



**BMC SOFTWARE BETA/PRE-RELEASE  
SUBSCRIPTION SERVICES AGREEMENT**

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**The Subscription Services Beta Service is still under development and testing.  
BMC has NOT made any Subscription Service Beta Service generally available as a formal BMC product available for  
purchase by its customers ("GA Service").  
You should not place the Beta Service into a production environment.**

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This Beta/Pre-Release Subscription Services Agreement ("Agreement") governs your use of the Beta Service (as defined below). This Agreement is between the entity or individual entering into this Agreement ("Customer") and the BMC Contracting Entity for the applicable region as described in Section 7(j) ("BMC"). A copy of this Agreement is posted at <http://www.bmc.com/legal/agreements.html>, where it can be saved and/or printed.

BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING YOUR ACCEPTANCE OR BY EXECUTING A FORM THAT REFERENCES THIS AGREEMENT, YOU AGREE TO THE TERMS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THESE TERMS AND CONDITIONS. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, YOU MUST NOT ACCEPT THIS AGREEMENT AND MAY NOT USE THE BETA SERVICE.

BMC and/or its affiliates and licensors owns the beta, alpha or other preliminary version of all BMC Subscription Services, related documentation, software and any pre-generally available updates, new versions and upgrades, if any (collectively, the "Beta Service"), or has the rights to license use of the Beta Service, and is willing to grant to Customer a limited license to access and use such Beta Service, on the following terms. "Subscription Services" means the hosted service which packages web-based access and the right-to-use the supported applications and associated reference, user and technical guides. You may not access the Beta Service if you are BMC's direct competitor, except with BMC's prior written consent.

The Agreement is effective between Customer and BMC as of the date of your acceptance. This Agreement was last updated on August 10, 2015.

**1. BETA LICENSE.** Subject to the terms of this Agreement and the Restrictions on Use set forth below, BMC grants to Customer, from time to time a worldwide, non-exclusive, non-sub-licensable, and non-transferable limited license for End Users to access and use the Beta Service in accordance with the terms of this Agreement, solely for the purpose of performing internal testing of the Beta Service. "End Users" means individuals (i) who are authorized by Customer to use and access the Beta Service, and (ii) who have been assigned unique user identifications and passwords by Customer. Customer is responsible for End Users' compliance with this Agreement.

**2. RESTRICTIONS ON USE.**

a. Customer agrees **NOT** to:

- (i) use the Beta Service to process production data, or where it may be used as would the GA Service;
- (ii) use the Beta Service with data or information that has not been backed up;
- (iii) modify, copy or create derivative works based on the Beta Service;
- (iv) create Internet "links" to or reproduce any content forming part of the Beta Service, other than for its own internal non-production business purposes;
- (v) disassemble, reverse engineer, or decompile the Beta Service or part thereof, or access it in order to copy any ideas, features, content, functions or graphics of the Beta Service;
- (vi) interfere with or disrupt the integrity or performance of the Beta Service;
- (vii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material via the Beta Service;
- (viii) send or store viruses or malicious code via the Beta Service;
- (ix) attempt to gain unauthorized access to the Beta Service or its related software, systems, platforms or networks;
- (x) use any components provided with the Beta Service separately from Beta Service;
- (xi) access the Beta Service for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes;
- (xii) sell, distribute, rent, lease, sublicense, display, modify, time share, outsource or otherwise provide the Beta Service to any third party or use it in a service bureau, outsourcing environment, or for the processing of third party data;
- (xiii) release any results of performance tests related to Beta Service to any third party without BMC's prior written consent;
- (xiv) modify, delete or remove any ownership, title, trademark, patent or copyright notices ("Identification") from any Beta Service; or
- (xv) use the Beta Service for any purpose other than as specifically provided in this Agreement.

b. Customer will be responsible for maintaining the confidentiality of the passwords assigned to Customer. Customer will immediately notify BMC if it becomes aware that a password is lost, stolen, disclosed to an unauthorized third party, or otherwise compromised. Customer will be responsible for any and all activities under Customer's account and/or using Customer passwords. Customer will (i) use commercially reasonable efforts to prevent unauthorized access to, or use of, the Beta Service,



and notify BMC promptly of any such unauthorized access or use, and (ii) comply with all applicable laws in using the Beta Service.

