

David Mercer Consulting, Inc. (DMC) TERMS OF SERVICE for Web Hosting

between David Mercer Consulting, Inc. ("we" or "DMC") and the customer who orders DMC® services ("you" or "Customer").

THE AGREEMENT.

Your use of DMC services is governed by these Terms of Service, the DMC Acceptable Use Policy, and the terms of your Order. When we use the term "Agreement" in any of the Order, Terms of Service, or Acceptable Use Policy, we are referring collectively to all of them. Sections 1 – 29 of these Terms of Service state the general terms applicable to all Cloud Services, and Sections 30 – 33 state additional terms that will apply only if you elect to purchase the particular services described in those sections. If the individual who submits an Order does so on behalf of a company or other legal entity, the individual represents that he or she has authority to bind that entity to the Agreement. **This Agreement is the complete and exclusive agreement between you and DMC regarding its subject matter and supersedes and replaces any prior agreement, understanding, or communication, written or oral.**

1. DEFINED TERMS.

Some words used in the Agreement have particular meanings:

"**Acceptable Use Policy**" or "**AUP**" means the DMC Acceptable Use Policy posted at <http://davidmercerconsulting.com> as of the date you sign the Order, as it may be amended pursuant to [Section 21](#) below.

"**Business Day**" means 8:00 a.m. – 5:00 p.m. Monday through Friday, United States pacific time, excluding federal public holidays in the United States.

"**Confidential Information**" means all information disclosed by one of us to the other, whether before or after the effective date of the Agreement, that the recipient should reasonably understand to be confidential, including: (i) for you, all information transmitted to or from, or stored on, the DMC cloud system, (ii) for DMC, unpublished prices and other terms of service, audit and security reports, product development plans, data center designs (including non-graphic information you may observe on a tour of a data center), server configuration designs, and other proprietary information or technology, and (iii) for both of us, information that is marked or otherwise conspicuously designated as confidential. Information that is developed by one of us on our own, without reference to the other's Confidential Information, or that becomes available to one of us other than through violation of the Agreement or applicable law, shall not be "Confidential Information" of the other party.

"**Junk Mail**" means email that is captured by our mail filter and other email that is reported by you

to DMC as undesirable.

"**Order**" means either: (i) the online order that you submit to DMC via the DMC website, or (ii) any other written order (either in electronic or paper form) provided to you by DMC for signature that describes the Services you are purchasing, and that is signed by you, either manually or electronically.

"**Services**" means those services described in the Order.

2. DMC'S OBLIGATIONS.

Contingent on DMC's acceptance of your Order, and subject to these Terms of Service, DMC agrees to provide the Services. If you have met DMC's minimum financial commitment for support, DMC will provide support for the Services twenty four hours per day, seven days per week, year round. DMC agrees to follow security procedures at least as stringent, in DMC's reasonable judgment, as those described at <http://www.DMC.com/information/legal/securitypractices.php>.

3. YOUR OBLIGATIONS.

You agree to do each of the following: (i) comply with applicable law and the DMC Cloud Acceptable Use Policy (ii) pay when due the fees for the Services, (iii) use reasonable security precautions in light of your use of the Services, (iv) cooperate with DMC's reasonable investigation of outages, security problems, and any suspected breach of the Agreement, (v) keep your billing contact and other account information up to date; and (vi) immediately notify DMC of any unauthorized use of your account or any other breach of security. In the event of a dispute between us regarding the interpretation of applicable law or the AUP, DMC's reasonable determination shall control.

4. ACCESS TO THE SERVICES.

You may access the Services via the online control panel, or via a DMC-provided Application Programming Interface or API. DMC may modify its control panel or APIs at any time, or may transition to new API's. Your use of any API you download from the DMC website is governed by the license terms included with the code in the file named "COPYING" or "LICENSE" or like caption.

