourth Amendment Effective Date the amount of the Total Revolving Commitments is \$95,000,000. The L/C Commitment and the Swingline Commitment are each sublimits of the Total Revolving Commitments.

“*Total Revolving Extensions of Credit*”: at any time, the aggregate amount of the Revolving Extensions of Credit outstanding at such time.

“*Trade Date*”: as defined in Section 10.6(b)(i)(B).

“*Transaction Report*”: that certain report of transactions and schedule of collections, including calculations of the Borrowing Base and the Recurring Revenue, a form of which has been provided by the Administrative Agent to the Borrowers.

“*Transferee*”: any Eligible Assignee or Participant.

“*Unfriendly Acquisition*”: any acquisition that has not, at the time of the first public announcement of an offer relating thereto, been approved by the board of directors (or other legally recognized governing body) of the Person to be acquired; except that with respect to any acquisition of a non-U.S. Person, an otherwise friendly acquisition shall not be deemed to be unfriendly if it is not customary in such jurisdiction to obtain such approval prior to the first public announcement of an offer relating to a friendly acquisition.

“*Uniform Commercial Code*” or “*UCC*”: the Uniform Commercial Code (or any similar or equivalent legislation) as in effect from time to time in the State of New York, or as the context may require, any other applicable jurisdiction.

“*United States*” and “*U.S.*”: the United States of America.

“**USCRO**”: the U.S. Copyright Office.

“**USPTO**”: the U.S. Patent and Trademark Office.

“**U.S. Person**”: any Person that is a “United States Person” as defined in Section 7701(a)(30) of the Code.

“**U.S. Tax Compliance Certificate**”: as defined in Section 2.20(f).

“**Withholding Agent**”: as applicable, any of any applicable Loan Party and the Administrative Agent, as the context may require.

## **1.2 Other Definitional Provisions.**

(a) Unless otherwise specified therein, all terms defined in this Agreement shall have the defined meanings when used in the other Loan Documents or any certificate or other document made or delivered pursuant hereto or thereto.

(b) As used herein and in the other Loan Documents, and in any certificate or other document made or delivered pursuant hereto or thereto, (i) accounting terms relating to any Group Member not defined in Section 1.1 and accounting terms partly defined in Section 1.1, to the extent not defined, shall have the respective meanings given to them under GAAP, (ii) the words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation,” (iii) the word “incur” shall be construed to mean incur, create, issue, assume, become liable in respect of or suffer to exist (and the words “incurred” and “incurrence” shall have correlative meanings), (iv) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, Capital Stock, securities, revenues, accounts, leasehold interests and contract rights, and (v) references to agreements (including this Agreement) or other Contractual Obligations shall, unless otherwise specified, be deemed to refer to such agreements or Contractual Obligations as amended, supplemented, restated, amended and restated or otherwise modified from time to time. Notwithstanding the foregoing clause (i), for purposes of determining compliance with any covenant (including the computation of any financial covenant) contained herein, Indebtedness of any Group Member shall be deemed to be carried at 100% of the outstanding principal amount thereof, and the effects of FASB ASC 825 on financial liabilities shall be disregarded.

(c) The words “**hereof**,” “**herein**” and “**hereunder**” and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement. The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise, (i) any reference herein to any Person shall be construed to include such Person’s successors and assigns, (ii) all references herein to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, this Agreement, and (iii) any reference to any law or regulation herein shall, unless otherwise specified, refer to such law or regulation as amended, modified or supplemented from time to time.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms.

## AMOUNT AND TERMS OF REVOLVING COMMITMENTS

- 2.1 Reserved.
- 2.2 Reserved.
- 2.3 Reserved.
- 2.4 Revolving Commitments.

(a) Subject to the terms and conditions hereof, each Revolving Lender severally agrees to make revolving credit loans (each, a “**Revolving Loan**” and, collectively, the “**Revolving Loans**”) to the Borrowers from time to time during the Revolving Commitment Period in an aggregate principal amount at any one time outstanding for each Revolving Lender which, when added to the sum of (i) such Revolving Lender’s Revolving Percentage of any Swingline Loans then outstanding and (ii) such Revolving Lender’s L/C Exposure, if any, at such time, does not exceed the amount of such Revolving Lender’s Revolving Commitment; provided, that the Total Revolving Extensions of Credit outstanding at such time, after giving effect to the making of such Revolving Loans, shall not exceed (x) the lesser of (i) the Total Revolving Commitments in effect at such time and (ii) the Borrowing Base in effect at such time, less (y) Reserves imposed by the Administrative Agent in its Permitted Discretion from time to time. During the Revolving Commitment Period the Borrowers may use the Revolving Commitments by borrowing, prepaying the Revolving Loans in whole or in part, and reborrowing, all in accordance with the terms and conditions hereof.

(b) The Borrowers shall repay all outstanding Revolving Loans on the Revolving Termination Date; provided, however, that during the existence of an Event of Default, the Revolving Loans then outstanding shall be repaid from funds in the Cash Collateral Account in accordance with Section 6.3(c).

**2.5 Procedure for Revolving Loan Borrowing.** The Borrowers may borrow up to the Available Revolving Commitment under the Revolving Commitments during the Revolving Commitment Period on any Business Day; provided that the Borrowers shall give the Administrative Agent an irrevocable Notice of Borrowing (which must be received by the Administrative Agent prior to 10:00 A.M., Pacific time one (1) Business Day prior to the requested Borrowing Date (provided that any such Notice of Borrowing under the Revolving Facility to finance payments under Section 3.5(a) may be given not later than 10:00 A.M., Pacific time, on the date of the proposed borrowing), in each such case specifying (i) the amount of Revolving Loans to be borrowed, (ii) the requested Borrowing Date, and (iii) instructions for remittance of the proceeds of the Loans to be borrowed. Except as provided in Sections 3.5(b) and 2.7(b), each borrowing shall be in a principal amount of \$500,000 or a whole multiple of \$100,000 in excess thereof (or, if the then aggregate Available Revolving Commitments are less than \$1,000,000, such lesser amount). In addition to such Notice of Borrowing, the Borrowers shall contemporaneously deliver to the Administrative Agent a completed Transaction Report executed by a Responsible Officer, together with such other supporting reports and information, including without limitation, cash receipts journals, and accounts receivable aging reports, as the Administrative Agent may reasonably request. Upon receipt of any such Notice of Borrowing and Transaction Report from the Borrowers, the Administrative Agent shall promptly notify each Revolving Lender thereof. Each Revolving Lender will make the amount of its pro rata share of each such borrowing available to the Administrative Agent for the account of the Borrowers at the Revolving Loan Funding Office prior to 12:00 P.M., Pacific time, on the Borrowing Date requested by the Borrowers in funds immediately available to the Administrative Agent. Such borrowing will then be made available to the Borrowers by the Administrative Agent crediting such account as is designated in writing to the Administrative Agent by the Borrowers with the aggregate of the amounts made available to the Administrative Agent by the Revolving Lenders and in like funds as received by the Administrative Agent or, if so specified in the Flow of Funds Agreement, the Administrative Agent shall wire transfer all

or a portion of such aggregate amounts to the Existing Lender (for application against amounts then outstanding under the Existing Credit Facility), in accordance with the Flow of Funds Agreement.

**2.6 Swingline Commitment.** Subject to the terms and conditions hereof, the Swingline Lender agrees to make available a portion of the credit accommodations otherwise available to the Borrowers under the Revolving Commitments from time to time during the Revolving Commitment Period by making swing line loans (each a “*Swingline Loan*” and, collectively, the “*Swingline Loans*”) to the Borrowers; provided that (a) the aggregate principal amount of Swingline Loans outstanding at any time shall not exceed the Swingline Commitment then in effect, (b) the Borrowers shall not request, and the Swingline Lender shall not make, any Swingline Loan if, after giving effect to the making of such Swingline Loan, the aggregate amount of the Available Revolving Commitments would be less than zero, and (c) the Borrower shall not use the proceeds of any Swingline Loan to refinance any then outstanding Swingline Loan. During the Revolving Commitment Period, the Borrower may use the Swingline Commitment by borrowing, repaying and reborrowing, all in accordance with the terms and conditions hereof. Swingline Loans shall be made only in Dollars. To the extent not otherwise required by the terms hereof to be repaid prior thereto, the Borrowers shall repay to the Swingline Lender the then unpaid principal amount of each Swingline Loan on the Revolving Termination Date.

**2.7 Procedure for Swingline Borrowing; Refunding of Swingline Loans.**

(a) Whenever the Borrowers desire that the Swingline Lender make Swingline Loans, the Borrowers shall give the Swingline Lender irrevocable telephonic or electronic notice (which notice must be received by the Swingline Lender not later than 12:00 P.M., Pacific time, on the proposed Borrowing Date) confirmed promptly in writing by a Notice of Borrowing, specifying (i) the amount to be borrowed, (ii) the requested Borrowing Date (which shall be a Business Day during the Revolving Commitment Period), and (iii) instructions for the remittance of the proceeds of such Loan. Each borrowing under the Swingline Commitment shall be in an amount equal to \$500,000 or a whole multiple of \$100,000 in excess thereof. Promptly thereafter, on the Borrowing Date specified in a notice in respect of any Swingline Loan, the Swingline Lender shall make available to the Borrowers an amount in immediately available funds equal to the amount of such Swingline Loan by depositing such amount in the account designated in writing to the Administrative Agent by the Borrowers (or, in the case of a Swingline Loan made to finance the reimbursement of an L/C Disbursement as provided in Section 3.5(b), by remittance to the Issuing Lender). Unless a Swingline Loan is sooner refinanced by the advance of a Revolving Loan pursuant to Section 2.7(b), such Swingline Loan shall be repaid by the Borrowers no later than five (5) Business Days after the advance of such Swingline Loan.

(b) The Swingline Lender, at any time and from time to time in its sole and absolute discretion, may, on behalf of the Borrowers (which hereby irrevocably direct the Swingline Lender to act on their behalf), on one (1) Business Day’s telephonic notice given by the Swingline Lender no later than 12:00 P.M., Pacific time, and promptly confirmed in writing, request each Revolving Lender to make, and each Revolving Lender hereby agrees to make, a Revolving Loan, in an amount equal to such Revolving Lender’s Revolving Percentage of the aggregate amount of such Swingline Loan (each a “*Refunded Swingline Loan*”) outstanding on the date of such notice, to repay the Swingline Lender. Each Revolving Lender shall make the amount of such Revolving Loan available to the Administrative Agent at the Revolving Loan Funding Office in immediately available funds, not later than 10:00 A.M., Pacific time, one (1) Business Day after the date of such written notice. The proceeds of such Revolving Loan shall immediately be made available by the Administrative Agent to the Swingline Lender for application by the Swingline Lender to the repayment of the Refunded Swingline Loan. The Borrowers irrevocably authorize the Swingline Lender to charge the Borrowers’ accounts with the Administrative Agent (up to the amount available in each such account) immediately to pay the amount of any Refunded Swingline Loan to the

extent amounts received from the Revolving Lenders are not sufficient to repay in full such Refunded Swingline Loan.

(c) If prior to the time that the Borrowers have repaid the Swingline Loans pursuant to Section 2.7(a) or a Revolving Loan has been made pursuant to Section 2.7(b), one of the events described in Section 8.1(f) shall have occurred or if for any other reason, as determined by the Swingline Lender in its sole discretion, Revolving Loans may not be made as contemplated by Section 2.7(b), each Revolving Lender shall, on the date such Revolving Loan was to have been made pursuant to the notice referred to in Section 2.7(b) or on the date requested by the Swingline Lender (with at least one (1) Business Days' notice to the Revolving Lenders), purchase for cash an undivided participating interest in the then outstanding Swingline Loans by paying to the Swingline Lender an amount (the "**Swingline Participation Amount**") equal to (i) such Revolving Lender's Revolving Percentage times (ii) the sum of the aggregate principal amount of the outstanding Swingline Loans that were to have been repaid with such Revolving Loans.

(d) Whenever, at any time after the Swingline Lender has received from any Revolving Lender such Lender's Swingline Participation Amount, the Swingline Lender receives any payment on account of the Swingline Loans, the Swingline Lender will distribute to such Lender its Swingline Participation Amount (appropriately adjusted, in the case of interest payments, to reflect the period of time during which such Lender's participating interest was outstanding and funded and, in the case of principal and interest payments, to reflect such Lender's pro rata portion of such payment if such payment is not sufficient to pay the principal of and interest on all Swingline Loans then due); provided that in the event that such payment received by the Swingline Lender is required to be returned, such Revolving Lender will return to the Swingline Lender any portion thereof previously distributed to it by the Swingline Lender.

(e) Each Revolving Lender's obligation to make the Loans referred to in Section 2.7(b) and to purchase participating interests pursuant to Section 2.7(c) shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any setoff, counterclaim, recoupment, defense or other right that such Revolving Lender or the Borrowers may have against the Swingline Lender, any Borrower or any other Person for any reason whatsoever, (ii) the occurrence of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Section 5, (iii) any adverse change in the condition (financial or otherwise) of the Borrowers, (iv) any breach of this Agreement or any other Loan Document by the Borrowers, any other Loan Party or any other Revolving Lender, or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

**2.8 Overadvances(a)** If at any time or for any reason the amount of the Total Revolving Extensions of Credit exceeds (x) the lesser of (i) the Total Revolving Commitments in effect at such time and (ii) the Borrowing Base in effect at such time, less (y) Reserves imposed by the Administrative Agent in its Permitted Discretion from time to time (any such excess, an "**Overadvance**"), the Borrower shall pay on demand the full amount of such Overadvance to the Administrative Agent for application against the Revolving Extensions of Credit in accordance with the terms hereof.

(b) Upon the occurrence and during the continuance of an Event of Default, the Administrative Agent, in its sole discretion, may make Revolving Loans to the Borrowers on behalf of the Revolving Lenders, so long as the aggregate amount of such Revolving Loans shall not exceed 10% of the Borrowing Base, if the Administrative Agent, in its Permitted Discretion, deems that such Revolving Loans are necessary or desirable (i) to protect all or any portion of the Collateral, (ii) to enhance the likelihood or maximize the amount of repayment of the Loans and the other Obligations or (iii) to pay any other amount chargeable to the Borrowers pursuant to this Agreement (such Revolving Loans, "**Protective Overadvances**"); provided that (A) in no event shall the Total Revolving Extensions of Credit exceed the

amount of the Total Revolving Commitments then in effect and (B) the Required Lenders may at any time revoke the Administrative Agent's authorization to make future Protective Advances (provided that any existing Protective Overadvance shall not be subject to such revocation and any such revocation must be in writing and shall become effective prospectively upon the Administrative Agent's receipt thereof). Each applicable Lender shall be obligated to advance to the Borrowers its Revolving Percentage of each Protective Overadvance made in accordance with this Section 2.8(b). If Protective Overadvances are made in accordance with the preceding sentence, then all Revolving Lenders shall be bound to make, or permit to remain outstanding, such Protective Overadvances based upon their Revolving Percentages in accordance with the terms of this Agreement. All Protective Overadvances shall be repaid by the Borrowers on demand, shall be secured by the Collateral and shall bear interest as provided in this Agreement for Revolving Loans generally.

## **2.9 Fees.**

(a) Fee Letter. The Borrowers agrees to pay to the Administrative Agent the fees in the amounts and on the dates as set forth in the Fee Letter and to perform any other obligations contained therein.

(b) Commitment Fee. As additional compensation for the Total Revolving Commitments, the Borrowers shall pay to the Administrative Agent for the account of the Lenders (other than any Defaulting Lender), a fee for the Borrowers' non-use of available funds under the Revolving Facility (the "**Commitment Fee**"), payable quarterly in arrears on the fifth day of each calendar quarter occurring after the Closing Date prior to the Revolving Termination Date, and on the Revolving Termination Date, in an amount equal to the Commitment Fee Rate multiplied by the average unused portion of the Total Revolving Commitments, as reasonably determined by the Administrative Agent. The unused portion of the Total Revolving Commitments, for purposes of this calculation, shall equal the difference between (i) the Total Revolving Commitments (as reduced from time to time), and (ii) the sum of (A) the average for the period of the daily closing balance of the Revolving Loans outstanding, (B) the aggregate undrawn amount of all Letters of Credit outstanding at such time, and (C) the aggregate amount of all L/C Disbursements that have not yet been reimbursed or converted into Revolving Loans at such time. For the avoidance of doubt, the outstanding amount of any Swingline Loans shall not be counted towards or considered usage of the Total Revolving Commitments for purposes of determining the Commitment Fee.

(c) Fees Nonrefundable. All fees payable under this Section 2.9 shall be fully earned on the date paid and nonrefundable.

(d) Increase in Fees. At any time that an Event of Default exists and is continuing, the Borrowers shall pay interest on any overdue fees due under subsections (a) and (b) at a rate per annum equal to 2.0% plus the rate applicable to Revolving Loans as provided in Section 2.15.

## **2.10 Termination or Reduction of Total Revolving Commitments; Total L/C Commitments.**

(a) Termination or Reduction of Total Revolving Commitments. The Borrowers shall have the right, upon not less than three (3) Business Days' written notice delivered to the Administrative Agent, to terminate the Total Revolving Commitments or, from time to time, to reduce the amount of the Total Revolving Commitments; provided that no such termination or reduction of the Total Revolving Commitment shall be permitted if, after giving effect thereto and to any prepayments of the Revolving Loans and Swingline Loans to be made on the effective date thereof the amount of the Total Revolving Extensions of Credit then outstanding would exceed (x) the lesser of (i) the Total Revolving Commitments



in effect at such time and (ii) the Borrowing Base in effect at such time, less (y) Reserves imposed by the Administrative Agent in its Permitted Discretion from time to time. Any such reduction shall be in an amount equal to \$1,000,000, or a whole multiple in excess thereof (or, if the then Total Revolving Commitments are less than \$1,000,000, such lesser amount), and shall reduce permanently the Total Revolving Commitments then in effect. Any reduction of the Total Revolving Commitments shall be applied to the Revolving Commitments of each Lender according to its respective Revolving Percentage. All fees accrued until the effective date of any termination of the Total Revolving Commitments shall be paid on the effective date of such termination.

(b) Termination or Reduction of Total L/C Commitments. The Borrowers shall have the right, upon not less than three (3) Business Days' written notice delivered to the Administrative Agent, to terminate the Total L/C Commitments available to the Borrowers or, from time to time, to reduce the amount of the Total L/C Commitments available to the Borrowers; provided that, in any such case, no such termination or reduction of the Total L/C Commitments shall be permitted if, after giving effect thereto, the Total L/C Commitments shall be reduced to an amount that would result in the aggregate L/C Exposure exceeding the Total L/C Commitments (as so reduced). Any such reduction shall be in an amount equal to \$1,000,000, or a whole multiple in excess thereof (or, if the then Total L/C Commitments are less than \$1,000,000, such lesser amount), and shall reduce permanently the Total L/C Commitments then in effect. Any reduction of the Total L/C Commitments shall be applied to the L/C Commitments of each Lender according to its respective L/C Percentage. All fees accrued until the effective date of any termination of the Total L/C Commitments shall be paid on the effective date of such termination.

## **2.11 Optional Loan Prepayments.**

The Borrowers may at any time and from time to time prepay the Loans, in whole or in part, without premium or penalty, upon irrevocable notice delivered to the Administrative Agent no later than 10:00 A.M., Pacific time, one (1) Business Day prior thereto, which notice shall specify the date and amount of the proposed prepayment; provided that if such notice of prepayment indicates that such prepayment is to be funded with the proceeds of a refinancing, such notice of prepayment may be revoked if the financing is not consummated. Upon receipt of any such notice the Administrative Agent shall promptly notify each Lender thereof. If any such notice is given, subject to any permitted revocation of such notice, the amount specified in such notice shall be due and payable on the date specified therein, together with accrued interest to such date on the amount prepaid. Partial prepayments of Revolving Loans shall be in an aggregate principal amount of \$1,000,000 or a whole multiple thereof. Partial prepayments of Swingline Loans shall be in an aggregate principal amount of \$100,000 or a whole multiple thereof.

## **2.12 Incremental Facility.**

(a) At any time during the Revolving Commitment Period, the Borrowers may request (but subject to the conditions set forth in clause (b) below) that the Revolving Commitments be increased by an amount not to exceed the Available Revolving Increase Amount (each such increase, an "**Increase**"); provided that the Borrowers may not request an Increase on more than two occasions during the term of this Agreement. No Lender shall be obligated to increase its Revolving Commitments in connection with a proposed Increase. Any Increase shall be in an amount of at least \$5,000,000 (or, if the Available Revolving Increase Amount is less than \$5,000,000, such remaining Available Revolving Increase Amount) and integral multiples of \$1,000,000 in excess thereof. Additionally, for the avoidance of doubt, it is understood and agreed that in no event shall the aggregate amount of the Increases to the Revolving Commitments exceed the Available Revolving Increase Amount during the term of the Agreement.

(b) Each of the following shall be conditions precedent to any Increase of the Revolving Commitments in connection therewith:

(i) any Increase shall be on the same terms (including the pricing, and maturity date), as applicable, as, and pursuant to documentation applicable to, the Revolving Facility then in effect;

(ii) the Borrowers shall have delivered an irrevocable written request for such Increase at least ten (10) Business Days prior to the requested funding date of such Increase;

(iii) each Lender agreeing to such Increase, the Borrowers and the Administrative Agent shall have signed an Increase Joinder (any Increase Joinder may, with the consent of the Administrative Agent, the Borrowers and the Lenders agreeing to such Increase, effect such amendments to this Agreement and the other Loan Documents as may be necessary or appropriate to effectuate the provisions of this Section 2.12) and the Borrowers shall have executed any Notes requested by any Lender in connection with the making of the Increase. Notwithstanding anything to the contrary in this Agreement or in any other Loan Document, an Increase Joinder reasonably satisfactory to the Administrative Agent, and the amendments to this Agreement effected thereby, shall not require the consent of any Lender other than the Lender(s) agreeing to fund such Increase;

(iv) each of the conditions precedent set forth in Section 5.2 shall be satisfied with respect to such Increase;

(v) after giving *pro forma* effect to such Increase and the use of proceeds thereof, (A) no Default or Event of Default shall have occurred and be continuing at the time of such Increase and (B) the Borrowers shall be in compliance with the then applicable financial covenants set forth in Section 7.1 hereof as of the end of the most recently ended month for which financial statements are required to be delivered prior to such Increase, and the Borrowers shall have delivered to the Administrative Agent a Compliance Certificate evidencing compliance with the requirements of this clause (v);

(vi) in connection with such Increase, the Borrowers shall pay to Administrative Agent all fees required to be paid pursuant to the terms of the Fee Letter; and

(vii) upon each Increase in accordance with this Section 2.12, all outstanding Loans, participations hereunder in Letters of Credit and participations hereunder in Swingline Loans held by each Lender shall be reallocated among the Lenders (including any newly added Lenders) in accordance with the Lenders' respective revised Revolving Percentages and L/C Percentages, pursuant to procedures reasonably determined by the Administrative Agent in consultation with the Borrowers.

(a) Upon the effectiveness of any Increase, (i) all references in this Agreement and any other Loan Document to the Revolving Loans shall be deemed, unless the context otherwise requires, to include such Increase advanced pursuant to this Section 2.12 and (ii) all references in this Agreement and any other Loan Document to the Revolving Commitments shall be deemed, unless the context otherwise requires, to include the commitments to advance an amount equal to such Increase pursuant to this Section 2.12.

(b) The Revolving Loans and Revolving Commitments established pursuant to this Section 2.12 shall constitute Revolving Loans and Revolving Commitments under, and shall be entitled to all the benefits afforded by, this Agreement and the other Loan Documents, and shall, without limiting the foregoing, benefit equally and ratably from any guarantees and the security interests created by the Loan Documents. The Borrowers shall take any actions reasonably required by Administrative Agent to ensure and demonstrate that the Liens and security interests granted by the Loan Documents continue to be perfected under the Code or otherwise after giving effect to the establishment of any such new Revolving Commitments.

**2.13 Reserved.**

**2.14 Reserved2.15 Interest Rates and Payment Dates.**

(a) Each Revolving Loan and each Swingline Loan shall bear interest at a rate per annum equal to (i) the ABR plus (ii) the Applicable Margin.

(b) During the continuance of an Event of Default, at the request of the Required Lenders, all outstanding Loans shall bear interest at a rate per annum equal to the rate that would otherwise be applicable thereto pursuant to the foregoing provisions of this Section plus 2.00% (the “*Default Rate*”); provided that the Default Rate shall apply to all outstanding Loans automatically and without any Required Lender consent therefor upon the occurrence of any Event of Default arising under Section 8.1(a) or (f).

(c) Interest on the outstanding principal amount of each Loan shall be payable in arrears on each Interest Payment Date; provided that interest accruing pursuant to Section 2.15(b) shall be payable from time to time on demand.

**2.16 Computation of Interest and Fees.**

(a) Interest and fees payable pursuant hereto shall be calculated on the basis of a 360-day year for the actual days elapsed, except that, with respect to Revolving Loans the rate of interest on which is calculated on the basis of the Prime Rate, the interest thereon shall be calculated on the basis of a 365- (or 366-, as the case may be) day year for the actual days elapsed. Any change in the interest rate on a Loan resulting from a change in the ABR shall become effective as of the opening of business on the day on which such change becomes effective. The Administrative Agent shall as soon as practicable notify the Borrowers and the relevant Lenders of the effective date and the amount of each such change in interest rate.

(b) Each determination of an interest rate by the Administrative Agent pursuant to any provision of this Agreement shall be conclusive and binding on the Borrowers and the Lenders in the absence of manifest error. The Administrative Agent shall, at the request of the Borrowers, deliver to the Borrowers a statement showing the quotations used by the Administrative Agent in determining any interest rate pursuant to Section 2.16(a).

**2.17 Reserved2.18 Pro Rata Treatment and Payments.**

(a) Each borrowing by the Borrowers from the Lenders hereunder, each payment by the Borrowers on account of any commitment fee and any reduction of the Revolving Commitments shall be made *pro rata* according to the respective L/C Percentages or Revolving Percentages, as the case may be, of the relevant Lenders.

(b) Each payment (including each prepayment) by the Borrowers on account of principal of and interest on the Revolving Loans shall be made *pro rata* according to the respective outstanding principal amounts of the Revolving Loans then held by the Revolving Lenders.

(c) All payments (including prepayments) to be made by the Borrowers hereunder, whether on account of principal, interest, fees or otherwise, shall be made without condition or deduction for any counterclaim, defense, recoupment or setoff and shall be made prior to 10:00 A.M., Pacific time, on the due date thereof to the Administrative Agent, for the account of the Lenders, at the applicable Revolving Loan Funding Office, in Dollars and in immediately available funds. The Administrative Agent shall distribute such payments to the Lenders promptly upon receipt in like funds as received. Any payment

received by the Administrative Agent after 10:00 A.M. Pacific time shall be deemed received on the next succeeding Business Day and any applicable interest or fee shall continue to accrue. If any payment hereunder becomes due and payable on a day other than a Business Day, such payment shall be extended to the next succeeding Business Day. In the case of any extension of any payment of principal pursuant to the preceding sentence, interest thereon shall be payable at the then applicable rate during such extension.

(d) Unless the Administrative Agent shall have been notified in writing by any Lender prior to the date of any borrowing that such Lender will not make the amount that would constitute its share of such borrowing available to the Administrative Agent, the Administrative Agent may assume that such Lender is making such amount available to the Administrative Agent on such date in accordance with Section 2, and the Administrative Agent may, in reliance upon such assumption, make available to the Borrowers a corresponding amount. If such amount is not in fact made available to the Administrative Agent by the required time on the Borrowing Date therefor, such Lender and the Borrowers severally agree to pay to the Administrative Agent, on demand, such corresponding amount with interest thereon, for each day from and including the date on which such amount is made available to the Borrowers but excluding the date of payment to the Administrative Agent, at (i) in the case of a payment to be made by such Lender, a rate equal to the greater of (A) the Federal Funds Effective Rate and (B) a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation, and (ii) in the case of a payment to be made by the Borrowers, the rate per annum applicable to Revolving Loans under the Revolving Facility. If the Borrowers and such Lender shall pay such interest to the Administrative Agent for the same or an overlapping period, the Administrative Agent shall promptly remit to the Borrowers the amount of such interest paid by the Borrowers for such period. If such Lender pays its share of the applicable borrowing to the Administrative Agent, then the amount so paid shall constitute such Lender's Revolving Loan included in such borrowing. Any payment by the Borrowers shall be without prejudice to any claim the Borrowers may have against a Lender that shall have failed to make such payment to the Administrative Agent.

(e) Unless the Administrative Agent shall have received notice from the Borrowers prior to the date on which any payment is due to the Administrative Agent for the account of the Lenders or the Issuing Lender hereunder that the Borrowers will not make such payment, the Administrative Agent may assume that the Borrowers are making such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to the Lenders or the Issuing Lender, as the case may be, the amount due. In such event, if the Borrowers have not in fact made such payment, then each of the Lenders or the Issuing Lender, as the case may be, severally agrees to repay to the Administrative Agent forthwith on demand the amount so distributed to such Lender or Issuing Lender, with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Administrative Agent, at the greater of the Federal Funds Effective Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation. Nothing herein shall be deemed to limit the rights of Administrative Agent or any Lender against any Loan Party.

(f) If any Lender makes available to the Administrative Agent funds for any Loan to be made by such Lender as provided in the foregoing provisions of this Section 2, and such funds are not made available to the Borrowers by the Administrative Agent because the conditions to the applicable extension of credit set forth in Section 5.1 or Section 5.2 are not satisfied or waived in accordance with the terms hereof, the Administrative Agent shall return such funds (in like funds as received from such Lender) to such Lender, without interest.

(g) The obligations of a Lender hereunder to (i) make Revolving Loans, (ii) to fund its participations in L/C Disbursements in accordance with its respective L/C Percentage, (iii) to fund its respective Swingline Participation Amount of any Swingline Loan, and (iv) to make payments pursuant to Section 9.7, as applicable, are several and not joint. The failure of any Lender to make any such Loan, to

fund any such participation or to make any such payment under Section 9.7 on any date required hereunder shall not relieve any other Lender of its corresponding obligation to do so on such date, and no Lender shall be responsible for the failure of any other Lender to so make its Loan, to purchase its participation or to make its payment under Section 9.7.

(h) Nothing herein shall be deemed to obligate any Lender to obtain the funds for any Loan in any particular place or manner or to constitute a representation by any Lender that it has obtained or will obtain the funds for any Loan in any particular place or manner.

(i) If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, interest and fees then due hereunder, such funds shall be applied (i) first, toward payment of interest, fees, Overadvances and Protective Overadvances then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest, fees, Overadvances and Protective Overadvances then due to such parties, and (ii) second, toward payment of principal then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal then due to such parties.

(j) If any Lender shall obtain any payment (whether voluntary, involuntary, through the exercise of any right of set-off, or otherwise) on account of the principal of or interest on any Loan made by it, its participation in the L/C Exposure or other obligations hereunder, as applicable (other than pursuant to a provision hereof providing for non-pro rata treatment), in excess of its Revolving Percentage or L/C Percentage, as applicable, of such payment on account of the Loans or participations obtained by all of the Lenders, such Lender shall forthwith advise the Administrative Agent of the receipt of such payment, and within five (5) Business Days of such receipt purchase (for cash at face value) from the other Revolving Lenders or L/C Lenders, as applicable (through the Administrative Agent), without recourse, such participations in the Revolving Loans made by them and/or participations in the L/C Exposure held by them, as applicable, or make such other adjustments as shall be equitable, as shall be necessary to cause such purchasing Lender to share the excess payment ratably with each of the other Lenders in accordance with their respective Revolving Percentages or L/C Percentages, as applicable; provided, however, that if all or any portion of such excess payment is thereafter recovered by or on behalf of the Borrowers from such purchasing Lender, the purchase shall be rescinded and the purchase price restored to the extent of such recovery, but without interest. The Borrowers agree that any Lender so purchasing a participation from another Lender pursuant to this Section 2.18(j) may exercise all its rights of payment (including the right of set-off) with respect to such participation as fully as if such Lender were the direct creditor of the Borrowers in the amount of such participation. No documentation other than notices and the like referred to in this Section 2.18(j) shall be required to implement the terms of this Section 2.18(j). The Administrative Agent shall keep records (which shall be conclusive and binding in the absence of manifest error) of participations purchased pursuant to this Section 2.18(j) and shall in each case notify the Revolving Lenders or the L/C Lenders, as applicable, following any such purchase. The provisions of this Section 2.18(j) shall not be construed to apply to (i) any payment made by or on behalf of the Borrowers pursuant to and in accordance with the express terms of this Agreement (including the application of funds arising from the existence of a Defaulting Lender), (ii) the application of Cash Collateral provided for in Section 3.10, or (iii) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or sub-participations in any L/C Exposure to any assignee or participant, other than an assignment to the Borrowers or any Subsidiary thereof (as to which the provisions of this Section shall apply). Each Borrower consents on behalf of itself and each other Loan Party to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against each Loan Party rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of each Loan Party in the amount of such participation.

(k) Any amounts actually paid to or collected by the Administrative Agent pursuant to Section 6.3(c) at any time during the existence of an Event of Default shall be applied by the Administrative Agent to the Revolving Loans then outstanding and distributed by the Administrative Agent to the Revolving Lenders, in each case, (i) in accordance with the Revolving Percentages of such Revolving Lenders then in effect, and (ii) by no later than the date occurring three days after the date on which such payments or proceeds are so received or collected by the Administrative Agent, with any remaining amounts to be returned to the Borrower as specified in Section 6.3(c).

(l) Notwithstanding anything to the contrary in this Agreement, the Administrative Agent may, in its discretion at any time or from time to time, without the Borrowers' request and even if the conditions set forth in Section 5.2 would not be satisfied, make a Revolving Loan in an amount equal to the portion of the Obligations constituting overdue interest and fees, Swingline Loans and L/C Disbursements that have not yet been reimbursed or converted into Revolving Loans from time to time due and payable to itself, any Revolving Lender, the Swingline Lender or the Issuing Lender, and apply the proceeds of any such Revolving Loan to those Obligations; provided that after giving effect to any such Revolving Loan, the aggregate outstanding Revolving Loans will not exceed the Total Revolving Commitments then in effect.

## **2.19 Requirements of Law.**

(a) If the adoption of or any change in any Requirement of Law or in the interpretation or application thereof or the compliance by any Lender with any request or directive (whether or not having the force of law) from any central bank or other Governmental Authority made subsequent to the date hereof:

(i) shall subject any Recipient to any Taxes (other than (A) Indemnified Taxes, (B) Taxes described in clauses (b) through (d) of the definition of Excluded Taxes and (C) Connection Income Taxes) on its Loans, loan principal, letters of credit, commitments, or other obligations, or its deposits, reserves, other liabilities or capital attributable thereto;

(ii) shall impose, modify or deem applicable any reserve, special deposit, compulsory loan, insurance charge or similar requirement against assets of, deposits with or for the account of or credit extended or participated in by, any Lender; or

(iii) impose on any Lender any other condition, cost or expense (other than Taxes) affecting this Agreement or Loans made by such Lender or any Letter of Credit or participation therein;

and the result of any of the foregoing is to increase the cost to such Lender or such other Recipient of issuing or participating in Letters of Credit, or to reduce any amount receivable or received by such Lender or other Recipient hereunder in respect thereof (whether in respect of principal, interest or any other amount), then, in any such case, upon the request of such Lender or other Recipient, the Borrowers shall promptly pay such Lender or other Recipient, as the case may be, any additional amounts necessary to compensate such Lender or other Recipient, as the case may be, for such increased cost or reduced amount receivable. If any Lender becomes entitled to claim any additional amounts pursuant to this paragraph, it shall promptly notify the Borrowers (with a copy to the Administrative Agent) of the event by reason of which it has become so entitled.