- c. Customer is responsible for complying with all legal requirements, including applicable privacy laws and regulations, relating to the collection, use, processing and transfer of Customer Data. "**Customer Data**" means all electronic data or information submitted by Customer to the Beta Service. Customer acknowledges and consents that the Beta Service provided may require Customer Data to be transferred to a country outside of Customer's country or the country where the Customer Data originated.

**3. FEEDBACK.** Customer shall promptly provide to BMC, in writing, any relevant feedback on the functionality and performance of the Beta Service and any test results (together, the "**Feedback**"). BMC or its affiliates owns all Feedback relating to the Beta Service. Customer hereby assigns to BMC all rights, title and interest in the Feedback and all intellectual property therein. If requested by BMC, Customer agrees to execute such further instruments as BMC may reasonably request confirming BMC's ownership interest in such Feedback.

#### **4. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

- a. BMC, its affiliates or licensors retain all rights, title and interest to the Beta Service and all related intellectual property and proprietary rights. The Beta Service and all third party software provided with the Beta Service is protected by applicable copyright, trade secret, industrial and other intellectual property laws. BMC owns all right, title and interest in all software, programming, documentation, templates, questionnaires, methodologies, models, charts, reports and any other items used to deliver the Beta Service or made available to Customer as a result of the Beta Service ("**Service Items**") and access to and use of the relevant Service Items will be governed by the terms of this Agreement. BMC reserves any rights not expressly granted to Customer in this Agreement.
- b. "**Confidential Information**" means all proprietary or confidential information that is disclosed by BMC to Customer, and includes, among other things (i) any and all information relating to the Beta Service or services provided by BMC, its financial information, software code, flow charts, techniques, specifications, development and marketing plans, strategies, and forecasts; (ii) the terms of this Agreement; and (iii) Feedback. Confidential Information does not include information that Customer can show: (A) was rightfully in Customer's possession without any obligation of confidentiality before receipt from BMC; (B) is or becomes a matter of public knowledge through no fault of Customer; (C) is rightfully received by Customer from a third party without violation of a duty of confidentiality; or (D) is or was independently developed by or for Customer. Customer may not disclose Confidential Information of BMC to any third party or use the Confidential Information in violation of this Agreement. In the event Customer becomes legally compelled to disclose any Confidential Information, Customer shall provide BMC with prompt prior written notice of such requirement so that BMC may seek a protective order or other appropriate remedy. If such protective order or other remedy is not obtained, or if BMC waives in writing compliance with the terms of this Agreement, Customer agrees to furnish only that portion of the information which Customer is advised by written opinion of counsel is legally required and to exercise reasonable efforts to obtain confidential treatment of such information. Customer (i) will exercise the same degree of care and protection with respect to the Confidential Information that it exercises with respect to its own confidential information, and (ii) will not, either directly or indirectly, disclose, copy, distribute, republish, or allow any third party to have access to any Confidential Information. Notwithstanding the foregoing, Customer may disclose Confidential Information to Customer's employees and agents who have a need to know provided that such employees and agents have legal obligations of confidentiality substantially the same (and in no case less protective) as the provisions of this Agreement.
- c. If Customer becomes aware of any unauthorized use or disclosure of Confidential Information, then Customer will promptly and fully notify BMC of all facts known to it concerning such unauthorized use or disclosure. In addition, if Customer or any of its employees or agents are required (by oral questions, interrogatories, requests for information, or documents in legal proceedings, subpoena, civil investigative demand, or other similar process) to disclose any of the Confidential Information, Customer will not disclose the Confidential Information without providing BMC with commercially reasonable advance prior written notice to allow BMC to seek a protective order or other appropriate remedy or to waive compliance with this provision. In any event, Customer will exercise its commercially reasonable efforts to preserve the confidentiality of the Confidential Information, including, without limitation, cooperating with BMC to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information.

