

Drake Hosted Hosted Service Agreement

Date last modified: 09/09/2019

IMPORTANT – PLEASE READ CAREFULLY THE FOLLOWING TERMS AND CONDITIONS

This Hosted Service Agreement (the “Agreement”) is a legal agreement between the customer (“Customer”) and Drake Software, LLC (“Provider”). This Agreement governs the Customer’s use of the Service provided. Customer agrees to and accepts the terms and conditions of this Agreement by using the Service.

1. Definitions

“Account Username” means the string of characters chosen by the Customer for the purpose of accessing and managing its account through the website provided by Provider.

“Affiliate” means an entity that, directly or indirectly, controls a party, is controlled by a party, or is under common control with a party.

“Authorized User” means the Customer and its employees, agents or representatives who are designated by the Customer to access the Service in accordance with the terms in this Agreement.

“Customer Data” means any and all files, electronic or otherwise, created by Customer using Hosted Applications or other applications and stored in the Drake Hosted Environment, including but not limited to all files created through Hosted Applications as a result of using the applications, and all files moved, saved, scanned or otherwise placed by the Customer into the Drake Hosted Environment for storage or other business purposes.

“Drake Hosted Environment” means the designated location on Provider’s servers and related hardware where a Customer accesses their Hosted Applications and related Customer Data.

“Hosted Applications” means the applications made available by Provider for use by the Customer in the Drake Hosted Environment.

“Password” or “Passwords” means the secret string of characters used by the Customer in conjunction with an Account Username to access and manage its account and the secret string of characters used by the Customer in conjunction with a Station Username to access the Drake Hosted Environment.

“Permitted Uses” means the Customer’s internal business operations as expressly provided in this Agreement, provided, however, Customer’s use of the Hosted Applications shall be subject to any and all licenses and terms agreed to by Customer for applications that are used in the Drake Hosted Environment.

“Provider Materials” means the Service and any documentation relating to the Service.

“Service” or “Services” means the capabilities and features provided by Provider to the Customer for the purposes of hosting, supporting, updating, maintaining, securing, and/or recovering, as necessary, the Hosted Applications, Customer Data, and the Drake Hosted Environment.

“Station Username” means the unique name assigned to each station which is used to access the Drake Hosted Environment in conjunction with its corresponding Password.

2. Services – Provider agrees to provide Customer with the Services during the Term of this Agreement in accordance with the terms and conditions of this Agreement.
3. License/Access Grant – Provider grants to Customer a non-exclusive, non-transferable, non-subcontractable license to access the Service; provided, however that such license to access the Service is limited to Permitted Uses by Authorized Users only. In addition, the license to access the Service does not transfer or convey any right, title or interest in or to the Service. Neither Customer nor any Authorized User shall rent, lease, lend, sell, sublicense, assign, distribute, publish, or transfer the Service to any third party. Customer will take reasonable precautions to safeguard Customer’s Passwords and keep them confidential. Customer agrees to use the Service only for lawful purposes. Customer is responsible for providing, at its expense, all necessary connections and equipment needed to access the Service. Customer must maintain the confidentiality of the Account Username and associated Station Usernames for the Service and Customer is responsible for all charges incurred under the Account Username, unless otherwise provided in this Agreement.
4. Service Availability – Provider agrees to make the Service available, as measured over the course of each one (1) month period during the Term beginning on the Effective Date, at least ninety-five percent (95%) of the time. “Service Availability” means the availability of the Service, excluding unavailability relating to planned maintenance, unplanned emergency maintenance, Customer’s or an Authorized User’s misuse of the Service, problems with Customer’s or Authorized User’s Internet connectivity, Customer’s or an Authorized User’s failure to meet any minimum hardware or software requirements, or any other events outside Provider’s control.
5. Remedies for Service Availability Failures – Customer’s sole remedy for Provider’s failure to provide Service Availability as set forth in Section 4 is to receive service credits commensurate with the fees paid by Customer for the time in which Provider failed to provide Service Availability for at least 95% of the one (1) month time period.