(b) If any Lender determines that any change in any Requirement of Law affecting such Lender or any lending office of such Lender or such Lender's holding company, if any, regarding capital or liquidity requirements, has or would have the effect of reducing the rate of return on such Lender's

capital or on the capital of such Lender's holding company, if any, as a consequence of this Agreement, the Revolving Commitments of such Lender or the Loans made by, or participations in Letters of Credit or Swingline Loans held by, such Lender, or the Letters of Credit issued by the Issuing Lender, to a level below that which such Lender or such Lender's holding company could have achieved but for such change in such Requirement of Law (taking into consideration such Lender's policies and the policies of such Lender's holding company with respect to capital adequacy), then from time to time upon demand of such Lender, the Borrowers will pay to such Lender or the Issuing Lender, as the case may be, such additional amount or amounts as will compensate such Lender or the Issuing Lender or such Lender's or Issuing Lender's holding company for any such reduction suffered.

(c) For purposes of this Agreement, (i) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines, or directives in connection therewith are deemed to have gone into effect and been adopted after the date of this Agreement, and (ii) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a change in any Requirement of Law, regardless of the date enacted, adopted or issued.

(d) A certificate as to any additional amounts payable pursuant to paragraphs (a), (b), or (c) of this Section submitted by any Lender to the Borrowers (with a copy to the Administrative Agent) shall be conclusive in the absence of manifest error. The Borrowers shall pay such Lender the amount shown as due on any such certificate within 10 days after receipt thereof. Failure or delay on the part of any Lender to demand compensation pursuant to this Section shall not constitute a waiver of such Lender's right to demand such compensation. Notwithstanding anything to the contrary in this Section 2.19, the Borrowers shall not be required to compensate a Lender pursuant to this Section 2.19 for any amounts incurred more than nine months prior to the date that such Lender notifies the Borrowers of such Lender's intention to claim compensation therefor; provided that if the circumstances giving rise to such claim have a retroactive effect, then such nine-month period shall be extended to include the period of such retroactive effect. The obligations of the Borrowers arising pursuant to this Section 2.19 shall survive the Discharge of Obligations and the resignation of the Administrative Agent.

## **2.20 Taxes.**

For purposes of this Section 2.20, the term "Lender" includes the Issuing Lender and the term "applicable law" includes FATCA.

(a) Payments Free of Taxes. Any and all payments by or on account of any obligation of any Loan Party under any Loan Document shall be made without deduction or withholding for any Taxes, except as required by applicable law and the Borrowers shall, and shall cause each other Loan Party, to comply with the requirements set forth in this Section 2.20. If any applicable law (as determined in the good faith discretion of an applicable Withholding Agent) requires the deduction or withholding of any Tax from any such payment by a Withholding Agent, then the applicable Withholding Agent shall be entitled to make such deduction or withholding and shall timely pay the full amount deducted or withheld to the relevant Governmental Authority in accordance with applicable law and, if such Tax is an Indemnified Tax, then the sum payable by the applicable Loan Party shall be increased as necessary so that after such deduction or withholding has been made (including such deductions and withholdings applicable to additional sums payable under this Section 2.20) the applicable Recipient receives an amount equal to the sum it would have received had no such deduction or withholding been made.

(b) Payment of Other Taxes. The Borrowers shall, and shall cause each other Loan Party to, timely pay to the relevant Governmental Authority in accordance with applicable law, or at the

option of the Administrative Agent timely reimburse it for the payment of, any Other Taxes applicable to such Loan Party.

(c) Evidence of Payments. As soon as practicable after any payment of Taxes by any Loan Party to a Governmental Authority pursuant to this Section 2.20, the Borrowers shall, or shall cause such other Loan Party to, deliver to the Administrative Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to the Administrative Agent.

(d) Indemnification by Loan Parties. The Borrowers shall, and shall cause each other Loan Party to, jointly and severally indemnify each Recipient, within 10 days after demand therefor, for the full amount of any Indemnified Taxes (including Indemnified Taxes imposed or asserted on or attributable to amounts payable under this Section 2.20) payable or paid by such Recipient or required to be withheld or deducted from a payment to such Recipient and any reasonable expenses arising therefrom or with respect thereto (including any recording and filing fees with respect thereto or resulting therefrom and any liabilities with respect to, or resulting from, any delay in paying such Indemnified Taxes), whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to the Borrowers by a Lender (with a copy to the Administrative Agent), or by the Administrative Agent on its own behalf or on behalf of a Lender, shall be conclusive absent manifest error. If any Loan Party fails to pay any Taxes when due to the appropriate taxing authority or fails to remit to the Administrative Agent the required receipts or other required documentary evidence, such Loan Party shall indemnify the Administrative Agent and the Lenders for any incremental taxes, interest or penalties that may become payable by the Administrative Agent or any Lender as a result of any such failure.

(e) Indemnification by Lenders. Each Lender shall severally indemnify the Administrative Agent, within 10 days after demand therefor, for (i) any Indemnified Taxes attributable to such Lender (but only to the extent that any Loan Party has not already indemnified the Administrative Agent for such Indemnified Taxes and without limiting the obligation of the Loan Parties to do so), (ii) any Taxes attributable to such Lender's failure to comply with the provisions of Section 10.6 relating to the maintenance of a Participant Register and (iii) any Excluded Taxes attributable to such Lender, in each case, that are payable or paid by the Administrative Agent in connection with any Loan Document, and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by the Administrative Agent shall be conclusive absent manifest error. Each Lender hereby authorizes the Administrative Agent to set off and apply any and all amounts at any time owing to such Lender under any Loan Document or otherwise payable by the Administrative Agent to the Lender from any other source against any amount due to the Administrative Agent under this paragraph (e).

(f) Status of Lenders.

(i) Any Lender that is entitled to an exemption from or reduction of withholding Tax with respect to payments made under any Loan Document shall deliver to the Borrowers and the Administrative Agent, at the time or times reasonably requested by the Borrowers or the Administrative Agent, such properly completed and executed documentation reasonably requested by the Borrowers or the Administrative Agent as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, any Lender, if reasonably requested by the Borrowers or the Administrative Agent, shall deliver such other documentation prescribed by applicable law or reasonably requested by the Borrowers or the Administrative Agent as will enable the Borrowers or the Administrative Agent to determine whether or not such Lender is subject to backup withholding or information reporting



requirements. Notwithstanding anything to the contrary in the preceding two sentences, the completion, execution and submission of such documentation (other than such documentation set forth in Sections 2.20(f)(ii)(A), (ii)(B) and (ii)(D) below) shall not be required if the Lender is not legally entitled to complete, execute or deliver such documentation or, in the Lender's reasonable judgment, such completion, execution or submission would subject such Lender to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of such Lender.

(ii) Without limiting the generality of the foregoing, in the event that any Borrower is a U.S. Person,

(A) any Lender that is a U.S. Person shall deliver to the Borrowers and the Administrative Agent on or prior to the date on which such Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of the Borrowers or the Administrative Agent), executed originals of IRS Form W-9 certifying that such Lender is exempt from U.S. federal backup withholding tax;

(B) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to the Borrowers and the Administrative Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of the Borrowers or the Administrative Agent), whichever of the following is applicable:

(1) in the case of a Foreign Lender claiming the benefits of an income tax treaty to which the United States is a party (x) with respect to payments of interest under any Loan Document, executed originals of IRS Form W-8BEN establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "interest" article of such tax treaty and (y) with respect to any other applicable payments under any Loan Document, IRS Form W-8BEN establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "business profits" or "other income" article of such tax treaty;

(2) executed originals of IRS Form W-8ECI;

(3) in the case of a Foreign Lender claiming the benefits of the exemption for portfolio interest under Section 871(h) or Section 881(c) of the Code, (x) a certificate substantially in the form of Exhibit F-1 to the effect that such Foreign Lender is not a "bank" within the meaning of Section 881(c)(3)(A) of the Code, a "10 percent shareholder" of the Borrowers within the meaning of Section 881(c)(3)(B) of the Code, or a "controlled foreign corporation" described in Section 881(c)(3)(C) of the Code (a "***U.S. Tax Compliance Certificate***") and (y) executed originals of IRS Form W-8BEN; or

(4) to the extent a Foreign Lender is not the beneficial owner, executed originals of IRS Form W-8IMY, accompanied by IRS Form W-8ECI, IRS Form W-8BEN, a U.S. Tax Compliance Certificate substantially in the form of Exhibit F-2 or Exhibit F-3, IRS Form W-9, and/or other certification documents from each beneficial owner, as applicable; provided that if the Foreign Lender is a partnership and one or more direct or indirect partners of such Foreign Lender are claiming the portfolio interest exemption, such Foreign Lender may provide a U.S. Tax Compliance Certificate substantially in the form of Exhibit F-4 on behalf of each such direct and indirect partner;

(C) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to the Borrowers and the Administrative Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this

Agreement (and from time to time thereafter upon the reasonable request of the Borrowers or the Administrative Agent), executed originals of any other form prescribed by applicable law as a basis for claiming exemption from or a reduction in U.S. federal withholding Tax, duly completed, together with such supplementary documentation as may be prescribed by applicable law to permit the Borrowers or the Administrative Agent to determine the withholding or deduction required to be made; and

(D) if a payment made to a Lender under any Loan Document would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Code, as applicable), such Lender shall deliver to the Borrowers and the Administrative Agent at the time or times prescribed by law and at such time or times reasonably requested by the Borrowers or the Administrative Agent such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by the Borrowers or the Administrative Agent as may be necessary for the Borrowers and the Administrative Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause (D), "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

(iii) Each Lender agrees that if any form or certification it previously delivered expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify the Borrowers and the Administrative Agent in writing of its legal inability to do so. Each Foreign Lender shall promptly notify the Borrowers at any time it determines that it is no longer in a position to provide any previously delivered certificate to the Borrowers (or any other form of certification adopted by the U.S. taxing authorities for such purpose). Notwithstanding any other provision of this paragraph, a Foreign Lender shall not be required to deliver any form pursuant to this paragraph that such Foreign Lender is not legally able to deliver.

(g) Right to Contest Taxes; Treatment of Certain Refunds. If the Borrowers determine in good faith that a reasonable basis exists for contesting any Taxes for which indemnification has been demanded or additional amounts have been payable hereunder, the relevant Lender or the Administrative Agent, as applicable, shall cooperate with the Borrowers in a reasonable challenge of such Taxes if so requested by the Borrowers; provided that (i) such Lender or the Administrative Agent determines in its reasonable discretion that it would not be prejudiced by cooperating in such challenge, (ii) the Borrowers pay all related expenses of the Administrative Agent or such Lender, (iii) the Borrowers indemnify such Lender or the Administrative Agent for any liabilities or other costs incurred by such party in connection with such challenge, and (iv) the Borrowers indemnify the Administrative Agent or such Lender, as applicable, for any indemnified Taxes or Other Taxes before any such contest. If any party determines, in its sole discretion exercised in good faith, that it has received a refund of any Taxes as to which it has been indemnified pursuant to this Section 2.20 (including by the payment of additional amounts pursuant to this Section 2.20), it shall pay to the indemnifying party an amount equal to such refund (but only to the extent of indemnity payments made under this Section 2.20 with respect to the Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) of such indemnified party and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund). Such indemnifying party, upon the request of such indemnified party, shall repay to such indemnified party the amount paid over pursuant to this paragraph (g) (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) in the event that such indemnified party is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this paragraph (g), in no event will the indemnified party be required to pay any amount to an indemnifying party pursuant to this paragraph (g) the payment of which would place the indemnified party in a less favorable net after-Tax position than the indemnified party would have been in if the Tax subject to indemnification and giving rise

to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

(h) Survival. Each party's obligations under this Section 2.20 shall survive the resignation or replacement of the Administrative Agent, any assignment of rights by, or the replacement of, a Lender, and the Discharge of Obligations.

## **2.21 Reserved.**

**2.22 Change of Lending Office.** Each Lender agrees that, upon the occurrence of any event giving rise to the operation of Section 2.19(a), Section 2.19(b), Section 2.20(a) or Section 2.20(d) with respect to such Lender, it will, if requested by the Borrowers, use commercially reasonable efforts (subject to legal and regulatory restrictions) to designate a different lending office for funding or booking its Loans affected by such event or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, in each case, with the object of avoiding the consequences of such event; provided that such designation is made on terms that, in the reasonable judgment of such Lender, cause such Lender and its lending office(s) to suffer no economic, legal or regulatory disadvantage; provided further that nothing in this Section shall affect or postpone any of the obligations of the Borrower or the rights of any Lender pursuant to Section 2.19(a), Section 2.19(b), Section 2.20(a) or Section 2.20(d). The Borrowers hereby agree to pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment made at the request of the Borrowers.

**2.23 Substitution of Lenders.** Upon the receipt by the Borrowers of any of the following (or in the case of clause (a) below, if the Borrowers are required to pay any such amount), with respect to any Lender (any such Lender described in clauses (a) through (c) below being referred to as an "***Affected Lender***" hereunder):

(a) a request from a Lender for payment of Indemnified Taxes or additional amounts under Section 2.20 or of increased costs pursuant to Section 2.19 (and, in any such case, such Lender has declined or is unable to designate a different lending office in accordance with Section 2.22 or is a Non-Consenting Lender);

(b) a notice from the Administrative Agent under Section 10.1(b) that one or more Minority Lenders are unwilling to agree to an amendment or other modification approved by the Required Lenders and the Administrative Agent; or

(c) notice from the Administrative Agent that a Lender is a Defaulting Lender;

then the Borrowers may, at their sole expense and effort, upon notice to the Administrative Agent and such Affected Lender: (i) request that one or more of the other Lenders acquire and assume all or part of such Affected Lender's Loans and Revolving Commitments and all other Obligations owing to such Affected Lender; or (ii) designate a replacement lending institution (which shall be an Eligible Assignee) to acquire and assume all or a ratable part of such Affected Lender's Loans and Revolving Commitments and all other Obligations owing to such Affected Lender (provided that, for the avoidance of doubt, such replacement lending institution shall not be a Disqualified Institution unless an Event of Default has occurred and is continuing) (the replacing Lender or lender in (i) or (ii) being a "***Replacement Lender***"); provided, however, that if the Borrowers elect to exercise such right with respect to any Affected Lender under clause (a) or (b) of this Section 2.23, then the Borrowers shall be obligated to replace all Affected Lenders under such clauses. The Affected Lender replaced pursuant to this Section 2.23 shall be required to assign and

delegate, without recourse, all of its interests, rights and obligations under this Agreement and the related Loan Documents to one or more Replacement Lenders that so agree to acquire and assume all or a ratable part of such Affected Lender's Loans and Revolving Commitments and all other Obligations owing to such Affected Lender upon payment to such Affected Lender of an amount (in the aggregate for all Replacement Lenders) equal to 100% of the outstanding principal of the Affected Lender's Loans, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents from such Replacement Lenders (to the extent of such outstanding principal and accrued interest and fees) or the Borrowers (in the case of all other amounts, including amounts under Section 2.21 hereof). Any such designation of a Replacement Lender shall be effected in accordance with, and subject to the terms and conditions of, the assignment provisions contained in Section 10.6 (with the assignment fee to be paid by the Borrowers in such instance); provided that if such Affected Lender does not comply with Section 10.6 within ten (10) Business Days after the Borrowers' request, compliance with Section 10.6 shall not be required to effect such assignment, and, if such Replacement Lender is not already a Lender hereunder or an Affiliate of a Lender or an Approved Fund, shall be subject to the prior written consent of the Administrative Agent (which consent shall not be unreasonably withheld). Notwithstanding the foregoing, with respect to any assignment pursuant to this Section 2.23, (a) in the case of any such assignment resulting from a claim for compensation under Section 2.19 or payments required to be made pursuant to Section 2.20, such assignment shall result in a reduction in such compensation or payments thereafter; (b) such assignment shall not conflict with applicable law and (c) in the case of any assignment resulting from a Lender being a Minority Lender referred to in clause (b) of this Section 2.23, the applicable assignee shall have consented to the applicable amendment, waiver or consent. Notwithstanding the foregoing, an Affected Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Affected Lender or otherwise, the circumstances entitling the Borrowers to require such assignment and delegation cease to apply.

## **2.24 Defaulting Lenders.**

(a) Adjustments. Notwithstanding anything to the contrary contained in this Agreement, if any Lender becomes a Defaulting Lender, then, until such time as such Lender is no longer a Defaulting Lender, to the extent permitted by applicable law:

(i) Waivers and Amendments. Such Defaulting Lender's right to approve or disapprove any amendment, waiver or consent with respect to this Agreement shall be restricted as set forth in Section 10.1 and in the definition of Required Lenders.

(ii) Defaulting Lender Waterfall. Any payment of principal, interest, fees or other amounts received by the Administrative Agent for the account of such Defaulting Lender (whether voluntary or mandatory, at maturity, pursuant to Section 8 or otherwise, and including any amounts made available to the Administrative Agent by such Defaulting Lender pursuant to Section 10.7), shall be applied at such time or times as may be determined by the Administrative Agent as follows: first, to the payment of any amounts owing by such Defaulting Lender to the Administrative Agent hereunder; second, to the payment on a pro rata basis of any amounts owing by such Defaulting Lender to the Issuing Lender or to the Swingline Lender hereunder; third, to be held as Cash Collateral for the funding obligations of such Defaulting Lender of any participation in any Swingline Loan or Letter of Credit; fourth, as the Borrowers may request (so long as no Default or Event of Default exists), to the funding of any Loan in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Administrative Agent; fifth, if so determined by the Administrative Agent and the Borrowers, to be held in a deposit account and released pro rata in order to (x) satisfy such Defaulting Lender's potential future funding obligations with respect to Loans under this Agreement, and (y) be held as Cash Collateral for the future funding obligations of such Defaulting Lender of any participation in any future Swingline Loans or Letter of Credit; sixth, to the payment of any amounts owing to any L/C Lender,

the Issuing Lender or the Swingline Lender as a result of any judgment of a court of competent jurisdiction obtained by any L/C Lender, the Issuing Lender or the Swingline Lender against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; seventh, so long as no Default or Event of Default has occurred and is continuing, to the payment of any amounts owing to the Borrowers as a result of any judgment of a court of competent jurisdiction obtained by the Borrowers against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; and eighth, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if (A) such payment is a payment of the principal amount of any Loans or L/C Advances in respect of which such Defaulting Lender has not fully funded its appropriate share and (B) such Loans or L/C Advances were made at a time when the conditions set forth in Section 5.2 were satisfied or waived, such payment shall be applied solely to pay the Loans of, and L/C Advances owed to, all non-Defaulting Lenders on a pro rata basis prior to being applied to the payment of any Loans of, or L/C Advances owed to, such Defaulting Lender until such time as all Loans and funded and unfunded participations in L/C Advances and Swingline Loans are held by the Lenders pro rata in accordance with the Revolving Commitments without giving effect to Section 2.24(a)(iv). Any payments, prepayments or other amounts paid or payable to a Defaulting Lender that are applied (or held) to pay amounts owed by a Defaulting Lender or to post Cash Collateral pursuant to this Section 2.24(a)(ii) shall be deemed paid to and redirected by such Defaulting Lender, and each Lender irrevocably consents hereto.

(iii) Certain Fees.

(A) No Defaulting Lender shall be entitled to receive any fee pursuant to Section 2.9(b) for any period during which such Lender is a Defaulting Lender (and the Borrowers shall not be required to pay any such fee that otherwise would have been required to have been paid to such Defaulting Lender).

(B) Each Defaulting Lender shall be limited in its right to receive Letter of Credit Fees as provided in Section 3.3(d).

(C) With respect to any Letter of Credit Fee not required to be paid to any Defaulting Lender pursuant to clause (A) or (B) above, the Borrowers shall (x) pay to each Non-Defaulting Lender that portion of any such Letter of Credit Fee otherwise payable to such Defaulting Lender with respect to such Defaulting Lender's participation in Letters of Credit or Swingline Loans that has been reallocated to such Non-Defaulting Lender pursuant to clause (iv) below, (y) pay to the Issuing Lender and to the Swingline Lender, as applicable, the amount of any such fee or Letter of Credit Fee, as applicable, otherwise payable to such Defaulting Lender to the extent allocable to the Issuing Lender's or the Swingline Lender's Fronting Exposure to such Defaulting Lender, and (z) not be required to pay the remaining amount of any such fee or Letter of Credit Fee, as applicable.

(iv) Reallocation of Pro Rata Share to Reduce Fronting Exposure. During any period in which there is a Defaulting Lender, for purposes of computing the amount of the obligation of each non-Defaulting Lender to acquire, refinance or fund participations in Letters of Credit pursuant to Section 3.4 or in Swingline Loans pursuant to Section 2.7(c), the L/C Percentage of each non-Defaulting Lender of any such Letter of Credit and the Revolving Percentage of each non-Defaulting Lender of any such Swingline Loan, as the case may be, shall be computed without giving effect to the Revolving Commitment of such Defaulting Lender; provided that, (A) each such reallocation shall be given effect only if, at the date the applicable Lender becomes a Defaulting Lender, no Event of Default has occurred and is continuing; (B) the aggregate obligations of each non-Defaulting Lender to acquire, refinance or fund participations in Letters of Credit and Swingline Loans shall not exceed the positive difference, if any, of (1) the Revolving Commitment of that non-Defaulting Lender minus (2) the aggregate outstanding amount of the Revolving Loans of that Lender plus the aggregate amount of that Lender's L/C Percentage of then

outstanding Letters of Credit and (C) the conditions set forth in Section 5.2 are satisfied at the time of such reallocation (and, unless the Borrowers shall have otherwise notified the Administrative Agent at such time, the Borrowers shall be deemed to have represented and warranted that such conditions are satisfied at such time). No reallocation hereunder shall constitute a waiver or release of any claim of any party hereunder against a Defaulting Lender arising from that Lender having become a Defaulting Lender, including any claim of a non-Defaulting Lender as a result of such non-Defaulting Lender's increased exposure following such reallocation.

(v) Cash Collateral, Repayment of Swingline Loans. If the reallocation described in clause (iv) above cannot, or can only partially, be effected, the Borrowers shall, without prejudice to any right or remedy available to them hereunder or under law and subject to Section 2.25, (x) first, prepay Swingline Loans in an amount equal to the Swingline Lender's Fronting Exposure, and (y) second, Cash Collateralize the Issuing Lender's Fronting Exposure in accordance with the procedures set forth in Section 3.10.

(b) Defaulting Lender Cure. If the Borrowers, the Administrative Agent, the Swingline Lender and the Issuing Lender agree in writing in their sole discretion that a Defaulting Lender should no longer be deemed to be a Defaulting Lender, the Administrative Agent will so notify the parties hereto, whereupon as of the effective date specified in such notice and subject to any conditions set forth therein (which may include arrangements with respect to any Cash Collateral), such Lender will, to the extent applicable, purchase at par that portion of outstanding Loans of the other Lenders or take such other actions as the Administrative Agent may determine to be necessary to cause the Loans and funded and unfunded participations in Letters of Credit and Swingline Loans to be held on a *pro rata* basis by the Lenders in accordance with their respective Revolving Percentages and L/C Percentages, as applicable (without giving effect to Section 2.24(a)(iv)), whereupon such Lender will cease to be a Defaulting Lender; provided that no adjustments will be made retroactively with respect to fees accrued or payments made by or on behalf of the Borrowers while such Lender was a Defaulting Lender; and provided, further, that except to the extent otherwise expressly agreed by the affected parties, no change hereunder from Defaulting Lender to Lender will constitute a waiver or release of any claim of any party hereunder arising from such Lender having been a Defaulting Lender.

(c) New Swingline Loans/Letters of Credit. So long as any Lender is a Defaulting Lender, (i) the Swingline Lender shall not be required to fund any Swingline Loans unless it is satisfied that it will have no Fronting Exposure after giving effect to such Swingline Loan and (ii) no Issuing Lender shall be required to issue, extend, renew or increase any Letter of Credit unless it is satisfied that it will have no Fronting Exposure in respect of Letters of Credit after giving effect thereto.

(d) Termination of Defaulting Lender. The Borrowers may terminate the unused amount of the Revolving Commitment of any Revolving Lender that is a Defaulting Lender upon not less than ten (10) Business Days' prior notice to the Administrative Agent (which shall promptly notify the Lenders thereof), and in such event the provisions of Section 2.24(a)(ii) will apply to all amounts thereafter paid by the Borrowers for the account of such Defaulting Lender under this Agreement (whether on account of principal, interest, fees, indemnity or other amounts); provided that (i) no Event of Default shall have occurred and be continuing, and (ii) such termination shall not be deemed to be a waiver or release of any claim the Borrowers, the Administrative Agent, the Issuing Lender, the Swingline Bank or any other Lender may have against such Defaulting Lender.

## **2.25 Joint and Several Liability of the Borrowers.**

(a) Each Borrower is accepting joint and several liability hereunder and under the other Loan Documents in consideration of the financial accommodations to be provided by the Lenders

under this Agreement, for the mutual benefit, directly and indirectly, of each Borrower and in consideration of the undertakings of the other the Borrowers to accept joint and several liability for the Obligations.

(b) Each Borrower, jointly and severally, hereby irrevocably and unconditionally accepts, not merely as a surety but also as a co-debtor, joint and several liability with the other the Borrowers, with respect to the payment and performance of all of the Obligations (including any Obligations arising under this Section 2.25), it being the intention of the parties hereto that all the Obligations shall be the joint and several obligations of each Borrower without preferences or distinction among them.

(c) If and to the extent that any Borrower shall fail to make any payment with respect to any of the Obligations as and when due or to perform any of the Obligations in accordance with the terms thereof, then in each such event the other Borrowers will make such payment with respect to, or perform, such Obligations.

(d) The Obligations of each Borrower under the provisions of this Section 2.25 constitute the absolute and unconditional, full recourse Obligations of each Borrower enforceable against each Borrower to the full extent of its properties and assets, irrespective of the validity, regularity or enforceability of this Agreement or any other circumstances whatsoever.

(e) Except as otherwise expressly provided in this Agreement, each Borrower hereby waives notice of acceptance of its joint and several liability, notice of any Loans made or Letters of Credit issued under or pursuant to this Agreement, notice of the occurrence of any Default, Event of Default, or of any demand for any payment under this Agreement, notice of any action at any time taken or omitted by the Administrative Agent or Lenders under or in respect of any of the Obligations, any requirement of diligence or to mitigate damages and, generally, to the extent permitted by applicable law, all demands, notices and other formalities of every kind in connection with this Agreement (except as otherwise provided in this Agreement). Each Borrower hereby assents to, and waives notice of, any extension or postponement of the time for the payment of any of the Obligations, the acceptance of any payment of any of the Obligations, the acceptance of any partial payment thereon, any waiver, consent or other action or acquiescence by the Administrative Agent or Lenders at any time or times in respect of any default by any Borrower in the performance or satisfaction of any term, covenant, condition or provision of this Agreement, any and all other indulgences whatsoever by the Administrative Agent or Lenders in respect of any of the Obligations, and the taking, addition, substitution or release, in whole or in part, at any time or times, of any security for any of the Obligations or the addition, substitution or release, in whole or in part, of any Borrower. Without limiting the generality of the foregoing, each Borrower assents to any other action or delay in acting or failure to act on the part of the Administrative Agent or Lender with respect to the failure by any Borrower to comply with any of its respective Obligations, including, without limitation, any failure strictly or diligently to assert any right or to pursue any remedy or to comply fully with applicable laws or regulations thereunder, which might, but for the provisions of this Section 2.25 afford grounds for terminating, discharging or relieving any Borrower, in whole or in part, from any of its Obligations under this Section 2.25, it being the intention of each Borrower that, so long as any of the Obligations hereunder remain unsatisfied, the Obligations of each Borrower under this Section 2.25 shall not be discharged except by performance and then only to the extent of such performance. The Obligations of each Borrower under this Section 2.25 shall not be diminished or rendered unenforceable by any winding up, reorganization, arrangement, liquidation, reconstruction or similar proceeding with respect to any Borrower, the Administrative Agent or any Lender.

(f) Each Borrower represents and warrants to the Administrative Agent and Lenders that such Borrower is currently informed of the financial condition of the Borrowers and of all other circumstances which a diligent inquiry would reveal and which bear upon the risk of nonpayment of the

Obligations. Each Borrower further represents and warrants to the Administrative Agent and Lenders that such Borrower has read and understands the terms and conditions of the Loan Documents. Each Borrower hereby covenants that such Borrower will continue to keep informed of the Borrowers' financial condition, the financial condition of other guarantors, if any, and of all other circumstances which bear upon the risk of nonpayment or nonperformance of the Obligations.

(g) Each Borrower waives all rights and defenses arising out of an election of remedies by the Administrative Agent or any Lender, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the Administrative Agent's or such Lender's rights of subrogation and reimbursement against such Borrower by the operation of Section 580(d) of the California Code of Civil Procedure or otherwise:

(h) Each Borrower waives all rights and defenses that such Borrower may have because the Obligations are secured by real property at any time. This means, among other things:

(i) The Administrative Agent and Lenders may collect from such Borrower without first foreclosing on any real or personal property Collateral pledged by the Borrowers.

(ii) If the Administrative Agent or any Lender forecloses on any Collateral consisting of real property pledged by the Borrowers:

(A) The amount of the Obligations may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

(B) The Administrative Agent and Lenders may collect from such Borrower even if the Administrative Agent or Lenders, by foreclosing on real property, has destroyed any right such Borrower may have to collect from the other Borrowers.

This is an unconditional and irrevocable waiver of any rights and defenses such Borrower may have because the Obligations are secured by real property. These rights and defenses include, but are not limited to, any rights or defenses based upon Section 580a, 580b, 580d or 726 of the California Code of Civil Procedure.

(i) The provisions of this Section 2.25 are made for the benefit of the Administrative Agent, Lenders and their respective successors and assigns, and may be enforced by it or them from time to time against any or all the Borrowers as often as occasion therefor may arise and without requirement on the part of the Administrative Agent, any Lender, any successor or any assign first to marshal any of its or their claims or to exercise any of its or their rights against any Borrower or to exhaust any remedies available to it or them against any Borrower or to resort to any other source or means of obtaining payment of any of the Obligations hereunder or to elect any other remedy. The provisions of this Section 2.25 shall remain in effect until all of the Obligations shall have been paid in full or otherwise fully satisfied. If at any time, any payment, or any part thereof, made in respect of any of the Obligations, is rescinded or must otherwise be restored or returned by the Administrative Agent or any Lender upon the insolvency, bankruptcy or reorganization of any Borrower, or otherwise, the provisions of this Section 2.25 will forthwith be reinstated in effect, as though such payment had not been made.

(j) Each Borrower hereby agrees that it will not enforce any of its rights of contribution or subrogation against any other Borrower with respect to any liability incurred by it hereunder or under any of the other Loan Documents, any payments made by it to the Administrative Agent or Lenders with respect to any of the Obligations or any collateral security therefor until such time as all of the



Obligations have been paid in full in cash. Any claim which any Borrower may have against any other Borrower with respect to any payments to the Administrative Agent or Lender hereunder or under any other Loan Documents are hereby expressly made subordinate and junior in right of payment, without limitation as to any increases in the Obligations arising hereunder or thereunder, to the prior payment in full in cash of the Obligations and, in the event of any insolvency, bankruptcy, receivership, liquidation, reorganization or other similar proceeding under the laws of any jurisdiction relating to any Borrower, its debts or its assets, whether voluntary or involuntary, all such Obligations shall be paid in full in cash before any payment or distribution of any character, whether in cash, securities or other property, shall be made to any other Borrower therefor. Notwithstanding anything to the contrary contained in this Section 2.25, no Borrower shall exercise any rights of subrogation, contribution, indemnity, reimbursement or other similar rights against, and shall not proceed or seek recourse against or with respect to any property or asset of, any other Borrower (the “**Foreclosed Borrower**”), including after payment in full of the Obligations, if all or any portion of the Obligations have been satisfied in connection with an exercise of remedies in respect of the Capital Stock of such Foreclosed Borrower whether pursuant to the Security Documents or otherwise.

(k) Each Borrower hereby agrees that, after the occurrence and during the continuance of any Default or Event of Default, the payment of any amounts due with respect to the indebtedness owing by any Borrower to any other Borrower is hereby subordinated to the prior payment in full in cash of the Obligations. Each Borrower hereby agrees that after the occurrence and during the continuance of any Default or Event of Default, such Borrower will not demand, sue for or otherwise attempt to collect any indebtedness of any other Borrower owing to such Borrower until the Obligations shall have been paid in full in cash. If, notwithstanding the foregoing sentence, such Borrower shall collect, enforce or receive any amounts in respect of such indebtedness, such amounts shall be collected, enforced and received by such Borrower as trustee for the Administrative Agent, and such Borrower shall deliver any such amounts to the Administrative Agent for application to the Obligations in accordance with the terms of this Agreement.

(l) Subject to the foregoing, to the extent that any Borrower shall, under this Agreement as a joint and several obligor, repay any of the Obligations made to another Borrower hereunder or other Obligations incurred directly and primarily by any other Borrower (an “**Accommodation Payment**”), then the Borrower making such Accommodation Payment shall be entitled to contribution and indemnification from, and be reimbursed by, each other Borrower in an amount, for each of such other Borrower, equal to a fraction of such Accommodation Payment, the numerator of which fraction is such other Borrower’s Allocable Amount and the denominator of which is the sum of the Allocable Amounts of all of the Borrowers. As of any date of determination, the “**Allocable Amount**” of each Borrower shall be equal to the maximum amount of liability for Accommodation Payments which could be asserted against such Borrower hereunder without (a) rendering such Borrower “insolvent” within the meaning of Section 101(31) of the Bankruptcy Code, Section 2 of the Uniform Fraudulent Transfer Act (“**UFTA**”) or Section 2 of the Uniform Fraudulent Conveyance Act (“**UFCA**”), (b) leaving such Borrower with unreasonably small capital or assets, within the meaning of Section 548 of the Bankruptcy Code, Section 4 of the UFTA, or Section 5 of the UFCA, or (c) leaving such Borrower unable to pay its debts as they become due within the meaning of Section 548 of the Bankruptcy Code or Section 4 of the UFTA, or Section 5 of the UFCA.

**2.26 Notes.** If so requested by any Lender by written notice to the Borrowers (with a copy to the Administrative Agent), the Borrowers shall execute and deliver to such Lender (and/or, if applicable and if so specified in such notice, to any Person who is an assignee of such Lender pursuant to Section 10.6) (promptly after the Borrowers’ receipt of such notice) a Note or Notes to evidence such Lender’s Loans.

**SECTION 3**  
**LETTERS OF CREDIT**

**3.1 L/C Commitment.**

(a) Subject to the terms and conditions hereof, the Issuing Lender agrees to issue letters of credit (“*Letters of Credit*”) for the account of the Borrowers on any Business Day during the Letter of Credit Availability Period in such form as may reasonably be approved from time to time by the Issuing Lender; provided that the Issuing Lender shall have no obligation to issue any Letter of Credit if, after giving effect to such issuance, either (x) the L/C Exposure would exceed the Total L/C Commitments or (y) the Available Revolving Commitments would be less than zero. Each Letter of Credit shall (i) be denominated in Dollars or, in the sole discretion of the Issuing Lender with respect to any particular Letter of Credit, a Foreign Currency and (ii) expire no later than the earlier of (x) the first anniversary of its date of issuance and (y) the Letter of Credit Maturity Date, provided that any Letter of Credit with a one-year term may provide for the renewal thereof for additional one-year periods (which shall in no event extend beyond the date referred to in clause (y) above). For purposes of this Agreement, the stated amount of any Letter of Credit issued in a Foreign Currency shall be converted into Dollars from time to time by the Issuing Lender and upon any drawing under such Letter of Credit.