**5. TERMINATION.** The license of Section 1 granted under this Agreement terminates on the earlier of:

- a. ninety (90) days after Customer's being granted access to the Beta Service, or
- b. immediately upon BMC's notice of termination for convenience.

Upon termination of any license or this Agreement, all rights and licenses granted herein will terminate and Customer shall cease accessing or using the Beta Service. Sections 3, 4, 5, 6, and 7 survive the termination of any Beta Service license or this Agreement.

If a GA Service is announced that replaces a Beta Service and Customer desires to acquire a license to access and use that GA Service, then Customer must acquire access to that GA Service under the then-current subscription service terms with BMC or its appropriate subsidiary or affiliate.

#### **6. DISCLAIMER OF WARRANTY, LIMITATION OF LIABILITY AND EXCLUSIVE REMEDY.**



- a. THE BETA SERVICE IS PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND WHATSOEVER. BMC, ITS AFFILIATES AND LICENSORS DO NOT WARRANT THAT ANY BETA SERVICE WILL SATISFY CUSTOMER'S REQUIREMENTS, THAT ANY BETA SERVICE IS WITHOUT DEFECT, ERROR FREE OR WITHOUT DELAY, OR THAT THE OPERATION OF ANY BETA SERVICE WILL BE UNINTERRUPTED. BMC, ITS AFFILIATES AND LICENSORS DISCLAIM ANY AND ALL REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, MADE WITH RESPECT TO THE BETA SERVICE, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INTERFERENCE, NON-INFRINGEMENT AND INFORMATION CONTENT; AND
- b. BMC DISCLAIMS AND REJECTS ANY LIABILITY TO CUSTOMER, OR ANY OTHER INDIVIDUAL OR ENTITY, FOR ANY CLAIM, LOSS, DAMAGE OR EXPENSE FOR INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE OR INCIDENTAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE BETA SERVICE (INCLUDING, WITHOUT LIMITATION, LOST PROFITS, LOST COMPUTER USAGE TIME, AND DAMAGE TO, OR LOSS OF USE OF, DATA), EVEN IF BMC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. BMC'S ENTIRE LIABILITY AND CUSTOMER'S EXCLUSIVE REMEDY FOR DIRECT DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE BETA SERVICE, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, IS LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER TO LICENSE THE APPLICABLE BETA SERVICE OR \$100.
- c. If a third party asserts a claim against BMC asserting that the Customer Data or Customer's use of the Beta Service in violation of this Agreement violates that third-party's patent, trade secret or copyright rights, or otherwise harms the third party ("**Claim**"), Customer will, at its own expense: (i) defend or settle the Claim; and (ii) indemnify BMC for any damages finally awarded against BMC based on the Claim.

