



TERMS AND CONDITIONS

PLEASE READ THESE TERMS AND CONDITIONS ("T&Cs") CAREFULLY AS THEY CONTAIN IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS AND REMEDIES. IT IS AN IMPORTANT DOCUMENT WHICH YOU MUST CONSIDER CAREFULLY BEFORE CHOOSING TO USE OUR SERVICES. EXCEPT AS EXPRESSLY PROVIDED HEREIN, YOU ACKNOWLEDGE AND AGREE THAT WE MAY AMEND THESE T&Cs AT ANY TIME AS SET FORTH HEREIN. YOU ARE RESPONSIBLE FOR REVIEWING AND INFORMING YOURSELF OF ALL APPLICABLE CHANGES. YOU SHOULD REFER REGULARLY TO OUR WEBSITE TO UNDERSTAND THE CURRENT T&Cs AND OTHER POLICIES, AND TO ENSURE YOUR COMPLIANCE. YOUR CONTINUED USE THE SERVICES BEYOND THE DATE OF POSTING, OR IN THE CASE OF MAJOR CHANGES, BEYOND THE NOTICE PERIOD, WILL CONSTITUTE YOUR ACCEPTANCE OF AMENDMENTS AND MAJOR CHANGES.

To the extent any term or condition set forth in the T&Cs expressly conflict with any other term of any written agreement you have entered into with us, the terms of that other written agreement shall govern.

You represent and warrant that you have the lawful authority to bind you or the person or entity on whose behalf you represent to agree to accept the T&Cs, and that you have read, understand, acknowledge and agree (on your own behalf or on behalf of the person or entity for whom/which you are agreeing, as the case may be) to be bound by the T&Cs.

- 1. GENERAL.** By using RapidScale, Inc.'s and its affiliates, subsidiaries, parents, sister concerns and related companies' ("RapidScale", "us", "our" or "we") websites, web portals, applications including, but not limited to, those services and products identified in your applicable Service Agreement(s) (collectively, the "Service(s)"), or by agreeing to these Terms and Conditions ("T&Cs"), you (the "customer", "client", or "you") agree to be bound by these T&Cs. RapidScale and you may be referred to herein as a "Party" or collectively, the "Parties"). Except as expressly set forth herein, we may modify the T&Cs at our sole discretion and such modification shall be effective upon the earlier of notice to you or revised T&Cs being posted at <http://rapidscale.net/terms-and-conditions/>. You accept modification to the T&Cs by continuing to use the Services, by continuing to agree the Services, by continuing to pay for the Services or continuing to be a Party to a Service Agreement or other agreement for the provision of the Services with us. These T&Cs are part of, and shall be incorporated into, any Service Agreement or any other agreement between you and us in which these Terms and Conditions are referenced, plus all applicable service orders, move-add change orders, change orders, addendums, attachments, purchase orders, service level agreements ("SLAs") and any other documents that are expressly incorporated herein ("Service Attachments") (collectively the "Agreement") between you and us.
- 2. SERVICES.** RapidScale will provide the Services described in the applicable Agreement. RapidScale may reject any Service Attachment and will not be bound by such Service Attachment until accepted



by a duly authorized representative of RapidScale. Customer issued Service Attachments will not modify the terms of the Agreement unless agreed to in writing by RapidScale. Any requests for ancillary services not described in the applicable Service Attachments may be provided on an individual case basis as agreed to in writing by the parties. These Professional Services ("Professional Services") are billable at a standard rate of \$195 per hour which rate may be changed upon ten (10) days written notice by RapidScale.

3. TERM.

- a. **Effective Date.** These T&Cs become effective pursuant to Section 1. Upon approval of your credit application (if any), we will begin as soon as practicable the provisioning, installation, connection and testing necessary to provide the Services.
- b. **Term.** These T&Cs shall continue in effect for the entire Term of your Service Agreement and for any subsequent "Renewal Term" (as defined in this Section 3b) unless otherwise agreed in writing between you and us. Pursuant to Section 6, your Term will automatically renew for successive periods equal to the original Term outlined in your applicable Service Agreement, unless earlier terminated as provided in Section 6 (the "Renewal Term"). We shall have no duty or obligation to provide the Services to you on a periodical basis after the expiration of the Term or a Renewal Term unless we explicitly agree in writing. We may in our sole discretion, but shall not be obligated to, provide you the Services after the Term for a period of not more than ninety (90) days if you request no later than twenty (20) days prior to the end of the Term if, if applicable, the Renewal Term (the "Month to Month Period"). You will be charged the sum of one hundred fifty percent (150%) of the monthly recurring charge ("MRC") set forth in the applicable Service Agreement for each thirty (30) day period during the Month to Month Period. We may require you to pay a one (1) month deposit at the inception of the Month to Month Period at our discretion. During the Month to Month Period, you will be required to provide thirty (30) days written notice if you wish to terminate prior to the end of the Month to Month Period.

