



## MOVEit Cloud Terms of Service

By checking the acceptance box or accessing or using all or any portion of MOVEit Cloud, you are accepting these Terms of Service (“**Terms**”, “**Agreement**”) in its entirety as published on Ipswitch website at [www.ipswitch.com](http://www.ipswitch.com) (as may be relocated by Ipswitch from time to time) (the “**Site**”). You agree that this Agreement is enforceable like any written agreement signed by you, or, if you represent a legal entity, the legal entity you represent (collectively, “**you**” or “**User**”) and legally binding between you and Ipswitch, Inc. or the applicable Ipswitch affiliate (“**Ipswitch**”, “**us**”, “**we**”). If you are entering into this agreement on behalf of a legal entity, you represent that you have the legal authority to bind that legal entity to this agreement. If you do not have such authority, or if you do not agree with all of the terms and conditions of this agreement, you are not permitted to access or use the Service.

We reserve the right to modify these Terms. We will post the most current version of these Terms on the Site. It is your responsibility to check this Site regularly for any modifications to these Terms. If we make material changes to these Terms, we will notify you by email to the address associated with your account. If you do not accept the changes, you must stop using and cancel your account by contacting us at <https://community.ipswitch.com/s/contactsupport>. Your continued use of the Service 30 days after we publish or send a notice about our changes to these Terms means that you are consenting to the updated terms.

### 1. EVALUATION ACCESS

1.1 If you have subscribed for free, trial or evaluation access to the Service (“**Evaluation Access**”), you may use such access solely for the purpose of evaluating the Service to determine whether to purchase a subscription from us. Evaluation Access is limited to 30 days from the date you activate your Evaluation Access, unless otherwise specified by us in the applicable Order Form or a separate writing from us (“**Evaluation Period**”). You may use Evaluation Access for purposes of monitoring service availability, performance or functionality, or any other benchmarking purposes only with our prior written consent. Unless you purchase a paid subscription for our Service, your right to access and use the Service automatically expires at the end of the Evaluation Period. Evaluation Access will be subject to the terms of this Agreement, provided that (i) Evaluation Access is provided “AS IS” without warranty or support of any kind, express or implied, (ii) Sections 5, 8 and 10 of the Agreement will not apply and (iii) we may terminate your Evaluation Access at any time for any reason and without liability of any kind.

### 2. SERVICE

2.1 **Service.** Subject to the terms and conditions of this Agreement and your payment of the Service Fees, you subscribe for and we agree to provide you with the Service as set forth on a Quotation forming the basis of an order placed by you and accepted by us (“**Order Form**”).

2.2 **Use of Service.** You may use the Service for your internal use only (meaning use of the Service for the transfer of files to or from you or your organization). You may make the Service available to your employees, consultants, contractors and authorized agents who use the Service for your internal use (“**Authorized Users**”).

2.3 **Service Availability.** We will use commercially reasonable efforts to make the Service available 24 hours a day 7 days a week in accordance with the MOVEit Cloud Service Description (the “**Service Description**”). You can monitor the Service availability and subscribe to related notifications as described in the Service Description.

2.4 **Support.** We will provide basic technical support for the Service, which means using reasonable efforts to correct any errors found in the Service that are directly attributable to



our hardware and software infrastructure (the “**Environment**”), within a reasonable time after you report such error to us. Support services will be provided in accordance with the Service Support Policy included in the Service Description. Our Service Support Policy is subject to change at our discretion; however, our policy changes will not result in a material reduction in the level of support services provided for the Service during the period for which you have paid the fees for the Service.

**2.5 Member Account, Password and Security.** We will create the first account for your use. Your Authorized Users may create additional accounts.

**2.6 Security.** We will use commercially reasonable efforts, consistent with generally accepted industry practices, to maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of User Data (as defined in Section 3.3). All User Data is stored at our infrastructure vendor only in encrypted form, all User Data remains in encrypted form while being transferred using the Service, and neither we nor our infrastructure vendor has authorized access to User Data in unencrypted form, and we follow regular procedures to detect unauthorized access. We agree to provide you, as and to the extent available, with copies of any SOC 2-Type 2 report upon request.