(b) The Issuing Lender shall not at any time be obligated to issue any Letter of Credit if:

(i) such issuance would conflict with, or cause the Issuing Lender or any L/C Lender to exceed any limits imposed by, any applicable Requirement of Law;

(ii) any order, judgment or decree of any Governmental Authority or arbitrator shall by its terms purport to enjoin or restrain the Issuing Lender from issuing, amending or reinstating such Letter of Credit, or any law, rule or regulation applicable to the Issuing Lender or any request, guideline or directive (whether or not having the force of law) from any Governmental Authority with jurisdiction over the Issuing Lender shall prohibit, or request that the Issuing Lender refrain from, the issuance, amendment, renewal or reinstatement of letters of credit generally or such Letter of Credit in particular or shall impose upon the Issuing Lender with respect to such Letter of Credit any restriction, reserve or capital requirement (for which the Issuing Lender is not otherwise compensated) not in effect on the Closing Date, or shall impose upon the Issuing Lender any unreimbursed loss, cost or expense which was not applicable on the Closing Date and which the Issuing Lender in good faith deems material to it;

(iii) the Issuing Lender has received written notice from any Lender, the Administrative Agent or any Borrower, at least one (1) Business Day prior to the requested date of issuance, amendment, renewal or reinstatement of such Letter of Credit, that one or more of the applicable conditions contained in Section 5.2 shall not then be satisfied (which notice shall contain a description of any such condition asserted not to be satisfied);

(iv) any requested Letter of Credit is not in form and substance acceptable to the Issuing Lender, or the issuance, amendment or renewal of a Letter of Credit shall violate any applicable laws or regulations or any applicable policies of the Issuing Lender;

(v) such Letter of Credit contains any provisions providing for automatic reinstatement of the stated amount after any drawing thereunder;

(vi) except as otherwise agreed by the Administrative Agent and the Issuing Lender, such Letter of Credit is in an initial face amount less than \$100,000; or

(vii) any Lender is at that time a Defaulting Lender, unless the Issuing Lender has entered into arrangements, including the delivery of Cash Collateral pursuant to Section 3.10, satisfactory to the Issuing Lender (in its sole discretion) with the Borrowers or such Defaulting Lender to eliminate the Issuing Lender's actual or potential Fronting Exposure (after giving effect to Section 2.24(a)(iv)) with respect to the Defaulting Lender arising from either the Letter of Credit then proposed to be issued or such Letter of Credit and all other L/C Exposure as to which the Issuing Lender has actual or potential Fronting Exposure, as it may elect in its sole discretion.

**3.2 Procedure for Issuance of Letters of Credit.** The Borrowers may from time to time request that the Issuing Lender issue a Letter of Credit for the account of the Borrowers by delivering to the Issuing Lender at its address for notices specified herein an Application therefor, completed to the satisfaction of the Issuing Lender, and such other certificates, documents and other papers and information as the Issuing Lender may request. Upon receipt of any Application, the Issuing Lender will process such Application and the certificates, documents and other papers and information delivered to it in connection therewith in accordance with its customary procedures and shall promptly issue the Letter of Credit requested thereby (but in no event shall the Issuing Lender be required to issue any Letter of Credit earlier than three (3) Business Days after its receipt of the Application therefor and all such other certificates, documents and other papers and information relating thereto) by issuing the original of such Letter of Credit to the beneficiary thereof or as otherwise may be agreed to by the Issuing Lender and the Borrowers. The Issuing Lender shall furnish a copy of such Letter of Credit to the Borrowers promptly following the issuance thereof. The Issuing Lender shall promptly furnish to the Administrative Agent, which shall in turn promptly furnish to the Lenders, notice of the issuance of each Letter of Credit (including the amount thereof).

### **3.3 Fees and Other Charges.**

(a) The Borrowers agree to pay, with respect to each outstanding Letter of Credit issued for the account of (or at the request of) the Borrowers, (i) a fronting fee of 0.125% per annum on the daily amount available to be drawn under each such Letter of Credit to the Issuing Lender for its own account (a "**Letter of Credit Fronting Fee**"), (ii) a letter of credit fee equal to the Applicable Margin relating to Letters of Credit multiplied by the daily amount available to be drawn under each such Letter of Credit on the drawable amount of such Letter of Credit to the Administrative Agent for the ratable account of the L/C Lenders (determined in accordance with their respective L/C Percentages) (a "**Letter of Credit Fee**"), and (iii) the Issuing Lender's standard and reasonable fees with respect to the issuance, amendment, renewal or extension of any Letter of Credit issued for the account of (or at the request of) the Borrowers or processing of drawings thereunder (the fees in this clause (iii), collectively, the "**Issuing Lender Fees**"). The Issuing Lender Fees shall be paid when required by the Issuing Lender, and the Letter of Credit Fronting Fee and the Letter of Credit Fee shall be payable quarterly in arrears on the fifth day of each calendar quarter occurring after the Closing Date and on the Letter of Credit Maturity Date (each, an "**L/C Fee Payment Date**") after the issuance date of such Letter of Credit. All Letter of Credit Fronting Fees and Letter of Credit Fees shall be computed on the basis of the actual number of days elapsed in a year of 360 days.

(b) In addition to the foregoing fees, the Borrowers shall pay or reimburse the Issuing Lender for such normal and customary costs and expenses as are incurred or charged by the Issuing Lender in issuing, negotiating, effecting payment under, amending or otherwise administering any Letter of Credit.

(c) The Borrowers shall furnish to the Issuing Lender and the Administrative Agent such other documents and information pertaining to any requested Letter of Credit issuance, amendment or renewal, including any L/C-Related Documents, as the Issuing Lender or the Administrative

Agent may reasonably require. This Agreement shall control in the event of any conflict with any L/C-Related Document (other than any Letter of Credit).

(d) Any Letter of Credit Fees otherwise payable for the account of a Defaulting Lender with respect to any Letter of Credit as to which such Defaulting Lender has not provided Cash Collateral satisfactory to the Issuing Lender pursuant to Section 3.10 shall be payable, to the maximum extent permitted by applicable law, to the other L/C Lenders in accordance with the upward adjustments in their respective L/C Percentages allocable to such Letter of Credit pursuant to Section 2.24(a)(iv), with the balance of such Letter of Credit Fees, if any, payable to the Issuing Lender for its own account.

(e) All fees payable pursuant to this Section 3.3 shall be fully-earned on the date paid and shall not be refundable for any reason.

### **3.4 L/C Participations.**

The Issuing Lender irrevocably agrees to grant and hereby grants to each L/C Lender, and, to induce the Issuing Lender to issue Letters of Credit, each L/C Lender irrevocably agrees to accept and purchase and hereby accepts and purchases from the Issuing Lender, on the terms and conditions set forth below, for such L/C Lender's own account and risk an undivided interest equal to such L/C Lender's L/C Percentage in the Issuing Lender's obligations and rights under and in respect of each Letter of Credit and the amount of each draft paid by the Issuing Lender thereunder. Each L/C Lender agrees with the Issuing Lender that, if a draft is paid under any Letter of Credit for which the Issuing Lender is not reimbursed in full by the Borrowers pursuant to Section 3.5(a), such L/C Lender shall pay to the Issuing Lender upon demand at the Issuing Lender's address for notices specified herein an amount equal to such L/C Lender's L/C Percentage of the amount of such draft, or any part thereof, that is not so reimbursed. Each L/C Lender's obligation to pay such amount shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any setoff, counterclaim, recoupment, defense or other right that such L/C Lender may have against the Issuing Lender, the Borrowers or any other Person for any reason whatsoever, (ii) the occurrence of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Section 5.2, (iii) any adverse change in the condition (financial or otherwise) of the Borrowers, (iv) any breach of this Agreement or any other Loan Document by the Borrowers, any other Loan Party or any other L/C Lender, or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

### **3.5 Reimbursement.**

(a) If the Issuing Lender shall make any L/C Disbursement in respect of a Letter of Credit, the Issuing Lender shall notify the Borrowers and the Administrative Agent thereof and the Borrowers shall pay or cause to be paid to the Issuing Lender an amount equal to the entire amount of such L/C Disbursement not later than (i) the immediately following Business Day if the Issuing Lender issues such notice before 10:00 a.m. Pacific time on the date of such L/C Disbursement, or (ii) on the second following Business Day if the Issuing Lender issues such notice at or after 10:00 a.m. Pacific time on the date of such L/C Disbursement. Each such payment shall be made to the Issuing Lender at its address for notices referred to herein in Dollars and in immediately available funds; provided that the Borrowers may, subject to the conditions to borrowing set forth herein, request in accordance with Section 2.5 or Section 2.7(a) that such payment be financed with a Revolving Loan or a Swingline Loan, as applicable, in an equivalent amount and, to the extent so financed, the Borrowers' obligations to make such payment shall be discharged and replaced by the resulting Revolving Loan or Swingline Loan.

(b) If the Issuing Lender shall not have received from the Borrowers the payment that they are required to make pursuant to Section 3.5(a) with respect to a Letter of Credit within the time

specified in such Section, the Issuing Lender will promptly notify the Administrative Agent of the L/C Disbursement and the Administrative Agent will promptly notify each L/C Lender of such L/C Disbursement and its L/C Percentage thereof, and each L/C Lender shall pay to the Issuing Lender upon demand at the Issuing Lender's address for notices specified herein an amount equal to such L/C Lender's L/C Percentage of such L/C Disbursement (and the Administrative Agent may apply Cash Collateral provided for this purpose) and upon such payment pursuant to this paragraph to reimburse the Issuing Lender for any L/C Disbursement, the Borrowers shall be required to reimburse the L/C Lenders for such payments (including interest accrued thereon from the date of such payment until the date of such reimbursement at the rate applicable to Revolving Loans plus 2% per annum) on demand; provided that if at the time of and after giving effect to such payment by the L/C Lenders, the conditions to borrowings and Revolving Loan Conversions set forth in Section 5.2 are satisfied, the Borrowers may, by written notice to the Administrative Agent certifying that such conditions are satisfied and that all interest owing under this paragraph has been paid, request that such payments by the L/C Lenders be converted into Revolving Loans (a "***Revolving Loan Conversion***"), in which case, if such conditions are in fact satisfied, the L/C Lenders shall be deemed to have extended, and the Borrowers shall be deemed to have accepted, a Revolving Loan in the aggregate principal amount of such payment without further action on the part of any party; any amount so paid pursuant to this paragraph shall, on and after the payment date thereof, be deemed to be Revolving Loans for all purposes hereunder; provided that the Issuing Lender, at its option, may effectuate a Revolving Loan Conversion regardless of whether the conditions to borrowings and Revolving Loan Conversions set forth in Section 5.2 are satisfied.

**3.6 Obligations Absolute.** The Borrowers' obligations under this Section 3 shall be absolute and unconditional under any and all circumstances and irrespective of any setoff, counterclaim or defense to payment that the Borrowers may have or have had against the Issuing Lender, any beneficiary of a Letter of Credit or any other Person. The Borrowers also agree with the Issuing Lender that the Issuing Lender shall not be responsible for, and the Borrowers' obligations hereunder shall not be affected by, among other things, the validity or genuineness of documents or of any endorsements thereon, even though such documents shall in fact prove to be invalid, fraudulent or forged, or any dispute between or among the Borrowers and any beneficiary of any Letter of Credit or any other party to which such Letter of Credit may be transferred or any claims whatsoever of the Borrowers against any beneficiary of such Letter of Credit or any such transferee. The Issuing Lender shall not be liable for any error, omission, interruption or delay in transmission, dispatch or delivery of any message or advice, however transmitted, in connection with any Letter of Credit, except for errors or omissions found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of the Issuing Lender. The Borrowers agree that any action taken or omitted by the Issuing Lender under or in connection with any Letter of Credit or the related drafts or documents, if done in the absence of gross negligence or willful misconduct, shall be binding on the Borrowers and shall not result in any liability of the Issuing Lender to the Borrowers.

In addition to amounts payable as elsewhere provided in the Agreement, the Borrowers hereby agree to pay and to protect, indemnify, and save Issuing Lender harmless from and against any and all claims, demands, liabilities, damages, losses, costs, charges and expenses (including reasonable attorneys' fees and allocated costs of internal counsel) that the Issuing Lender may incur or be subject to as a consequence, direct or indirect, of (A) the issuance of any Letter of Credit, or (B) the failure of Issuing Lender or of any L/C Lender to honor a demand for payment under any Letter of Credit thereof as a result of any act or omission, whether rightful or wrongful, of any present or future de jure or de facto government or Governmental Authority, in each case other than to the extent solely as a result of the gross negligence or willful misconduct of Issuing Lender or such L/C Lender (as finally determined by a court of competent jurisdiction).

**3.7 Letter of Credit Payments.** If any draft shall be presented for payment under any Letter of Credit, the Issuing Lender shall promptly notify the Borrowers and the Administrative Agent of the date and amount thereof. The responsibility of the Issuing Lender to the Borrowers in connection with any draft presented for payment under any Letter of Credit shall, in addition to any payment obligation expressly provided for in such Letter of Credit, be limited to determining that the documents (including each draft) delivered under such Letter of Credit in connection with such presentment are substantially in conformity with such Letter of Credit.

**3.8 Applications.** To the extent that any provision of any Application related to any Letter of Credit is inconsistent with the provisions of this Section 3, the provisions of this Section 3 shall apply.

**3.9 Interim Interest.** If the Issuing Lender shall make any L/C Disbursement in respect of a Letter of Credit, then, unless either the Borrowers shall have reimbursed such L/C Disbursement in full within the time period specified in Section 3.5(a) or the L/C Lenders shall have reimbursed such L/C Disbursement in full on such date as provided in Section 3.5(b), in each case the unpaid amount thereof shall bear interest for the account of the Issuing Lender, for each day from and including the date of such L/C Disbursement to but excluding the date of payment by the Borrowers, at the rate per annum that would apply to such amount if such amount were a Revolving Loan; provided that the provisions of Section 2.15(c) shall be applicable to any such amounts not paid when due.

### **3.10 Cash Collateral.**

(a) Certain Credit Support Events. Upon the request of the Administrative Agent or the Issuing Lender (i) if the Issuing Lender has honored any full or partial drawing request under any Letter of Credit and such drawing has resulted in an L/C Advance by all the L/C Lenders that is not reimbursed by the Borrowers or converted into a Revolving Loan pursuant to Section 3.5(b), or (ii) if, as of the Letter of Credit Maturity Date, any L/C Exposure for any reason remains outstanding, the Borrowers shall, in each case, immediately Cash Collateralize the then effective L/C Exposure in an amount equal to 105% (110% in the case of any L/C Exposure in respect of any Letter of Credit denominated in a Foreign Currency) of such L/C Exposure.

At any time that there shall exist a Defaulting Lender, within one (1) Business Day following the request of the Administrative Agent or the Issuing Lender (with a copy to the Administrative Agent), the Borrowers shall deliver to the Administrative Agent Cash Collateral in an amount sufficient to cover 105% (110% in the case of any L/C Exposure in respect of any Letter of Credit denominated in a Foreign Currency) of the Fronting Exposure relating to the Letters of Credit (after giving effect to Section 2.24(a)(iv) and any Cash Collateral provided by such Defaulting Lender).

(b) Grant of Security Interest. All Cash Collateral (other than credit support not constituting funds subject to deposit) shall be maintained in blocked, non-interest bearing deposit accounts with the Administrative Agent. The Borrowers, and to the extent provided by any Lender or Defaulting Lender, such Lender or Defaulting Lender, hereby grants to (and subjects to the control of) the Administrative Agent, for the benefit of the Administrative Agent, the Issuing Lender and the L/C Lenders, and agrees to maintain, a first priority security interest and Lien in all such Cash Collateral and in all proceeds thereof, as security for the Obligations to which such Cash Collateral may be applied pursuant to Section 3.10(c). If at any time the Administrative Agent determines that Cash Collateral is subject to any right or claim of any Person other than the Administrative Agent or any Issuing Lender as herein provided, or that the total amount of such Cash Collateral is less than 105% (110% in the case of any L/C Exposure in respect of any Letter of Credit denominated in a Foreign Currency) of the applicable L/C Exposure, Fronting Exposure and other Obligations secured thereby, the Borrowers or the relevant Lender or Defaulting Lender, as applicable, will, promptly upon demand by the Administrative Agent, pay or provide

to the Administrative Agent additional Cash Collateral in an amount sufficient to eliminate such deficiency (after giving effect to any Cash Collateral provided by such Defaulting Lender).

(c) **Application.** Notwithstanding anything to the contrary contained in this Agreement, Cash Collateral provided under any of this Section 3.10, Section 2.24 or otherwise in respect of Letters of Credit shall be held and applied to the satisfaction of the specific L/C Exposure, obligations to fund participations therein (including, as to Cash Collateral provided by a Defaulting Lender, any interest accrued on such obligation) and other obligations for which the Cash Collateral was so provided, prior to any other application of such property as may otherwise be provided for herein.

(d) **Termination of Requirement.** Cash Collateral (or the appropriate portion thereof) provided to reduce Fronting Exposure in respect of Letters of Credit or other Obligations shall no longer be required to be held as Cash Collateral pursuant to this Section 3.10 following (i) the elimination of the applicable Fronting Exposure and other Obligations giving rise thereto (including by the termination of the Defaulting Lender status of the applicable Lender), or (ii) a determination by the Administrative Agent and the Issuing Lender that there exists excess Cash Collateral; provided, however, (A) that Cash Collateral furnished by or on behalf of a Loan Party shall not be released during the continuance of an Event of Default, and (B) that, subject to Section 2.24, the Person providing such Cash Collateral and the Issuing Lender may agree that such Cash Collateral shall not be released but instead shall be held to support future anticipated Fronting Exposure or other obligations, and provided further, that to the extent that such Cash Collateral was provided by the Borrowers or any other Loan Party, such Cash Collateral shall remain subject to any security interest and Lien granted pursuant to the Loan Documents.

**3.11 Reserved.**

**3.12 Reserved.**

**3.13 Applicability of ISP.** Unless otherwise expressly agreed by the Issuing Lender and the Borrowers when a Letter of Credit is issued and subject to applicable laws, the Letters of Credit shall be governed by and subject to the rules of the ISP.

## **SECTION 4 REPRESENTATIONS AND WARRANTIES**

To induce the Administrative Agent and the Lenders to enter into this Agreement, to make the initial Loans on the Closing Date and to make Loans and to issue the Letters of Credit thereafter, each Borrower hereby jointly and severally represents and warrants to the Administrative Agent and each Lender, as to themselves, each of their respective Subsidiaries and each other Loan Party, as applicable, that:

### **4.1 Financial Condition.**

(a) The Pro Forma Financial Statements have been prepared giving effect (as if such events had occurred on such date in the case of the balance sheets and the beginning of the period presented in the case of the statements of income and cash flows) to (i) the Loans to be made on the Closing Date and the use of proceeds thereof, and (ii) the payment of fees and expenses in connection with the foregoing. The Pro Forma Financial Statements have been prepared based on the information available to the Borrowers as of the date of delivery thereof, and present fairly in all material respects on a *pro forma* basis the estimated financial position of the Parent and its consolidated Subsidiaries as of December 31, 2014 assuming that the events specified in the preceding sentence had actually occurred at such date in the case

of the balance sheets and at the beginning of the period presented in the case of the statements of income and cash flows

(b) The audited consolidated balance sheets of the Parent (or its predecessor) and its Subsidiaries as of December 31, 2012 and December 31, 2013, and the related consolidated statements of income and of cash flows for the fiscal years ended on such dates, reported on by and accompanied by an unqualified report from Ernst & Young LLP, present fairly in all material respects the consolidated financial condition of the Parent and its Subsidiaries as at such date, and the consolidated results of its operations and its consolidated cash flows for the respective fiscal years then ended. The unaudited consolidated balance sheet of the Parent and its Subsidiaries as at December 31, 2014, and the related unaudited consolidated statements of income and cash flows for the three-month period ended on such date, present fairly in all material respects the consolidated financial condition of the Parent and its Subsidiaries as at such date, and the consolidated results of its operations and its consolidated cash flows for the three-month period then ended (subject to normal year-end audit adjustments and the absence of footnotes). All such financial statements, including the related schedules and notes thereto, have been prepared in accordance with GAAP applied consistently throughout the periods involved (except with respect to audited financial statements as approved by the aforementioned firm of accountants and disclosed therein) subject in the case of unaudited financial statements to changes resulting from normal year-end adjustments and the absence of footnotes. No Group Member has, as of the Closing Date, any material Guarantee Obligations, contingent liabilities and liabilities for taxes, or any long-term leases or unusual forward or long-term commitments, including any interest rate or foreign currency swap or exchange transaction or other obligation in respect of derivatives, that are not reflected in the most recent financial statements referred to in this paragraph. During the period from December 31, 2013 to and including the date hereof, there has been no Disposition by any Group Member of any material part of its business or property.

**4.2 No Change.** Since December 31, 2013, there has been no development or event that has had or would reasonably be expected to have a Material Adverse Effect.

**4.3 Existence; Compliance with Law.** Each Group Member (a) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (b) has the power and authority, and the legal right, to own and operate its property, to lease the property it operates as lessee and to conduct the business in which it is currently engaged, (c) is duly qualified as a foreign corporation or other organization and in good standing under the laws of each jurisdiction where the failure to be so qualified would reasonably be expected to have a Material Adverse Effect and (d) is in material compliance with all Requirements of Law except in such instances in which (i) such Requirement of Law is being contested in good faith by appropriate proceedings diligently conducted and the prosecution of such contest would not reasonably be expected to result in a Material Adverse Effect, or (ii) the failure to comply therewith, either individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect.

**4.4 Power, Authorization; Enforceable Obligations.** Each Loan Party has the power and authority, and the legal right, to make, deliver and perform the Loan Documents to which it is a party and, in the case of the Borrowers, to obtain extensions of credit hereunder. Each Loan Party has taken all necessary organizational action to authorize the execution, delivery and performance of the Loan Documents to which it is a party and, in the case of the Borrowers, to authorize the extensions of credit on the terms and conditions of this Agreement. No Governmental Approval or consent or authorization of, filing with, notice to or other act by or in respect of, any other Person is required in connection with the extensions of credit hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the Loan Documents, except (i) Governmental Approvals, consents, authorizations, filings and notices which have been obtained or made and are in full force and effect and the filing of a Form 8-K with the SEC following the Closing Date and (ii) the filings referred to in



Section 4.19. Each Loan Document has been duly executed and delivered on behalf of each Loan Party party thereto. This Agreement constitutes, and each other Loan Document upon execution will constitute, a legal, valid and binding obligation of each Loan Party party thereto, enforceable against each such Loan Party in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles (whether enforcement is sought by proceedings in equity or at law).

**4.5 No Legal Bar.** The execution, delivery and performance of this Agreement and the other Loan Documents, the issuance of Letters of Credit, the borrowings hereunder and the use of the proceeds thereof will not violate any material Requirement of Law or any material Contractual Obligation of any Group Member and will not result in, or require, the creation or imposition of any Lien on any of their respective properties or revenues pursuant to any material Requirement of Law or any such material Contractual Obligation (other than the Liens created by the Security Documents). No Requirement of Law or Contractual Obligation applicable to the Borrowers or any of their respective Subsidiaries would reasonably be expected to have a Material Adverse Effect.

**4.6 Litigation.** No litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of any Borrower, threatened by or against any Group Member or against any of their respective properties or revenues (a) with respect to any of the Loan Documents or any of the transactions contemplated hereby or thereby, or (b) that would reasonably be expected to have a Material Adverse Effect.

**4.7 No Default.** No Group Member is in default under or with respect to any of its Contractual Obligations in any respect that would reasonably be expected to have a Material Adverse Effect. No Default or Event of Default has occurred and is continuing, nor shall either result from the making of a requested credit extension.

**4.8 Ownership of Property; Liens; Investments.** Each Group Member has title in fee simple to, or a valid leasehold interest in, all of its real property, and good title to, or a valid leasehold interest in, all of its other property, and none of such property is subject to any Lien except as permitted by Section 7.3. No Loan Party owns any Investment except as permitted by Section 7.8. The Collateral Information Certificate sets forth a complete and accurate list of all real property owned and leased by each Loan Party as of the Closing Date.

**4.9 Intellectual Property.** Each Group Member owns, or is licensed to use, all Intellectual Property necessary for the conduct of its business as currently conducted. No claim has been asserted and is pending by any Person challenging or questioning any Group Member's use of any Intellectual Property or the validity or effectiveness of any such Group Member's Intellectual Property, nor does any Borrower know of any valid basis for any such claim, unless such claim would not reasonably be expected to have a Material Adverse Effect. To the knowledge of the Loan Parties, the use of Intellectual Property by each Group Member, and the conduct of such Group Member's business, as currently conducted, does not infringe on or otherwise violate the rights of any Person, unless such infringement would not reasonably be expected to have a Material Adverse Effect, and there are no claims pending or, to the knowledge of any Borrower, threatened to such effect.

**4.10 Taxes.** Each Group Member has filed or caused to be filed all Federal, all income and all other material state and other tax returns that are required to be filed and has paid all material taxes shown to be due and payable on said returns or on any assessments made against it or any of its property and all other material taxes, fees or other charges imposed on it or any of its property by any Governmental Authority (other than any the amount or validity of which are currently being contested in good faith by

appropriate proceedings and with respect to which reserves in conformity with GAAP have been provided on the books of the relevant Group Member); no tax Lien has been filed (other than Liens permitted by Section 7.3(a)), and, to the knowledge of each Borrower, no material claim is being asserted, with respect to any such tax, fee or other charge.

**4.11 Federal Regulations.** No part of the proceeds of any Loans, and no other extensions of credit hereunder, will be used (a) for “buying” or “carrying” any “margin stock” within the respective meanings of each of the quoted terms under Regulation U as now and from time to time hereafter in effect for any purpose that violates the provisions of the Regulation U of the Board or (b) for any purpose that violates the provisions of the other regulations of the Board. If requested by any Lender or the Administrative Agent, the Borrowers will furnish to the Administrative Agent and each Lender a statement to the foregoing effect in conformity with the requirements of FR Form G-3 or FR Form U-1, as applicable, referred to in Regulation U.

**4.12 Labor Matters.** Except as, in the aggregate, would not reasonably be expected to have a Material Adverse Effect: (a) there are no strikes or other labor disputes against any Group Member pending or, to the knowledge of the Borrowers, threatened; (b) hours worked by and payment made to employees of each Group Member have not been in violation of the Fair Labor Standards Act or any other applicable Requirement of Law dealing with such matters; and (c) all payments due from any Group Member on account of employee health and welfare insurance have been paid or accrued as a liability on the books of the relevant Group Member.

#### **4.13 ERISA.**

(a) Each Loan Party and each of its respective ERISA Affiliates are in compliance in all material respects with all applicable provisions and requirements of ERISA with respect to each Pension Plan, and have performed all their obligations under each Pension Plan;

(b) no ERISA Event has occurred or is reasonably expected to occur;

(c) each Loan Party and each of its respective ERISA Affiliates has met all applicable requirements under the ERISA Funding Rules with respect to each Pension Plan, and no waiver of the minimum funding standards under the ERISA Funding Rules has been applied for or obtained;

(d) to the extent applicable with respect to any Pension Plan, as of the most recent valuation date for such Pension Plan, the funding target attainment percentage (as defined in Section 430(d)(2) of the Code) is at least 60%, and no Loan Party nor any of its respective ERISA Affiliates knows of any facts or circumstances that could reasonably be expected to cause the funding target attainment percentage to fall below 60% as of the most recent valuation date;

(e) as of the most recent valuation date for any Pension Plan, the amount of outstanding benefit liabilities (as defined in Section 4001(a)(18) of ERISA), individually or in the aggregate for all Pension Plans (excluding for purposes of such computation any Pension Plans with respect to which assets exceed benefit liabilities), does not exceed \$100,000;

(f) the execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder will not involve any transaction that is subject to the prohibitions of Section 406 of ERISA or in connection with which taxes could be imposed pursuant to Section 4975(c)(1)(A)-(D) of the Code;

(g) to the extent applicable with respect to any Pension Plan, all liabilities under such Pension Plan are (i) funded to at least the minimum level required by law, (ii) provided for or recognized in the financial statements most recently delivered to the Administrative Agent and the Lenders pursuant hereto or (iii) estimated in the formal notes to the financial statements most recently delivered to the Administrative Agent and the Lenders pursuant hereto; and;

(h) (i) no Loan Party is nor will any such Loan Party be a “plan” within the meaning of Section 4975(e) of the Code; (ii) the respective assets of the Loan Parties do not and will not constitute “plan assets” within the meaning of the United States Department of Labor Regulations set forth in 29 C.F.R. §2510.3-101; (iii) no Loan Party is nor will any such Loan Party be a “governmental plan” within the meaning of Section 3(32) of ERISA; and (iv) transactions by or with any Loan Party are not and will not be subject to state statutes applicable to such Loan Party regulating investments of fiduciaries with respect to governmental plans.

**4.14 Investment Company Act; Other Regulations** No Loan Party is an “investment company,” or a company “controlled” by an “investment company”, within the meaning of the Investment Company Act of 1940, as amended. No Loan Party is subject to regulation under any Requirement of Law (other than Regulation X of the Board), including the Federal Power Act, that may limit its ability to incur Indebtedness or that may otherwise render all or any portion of the Obligations unenforceable.

**4.15 Subsidiaries.** Except as disclosed to the Administrative Agent by the Borrowers in writing from time to time after the Closing Date, (a) Schedule 4.15 sets forth the name and jurisdiction of organization of the Parent and each Subsidiary of the Parent and, as to each such Subsidiary, the percentage of each class of Capital Stock owned by any Loan Party, and (b) there are no outstanding subscriptions, options, warrants, calls, rights or other agreements or commitments (other than stock options granted to employees or directors and directors’ qualifying shares) of any nature relating to any Capital Stock of the Borrowers (other than the Parent) or any Subsidiary, except as may be created by the Loan Documents.

**4.16 Use of Proceeds.** The proceeds of the Revolving Loans shall be to refinance the obligations of the Borrowers outstanding under the Existing Credit Facility, to pay related fees and expenses and for general corporate purposes. All or a portion of the proceeds of the Swingline Loans and the Letters of Credit, shall be used for general corporate purposes.

**4.17 Environmental Matters.** Except as, in the aggregate, would not reasonably be expected to have a Material Adverse Effect:

(a) Except as disclosed on Schedule 4.17, the facilities and properties owned, leased or operated by any Group Member (the “**Properties**”) do not contain, and, to the knowledge of the Borrowers, have not previously contained, any Materials of Environmental Concern in amounts or concentrations or under circumstances that constitute or have constituted a violation of, or could give rise to liability under, any Environmental Law;

(b) no Group Member has received or is aware of any notice of violation, alleged violation, non-compliance, liability or potential liability regarding environmental matters or compliance with Environmental Laws with regard to any of the Properties or the business operated by any Group Member (the “**Business**”), nor does any Borrower have knowledge or reason to believe that any such notice will be received or is being threatened;

(c) no Group Member has transported or disposed of Materials of Environmental Concern from the Properties in violation of, or in a manner or to a location that could give rise to liability under, any Environmental Law, nor has any Group Member generated, treated, stored or disposed of

Materials of Environmental Concern at, on or under any of the Properties in violation of, or in a manner that could give rise to liability under, any applicable Environmental Law;

(d) no judicial proceeding or governmental or administrative action is pending or, to the knowledge of the Borrowers, threatened, under any Environmental Law to which any Group Member is or will be named as a party with respect to the Properties or the Business, nor are there any consent decrees or other decrees, consent orders, administrative orders or other orders, or other administrative or judicial requirements outstanding under any Environmental Law with respect to the Properties or the Business;

(e) to the knowledge of the Borrowers, there has been no release or threat of release of Materials of Environmental Concern at or from the Properties arising from or related to the operations of any Group Member or otherwise in connection with the Business, in violation of or in amounts or in a manner that could give rise to liability under Environmental Laws;

(f) all operations of the Group Members at the Properties are in compliance, and have in the last five years been in compliance, with all applicable Environmental Laws, and except as disclosed on Schedule 4.17, to the knowledge of the Borrowers, there is no contamination at, under or about the Properties or violation of any Environmental Law with respect to the Properties or the Business; and

(g) no Group Member has assumed any liability of any other Person under Environmental Laws.

**4.18 Accuracy of Information, Etc.** No statement or information contained in this Agreement, any other Loan Document or any other document, certificate or statement furnished by or on behalf of any Loan Party to the Administrative Agent or the Lenders, or any of them, for use in connection with the transactions contemplated by this Agreement or the other Loan Documents, contained as of the date such statement, information, document or certificate was so furnished, any untrue statement of a material fact or omitted to state a material fact necessary to make the statements contained herein or therein, in light of the circumstances, not misleading in any material respect. The projections and *pro forma* financial information contained in the materials referenced above are based upon good faith estimates and assumptions believed by the Borrowers to be reasonable at the time made, it being recognized by the Lenders that such financial information as it relates to future events is not to be viewed as fact and that actual results during the period or periods covered by such financial information may differ from the projected results set forth therein by a material amount and that no assurance can be given that any particular projected result will be realized. There is no fact known to any Loan Party that would reasonably be expected to have a Material Adverse Effect that has not been expressly disclosed herein, in the other Loan Documents or in any other documents, certificates and statements furnished to the Administrative Agent and the Lenders for use in connection with the transactions contemplated hereby and by the other Loan Documents.

#### **4.19 Security Documents.**

(a) The Guarantee and Collateral Agreement is effective to create in favor of the Administrative Agent, for the ratable benefit of the Secured Parties, a legal, valid and enforceable security interest in the Collateral described therein and the proceeds thereof. In the case of the Pledged Stock, if any, described in the Guarantee and Collateral Agreement that are securities represented by stock certificates or otherwise constituting certificated securities within the meaning of Section 8-102(a)(15) of the UCC or the corresponding code or statute of any other applicable jurisdiction (“*Certificated Securities*”), when certificates representing such Pledged Stock are delivered to the Administrative Agent, and in the case of the other Collateral constituting personal property described in the Guarantee and Collateral Agreement, when financing statements and other filings specified on Schedule 4.19(a) in

appropriate form are filed in the offices specified on Schedule 4.19(a), the Administrative Agent, for the benefit of the Secured Parties, shall have a fully perfected Lien on, and security interest in, all right, title and interest of the Loan Parties in such Collateral and the proceeds thereof, as security for the Obligations, in each case prior and superior in right to any other Person (except, in the case of Collateral other than Pledged Stock, Liens permitted by Section 7.3). As of the Closing Date, no Loan Party that is a limited liability company or partnership has any Capital Stock that is a not Certificated Security.

(b) Any Mortgages delivered after the Closing Date pursuant to Section 6.12 will be, upon execution, effective to create in favor of the Administrative Agent, for the benefit of the Secured Parties, a legal, valid and enforceable Lien on the Mortgaged Properties described therein and proceeds thereof, and when the Mortgages are filed in the offices for the applicable jurisdictions in which the Mortgaged Properties are located, each such Mortgage shall constitute a fully perfected Lien on, and security interest in, all right, title and interest of the Loan Parties in the Mortgaged Properties and the proceeds thereof, as security for the Obligations (as defined in the relevant Mortgage), in each case prior and superior in right to any other Person other than Liens permitted by Section 7.3.

**4.20 Solvency; Fraudulent Transfer.** Each Loan Party is, and after giving effect to the inurrence of all Indebtedness, Obligations and obligations being incurred in connection herewith, will be, Solvent. No transfer of property is being made by any Loan Party and no obligation is being incurred by any Loan Party in connection with the transactions contemplated by this Agreement or the other Loan Documents with the intent to hinder, delay, or defraud either present or future creditors of such Loan Party.

**4.21 Regulation H.** No Mortgage encumbers improved real property that is located in an area that has been identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has not been made available under the National Flood Insurance Act of 1968.

**4.22 Designated Senior Indebtedness.** The Loan Documents and all of the Obligations have been deemed “Designated Senior Indebtedness” or a similar concept thereto, if applicable, for purposes of any other Indebtedness of the Loan Parties.

**4.23 Reserved.**

**4.24 Insurance.** All insurance maintained by the Loan Parties is in full force and effect, all premiums have been duly paid, no Loan Party has received notice of violation or cancellation thereof, and there exists no default under any requirement of such insurance. Each Loan Party maintains, with financially sound and reputable insurance companies insurance on all its property in at least such amounts and against at least such risks (but including in any event public liability, product liability and business interruption) as are usually insured against in the same general area by companies engaged in the same or a similar business.