5. TERM.

The initial term for each Order begins on the date we make the Services available for your use and continues for the period stated in the Order. If no period is stated in the Order, then the initial term shall be one month. Upon expiration of the initial term, the Order will automatically renew for successive renewal terms of one month each, unless and until one of us gives the other a written notice of non-renewal prior to the expiration of the initial term, or then-current renewal term, as applicable. You must follow DMC's non-renewal process accessible from your control panel to

give an effective notice of non-renewal.

6. FEE INCREASES.

If you are under a month-to-month contract, then we may increase fees at any time on forty-five (45) days advance written notice. If the initial term of your Agreement is longer than one month, then we may increase your fees effective as of the first day of the renewal term that first begins forty-five days from the day of our written notice of a fee increase. In addition, if during the initial term or any renewal term there is an increase in the Producer Price Index over the Producer Price Index reported for the month in which you signed your Order, we may increase your fees by the same percentage as the increase in the Producer Price Index; provided that we may not increase your fees pursuant to this sentence more often than once per twelve months, and we must give you at least thirty days advance written notice of the increase. The "Producer Price Index" means the Producer Price Index for Finished Goods, WPUSOP3000, not seasonally adjusted, and first published as "preliminary" data by the United States Bureau of Labor Statistics in its PPI Detailed Report or successor publication. For historical information on the Producer Price Index, you may visit the Bureau of Labor Statistics website. (Example: if the Producer Price Index for the month in which you sign the Order is 186, and then increases in a subsequent month during the term of the Order to 195, we may increase your fees by up to 4.8%).

7. SUSPENSION.

We may suspend your Services without liability if: (i) we reasonably believe that the Services are being used (or have been or will be used) in violation of the Agreement, (ii) we discover that you are, or are affiliated in any manner with, a person who has used similar services abusively in the past; (iii) you don't cooperate with our reasonable investigation of any suspected violation of the Agreement; (iv) we reasonably believe that your Services have been accessed or manipulated by a third party without your consent, (v) we reasonably believe that suspension of the Services is necessary to protect our network or our other customers, (vi) a payment for the Services is overdue, or (vii) suspension is required by law. We will give you reasonable advance notice of a suspension under this paragraph and a chance to cure the grounds on which the suspension are based, unless we determine, in our reasonable commercial judgment, that a suspension on shorter or contemporaneous notice is necessary to protect DMC or its other customers from imminent and significant operational or security risk. If the suspension was based on your breach of your obligations under the Agreement, then we may continue to charge you the fees for the Services during the suspension, and may charge you a reasonable reinstatement fee (not to exceed \$150) upon reinstatement of the Services.

8. TERMINATION FOR CONVENIENCE; EARLY TERMINATION FEE.

You may terminate the Agreement for convenience at any time on thirty days advance written notice. If you terminate the Agreement for convenience, in addition to other amounts you may owe, you must pay an early termination fee equal to any minimum monthly financial commitment you have made for the remaining portion of the then-current term.

9. TERMINATION FOR BREACH.

We may terminate the Agreement for breach on written notice if: (i) we discover that the information you provided to us about yourself or your proposed use of the Services was materially inaccurate or incomplete, (ii) if you are an individual, you were not at least 18 years old or otherwise did not have the legal capacity to enter into the Agreement at the time you submitted the Order for Services, or if you are an entity or fiduciary, the individual submitting the Order for Services did not have the legal right or authority to enter into the Agreement on behalf of the person represented to be the customer, (iii) your payment of any invoiced amount is overdue, and you do not pay the overdue amount within three (3) days of our written notice, (iv) a credit report indicates you no longer meet our reasonable credit criteria, provided that if we terminate on these grounds, we must give you a reasonable opportunity to migrate your environment out of DMC in an orderly fashion, (v) you use your Service in violation of the AUP and fail to remedy the violation within ten (10) days of our written notice, (vi) you violate the AUP more than once, even if you cure each violation, or (vii) you fail to comply with any other provision of the Agreement and do not remedy the failure within thirty (30) days of our notice to you describing the failure.

You may terminate the Agreement for breach on written notice if: (i) we materially fail to provide the Services as agreed and do not remedy that failure within five (5) days of your written notice describing the failure, or (ii) we materially fail to meet any other obligation stated in the Agreement and do not remedy that failure within thirty (30) days of your written notice describing the failure.