6. Software Availability and Software Updates - By agreeing to and accepting the terms and conditions of this Agreement, Customer confirms that Customer has read, understood, and agrees to the [Software Availability and Software Update Schedule](#) for Provider's Hosted Applications.
7. Term and Termination – Customer acknowledges that Customer understands and agrees to the terms set forth in this Agreement, and that the Initial Term of this Agreement shall begin on the Effective Date and continue for a period of one (1) month, six (6) months or one (1) year (the “Initial Term”) as chosen by Customer unless earlier terminated by either party. In the event the Agreement is not terminated by either party or the Customer does not request a different Term prior to the end of the Initial Term or a Renewal Term, this Agreement shall automatically renew for the same Term period, i.e., for an additional term of one (1) month, six (6) months or one (1) year, as applicable (each, a “Renewal Term”). The Initial Term and any Renewal Terms shall be referred to herein as the “Term”. Notwithstanding the foregoing, Customer may terminate the Service no later than fourteen (14) days after the Effective Date of the Initial Term and receive a refund of the monthly Service fee; however, Customer shall not receive a refund of the setup fee. If the setup fee is waived, and Customer terminates the Service no later than fourteen (14) days after the Effective Date of the Initial Term, then Provider may withhold an amount equivalent to the waived setup fee from the refunded Service fee.

Either party may terminate this Agreement based upon a material breach by the other party which is not cured after fourteen (14) days written notice. Either party may terminate this Agreement without cause at the end of the Initial Term or a Renewal Term. Provider may terminate this Agreement immediately upon written notice to Customer and retain Customer's Data until payment is received in full upon Customer's (i) delinquent payment, (ii) unauthorized or unlawful use of the Service, or (iii) disclosure of any Provider Confidential Information to a third party. Provider may also terminate this Agreement upon thirty (30) days written notice if Provider, in its sole discretion, determines Customer is not able to utilize the Service in a way that is mutually beneficial to both parties. The rights and obligations set forth in Sections 8, 9, 10, 11, 12, 13, and 14 shall survive the termination of this Agreement by either party for any reason.

8. Fees and Expenses – [Click here](#) to see Provider's Billing and Payment Policy, the terms and conditions of which are incorporated as if set forth herein. Notwithstanding the terms and conditions of Provider's Billing and Payment Policy, Customer shall be liable for all applicable taxes, including without limitation, any applicable state sales taxes. Provider reserves the right to amend its Billing and Payment Policy and the fees for the Services upon written notice to Customer.
9. Ownership – Customer shall retain ownership of its Customer Data; provided, however, Customer hereby grants Provider a license to use Customer Data for the purpose of providing the Services to Customer and to store a copy of the Customer Data for archival purposes. Provider shall retain ownership of its Provider Materials.
10. Confidentiality – As used in this Agreement, "Confidential Information" means non-public, confidential or proprietary information relating to Provider's business or relating

to the business of any Affiliate of the Provider. Confidential Information may include, but is not necessarily limited to: product development information, processes, procedures, inventions, research, business methods, engineering drawings, technologies, specifications, business plans, marketing plans, manufacturing secrets, computer software, and financial information. Notwithstanding the foregoing, information shall not be deemed "Confidential Information" for purposes of this Agreement if such information: (i) currently is generally available to the public, (ii) subsequently becomes generally available to the public through no act or fault of Customer, or (iii) is in Customer's possession prior to disclosure hereunder, as evidenced by Customer's written records.

Customer agrees that Customer will not, at any time: (i) directly or indirectly divulge, disclose, or communicate any Confidential Information to any third party or (ii) use any Confidential Information for any purpose other than the Permitted Uses. Customer agrees to take all necessary precautions, including the establishment of appropriate procedures and disciplines, to safeguard the confidential nature of the Confidential Information. Under no circumstances will Customer at any time decompile, reverse assemble, or reverse engineer any computer software or other information disclosed to Customer hereunder. Customer agrees to be responsible for any and all disclosures and uses of Confidential Information by its Authorized Users.

Customer shall upon the Provider's request promptly deliver to Provider any drawings, specifications, notes, documents, video tapes, photographs, or other materials provided by Provider that contain Confidential Information of Provider, and any copies thereof, which are in Customer's or its Authorized User's possession. Any such materials prepared by Customer or its Authorized Users using Confidential Information of Provider, or derived therefrom, shall be promptly destroyed upon request of Provider, confirmation of which shall be provided in writing. Customer may, however, keep one copy of all materials requested to be returned or destroyed in the files of its legal counsel for the sole purpose of maintaining a record of what Confidential Information was disclosed.