**2.7 Suspension of Access.** We will have the right to suspend your access to any portion or all of the Service if:

2.7.1 Such suspension is requested or required by any governmental authority or any court of law; or

2.7.2 We reasonably believe you or any Authorized User is using or permitting the use of the Service in a manner not permitted under this Agreement.

**2.8 Effect of Suspension.** If we suspend your access to any portion or all of the Service:

2.8.1 You remain responsible for all fees and charges you incur during the period of suspension; and

2.8.2 You will not be entitled to any Service Credits provided in the Service Description for any period of suspension.

### **3. YOUR RESPONSIBILITIES**

**3.1 Your Account.** You will be responsible for (a) all activity occurring under your account; (b) all Internet, communication and other costs associated with use of the Service; (c) implementing reasonable security and environmental precautions in your facilities and your hardware and software infrastructure; and (d) reporting to us all errors in the Service promptly by opening an online support case.

**3.2 Authorized Users.** You will be responsible for (a) your Authorized Users’ use of the Service and compliance with this Agreement; (b) choosing a password and a user name; and (c) maintaining the confidentiality of your Authorized Users’ password and accounts. We will not be liable for any loss that you may incur as a result of someone else using your Authorized Users’ password or account, either with or without your knowledge, except to the extent arising out of your gross negligence or willful misconduct.

**3.3 User Data.**



3.3.1 You will have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right to use of all electronic data or information submitted to the Service by you or your Authorized Users in the course of using the Service (“**User Data**”). We will not be responsible or liable for the deletion, corruption, destruction, damage, loss or failure to store any of User Data, subject to our obligations under Section 2.6.

3.3.2 You represent and warrant that you have all necessary rights and have obtained all necessary consents to collect and use the User Data and to submit the User Data to the Service, including without limitation any User Data that comprises personal information or personal data.

3.3.3 If you are located in the European Union, your use of the Service is also governed by our standard Data Protection Addendum.

3.3.4 We will require written permission before we act as an Admin within your organization (ORG), as described in the Service Description.

3.4 **Notification of Unauthorized Use.** You will promptly notify us of any unauthorized use of your account or of any other breach of security.

3.5 **Primary Contact.** You will designate a primary contact person who is responsible for the administering your account, including such person’s name, position, phone, email and postal address.

3.6 **Restrictions on Use.** You will not, and will not permit your Authorized Users to:

3.6.1 Use the Service for any purpose that is unlawful or prohibited by this Agreement;

3.6.2 Use the Service to provide services to third parties, including without limitation, managed file transfer or network management services that are provided through commercial timesharing, rental or sharing arrangements, “service bureau” based services, “application service provider” based services or software as a service (SaaS) based services, or any other use of the Service for the benefit of any third party;

3.6.3 Modify, create derivative works from or reverse engineer the Service or any portion of the Service;

3.6.4 Use the Service in any manner that is intended or would reasonably be expected to damage, disable, overburden, or impair the Environment, or interfere with or disrupt the integrity or performance of the Service or third-party data or information contained therein or any other party’s use of the Service;

3.6.5 Attempt to gain unauthorized access to the Environment, the Service, the accounts of our other customers, computer systems or networks connected to our servers or to the Service;

3.6.6 Attempt to obtain information from the Service through any means that are not intentionally made available to you by us, or otherwise collect information about others;

3.6.7 Use the Service to store or transmit infringing, libellous, or otherwise unlawful or tortuous material, or to store or transmit material in violation of third-party privacy or other rights;



3.6.8 Upload files that contain viruses, Trojan horses, worms, time bombs, corrupted files, or take other actions which purpose or effect is to (a) disrupt, disable, harm, or otherwise impede in any manner or impair the operation of the Environment or the Service; (b) permit unauthorized access to the Environment or the Service; (c) cause the Environment or the Service to cease functioning or to damage or corrupt data, storage media, programs, equipment or communications, or otherwise interfere with, or upload software or programs that may damage, the operation of another computer or property of another;

3.6.9 Customize, brand or modify the Service in any manner that infringes a patent, copyright, trade secret, or other proprietary right of a third party;

3.6.10 Create a false identity for the purpose of misleading others; or

3.6.11 Except as set forth in Section 1, access the Service for purposes of monitoring service availability, performance or functionality, or for any other benchmarking or competitive purposes.