10. ACCESS TO DATA.

10.1 You will not have access to your data stored on the DMC Cloud™ system during a suspension or following termination.

10.2 We backup the DMC Cloud systems on a periodic basis so that we are able to more quickly restore the systems in the event of a failure. These backups are made on a snap-shot basis and, therefore, capture only the information that exists on the system at the time of the backup. In addition, we may destroy all but the most recent backup. These backups may not be available to you or, if available, may not be useful to you outside of the DMC Cloud systems.

10.3 Although the DMC Cloud service may be used as a backup service, you agree that you will maintain at least one additional current copy of your programs and data stored on the DMC Cloud system somewhere other than on the DMC Cloud system .

11. UNAUTHORIZED ACCESS TO YOUR DATA OR USE OF THE SERVICES.

DMC is not responsible to you for unauthorized access to your data or the unauthorized use of the Services unless the unauthorized access or use results from DMC's failure to meet its security obligations stated in the Agreement. You are responsible for the use of the Services by any employee of yours, any person to whom you have given access to the Services, and any person who gains access to your data or the Services as a result of your failure to use reasonable security

precautions, even if such use was not authorized by you.

12. DISCLAIMERS.

We do not promise that the Services will be uninterrupted, error-free, or completely secure. You acknowledge that there are risks inherent in Internet connectivity that could result in the loss of your privacy, Confidential Information, and property. DMC has no obligation to provide security other than as stated in this Agreement. We disclaim any and all warranties not expressly stated in the Agreement, including the implied warranties of merchantability, fitness for a particular purpose, and noninfringement. You are solely responsible for the suitability of the service chosen. If you have not made the minimum financial commitment for support and SLA coverage, the Services are provided AS IS. Any voluntary services we may perform for you at your request and without any additional charge are provided AS IS.

13. EXPORT MATTERS.

You represent and warrant that you are not on the United States Department of Treasury, Office of Foreign Asset Controls list of Specially Designated National and Blocked Persons and are not otherwise a person to whom DMC is legally prohibited to provide the Services. You may not use the Services for the development, design, manufacture, production, stockpiling, or use of nuclear, chemical or biological weapons, weapons of mass destruction, or missiles, in a country listed in Country Groups D: 4 and D: 3, as set forth in Supplement No. 1 to the Part 740 of the United States Export Administration Regulations, nor may you provide administrative access to the Service to any person (including any natural person or government or private entity) that is located in or is a national of Cuba, Iran, Libya, Sudan, North Korea or Syria or any country that is embargoed or highly restricted under United States export regulations.

14. CONFIDENTIAL INFORMATION.

Each of us agrees not to use the other's Confidential Information except in connection with the performance or use of the Services, as applicable, the exercise of our respective legal rights under the Agreement, or as may be required by law. Each of us agrees not to disclose the other's Confidential Information to any third person except as follows:

- i to our respective service providers, agents, and representatives, provided that such service providers, agents, or representatives agree to confidentiality measures that are at least as stringent as those stated in these General Terms and Conditions.
- ii to law enforcement or government agency if required by a subpoena or other compulsory legal process, or if either of us believes, in good faith, that the other's conduct may violate applicable criminal law as required by law; or
- iii in response to a subpoena or other compulsory legal process, provided that each of us agrees to give the other written notice of at least seven days prior to disclosing Confidential Information under this subsection (or prompt notice in advance of disclosure, if seven days advance notice is not reasonably feasible), unless the law forbids such notice.

15. LIMITATION ON DAMAGES.

Our obligations to you are defined by this Agreement. We are not liable to you for failing to provide the Services unless the failure results from a breach of this Agreement, or results from our gross negligence or willful misconduct. If you have made the minimum financial commitment for coverage under a Service Level Agreement, the dollar credits stated in the Service Level Agreement are your **sole and exclusive** remedy for unavailability of the Services.