If Customer or its Authorized User becomes legally compelled to disclose any Confidential Information (or any other information that is subject to a nondisclosure restriction hereunder), then Customer shall immediately notify Provider in writing so that Provider or an Affiliate may: (i) seek a protective order or other appropriate remedy or (ii) waive compliance with this Agreement. Failing entry of a protective order or other appropriate remedy or receipt of a waiver of compliance with this Agreement, Customer or its Authorized User shall disclose only such information as Customer or its Authorized User is legally required to disclose by court order and will use Customer's or its Authorized User's best efforts to obtain confidential treatment of such information. Such disclosure shall not constitute a breach of this Agreement if Customer or its Authorized User has complied with the requirements of this Section.

In the event of a breach or a threatened breach of any provision of this Agreement, Provider or an Affiliate shall be entitled to an injunction restraining Customer or any of its Authorized Users from violating that provision, or to an order requiring Customer or any of its Authorized Users to comply with the terms of that provision, or both. Neither

Provider nor any Affiliate shall be required to post a bond or other security in connection with such an injunction or order. Neither the right to injunctive relief nor any other provision of this Agreement shall be construed to prohibit Provider or an Affiliate from pursuing any other remedy available to it for violation of any provision of this Agreement including, but not limited to, the recovery of damages. Customer agrees to pay to Provider or an Affiliate on demand all costs and expenses (including, but not limited to, reasonable attorneys' fees and disbursements) incurred by Provider or an Affiliate in protecting or enforcing any of its rights under this Agreement or in seeking to recover damages for any breach of this Agreement.

11. Privacy Policy and Terms of Use - By using the Services, Customer agrees to the terms and conditions of Provider's Privacy Policy and Terms of Use, which are available on its website(s) and are subject to change. All notice of changes to Provider's Privacy Policy and Terms of Use will be provided by posting revisions on the applicable Provider website. Customer understands that any suspected illegal or fraudulent activity will be reported to the appropriate governmental or law enforcement authorities. Customer acknowledges that Provider retains the right to take whatever steps necessary, as determined in Provider's sole discretion, to comply with applicable laws and regulations, including those relating to data security and privacy.
12. **Indemnification** – Customer shall indemnify, defend and hold harmless Provider, Provider's Affiliates, and their respective directors, officers, employees and agents, from and against any and all claims, liabilities, losses, damages, injuries, demands, actions, causes of action, suits, proceedings, judgments and expenses, including, without limitation, reasonable attorneys' fees, court costs and other legal expenses, brought, alleged or incurred by or awarded to any third party arising from or relating to (i) Customer Data, including without limitation, the infringement of any third party rights, and (ii) any unauthorized or unlawful use of the Services by Customer or any of its Authorized Users.
13. **Limitations of Liability** – PROVIDER'S TOTAL LIABILITY TO CUSTOMER AND ANY OF ITS AUTHORIZED USERS SHALL NOT EXCEED THE FEES PAID TO PROVIDER BY CUSTOMER FOR THE FAILED SERVICE FEATURE DURING THE PERIOD OF FAILURE. IN NO EVENT WILL PROVIDER OR ITS AFFILIATES BE LIABLE TO CUSTOMER, ITS AUTHORIZED USERS OR TO ANY THIRD PARTY FOR (A) ANY CLAIMS ASSERTING OR BASED ON THE USE, INABILITY TO USE, LOSS, INTERRUPTION OR DELAY OF THE SERVICES, LOSS OF USE OF FACILITY OR EQUIPMENT, LOST BUSINESS, REVENUES OR PROFITS, LOSS OF GOODWILL, FAILURE TO ACHIEVE COST SAVINGS, FAILURE OR INCREASED COST OF OPERATIONS, LOSS, DAMAGE OR CORRUPTION OF DATA, LOSS RESULTING FROM SYSTEM OR SERVICE FAILURE, MALFUNCTION, DOWNTIME, SHUTDOWN, SERVICE INCOMPATIBILITY OR PROVISION OF INCORRECT COMPATIBILITY INFORMATION, FAILURE TO ACCURATELY TRANSFER, READ OR TRANSMIT INFORMATION, FAILURE TO UPDATE OR PROVIDE CORRECT INFORMATION OR BREACHES IN SYSTEM SECURITY, OR (B) FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, EXEMPLARY, SPECIAL, PUNITIVE OR ENHANCED

DAMAGES, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ITS SUBJECT MATTER, IN THE CASE OF EACH OF CLAUSE (A) AND CLAUSE (B), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES ARE OTHERWISE FORESEEABLE, REGARDLESS OF THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE) UPON WHICH THE CLAIM IS BASED, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