**4.25 No Casualty.** No Loan Party has received any notice of, nor does any Loan Party have any knowledge of, the occurrence or pendency or contemplation of any Casualty Event affecting all or any material portion of its property.

**4.26 Accounts Receivable.**

All statements made and all unpaid balances appearing in all invoices, instruments and other documents evidencing the Accounts are and shall be true and correct in all material respects and all such invoices, instruments and other documents, and all of the Borrower’s books and records are genuine and in all respects what they purport to be. All sales and other transactions underlying or giving rise to each

Account shall comply in all material respects with all applicable laws and governmental rules and regulations. To the best of the Borrower's knowledge, all signatures and endorsements on all documents, instruments, and agreements relating to all Accounts are genuine, and all such documents, instruments and agreements are legally enforceable in accordance with their terms.

**4.27 Definition of "Knowledge".** Except as otherwise set forth herein, for purposes of the Loan Documents, whenever a representation or warranty is made to the Borrowers' knowledge or awareness, to the "best of" the Borrowers' knowledge, or with a similar qualification, knowledge or awareness means the actual knowledge, after reasonable investigation, of any Responsible Officer.

**4.28 Patriot Act.** Each Loan Party is in compliance, in all material respects, with the (a) Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, and (b) the Patriot Act or the Bribery Act 2012. No part of the proceeds of the Loans made hereunder will be used by any Loan Party or any of their Affiliates, directly or indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended. Each Loan Party and their respective directors, officers and, to the knowledge of the Borrower, employees, agents, advisors and Affiliates is in compliance, in all material respects, with the United States Foreign Corrupt Practices Act of 1977, as amended.

**4.29 OFAC.** No Loan Party nor any of its Subsidiaries is in violation of any of the country or list based economic and trade sanctions administered and enforced by OFAC. No Loan Party nor any of its Subsidiaries nor their respective directors, officers nor, to the knowledge of such Loan Party, employees, agents, advisors and Affiliates (a) is a Sanctioned Person or a Sanctioned Entity, (b) has its assets located in Sanctioned Entities, or (c) derives revenues from investments in, or transactions with Sanctioned Persons or Sanctioned Entities. No proceeds of any Loan made hereunder will be used to fund any operations in, finance any investments or activities in, or make any payments to, a Sanctioned Person or a Sanctioned Entity. No Loan Party nor any of its Subsidiaries nor their respective directors, officers nor, to the knowledge of such Loan Party, employees, agents, advisors and Affiliates (a) is a Sanctioned Person or a Sanctioned Entity, (b) has its assets located in Sanctioned Entities, or (c) derives revenues from investments in, or transactions with Sanctioned Persons or Sanctioned Entities.

## SECTION 5 CONDITIONS PRECEDENT

**5.1 Conditions to Initial Extension of Credit.** The effectiveness of this Agreement and the obligation of each Lender to make its initial extension of credit hereunder shall be subject to the satisfaction, prior to or concurrently with the making of each such extension of credit on the Closing Date, of the following conditions precedent:

(a) **Loan Documents.** The Administrative Agent shall have received each of the following, each of which shall be in form and substance satisfactory to the Administrative Agent:

(i) this Agreement, executed and delivered by the Administrative Agent, each Borrower and each Lender listed on Schedule 1.1A;

(ii) the Collateral Information Certificate, executed by a Responsible Officer of the Loan Parties;

(iii) if required by any Revolving Lender, a Revolving Loan Note executed by the Borrowers in favor of such Revolving Lender;

(iv) if required by the Swingline Lender, the Swingline Loan Note executed by the Borrowers in favor of such Swingline Lender;

(v) the Guarantee and Collateral Agreement, executed and delivered by the Borrowers and each other Grantor named therein;

(vi) each Intellectual Property Security Agreement, executed by the applicable Grantor related thereto;

(vii) Control Agreements with each of SVB and NBSC;

(viii) each other Security Document, executed and delivered by the applicable Loan Party party thereto;

(ix) a completed Compliance Certificate as of the last day of the fiscal quarter of the Parent ended on December 31, 2014;

(x) a completed Liquidity Report dated as of December 31, 2014;

(xi) a completed Transaction Report dated as of December 31, 2014; and

(xii) the Flow of Funds Agreement, executed by the Borrowers.

(b) Pro Forma Financial Statements; Financial Statements; Projections. The Administrative Agent shall have received (i) the Pro Forma Financial Statements, (ii) audited consolidated financial statements of the Parent (or its predecessor) as of December 31, 2012 and December 31, 2013, (iii) unaudited consolidated financial statements of the Parent as of December 31, 2014 and for each fiscal month ended thereafter and at least 15 days before the Closing Date, and (iv) forecasts prepared by management of the Parent, each in form reasonably satisfactory to the Administrative Agent, of balance sheets, income statements and cash flow statements on a monthly basis for each fiscal month during the term of the Revolving Facility.

(c) Approvals. All Governmental Approvals and consents and approvals of, or notices to, any other Person (including the holders of any Capital Stock issued by any Loan Party) required in connection with the execution and performance of the Loan Documents and consummation of the other transactions contemplated hereby, shall have been obtained and be in full force and effect.

(d) Secretary's Certificates; Certified Operating Documents; Good Standing Certificates. The Administrative Agent shall have received a certificate of each Loan Party, dated the Closing Date and executed by the Secretary or Assistant Secretary of such Loan Party, substantially in the form of Exhibit C, with appropriate insertions and attachments, including (i) the Operating Documents of such Loan Party, (ii) the relevant board resolutions or written consents of such Loan Party adopted by such Loan Party for the purposes of authorizing such Loan Party to enter into and perform the Loan Documents to which such Loan Party is party and (iii) the names, titles, incumbency and signature specimens of those representatives of such Loan Party who have been authorized by such resolutions and/or written consents to execute Loan Documents on behalf of such Loan Party, (iv) a good standing certificate for each Loan Party certified as of a recent date by the appropriate Governmental Authority of its respective jurisdiction

of organization, and (v) certificates of qualification as a foreign corporation issued by each of North Carolina, South Carolina, California and Oklahoma.

(e) Responsible Officer's Certificates.

(i) The Administrative Agent shall have received a certificate signed by a Responsible Officer of each Loan Party, dated as of the Closing Date, in form and substance reasonably satisfactory to it, either (A) attaching copies of all consents, licenses and approvals required in connection with the execution, delivery and performance by such Loan Party and the validity against such Loan Party of the Loan Documents to which it is party, and such consents, licenses and approvals shall be in full force and effect, or (B) stating that no such consents, licenses or approvals are so required.

(ii) The Administrative Agent shall have received a certificate signed by a Responsible Officer of the Parent, dated as of the Closing Date and in form and substance reasonably satisfactory to it, certifying (A) that the conditions specified in Sections 5.2(a) and (d) have been satisfied, and (B) that there has been no event or circumstance since December 31, 2013, that has had or that would reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect.

(f) Patriot Act. The Administrative Agent shall have received, prior to the Closing Date, all documentation and other information required by Governmental Authorities under applicable "know your customer" and anti-money-laundering rules and regulations, including the Patriot Act.

(g) Due Diligence Investigation. The Administrative Agent shall have completed a due diligence investigation of the Parent and its Subsidiaries in scope, and with results, satisfactory to the Administrative Agent and shall have been given such access to the management, records, books of account, contracts and properties of the Parent and its Subsidiaries and shall have received such financial, business and other information regarding each of the foregoing Persons and businesses as it shall have requested. Without limiting the foregoing, the Administrative Agent shall have received a copy of the most recent investment policy approved by the Parent's board of directors.

(h) Reports. The Administrative Agent shall have received, in form and substance satisfactory to it, all audits and certifications as it has reasonably requested.

(i) Existing Credit Facility, Etc. The Borrowers shall have provided notice to the Existing Lender (in accordance with the terms of the Existing Credit Facility) of their intent to pay all obligations of the Group Members outstanding under the Existing Credit Facility on the Closing Date, (B) the Administrative Agent shall have received the Payoff Letter executed by the Existing Lender and the Borrowers party to the Existing Credit Facility, (C) all obligations of the Group Members in respect of the Existing Credit Facility shall, substantially contemporaneously with the funding of certain Loan proceeds on the Closing Date directly to the Existing Lender as contemplated by Section 2.5 and the Flow of Funds Agreement, have been paid in full, (D) the Administrative Agent shall be satisfied that all actions necessary to terminate the agreements evidencing the obligations of the Group Members in respect of the Existing Credit Facility and the Liens of the Existing Lender in the assets of the Group Members securing obligations under the Existing Credit Facility shall have been, or substantially contemporaneously with the Closing Date, shall be, taken, and (E) the Administrative Agent shall have received such other documents and information related to the Existing Credit Facility and the refinancing thereof as it may request.

(j) Collateral Matters.

(i) Lien Searches. The Administrative Agent shall have received the results of recent lien searches in each of the jurisdictions where any of the Loan Parties is formed or organized,



and such searches shall reveal no liens on any of the assets of the Loan Parties except for Liens permitted by Section 7.3, Liens to be discharged on or prior to the Closing Date, or Liens securing obligations of the Group Members under the Existing Credit Facility, which Liens shall be discharged substantially contemporaneously with the Closing Date pursuant to the Payoff Letter.

(ii) Pledged Stock; Stock Powers; Pledged Notes. The Administrative Agent shall have received original versions of (A) the certificates representing the shares of Capital Stock pledged to the Administrative Agent (for the ratable benefit of the Secured Parties) pursuant to the Guarantee and Collateral Agreement, together with an undated stock power for each such certificate executed in blank by a duly authorized officer of the pledgor thereof, and (B) each promissory note (if any) pledged to the Administrative Agent (for the ratable benefit of the Secured Parties) pursuant to the Guarantee and Collateral Agreement, endorsed (without recourse) in blank (or accompanied by an executed transfer form in blank) by the pledgor thereof.

(iii) Filings, Registrations, Recordings, Agreements, Etc. Each document (including any UCC financing statements, Intellectual Property Security Agreements, Deposit Account Control Agreements, Securities Account Control Agreements, and a landlord access agreement for the Borrowers' headquarters location) required by the Loan Documents or under law or reasonably requested by the Administrative Agent to be filed, executed, registered or recorded to create in favor of the Administrative Agent (for the ratable benefit of the Secured Parties), a perfected Lien on the Collateral described therein, prior and superior in right and priority to any Lien in the Collateral held by any other Person (other than with respect to Liens expressly permitted by Section 7.3), shall have been executed (if applicable) and delivered to the Administrative Agent in proper form for filing, registration or recordation.

(k) Insurance. The Administrative Agent shall have received insurance certificates satisfying the requirements of Section 6.6 hereof and Section 5.2(b) of the Guaranty and Collateral Agreement, together with evidence reasonably satisfactory to the Administrative Agent that the insurance policies of each Loan Party have been endorsed for the purpose of naming the Administrative Agent (for the ratable benefit of the Secured Parties) as an "additional insured" or "lender loss payee", as applicable, with respect to such insurance policies, in form and substance satisfactory to the Administrative Agent.

(l) Fees. The Lenders and the Administrative Agent shall have received all fees required to be paid on or prior to the Closing Date (including pursuant to the Fee Letter), and all reasonable and documented fees and expenses for which invoices have been presented (including the reasonable and documented fees and expenses of legal counsel to the Administrative Agent) for payment on or before the Closing Date. All such amounts will be paid with proceeds of Loans made on the Closing Date and will be reflected in the Flow of Funds Agreement.

(m) Legal Opinions. The Administrative Agent shall have received the executed legal opinion of Wyrick Robbins Yates & Ponton LLP, counsel to the Loan Parties, in form and substance reasonably satisfactory to the Administrative Agent. Such legal opinion shall cover such matters incident to the transactions contemplated by this Agreement and the other Loan Documents as the Administrative Agent may reasonably require.

(n) Borrowing Notices. The Administrative Agent shall have received, in respect of any Revolving Loans to be made on the Closing Date, a completed Notice of Borrowing executed by the Borrowers and otherwise complying with the requirements of Section 2.5.

(o) Solvency Certificate. The Administrative Agent shall have received a Solvency Certificate from the chief financial officer or treasurer of the Parent.

(p) No Material Adverse Effect. There shall not have occurred since December 31, 2013 any event or condition that has had or would be reasonably expected to have, individually or in the aggregate, a Material Adverse Effect.

(q) No Litigation. No litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of any Group Member, threatened in writing, relating to or arising out of the Loan Documents or the transactions contemplated hereby and thereby.

(r) Consistency. The final terms and conditions of the transactions contemplated by the Loan Documents shall be (i) as described in the Engagement Letter, and otherwise consistent with the description thereof provided to Administrative Agent in writing or (ii) otherwise reasonably satisfactory to Administrative Agent and the Lenders.

For purposes of determining compliance with the conditions specified in this Section 5.1, each Lender that has executed this Agreement shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter either sent (or made available) by the Administrative Agent to such Lender for consent, approval, acceptance or satisfaction, or required thereunder to be consented to or approved by or acceptable or satisfactory to such Lender, unless an officer of the Administrative Agent responsible for the transactions contemplated by the Loan Documents shall have received notice from such Lender prior to the Closing Date specifying such Lender's objection thereto and either such objection shall not have been withdrawn by notice to the Administrative Agent to that effect on or prior to the Closing Date or, if any extension of credit on the Closing Date has been requested, such Lender shall not have made available to the Administrative Agent on or prior to the Closing Date such Lender's Revolving Percentage of such requested extension of credit.

**5.2 Conditions to Each Extension of Credit.** The agreement of each Lender to make any extension of credit requested to be made by it hereunder on any date (including its initial Loans disbursed on the Closing Date) is subject to the satisfaction of the following conditions precedent:

(a) Representations and Warranties. Each of the representations and warranties made by each Loan Party in or pursuant to any Loan Document (i) that is qualified by materiality shall be true and correct, and (ii) that is not qualified by materiality, shall be true and correct in all material respects, in each case, on and as of such date as if made on and as of such date, except to the extent any such representation and warranty expressly relates to an earlier date, in which case such representation and warranty shall have been true and correct in all material respects as of such earlier date.

(b) Availability. With respect to any requests for any Revolving Extensions of Credit, after giving effect to such Revolving Extension of Credit, the availability and borrowing limitations specified in Section 2.4 shall be complied with.

(c) Notices of Borrowing; Transaction Report. The Administrative Agent shall have received a Notice of Borrowing and a Transaction Report in connection with any such request for extension of credit which complies with the requirements hereof.

(d) No Default. No Default or Event of Default shall have occurred and be continuing as of or on such date or after giving effect to the extensions of credit requested to be made on such date.

Each borrowing by and issuance of a Letter of Credit on behalf of any Borrower hereunder shall constitute a representation and warranty by the Borrowers as of the date of such extension of credit that the conditions contained in this Section 5.2 have been satisfied.

**5.3 Post-Closing Conditions Subsequent.** The Borrowers shall satisfy each of the conditions subsequent to the Closing Date specified in this Section 5.3 to the reasonable satisfaction of the Administrative Agent, in each case by no later than the date specified for such condition below (or such other date as Administrative Agent shall agree in its sole discretion):

(a) Within thirty (30) days following the Closing Date, the Borrowers shall deliver the landlord access agreements and bailee waivers set forth on Schedule 5.3 hereto as required pursuant to Section 6.12(e) hereof.

## **SECTION 6 AFFIRMATIVE COVENANTS**

Each Borrower hereby jointly and severally agrees that, at all times prior to the Discharge of Obligations, each such Borrower shall, and, where applicable, shall cause each of its respective Subsidiaries to:

**6.1 Financial Statements.** Furnish to the Administrative Agent, with sufficient copies for distribution to each Lender:

(a) as soon as available, but in any event within 120 days after the end of each fiscal year of the Parent (commencing with the fiscal year ending December 31, 2014), a copy of the audited consolidated and consolidating balance sheet of the Parent and its consolidated Subsidiaries as at the end of such fiscal year and the related audited consolidated and consolidating statements of income and of cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous year, together with an unqualified opinion by an independent certified public accounting firm of nationally recognized standing and reasonably acceptable to the Administrative Agent;

(b) as soon as available, but in any event not later than 35 days (provided that, for the month ending January 31, 2016, such financial statements shall be due on or before March 25, 2016) after the end of each month occurring during each fiscal year of the Parent, the unaudited consolidated and consolidating balance sheet of the Parent and its consolidated Subsidiaries as at the end of such month and the related unaudited consolidated and consolidating statements of income and of cash flows for such month and the portion of the fiscal year through the end of such month, setting forth in each case in comparative form the figures for the previous year, certified by a Responsible Officer of the Parent as being fairly stated in all material respects (subject to normal year-end audit adjustments and the absence of footnotes).

(c) as soon as available, but in any event (i) within 90 days after the end of each fiscal year of the Parent, the Parent's annual report on form 10-K filed with the SEC, (ii) within 45 days after the end of each fiscal quarter of the Parent, the Parent's quarterly report on form 10-Q filed with the SEC, and (iii) each form 8-K filing made by the Parent as and when filed with the SEC; provided that documents required to be delivered pursuant to this Section 6.1(c) may be delivered electronically and if so, shall be deemed to have been delivered on the date on which the Parent posts such documents, or provides a link thereto, either: (x) on the Parent's website on the Internet at the website address listed in Section 10.2; or (y) when such documents are posted electronically on the Parent's behalf on an internet or intranet website to which each Lender and the Administrative Agent have access (whether a commercial, third-party website or whether sponsored by the Administrative Agent), if any.

All such financial statements shall be complete and correct in all material respects and shall be prepared in reasonable detail and in accordance with GAAP applied (except as approved by such accountants or officer, as the case may be, and disclosed in reasonable detail therein) consistently throughout the periods reflected therein and with prior periods, subject in the case of unaudited financial

statements to changes resulting from normal year-end adjustments and the absence of footnotes.

**6.2 Certificates; Reports; Other Information.** Furnish to the Administrative Agent, for distribution to each Lender:

(a) concurrently with the delivery of any financial statements pursuant to Section 6.1, (i) a certificate of a Responsible Officer stating that, to the best of such Responsible Officer's knowledge, each Loan Party during such period has observed or performed all of its covenants and other agreements, and satisfied every condition contained in this Agreement and the other Loan Documents to which it is a party to be satisfied by it, and that such Responsible Officer has obtained no knowledge of any Default or Event of Default except as specified in such certificate and (ii) in the case of all monthly, quarterly or annual financial statements, (x) a Compliance Certificate containing all information and calculations reasonably necessary for determining compliance by each Group Member with the provisions of this Agreement referred to therein as of the last day of the month or fiscal year of the Parent, as the case may be, and (y) to the extent not previously disclosed to the Administrative Agent, a description of any change in the jurisdiction of organization of any Loan Party and a list of any registered Intellectual Property issued to or acquired by any Loan Party since the date of the most recent report delivered pursuant to this clause (y) (or, in the case of the first such report so delivered, since the Closing Date);

(b) as soon as available, and in any event no later than 60 days after the end of each fiscal year of the Parent, a detailed consolidated budget for the following fiscal year (including a projected consolidated balance sheet of the Parent and its Subsidiaries as of the end of each fiscal quarter of such fiscal year, the related consolidated statements of projected cash flow, projected changes in financial position and projected income and a description of the underlying assumptions applicable thereto), and, as soon as available, significant revisions, if any, of such budget and projections with respect to such fiscal year (collectively, the "**Projections**"), which Projections shall be commensurate with those provided to the Parent's board of directors;

(c) promptly, and in any event within five (5) Business Days after receipt thereof by any Loan Party or any Subsidiary thereof, copies of each notice or other correspondence received from the SEC (or comparable agency in any applicable non-U.S. jurisdiction) concerning any investigation or possible investigation or other inquiry by such agency regarding financial or other operational results of any Loan Party or any Subsidiary thereof (other than routine comment letters from the staff of the SEC relating to the Parent's filings with the SEC);

(d) within five days after the same are sent, copies of each annual report, proxy or financial statement or other material report that the Parent sends to the holders of any class of the Parent's debt securities or public equity securities and, within five days after the same are filed, copies of all annual, regular, periodic and special reports and registration statements which the Parent may file with the SEC under Section 13 or 15(d) of the Exchange Act, or with any national securities exchange, and not otherwise required to be delivered to the Administrative Agent pursuant hereto;

(e) upon request by the Administrative Agent, within five days after the same are sent or received, copies of all correspondence, reports, documents and other filings with any Governmental Authority regarding compliance with or maintenance of Governmental Approvals or Requirements of Law or that would reasonably be expected to have a Material Adverse Effect on any of the Governmental Approvals or otherwise on the operations of the Group Members;

(f) concurrently with each Notice of Borrowing and in any event within 35 days after the end of each month, account receivable and account payable agings (by invoice date), a deferred revenue schedule, and a Transaction Report summarizing and calculating (where applicable) the Borrowing Base,

the Annualized Recurring Revenue Retention Rate, Recurring Revenue and Recurring Revenue Lost, together with all key performance metrics related to such calculations;

(g) concurrently with the delivery of financial statements referred to in Section 6.1(b), a Liquidity Report as of the last day of the month to which such financial statements relate;

(h) concurrently with the delivery of the financial statements referred to in Section 6.1(a), a report of a reputable insurance broker with respect to the insurance coverage maintained by the Borrowers pursuant to Section 6.6 and the terms of the Guarantee and Collateral Agreement, together with any supplemental reports with respect thereto which the Administrative Agent may reasonably request; and

(i) promptly, such additional financial and other information as the Administrative Agent may from time to time reasonably request.

### **6.3 Accounts Receivable.**

(a) Schedules and Documents Relating to Accounts. The Borrowers shall deliver to the Administrative Agent the Transaction Reports required by Section 6.2, on the Administrative Agent's standard forms. If reasonably requested by the Administrative Agent, the Borrowers shall furnish the Administrative Agent with copies of all contracts, orders, invoices, and other similar documents, and all shipping instructions, delivery receipts, bills of lading, and other evidence of delivery, for any goods the sale or disposition of which gave rise to the Accounts relating to such collections. In addition, the Borrowers shall deliver to the Administrative Agent, upon its reasonable request therefor, the originals of all instruments, chattel paper, security agreements, guarantees and other documents and property evidencing or securing any Accounts, in the same form as received, with all necessary endorsements, and copies of all credit memos.

(b) Disputes. The Borrowers shall promptly notify the Administrative Agent of all disputes for which a claim has been filed in excess of \$1,000,000 relating to Accounts included within Recurring Revenue. The Borrowers may forgive (completely or partially), compromise, or settle any Account for less than payment in full, or agree to do any of the foregoing at any time so long as (i) the Borrowers do so in good faith, in a commercially reasonable manner, in the ordinary course of business, in arm's-length transactions, and reports the same to the Administrative Agent in the regular reports provided to the Administrative Agent; (ii) no Default or Event of Default has occurred and is continuing at such time; and (iii) after taking into account all such discounts, settlements and forgiveness, the Total Revolving Extensions of Credit then outstanding will not exceed the Available Revolving Commitment then in effect.

(c) Collection of Accounts. The Borrowers shall have the right to collect all Accounts, unless and until a Default or an Event of Default has occurred and is continuing. The Borrowers shall direct all Account Debtors to deliver or transmit all proceeds of Accounts into a lockbox account, or via electronic deposit capture into a "blocked account", as specified by the Administrative Agent (either such account, the "*Cash Collateral Account*"), which such Cash Collateral Account shall be subject to a Deposit Account Control Agreement in form and substance satisfactory to the Administrative Agent. Whether or not an Event of Default has occurred and is continuing, the Borrowers shall immediately deliver all payments on and proceeds of Accounts to the Cash Collateral Account to be (i) prior to the occurrence and the continuance of an Event of Default, at Borrower's sole discretion (x) transferred to an account of the Borrowers maintained at SVB or (y) applied immediately reduce the Obligations; and (ii) after the occurrence and during the continuance of an Event of Default applied as described in Section 8.3.

(d) Returns. Provided no Event of Default has occurred and is continuing, if any Account Debtor returns any Inventory to any Borrower, such Borrower shall promptly (i) determine the reason for such return, (ii) issue a credit memorandum to the Account Debtor in the appropriate amount, and (iii) provide a copy of such credit memorandum to the Administrative Agent, upon request from the Administrative Agent. In the event any attempted return occurs after the occurrence and during the continuance of any Event of Default, such Borrower shall hold the returned Inventory in trust for the Secured Parties, and immediately notify the Administrative Agent of the return of the Inventory.

(e) Verification. Following the occurrence and during the continuance of an Event of Default, the Administrative Agent may, from time to time, verify directly with the respective Account Debtors the validity, amount and other matters relating to the Accounts, either in the name of a Borrower or the Administrative Agent or any of its Affiliates as the Administrative Agent may choose, and may notify any Account Debtor of the Administrative Agent's security interest in such Account.

(f) No Liability. The Administrative Agent shall not be responsible or liable for any shortage or discrepancy in, damage to, or loss or destruction of, any goods, the sale or other disposition of which gives rise to an Account, or for any error, act, omission, or delay of any kind occurring in the settlement, failure to settle, collection or failure to collect any Account, or for settling any Account in good faith for less than the full amount thereof, nor shall the Administrative Agent be deemed to be responsible for any Borrower's obligations under any contract or agreement giving rise to an Account. Nothing herein shall, however, relieve the Administrative Agent from liability for its own gross negligence or willful misconduct.

#### **Payment of Obligations; Taxes.**

(a) Pay, discharge or otherwise satisfy at or before maturity or before they become delinquent, as the case may be, all its material obligations (including all material Taxes and material Other Taxes imposed by law on an applicable Loan Party) of whatever nature, except where the amount or validity thereof is currently being contested in good faith by appropriate proceedings and reserves in conformity with GAAP with respect thereto have been provided on the books of the relevant Group Member.

(b) File or cause to be filed all Federal and state income and all other material tax returns that are required to be filed.

**6.5 Maintenance of Existence; Compliance.** (a) Except as otherwise permitted by Section 7.4, (i) preserve, renew and keep in full force and effect its organizational existence, in the case of the Borrowers, in any State of the United States or the District of Columbia, and (ii) unless the failure to do so would not reasonably be expected to have a Material Adverse Effect, take all reasonable action to maintain or obtain all Governmental Approvals and all other rights, privileges and franchises necessary in the normal conduct of its business or necessary for the performance by such Person of its Obligations under any Loan Document; (b) comply with all Contractual Obligations (including with respect to leasehold interests of the Borrowers) and Requirements of Law except to the extent that failure to comply therewith could not, in the aggregate, reasonably be expected to have a Material Adverse Effect; and (c) comply with all Governmental Approvals, and any term, condition, rule, filing or fee obligation, or other requirement related thereto, except to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect. Without limiting the generality of the foregoing, the Parent shall, and shall cause each of its ERISA Affiliates to: (1) maintain each Pension Plan in compliance in all material respects with the applicable provisions of ERISA, the Code or other Federal or state law; (2) cause each Pension Plan to maintain its qualified status under Section 401(a) of the Code; (3) make all required contributions to any Pension Plan; (4) not become a party to any Multiemployer Plan; (5) to the extent applicable with respect to any Pension Plan, ensure that all liabilities under such Pension Plan are either (x) funded to at least the minimum level

required by law or, if higher, to the level required by the terms governing such Pension Plan; (y) insured with a reputable insurance company; or (z) provided for or recognized in the financial statements most recently delivered to the Administrative Agent and the Lenders pursuant hereto; and (6) ensure that the contributions or premium payments to or in respect of each Pension Plan are and continue to be promptly paid at no less than the rates required under the rules of such Pension Plan and in accordance with the most recent actuarial advice received in relation to such Pension Plan and applicable law.

**6.6 Maintenance of Property; Insurance.** (a) Keep all property useful and necessary in its business in good working order and condition, ordinary wear and tear excepted and (b) maintain with financially sound and reputable insurance companies insurance on all its property in at least such amounts and against at least such risks as is customary for companies engaged in the same or a similar business. All property policies shall have a lender's loss payable endorsement showing the Administrative Agent as an additional loss payee. All liability policies shall show, or have endorsements showing, the Administrative Agent as an additional insured. All proceeds payable under any property policy shall, at the option of the Administrative Agent, be payable to the Administrative Agent on account of the Obligations; provided, however, that the Borrowers shall be entitled to retain and apply insurance proceeds of up to \$100,000 per occurrence to the repair or replacement of any property that is the subject of a claim under such policy.

**6.7 Inspection of Property; Books and Records; Discussions.** (a) Keep proper books of records and account in which full, true and correct entries shall be made in order to enable its financial statements to be prepared in conformity with GAAP and all Requirements of Law shall be made of all dealings and transactions in relation to its business and activities and (b) at reasonable times on three (3) Business Days' notice (provided no notice is required if an Event of Default has occurred and is continuing), permit the Administrative Agent, its agents and representatives and independent contractors of the Administrative Agent to visit and inspect any of its properties and examine and make abstracts from any of its books and records and to discuss the business, operations, properties and financial and other condition of the Group Members with officers, directors and employees of the Group Members and with their independent certified public accountants; provided that such inspections shall not be undertaken more frequently once every twelve (12) months, unless an Event of Default has occurred and is continuing, in which case such inspections and audits shall occur as often as the Administrative Agent shall reasonably determine is necessary.

**6.8 Notices.** Give prompt written notice to the Administrative Agent of:

- (a) the occurrence of any Default or Event of Default;
- (b) any (i) default or event of default under any Contractual Obligation of any Group Member that, if not cured would reasonably be expected to have a Material Adverse Effect; and (ii) litigation, investigation or proceeding that may exist at any time between any Group Member and any Governmental Authority that, if adversely determined, would reasonably be expected to have a Material Adverse Effect;
- (c) any litigation or proceeding to which a Group Member is a party (i) in which the amount involved is \$1,000,000 or more and not covered by insurance, (ii) in which injunctive or similar relief is sought against any Group Member, or (iii) which relates to any Loan Document;
- (d) (i) the occurrence of any of the following events affecting such Borrower or any of its respective ERISA Affiliates (but in no event more than ten days after such event), the occurrence of any of the following events, and shall provide the Administrative Agent with a copy of any notice with respect to such event that may be required to be filed with a Governmental Authority and any notice delivered by a Governmental Authority to such Borrower or any of its ERISA Affiliates with respect to

such event, if such event would reasonably be expected to result in liability in excess of \$250,000 to such Borrower or any of its respective ERISA Affiliates: (A) an ERISA Event, (B) the adoption of any new Pension Plan by such Borrower or any of its ERISA Affiliates, (C) the adoption of any amendment to a Pension Plan, if such amendment will result in a material increase in benefits or unfunded benefit liabilities (as defined in Section 4001(a)(18) of ERISA), or (D) the commencement of contributions by such Borrower or any of its ERISA Affiliate to any Pension Plan that is subject to Title IV of ERISA or Section 412 of the Code; and

(ii) to the extent applicable with respect to any Pension Plan, upon the reasonable request of the Administrative Agent after the giving, sending or filing thereof, or the receipt thereof, copies of each Schedule B (Actuarial Information) to the annual report (Form 5500 Series) filed by Loan Party or any of its respective ERISA Affiliates with the IRS with respect to such Pension Plan; and

(iii) all notices from a Multiemployer Plan sponsor concerning an ERISA Event that would reasonably be expected to result in a liability in excess of \$250,000 to such Borrower or any of its ERISA Affiliates;

(e) any material change in accounting policies or financial reporting practices by any Loan Party; and

(f) any development or event that has had or would reasonably be expected to have a Material Adverse Effect.

Each notice pursuant to this Section 6.8 shall be accompanied by a statement of a Responsible Officer of the Borrowers setting forth details of the occurrence referred to therein and stating what action the relevant Group Member proposes to take with respect thereto.

## **6.9 Environmental Laws.**

(a) Comply with all applicable Environmental Laws, and obtain and comply with and maintain, any and all licenses, approvals, notifications, registrations or permits required by applicable Environmental Laws, except those the failure to obtain, comply with and maintain would not reasonably be expected to have a Material Adverse Effect.

(b) Conduct and complete all investigations, studies, sampling and testing, and all remedial, removal and other actions required of the Borrowers under Environmental Laws and promptly comply in all material respects with all lawful orders and directives of all Governmental Authorities regarding Environmental Laws, subject to the Borrowers' right to challenge the applicability of any such orders and directives in good faith.

**6.10 Operating Accounts.** Maintain its and its Subsidiaries' primary depository and operating accounts and securities accounts with SVB or with SVB's Affiliates; provided that a portion of the operating accounts and securities accounts of the Borrowers and their respective Subsidiaries' may be maintained with one or more of the Lenders or their Affiliates and the accounts listed on Schedule 6.10 may be maintained with NBSC, subject in each case to a Control Agreement.

**6.11 Audits.** Without duplication of Section 6.7 hereof, at reasonable times, on three (3) Business Days' prior notice (provided that no notice shall be required if an Event of Default has occurred and is continuing), the Administrative Agent, or its agents, shall have the right to inspect the Collateral and perform field examinations, and the right to audit the Collateral and the Group Members' business. The foregoing inspections, audits and field examinations shall be at the Borrowers' expense, and the charge



therefor shall be \$850 per person per day (or such higher amount as shall represent the Administrative Agent's then-current standard charge for the same or any third party expenses in connection with performing such audit or field examination), plus reasonable out-of-pocket expenses. Such inspections, field examinations and audits shall not be undertaken more frequently than once every twelve (12) months, unless an Event of Default has occurred and is continuing, in which case such inspections and audits shall occur as often as the Administrative Agent shall reasonably determine is necessary; provided that, notwithstanding the foregoing, the Administrative Agent shall have the right to conduct one (1) additional audit and field examination within 120 days following the Closing Date at the Borrowers' expense that shall not be included in the constraints on frequency set forth above. In the event the Borrowers and the Administrative Agent schedule an audit more than ten (10) days in advance, and the Borrowers cancel or seek to or reschedule the audit with less than seven (7) days written notice to the Administrative Agent (without limiting any of the Administrative Agent's rights or remedies) then the Borrowers shall pay the Administrative Agent a fee of \$1,000 plus any out-of-pocket expenses incurred by the Administrative Agent to compensate the Administrative Agent for the anticipated costs and expenses of such cancellation or rescheduling.

#### **6.12 Additional Collateral, Etc.**

(a) With respect to any property (to the extent included in the definition of Collateral) acquired after the Closing Date by any Loan Party (other than (x) any property described in paragraph (b), (c) or (d) below, and (y) any property subject to a Lien expressly permitted by Section 7.3(g)) as to which the Administrative Agent, for the ratable benefit of the Secured Parties, does not have a perfected Lien, promptly (and in any event within five (5) Business Days, or such longer period as the Administrative Agent may agree in its sole discretion) (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement or such other documents as the Administrative Agent may reasonably deem necessary or advisable to evidence that such Loan Party is a Guarantor and to grant to the Administrative Agent, for the ratable benefit of the Secured Parties, a security interest in such property and (ii) take all actions necessary or advisable in the opinion of the Administrative Agent to grant to the Administrative Agent, for the ratable benefit of the Secured Parties, a perfected first priority (except as expressly permitted by Section 7.3) security interest and Lien in such property, including the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be requested by the Administrative Agent.