4. BILLING & PAYMENT.

- a. **Billing.** Unless provided otherwise in your Agreement, we will begin invoicing you for the Services after giving you notice that the Services are available for your use and will continue invoicing you on a monthly basis until the Agreement is terminated. Except as otherwise set forth in your applicable Agreement, (a) MRCs will be billed monthly in advance, (b) varying or usage-based charges will be billed monthly in arrears and (c) installation, Professional Services, or other non-recurring charges will be billed upon completion of the customer kick off call to you unless otherwise agreed in writing. If RapidScale is unable to deliver the Services on time due to the delay of Customer or its member, end-users, customer or any other third parties who utilize or access the Services or RapidScale systems via the Services provided hereunder ("End Users"), or agents, RapidScale may commence billing as of the date of notice that the Services are available. RapidScale may, upon ten (10) days prior notice, modify the payment terms or require a mutually acceptable form of security (e.g., a deposit) if Customer has repeatedly failed to pay its invoices by the Due Date or if there has been a



material adverse change in its financial condition. Notwithstanding any other provision to the contrary and not more than once per calendar year, RapidScale may increase the charges applicable to any Service provided hereunder in an amount not to exceed the latest annual increase in the Consumer Price Index, specifically, the U.S. Department of Labor, Bureau of Labor Statistics "All Items Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average". Such increase shall be effective upon the date set forth in RapidScale's written notice thereof to Customer. The foregoing shall not limit RapidScale's ability to increase charges as set forth in a Service Schedule; or (ii) during any automatic renewal term.

- b. **Payment.** Unless otherwise provided in your Agreement, invoices are due in full and payable upon presentation, and become past due after the due date ("Due Date") printed on the invoice. In addition to the Service charges, Customer shall also pay all applicable Taxes and any third party charges pre-approved by Customer (e.g., installation, local access, utilities). "Taxes" means any applicable foreign, federal, state, or local taxes and charges assessed or incurred in connection with the Service, including without limitation, all governmental excise, use, sales, value-added, environmental assessments or charges, and occupational taxes and other fees, or similar surcharges and levies, but excluding any taxes based on RapidScale's net income. If you have a bona fide dispute with any of the amounts on the invoice ("Disputed Amount"), you shall pay all amounts not in dispute by the Due Date and provide us with a written request for a billing adjustment, together with all supporting documentation, within 60 days after the Due Date or your right to any billing adjustment shall be waived. If we agree to adjust all or a portion of the Disputed Amount, you will not be obligated to pay a late payment charge on the adjusted amount. If you fail to pay all non-Disputed charges on our invoice by the Due Date, we may impose a late payment charge of 1.5% per month or the maximum rate allowed by law, whichever is less, on the unpaid balance until the amount is paid in full. We may also suspend your services until all delinquent amounts, including late payment charges, are paid in full. An additional charge will apply to each returned check.

5. CUSTOMER OBLIGATIONS.

- a. **Use of Services:** As an express condition of the provision of the Services, you and your End Users agree to comply with RapidScale's Acceptable Use Policies ("AUP"), which is included herein by reference. RapidScale may make reasonable changes to the AUP at any time and such change will be effective upon posting to RapidScale's website or other notice to you. RapidScale may suspend the Services or otherwise restrict access to RapidScale systems without notice if RapidScale learns of an AUP violation that, in its reasonable discretion, is unlawful or is likely to cause loss or liability for RapidScale or any third party. Any such suspension or restriction will be on the most limited basis as RapidScale determines is reasonably practical under the circumstances in order to address the underlying violation. Customer will indemnify, defend, and holds RapidScale and its contractors harmless from any and all third party claims, losses, damages, costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, or liabilities arising from or related to the user or resale of the Service, including, without limitation, any violation of this Section.