Neither of us (nor any of our employees, agents, affiliates or suppliers) is liable to the other for any lost profits or any other indirect, special, incidental or consequential loss or damages of any kind, or for any loss that could have been avoided by the damaged party's use of reasonable diligence, even if the party responsible for the damages has been advised or should be aware of the possibility of such damages. In no event shall either of us be liable to the other for any punitive damages.

Notwithstanding anything in the Agreement to the contrary, except for liability based on willful misconduct or fraudulent misrepresentation, and liability for death or personal injury resulting from DMC's negligence, the maximum aggregate monetary liability of DMC and any of its employees, agents, suppliers, or affiliates in connection with the Services, the Agreement, and any act or omission related to the Services or Agreement, under any theory of law (including breach of contract, tort, strict liability, violation of law, and infringement) shall not exceed the greater of (i) the amount of fees you paid for the Services for the six months prior to the occurrence of the event giving rise to the claim, or (ii) Five Hundred Dollars (\$200.00).

16. INDEMNIFICATION.

If we, our affiliates, or any of our or their respective employees, agents, or suppliers (the "**DMC Indemnitees**") are faced with a legal claim by a third party arising out of your actual or alleged gross negligence, willful misconduct, violation of law, failure to meet the security obligations required by the Agreement, violation of the AUP, or violation of Section 15 (Export Matters) of these Terms and Conditions, then you will pay the cost of defending the claim (including reasonable attorney fees) and any damages award, fine, or other amount that is imposed on the DMC Indemnitees as a result of the claim. Your obligations under this subsection include claims arising out of the acts or omissions of your employees, any other person to whom you have given access to the Services, and any person who gains access to the Services as a result of your failure to use reasonable security precautions, even if the acts or omissions of such persons were not authorized by you. If you resell the Services, the grounds for indemnification stated above also include any claim brought by your customers or end users arising out of your resale of the Services. We will choose legal counsel to defend the claim, provided that these decisions must be reasonable and must be promptly communicated to you. You must comply with our reasonable requests for assistance and cooperation in the defense of the claim. We may not settle the claim without your consent, although such consent may not be unreasonably withheld. You must pay expenses due under this Section as we incur them.

17. MICROSOFT SOFTWARE.

In addition to the terms of our Agreement, your use of any Microsoft® software is governed by Microsoft's license terms.

18. WHO MAY USE THE SERVICE.

You may resell the Services, but you are responsible for use of the Services by any third party to the same extent as if you were using the Services yourself. If you resell any part of the Services that includes Microsoft software, then you must include these Microsoft terms described in Section 19 (Microsoft Software) above in a written agreement with your customers as well as the content of Section 23 (No High Risk Use). Unless otherwise agreed, DMC will provide support only to you, not to any other person you authorize to use the Services. There are no third party beneficiaries to the Agreement, meaning that third parties do not have any rights against either of us under the Agreement.

19. CHANGES TO THE ACCEPTABLE USE POLICY.

We may change our Acceptable Use Policy, provided that any changes are reasonable and consistent with applicable law and industry norms. Any such changes made during the term of your Agreement will become effective to your account upon the first to occur of: (i) renewal, (ii) your execution of a new/additional Order for your account that incorporates the revised AUP or General Terms, or (iii) thirty (30) days following our notice to you describing the change. If the change materially and adversely affects you, you may terminate the Agreement by giving us written notice of termination on such grounds no later than thirty (30) days following the date the change became effective for your account, and we will not enforce the change with respect to that account for thirty (30) days following the date of your notice. If you terminate your Service because the change adversely affects you, we may decide not to enforce that change with respect to your account and keep your Agreement in place for the remainder of the term.

20. NOTICES.

Your routine communications regarding the Services should be sent to david@davidmercerconsulting.com.

21. NO HIGH RISK USE.

You may not use the Services in any situation where failure or fault of the Services could lead to death or serious bodily injury of any person, or to physical or environmental damage. For example, you may not use, or permit any other person to use, the Services in connection with aircraft or other modes of human mass transportation, nuclear or chemical facilities, or Class III medical devices under the Federal Food, Drug and Cosmetic Act.