(b) With respect to any fee interest in any real property having a value (together with improvements thereof) of at least \$1,000,000 acquired after the Closing Date by any Loan Party (other than any such real property subject to a Lien expressly permitted by Section 7.3(g)), promptly (and in any event within forty-five (45) days (or such longer period as the Administrative Agent may agree in its sole discretion) of such request), to the extent requested by the Administrative Agent, (i) execute and deliver a first priority (except for any Liens permitted by Section 7.3(g)) Mortgage, in favor of the Administrative Agent, for the ratable benefit of the Secured Parties, covering such real property, (ii) if requested by the Administrative Agent, provide the Lenders with (x) title and extended coverage insurance covering such real property in an amount at least equal to the purchase price of such real property (or such other amount as shall be reasonably specified by the Administrative Agent, not to exceed the fair market value of the real property) as well as a current ALTA survey thereof, together with a surveyor's certificate, and (y) any consents or estoppels reasonably deemed reasonably necessary by the Administrative Agent in connection with such Mortgage, each of the foregoing in form and substance reasonably satisfactory to the Administrative Agent and (iii) if requested by the Administrative Agent, deliver to the Administrative Agent legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent. In connection with the foregoing, no later than three (3) Business Days prior to the date on which a Mortgage is executed and delivered pursuant to this Section 6.12, in order to comply with the Flood Laws, the Administrative Agent shall have

received the following documents (collectively, the “**Flood Documents**”): (A) a completed standard “life of loan” flood hazard determination form (a “**Flood Determination Form**”), (B) if the improvement(s) to the applicable improved real property is located in a special flood hazard area, a notification to the applicable Loan Party (“**Loan Party Notice**”) and (if applicable) notification to the applicable Loan Party that flood insurance coverage under the National Flood Insurance Program (“**NFIP**”) is not available because the community does not participate in the NFIP, (C) documentation evidencing the applicable Loan Party’s receipt of the Loan Party Notice (e.g., countersigned Loan Party Notice, return receipt of certified U.S. Mail, or overnight delivery), and (D) if the Loan Party Notice is required to be given and, to the extent flood insurance is required by any applicable Requirement of Law or any Lenders’ written regulatory or compliance procedures and flood insurance is available in the community in which the property is located, a copy of one of the following: the flood insurance policy, the applicable Loan Party’s application for a flood insurance policy plus proof of premium payment, a declaration page confirming that flood insurance has been issued, or such other evidence of flood insurance reasonably satisfactory to the Administrative Agent (any of the foregoing being “**Evidence of Flood Insurance**”).

(c) With respect to any new direct or indirect Subsidiary (other than an Excluded Foreign Subsidiary) created or acquired after the Closing Date by any Loan Party (including pursuant to a Permitted Acquisition), promptly (and in any event within ten (10) Business Days) (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the ratable benefit of the Secured Parties, a perfected first priority security interest and Lien in the Capital Stock of such new Subsidiary that is owned directly or indirectly by such Loan Party, (ii) deliver to the Administrative Agent such documents and instruments as may be reasonably required to grant, perfect, protect and ensure the priority of such security interest, including but not limited to, the certificates representing such Capital Stock, together with undated stock powers, in blank, executed and delivered by a duly authorized officer of the relevant Loan Party, (iii) cause such new Subsidiary (A) to become a party to the Guarantee and Collateral Agreement, (B) to take such actions as are necessary or advisable in the opinion of the Administrative Agent to grant to the Administrative Agent for the ratable benefit of the Secured Parties a perfected first priority security interest and Lien in the Collateral described in the Guarantee and Collateral Agreement, with respect to such Subsidiary, including the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be reasonably requested by the Administrative Agent and (C) to deliver to the Administrative Agent a certificate of such Subsidiary, in a form reasonably satisfactory to the Administrative Agent, with appropriate insertions and attachments, and (iv) if requested by the Administrative Agent, deliver to the Administrative Agent legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent.

(d) With respect to any new Excluded Foreign Subsidiary created or acquired after the Closing Date by any Loan Party, promptly (and in any event within ten (10) Business Days) (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement, as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the ratable benefit of the Secured Parties, a perfected first priority security interest and Lien in the Capital Stock of such new Excluded Foreign Subsidiary that is owned by any such Loan Party (provided that in no event shall more than 66% of the total outstanding voting Capital Stock of any such new Excluded Foreign Subsidiary be required to be so pledged), (ii) deliver to the Administrative Agent the certificates representing such Capital Stock, together with undated stock powers, in blank, executed and delivered by a duly authorized officer of the relevant Loan Party, and take such other action as may be necessary or, in the opinion of the Administrative Agent, desirable to perfect the Administrative Agent’s security interest therein, and (iii) if reasonably requested by the Administrative Agent, deliver to the Administrative Agent

legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent.

(e) Each Loan Party shall use commercially reasonable efforts to obtain a landlord's agreement or bailee letter, as applicable, from the lessor of its headquarters location, from the lessor of each data center of the Loan Parties, and from the lessor of or the bailee related to any other location where in excess of \$100,000 of Collateral is stored or located, which agreement or letter, in any such case, shall contain a waiver or subordination of all Liens or claims that the landlord or bailee may assert against the Collateral at that location, and shall otherwise be reasonably satisfactory in form and substance to the Administrative Agent. After the Closing Date, no Collateral having a book value in excess of \$100,000 shall be stored at any new location without the prior written consent of the Administrative Agent or unless and until a reasonably satisfactory landlord agreement or bailee letter, as appropriate, shall first have been obtained with respect to such location. Each Loan Party shall pay and perform its material obligations under all leases and other agreements with respect to each leased location or public warehouse where any Collateral is or may be located.

**6.13 Use of Proceeds.** Use the proceeds of each credit extension only for the purposes specified in [Section 4.16](#).

**6.14 Licensee Consent.**

Prior to entering into or becoming bound by any inbound Intellectual Property license or agreement (other than over-the-counter software that is commercially available to the public), the breach or termination of which would reasonably be expected to cause a Material Adverse Effect, the applicable Loan Party shall: (a) provide written notice to the Administrative Agent of the material terms of such license or agreement; and (b) to the extent reasonably requested by the Administrative Agent, obtain the consent of, or waiver by, any person whose consent or waiver is necessary for (i) the applicable Loan Party's interest in such license or agreement to be deemed Collateral and for the Administrative Agent to have a security interest in it that might otherwise be restricted by the terms of the applicable license or agreement, and (ii) the Administrative Agent to have the ability in the event of a liquidation of any Collateral to dispose of such Collateral in accordance with the Administrative Agent's rights and remedies under this Agreement and the other Loan Documents.

**6.15 Designated Senior Indebtedness.** Cause the Loan Documents and all of the Obligations to be deemed "Designated Senior Indebtedness" or a similar concept thereto, if applicable, for purposes of any other Indebtedness of the Loan Parties.

**6.16 Further Assurances.** Execute any further instruments and take such further action as the Administrative Agent reasonably deems necessary to perfect, protect, ensure the priority of or continue the Administrative Agent's Lien on the Collateral or to effect the purposes of this Agreement.

## SECTION 7 NEGATIVE COVENANTS

Each Borrower hereby jointly and severally agrees that, at all times prior to the Discharge of Obligations, no Borrower shall, nor shall any Borrower permit any of its Subsidiaries to, directly or indirectly:

## 7.1 Financial Condition Covenants.

(a) Minimum Liquidity. Permit Liquidity at any time, as tested on the last day of each month, to be less than \$40,000,000; provided that, in connection with any calculation of Liquidity required under this Section 7.1(a), at least \$25,000,000 must consist of unrestricted cash and Cash Equivalents (including short term marketable securities) satisfying the requirements of clause (i) of the definition of Liquidity.

(b) Minimum Consolidated EBITDA. Permit Consolidated EBITDA for any quarter specified below, as calculated on a trailing twelve (12) months basis, to be less than the correlative amount specified below:

<u>Quarter Ending</u>	<u>Minimum Consolidated EBITDA for Applicable Trailing Twelve Month Period</u>
March 31, 2018	\$(15,100,000)
June 30, 2018	\$(14,700,000)
September 30, 2018	\$(10,300,000)
December 31, 2018	\$(2,200,000)
March 31, 2019	\$[*]
June 30, 2019	\$[*]
September 30, 2019	\$[*]
December 31, 2019	\$[*]

**7.2 Indebtedness.** Create, issue, incur, assume, become liable in respect of or suffer to exist any Indebtedness, except:

(a) Indebtedness of any Loan Party pursuant to any Loan Document;

(b) Indebtedness of (i) any Loan Party owing to any other Loan Party, and (ii) any Group Member (which is not a Loan Party) to any other Group Member (which is not a Loan Party);

(c) Guarantee Obligations (i) of any Loan Party of the Indebtedness of any other Loan Party; (ii) of any Group Member (which is not a Loan Party) of the Indebtedness of any Loan Party, or (iii) by any Group Member (which is not a Loan Party) of the Indebtedness of any other Group Member (which is not a Loan Party), provided that, in any case (i), (ii) or (iii), the Indebtedness so guaranteed is otherwise permitted by the terms hereof;

(d) Indebtedness outstanding on the date hereof and listed on Schedule 7.2(d) and any Permitted Refinancing Indebtedness in respect thereof;

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[\*] Confidential treatment requested; certain information omitted and filed separately with the SEC.

(e) Indebtedness (including, without limitation, Capital Lease Obligations, including any incurred in addition to those permitted pursuant to clause (d) above) secured by Liens permitted by Section 7.3(g) in an aggregate principal amount not to exceed \$20,000,000 at any one time outstanding and any Permitted Refinancing Indebtedness in respect thereof);

(f) Subordinated Indebtedness;

(g) unsecured Indebtedness to trade creditors incurred in the ordinary course of business;

(h) Indebtedness incurred as a result of endorsing negotiable instruments received in the ordinary course of business

(i) unsecured Indebtedness of a type not described above of the Loan Parties and their respective Subsidiaries in an aggregate principal amount, for all such Indebtedness taken together, not to exceed \$250,000 at any one time outstanding;

(j) obligations (contingent or otherwise) of the Loan Parties and their respective Subsidiaries existing or arising under any Specified Swap Agreement, provided that such obligations are (or were) entered into by such Person in accordance with Section 7.13 and not for purposes of speculation;

(k) to the extent constituting Indebtedness, building lease obligations, whether or not reflected on the balance sheet of the Borrowers, provided that the aggregate outstanding amount of such obligations does not exceed \$180,000,000; and

(l) Indebtedness of a Person (other than a Loan Party or one of their respective Subsidiaries which constituted a Subsidiary prior to the consummation of the applicable merger referenced below) existing at the time such Person is merged with or into a Loan Party or a Subsidiary or becomes a Subsidiary; provided that (i) such Indebtedness was not, in any case, incurred by such other Person in connection with, or in contemplation of, such merger or acquisition, (ii) such merger or acquisition constitutes a Permitted Acquisition, (iii) with respect to any such Person who becomes a Subsidiary, (A) such Subsidiary is the only obligor in respect of such Indebtedness, and (B) to the extent such Indebtedness is permitted to be secured hereunder, only the assets of such Subsidiary secure such Indebtedness, and (iv) the aggregate amount of all such Indebtedness at any one time outstanding shall not exceed \$5,000,000; ~~and~~

(m) obligations incurred in the ordinary course of business in respect of bids, tenders, trade contracts, governmental contracts, statutory obligations, surety bonds, performance and return of money bonds, performance and completion guarantees and other obligations of a like nature;

(n) up to \$300,000,000 aggregate principal amount of Permitted Convertible Indebtedness; and

(o) any Permitted Bond Hedge Transaction.

**7.3 Liens.** Create, incur, assume or suffer to exist any Lien upon any of its property, whether now owned or hereafter acquired, except:

(a) Liens for Taxes not yet due or that are being contested in good faith by appropriate proceedings; provided that adequate reserves with respect thereto are maintained on the books of the applicable Group Member in conformity with GAAP;

(b) carriers', warehousemen's, landlord's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business that are not overdue for a period of more than 30 days or that are being contested in good faith by appropriate proceedings;

(c) pledges or deposits in connection with workers' compensation, unemployment insurance and other social security legislation;

(d) deposits to secure the performance of bids, trade contracts (other than for borrowed money), leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business (other than for indebtedness or any Liens arising under ERISA);

(e) easements, rights-of-way, restrictions and other similar encumbrances incurred in the ordinary course of business that, in the aggregate, are not substantial in amount and that do not in any case materially detract from the value of the property subject thereto or materially interfere with the ordinary conduct of the business of the applicable Group Member;

(f) Liens in existence on the date hereof listed on Schedule 7.3(f); provided that (i) no such Lien is spread to cover any additional property after the Closing Date, (ii) the amount of Indebtedness secured or benefitted thereby is not increased, (iii) the direct or any contingent obligor with respect thereto is not changed, and (iv) any renewal or extension of the obligations secured thereby is permitted by Section 7.2(d);

(g) Liens securing Indebtedness incurred pursuant to Section 7.2(e) to finance the acquisition, improvement or construction of fixed or capital assets; provided that (i) such Liens shall be created substantially simultaneously with the acquisition, improvement or construction of such fixed or capital assets, (ii) such Liens do not at any time encumber any property other than the property financed by such Indebtedness, and (iii) the amount of Indebtedness secured thereby is not increased;

(h) Liens created pursuant to the Security Documents;

(i) any interest or title of a lessor or licensor under any lease or license entered into by a Group Member in the ordinary course of its business and covering only the assets so leased or licensed;

(j) judgment Liens that do not constitute a Default or an Event of Default under Section 8.1(h) of this Agreement;

(k) bankers' Liens, rights of setoff and other similar Liens existing solely with respect to cash, Cash Equivalents, securities, commodities and other funds on deposit in one or more accounts maintained by a Group Member, in each case arising in the ordinary course of business in favor of banks, other depositary institutions, securities or commodities intermediaries or brokerages with which such accounts are maintained securing amounts owing to such banks or financial institutions with respect to cash management and operating account management or are arising under Section 4-208 or 4-210 of the UCC on items in the course of collection;

(l) Liens on property of a Person existing at the time such Person is acquired by, merged into or consolidated with a Loan Party or becomes a Subsidiary of a Loan Party or acquired by a Loan Party; provided that (i) such Liens were not created in contemplation of such acquisition, merger, consolidation or Investment, (ii) such Liens do not extend to any assets other than those of such Person, and (iii) the applicable Indebtedness secured by such Lien is permitted under Section 7.2;

(m) the replacement, extension or renewal of any Lien permitted by clause (l) above upon or in the same property theretofore subject thereto or the replacement, extension or renewal (without increase in the amount or change in any direct or contingent obligor) of the Indebtedness secured thereby;

(n) non-exclusive licenses of Intellectual Property granted to third parties in the ordinary course of business and licenses of Intellectual Property that could not result in a legal transfer of title of the licensed property that may be exclusive in respects other than territory and that may be exclusive as to territory only as to discreet geographical areas outside the United States; and

(o) Liens arising from precautionary UCC financing statements filed under any lease solely covering such leased items.

**7.4 Fundamental Changes.** Enter into any merger, consolidation or amalgamation, or liquidate, wind up or dissolve itself (or suffer any liquidation or dissolution), or Dispose of all or substantially all of its property or business, except that:

(a) any Subsidiary of a Loan Party may be merged or consolidated with or into a Loan Party (provided that such Loan Party shall be the continuing or surviving Person);

(b) any Subsidiary of the Parent may Dispose of any or all of its assets (i) pursuant to any liquidation or other transaction that results in the assets of such Subsidiary being transferred to a Borrower or any other Loan Party, or (ii) pursuant to a Disposition permitted by Section 7.5; and

(c) any Investment expressly permitted by Section 7.8 may be structured as a merger, consolidation or amalgamation.

**7.5 Disposition of Property.** Dispose of any of its property, whether now owned or hereafter acquired, except:

(a) Dispositions of obsolete or worn out property in the ordinary course of business;

(b) Dispositions of Inventory in the ordinary course of business;

(c) Dispositions permitted by clause (i) of Section 7.4(b);

(d) the sale or issuance of the Capital Stock of any Subsidiary of the Parent (i) to a Borrower or any other Loan Party, or (ii) in connection with any transaction that does not result in a Change of Control;

(e) the use or transfer of money, cash or Cash Equivalents in a manner that is not prohibited by the terms of this Agreement or the other Loan Documents;

(f) the licensing of Intellectual Property as permitted in Section 7.3(n);

(g) the Disposition of property (i) by any Loan Party to any other Loan Party, and (ii) by any Group Member (which is not a Loan Party) to any other Group Member;

(h) Dispositions of property subject to a Casualty Event;

(i) leases or subleases of Real Property;

(j) source code escrow arrangements in the ordinary course of business;

(k) the sale or discount without recourse of accounts receivable arising in the ordinary course of business in connection with the compromise or collection thereof; provided that any such sale or discount is undertaken in accordance with Section 6.3(b);

(l) any abandonment, cancellation, non-renewal or discontinuance of use or maintenance of Intellectual Property (or rights relating thereto) of any Group Member that the Borrowers determine in good faith is desirable in the conduct of its business and not materially disadvantageous to the interests of the Lenders;

(m) Dispositions of other property having a fair market value not to exceed \$1,000,000 in the aggregate for any fiscal year of the Parent, provided that at the time of any such Disposition, no Event of Default shall have occurred and be continuing or would result from such Disposition; ~~and~~

(n) payments permitted under Section 7.6, Investments permitted under Section 7.7, and Liens permitted under Section 7.3; and

(o) the unwinding of any Permitted Bond Hedge Transaction.

provided, however, that any Disposition made pursuant to this Section 7.5 shall be made in good faith on an arm's length basis and, other than with respect to Dispositions permitted under clauses (a), (c), (g), (h) and (l) above, for fair value.

**7.6 Restricted Payments.** Make any payment or prepayment of principal of, premium, if any, or interest on, or redemption, purchase, retirement, defeasance (including in-substance or legal defeasance), sinking fund, settlement, conversion or similar payment with respect to, any Permitted Convertible Indebtedness, Permitted Bond Hedge Transaction, earn-out payment, seller debt or deferred purchase payments, declare or pay any dividend (other than dividends payable solely in common stock of the Person making such dividend) on, or make any payment on account of, or set apart assets for a sinking or other analogous fund for, the purchase, redemption, defeasance, retirement or other acquisition of, any Capital Stock of any Group Member, whether now or hereafter outstanding, or make any other distribution in respect thereof, either directly or indirectly, whether in cash or property or in obligations of any Group Member (collectively, "**Restricted Payments**"), except that, so long as no Event of Default shall have occurred and be continuing at the time of any action described below or would result therefrom:

(a) any Group Member may (i) make Restricted Payments to any Borrower and (ii) declare and make dividends which are payable solely in the common Capital Stock of such Group Member;

(b) each Loan Party may purchase common Capital Stock or common Capital Stock options from present or former officers, employees or consultants of any Group Member pursuant to stock repurchase agreements; provided that no Default or Event of Default then exists or would result therefrom and the aggregate amount of payments made under this clause (b) shall not exceed \$750,000 during any fiscal year of the Borrower; ~~and~~

(c) the Loan Parties may make earn-out payments, payments on account of seller debt and deferred purchase payments so long as both before and after giving effect to such payments, no Event of Default has occurred and is continuing, and the Loan Parties are in pro forma compliance with the financial covenants set forth in Section 7.1 hereof;

(d) Parent may (A) convert or exchange any Permitted Convertible Indebtedness in accordance with its terms into common stock of Parent and make a payment of cash in lieu of fractional shares of common stock deliverable upon any such conversion or exchange, (B) make regularly scheduled



interest payments in respect of Permitted Convertible Indebtedness, (C) deliver cash in connection with any conversion or exchange of Permitted Convertible Indebtedness in an aggregate amount since the date of the indenture governing such Permitted Convertible Indebtedness not to exceed the sum of (i) the principal amount of such Permitted Convertible Indebtedness plus (ii) any payments received by Parent pursuant to the exercise, settlement or termination of any related Permitted Bond Hedge Transaction; provided that after giving *pro forma* effect to such Restricted Payment, (1) the Borrower shall be in compliance with the then applicable financial covenants set forth in Section 7.1 hereof as of the end of the most recently ended quarter for which financial statements are required to be delivered prior to such Restricted Payment, and the Borrower shall have delivered to the Administrative Agent a certificate in form and substance reasonably satisfactory to the Administrative Agent evidencing compliance with the requirements of this clause (C), and (2) immediately before and after giving effect to such Restricted Payment, the Loan Parties shall have Liquidity of at least \$50,000,000, (D) make any required payments of cash upon the required repurchase (including a required repurchase in connection with the redemption of Permitted Convertible Indebtedness upon satisfaction of a condition related to the stock price of Parent's common stock) or required repayment of Permitted Convertible Indebtedness, in each case, in an amount that does not exceed the principal amount thereof plus accrued interest; provided that after giving *pro forma* effect to such Restricted Payment, (1) the Borrower shall be in compliance with the then applicable financial covenants set forth in Section 7.1 hereof as of the end of the most recently ended quarter for which financial statements are required to be delivered prior to such Restricted Payment, and the Borrower shall have delivered to the Administrative Agent a certificate in form and substance reasonably satisfactory to the Administrative Agent evidencing compliance with the requirements of this clause (D), and (2) immediately before and after giving effect to such Restricted Payment, the Loan Parties shall have Liquidity of at least \$50,000,000, and (E) make any repurchases or exchanges of Permitted Convertible Indebtedness for cash, shares of Parent's common stock or any combination of cash and shares of Parent's common stock that are not required pursuant to the terms of such Permitted Convertible Indebtedness where the aggregate amount of such cash does not exceed the principal amount thereof plus accrued interest plus cash in lieu of fractional shares of common stock; provided that after giving *pro forma* effect to such Restricted Payment, (1) the Borrower shall be in compliance with the then applicable financial covenants set forth in Section 7.1 hereof as of the end of the most recently ended quarter for which financial statements are required to be delivered prior to such Restricted Payment and the Borrower shall have delivered to the Administrative Agent a certificate in form and substance reasonably satisfactory to the Administrative Agent evidencing compliance with the requirements of this clause (E), and (2) immediately before and after giving effect to such Restricted Payment, Liquidity shall not be less than \$50,000,000; and

(e) Parent may (x) make any payments in connection with the entry into a Permitted Bond Hedge Transaction on the closing date of any Permitted Convertible Indebtedness with the proceeds of such Permitted Convertible Indebtedness and (y) acquire common stock of Parent upon exercise and settlement or termination of any Permitted Bond Hedge Transaction, in each case, in accordance with the terms of the agreement governing such Permitted Bond Hedge Transaction.

**7.7 Consolidated Capital Expenditures.** Make or commit to make any Consolidated Capital Expenditure, except Consolidated Capital Expenditures made by the Group Members in the ordinary course of business and not exceeding during any fiscal year, for all such Consolidated Capital Expenditures of all of the Group Members taken together, the amount set forth below opposite such fiscal year:

<u>Fiscal Year</u>	<u>Consolidated Capital Expenditures</u>
2015 fiscal year	\$16,500,000
2016 fiscal year	\$21,000,000

2017 fiscal year	\$19,000,000
2018 fiscal year	\$22,000,000
2019 fiscal year	\$24,000,000

; provided that (i) any such amount that is not expended in the fiscal year for which it is permitted may be carried over for expenditure in the next succeeding fiscal year only and (ii) Consolidated Capital Expenditures made pursuant to this Section 7.7 during any fiscal year shall be deemed made, first, in respect of amounts carried over from the prior fiscal year pursuant to clause (i) above and, second, in respect of amounts permitted for such fiscal year as provided above.

**7.8 Investments.** Make any advance, loan, extension of credit (by way of guarantee or otherwise) or capital contribution to, or purchase any Capital Stock, bonds, notes, debentures or other debt securities of, or any assets constituting a business unit of, or make any other investment in, any Person (all of the foregoing, “*Investments*”), except:

- (a) extensions of trade credit in the ordinary course of business;
- (b) (i) Investments in cash and Cash Equivalents and (ii) Investments permitted by the Parent’s board-approved investment policy, a copy of which has been provided to the Administrative Agent (as the same may be amended from time to time, so long as (x) such amendment is approved by the Parent’s board of directors; and (y) promptly, and in any event within five (5) Business Days after approval, a copy of such amendment is provided to the Administrative Agent);
- (c) Guarantee Obligations permitted by Section 7.2;
- (d) (i) travel advances and employee relocation loans and other employee loans and advances in the ordinary course of business in an aggregate amount not to exceed \$250,000 at any time, and (ii) loans to employees, officers or directors relating to the purchase of equity securities of the Parent or its Subsidiaries pursuant to employee stock purchase plans or agreements approved by the Parent’s board of directors in an aggregate amount not to exceed \$500,000 in any fiscal year;
- (e) intercompany Investments by any Group Member in a Loan Party;
- (f) Investments in the ordinary course of business consisting of endorsements of negotiable instruments for collection or deposit;
- (g) Investments received in the ordinary course of business in connection with credit extensions to customers or in settlement of amounts due to any Group Member effected in the ordinary course of business or owing to such Group Member as a result of Insolvency Proceedings involving an Account Debtor or upon the foreclosure or enforcement of any Lien in favor of such Group Member;
- (h) (i) Investments constituting Permitted Acquisitions, and (ii) Investments held by any Person as of the date such Person is acquired in connection with a Permitted Acquisition, provided that (A) such Investments were not made, in any case, by such Person in connection with, or in contemplation of, such Permitted Acquisition, and (B) with respect to any such Person which becomes a Subsidiary as a result of such Permitted Acquisition, such Subsidiary remains the only holder of such Investment;

(i) in addition to Investments otherwise expressly permitted by this Section, Investments by the Group Members the aggregate amount of all of which Investments (valued at cost) does not exceed \$50,000 outstanding at any time;

(j) deposits made to secure the performance of leases, licenses or contracts in the ordinary course of business, and other deposits made in connection with the incurrence of Liens permitted under Section 7.3;

(k) promissory notes and other non-cash consideration received in connection with Dispositions permitted by Section 7.5; and

(l) purchases or other acquisitions by any Group Member of the Capital Stock in a Person that, upon the consummation thereof, will be a Subsidiary (including as a result of a merger or consolidation) or all or substantially all of the assets of, or assets constituting one or more business units of, any Person (each, a “**Permitted Acquisition**”); provided that, with respect to each such purchase or other acquisition:

(i) the newly-created or acquired Subsidiary (or assets acquired in connection with an asset sale) shall be (x) in the same or a related line of business as that conducted by the Borrowers on the date hereof, or (y) in a business that is ancillary to and in furtherance of the line of business as that conducted by the Borrowers on the date hereof;

(ii) all transactions related to such purchase or acquisition shall be consummated in all material respects in accordance with all Requirements of Law;

(iii) no Loan Party shall, as a result of or in connection with any such purchase or acquisition, assume or incur any direct or contingent liabilities (whether relating to environmental, tax, litigation or other matters) that, as of the date of such purchase or acquisition, would reasonably be expected to result in a Material Adverse Effect;

(iv) the Borrowers shall give the Administrative Agent at least ten (10) Business Days’ prior written notice of any such purchase or acquisition;

(v) the Borrowers shall provide to the Administrative Agent as soon as available but in any event not later than five (5) Business Days after the execution thereof, a copy of any executed purchase agreement or similar agreement with respect to any such purchase or acquisition;

(vi) any such newly-created or acquired Subsidiary, or the Loan Party that is the acquirer of assets in connection with an asset acquisition, shall comply with the requirements of Section 6.12, except to the extent compliance with Section 6.12 is prohibited by pre-existing Contractual Obligations or Requirements of Law binding on such Subsidiary or its properties;

(A) Liquidity shall equal or exceed \$30,000,000 as of the date the definitive agreements relating to any such acquisition or other purchase are executed (after giving effect, on a *pro forma* basis, to the consummation of such acquisition or other purchase);

(vii) (x) immediately before and immediately after giving effect to any such purchase or other acquisition, no Default or Event of Default shall have occurred and be continuing and (y) immediately before and immediately after giving effect to such purchase or other acquisition, the Borrowers shall be in compliance with each of the covenants set forth in Section 7.1, based upon financial statements

delivered to the Administrative Agent which give effect, on a *pro forma* basis, to such acquisition or other purchase;

(viii) the Borrowers shall not, based upon the knowledge of the Borrowers as of the date any such acquisition or other purchase is consummated, reasonably expect such acquisition or other purchase to result in an Event of Default under Section 8.1(c), at any time during the term of this Agreement, as a result of a breach of any of the financial covenants set forth in Section 7.1;

(ix) no Indebtedness is assumed or incurred in connection with any such purchase or acquisition other than Indebtedness permitted by the terms of Section 7.2(k);

(x) such purchase or acquisition shall not constitute an Unfriendly Acquisition;

(xi) (A) the aggregate amount of the cash consideration paid by such Group Member in connection with any particular Permitted Acquisition shall not exceed \$5,000,000, and (B) the aggregate amount of the cash consideration paid by all Group Members in connection with all such Permitted Acquisitions consummated from and after the Closing Date shall not exceed \$10,000,000;

(xii) each such Permitted Acquisition is of a Person organized under the laws of the United States and engaged in business activities primarily conducted within the United States and in which the Borrowers are permitted to engage pursuant to Section 7.17; and

(xiii) the Borrowers shall have delivered to the Administrative Agent, at least five Business Days prior to the date on which any such purchase or other acquisition is to be consummated (or such later date as is agreed by the Administrative Agent in its sole discretion), a certificate of a Responsible Officer of the Parent, in form and substance reasonably satisfactory to the Administrative Agent, certifying that all of the requirements set forth in this Section 7.8(l) have been satisfied or will be satisfied on or prior to the consummation of such purchase or other acquisition; ~~and~~

(m) ~~(m)~~ Investments existing on the date hereof and listed on Schedule 7.8(m), but excluding any increases in the amounts thereof following the Closing Date; ~~and~~

(n) the purchase of any Permitted Bond Hedge Transaction by Parent and, subject to Section 7.6, the performance of its obligations thereunder.

**7.9 ERISA.** The Borrowers shall not, and shall not permit any of their respective ERISA Affiliates to: (a) terminate any Pension Plan so as to result in any material liability to such Person or any of such Person's ERISA Affiliates, (b) permit to exist any ERISA Event, or any other event or condition, which presents the risk of a material liability to any of their respective ERISA Affiliates, (c) make a complete or partial withdrawal (within the meaning of ERISA Section 4201) from any Multiemployer Plan so as to result in any material liability to such Person or any of their respective ERISA Affiliates, (d) enter into any new Pension Plan or modify any existing Pension Plan so as to increase its obligations thereunder which could result in any material liability to any such Person or any of its respective ERISA Affiliates, (e) permit the present value of all nonforfeitable accrued benefits under any Pension Plan (using the actuarial assumptions utilized by the PBGC upon termination of a Pension Plan) materially to exceed the fair market value of Pension Plan assets allocable to such benefits, all determined as of the most recent valuation date for each such Pension Plan, or (f) engage in any transaction which would cause any obligation, or action taken or to be taken, hereunder (or the exercise by the Administrative Agent or any Lender of any of its rights under this Agreement, any Note or the other Loan Documents) to be a non-exempt (under a statutory or administrative class exemption) prohibited transaction under ERISA or Section 4975 of the Code.

**7.10 Optional Payments and Modifications of Certain Preferred Stock and Debt Instruments.** (a) Amend, modify, waive or otherwise change, or consent or agree to any amendment, modification, waiver or other change to, any of the terms of the Preferred Stock, if any (i) that would move to an earlier date the scheduled redemption date or increase the amount of any scheduled redemption payment or increase the rate or move to an earlier date any date for payment of dividends thereon or (ii) that would be otherwise materially adverse to any Lender or any other Secured Party; or (b) amend, modify, waive or otherwise change, or consent or agree to any amendment, modification, waiver or other change to, any of the terms of any Indebtedness permitted by Section 7.2 (other than Indebtedness pursuant to any Loan Document) that would shorten the maturity or increase the amount of any payment of principal thereof or the rate of interest thereon or shorten any date for payment of interest thereon or that would be otherwise materially adverse to any Lender or any other Secured Party.

**7.11 Transactions with Affiliates.** Enter into any transaction, including any purchase, sale, lease or exchange of property, the rendering of any service or the payment of any management, advisory or similar fees, with any Affiliate (other than any other Loan Party) unless such transaction is (a) otherwise permitted under this Agreement, (b) in the ordinary course of business of the relevant Group Member, and (c) upon fair and reasonable terms no less favorable to the relevant Group Member than it would obtain in a comparable arm's length transaction with a Person that is not an Affiliate.

**7.12 Sale Leaseback Transactions.** Enter into any Sale Leaseback Transaction unless (a) the Disposition of the applicable property subject to such Sale Leaseback Transaction is permitted under Section 7.5, and (b) any Liens in the property of any Loan Party incurred in connection with any such Sale Leaseback Transaction are permitted under Section 7.3.

**7.13 Swap Agreements.** Enter into any Swap Agreement, except Specified Swap Agreements which are (a) entered into by a Group Member to (a1) hedge or mitigate risks to which such Group Member has actual exposure (other than those in respect of Capital Stock), or (b2) effectively cap, collar or exchange interest rates (from fixed to floating rates or vice versa, from one floating rate to another floating rate or otherwise) with respect to any interest-bearing liability or investment of such Group Member, or (b) a Permitted Bond Hedge Transaction.

**7.14 Accounting Changes.** Make any change in its (a) accounting policies or reporting practices, except as required by GAAP, or (b) fiscal year.

**7.15 Negative Pledge Clauses.** Enter into or suffer to exist or become effective any agreement that prohibits or limits the ability of any Loan Party to create, incur, assume or suffer to exist any Lien upon any of its property or revenues, whether now owned or hereafter acquired, to secure its Obligations under the Loan Documents to which it is a party, other than (a) this Agreement and the other Loan Documents, (b) any agreements governing any purchase money Liens or Capital Lease Obligations otherwise permitted hereby (in which case, any prohibition or limitation shall only be effective against the assets financed thereby), (c) customary restrictions on the assignment of leases, licenses and other agreements, and (d) any agreement in effect at the time any Subsidiary becomes a Subsidiary of a Loan Party, so long as such agreement was not entered into solely in contemplation of such Person becoming a Subsidiary or, in any such case, that is set forth in any agreement evidencing any amendments, restatements, supplements, modifications, extensions, renewals and replacements of the foregoing, so long as such amendment, restatement, supplement, modification, extension, renewal or replacement applies only to such Subsidiary and does not otherwise expand in any material respect the scope of any restriction or condition contained therein.

**7.16 Clauses Restricting Subsidiary Distributions.** Enter into or suffer to exist or become effective any consensual encumbrance or restriction on the ability of any Loan Party and any of their

respective Subsidiaries to (a) make Restricted Payments in respect of any Capital Stock of such Subsidiary held by, or to pay any Indebtedness owed to, any other Group Member, (b) make loans or advances to, or other Investments in, any other Group Member, or (c) transfer any of its assets to any other Group Member, except for such encumbrances or restrictions existing under or by reason of (i) any restrictions existing under the Loan Documents, (ii) any restrictions with respect to a Subsidiary imposed pursuant to an agreement that has been entered into in connection with a Disposition permitted hereby of all or substantially all of the Capital Stock or assets of such Subsidiary, (iii) customary restrictions on the assignment of leases, licenses and other agreements, (iv) restrictions of the nature referred to in Section 7.15(b) above under agreements governing purchase money liens or Capital Lease Obligations otherwise permitted hereby which restrictions are only effective against the assets financed thereby or (v) any agreement in effect at the time any Subsidiary becomes a Subsidiary of a Borrower, so long as such agreement applies only to such Subsidiary, was not entered into solely in contemplation of such Person becoming a Subsidiary or in each case that is set forth in any agreement evidencing any amendments, restatements, supplements, modifications, extensions, renewals and replacements of the foregoing, so long as such amendment, restatement, supplement, modification, extension, renewal or replacement does not expand in any material respect the scope of any restriction or condition contained therein.

**7.17 Lines of Business.** Enter into any business, either directly or through any Subsidiary, except for those businesses in which the Borrowers and their respective Subsidiaries are engaged on the date of this Agreement or that are reasonably related, ancillary or incidental thereto.

**7.18 Designation of other Indebtedness.** Designate any Indebtedness or indebtedness other than the Obligations as “Designated Senior Indebtedness” or a similar concept thereto, if applicable.

**7.19 Certification of Certain Capital Stock.** Take any action to certificate any Capital Stock having been pledged to the Administrative Agent (for the ratable benefit of the Secured Parties) which was uncertificated at the time so pledged, in any such case, without first obtaining the Administrative Agent’s prior written consent to do so and undertaking to the reasonable satisfaction of the Administrative Agent all such actions as may reasonably be requested by the Administrative Agent to continue the perfection of its Liens (held for the ratable benefit of the Secured Parties) in any such newly certificated Capital Stock.