14. Representations and Warranties – Customer represents and warrants to Provider that:

- (a) it has, and throughout the Term will retain, the full right, power and authority to enter into this Agreement and perform its obligations hereunder;
- (b) it shall not provide any Customer Data that infringes the rights of any third party, including without limitation, patent, trademark and copyright infringement;
- (c) it shall comply with all applicable privacy and security regulations and laws;
- (d) there is currently no pending or threatened litigation arising from or relating to any of the Customer Data;
- (e) it has, and throughout the Term will retain, software, hardware and Internet connections that meet with Provider's minimum system requirements ([click here](#) to see Provider's minimum system requirements);
- (f) the Customer Data shall not include any inappropriate content, including without limitation, unlawful, threatening, libelous, defamatory, obscene, scandalous, inflammatory, pornographic or profane material or any material that could constitute or encourage unlawful conduct, viruses, time bombs, Trojan horses, worms, and cancelbots;
- (g) it shall not permit or enable any non-Authorized User to access the Service or otherwise use any of the Services.

Disclaimer – EXCEPT FOR THE EXPRESS WARRANTIES IN THIS AGREEMENT, THE SERVICES AND PROVIDER MATERIALS ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND. PROVIDER, ITS AFFILIATES, AND THEIR THIRD PARTY SERVICE PROVIDERS, LICENSORS, OR SUPPLIERS (COLLECTIVELY, "SUPPLIERS") HEREBY DISCLAIM ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY SUBJECT MATTER HEREOF, INCLUDING WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE IN TRADE, OR THAT THE SERVICES, PROVIDER MATERIALS OR OTHER WORK PRODUCT WILL BE SECURE,

UNINTERRUPTED, ERROR-FREE OR SUITABLE FOR THE PARTICULAR NEEDS OF CUSTOMER OR ANY AUTHORIZED USER OR THIRD PARTY. WITHOUT LIMITING THE FOREGOING, PROVIDER, ITS AFFILIATES, AND THEIR SUPPLIERS MAKE NO WARRANTY OF ANY KIND THAT THE PROVIDER MATERIALS, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CUSTOMER'S OR OTHER PERSONS' REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEMS, OR OTHER SERVICES, OR BE DEFECT OR ERROR FREE OR THAT DEFECTS WILL BE CORRECTED. NO EMPLOYEE OR AGENT OF PROVIDER IS AUTHORIZED TO MAKE ANY STATEMENT THAT ADDS TO OR AMENDS ANY OF THE WARRANTIES OR LIMITATIONS CONTAINED IN THIS AGREEMENT.

15. Insurance – Provider is not required to carry any insurance for the benefit of Customer, including without limitation, commercial general liability, cyber liability, worker’s compensation, employers’ liability, commercial automobile, and errors and omissions/professional liability insurance.
16. Force Majeure - Provider shall not be liable or responsible to Customer or its Authorized Users, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term hereof, when and to the extent such failure or delay is caused by: acts of God, flood, fire or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Agreement, national or regional emergency, strikes, labor stoppages or slowdowns or other industrial disturbances, any passage of law or governmental order, rule, regulation or direction, or any action taken by a governmental or public authority, including imposing an embargo, export or import restriction, quota or other restriction or prohibition, national or regional shortage of adequate power or telecommunications or transportation facilities.
17. Other Products by Provider - Customer understands that Provider may provide to Customer other products and services other than the Services, including but not limited to tax filing software, on-line databases (OLDB), account management website (EOM), user forums, electronic communication interfaces, tax workflow automation tools, mobile apps, file transfer software, 7216 sample letters and similar tax resources, conversion software, accounting and payroll software, and the like. Provider makes no guarantee as to delivery time, functionality, security, reliability or availability of such products and services. Customer agrees to hold Provider harmless for any failure in providing or delivering these products and services, and Provider shall have no liability or responsibility to Customer for damages of any kind, including special, indirect or consequential damages, arising out of or resulting from such other products or services provided to Customer by Provider. All Provider website content is monitored by Provider, including but not limited to all forums, Facebook, or other sites, and Provider reserves the right to edit, delete, or withdraw access to support and public media websites at its sole discretion. Access to any on-line service is subject to Provider's Terms of Use located on the applicable website.