#### 4. TERM AND TERMINATION

4.1 **Term.** This Agreement will be effective as of the Effective Date and, unless sooner terminated as provided in Section 4.2, will remain in effect for the initial term specified on the applicable Order Form (“**Initial Term**”). At the expiration of the Initial Term, this Agreement will automatically renew for successive one-year terms (each, a “**Renewal Term**” and together with the Initial Term, the “**Term**”), unless either party notifies the other in writing of its desire not to renew this Agreement not later than 30 days prior to the expiration of the then current Initial Term or Renewal Term, as applicable. We will notify of any increase in fees for a Renewal Term not later than 60 days prior to the expiration of the then current Initial Term or Renewal Term, as applicable.

4.2 **Termination.** This Agreement may be terminated by either party in the event that the other party commits a material breach of this Agreement if, in the case of a breach which is capable of remedy, such breach is not remedied within 30 days after notice from the non-breaching party, or, in the case of a breach which is incapable of complete remedy, the breaching party has not remedied such breach to the greatest extent reasonably practicable within 30 days after notice from the non-breaching party and used reasonable efforts to ensure that such breach does not reoccur. In addition, you may terminate this Agreement the circumstances described in the Service Description.

4.3 **Effect of Termination.** Upon the expiration or any termination of this Agreement, (a) you will immediately cease accessing and using the Service and will have no further right to access or use the Service and (b) we will retain User Data for a period of 30 days, after which it will be destroyed.

4.4 **Survival.** The following provisions will survive the expiration or any termination of this Agreement: 4.3, 5, 6, 7, 8.2 and 9-11.

#### 5. PAYMENTS

5.1 **Payments.** You will pay the fees specified in the Order Form in the manner specified in the Order. All payments will be made in full in the currency specified in the Order Form within 30 days of invoice.

5.2 **Taxes.** All amounts payable hereunder do not include VAT, sales tax, use tax, withholding tax (if applicable in your jurisdiction), foreign export duties or other similar taxes, duties, levies and charges, all of which (other than income tax attributable to our income in the



USA) will be paid by you.

5.3 **Late Charges.** If any payment due from you under this Agreement becomes past due, we may charge you a late payment charge equal to the lower of (i) one and one-half percent per month, compounded monthly; or (ii) the maximum rate permitted under applicable law on the past due balance. You also will reimburse us for all of our reasonable costs and expenses incident to the collection of overdue amounts hereunder, including but not limited to reasonable attorneys' fees.

## 6. CONFIDENTIALITY.

6.1 **"Confidential Information"** will include information pertaining to the business, software programs, financials, trade secrets, intellectual property, technical data, marketing, methodologies, customer information, and business information of each party and such other information, the nature of which is such that a reasonable person should know that such information is proprietary or confidential to the other party. Each party agrees to hold as confidential all Confidential Information received by such party ("**Recipient**") from the other party ("**Disclosing Party**"). All Confidential Information will remain the property of Disclosing Party. Confidential Information will be returned to Disclosing Party at the termination of this Agreement.

6.2 Recipient will use the same care and discretion to avoid disclosure of Confidential Information as it uses with its own similar information that it does not wish disclosed, but in no event less than a reasonable standard of care for the industry and materials in question. Recipient may use Confidential Information only in the furtherance of the purposes of this Agreement. Recipient may disclose Confidential Information to (i) its employees and employees of its affiliates who have a need to know; and (ii) any other party with Disclosing Party's written consent, provided that the Recipient ensures that such employees or other party comply with Sections 6.1 and 6.2 as if they were a party to this Agreement. Recipient may disclose Confidential Information to the extent required by law. However, Recipient agrees to give Disclosing Party prompt notice and make a reasonable effort to obtain a protective order.