**7.20 Amendments to Organizational Agreements and Material Contracts.** (a) Amend or permit any amendments to any Loan Party’s organizational documents; or (b) amend or permit any amendments to, or terminate or waive any provision of, any material Contractual Obligation, in each such case if such amendment, termination, or waiver would be adverse to Administrative Agent or the Lenders in any material respect.

**7.21 Use of Proceeds.** Use the proceeds of any extension of credit hereunder, whether directly or indirectly, and whether immediately, incidentally or ultimately, to (a) purchase or carry margin stock (within the meaning of Regulation U of the Board) or to extend credit to others for the purpose of purchasing or carrying margin stock or to refund indebtedness originally incurred for such purpose, in each case in violation of, or for a purpose which violates, or would be inconsistent with, Regulation T, U or X of the Board, or (b) finance an Unfriendly Acquisition.

**7.22 Subordinated Indebtedness.**

(a) Amendments. Amend, modify, supplement, waive compliance with, or consent to noncompliance with, any Subordinated Debt Document, unless the amendment, modification, supplement, waiver or consent (i) does not adversely affect the Loan Parties’ ability to pay and perform each of their respective Obligations at the time and in the manner set forth herein and in the other Loan Documents and is not otherwise materially adverse to the Administrative Agent and the Lenders, and (ii) is in compliance

with the subordination provisions therein and any subordination agreement with respect thereto in favor of the Administrative Agent and the Lenders.

(b) Payments. Make any payment or prepayment of principal of, premium, if any, or interest on, or redemption, purchase, retirement, defeasance (including in-substance or legal defeasance), sinking fund or similar payment with respect to, any Subordinated Indebtedness, except as permitted by the subordination provisions in the applicable Subordinated Debt Documents and any subordination agreement with respect thereto in favor of the Administrative Agent and the Lenders.

**7.23 Anti-Terrorism Laws.** Conduct, deal in or engage in or permit any Affiliate or agent of any Loan Party within its control to conduct, deal in or engage in any of the following activities: (a) conduct any business or engage in any transaction or dealing with any person blocked pursuant to Executive Order No. 13224 (“*Blocked Person*”), including the making or receiving any contribution of funds, goods or services to or for the benefit of any Blocked Person; (b) deal in, or otherwise engage in any transaction relating to, any property or interests in property blocked pursuant to Executive Order No. 13224; or (c) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in Executive Order No. 13224 or the Patriot Act. The Borrowers shall deliver to the Administrative Agent and the Lenders any certification or other evidence reasonably requested from time to time by the Administrative Agent or any Lender confirming the Borrower's compliance with this Section 7.23.

## SECTION 8 EVENTS OF DEFAULT

**8.1 Events of Default.** The occurrence of any of the following shall constitute an Event of Default:

(a) the Borrowers shall fail to pay any amount of principal or interest on any Loan when due in accordance with the terms hereof (including Section 2.8); or the Borrowers shall fail to pay fees or any other amount payable hereunder or under any other Loan Document (other than those relating to Bank Services), within three (3) Business Days after any such amount becomes due in accordance with the terms hereof, or the Borrowers shall fail to pay any Obligations relating to Bank Services within ten (10) days after such Obligations become due in accordance with the terms thereof; or

(b) any representation or warranty made or deemed made by any Loan Party herein or in any other Loan Document or that is contained in any certificate, document or financial or other statement furnished by it at any time under or in connection with this Agreement or any such other Loan Document (i) if qualified by materiality, shall be incorrect or misleading when made or deemed made, or (ii) if not qualified by materiality, shall be incorrect or misleading in any material respect when made or deemed made; or

(c) (i) any Loan Party shall default in the observance or performance of any agreement contained in Section 2.8, Section 5.3, Section 6.1 (other than clause (c) thereof), Section 6.2, Section 6.3(c), clause (i) or (ii) of Section 6.5(a), Section 6.6(b), Section 6.8(a), Section 6.10, Section 6.11 or Section 7 of this Agreement, (ii) any Loan Party shall default in the observance or performance of any agreement contained in Section 6.1(c) and such default shall continue unremedied for a period of five (5) Business Days thereafter, or (iii) an “Event of Default” under and as defined in any Security Document shall have occurred and be continuing; or

(d) any Loan Party shall default in the observance or performance of any other agreement contained in this Agreement or any other Loan Document to which it is party (other than as

provided in paragraphs (a) through (c) of this Section), and such default shall continue unremedied for a period of 10 days thereafter; provided, however, that if the default cannot by its nature be cured within the ten (10) day period or cannot after diligent attempts by the Borrowers be cured within such ten (10) day period, and such default is likely to be cured within a reasonable time, then the Borrowers shall have an additional period (which shall not in any case exceed thirty (30) days) to attempt to cure such default, and within such reasonable time period the failure to cure the default shall not be deemed an Event of Default (but no Revolving Credit Extensions shall be made during such cure period); or

(e) (1) any Group Member shall (i) default in making any payment of any principal of any Indebtedness (including any Guarantee Obligation, but excluding the Loans) on the scheduled or original due date with respect thereto; or (ii) default in making any payment of any interest on any such Indebtedness beyond the period of grace, if any, provided in the instrument or agreement under which such Indebtedness was created; (iii) default in making any payment or delivery under any such Indebtedness constituting a Swap Agreement beyond the period of grace, if any, provided in such Swap Agreement; or (iv) default in the observance or performance of any other agreement or condition relating to any such Indebtedness or contained in any instrument or agreement evidencing, securing or relating thereto which such default is not cured within any applicable cure period, or any other event shall occur or condition exist, the effect of which default or other event or condition is to (x) cause, or to permit the holder or beneficiary of, or, in the case of any such Indebtedness constituting a Swap Agreement, counterparty under, such Indebtedness (or a trustee or agent on behalf of such holder, beneficiary, or counterparty) to cause, with the giving of notice if required, such Indebtedness to become due prior to its stated maturity or (in the case of any such Indebtedness constituting a Guarantee Obligation) to become payable or (in the case of any such Indebtedness constituting a Swap Agreement) to be terminated, or (y) to cause, with the giving of notice if required, any Group Member to purchase or redeem or make an offer to purchase or redeem such Indebtedness prior to its stated maturity; provided that, unless such Indebtedness constitutes a Specified Swap Agreement, a default, event or condition described in clause (i), (ii), (iii), or (iv) of this paragraph (e) shall not at any time constitute an Event of Default unless, at such time, one or more defaults, events or conditions of the type described in clauses (i), (ii), (iii), and (iv) of this paragraph (e) shall have occurred with respect to Indebtedness the outstanding principal amount (and, in the case of Swap Agreements, other than Specified Swap Agreements, the Swap Termination Value) of which, individually or in the aggregate of all such Indebtedness, exceeds in the aggregate \$500,000 and the holder(s) of such Indebtedness have not delivered a waiver in writing to the applicable Group Member with respect to such default, event or condition; provided, further, that this clause (e)(1) shall not apply to (x) any early payment requirement or unwinding or termination with respect to any Permitted Bond Hedge Transaction, or satisfaction of any condition giving rise to or permitting the foregoing, in accordance with the terms thereof, so long as, in any such case, Parent is not the “defaulting party” (or substantially equivalent term) under the terms of such Permitted Bond Hedge Transaction, (y) any event that permits conversion or exchange of Permitted Convertible Indebtedness (whether into cash, shares of common stock in Parent or any combination thereof) that is not the result of a breach or default by a Group Member of the terms of an agreement governing such Permitted Convertible Indebtedness or (z) any conversion or exchange of Permitted Convertible Indebtedness (whether into cash, shares of common stock in Parent or any combination thereof) that is not the result of a breach or default by a Group Member of the terms of an agreement governing such Permitted Convertible Indebtedness; or (2) any default or event of default (however designated) shall occur with respect to any Subordinated Indebtedness of any Group Member and such default or event of default has not been waived in writing by the holder thereof; or

(f) (i) any Group Member shall commence any case, proceeding or other action (a) under any Debtor Relief Law seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (b) seeking appointment of a receiver, trustee, custodian, conservator, judicial manager or other similar official for it or for all or



any substantial part of its assets, or any Group Member shall make a general assignment for the benefit of its creditors; or (ii) there shall be commenced against any Group Member any case, proceeding or other action of a nature referred to in clause (i) above that (a) results in the entry of an order for relief or any such adjudication or appointment, or (b) remains undismissed, undischarged or unbonded for a period of 60 days (provided that, during such 60 day period, no Loans shall be advanced or Letters of Credit issued hereunder); or (iii) there shall be commenced against any Group Member any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets that results in the entry of an order for any such relief that shall not have been vacated, discharged, or stayed or bonded pending appeal within 60 days from the entry thereof (provided that, during such 60 day period, no Loans shall be advanced or Letters of Credit issued hereunder); or (iv) any Group Member shall take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (i), (ii), or (iii) above; or (v) any Group Member shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due; or

(g) There shall occur one or more ERISA Events which individually or in the aggregate results in or otherwise is associated with liability of any Loan Party or any ERISA Affiliate thereof in excess of \$250,000 during the term of this Agreement; or there exists an amount of unfunded benefit liabilities (as defined in Section 4001(a)(18) of ERISA), individually or in the aggregate for all Pension Plans (excluding for purposes of such computation any Pension Plans with respect to which assets exceed benefit liabilities) which exceeds \$250,000; or

(h) There is entered against any Group Member (i) one or more final judgments or orders for the payment of money or fines or penalties issued by any Governmental Authority involving in the aggregate a liability (not paid or fully covered by insurance as to which the relevant insurance company has acknowledged coverage) of \$500,000 or more, or (ii) one or more non-monetary final judgments that have, or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect and, in either case (i) or (ii), (A) enforcement proceedings are commenced by any creditor or any such Governmental Authority, as applicable, upon such judgment, order, penalty or fine, as applicable, or (B) such judgment, order, penalty or fine, as applicable, shall not have been vacated, discharged, stayed or bonded, as applicable, pending appeal within 45 days from the entry or issuance thereof; or

(i) (i) any of the Security Documents shall cease, for any reason, to be in full force and effect (other than pursuant to the terms thereof), or any Loan Party shall so assert, or any Lien created by any of the Security Documents shall cease to be enforceable and of the same effect and priority purported to be created thereby; or

(ii) any court order enjoins, restrains or prevents a Loan Party from conducting all or any material part of its business; or

(j) the guarantee contained in Section 2 of the Guarantee and Collateral Agreement shall cease, for any reason, to be in full force and effect or any Loan Party shall so assert; or

(k) a Change of Control shall occur; or

(l) any of the Governmental Approvals shall have been (i) revoked, rescinded, suspended, modified in an adverse manner or not renewed in the ordinary course for a full term or (ii) subject to any decision by a Governmental Authority that designates a hearing with respect to any applications for renewal of any of the Governmental Approvals or that could result in the Governmental Authority taking any of the actions described in clause (i) above, and such decision or such revocation, rescission, suspension, modification or nonrenewal (A) has, or would reasonably be expected to have, a

Material Adverse Effect, or (B) materially adversely affects the legal qualifications of any Group Member to hold any material Governmental Approval in any applicable jurisdiction and such revocation, rescission, suspension, modification or nonrenewal could reasonably be expected to materially adversely affect the status of or legal qualifications of any Group Member to hold any material Governmental Approval in any other jurisdiction; or

(m) Any Loan Document not otherwise referenced in Section 8.1(i) or (j), at any time after its execution and delivery and for any reason other than as expressly permitted hereunder or thereunder, ceases to be in full force and effect; or any Loan Party contests in any manner the validity or enforceability of any Loan Document; or any Loan Party denies that it has any or any further liability or obligation under any Loan Document to which it is a party, or purports to revoke, terminate or rescind any such Loan Document; or

(n) a Material Adverse Effect shall occur.

**8.2 Remedies upon Event of Default.** If any Event of Default occurs and is continuing, the Administrative Agent shall, at the request of, or may, with the consent of, the Required Lenders, take any or all of the following actions:

(a) if such event is an Event of Default specified in clause (i) or (ii) of paragraph (f) of Section 8.1 with respect to any Borrower, the Revolving Commitments shall immediately terminate automatically and the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents shall automatically immediately become due and payable, and

(b) if such event is any other Event of Default, any of the following actions may be taken: (i) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrowers state that no further extensions of credit shall be funded by the Lenders hereunder, and/or declare the Revolving Commitments, the Swingline Commitments and the L/C Commitments to be terminated forthwith, whereupon the Revolving Commitments, the Swingline Commitments and the L/C Commitments shall immediately terminate; (ii) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrowers, declare the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents to be due and payable forthwith, whereupon the same shall immediately become due and payable; (iii) any Qualified Counterparty or Bank Services Provider may terminate any Specified Swap Agreement or other Bank Services Agreement then outstanding; and (iv) the Administrative Agent may exercise on behalf of itself, the Lenders and the Issuing Lender all rights and remedies available to it, the Lenders and the Issuing Lender under the Loan Documents. With respect to all Letters of Credit with respect to which presentment for honor shall not have occurred at the time of an acceleration pursuant to this paragraph, the Borrowers shall Cash Collateralize an amount equal to 105% (110% in the case of any L/C Exposure in respect of any Letter of Credit denominated in a Foreign Currency) of the aggregate then undrawn and unexpired amount of such Letters of Credit. Amounts so Cash Collateralized shall be applied by the Administrative Agent to the payment of drafts drawn under such Letters of Credit, and the unused portion thereof after all such Letters of Credit shall have expired or been fully drawn upon, if any, shall be applied to repay other Obligations of the Borrowers hereunder and under the other Loan Documents in accordance with Section 8.3. In addition, (x) the Borrowers shall also Cash Collateralize the full amount of any Swingline Loans then outstanding, and (y) to the extent elected by the applicable Bank Services Provider, the Borrowers shall also Cash Collateralize the amount of any Obligations in respect of Bank Services then outstanding. After all such Letters of Credit and Bank Services Agreements shall have been terminated, expired or fully drawn upon, as applicable, and all amounts drawn under any such Letters of Credit shall have been reimbursed in full and all other Obligations of the Borrowers and the other Loan

Parties (including any such Obligations arising in connection with Bank Services) shall have been paid in full, the balance, if any, of the funds having been so Cash Collateralized shall be returned to the Borrowers (or such other Person as may be lawfully entitled thereto). Except as expressly provided above in this Section, presentment, demand, protest and all other notices of any kind are hereby expressly waived by the Borrowers.

**8.3 Application of Funds.** After the exercise of remedies provided for in Section 8.2, any amounts received by the Administrative Agent on account of the Obligations shall be applied by the Administrative Agent in the following order:

First, to the payment of that portion of the Obligations constituting fees, indemnities, expenses and other amounts (other than principal and interest but including any Collateral-Related Expenses, fees, charges and disbursements of counsel to the Administrative Agent and amounts payable under Sections 2.19 and 2.20) payable to the Administrative Agent in its capacity as such (including interest thereon);

Second, to payment of that portion of the Obligations constituting fees, indemnities and other amounts (other than principal, interest and Letter of Credit Fees) payable to the Lenders and the Issuing Lender (including any Letter of Credit Fronting Fees, Issuing Lender Fees and the reasonable fees, charges and disbursements of counsel to the respective Lenders and the Issuing Lender and amounts payable under Sections 2.19 and 2.20), in each case, ratably among them in proportion to the respective amounts described in this clause Second payable to them;

Third, to payment of that portion of the Obligations constituting accrued and unpaid Letter of Credit Fees and interest on the Loans and L/C Disbursements which have not yet been converted into Swingline Loans or Revolving Loans, in each case, ratably among them in proportion to the respective amounts described in this clause Third payable to them;

Fourth, to payment of that portion of the Obligations constituting unpaid principal of the Loans and L/C Disbursements which have not yet been converted into Revolving Loans, in each case, ratably among them in proportion to the respective amounts described in this clause Fourth held by them;

Fifth, to the Administrative Agent for the account of the Issuing Lender, to Cash Collateralize that portion of the L/C Exposure comprised of the aggregate undrawn amount of Letters of Credit pursuant to Section 3.10;

Sixth, if so elected by the applicable Bank Services Provider or applicable Qualified Counterparty, to the Administrative Agent for the ratable account of each Bank Services Provider and Qualified Counterparty, to repay or Cash Collateralize Obligations arising in connection with Bank Services and Specified Swap Agreements that are then due and payable;

Seventh, to the payment of all other Obligations of the Loan Parties that are then due and payable to the Administrative Agent and the other Secured Parties on such date, in each case, ratably among them in proportion to the respective aggregate amounts of all such Obligations owing to the Administrative Agent and the other Secured Parties on such date; and

Last, the balance, if any, after all of the Obligations have been indefeasibly paid in full (excluding, for this purpose, any Obligations which have been Cash Collateralized in accordance with the terms hereof), to the Borrowers or as otherwise required by Law.

Subject to Sections 2.24(a), 3.4, 3.5 and 3.10, amounts used to Cash Collateralize the aggregate

undrawn amount of Letters of Credit pursuant to clause Fifth above shall be applied to satisfy drawings under such Letters of Credit as they occur. If any amount remains on deposit as Cash Collateral for Letters of Credit after all Letters of Credit have either been fully drawn or expired, such remaining amount shall be applied to the other Obligations, if any, in the order set forth above.

## **SECTION 9 THE ADMINISTRATIVE AGENT**

### **9.1 Appointment and Authority.**

(a) Each of the Lenders hereby appoints SVB to act on its behalf as the Administrative Agent hereunder and under the other Loan Documents and authorizes the Administrative Agent to take such actions on its behalf and to exercise such powers as are delegated to the Administrative Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto.

(b) The provisions of Section 9 are solely for the benefit of the Administrative Agent, the Lenders and the Issuing Lender, and neither the Borrowers nor any other Loan Party shall have rights as a third party beneficiary of any of such provisions. The Administrative Agent shall not have any duties or responsibilities to any Lender or any other Person, except those expressly set forth herein and in the other Loan Documents, or any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against the Administrative Agent. It is understood and agreed that the use of the term “agent” herein or in any other Loan Documents (or any other similar term) with reference to the Administrative Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any applicable law. Instead such term is used as a matter of market custom, and is intended to create or reflect only an administrative relationship between contracting parties.

(c) The Administrative Agent shall also act as the collateral agent under the Loan Documents, and the Issuing Lender and each of the other Lenders (in their respective capacities as a Lender and, as applicable, Qualified Counterparty or Bank Services Provider)—hereby (i) authorize the Administrative Agent to enter into all other Loan Documents, as applicable, including the Guarantee and Collateral Agreement and any other Security Documents, and (ii) appoint and authorize the Administrative Agent to act as the agent of the Secured Parties for purposes of acquiring, holding and enforcing any and all Liens on Collateral granted by any of the Loan Parties to secure any of the Obligations, together with such powers and discretion as are reasonably incidental thereto. The Administrative Agent, as collateral agent and any co-agents, sub-agents and attorneys-in-fact appointed by the Administrative Agent pursuant to Section 9.2 for purposes of holding or enforcing any Lien on the Collateral (or any portion thereof) granted under the Security Documents, or for exercising any rights and remedies thereunder at the direction of the Administrative Agent, shall be entitled to the benefits of all provisions of this Section 9 and Section 10 (including Section 9.7, as though such co-agents, sub-agents and attorneys-in-fact were the collateral agent under the Loan Documents) as if set forth in full herein with respect thereto. Without limiting the generality of the foregoing, the Administrative Agent is further authorized on behalf of all the Lenders, without the necessity of any notice to or further consent from the Lenders, from time to time to take any action, or permit any co-agents, sub-agents and attorneys-in-fact appointed by the Administrative Agent to take any action, with respect to any Collateral or the Loan Documents which may be necessary to perfect and maintain perfected the Liens upon any Collateral granted pursuant to any Loan Document.

**9.2 Delegation of Duties.** The Administrative Agent may perform any and all of its duties and exercise its rights and powers hereunder or under any other Loan Document by or through any one or more sub-agents appointed by the Administrative Agent. The Administrative Agent and any such sub-agent may perform any and all of its duties and exercise its rights and powers by or through their respective Related

Parties. The exculpatory provisions of this Section shall apply to any such sub-agent and to the Related Parties of the Administrative Agent and any such sub-agent. The Administrative Agent shall not be responsible for the negligence or misconduct of any sub-agents except to the extent that a court of competent jurisdiction determines in a final and nonappealable judgment that the Administrative Agent acted with gross negligence or willful misconduct in the selection or monitoring of such sub-agents.

**9.3 Exculpatory Provisions.** The Administrative Agent shall have no duties or obligations except those expressly set forth herein and in the other Loan Documents, and its duties hereunder and thereunder shall be administrative in nature. Without limiting the generality of the foregoing, the Administrative Agent shall not:

(a) be subject to any fiduciary or other implied duties, regardless of whether any Default or any Event of Default has occurred and is continuing;

(b) have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Loan Documents that the Administrative Agent is required to exercise as directed in writing by the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for herein or in the other Loan Documents), as applicable; provided that the Administrative Agent shall not be required to take any action that, in its opinion or the opinion of its counsel, may expose the Administrative Agent to liability or that is contrary to any Loan Document or applicable law, including for the avoidance of doubt any action that may be in violation of the automatic stay under any Debtor Relief Law or that may effect a forfeiture, modification or termination of property of a Defaulting Lender in violation of any Debtor Relief Law; and

(c) except as expressly set forth herein and in the other Loan Documents, have any duty to disclose, and the Administrative Agent shall not be liable for the failure to disclose, any information relating to the Borrowers or any of their Affiliates that is communicated to or obtained by any Person serving as the Administrative Agent or any of its Affiliates in any capacity.

The Administrative Agent shall not be liable for any action taken or not taken by it (i) with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary, or as the Administrative Agent shall believe in good faith shall be necessary, under the circumstances as provided in Sections 8.2 and 10.1), or (ii) in the absence of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction by final and nonappealable judgment.

The Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document, (ii) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Default or Event of Default, (iv) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Loan Document or any other agreement, instrument or document or (v) the satisfaction of any condition set forth in Section 5.1, Section 5.2 or elsewhere herein, other than to confirm receipt of items expressly required to be delivered to the Administrative Agent.

**9.4 Reliance by Administrative Agent.** The Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing (including any electronic message, internet or intranet website posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. The Administrative Agent also may rely upon any statement made to it orally or by telephone and believed by it to have been made by the proper Person, and shall not incur any

liability for relying thereon. In determining compliance with any condition hereunder to the making of a Loan, or the issuance, extension, renewal or increase of a Letter of Credit, that by its terms must be fulfilled to the satisfaction of a Lender, the Administrative Agent may presume that such condition is satisfactory to such Lender unless the Administrative Agent shall have received notice to the contrary from such Lender prior to the making of such Loan or the issuance of such Letter of Credit. The Administrative Agent may consult with legal counsel (who may be counsel for any of the Loan Parties), independent accountants and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts. The Administrative Agent may deem and treat the payee of any Note as the owner thereof for all purposes unless a written notice of assignment, negotiation or transfer thereof shall have been filed with the Administrative Agent. The Administrative Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Loan Document unless it shall first receive such advice or concurrence of the Required Lenders (or such other number or percentage of Lenders as shall be provided for herein or in the other Loan Documents) as it deems appropriate or it shall first be indemnified to its satisfaction by the Lenders against any and all liability and expense that may be incurred by it by reason of taking or continuing to take any such action. The Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Loan Documents in accordance with a request of the Required Lenders (or such other number or percentage of Lenders as shall be provided for herein or in the other Loan Documents), and such request and any action taken or failure to act pursuant thereto shall be binding upon the Lenders and all future holders of the Loans.

**9.5 Notice of Default.** The Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default unless the Administrative Agent has received notice in writing from a Lender or the Borrowers referring to this Agreement, describing such Default or Event of Default and stating that such notice is a “*notice of default*.” In the event that the Administrative Agent receives such a notice, the Administrative Agent shall promptly give notice thereof to the Lenders. The Administrative Agent shall take such action with respect to such Default or Event of Default as shall be directed by the Required Lenders (or, if so specified by this Agreement, all Lenders); provided that unless and until the Administrative Agent shall have received such directions, the Administrative Agent may (but shall not be obligated to) take such action or refrain from taking such action with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

**9.6 Non-Reliance on Administrative Agent and Other Lenders.** Each Lender expressly acknowledges that neither the Administrative Agent nor any of its officers, directors, employees, agents, attorneys in fact or affiliates has made any representations or warranties to it and that no act by the Administrative Agent hereafter taken, including any review of the affairs of a Group Member or any affiliate of a Group Member, shall be deemed to constitute any representation or warranty by the Administrative Agent to any Lender. Each Lender represents to the Administrative Agent that it has, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of the Group Members and their affiliates and made its own credit analysis and decision to make its Loans hereunder and enter into this Agreement. Each Lender also agrees that it will, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under or based upon this Agreement, the other Loan Documents or any related agreement or any document furnished hereunder or thereunder, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of the Group Members and their affiliates. Except for notices, reports and other documents expressly required to be furnished to the Lenders by the Administrative Agent hereunder, the Administrative Agent shall have no duty or

responsibility to provide any Lender with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of any Group Member or any Affiliate of a Group Member that may come into the possession of the Administrative Agent or any of its officers, directors, employees, agents, attorneys in fact or affiliates.

**9.7 Indemnification.** Each of the Lenders agrees to indemnify each of the Administrative Agent, the Issuing Lender and the Swingline Lender and each of its Related Parties in its capacity as such (to the extent not reimbursed by the Borrowers or any other Loan Party pursuant to any Loan Document and without limiting the obligation of the Borrowers or any other Loan Party to do so) according to its Revolving Percentage in effect on the date on which indemnification is sought under this Section 9.7 (or, if indemnification is sought after the date upon which the Revolving Commitments shall have terminated and the Loans shall have been paid in full, in accordance with its Revolving Percentage immediately prior to such date), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever that may at any time (whether before or after the payment of the Loans) be imposed on, incurred by or asserted against the Administrative Agent or such other Person in any way relating to or arising out of, the Revolving Commitments, this Agreement, any of the other Loan Documents or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by the Administrative Agent or such other Person under or in connection with any of the foregoing and any other amounts not reimbursed by the Borrowers or such other Loan Party; provided that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements to the extent found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the Administrative Agent's or such other Person's gross negligence or willful misconduct, and that with respect to such unpaid amounts owed to any Issuing Lender or Swingline Lender solely in its capacity as such, only the Revolving Lenders shall be required to pay such unpaid amounts, such payment to be made severally among them based on such Revolving Lenders' Revolving Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought). The agreements in this Section 9.7 shall survive the payment of the Loans and all other amounts payable hereunder.

**9.8 Agent in Its Individual Capacity.** The Person serving as the Administrative Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not the Administrative Agent and the term "Lender" or "Lenders" shall, unless otherwise expressly indicated or unless the context otherwise requires, include the Person serving as the Administrative Agent hereunder in its individual capacity. Such Person and its Affiliates may accept deposits from, lend money to, own securities of, act as the financial advisor or in any other advisory capacity for and generally engage in any kind of business with the Borrowers or any Subsidiary or other Affiliate thereof as if such Person were not the Administrative Agent hereunder and without any duty to account therefor to the Lenders.

**9.9 Successor Administrative Agent.**

(a) The Administrative Agent may at any time give notice of its resignation to the Lenders and the Borrowers. If the Administrative Agent at any time shall resign or if the office of the Administrative Agent shall become vacant for any other reason, the Required Lenders, with the consent of the Borrowers (which consent shall not be unreasonably withheld or delayed and shall not be required at any time that an Event of Default is continuing under Section 8.1(a) or (f)) shall, by written instrument, appoint a successor Administrative Agent. Such successor Administrative Agent shall thereupon become the Administrative Agent hereunder, as applicable, and the Administrative Agent shall deliver or cause to be delivered to any successor Administrative Agent such documents of transfer and assignment as such successor Administrative Agent may reasonably request. If no such successor shall have been so appointed

by the Required Lenders and shall have accepted such appointment within 30 days after the retiring Administrative Agent gives notice of its resignation (or such earlier day as shall be agreed by the Required Lenders) (the “**Resignation Effective Date**”), then the retiring Administrative Agent may (but shall not be obligated to), on behalf of the Lenders, appoint a successor Administrative Agent that is a Lender at such time or that meets the qualifications for an Eligible Assignee hereunder. Whether or not a successor has been appointed, such resignation shall become effective in accordance with such notice on the Resignation Effective Date. Any resignation by SVB as Administrative Agent pursuant to this Section 9.9 shall also constitute its resignation as the Issuing Lender and Swingline Lender. Upon the acceptance of a successor’s appointment as Administrative Agent hereunder, (i) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring Issuing Lender and Swingline Lender, (ii) the retiring Issuing Lender and Swingline Lender shall be discharged from all of their respective duties and obligations hereunder and under the other Loan Documents, and (iii) the successor Issuing Lender shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to the retiring Issuing Lender to effectively assume the obligations of the retiring Issuing Lender with respect to such Letters of Credit.

(b) If the Person serving as Administrative Agent is a Defaulting Lender pursuant to clause (d) of the definition thereof, the Required Lenders may, to the extent permitted by applicable law, by notice in writing to the Borrowers and such Person remove such Person as Administrative Agent and, with the consent of the Borrowers (which consent shall not be unreasonably withheld or delayed and shall not be required at any time that an Event of Default is continuing under Section 8.1(a) or (f)), appoint a successor. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days (or such earlier day as shall be agreed by the Required Lenders) (the “**Removal Effective Date**”), then such removal shall nonetheless become effective in accordance with such notice on the Removal Effective Date.

(c) With effect from the Resignation Effective Date or the Removal Effective Date (as applicable) (i) the retiring or removed Administrative Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents (except that in the case of any collateral security held by the Administrative Agent on behalf of the Secured Parties under any of the Loan Documents, the retiring or removed Administrative Agent shall continue to hold such collateral security until such time as a successor Administrative Agent is appointed and such collateral security is assigned to such successor Administrative Agent) and (ii) except for any indemnity payments owed to the retiring or removed Administrative Agent, all payments, communications and determinations provided to be made by, to or through the Administrative Agent shall instead be made by or to each Lender directly, until such time, if any, as the Required Lenders appoint a successor Administrative Agent as provided for above in this Section. Upon the acceptance of a successor’s appointment as Administrative Agent hereunder, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring or removed Administrative Agent (other than any rights to indemnity payments owed to the retiring or removed Administrative Agent), and the retiring or removed Administrative Agent shall be discharged from all of its duties and obligations hereunder or under the other Loan Documents (if not already discharged therefrom as provided above in this Section). The fees payable by the Borrowers to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrowers and such successor. After the retiring or removed Administrative Agent’s resignation or removal hereunder and under the other Loan Documents, the provisions of Section 9 and Section 10.5 shall continue in effect for the benefit of such retiring or removed Administrative Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while the retiring or removed Administrative Agent was acting as the Administrative Agent.

**9.10 Collateral and Guaranty Matters.** The Lenders authorize the Administrative Agent, at its option and in its discretion,



(a) to release any Lien on any Collateral or other property granted to or held by the Administrative Agent under any Loan Document (i) upon the Discharge of Obligations, (ii) that is sold or otherwise disposed of or to be sold or otherwise disposed of as part of or in connection with any sale or other disposition permitted hereunder or under any other Loan Document, or (iii) subject to Section 10.1, if approved, authorized or ratified in writing by the Required Lenders;

(b) to subordinate any Lien on any Collateral or other property granted to or held by the Administrative Agent under any Loan Document to the holder of any Lien on such property that is permitted by Sections 7.3(g) and (i); and

(c) to release any Guarantor from its obligations under the Guarantee and Collateral Agreement if such Person ceases to be a Subsidiary as a result of a transaction permitted under the Loan Documents.

(d) Upon request by the Administrative Agent at any time, the Required Lenders will confirm in writing the Administrative Agent's authority to release or subordinate its interest in particular types or items of property, or to release any Guarantor from its obligations under the Guaranty pursuant to this Section 9.10.

(e) The Administrative Agent shall not be responsible for or have a duty to ascertain or inquire into any representation or warranty regarding the existence, value or collectability of the Collateral, the existence, priority or perfection of the Administrative Agent's Lien thereon, or any certificate prepared by any Loan Party in connection therewith, nor shall the Administrative Agent be responsible or liable to the Lenders for any failure to monitor or maintain any portion of the Collateral.

**9.11 Administrative Agent May File Proofs of Claim.** In case of the pendency of any proceeding under any Debtor Relief Law or any other judicial proceeding relative to any Loan Party, the Administrative Agent (irrespective of whether the principal of any Loan or Obligation in respect of any Letter of Credit shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether the Administrative Agent shall have made any demand on the Borrowers) shall be entitled and empowered (but not obligated), by intervention in such proceeding or otherwise:

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Loans, Obligations in respect of any Letter of Credit and all other Obligations that are owing and unpaid and to file such other documents as may be necessary or advisable to have the claims of the Lenders and the Administrative Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of the Lenders and the Administrative Agent and their respective agents and counsel and all other amounts due the Lenders and the Administrative Agent under Sections 2.9 and 10.5) allowed in such judicial proceeding; and

(b) to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Lender to make such payments to the Administrative Agent and, in the event that the Administrative Agent shall consent to the making of such payments directly to the Lenders, to pay to the Administrative Agent any amount due for the reasonable compensation, expenses, disbursements and advances of the Administrative Agent and its agents and counsel, and any other amounts due the Administrative Agent under Sections 2.9 and 10.5.

Nothing contained herein shall be deemed to authorize the Administrative Agent to authorize or consent to or accept or adopt on behalf of any Lender any plan of reorganization, arrangement, adjustment or composition affecting the Obligations or the rights of any Lender to authorize the Administrative Agent to vote in respect of the claim of any Lender in any such proceeding.

### **9.12 Reports and Financial Statements.**

Each Bank Services Provider agrees to furnish to the Administrative Agent at such frequency as the Administrative Agent may reasonably request with a summary of all Obligations in respect of Bank Services due or to become due to such Bank Services Provider. In connection with any distributions to be made hereunder, the Administrative Agent shall be entitled to assume that no amounts are due to any Bank Services Provider unless the Administrative Agent has received written notice thereof from such Bank Services Provider and if such notice is received, the Administrative Agent shall be entitled to assume that the only amounts due to such Bank Services Provider on account of Bank Services is the amount set forth in such notice.

To the extent that a notice, report or other written communication delivered or made available pursuant to any Loan Document is delivered or made available solely to the Administrative Agent, then the Administrative Agent shall promptly deliver or make available to the Lenders, in the manner prescribed in Section 10.2(b), all such notices, reports, and other written communications.

### **9.13 No Other Duties, Etc.**

Anything herein to the contrary notwithstanding, the “Documentation Agent” listed on the cover page hereof shall have no powers, duties or responsibilities under this Agreement or any of the other Loan Documents, except in its capacity as a Lender hereunder.

### **9.14 Survival.**

This Section 9 shall survive the Discharge of Obligations.