18. Other Third-Party Products and Services offered by Provider - Licensee understands that Provider may offer, suggest or provide to Licensee other third-party products and services, including but not limited to on-line research, bank products, W-2 import services, investment and financial services, tax due electronic payments, audit protection services, merchant card processing tools, retirement and estate planning services, forms, checks and envelope supplies, and the like. Provider makes no guarantee or representation as to the delivery time, functionality, security, reliability or availability of such products and services. Customer agrees to hold Provider harmless for any failure in providing or delivering these products and services, and Provider shall have no liability or responsibility to Customer for damages of any kind, including special, indirect or consequential damages, arising out of or resulting from such other products or services offered, suggested or provided to Customer by Provider.

19. General Provisions

- (a) Further Assurances - Customer shall, upon the request of Provider, promptly execute such documents and perform such acts as may be necessary to give full effect to the terms of this Agreement.
- (b) Relationship of Parties - The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.
- (c) Notices - All notices, requests, consents, claims, demands, waivers and other communications hereunder (other than routine communications having no legal effect) by Customer to Provider shall be in writing and addressed to Provider as follows (or as otherwise specified by Provider):

Attn: Legal Department
Drake Software
235 East Palmer Street
Franklin, NC 28734

Facsimile: 828-349-5729

Notices sent in accordance with this **Section 17(c)** shall be deemed effectively given: (a) when received, if delivered by hand (with written confirmation of receipt); (b) when received, if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile, in each case with confirmation of transmission, if sent during normal business hours of the recipient, and on the next business day, if sent after normal business hours of the recipient; or (d) on the 3rd day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid.

- (d) Consent to Electronic Communications - By using the Services, Customer consents to receive all communications, notices, agreements, renewals, statements, and disclosures (collectively, "Communications") electronically. Provider may provide Communications to Customer related to the Services, and Customer's use thereof by electronic communication, including by email, facsimile, or by making such Communications available on Provider's websites.
- (e) Entire Agreement - This Agreement, together with Provider's Terms of Use and Privacy Policy, constitutes the sole and entire agreement of the parties and supersedes all understandings, representations, and warranties, both written and oral, with respect to the subject matter hereof.
- (f) Assignment - This Agreement shall not be assigned by either party without the prior written consent of the other party, which consent shall not be unreasonably withheld. This Agreement shall be binding upon and shall inure to the benefit of the parties and their successors and permitted assigns.
- (g) Waiver - Failure to enforce any provisions of this Agreement shall not constitute a waiver of any of the terms and conditions hereof.
- (h) Amendment - This Agreement may be modified only by Provider, at its sole discretion. Customer's continued use of Provider's Services shall be deemed to be Customer's acceptance of and agreement to Provider's modification of this Agreement.
- (i) Severability - If any provision of this Agreement is found by a court of competent jurisdiction to be legally invalid or unenforceable: (i) the validity and enforceability of the remainder of this Agreement shall not be affected, (ii) such provision shall be deemed modified to the minimum extent necessary to make such provision consistent with applicable law, and (iii) such provision shall be valid, enforceable, and enforced in its modified form.
- (j) Governing Law - This Agreement has been entered into and shall be governed, construed, and interpreted pursuant to and in accordance with the laws of the State of North Carolina, without regard to conflicts of law principles and the state court for the county of Macon, and federal courts of the Western District, North Carolina shall have exclusive jurisdiction and shall be the only venues for any formal legal actions. Any controversy or claim arising out of, or relating to, this Agreement, or the making, performance or interpretation thereof, other than a claim by Provider for injunctive or other equitable relief, shall be settled by arbitration in the City of Franklin, County of Macon, State of North Carolina, in accordance with the Rules of the American Arbitration Association then existing. Any judgment on the arbitration award may be entered in any court having jurisdiction over the subject matter of the controversy. Arbitrators shall be persons experienced in software hosting related issues.

- (k) IP Rights - Neither this Agreement nor the disclosure of Confidential Information hereunder shall be deemed, by implication or otherwise, to vest in Customer or any of its Authorized Users any rights in any patents, copyrights, or other property of Provider or any Affiliate.
- (l) Survival - The force and continuing nature of the parties' obligations under this Agreement shall not be affected by the termination of any business relationship between the parties.
- (m) General Data Protection Regulation - Provider does not market the Services to persons residing in the European Economic Area (“EEA”) and the Services are not intended for use inside the EEA. By using the Services, Customer agrees not to collect data from persons residing inside the EEA and understands and agrees that any data or information transferred to Provider will be processed and stored in the United States and subject to United States law.