6.3 Confidential Information does not include any information that (i) Recipient already possesses without obligation of confidentiality; (ii) Recipient develops independently without reference to any Confidential Information; (iii) Recipient rightfully receives without obligation of confidentiality from a third party; or (iv) is, or becomes, publicly available without breach of this Agreement or any other action by Recipient.

## 7. PROPRIETARY RIGHTS

7.1 **Service.** You acknowledge that the Service (including any and all updates, modifications, enhancements, or customizations thereof) consists of proprietary services and products of Ipswitch or its third party suppliers, and the proprietary rights that protect such property may include, but are not limited to, U.S. and international copyrights, trademarks, patents and trade secret laws of general applicability. All right, title and interest in and to the Service are and will remain with us or our third party suppliers, as applicable. This Agreement does not convey to you any interest in or title to the Service, but only a limited right of use revocable in accordance with its terms.

7.2 **User Data.** You will have and retain all rights in User Data.

## 8. WARRANTIES

8.1 **Service Warranty.** We represent and warrant to you that the Service will perform substantially in accordance with the Service Description. This Section 8.1 will not apply to the



extent any failure arises out of or is caused by: (a) your failure to use Service in accordance with its documentation or (b) the combination of Service with any service or products not provided by us.

8.2 **Disclaimer.** EXCEPT AS EXPRESSLY SET FORTH IN SECTION 8.1, (A) THE SERVICE AND ANY OTHER PRODUCTS OR SERVICES RELATED THERETO, ARE PROVIDED AS IS AND AS AVAILABLE AND (B) TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, WE DISCLAIM ANY AND ALL WARRANTIES, WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.

## 9. LIMITATION OF LIABILITY

9.1 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY AND EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

9.2 EACH PARTY'S LIABILITY UNDER THIS AGREEMENT FOR ALL CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT (EXCLUDING CLAIMS TO COLLECT FEES) WILL NOT EXCEED THE FEES ACTUALLY PAID TO US UNDER THIS AGREEMENT.

9.3 THE LIMITATIONS ON LIABILITY SET FORTH IN THIS SECTION 9 DO NOT APPLY TO THE INDEMNIFICATION PROVISIONS SET FORTH IN SECTION 10.

## 10. INDEMNIFICATION

10.1 We will defend you and hold you harmless against any claim or action ("**Claim**") that alleges that Service, as provided to you, infringes a patent, copyright, trade secret, or other proprietary right of a third party, and we will pay resulting costs, damages, losses and reasonable attorney fees incurred.

10.2 In addition to our obligations under Section 10.1, if as a result of any such Claim, you are unable to use the Service, we will, at our sole option and expense (i) procure for you the right to continue to use the Service; or (ii) replace or modify the Service so that it becomes non-infringing, which replacement or modification must be functionally equivalent, so as to settle such claim, or (iii) refund any pre-paid Service fees pro rata based on the time remaining in the Term.

10.3 SECTIONS 10.1 AND 10.2 SET FORTH YOUR SOLE REMEDY AND OUR SOLE LIABILITY OR OBLIGATION WITH RESPECT TO ANY CLAIM THAT THE SERVICE INFRINGES A PATENT, COPYRIGHT, TRADE SECRET, OR OTHER PROPRIETARY RIGHT OF A THIRD PARTY.

10.4 You will defend us and hold us harmless against any claim or action arising out of or relating to (a) your User Data or (c) your use of the Service in any manner prohibited by Section 3.6, and you will pay resulting costs, damages, losses and reasonable attorney fees incurred.