- b. **Responsibility for Message Content:** You are solely responsible for all content that you make available on or through our Services. You guarantee that all such content will not infringe on, or contain any content that infringes on, or otherwise violates any copyright, patent or any other right held by a third party and that all such content will not violate any applicable law, rule, regulation or industry standard.
- c. **Automatic Credit Card payments:** Unless otherwise provided in your applicable Agreement, any account with monthly recurring charges ("MRC") of less than one thousand dollars (\$1,000) will be set up for automated payments via credit card authorization form or automated clearing house ("ACH") payment.
 - i. For each transaction, in addition to the charge you have authorized, your credit card issuer and network may assess their customary transaction or handling charge, if any. If a charge is declined or reversed by the credit card issuer or network, you agree to pay us a service charge and to reimburse us for all reasonable costs of collection. Your credit card issuer may also assess its customary charge for such transactions. If you choose to pay by ACH payment, you authorize RapidScale or its designated agent to initiate ACH transfer entries and to credit and/or debit the account identified herein for provision of the Services or any charge associated with your Agreement. This authorization shall remain in effect unless and until RapidScale has received written notification from you that this authorization has been terminated in such time and manner to allow RapidScale to act. You represent and warrant to RapidScale that the person entering into the Agreement on your behalf duly authorized to act on behalf of your behalf as it relates to the Agreement including, but not limited to, this Section.

6. AUTOMATIC RENEWALS; TERMINATIONS; RIGHTS AND REMEDIES.

- a. During the Term or any Renewal Term, your applicable Agreement(s) and any Service Attachments shall remain in effect until terminated as stated in this Section 6. Unless your applicable Agreement provides otherwise, your Agreement will automatically renew for successive Renewal Terms unless you notify us in writing at least sixty (60) days of the then-current Term or Renewal Term or unless we notify you in writing at least sixty (60) days of the then-current Term or Renewal Term that we will not provide a Renewal Term. Any Service Attachments shall be subject to the same automatic renewal and termination notice provisions as are contained in these T&Cs or, if applicable, your applicable Agreement.
- b. Unless otherwise provided in the Agreement, either Party may terminate the Agreement upon thirty (30) days notice if the other party materially breaches the terms and conditions of the Agreement, including, but not limited to, the applicable provisions of these T&Cs and fails to cure the default within the thirty (30) day period. If you terminate the Agreement after our material breach, then you will be responsible only for charges for the period before the date of termination. If, however, we terminate your Agreement as a result of your material breach, or you terminate your Agreement or any Services provided to you for any reason other than our material breach, you shall pay to us a termination charge as follows:

- i. If within the first year of the Term, non-recurring charges for the terminated Services, even if those charges had been initially waived and one hundred percent (100%) of the MRC times the remaining months of the Term.
 - ii. If after the first year of the Term, you will be responsible for fifty percent (50%) of MRC times the remaining months in the Term and any underlying third party costs that RapidScale incurred or will incur to fulfill its obligations under the Agreement .
- c. RapidScale may suspend Service or terminate the Agreement: (a) upon five (5) days notice in the event of any payment default, if such default is not cured within that period or (b) upon notice in the event of any violation of RapidScale's Acceptable Use Policy ("AUP") located on its website at <http://www.rapidscale.net/aup>.
- d. If you elect to terminate your Agreement or any orders for Services before the installation of the Services, you must do so in writing, and you shall pay to RapidScale as a termination charge an amount equal to:
 - i. The non-recurring charges applicable to the Services, even if initially waived, unless those charges have already been paid, and
 - ii. Any third party provider charges or out-of-pocket expenses incurred by RapidScale (e.g., cancellation charges or annual software license fees), and
 - iii. If your Agreement is for a term of one (1) year or less, an amount equal to three (3) times the one (1) month recurring charges, or, if this Agreement is for a term of more than one (1) year, an amount equal to six (6) times the one (1) month recurring charges.
- e. The parties agree that any cancellation fees and early termination charges set forth in the Agreement constitute liquidated damages and are not intended as a penalty and represents represent a fair, reasonable and appropriate estimate of RapidScale's damages. If a particular Service is terminated by Customer without cause or by RapidScale for cause, and RapidScale advises the Customer in writing that in RapidScale's good faith judgment provision of a related Services is impractical or impossible ("Related Service") as a result of such termination, then the Related Service shall be deemed terminated for cause by RapidScale and any applicable termination charges will apply.
- f. **DISCLAIMER OF WARRANTIES.** THE FOLLOWING DISCLAIMERS SHALL NOT LIMIT CUSTOMER'S ABILITY TO SEEK ANY APPLICABLE SLA REMEDIES. THE SERVICES AND ANY RELATED EQUIPMENT, SOFTWARE, AND OTHER MATERIALS PROVIDED BY RAPIDSCALE IN CONNECTION WITH THE SERVICES ARE PROVIDED WITHOUT ANY WARRANTIES OR REPRESENTATIONS OF ANY KIND, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, COMPLETENESS OR ANY RESULTS TO BE ACHIEVED HERE FROM. RAPIDSCALE MAKES NO WARRANTIES OR REPRESENTATIONS CONCERNING THE COMPATIBILITY OF SOFTWARE OR EQUIPMENT OR ANY RESULTS TO BE ACHIEVED THEREFROM OR THAT ANY SERVICE WILL BE FREE FROM LOSS OR LIABILITY ARISING OUT OF ANY THIRD PARTY TECHNOLOGY, ANY THIRD PARTY ACTION SUCH AS