## **SECTION 10 MISCELLANEOUS**

### **10.1 Amendments and Waivers.**

(a) Neither this Agreement, nor any other Loan Document (other than any L/C Related Document, any Specified Swap Agreement and any Bank Services Agreement), nor any terms hereof or thereof may be amended, supplemented or modified except in accordance with the provisions of this Section 10.1. The Required Lenders and each Loan Party that is party to the relevant Loan Document may, or, with the written consent of the Required Lenders, the Administrative Agent and each Loan Party that is party to the relevant Loan Document may, from time to time, (i) enter into written amendments, supplements or modifications hereto and to the other Loan Documents for the purpose of adding any provisions to this Agreement or the other Loan Documents or changing in any manner the rights of the Lenders or of the Loan Parties hereunder or thereunder or (ii) waive, on such terms and conditions as the Required Lenders or the Administrative Agent, as the case may be, may specify in such instrument, any of the requirements of this Agreement or the other Loan Documents or any Default or Event of Default and its consequences; provided that no such waiver and no such amendment, supplement or modification shall (A) forgive the principal amount or extend the final scheduled date of maturity of any Loan, reduce the stated rate of any interest or fee payable hereunder (except that any amendment or modification of defined terms used in the financial covenants in this Agreement shall not constitute a reduction in the rate of interest

or fees for purposes of this clause (A)) or waive, postpone or extend the scheduled date of any payment thereof, or alter the amount or expiration date of any Lender's Revolving Commitment, in each case without the written consent of each Lender directly affected thereby; (B) eliminate or reduce the voting rights of any Lender under this Section 10.1 without the written consent of such Lender; (C) amend the definition of Required Lenders, consent to the assignment or transfer by the Borrowers of any of their respective rights and obligations under this Agreement and the other Loan Documents, except as provided in Sections 9.10 and 10.16 release all or substantially all of the Collateral or release any of the Guarantors from their obligations under the Guarantee and Collateral Agreement, in each case without the written consent of all Lenders; (D) amend, modify or waive the pro rata requirements of Section 2.18 in a manner that adversely affects Revolving Lenders without the written consent of each Revolving Lender or amend, modify or waive the pro rata requirements of Section 2.18 in a manner that adversely affects the L/C Lenders without the written consent of each L/C Lender; (E) amend, modify or waive any provision of Section 9 without the written consent of the Administrative Agent; (F) amend, modify or waive any provision of Section 2.6 or 2.7 without the written consent of the Swingline Lender; (G) amend, modify or waive any provision of Section 3 without the written consent of the Issuing Lender; or (H)(i) amend or modify the application of payments set forth in Section 8.3 in a manner that adversely affects Revolving Lenders without the written consent of the Revolving Lenders, (ii) amend or modify the application of payments set forth in Section 8.3 in a manner that adversely affects the L/C Lenders without the written consent of the L/C Lenders, or (iii) amend or modify the application of payments provisions set forth in Section 8.3 in a manner that adversely affects the Issuing Lender, any Bank Services Provider or any Qualified Counterparty, as applicable, without the written consent of the Issuing Lender, Bank Services Provider or each such Qualified Counterparty, as applicable. Any such waiver and any such amendment, supplement or modification shall apply equally to each of the Lenders and shall be binding upon the Loan Parties, the Lenders, the Administrative Agent, the Issuing Lender, each Bank Services Provider, each Qualified Counterparty, and all future holders of the Loans. In the case of any waiver, the Loan Parties, the Lenders and the Administrative Agent shall be restored to their former position and rights hereunder and under the other Loan Documents, and any Default or Event of Default waived shall be deemed to be cured during the period such waiver is effective; but no such waiver shall extend to any subsequent or other Default or Event of Default, or impair any right consequent thereon. Notwithstanding the foregoing, the Issuing Lender may amend any of the L/C Documents without the consent of the Administrative Agent or any other Lender. Notwithstanding anything to the contrary herein, no Defaulting Lender shall have any right to approve or disapprove any amendment, waiver or consent hereunder (and any amendment, waiver or consent which by its terms requires the consent of all Lenders or each affected Lender may be effected with the consent of the applicable Lenders other than Defaulting Lenders), except that (x) the Revolving Commitment of any Defaulting Lender may not be increased or extended without the consent of such Lender and (y) any waiver, amendment or modification requiring the consent of all Lenders or each affected Lender that by its terms affects any Defaulting Lender disproportionately adversely relative to other affected Lenders shall require the consent of such Defaulting Lender.

(b) Notwithstanding anything to the contrary contained in Section 10.1(a) above, in the event that any Borrower or any other Loan Party, as applicable, requests that this Agreement or any of the other Loan Documents, as applicable, be amended or otherwise modified in a manner which would require the consent of all of the Lenders and such amendment or other modification is agreed to by the Borrowers and/or such other Loan Party, as applicable, the Required Lenders and the Administrative Agent, then, with the consent of the Borrowers and/or such other Loan Party, as applicable, the Administrative Agent and the Required Lenders, this Agreement or such other Loan Document, as applicable, may be amended without the consent of the Lender or Lenders who are unwilling to agree to such amendment or other modification (each, a "**Minority Lender**"), to provide for:

- (i) the termination of the Commitments of each such Minority Lender;

(ii) the assumption of the Loans and Revolving Commitments of each such Minority Lender by one or more Replacement Lenders pursuant to the provisions of Section 2.23; and

(iii) the payment of all interest, fees and other obligations payable or accrued in favor of each Minority Lender and such other modifications to this Agreement or to such Loan Documents as the Borrowers, the Administrative Agent and the Required Lenders may determine to be appropriate in connection therewith.

(c) Notwithstanding any provision herein to the contrary but subject to the proviso in Section 10.1(a), this Agreement may be amended (or amended and restated) with the written consent of the Required Lenders, the Administrative Agent and the Borrowers (i) to add one or more additional credit or term loan facilities to this Agreement and to permit all such additional extensions of credit and all related obligations and liabilities arising in connection therewith and from time to time outstanding thereunder to share ratably (or on a basis subordinated to the existing facilities hereunder) in the benefits of this Agreement and the other Loan Documents with the obligations and liabilities from time to time outstanding in respect of the existing facilities hereunder, and (ii) in connection with the foregoing, to permit, as deemed appropriate by the Administrative Agent and approved by the Required Lenders, the Lenders providing such additional credit facilities to participate in any required vote or action required to be approved by the Required Lenders. For the avoidance of doubt, no Lender shall be required to participate in any such additional credit or term loan facility or be deemed a Defaulting Lender in the event that such Lender does not approve any such additional credit or term loan facility.

(d) Notwithstanding any provision herein to the contrary, any Bank Services Agreement or Specified Swap Agreement may be amended or otherwise modified by the parties thereto in accordance with the terms thereof without the consent of the Administrative Agent or any Lender.

## 10.2 Notices.

(a) All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by facsimile or electronic mail), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered, or three (3) Business Days after being deposited in the mail, postage prepaid, or sent via reputable overnight courier, or, in the case of facsimile or electronic mail notice, when received, addressed as follows in the case of the Borrowers and the Administrative Agent, and as set forth in an administrative questionnaire delivered to the Administrative Agent in the case of the Lenders, or to such other address as may be hereafter notified by the respective parties hereto:

Borrowers:	Benefitfocus, Inc. 100 Benefitfocus Way Charleston, South Carolina 29492 Attention: Milt Alpern, Chief Financial Officer and Paris Cavic, General Counsel Facsimile No.: 843-849-6062 Telephone No.: Telephone No.: (Paris Cavic) E-Mail: E-Mail: Website address: <a href="http://www.benefitfocus.com">www.benefitfocus.com</a>
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with a copy to:

Wyrick Robbins Yates & Ponton LLP  
4101 Lake Boone Trail, Suite 300  
Raleigh, NC 27607  
Attention: Carolyn Minshall  
Facsimile No.:

Administrative Agent: Silicon Valley Bank  
3353 Peachtree Road  
NE Tower, Suite M-10  
Atlanta, GA 30326  
Attention: Andy Kirk  
Facsimile No.:  
E-Mail:

with a copy to: Riemer & Braunstein, LLP  
3 Center Plaza  
Boston, Massachusetts 02108  
Attn.: Charles W. Stavros, Esq.  
Facsimile No.:  
E-mail:

(b) Notices and other communications to the Lenders hereunder may be delivered or furnished by electronic communications (including email and Internet websites) pursuant to procedures approved by the Administrative Agent and each Lender; provided that the foregoing shall not apply to notices to any Lender pursuant to Section 2 unless otherwise agreed by the Administrative Agent and the applicable Lender. The Administrative Agent or the Borrowers may, in their discretion, agree to accept notices and other communications to them hereunder by electronic communications pursuant to procedures approved by it; provided that approval of such procedures may be limited to particular notices or communications. Unless the Administrative Agent otherwise prescribes, (a) notices and other communications sent to an email address shall be deemed received upon the sender's receipt of an acknowledgment from the intended recipient (such as by the "return receipt requested" function, as available, return email or other written acknowledgment); and (b) notices or communications posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its email address as described in the foregoing clause (a) of notification that such notice or communication is available and identifying the website address therefor; provided that, for both clauses (a) and (b), if such notice or other communication is not sent during the normal business hours of the recipient, such notice or communication shall be deemed to have been sent at the opening of business on the next Business Day for the recipient.

(c) Any party hereto may change its address or facsimile number for notices and other communications hereunder by notice to the other parties hereto.

- ○ Each Loan Party agrees that the Administrative Agent may, but shall not be obligated to, make the Communications (as defined below) available to the Issuing Lender and the other Lenders by posting the Communications on Debt Domain, Intralinks, Syndtrak or a substantially similar electronic transmission system (the "**Platform**").

(ii) the Platform is provided “as is” and “as available.” The Agent Parties (as defined below) do not warrant the adequacy of the Platform and expressly disclaim liability for errors or omissions in the Communications. No warranty of any kind, express, implied or statutory, including, without limitation, any warranty of merchantability, fitness for a particular purpose, non-infringement of third-party rights or freedom from viruses or other code defects, is made by any Agent Party in connection with the Communications or the Platform. In no event shall the Administrative Agent or any of its Related Parties (collectively, the “*Agent Parties*”) have any liability to the Borrowers or the other Loan Parties, any Lender or any other Person or entity for damages of any kind, including, without limitation, direct or indirect, special, incidental or consequential damages, losses or expenses (whether in tort, contract or otherwise) arising out of any Borrower’s, any Loan Party’s or the Administrative Agent’s transmission of communications through the Platform. “*Communications*” means, collectively, any notice, demand, communication, information, document or other material provided by or on behalf of any Loan Party pursuant to any Loan Document or the transactions contemplated therein which is distributed to the Administrative Agent, any Lender or the Issuing Lender by means of electronic communications pursuant to this Section, including through the Platform.

**10.3 No Waiver; Cumulative Remedies.** No failure to exercise and no delay in exercising, on the part of the Administrative Agent or any Lender, any right, remedy, power or privilege hereunder or under the other Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. NONE OF THE ADMINISTRATIVE AGENT OR ANY LENDER SHALL BE DEEMED TO HAVE WAIVED ANY OF ITS RESPECTIVE RIGHTS UNDER THIS AGREEMENT OR UNDER ANY OTHER LOAN DOCUMENT UNLESS SUCH WAIVER IS EXPRESSED IN WRITING AND SIGNED BY THE ADMINISTRATIVE AGENT, THE REQUIRED LENDERS, OR ALL LENDERS, AS APPLICABLE. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

**10.4 Survival of Representations and Warranties.** All representations and warranties made hereunder, in the other Loan Documents and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the making of the Loans and other extensions of credit hereunder.

## 10.5 Expenses; Indemnity; Damage Waiver.

(a) Costs and Expenses. The Borrowers shall pay (i) all reasonable out-of-pocket expenses incurred by the Administrative Agent and its Affiliates (including the reasonable fees, charges and disbursements of counsel for the Administrative Agent), in connection with the syndication of the Revolving Facility, the preparation, negotiation, execution, delivery and administration of this Agreement and the other Loan Documents, or any amendments, modifications or waivers of the provisions hereof or thereof (whether or not the transactions contemplated hereby or thereby shall be consummated but subject to the limitations set forth in the Engagement Letter), (ii) all reasonable out-of-pocket expenses incurred by the Issuing Lender in connection with the issuance, amendment, renewal or extension of any Letter of Credit or any demand for payment thereunder, and (iii) all out-of-pocket expenses incurred by the Administrative Agent or any Lender (including the reasonable fees, charges and disbursements of one primary counsel for the Administrative Agent and the Lenders (and additional counsel in the case of any conflict among the Administrative Agent and the Lenders)) in connection with the enforcement or protection of their rights (A) in connection with this Agreement and the other Loan Documents, including their rights under this Section, or (B) in connection with the Loans made or Letters of Credit issued or participated in hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit.

(b) Indemnification by the Borrowers. The Borrowers shall indemnify the Administrative Agent (and any sub-agent thereof), each Lender (including the Issuing Lender), and each Related Party of any of the foregoing Persons (each such Person being called an “*Indemnitee*”) against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related reasonable and documented or invoiced (in reasonable detail) out-of-pocket expenses (including the reasonable fees, charges and disbursements of any counsel for any Indemnitee) incurred by any Indemnitee or asserted against any Indemnitee by any Person (including the Borrowers or any other Loan Party) other than such Indemnitee and its Related Parties arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby, (ii) any Loan or Letter of Credit or the use or proposed use of the proceeds therefrom (including any refusal by the Issuing Lender to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit), (iii) any actual or alleged presence or release of Materials of Environmental Concern on or from any property owned or operated by the Borrowers or any of their Subsidiaries, or any Environmental Liability related in any way to the Borrowers or any of their Subsidiaries, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by a Borrower or any other Loan Party, and regardless of whether any Indemnitee is a party thereto; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence, willful misconduct or violation of law of or by such Indemnitee or (y) result from a claim brought by a Borrower or any other Loan Party against an Indemnitee for breach in bad faith of such Indemnitee's obligations hereunder or under any other Loan Document, if such Borrower or such Loan Party has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction. This Section 10.5(b) shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim.

(c) Reimbursement by Lenders. To the extent that the Borrowers or any other Loan Party pursuant to any other Loan Document for any reason fail indefeasibly to pay any amount required under paragraph (a) or (b) of this Section to be paid by them to the Administrative Agent (or any sub-agent

thereof), the Issuing Lender, the Swingline Lender or any Related Party of any of the foregoing, each Lender severally agrees to pay to the Administrative Agent (or any such sub-agent), the Issuing Lender, the Swingline Lender or such Related Party, as the case may be, such Lender's *pro rata* share (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought based on each Lender's share of the Total Credit Exposure at such time) of such unpaid amount (including any such unpaid amount in respect of a claim asserted by such Lender); provided that with respect to such unpaid amounts owed to the Issuing Lender or the Swingline Lender solely in its capacity as such, only the Revolving Lenders shall be required to pay such unpaid amounts, such payment to be made severally among them based on such Revolving Lenders' Revolving Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) and provided further, that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against the Administrative Agent (or any such sub-agent), the Issuing Lender or the Swingline Lender in its capacity as such, or against any Related Party of any of the foregoing acting for the Administrative Agent (or any such sub-agent), the Issuing Lender or the Swingline Lender in connection with such capacity. The obligations of the Lenders under this paragraph (c) are subject to the provisions of Sections 2.4 and 2.20(e).

(d) Waiver of Consequential Damages, Etc. To the fullest extent permitted by applicable law, no Borrower shall assert, and each such Person hereby waives, any claim of such Person against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any agreement or instrument contemplated hereby, the transactions contemplated hereby or thereby, any Loan or Letter of Credit, or the use of the proceeds thereof. No Indemnitee referred to in paragraph (b) above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed by it through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby.

(e) Payments. All amounts due under this Section shall be payable promptly after demand therefor.

(f) Survival. Each party's obligations under this Section shall survive the resignation of the Administrative Agent, the Issuing Lender and the Swingline Lender, the replacement of any Lender, the termination of the Loan Documents, the termination of the Revolving Commitments and the Discharge of Obligations.

#### **1.06 Successors and Assigns; Participations and Assignments.**

(a) Successors and Assigns Generally. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that no Loan Party may assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of the Administrative Agent and each Lender, and no Lender may assign or otherwise transfer any of its rights or obligations hereunder except (i) to an assignee in accordance with the provisions of paragraph (b) of this Section, (ii) by way of participation in accordance with the provisions of paragraph (d) of this Section, or (iii) by way of pledge or assignment of a security interest subject to the restrictions of paragraph (f) of this Section (and any other attempted assignment or transfer by any party hereto shall be null and void). Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants to the extent provided in paragraph (d) of this Section and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.



(b) Assignments by Lenders. Any Lender may at any time assign to one or more assignees all or a portion of its rights and obligations under this Agreement (including all or a portion of its Revolving Commitments and the Loans at the time owing to it); provided that any such assignment shall be subject to the following conditions:

(i) Minimum Amounts.

(A) in the case of an assignment of the entire remaining amount of the assigning Lender's Revolving Commitment and/or the Loans at the time owing to it or contemporaneous assignments to related Approved Funds that equal at least the amount specified in paragraph (b)(i)(B) of this Section in the aggregate or in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund, no minimum amount need be assigned; and

(B) in any case not described in paragraph (b)(i)(A) of this Section, the aggregate amount of the Revolving Commitments (which for this purpose includes Loans outstanding thereunder) or, if the Revolving Commitment is not then in effect, the principal outstanding balance of the Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent or, if "**Trade Date**" is specified in the Assignment and Assumption, as of the Trade Date) shall not be less than \$5,000,000, unless each of the Administrative Agent and, so long as no Default or Event of Default has occurred and is continuing, the Borrowers otherwise consent (each such consent not to be unreasonably withheld or delayed).

(ii) Proportionate Amounts. Each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement with respect to the Loans and/or the Revolving Commitments assigned.

(iii) Required Consents. No consent shall be required for any assignment by a Lender except to the extent required by paragraph (b)(i)(B) of this Section and, in addition:

(A) the consent of the Borrowers (such consent not to be unreasonably withheld or delayed) shall be required unless (x) a Default or an Event of Default has occurred and is continuing at the time of such assignment, or (y) such assignment is to a Lender, an Affiliate of a Lender or an Approved Fund; provided that the Borrowers shall be deemed to have consented to any such assignment unless they shall object thereto by written notice to the Administrative Agent within five Business Days after having received notice thereof; and

(B) the consent of the Administrative Agent (such consent not to be unreasonably withheld or delayed) shall be required for assignments if such assignment is to a Person that is not a Lender, an Affiliate of such Lender or an Approved Fund with respect to such Lender.

(iv) Assignment and Assumption. The parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee of \$3,500; provided that the Administrative Agent may, in its sole discretion, elect to waive such processing and recordation fee in the case of any assignment. The assignee, if it is not a Lender, shall deliver to the Administrative Agent any such administrative questionnaire as the Administrative Agent may request.

(v) No Assignment to Certain Persons. No such assignment shall be made to (A) a Loan Party or any of a Loan Party's Affiliates or Subsidiaries or (B) to any Defaulting Lender or any

of its Subsidiaries, or any Person who, upon becoming a Lender hereunder, would constitute any of the foregoing Persons described in this clause (B).

(vi) No Assignment to Disqualified Institutions. So long as no Event of Default has occurred and is continuing, no such assignment shall be made to any Disqualified Institution.

(vii) No Assignment to Natural Persons. No such assignment shall be made to a natural Person.

(viii) Certain Additional Payments. In connection with any assignment of rights and obligations of any Defaulting Lender hereunder, no such assignment shall be effective unless and until, in addition to the other conditions thereto set forth herein, the parties to the assignment shall make such additional payments to the Administrative Agent in an aggregate amount sufficient, upon distribution thereof as appropriate (which may be outright payment, purchases by the assignee of participations or subparticipations, or other compensating actions, including funding, with the consent of the Borrowers and the Administrative Agent, the applicable pro rata share of Loans previously requested but not funded by the Defaulting Lender, to each of which the applicable assignee and assignor hereby irrevocably consent), to (x) pay and satisfy in full all payment liabilities then owed by such Defaulting Lender to the Administrative Agent, the Issuing Lender, the Swingline Lender and each other Lender hereunder (and interest accrued thereon), and (y) acquire (and fund as appropriate) its full pro rata share of all Loans and participations in Letters of Credit and Swingline Loans in accordance with its Revolving Percentage. Notwithstanding the foregoing, in the event that any assignment of rights and obligations of any Defaulting Lender hereunder shall become effective under applicable law without compliance with the provisions of this paragraph, then the assignee of such interest shall be deemed to be a Defaulting Lender for all purposes of this Agreement until such compliance occurs.

Subject to acceptance and recording thereof by the Administrative Agent pursuant to paragraph (c) of this Section, from and after the effective date specified in each Assignment and Assumption, the assignee thereunder shall be a party to this Agreement and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto) but shall continue to be entitled to the benefits of Sections 2.19, 2.20 and 10.5 with respect to facts and circumstances occurring prior to the effective date of such assignment; provided, that except to the extent otherwise expressly agreed by the affected parties, no assignment by a Defaulting Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this paragraph shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (d) of this Section.

(c) Register. The Administrative Agent, acting solely for this purpose as an agent of the Borrowers, shall maintain at one of its offices in California a copy of each Assignment and Assumption delivered to it and a register for the recordation of the names and addresses of the Lenders, and the Revolving Commitments of, and principal amounts (and stated interest) of the Loans owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and the Borrowers, the Administrative Agent and the Lenders shall treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement. The Register shall be available for inspection by the Borrowers and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(d) Participations. Any Lender may at any time, without the consent of, or notice to, the Borrowers or the Administrative Agent, sell participations to any Person (other than a natural Person or any Loan Party or any of any Loan Party's Affiliates or Subsidiaries) (each, a "**Participant**") in all or a portion of such Lender's rights and/or obligations under this Agreement (including all or a portion of its Revolving Commitments and/or the Loans owing to it); provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, and (iii) the Borrowers, the Administrative Agent, the Issuing Lender and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. For the avoidance of doubt, each Lender shall be responsible for the indemnities under Sections 2.20(e) and 9.7 with respect to any payments made by such Lender to its Participant(s).

Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver which affects such Participant and for which the consent of such Lender is required (as described in Section 10.1). Each Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.19 and 2.20 (subject to the requirements and limitations therein, including the requirements under Section 2.20(f) (it being understood that the documentation required under Section 2.20(f) shall be delivered to such Participant)) to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section; provided that such Participant (A) agrees to be subject to the provisions of Section 2.23 as if it were an assignee under paragraph (b) of this Section; and (B) shall not be entitled to receive any greater payment under Sections 2.19 or 2.20, with respect to any participation, than its participating Lender would have been entitled to receive, except to the extent such entitlement to receive a greater payment results from a change in any Requirement of Law that occurs after the Participant acquired the applicable participation. Each Lender that sells a participation agrees, at the Borrowers' request and expense, to use reasonable efforts to cooperate with the Borrowers to effectuate the provisions of Section 2.23 with respect to any Participant. To the extent permitted by law, each Participant also shall be entitled to the benefits of Section 10.7 as though it were a Lender; provided that such Participant agrees to be subject to Section 2.18(j) as though it were a Lender. Each Lender that sells a participation shall, acting solely for this purpose as an agent of the Borrowers, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loans or other obligations under the Loan Documents (the "**Participant Register**"); provided that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information relating to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Loan Document) to any Person except to the extent that such disclosure is necessary to establish that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the United States Treasury Regulations. The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary. For the avoidance of doubt, the Administrative Agent (in its capacity as Administrative Agent) shall have no responsibility for maintaining a Participant Register.

(e) Certain Pledges. Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement to secure obligations of such Lender, including any pledge or assignment to secure obligations to a Federal Reserve Bank; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

(f) Notes. The Borrowers, upon receipt by the Borrowers of written notice from the relevant Lender, agrees to issue Notes to any Lender requiring Notes to facilitate transactions of the type described in Section 10.6.

(g) Representations and Warranties of Lenders. Each Lender, upon execution and delivery hereof or upon succeeding to an interest in the Revolving Commitments or Loans, as the case may be, represents and warrants as of the Closing Date or as of the effective date of the applicable Assignment and Assumption that (i) it is an Eligible Assignee; (ii) it has experience and expertise in the making of or investing in commitments, loans or investments such as the Revolving Commitments and Loans; and (iii) it will make or invest in its Revolving Commitments and Loans for its own account in the ordinary course of its business and without a view to distribution of such Revolving Commitments and Loans within the meaning of the Securities Act or the Exchange Act, or other federal securities laws (it being understood that, subject to the provisions of this Section 10.6, the disposition of such Revolving Commitments and Loans or any interests therein shall at all times remain within its exclusive control).

### **10.7 Adjustments; Set-off.**

(a) Except to the extent that this Agreement expressly provides for payments to be allocated to a particular Lender, if any Lender (a “**Benefitted Lender**”) shall, at any time after the Loans and other amounts payable hereunder shall immediately become due and payable pursuant to Section 8.2, receive any payment of all or part of the Obligations owing to it, or receive any Collateral in respect thereof (whether voluntarily or involuntarily, by set-off, pursuant to events or proceedings of the nature referred to in Section 8.1(f), or otherwise), in a greater proportion than any such payment to or Collateral received by any other Lender, if any, in respect of the Obligations owing to such other Lender, such Benefitted Lender shall purchase for cash from the other Lenders a participating interest in such portion of the Obligations owing to each such other Lender, or shall provide such other Lenders with the benefits of any such Collateral, as shall be necessary to cause such Benefitted Lender to share the excess payment or benefits of such Collateral ratably with each of the Lenders; provided that if all or any portion of such excess payment or benefits is thereafter recovered from such Benefitted Lender, such purchase shall be rescinded, and the purchase price and benefits returned, to the extent of such recovery, but without interest.

(b) Upon (i) the occurrence and during the continuance of any Event of Default and (ii) obtaining the prior written consent of the Administrative Agent or the Required Lenders, each Lender and each of its Affiliates is hereby authorized at any time and from time to time, without prior notice to the Borrowers or any other Loan Party, any such notice being expressly waived by each Borrower and each other Loan Party, to the fullest extent permitted by applicable law, to set off and apply any and all deposits (general or special, time or demand, provisional or final), in any currency, at any time held or owing, and any other credits, indebtedness, claims or obligations, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by such Lender, its Affiliates or any branch or agency thereof to or for the credit or the account of any Borrower or any other Loan Party, as the case may be, against any and all of the obligations of the Borrowers or such other Loan Party now or hereafter existing under this Agreement or any other Loan Document to such Lender or its Affiliates, irrespective of whether or not such Lender or Affiliate shall have made any demand under this Agreement or any other Loan Document and although such obligations of the Borrowers or such other Loan Party may be contingent or unmatured or are owed to a branch, office or Affiliate of such Lender different from the branch, office or Affiliate holding such deposit or obligated on such indebtedness; provided, that in the event that any Defaulting Lender or any of its Affiliates shall exercise any such right of setoff, (x) all amounts so set off shall be paid over immediately to the Administrative Agent for further application in accordance with the provisions of Section 2.23 and, pending such payment, shall be segregated by such Defaulting Lender or Affiliate thereof from its other funds and deemed held in trust for the benefit of the Administrative Agent and the Lenders, and (y) the Defaulting Lender shall provide promptly to the

Administrative Agent a statement describing in reasonable detail the Obligations owing to such Defaulting Lender or Affiliate thereof as to which it exercised such right of setoff. Each Lender agrees to notify the Borrowers and the Administrative Agent promptly after any such setoff and application made by such Lender or any of its Affiliates; provided that the failure to give such notice shall not affect the validity of such setoff and application. The rights of each Lender and its Affiliates under this Section 10.7 are in addition to other rights and remedies (including other rights of set-off) which such Lender or its Affiliates may have.

**10.8 Payments Set Aside.** To the extent that any payment or transfer by or on behalf of the Borrowers is made to the Administrative Agent or any Lender, or the Administrative Agent or any Lender exercises its right of setoff, and such payment or transfer or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by the Administrative Agent or such Lender in its discretion) to be repaid to a trustee, receiver or any other party, in connection with any Insolvency Proceeding or otherwise, then (a) to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred, and (b) each Lender severally agrees to pay to the Administrative Agent upon demand its applicable share (without duplication) of any amount so recovered from or repaid by the Administrative Agent, plus interest thereon from the date of such demand to the date such payment is made at a rate per annum equal to the Federal Funds Effective Rate from time to time in effect. This Section 10.8 shall survive the Discharge of Obligations.

**10.9 Interest Rate Limitation.** Notwithstanding anything to the contrary contained in any Loan Document, the interest paid or agreed to be paid under the Loan Documents shall not exceed the maximum rate of non-usurious interest permitted by applicable law (the “*Maximum Rate*”). If the Administrative Agent or any Lender shall receive interest in an amount that exceeds the Maximum Rate, the excess interest shall be applied to the principal of the Loans or, if it exceeds such unpaid principal, refunded to the Borrowers. In determining whether the interest contracted for, charged, or received by the Administrative Agent or a Lender exceeds the Maximum Rate, such Person may, to the extent permitted by applicable law, (a) characterize any payment that is not principal as an expense, fee, or premium rather than interest, (b) exclude voluntary prepayments and the effects thereof, and (c) amortize, prorate, allocate, and spread in equal or unequal parts the total amount of interest throughout the contemplated term of the Obligations hereunder.

**10.10 Counterparts; Electronic Execution of Assignments.**

(a) This Agreement may be executed by one or more of the parties to this Agreement on any number of separate counterparts, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed signature page of this Agreement by facsimile or other electronic mail transmission shall be effective as delivery of a manually executed counterpart hereof. A set of the copies of this Agreement signed by all the parties shall be lodged with the Borrowers and the Administrative Agent.

(b) The words “execution,” “signed,” “signature,” and words of like import in any Assignment and Assumption shall be deemed to include electronic signatures or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act.

**10.11 Severability.** Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Without limiting the foregoing provisions of this Section 10.11, if and to the extent that the enforceability of any provisions in this Agreement relating to Defaulting Lenders shall be limited under or in connection with any Insolvency Proceeding, as determined in good faith by the Administrative Agent or the Issuing Lender, as applicable, then such provisions shall be deemed to be in effect only to the extent not so limited.

**10.12 Integration.** This Agreement and the other Loan Documents represent the entire agreement of the Borrowers, the other Loan Parties, the Administrative Agent and the Lenders with respect to the subject matter hereof and thereof, and there are no promises, undertakings, representations or warranties by the Administrative Agent or any Lender relative to the subject matter hereof not expressly set forth or referred to herein or in the other Loan Documents.

**10.13 GOVERNING LAW.** THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK. This Section 10.13 shall survive the Discharge of Obligations.

**10.14 Submission to Jurisdiction; Waivers.** Each Borrower hereby irrevocably and unconditionally:

(a) submits to the exclusive jurisdiction of the State and Federal courts in the Southern District of the State of New York; provided that nothing in this Agreement shall be deemed to operate to preclude the Administrative Agent or any Lender from bringing suit or taking other legal action in any other jurisdiction to realize on the Collateral or any other security for the Obligations, or to enforce a judgment or other court order in favor of Administrative Agent or such Lender. Borrower expressly submits and consents in advance to such jurisdiction in any action or suit commenced in any such court, and each Borrower hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue, or forum non conveniens and hereby consents to the granting of such legal or equitable relief as is deemed appropriate by such court. Each Borrower hereby waives personal service of the summons, complaints, and other process issued in such action or suit and agrees that service of such summons, complaints, and other process may be made by registered or certified mail addressed to the Borrowers at the addresses set forth in Section 10.2 of this Agreement and that service so made shall be deemed completed upon the earlier to occur of the Borrowers' actual receipt thereof or three (3) Business Days after deposit in the U.S. mails, proper postage prepaid;

**(b) WAIVES, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ITS RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE OTHER LOAN DOCUMENTS OR ANY CONTEMPLATED TRANSACTION, INCLUDING CONTRACT, TORT, BREACH OF DUTY AND ALL OTHER CLAIMS. THIS WAIVER IS A MATERIAL INDUCEMENT FOR THE PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HAS REVIEWED THIS WAIVER WITH ITS COUNSEL; and**

(c) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

This Section 10.14 shall survive the Discharge of Obligations.

**10.15 Acknowledgements.** Each Borrower hereby acknowledges that:

(a) it has been advised by counsel in the negotiation, execution and delivery of this Agreement and the other Loan Documents;

(b) none of the Administrative Agent nor any Lender has any fiduciary relationship with or duty to the Borrowers arising out of or in connection with this Agreement or any of the other Loan Documents, and the relationship between the Administrative Agent and Lenders, on one hand, and the Borrowers, on the other hand, in connection herewith or therewith is solely that of debtor and creditor; and

(c) no joint venture is created hereby or by the other Loan Documents or otherwise exists by virtue of the transactions contemplated hereby among the Lenders or among the Borrowers and the Lenders.

**10.16 Releases of Guarantees and Liens.**

(a) Notwithstanding anything to the contrary contained herein or in any other Loan Document, the Administrative Agent is hereby authorized by each Lender (without requirement of notice to or consent of any Lender except as expressly required by Section 10.1) to take any action requested by the Borrowers having the effect of releasing any Collateral or Guarantee Obligations (1) to the extent necessary to permit consummation of any transaction not prohibited by any Loan Document or that has been consented to in accordance with Section 10.1 or (2) under the circumstances described in Section 10.16(b) below.

(b) Upon the Discharge of Obligations, the Collateral shall be released from the Liens created by the Security Documents, and the Security Documents and all obligations (other than those expressly stated to survive such termination) of the Administrative Agent and each Loan Party under the Security Documents shall terminate, all without delivery of any instrument or performance of any act by any Person.

**10.17 Treatment of Certain Information; Confidentiality.** Each of the Administrative Agent and each Lender agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) to its Affiliates and to its Related Parties (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential and will so agree to comply with such instructions and the requirements of this Section 10.17); (b) to the extent required or requested by any regulatory authority purporting to have jurisdiction over such Person or its Related Parties (including any self-regulatory authority, such as the National Association of Insurance Commissioners); (c) to the extent required by applicable laws or regulations or by any subpoena or similar legal process, upon the request or demand of any Governmental Authority, in response to any order of any court or other Governmental Authority or as may otherwise be required pursuant to any Requirement of Law or if requested or required to do so in connection with any litigation or similar proceeding; (d) to any other party hereto; (e) in connection with the exercise of any remedies hereunder or under any other Loan Document or any action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder; (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights and obligations under this Agreement, or (ii) any actual or prospective party (or its Related Parties) to any Swap Agreement under which payments are to be made by reference to the Borrowers and their obligations, this Agreement or payments hereunder; (g) on a confidential basis to (i) any rating agency in connection with rating the Borrowers or their Subsidiaries or the Revolving Facility or (ii) the CUSIP Service Bureau or any similar agency in connection with the issuance and monitoring of CUSIP numbers with respect to the

Revolving Facility; (h) with the consent of the Borrowers; or (i) to the extent such Information (x) becomes publicly available other than as a result of a breach of this Section, or (y) becomes available to the Administrative Agent, any Lender or any of their respective Affiliates on a non-confidential basis from a source other than the Borrowers.

In the event that the Administrative Agent or any Lender is required or receives a demand to disclose under subparagraph (b) (excluding regulatory audits of the Lenders' loan portfolios in the ordinary course of business that do not subject the Borrowers to requests for disclosure under the Freedom of Information Act or the Physician Payments Sunshine Act or otherwise require the public disclosure of confidential Information) or (c) of the preceding paragraph, it will use reasonable efforts to promptly notify the Borrowers thereof, to the extent permitted under applicable law, in order to enable the Borrowers to seek a protective order or other appropriate remedy. In the event that no such protective order or other remedy is obtained, the Administrative Agent or such Lender agrees that it shall furnish only that portion of the Information that it is advised by counsel is required by law. The Administrative Agent and each Lender shall comply with the restrictions imposed by the United States securities laws on the purchase or sale of securities by any person who has received material, non-public information from the issuer of such.

Notwithstanding anything herein to the contrary, any party to this Agreement (and any employee, representative, or other agent of any party to this Agreement) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure. However, any such information relating to the tax treatment or tax structure is required to be kept confidential to the extent necessary to comply with any applicable federal or state securities laws.

For purposes of this Section, "**Information**" means all information received from the Borrowers or any of their Subsidiaries relating to the Borrowers or any of their Subsidiaries or any of their respective businesses, other than any such information that is available to the Administrative Agent or any Lender on a non-confidential basis prior to disclosure by the Borrowers or any of their Subsidiaries; provided that, in the case of information received from the Borrowers or any of their Subsidiaries after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

**10.18 Automatic Debits.** With respect to any principal, interest, fee, or any other cost or expense (including reasonable attorney costs of one primary counsel to the Administrative Agent and the Lenders payable by the Borrowers hereunder) due and payable to the Administrative Agent or any Lender under the Loan Documents, the Borrowers hereby irrevocably authorize the Administrative Agent to debit any deposit account of the Borrowers maintained with the Administrative Agent (and the Administrative Agent agrees to provide the Borrowers an invoice or loan statement, as applicable, with respect to such amount; provided that any such invoice with respect to an amount to be debited outside the ordinary course (including audit fees and legal fees and expenses) shall be provided prior to such debit) in an amount such that the aggregate amount debited from all such deposit accounts does not exceed such principal, interest, fee or other cost or expense. If there are insufficient funds in such deposit accounts to cover the amount then due, such debits will be reversed (in whole or in part, in the Administrative Agent's sole discretion) and such amount not debited shall be deemed to be unpaid. No such debit under this Section 10.18 shall be deemed a set-off.

**10.19 Judgment Currency.** If, for the purposes of obtaining judgment in any court, it is necessary to convert a sum due hereunder or any other Loan Document in one currency into another



currency, the rate of exchange used shall be that at which in accordance with normal banking procedures the Administrative Agent could purchase the first currency with such other currency on the Business Day preceding that on which final judgment is given. The obligation of each Borrower and each other Loan Party in respect of any such sum due from it to the Administrative Agent or any Lender hereunder or under any other Loan Document shall, notwithstanding any judgment in a currency (the “**Judgment Currency**”) other than that in which such sum is denominated in accordance with the applicable provisions of this Agreement (the “**Agreement Currency**”), be discharged only to the extent that on the Business Day following receipt by the Administrative Agent or such Lender, as the case may be, of any sum adjudged to be so due in the Judgment Currency, the Administrative Agent or such Lender, as the case may be, may in accordance with normal banking procedures purchase the Agreement Currency with the Judgment Currency. If the amount of the Agreement Currency so purchased is less than the sum originally due to the Administrative Agent or any Lender from any Borrower or any other Loan Party in the Agreement Currency, such Borrower and each other Loan Party agrees, as a separate obligation and notwithstanding any such judgment, to indemnify the Administrative Agent or such Lender, as the case may be, against such loss. If the amount of the Agreement Currency so purchased is greater than the sum originally due to the Administrative Agent or any Lender in such currency, the Administrative Agent or such Lender, as the case may be, agrees to return the amount of any excess to such Borrower or other Loan Party, as applicable (or to any other Person who may be entitled thereto under applicable law).

**10.20 Patriot Act.** Each Lender and the Administrative Agent (for itself and not on behalf of any other party) hereby notifies the Borrowers that, pursuant to the requirements of the Patriot Act, it is required to obtain, verify and record information that identifies each Borrower, which information includes the names and addresses and other information that will allow such Lender or the Administrative Agent, as applicable, to identify each Borrower in accordance with the Patriot Act. Each Borrower will, and will cause each of its respective Subsidiaries to, provide, to the extent commercially reasonable or required by any Requirement of Law, such information and take such actions as are reasonably requested by the Administrative Agent or any Lender to assist the Administrative Agent and the Lenders in maintaining compliance with the Patriot Act.

**10.21 Termination.** This Agreement (other than Sections 2.19, 2.20, 9, 10.5, 10.8, 10.13 and 10.14) shall terminate upon the occurrence of the Discharge of Obligations.

*[Remainder of page left blank intentionally]*

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

**BORROWERS:**

**BENEFITFOCUS, INC.**

as a Borrower

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

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

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

**BENEFITFOCUS.COM, INC.**

as a Borrower

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

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

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

**BENEFIT INFORMATICS, INC.**

as a Borrower

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

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

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

**BENEFITSTORE, INC.**  
as a Borrower

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

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

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

**ADMINISTRATIVE AGENT:**

**SILICON VALLEY BANK,**  
as the Administrative Agent

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

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

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

**DOCUMENTATION AGENT:**

**COMERICA BANK,**  
as the Documentation Agent

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

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

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

Exhibit A – Conformed Credit Agreement

**LENDERS:**

**SILICON VALLEY BANK,**  
as Issuing Lender, Swingline Lender and as a Lender

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

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

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

**COMERICA BANK,**  
as a Lender

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

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

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

~~SQUARE 1~~ **PACIFIC WESTERN BANK,**  
as a Lender

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

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

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

**SCHEDULE 1.1A**

**REVOLVING COMMITMENTS  
AND REVOLVING PERCENTAGES**

**REVOLVING COMMITMENTS**

Lender	Revolving Commitment	Revolving Percentage
Silicon Valley Bank	\$30,500,000.00	50.8333333333%

Lender	Revolving Commitment	Revolving Percentage
Comerica Bank	\$17,250,000.00	28.750000000%
Square 1 Bank	\$12,250,000.00	20.416666667%
Total	\$60,000,000.00	100.000000000%

**L/C COMMITMENTS**

(which is a sublimit of, and not in addition to, the Revolving Commitments)

Lender	L/C Commitments	L/C Percentage
Silicon Valley Bank	\$5,000,000	100.000000000%
Total	\$5,000,000	100.000000000%

**SWINGLINE COMMITMENT**

(which is a sublimit of, and not in addition to, the Revolving Commitments)

Lender	Swingline Commitment	Exposure Percentage
Silicon Valley Bank	\$5,000,000	100.000000000%
Total	\$5,000,000	100.000000000%

**SCHEDULE 4.15**

**SUBSIDIARIES**

**SCHEDULE 4.17**

**ENVIRONMENTAL MATTERS**

**SCHEDULE 4.19(a)**

**FINANCING STATEMENTS AND OTHER FILINGS**

**SCHEDULE 6.10**

**NBSC BANK ACCOUNTS**

**SCHEDULE 7.2(d)**

**EXISTING INDEBTEDNESS**

**SCHEDULE 7.3(f)**

**EXISTING LIENS**



**SCHEDULE 7.8(M)**

**EXISTING INVESTMENTS**

**GOLDMAN SACHS LENDING PARTNERS LLC,**  
**as a Lender**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[2042849.8](#)  
[2042849.11](#)

**BENEFITFOCUS.COM, INC.****EMPLOYMENT AGREEMENT**

THIS AGREEMENT (the “**Agreement**”), is made and entered into this 1st day of December 2015, by and between: Benefitfocus.com, Inc., having its principal place of business at 100 Benefitfocus Way, Charleston, SC 29492, (hereinafter referred to as “**Benefitfocus**”) and James Restivo whose present address is: 159 Pembroke Circle, Phoenixville, PA 19460 (hereinafter referred to as the “**Associate**”).

1. **Employment.** Benefitfocus hereby agrees to employ the Associate in the capacity of Chief Technology Officer, upon the terms and conditions set out herein, and the Associate accepts such employment.
2. **Term.** The term of this Agreement shall begin on January 18, 2016. The Associate understands and acknowledges that employment is “at will” and is terminable at any time at the will of Benefitfocus or the Associate, notwithstanding any other provisions of this Agreement, including Section 19 hereof. This Agreement shall remain in force until terminated at the will of either party or as described in Section 19 of this Agreement.
3. **Duties.** The Associate shall perform, for Benefitfocus, the duties set out in the attached Exhibit A entitled “Job Description,” which is incorporated herein and made a part of this Agreement, along with those other duties as may be assigned to Associate from time to time by Benefitfocus’ Chief Executive Officer or his designee.
4. **Compensation.** The Associate’s compensation shall be paid in accordance with that outlined in Exhibit B entitled “Compensation Program,” which is incorporated herein and made a part hereof.
5. **Extent of Services.** The Associate shall devote his entire time, attention, and energies to Benefitfocus’ business and shall not, during the term of this Agreement, be engaged in any other business activity that conflicts with, or takes the Associate’s time or attention away from, the Associate’s work for Benefitfocus, whether or not such business activity is pursued for gain, profit or other pecuniary advantage. The Associate further agrees that he or she will perform all of the duties assigned to the Associate to the best of his or her ability and in a manner satisfactory to Benefitfocus, that he or she will truthfully and accurately maintain all records, preserve all such records, and make all such reports as Benefitfocus may require; that he or she will fully account for all money and all of the property of Benefitfocus of which the Associate may have custody and will pay over and deliver the same whenever and however the Associate may be directed to do so.

6. **Expenses.** Benefitfocus agrees to reimburse the Associate for travel and other expenses incurred while conducting business on behalf of Benefitfocus as long as they are reasonable and approved by Benefitfocus and comply with government regulations covering such expenses for business purposes. Such expenses will be stated on a Benefitfocus furnished expense form, have required receipts, be signed by the Associate, and sent to Benefitfocus for approval and reimbursement, all in accordance with Benefitfocus' reimbursement policies and procedures as may be in effect from time to time.

7. **Covenant Not to Disclose Trade Secrets and Confidential Information.**

a. As an employee of Benefitfocus, the Associate will be exposed to "Trade Secrets" and "Confidential Business Information" (as those terms are defined below). "**Trade Secrets**" shall mean information or data of or about Benefitfocus or any affiliated entity, including, but not limited to, technical or non-technical data, formulas, patterns, compilations, programs, devices, methods, techniques, drawings, processes, financial data, financial plans, products plans, or lists of actual or potential customers, clients, distributors, or licensees, that: (i) derive economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use; and (ii) are the subject of efforts that are reasonable under the circumstances to maintain their secrecy. To the extent that the foregoing definition is inconsistent with a broader definition of "trade secret" under applicable law, the latter definition shall govern for purposes of interpreting the Associate's obligations under this Agreement. Except as required to perform his or her obligations under this Agreement or except with Benefitfocus' prior written permission, the Associate shall not use, redistribute, market, publish, disclose or divulge to any other person or entity any Trade Secrets of Benefitfocus. The Associate's obligations under this provision shall remain in force (during or after the Term) for so long as such information or data shall continue to constitute a "trade secret" under applicable law. The Associate agrees to cooperate with any and all confidentiality requirements of Benefitfocus and the Associate shall immediately notify Benefitfocus of any unauthorized disclosure or use of any Trade Secrets of which the Associate becomes aware.

b. The Associate agrees to maintain in strict confidence and, except as necessary to perform his or her duties for Benefitfocus, not to use or disclose any Confidential Business Information at any time, during the term of his or her employment or for a period of one (1) year after the Associate's last date of employment, so long as the pertinent data or information remains Confidential Business Information. "**Confidential Business Information**" shall mean any non-public Information of a competitively sensitive or personal nature, other than Trade Secrets, acquired by the Associate, directly or indirectly, in connection with the Associate's employment (including his or her employment with Benefitfocus prior to the date of this Agreement), including (without limitation) oral and written information concerning Benefitfocus or its affiliates relating to financial position and results of operations (revenues, margins, assets, net income, etc.), annual and long-range business plans, marketing plans and methods, account invoices, oral or written customer information, and personnel information. Confidential Business Information also includes information recorded in manuals, memoranda, projections, minutes, plans, computer programs, and records, whether or not legended or otherwise identified by Benefitfocus and its affiliates as Confidential Business

Information, as well as information which is the subject of meetings and discussions and not so recorded; provided, however, that Confidential Business Information shall not include information that is generally available to the public, other than as a result of disclosure, directly or indirectly, by the Associate, or that was available to the Associate on a non-confidential basis prior to its disclosure to the Associate.

- c. Without limiting any of the foregoing, Associate acknowledges that Trade Secrets and Confidential Business Information exist in all formats in which information is preserved, including electronic, print, or any other form, and that each term includes all originals, copies, notes, or other reproductions or replicas thereof.
- d. Upon termination of employment, the Associate shall leave with Benefitfocus all Trade Secrets, Confidential Business Information, and any other business records relating to Benefitfocus and its affiliates including, without limitation, all contracts, calendars, and other materials or business records concerning its business or customers, including all physical, electronic, and computer copies thereof, whether or not the Associate prepared such materials or records himself, and Associate shall retain no copies of any such materials. In addition, upon termination of employment, Associate will immediately return to Benefitfocus all other property whatsoever of Benefitfocus in his possession or under his control. If requested, Associate shall certify in writing to Benefitfocus that no such materials are in his possession.
- e. As set forth above, the Associate shall not disclose Trade Secrets or Confidential Business Information. However, nothing in this Section 7 shall prevent the Associate from (i) disclosing Trade Secrets or Confidential Business Information pursuant to a court order or court-issued subpoena, so long as the Associate first notifies Benefitfocus of said order or subpoena in sufficient time to allow Benefitfocus to seek an appropriate protective order, and provided that Associate only discloses such information as he or she is actually required to disclose, or (ii) from reporting violations of law to any governmental agency or entity, or otherwise making disclosures that are protected under a whistleblower any law. The Associate agrees that if he or she receives any formal or informal discovery request, court order, or subpoena requesting that the Associate disclose Trade Secrets or Confidential Business Information, he or she will immediately notify Benefitfocus and provide Benefitfocus with a copy of said request, court order, or subpoena.

**8. Covenant Not to Solicit Customers.**

- a. The Associate covenants and agrees that during his or her employment and for a period of one (1) year following the date of termination of the Associate's employment with Benefitfocus, for any reason, whether by the Associate or Benefitfocus, the Associate shall not (except on behalf of or with the prior written consent of Benefitfocus) either directly or indirectly, on the Associate's own behalf or in the service or on behalf of others, (i) solicit, divert or appropriate to or for a Competing Business (as defined below), or (ii) attempt to solicit, divert, or appropriate to or for a Competing Business, any person or entity that was a customer or prospective customer of Benefitfocus on the date of termination and with whom the Associate had direct material contact within six months of the Associate's last date of employment. For purposes of this Agreement, the term

**“Competing Business”** shall mean the business of offering human resource management and benefit administration services to companies via a Web-based system.

- b. The Associate recognizes and acknowledges that Benefitfocus’ customers and the specific needs of such customers are essential to the success of its business and its continued goodwill and that its customer list and customer information constitute a property interest of Benefitfocus, having been developed by Benefitfocus at great effort and expense.

9. **Covenant Not to Solicit Employees/Consultants**. The Associate covenants and agrees that during his or her employment and for a period of one (1) year following the date of termination of the Associate’s employment with Benefitfocus, for any reason, whether by Associate or Benefitfocus, Associate will not, either directly or indirectly, on the Associate’s own behalf or in the service or on behalf of others, (i) solicit, divert, or hire away, or (ii) attempt to solicit, divert, or hire away any employee of or consultant to Benefitfocus or any of its affiliates engaged or experienced in the Business (as defined herein), regardless of whether the employee or consultant is full-time or temporary, the employment or engagement is pursuant to written agreement, or the employment is for a determined period or is at will. For purposes of this Agreement, the term **“Business”** shall mean the business of offering human resource management and benefit administration services to companies via a Web-based system.

10. **Covenant Not to Compete**. The Associate covenants and agrees that during his or her employment and for a period of one (1) year following the termination of the Associate’s employment with Benefitfocus (by either party and regardless of the reason for such termination), Associate will not, hold a position based in or with responsibility for all or part of the Restricted Territory (as defined below), with any Competing Business (as defined above) whether as employee, consultant, or otherwise, in which Associate will have duties, or will perform or be expected to perform services for such Competing Business, that is or are the same as or substantially similar to the position held by Associate or those duties or services actually performed by Associate for Benefitfocus within the twelve (12) month period immediately preceding the termination of Associate’s employment with Benefitfocus, or in which Associate will use or disclose or be reasonably expected to use or disclose any confidential or proprietary information of Benefitfocus for the purpose of providing, or attempting to provide, such Competing Business with a competitive advantage with respect to the Business. As used herein, **“Restricted Territory”** means the United States of America, it being understood that Benefitfocus’ business is nationwide in scope, provided, however, that if a court of competent jurisdiction determines that the foregoing definition is too broad to be enforced under applicable law, then the parties agree that **“Restricted Territory”** will mean any State, province, or similar political subdivision to which Associate directed, or in which Associate performed, employment-related activities on behalf of Benefitfocus at the time of, or during the twelve (12) month period prior to, the termination of Associate’s employment with Benefitfocus for any reason.

11. **Covenants are Independent**. The covenants on the part of the Associate contained in paragraphs 7, 8, 9 and 10 hereof, as well as in each subsection thereof, shall each be construed as agreements independent of each other and of any other provision in this Agreement and the unenforceability of one shall not affect the remaining covenants.

12. **Consideration.** The Associate acknowledges and agrees that valid consideration has been given to the Associate by Benefitfocus in return for the promises of the Associate set forth herein, including the promise of additional compensation to which the Associate was not entitled prior to the execution of this Agreement.
13. **Extension of Periods.** Each of the time periods described in this Agreement shall be automatically extended by any length of time during which the Associate is in breach of the corresponding covenant contained herein. The provisions of this Agreement shall continue in full force and effect throughout the duration of the extended periods.
14. **Reasonable Restraint.** It is agreed by the parties that the foregoing covenants in this Agreement are necessary for the legitimate business interests of Benefitfocus and impose a reasonable restraint on the Associate in light of the activities and Business of Benefitfocus on the date of the execution of this Agreement.
15. **Notices.** Any notice required or desired to be given under this Agreement shall be given in writing, sent by certified mail, return receipt requested, to his or her residence as shown in the records of Benefitfocus in the case of the Associate, or to its principal place of business, in the case of Benefitfocus.
16. **Waiver of Breach.** The waiver by Benefitfocus of a breach of any provision of this Agreement by the Associate shall not operate or be construed as a waiver of any subsequent breach by the Associate. No waiver shall be valid unless in writing and signed by Benefitfocus.
17. **Assignment.** The Associate acknowledges that the services to be rendered by the Associate are unique and personal. Accordingly, the Associate may not assign any of his or her rights or delegate any of his or her duties or obligations under this Agreement. The rights and obligations of Benefitfocus under this Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Benefitfocus. The Associate agrees that this Agreement, and the covenants contained herein, may be assigned by Benefitfocus to any successor company.
18. **Paid Time Off.** Associate will be eligible to receive paid time off in accordance with Benefitfocus' paid time off policies as detailed in its Associate Handbook, the provisions of which are subject to change on a prospective basis.
19. **Termination.** Either party may terminate this Agreement at any time, with or without cause. In the event that Associate chooses to resign his employment, Benefitfocus requests fourteen (14) days written notice to Benefitfocus. In such event, no severance allowance shall be paid to the Associate; but the Associate shall continue (if agreed to by Benefitfocus) to render his services and shall be paid his regular compensation up to the date of termination.
20. **Entire Agreement; Amendment.** This Agreement contains the entire understanding of the parties with respect to the subject matter hereof and supersedes all prior agreements (whether written or oral and whether express or implied) between the parties to the extent related to such subject matter. It may be changed only by an Agreement in writing, signed by the parties hereto.
21. **Governing Law; Jurisdiction and Venue.** This Agreement, and all transactions contemplated hereby, shall be governed by, construed and enforced in accordance with the laws of the State of South Carolina. The parties agree that any action or dispute regarding this Agreement shall be

filed exclusively in a court having subject matter jurisdiction located in Charleston County, State of South Carolina, and the parties waive any objection to personal jurisdiction or venue in such courts.

22. **Work Facilities.** The Associate shall be provided with such other facilities and services as are suitable to the Associate's position and appropriate for the performance of his or her duties. In the case of an Associate performing the sales duties and located remote to the main office, it is expected that the Associate will maintain some form of office at his or her residence, which contains the necessary equipment to perform the assigned duties.
23. **Severability.** To the extent that any provision or language of this Agreement is deemed unenforceable, by virtue of the scope of the business activity prohibited or the length of time the activity is prohibited, Benefitfocus and Associate agree that this Agreement shall be enforced to the fullest extent permissible under the laws and public policies of the State of South Carolina.
24. **Remedies for Breach.** The Associate recognizes and agrees that a breach by the Associate of any covenant contained in this Agreement would cause immeasurable and irreparable harm to Benefitfocus. In the event of a breach or threatened breach of any covenant contained herein, Benefitfocus shall be entitled to temporary and permanent injunctive relief, restraining the Associate from violating or threatening to violate any covenant contained herein, as well as all costs and fees incurred by Benefitfocus, including attorneys' fees, as a result of the Associate's breach or threatened breach of the covenant. Benefitfocus and the Associate agree that the relief described herein is in addition to such other and further relief as may be available to Benefitfocus at equity or by law. Nothing herein shall be construed as prohibiting Benefitfocus from pursuing any other remedies available to it for such breach or threatened breach, including the recovery of damages from the Associate.
25. **Additional Representations and Warranties of Associate. Indemnification by Associate.** The Associate acknowledges and agrees that: (i) the covenants contained in this Agreement are the essence of this Agreement; (ii) the Associate has received good, adequate and valuable consideration for each of these covenants; (iii) each of these covenants is reasonable and necessary to protect and preserve the interests and properties of Benefitfocus; (iv) each of these covenants in this Agreement is separate, distinct and severable not only from the other covenants but also from the remaining provisions of this Agreement; (v) the unenforceability of any covenants or agreements shall not affect the validity or enforceability of any of the other covenants or agreements or any other provision or provisions of this Agreement; and (vi) if the covenants herein shall ever be deemed to exceed the time, activity, or geographic limitations permitted by applicable law, then such provisions shall be and hereby are reformed to the maximum time, activity, or geographical limitations permitted by applicable law. The Associate represents and warrants that his acceptance of employment with Benefitfocus and the performance of his duties hereunder will not conflict with, or result in a violation of, a breach of, or a default under any contract, agreement, or understanding to which he is a party or is otherwise bound, including any non-solicitation, non-competition, or other similar covenant or agreement of a prior employer. In the event that Associate's former employer or business associate makes a claim against Benefitfocus relating to Associate's employment, Associate shall, at his own expense, defend and indemnify Benefitfocus from and against any and all allegations, threats, claims, suits, and proceedings brought by Associate's former employer or business associate

arising out of a prior employment or shareholder agreement, including any applicable non-solicitation, non-competition, or other similar covenant or agreement of a prior employer.

26. **At-Will Employment.** THE ASSOCIATE UNDERSTANDS AND AGREES THAT THIS AGREEMENT SHALL IN NO WAY IMPOSE UPON BENEFITFOCUS ANY OBLIGATION TO EMPLOY THE ASSOCIATE OR TO CONTINUE THE ASSOCIATE'S EMPLOYMENT FOR ANY LENGTH OF TIME. THE EMPLOYMENT OR CONTINUATION OF EMPLOYMENT BY BENEFITFOCUS IS, AND AT ALL TIMES SHALL REMAIN, IN THE ABSOLUTE DISCRETION OF BENEFITFOCUS, WHICH EMPLOYMENT MAY BE TERMINATED BY THE ASSOCIATE OR BENEFITFOCUS AT WILL.

**[Signature Page Follows]**



IN WITNESS WHEREOF, the parties hereto have executed this Agreement on this 1st day of December 2015.

Signed, sealed and delivered in the presence of:

/s/ Leslie Jones  
Witness

Leslie Jones  
Witness name printed

/s/ Margaret St. Pierre  
Witness

Margaret St. Pierre  
Witness name printed

BENEFITFOCUS

/s/ Ray August  
Benefitfocus.com, Inc.  
By: Ray August  
Its: President & COO

ASSOCIATE

/s/ James P. Restivo  
Signature

James Restivo  
Print name

## EXHIBIT A

### Chief Technology Officer Job Description

This position is responsible to serve as the Chief Technical Officer and to collaborate with the Benefitfocus business leaders in the process to define the Company's technology vision, strategy, delivery effectiveness, customer experience and insight into the key technologies the company should be evaluating for the future. The CTO is a key technical advisor to the CEO and President and has the responsibility to provide thoughtful objective advice and timely updates as to the effectiveness of the company's current and future technical direction, capabilities, methodologies and operations. It is also expected that the CTO will have the business acumen to participate in the formation of the corporate strategy and budget as well as weigh in on other business issues that affect the executive management team. The CTO will be expected to provide a technical opinion on acquisitions and work with other members of the executive leadership team in evaluating potential acquisitions.

#### Key Responsibilities

- Develop technology strategic objectives, as well as policies and operating plans:
  - Establish vision and goals that ties with overall Company direction and adapts goals based on changes in Benefitfocus' strategy.
  - Ensure that plans and policies are understood and administered by the functional management team.
  - Establish operational strategies by evaluating trends; establishing critical measurements; determining production, productivity, quality, and customer-service strategies; designing systems; accumulating resources; resolving problems; implementing change.
  - Work closely with the CEO, President and the rest of the Executive Leadership Team, and the Business Units
- The CTO must be considered a thought leader in the fields of technology that are important to Benefitfocus' success. He or she must routinely demonstrate this in both internal and external thought leadership activities.
- The CTO role is both an external and internal facing role:
  - **External:** The CTO should work with the company's Chief Commercial Officer to position themselves at appropriate conferences to articulate the value of Benefitfocus products. He/she will work with customers and prospects to discuss the company's technology strategy, and broad technology directions as appropriate.
  - **Internal:** The CTO should view this role as a service provider to the following constituencies:
    - The Senior Vice President of Product Strategy
    - The Senior Vice President of Engineering
  - Perform annual analysis of expense needs. Develop operating budget. Manage and track expenditures to plan on a monthly basis.
  - Drive R&D software innovation and development efforts by maintaining an understanding of the competitive landscape.
  - Ensure common technology architecture and services across Benefitfocus' products where appropriate.

- Engage various departments and contribute in the investigation of new technologies to ensure the R&D Technology group's direction meets the Company's requirement of software product leadership.
- Conduct presentations to peers, teams and senior management on potential new technologies/products.
- Interact with senior management in ensuring that proprietary technologies, as well as third party sources of technology, are optimally implemented in the products.
- Provide insight and alerts to the management team on broad strategic and tactical assessments of product technology in the marketplace, including opportunities and threats.
- Lead a specialized team of advanced technologists within the Technology organization.
- Represent the Company in development discussions with major customers.

## **EXHIBIT B**

### **Benefitfocus.com, Inc. Compensation Program for James Restivo**

Exhibit B to Employment Agreement dated December 1, 2015.

1. *Salary:* As compensation for services rendered by the Associate, Benefitfocus shall pay a salary of \$12,500 per pay period (which annualizes to \$300,000), payable in accordance with Benefitfocus' customary payroll practices as in effect from time to time. All compensation paid to Associate shall be subject to withholding for such federal, state and local taxes as Benefitfocus determines are required to be withheld pursuant to applicable law.
2. *Annual Review:* Annual salary reviews will occur on or around the annual budget process for Benefitfocus.
3. *Annual Bonus Opportunity:* You are eligible to participate in the Benefitfocus management incentive bonus program at the CTO level, which is up to 50% of your base pay, subject to adoption by the Board of Directors from time to time, depending on achievement of annual performance targets. The targets for achieving the Bonus will be the same company targets set for the entire Executive Management Team as adjusted at the beginning of each year. In general, you must be employed by Benefitfocus on the date on which a bonus is paid in order to earn and receive the bonus.
4. *Initial Restricted Stock Unit Award:* In accordance with the Benefitfocus.com, Inc. 2012 Stock Plan, you will receive a Benefitfocus stock grant award in the amount of 15,000 restricted stock units, subject to approval by the board of directors. You will be receiving the formal Annual Award Grant Notice and accompanying documentation at the next quarterly grant date. This grant will have a four-year vesting period, and will be subject to the terms of an RSU award agreement between you and Benefitfocus.
5. *Annual Restricted Stock Unit Bonus:* You will be eligible to receive an annual RSU award of up to 100% of your base salary, subject to approval by the Board of Directors. These RSU awards will have a four-year vesting period, and will be subject to the terms of an RSU award agreement between you and Benefitfocus.
6. *Housing & Relocation Reimbursement:* The Company will work with you and support your family's relocation to the Charleston area. The Company will provide reimbursement for housing in the area during your transition and will also provide an allowance for the moving expenses as described herein. The Company will reimburse the Associate up to a maximum of \$2000 per month, up to 3 months, for purposes of temporary housing in the Charleston, SC area. The Company will reimburse the Associate up to a maximum of \$15,000 for moving expenses. The Employer follows IRS accountable plan moving reimbursement guidelines (refer to IRS Publication 521). The Associate will need to submit receipts for any direct moving expenses incurred, the balance will be paid to the Associate as ordinary wages. Should Associate terminate employment with Benefitfocus by resignation, or is terminated for Cause by the Company within Twenty Four (24) months of hire, Associate will be obligated to repay all housing and relocation expenses to Benefitfocus.
7. *Relocation Assistance.* In accordance with the Benefitfocus Travel & Entertainment Policy attached hereto, Benefitfocus agrees to reimburse Associate for pre-approved and documented expenses associated with a maximum of two house hunting trips conducted within 45 days of Associate's start date, including reasonable airfare, hotel, and meal expenses for Associate and one companion. In accordance with the Benefitfocus Travel & Entertainment Policy, Associate

will be reimbursed for airfare, hotel expenses for up to a maximum of two nights for each trip, and personal meals for Associate and one companion. Reimbursements will be issued after Associate's start date with Company.

8. *Normal Hours of Work:* Full time executive positions are expected to work the amount of time needed to meet or exceed all job duties and performance expectations as assigned by the President and CEO.
9. *Benefits:* You are eligible for all Benefitfocus associate benefit programs including but not limited to Health Insurance, Life Insurance, Disability Insurance, 401(k) Retirement Program, and more, subject to the terms and conditions of such programs. Nothing in this Agreement or Compensation Program alters or limits Benefitfocus' rights to modify or terminate any such programs in its sole discretion.
10. *Paid Time Off and Paid Holidays:* Your paid time off will follow the company schedule, as outlined in the benefit summary.
11. *Severance:* In the event that Benefitfocus terminates your employment without Cause, as defined herein, at any time then upon your execution of a general release of claims satisfactory to Benefitfocus within the time allowed for execution, which release is not revoked by you during any revocation period allowed by law, Benefitfocus will provide you with the following severance benefits salary continuation for a period of six (6) months at your then-current rate of base salary.

The severance benefits will be payable to you beginning on the sixtieth (60th) day following the termination of your employment, provided that Benefitfocus, in its sole discretion, may begin the payments earlier.

For purposes of this document, you will receive the same severance benefits as upon a termination without Cause if you notify Benefitfocus of your decision to terminate your employment with Benefitfocus within three (3) months of the occurrence of either of the following: (i) a material decrease to your base salary or targeted annual bonus without your consent to an amount less than the then current amount immediately preceding the decrease, or (ii) a material diminution of your authority, job duties, or responsibilities without your consent.

As used herein, "**Cause**" shall mean a determination by Benefitfocus' board of directors of any of the following: (i) your violation of any applicable material law or regulation respecting the business of Benefitfocus; (ii) your commission of a felony or a crime involving moral turpitude; (iii) any act of dishonesty, fraud or misrepresentation in relation to your duties to Benefitfocus, (iv) failure to perform in any material respect your duties hereunder after twenty (20) days written notice and an opportunity to cure such failure and a reasonable opportunity to present to Benefitfocus' board of directors your position regarding any dispute relating to the existence of such failure; (v) your failure to attempt in good faith to implement a clear and reasonable directive from Benefitfocus' board of directors or to comply with any of Benefitfocus' policies and procedures which failure is material and occurs after written notice from Benefitfocus' board of directors; (vi) any act of gross misconduct which is materially and demonstrably injurious to Benefitfocus; or, (vii) your breach of fiduciary responsibility.

12. *Application of Internal Revenue Code Section 409A:* All provisions of this Agreement will be interpreted in a manner consistent with Section 409A of the Internal Revenue Code and the regulations and other guidance thereunder and any state law of similar effect (collectively “**Section 409A**”). Notwithstanding anything to the contrary set forth herein, any payments and benefits provided under this Exhibit B that constitute “deferred compensation” within the meaning of Section 409A will not commence in connection with your termination of employment unless and until you have also incurred a “separation from service” (as such term is defined in Treasury Regulation Section 1.409A-1(h), unless Benefitfocus reasonably determines that such amounts may be provided to you without causing you to incur the additional 20% tax under Section 409A. The parties intend that each installment of the severance benefits payments provided for above is a separate “payment” for purposes of Treasury Regulation Section 1.409A-2(b)(2)(i). For avoidance of doubt, the parties intend that payments of the severance benefits satisfy, to the greatest extent possible, the exemptions from the application of Section 409A provided under Treasury Regulation Sections 1.409A-1(b)(4), 1.409A-1(b)(5), and 1.409A-1(b)(9). However, if Benefitfocus determines that the severance benefits constitute “deferred compensation” under Section 409A and you are, on the termination of service, a “specified employee” of Benefitfocus, as such term is defined in Section 409A, then, solely to the extent necessary to avoid the incurrence of the adverse personal tax consequences under Section 409A, the timing of the severance benefit payments will be delayed until the earlier to occur of: (i) the date that is six months and one day after your separation from service, or (ii) the date of your death (such applicable date, the “**Specified Employee Initial Payment Date**”), and Benefitfocus will (A) pay you a lump sum amount equal to the sum of the severance benefits payments that you would otherwise have received through the Specified Employee Initial Payment Date if the commencement of the payment of the severance benefits had not been so delayed pursuant to this paragraph, and (B) commence paying the balance of the severance benefits in accordance with the applicable payment schedules set forth in this Agreement.

Signed and delivered in this   21   day of   Dec.  , 2015 in the presence of:

**BENEFITFOCUS**

**ASSOCIATE**

/s/ Ray August  
Signature

/s/ James P. Restivo  
Signature

Ray August, President & COO  
Name/Title

James Restivo  
Name Printed

**Benefitfocus, Inc.,  
A Delaware corporation  
List of subsidiaries**

- Benefitfocus.com, Inc.
- BenefitStore, Inc.

**Consent of Independent Registered Public Accounting Firm**

We consent to the incorporation by reference in the following registration statements:

- (1) Registration Statement (Form S-8 No. 333-211904) pertaining to the Benefitfocus, Inc. 2016 Employee Stock Purchase Plan,
- (2) Registration Statement (Form S-8 No. 333-192278) pertaining to the 2012 Stock Plan, as amended, and the Amended and Restated 2000 Stock Option Plan of Benefitfocus, Inc., and
- (3) Registration Statement (Form S-8 No. 333-218633) pertaining to the Benefitfocus, Inc. Amended and Restated 2012 Stock Plan;

of our reports dated February 26, 2019, with respect to the consolidated financial statements and schedule of Benefitfocus, Inc. included in this Annual Report (Form 10-K) for the year ended December 31, 2018.

/s/ Ernst & Young LLP  
Raleigh, North Carolina  
February 26, 2019



**CERTIFICATION PURSUANT TO  
SECTION 302 OF  
THE SARBANES-OXLEY ACT OF 2002**

I, Raymond A. August, certify that:

1. I have reviewed this Annual Report on Form 10-K of Benefitfocus, Inc. (the registrant);
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 26, 2019

/s/ Raymond A. August  
Raymond A. August  
*President and Chief Executive Officer*  
(Principal executive officer)

**CERTIFICATION PURSUANT TO  
SECTION 302 OF  
THE SARBANES-OXLEY ACT OF 2002**

I, Jonathon E. Dussault, certify that:

1. I have reviewed this Annual Report on Form 10-K of Benefitfocus, Inc. (the registrant);
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 26, 2019

/s/ Jonathon E. Dussault  
Jonathon E. Dussault  
*Chief Financial Officer*  
(Principal financial and accounting officer)

**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350, AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In accordance with 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, Raymond A. August, President and Chief Executive Officer (principal executive officer) of Benefitfocus, Inc. (the "registrant"), and Jonathon E. Dussault, Chief Financial Officer (principal financial and accounting officer) of the registrant, each hereby certifies that, to the best of their knowledge:

1. The registrant's Annual Report on Form 10-K for the year ended December 31, 2018, to which this Certification is attached as Exhibit 32.1 (the "Report"), fully complies with the requirements of Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934, as amended; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition of the registrant at the end of the period covered by the Report and results of operations of the registrant for the periods covered by the Report.

Date: February 26, 2019

/s/ Raymond A. August  
Raymond A. August  
*President and Chief Executive Officer*  
(Principal executive officer)

/s/ Jonathon E. Dussault  
Jonathon E. Dussault  
*Chief Financial Officer*  
(Principal financial and accounting officer)