10.5 A party seeking indemnification will: (i) notify the indemnifying party in writing within 30 days after learning that the claim or action has been brought or might be asserted (provided that the failure to provide notification will only relieve the indemnifying party of its obligations to



the extent it is actually prejudiced by such failure); (ii) allow the indemnifying party sole control of the defense and all related settlement negotiations (provided that the indemnifying party may not settle any claim or action without the indemnified party's written consent if such settlement imposes an unreimbursed monetary or continuing non-monetary obligation on any indemnified party or does not include an unconditional release of any indemnified party); and (iii) provide the indemnifying party with the information, authority and all assistance reasonably requested by the indemnifying party to provide the aforementioned defense. The indemnified party will have the right to be represented in any such claim or action by its own counsel, at its own expense.

## 11. GENERAL

11.1 **Entire Agreement.** This Agreement constitutes the complete and exclusive statement of the agreement between the parties on the subject matter hereof unless amended or superseded by a written agreement executed by duly authorized representatives of each party.

11.2 **Relationship.** The parties expressly agree they are acting as independent contractors and under no circumstances will any of the employees of one party be deemed the employees of the other for any purpose. This Agreement will not be construed as authority for either party to act for the other party in any agency or other capacity, or to make commitments of any kind for the account of or on behalf of the other except as expressly authorized herein.

11.3 **Section Headings.** The section headings used herein are inserted only as a matter of convenience and for reference and will not affect the construction or interpretation of this Agreement.

11.4 **No Third-Party Beneficiaries.** There are no third-party beneficiaries to this Agreement.

11.5 **Assignment.** Neither party may assign or subcontract any of its rights or obligations under this Agreement in whole or in part without the prior written consent of the other party.

11.6 **Force Majeure.** Except with respect to payment of Service fees or other charges hereunder, neither party will be in default of its obligations to the extent its performance is delayed or prevented by causes beyond its reasonable control, including but not limited to acts of God, earthquake, flood, embargo, riots, sabotage, utility or transmission failures, fire or labor disturbances, explosion, vandalism, cable cut, computer viruses, storm or other similar occurrence, any law, order, regulation, direction, action or request of any government, or any body of authority thereof, or by national emergency, insurrection, riot, war, general strike, lockout, or work stoppage, or other labor difficulties, shortage, breach, or delay on the part of a party's supplier.

11.7 **Export Compliance.** You will comply with the export laws and regulations of the United States and other applicable jurisdictions in using the Service.

11.8 **Notice.** Any notice required or permitted to be given hereunder will be given in writing (a) if by Ipswitch (i) by internationally recognized delivery service ("**Courier**") or US mail to the contact mailing address provided by you or (ii) by electronic mail to the electronic mail address provided by you and (b) if by you by submission at <https://community.ipswitch.com/s/contactsupport> ("**Support Page**"). All such notices will be effective (a) immediately upon delivery by electronic mail or submission at the Support Page and (b) 2 business days after being deposited in the mail or with a Courier.



11.9 **Severability.** If any provision of this Agreement is held to be unenforceable or invalid, the other provisions will continue in full force and effect.

11.10 **Waiver.** No failure or delay by either party in exercising any right under this Agreement will constitute a waiver of that right.

11.11 **Governing Law and Jurisdiction.** This Agreement will be governed by the laws of The Commonwealth of Massachusetts, USA, without regard to its conflicts of law principles. The United Nations Convention for the International Sale of Goods does not apply to this Agreement. All litigation arising from or relating to this Agreement will be filed and prosecuted in any court of competent subject matter jurisdiction in (a) in the case of any action initiated by you, Boston, Massachusetts, USA and (b) in the case of any action initiated by us, the city in which the address on your order form is located, if such city is within the USA, and otherwise in Boston, Massachusetts, USA. The parties stipulate to the convenience and efficiency of proceeding in such forum, and waive and covenant not to assert any objections to proceeding in such forum based on grounds other than a lack of subject matter jurisdiction.

11.12 **Language.** All communications and notices made or given pursuant to this Agreement must be in the English language. If we provide a translation of the English language version of this Agreement, the English language version of the Agreement will control if there is any conflict.

**Last updated on March 29, 2018**