HACKING, OR ANY ACT OR OMISSION OF THE CUSTOMER, INCLUDING FAILURE TO ENCRYPT, AND RAPIDSCALE SHALL HAVE NO RESPONSIBILITY THEREFORE.

- 7. LIMITATION ON LIABILITY.** NEITHER PARTY, NOR ITS AFFILIATES, CONTRACTORS, SUPPLIERS, OR AGENTS, SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, RELIANCE, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION, ANY LOST OR IMPUTED PROFITS OR REVENUES, LOST DATA, DAMAGES TO SOFTWARE OR FIRMWARE, OR COST OF PROCURING OR TRANSITIONING TO SUBSTITUTIVE SERVICES, REGARDLESS OF THE LEGAL THEORY UNDER WHICH SUCH A LIABILITY IS ASSERTED, AND REGARDLESS OF WHETHER A PARTY HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH LIABILITY. THE TOTAL AGGREGATE LIABILITY OF RAPIDSCALE ARISING FROM OR RELATED TO YOUR APPLICABLE AGREEMENT SHALL BE LIMITED TO THE TOTAL NET PAYMENTS PAID BY CUSTOMER TO RAPIDSCALE FOR THE AFFECTED SERVICE WHICH GIVES RISE TO SUCH LIABILITY IN THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE IN WHICH THE CLAIM ARISES.
- 8. CONFIDENTIALITY.** Neither Party shall, without the prior written consent of the other Party, use or disclose the Confidential Information of the other Party during the Term of the Agreement and for two (2) years following the expiration or termination hereof. As used herein, "Confidential Information" shall mean any non-public information owned or duly licensed by a Party relating to your or our respective business activities, financial affairs, technology, marketing or sales plans disclosed related to the Agreement, and received by, the other Party pursuant to the Agreement, including, but is not limited to, the terms and pricing of the Agreement. Confidential Information shall not include information which: (i) is or becomes public knowledge through no breach of the Agreement by the receiving Party, (ii) is received by recipient from a third party not under a duty of confidence, or (iii) is already known or is independently developed by the receiving Party without use of the Confidential Information. Each Party will take all reasonable precautions to protect the other Party's Confidential Information, using at least the same standard of care as it uses to maintain the confidentiality of its own Confidential Information. Notwithstanding the foregoing, a Party may disclose Confidential Information: (i) to any consultants, contractors, and counsel who have a need to know in connection with your Agreement and have executed a reasonably protective non-disclosure agreement with the disclosing Party, or (ii) pursuant to legal process; provided that, the disclosing Party shall, unless legally prohibited, provide the non-disclosing Party with reasonable prior written notice sufficient to permit it an opportunity to contest such disclosure.
- 9. PUBLICITY.** Neither Party shall use, publicize, or issue any press release which includes the name, trademarks, or other propriety identifying symbol of the other Party or its affiliates, without the prior written consent of such other Party.
- 10. DISPUTE RESOLUTION.** Unless stated otherwise in your applicable Agreement, your Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to its principles for resolving conflicts of law. *In the event of litigation*, each party expressly waives its right to have its claims or defenses heard by a jury.