22. OWNERSHIP OF INTELLECTUAL PROPERTY

Each of us retains all right, title and interest in and to our respective trade secrets, inventions, copyrights, and other intellectual property. Any intellectual property developed by DMC during the performance of the Services shall belong to DMC unless we have agreed with you in advance in writing that you shall have an interest in the intellectual property.

23. IP ADDRESSES.

Upon expiration or termination of the Agreement, you must discontinue use of the Services and relinquish use of the IP addresses and server names assigned to you by DMC in connection with Services, including pointing the DNS for your domain name(s) away from DMC Services.

24. ASSIGNMENT/SUBCONTRACTORS

You may not assign the Agreement without DMC's prior written consent. We may assign the Agreement in whole or in part as part of a corporate reorganization or a sale of our business, and we may transfer your Confidential Information as part of any such transaction. DMC may use third party service providers to perform all or any part of the Services, but DMC remains responsible to you under this Agreement for work performed by its third party service providers to the same extent as if DMC performed the Services itself.

25. FORCE MAJEURE

Neither of us will be in violation of the Agreement if the failure to perform the obligation is due to an event beyond our control, such as significant failure of a part of the power grid, significant failure of the Internet, natural disaster, war, riot, insurrection, epidemic, strikes or other organized labor action, terrorism, or other events of a magnitude or type for which precautions are not generally taken in the industry.

26. GOVERNING LAW, LAWSUITS

The Agreement is governed by the laws of the State of Texas, exclusive of any Texas choice of law principle that would require the application of the law of a different jurisdiction, and the laws of the United States of America, as applicable. The Agreement shall not be governed by the United Nations Convention on the International Sale of Goods. **Exclusive venue for all disputes arising out of the Agreement shall be in the state or federal courts in Napa County, CA, and we each agree not to bring an action in any other venue.** You waive all objections to this venue and agree not to dispute personal jurisdiction or venue in these courts. You agree that you will not bring or participate in any class action lawsuit against DMC or any of its employees or affiliates. Each of us agrees that we will not bring a claim under the Agreement more than two years after the time that the claim accrued.

27. SOME AGREEMENT MECHANICS

These Terms of Service may have been incorporated in your Order by reference to page on the DMC website. Although we may from time to time revise the Terms of Service posted on that

page, those revisions will not be effective as to an Order that we accepted prior to the date we posted the revision, and your Order will continue to be governed by the Terms of Service posted on the effective date of the Order. However, any amended Terms of Service will become effective on the first day of the renewal period that follows the date that the new Terms of Service were posted by at least thirty days. In addition, if over time you sign multiple Orders for a single account, then the Terms of Service incorporated in the latest Order posted on the effective date of the latest Order will govern the entire account. DMC may accept or reject any Order you submit in its sole discretion. DMC's provisioning of the Services described in an Order shall be DMC's acceptance of the Order.

An Order may be amended by a formal written agreement signed by both parties, or by an exchange of correspondence, including electronic mail, that includes the express consent of an authorized individual for each of us. Any such correspondence that adds or modifies Services in connection with an account established by an Order shall be deemed to be an amendment to that Order, notwithstanding the fact that the correspondence does not expressly refer to the Order.

Other than as stated herein, the Agreement may be modified only by a formal document signed by both parties.

If there is a conflict between the terms of any of the documents that comprise the Agreement, the documents will govern in the following order: Order, Terms of Service, and the Acceptable Use Policy. If any part of the Agreement is found unenforceable by a court or other tribunal, the rest of the Agreement will nonetheless continue in effect, and we agree that the tribunal may reform the unenforceable part if it is possible to do so consistent with the material economic incentives of the parties resulting in this Agreement. Each of us may enforce each of our respective rights under the Agreement even if we have waived the right or failed to enforce the same or other rights in the past. Our relationship is that of independent contractors and not business partners. Neither of us is the agent for the other, and neither of us has the right to bind the other on any agreement with a third party. The captions in the Agreement are for convenience only and are not part of the Agreement. The use of the word "including" in the Agreement shall be read to mean "including without limitation." Sections 1, 7, 10, 16, 17, 18, 22, 24, 28, 29, 33 and all other provisions that by their nature are intended to survive expiration or termination of the Agreement shall survive expiration or termination of the Agreement.