## 7. **MISCELLANEOUS.**

- a. **No-Guarantee as to New Versions.** Customer acknowledges and agrees that BMC is under no obligation to provide any maintenance releases, updates or new versions of the Beta Service. BMC does not guarantee that any Beta Service will become a GA Service. If a GA Service is announced replacing a Beta Service, BMC does not guarantee that the GA Service will be similar in functionality to the comparable Beta Service version licensed under this Agreement. This Agreement creates no obligation on behalf of Customer to acquire any GA Service, or for BMC to provide any GA Service to Customer.
- b. **Entire Agreement and Modifications.** This Agreement is the entire understanding between Customer and BMC and replaces any prior or contemporaneous communication, agreement or understanding of any kind, oral or written, concerning this subject matter. This Agreement may only be changed if mutually agreed to in writing by the parties. Should any provision of this Agreement be invalid or unenforceable, the remainder of the provisions will remain in effect.
- c. **Enforceability, Non-Waiver and Non-Assignment.** If any part of this Agreement is found to be invalid or unenforceable, that part will be modified to the extent necessary to eliminate its invalidity or unenforceability, and the remaining terms will be in full force and effect. A waiver by a party of any breach of any term of this Agreement will not be construed as a waiver of any continuing or succeeding breach. Customer may not assign or otherwise transfer this Agreement or any of its rights or obligations without the prior written consent of BMC.
- d. **Governing Law and Dispute Resolution.** A party will provide written notice to the other party of any controversy, dispute or claim arising out of or relating to this Agreement, or to the formation, interpretation, breach, termination, or validity thereof ("**Controversy**"). The parties shall engage in good faith negotiations to resolve the Controversy. Only if the Controversy is not resolved through good faith negotiations within 15 days of the sending of the written notice of Controversy, the Controversy may be submitted to litigation or binding arbitration, based on the place of incorporation of the parties, as follows:
  - (i) If both parties to this Agreement are entities incorporated under the law of any state in the United States, the Controversy shall be tried in either state or federal court located in Houston, Texas and the laws of the State of Texas shall govern. Both sides hereby submit to the exclusive jurisdiction of the courts in Houston, Texas and waive all defenses based on forum non conveniens.
  - (ii) If both parties to this Agreement are entities incorporated in countries in the Europe, Middle East, or Africa regions, the arbitration shall be held in Amsterdam, Netherlands under the then-applicable rules of the International Chamber of Commerce and the substantive laws of the Netherlands will govern.
  - (iii) If both parties to this Agreement are entities incorporated in countries in the Asia Pacific region, the arbitration shall be held in Singapore under the then-applicable rules of the Singapore International Arbitration Centre and the substantive laws of Singapore will govern.
  - (iv) In all other instances, the arbitration shall be held in New York City, New York, under the then-applicable international rules of the American Arbitration Association and the substantive laws of the State of Texas will govern.

For all arbitrations conducted hereunder: (a) the arbitration shall be conducted in English; (b) the relevant arbitral institution shall determine the number of arbitrators, but any Controversy in which the amount in dispute is greater than \$10 million USD shall be decided by three arbitrators, with each party having the right to select one arbitrator; (c) the costs of such arbitration shall be borne equally, pending the arbitrator's award; (d) the arbitration award rendered shall be final and binding on the parties, shall



not be subject to appeal to any court and shall be enforceable in any court having jurisdiction over the Parties; (e) the arbitration proceedings, award and pleadings shall all be confidential, unless disclosure of particular information is required for purposes of enforcing/challenging the award or to meet local securities law requirements; and (f) the party prevailing in arbitration shall be entitled to recover its reasonable attorneys’ fees and the necessary costs incurred in connection with the arbitration.