11. FORCE MAJEURE. Neither Party will be held liable for any failure or delay in its performance under your Agreement (other than a failure to comply with payment obligations) due to a Force Majeure Event. "Force Majeure Event" means an unforeseeable event beyond a party's reasonable control, including but not limited to, acts of war; acts of God; earthquake; flood or extreme weather conditions; embargo; riot; sabotage; or terrorist acts. If a Force Majeure Event prevents the provision of Service for a period of thirty (30) days, either Party may terminate the affected Service by providing thirty (30) days written notice to the other Party.

12. ACCESS TO DATA. We backup customer 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 RapidScale environment.

13. NOTICES. All legal notices required to be given hereunder shall be in writing and deemed given if sent to the addressee specific below either (a) by registered or certified U.S. Mail, return receipt requested, postage prepaid, three days after such mailing; or (b) by national overnight courier service, the next business day. All other notices (e.g., notice reminder of non-payment) may be sent via facsimile or email and will be deemed given on the day such notice is delivered. Customer's Service change, disconnect notice, termination notice, notice of default, notice of non-renewal or request for Month to Month Period service must be in writing sent via mail as provided herein to:

Account Cancellations
RapidScale, Inc.
17872 Gillette Avenue, Suite 450
Irvine, CA 92614

14. MAINTENANCE. Customer acknowledges that the Services may be subject to maintenance or repair and agrees to cooperate in a timely manner and provide reasonable access and assistance as necessary to allow such maintenance or repair.

15. WAIVER. Except as otherwise expressly set forth in your Agreement, neither party's failure to insist upon strict performance of any provision of your Agreement shall be construed as a waiver of any of its rights hereunder. Neither the course of conduct between parties nor trade practice shall act to modify any provision of your Agreement.

16. SECURITY. RapidScale shall use reasonable data center security practices consistent with industry standards.

17. GOVERNING LAW AND VENUE. The T&Cs has been accepted by you in the State of California and irrespective of your state of residence or the place where you business are located, you agree that any term, provisions, duty, right, obligations, cause of action, right of action or claim between us shall



be governed by the laws of the State of California, without giving effect to any choice or conflict of law provisions. You agree that the sole and exclusive venue for bringing any action arising under or related to the T&Cs will be in Orange County, California. Each Party agrees to comply with all applicable laws and regulations with respect to their rights and obligations under the T&Cs.

- 18. SEVERABILITY/UNENFORCEABILITY.** If any provision(s) of the T&Cs are found to be invalid, illegal or unenforceable, the continuation in full force and effect of the remainder of them will not be prejudiced, and such provision(s) shall be deemed modified to the extent necessary render such provision(s) enforceable and the rights and obligations of the Parties shall be construed and enforced accordingly, preserving to the fullest permissible extent the intent and agreement of the Parties set out in the Agreement.
- 19. FORCE MAJEURE.** No Party shall be liable for any delay or failure to perform any of the obligations under the Agreement where such delay or failure is caused by circumstances beyond its reasonable control which prevent it from performing the obligations in question. The affected Party(ies) must promptly notify the other Party(ies) of the nature or failure, and provide an estimate of the likely period of delay. The delivery timetable will then be amended accordingly.
- 20. DELAY IN ENFORCEMENT.** We can delay enforcing any of our rights under the Agreement without losing them. Any waiver by us of any provision of the Agreement will not be a waiver of the same or any other provision on any other occasion.
- 21. ASSIGNMENT.** You may not assign or otherwise transfer your rights or obligations (or any portion(s) of them) under the Agreement, or delegate your obligations (or any portion(s) of them) to pay amounts you owe us in relation to your use of the Services without our prior written consent. You also may not assign or delegate any claims, rights of action, causes of actions or claims held by you against us without our prior written consent. Any attempt to assign or delegate will be void and of no effect. We may assign any or all of our rights and obligations (or any portion(s) of them) under the Agreement at any time without your consent. Any person to which we assign the Agreement or any right(s) or obligations under it shall be entitled to all such of our rights or obligations so assigned.
- 22. WAIVER.** The waiver or modification by us of any term or condition hereof shall not void, waive, or modify any other term or condition. The failure by us to insist, in any one or more instances, upon the performance of any term of the Agreement shall not be construed as a waiver or relinquishment of such right to such performance or to future performance of such item. A waiver granted on one occasion shall not constitute a waiver of any future occasion.
- 23. ENTIRE AGREEMENT.** The Agreement (including, but not limited to, all signed and clicked-through agreements, Schedules, Exhibits and Amendments), contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments or understandings related hereto, if any, are hereby superseded.

