

FLICKR SERVICE AMENDMENT

THIS FLICKR SERVICE AMENDMENT (this “**Amendment**”) is entered into and is effective as of _____ (the “**Effective Date**”) between SmugMug, Inc. a Delaware corporation with offices at 67 E. Evelyn Ave., Suite 200, Mountain View, CA 94041, on behalf of its subsidiaries affiliates, including the Flickr division of SmugMug, Inc. (“**SmugMug**”, “**We**” or “**Company**”), and _____ with offices at _____, a federal agency (“**Agency**,” “**You**,” or “**Your**”).

WHEREAS, SmugMug’s Flickr division (“**Flickr**”) provides a service for hosting member photographs and videos, which photographs and videos may be further distributed to third parties via application program interfaces (“**APIs**”) for both commercial and non-commercial use, and which service allows, among other things, other third party members of the service to add tags and otherwise augment the metadata associated with any photograph or video, which service is currently located at <http://www.flickr.com> (the “**Service**”);

WHEREAS, You, as a U.S. Government entity, are required, when entering into agreements with other parties, to follow applicable federal laws and regulations, including, but not limited to, those related to ethics, limitations on indemnification, fiscal law constraints, advertising and endorsements, freedom of information, governing law and dispute resolution forum; and

NOW THEREFORE, in consideration of the mutual promises contained herein and for good and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, SmugMug and You (together, the “Parties”) agree that modifications to the Flickr Terms and Conditions of Use, available currently at <https://www.smugmug.com/about/terms-flickr> and subsequently at <https://flickr.com/help/terms>, the Flickr API Terms of Use located at <https://www.flickr.com/services/api/tos/> the Flickr Service Agreement for Flickr Commons, if applicable, and any other relevant terms, conditions, standards or agreements (collectively, the “**TOU**”) are appropriate to accommodate Your legal status, Your public (in contrast to private) mission, and other special circumstances. Accordingly, the TOU are hereby modified by this Amendment as they pertain to Your use of the Service as set forth below. All initially capitalized terms not defined herein shall have the meanings ascribed to them in the TOU.

- A. **Government entity:** “You” within the TOU shall mean the Agency itself and shall not apply to, or bind: (i) the individual(s) who utilize the Service on Agency's behalf; or (ii) any individual users who happen to be employed by, or otherwise associated with, the Agency.
- B. **Public purpose:** Any requirement(s) set forth within the TOU that use of the Company site and Service be for private, personal and/or non-commercial purposes is hereby waived in connection with the Flickr accounts created pursuant to this Agreement.
- C. **Advertisements:** Provided that You have a Flickr Pro account, Company hereby agrees to use commercially reasonable efforts not to serve or display any commercial advertisements or solicitations on any pages within the Company site displaying content created by or under the control of the Agency provided that Agency has a Flickr Pro Account.