- e. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement. Nothing in this Agreement shall be deemed as preventing either party from seeking immediate injunctive relief from any court having jurisdiction over the parties and the subject matter of the dispute.
- f. **Independent Contractor.** Nothing in this Agreement will be construed as creating a joint venture, partnership, franchise, fiduciary, employment or principal/agent relationship between the parties.
- g. **U.S. Federal Acquisitions.** This Section applies only to acquisitions of the commercial Beta Service and Documentation subject to this Agreement by or on behalf of the United States Government, or by any prime contractor or subcontractor (at any tier) under any contract, grant, cooperative agreement or other activity with the United States Government. In the event the Beta Services are delivered to the United States Government, the United States Government hereby agrees that the Beta Services qualify as “commercial items” within the meaning of the Federal acquisition regulation(s) applicable to this procurement. The terms and conditions of this Agreement shall pertain to the United States Government’s use and disclosure of the Beta Service, and shall supersede any conflicting contractual terms and conditions. The following additional statement applies only to acquisitions governed by DFARS Subpart 227.4 (October 1988): “Restricted Rights – Use, duplication and disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 (Oct. 1988).
- h. **Export Controls.** Customer represents and warrants that it: a) will comply with the United States Export Administration Regulations and other U.S. or foreign export regulations; b) no individual accessing or using the Beta Service is a citizen of or from an embargoed country (currently Iran, Syria, Sudan, Cuba and North Korea); c) is not prohibited from receiving the Beta Service under such regulations; d) will not acquire the Beta Service for a person who is restricted under such regulations; e) will not use the Beta Service in contradiction to such regulations; and f) will not use the Beta Service for prohibited uses, including but not limited to nuclear, chemical, missile or biological weapons related end uses. For Beta Service exported from Ireland, EC No. 428/2009 sets up a Community regime for control of exports of dual-use items and technology, and it is declared that this Beta Service is intended for civil purposes only. Therefore, Customer agrees to comply with both the U.S. regulations and those E.U. regulations and will not export in violation of the regulations and without all proper licenses. Any failure to comply with these regulations will result in Customer forfeiting all rights to the Beta Service.
- i. **Third Party Code.** The Beta Service may contain third party software which is delivered to Customer as part of the Beta Service and may not be taken out of the Beta Service or used separately from the Beta Service and for which additional terms may be included in the Documentation.
- j. **Data Protection.** Customer acknowledges that BMC neither requires nor needs Customer to (i) send BMC any personal data collected by Customer (“**Customer Collected Data**”) or (ii) give BMC access to any Customer Collected Data. Consequently, Customer remains responsible for either filtering, making anonymous, encrypting such Customer Collected Data or for having proper procedures in place to prevent Customer Collected Data from being sent to or accessed by BMC.
- k. **Product-Specific Terms.** The following term applies to the BMC Server Automation - License Add-On and BMC BladeLogic Server Automation Suite Products or any Services based thereupon: Customer represents and warrants that Customer has an active (fully paid and current) subscription with Red Hat sufficient to cover the number and type of BMC Server Automation rapid deployment systems being deployed by BMC and Customer. Customer agrees to allow BMC to provide Red Hat with Customer’s name, address, and the number of systems Customer has deployed that are covered by Customer’s subscription with Red Hat.
- l. **BMC Entities.** The following licensing entities apply to this Agreement:

Region	Licensing Entity	Address of Licensing Entity
United States and Latin America South (not a specified Central or South America country below) Canada	BMC Software, Inc.	2101 CityWest Boulevard, Houston, Texas 77042
EMEA (Europe, Middle East and Africa) Brazil	BMC Software Canada Inc. BMC Software Distribution B.V. BMC Software do Brasil Ltda.	50 Minthorn Boulevard, Suite 200 Markham, Ontario L3T 7X8 Canada Boeing Avenue 245, 1119 PE Schiphol Rijk, The Netherlands Rua Leopoldo Couto de Magalhães Jr, 758 - 14º andar, São Paulo – SP – Brazil
Mexico	BMC Software Distribution de México, S.A. de C.V.	Torre Esmeralda II Blvd. Manuel Avila, Camacho #36, Piso 23 Lomas de Chapultepec, CP11000, México D.F.
Argentina	BMC Software de Argentina S.A.	Ing. Butty 220 – Piso 14, Buenos Aires, Republica Argentina, C1001AFB
S.E.A (Southeast Asia), Australia, New Zealand, Hong Kong, Taiwan	BMC Software Asia Pacific Pte Ltd	600 North Bridge Road, #20-01/10 Parkview Square, Singapore 188778



	<b>Region</b>	<b>Licensing Entity</b>	<b>Address of Licensing Entity</b>
	China	BMC Software (China) Limited	Suite 501-504, Level 5, Tower W1, The Towers, Oriental Plaza, #1 East Chang An Ave., Dong Cheng, Beijing 100738, China
	Japan	BMC Software K.K.	Harmony Tower 24th Floor, 1-32-2 Honcho, Nakano-ku, Tokyo, 164-8721
	Korea	BMC Software Korea Ltd	33 <sup>rd</sup> Fl., ASEM Tower World Trade Center, 159-1, Samsung-dong, Kangnam-ku, Seoul 135-798