If you have made any change to the Agreement documents that you did not bring to our attention in a way that is reasonably calculated to put us on notice of the change, the change shall not become part of the Agreement.

The Agreement may be signed in multiple counterparts, which, taken together, will be considered one original. Facsimile signatures, signatures on an electronic image (such as .pdf or .jpg format), and electronic signatures shall be deemed to be original signatures.

ADDITIONAL TERMS FOR CERTAIN SERVICES

28. DOMAIN NAME REGISTRATION SERVICES.

If you register, renew, or transfer a domain name through DMC, DMC will submit the request to its domain name services provider (the "Registrar") on your behalf. DMC's sole responsibility is to submit the request to the Registrar. DMC is not responsible for any errors, omissions, or failures of the Registrar. Your use of domain name services is subject to the applicable legal terms of the Registrar posted at <http://www.DMCcloud.com/legal>. You are responsible for closing any account with any prior reseller of or registrar for the requested domain name, and you are responsible for responding to any inquiries sent to you by the Registrar.

29. MAIL SERVICES.

29.1 Access. You may access your Mail Services over the web via our control panel, or via a DMC-provided API. DMC may modify its control panel or APIs at any time, or may transition to new APIs.

29.2 Management of the Service. DMC will provision your initial mail environment, but you are otherwise responsible for managing your mail service, including adding mailboxes, adding wireless or other service components, adding storage capacity, managing settings, and configuring spam filters.

29.3 Filtering. DMC will provide email filtering services designed to filter spam, phishing scams, and email infected with viruses. DMC recommends that you employ additional security measures, such as a desktop virus scanner and firewall, on computers that are connected to the Internet. Email that is quarantined by the filtering system is excluded from the Service Level Guaranty above. DMC will use commercially reasonable efforts to deliver your email messages. Third party filtering services may from time to time prevent successful delivery of your messages. **You acknowledge that the technological limitations of the filtering service will likely result in the capture of some legitimate email and the failure to capture some unwanted email, including email infected with viruses. You hereby release DMC and its employees, agents, affiliates, and third party suppliers from any liability for damages arising from the failure of DMC's filtering services to capture unwanted email or from the capture of legitimate email, or from a failure of your email to reach its intended recipient as a result of a filtering service used by the recipient or the recipient's email service provider.**

29.4 Memory Limitations. Mail that exceeds the storage limit when received may be permanently lost. You may adjust the storage capacity of your individual mailboxes via the control panel, and it is your obligation to monitor and adjust the storage capacity of individual mailboxes as needed. An individual email message that exceeds the per-message size limit may also be permanently lost. As of November 2008, the per-message size limit is 50MB.

29.5 Content Privacy. Your email messages and other items sent or received via the mail service will include: (i) the content of the communication ("content"), and (ii) certain information that is created by the systems and networks that are used to create and transmit the message (the "message routing data"). The content includes things like the text of email messages and attached media files, and is generally the information that could be communicated using some media other than email (like a letter, telephone call, CD, DVD, etc.) The message routing data includes information such as server hostnames, IP addresses, timestamps, mail queue file identifiers, and spam filtering

information, and is generally information that would not exist but for the fact that the communication was made via email. The content of your items is your Confidential Information and is subject to the restrictions on use and disclosure described in these Terms of Service. However, you agree that we may view and use the message routing data for our general business purposes, including maintaining and improving security, improving our services, and developing products. In addition, you agree that we may disclose message routing data to third parties in aggregate statistical form, provided that we do not include any information that could be used to identify you.

29.6 Usage Data. We collect and store information related to your use of the Services, such as use of SMTP, POP3, IMAP, and filtering choices and usage. You agree that we may use this information for our general business purposes and may disclose the information to third parties in aggregate statistical form, provided that we do not include any information that could be used to identify you.