- D. **Indemnification:** It is agreed by the Parties that all indemnification provisions contained in the TOU do not apply to Agency and that any and all Agency liability under the TOU shall be determined under the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq., or other such governing authority.
- E. **Governing law:** It is agreed by the Parties that any arbitration, mediation or similar dispute resolution provision in the TOU does not apply to Agency. Further, it is agreed that the jurisdiction/choice of law provisions in the TOU do not apply to Agency and that the TOU and this Amendment shall be governed, interpreted and enforced in accordance with the laws of the United States of America. To the extent permitted by federal law, the laws of the State of California will apply in the absence of federal law.
- F. **License Type:** The concepts of “United States Government Work” and, if You are a member of the Flickr Commons, “No Known Copyright Restrictions” that You have requested SmugMug to attribute to content that you submit to the Service are legally valid in each of the jurisdictions in which the Service operates.
- G. **Modifications of Member Content:** Company agrees that the right reserved in the TOU to "modify" or "adapt" Your content is limited to technical actions necessary to index, format and display that content. The right to modify or adapt does not include the right to edit or otherwise alter the meaning of the content. Notwithstanding the foregoing, nothing in this Amendment shall result in an expansion of Your rights as a United States Government entity under the Copyright Act of 1976 (17 U.S.C. §§101 et seq.), specifically including Section 105 of said Act. SmugMug, in appropriate circumstances and in its sole discretion with or without notice, reserves the right to delete Your content and disable and/or terminate Your accounts if You infringe or repeatedly infringe the copyrights or other intellectual property rights of others or violate the TOU as amended. You agree that You are responsible for backing up Your data. SmugMug does not guarantee that SmugMug will provide copies to You in the event data is deleted or lost.
- H. **Limitation of Liability:** The Parties agree that nothing in the Limitation of Liability clause or elsewhere in the TOU in any way grants Company a waiver from, release of, or limitation of liability pertaining to, any past, current or future violation of federal law except to the extent that such violation of federal law relates to potential contract liability under the TOU.
- I. **Uploading, Deleting:** The Parties understand and agree that You are not obligated to place any content on the Company Service, and You reserve the right to remove any and all content You upload to the Company Service at Your sole discretion.
- J. **No endorsement:** Company agrees that Your trademarks, seals, logos, service marks, trade names, and the fact that You have a presence on the Company Service and use its Services, shall not be used by Company to imply an endorsement, sponsorship or recommendation of Company or its services by You or the Federal Government. However, SmugMug may, in its sole discretion, publicly mention the nature and existence of the relationship embedded within this Amendment.
- K. **No business relationship created:** The Parties are independent entities and nothing in this Amendment or the TOU creates an agency, partnership or joint venture.
- L. **No cost agreement:** Nothing in this Amendment or TOU obligates You to expend

appropriations or incur financial obligations except for any fee required to open a Flickr Pro Account. The Parties acknowledge and agree that none of the obligations arising from this Amendment or TOU are contingent upon the payment of fees by one party to the other except for any fee required to open a Flickr Pro Account.

- M. ***Future fee based arrangements:*** You acknowledge that while Company may provide You with some services and features for free, Company reserves the right to begin charging for those services and features at some point in the future. Company will provide You with advance notice of such a change. You also understand that Company currently offers other premium and enterprise services for a fee. Before deciding to enter into a premium or enterprise subscription, or any other fee-based service Company may offer in the future, You agree to determine if Agency has a need for those additional services, to consider the subscription's value in comparison with comparable services available elsewhere, to determine that Agency funds are available for payment, to properly use the Government Purchase Card if that Card is used as the payment method, to review this Amendment and the then-applicable TOU for conformance to federal procurement law, and in all other respects to follow applicable acquisition laws, regulations, and agency guidelines when initiating that separate action.
- N. ***Assignment:*** You may not assign Your obligations under this Amendment or TOU to any third party without SmugMug's prior written consent, which consent will not be unreasonably withheld.
- O. ***Precedence; Further Amendment; Termination:*** This Amendment constitutes an amendment to the TOU. It is agreed by the Parties that language in the TOU indicating it alone is the entire agreement between the Parties does not apply to this Amendment. Similarly, language in the TOU indicating Flickr will grant no license to use Flickr API's to a party requesting changes to the TOU does not apply to Agency. In the event of any conflict between this Amendment and the TOU, this Amendment shall first control, followed by the Flickr Community Guidelines (located at <https://www.flickr.com/help/guidelines>) then the Flickr Terms and Conditions of Use and then the Flickr Additional Terms of Service and Flickr API Terms of Use. This Amendment may be further amended only upon written agreement executed by both Parties. Either Party may terminate Agency's account on thirty (30) days written notice. Notwithstanding the foregoing, Company may terminate Your accounts immediately and without notice for violation of the TOU as amended.
- P. ***Posting and availability of this Amendment:*** The provision of the TOU requiring modifications to the TOU to be posted on Company's website is inapplicable since this Amendment is of limited, not general, application, and the provision is otherwise waived for this special circumstance. The Parties agree this Amendment contains no confidential or proprietary information and You may release it to the public upon request.
- Q. ***Entire Agreement:*** This Amendment supersedes any prior agreement between the Parties regarding the Service.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

SmugMug, Inc.	Name of Agency:
By: _____	By: _____
Name: [_____]	Name:
Title:	Title:
Date:	Date: