

VMware Professional Services General Terms & Conditions

1. Definitions.

- a) **"Consulting Services"** means those services provided by VMware to Customer as delineated in this Statement of Work ("SOW").
- b) **"Customer Materials"** means any and all materials or Technology that Customer provides to VMware that are required for VMware to complete the Deliverables. Customer Materials shall not be included in the Deliverables, unless necessary to perform the Consulting Services.
- c) **"Deliverables"** means the work product from the Consulting Services that VMware performs pursuant to this SOW and any Prior Technology incorporated therein.
- d) **"Derivative Work"** means a derivative work within the meaning of the U.S. copyright law.
- e) **"Intellectual Property Rights"** means (by whatever name or term known or designated) copyrights, trade secrets, trademarks, patents, and any other intellectual and industrial property and proprietary rights, including registrations, applications, renewals and extensions of such rights.
- f) **"Prior Technology"** means any and all Technology incorporated into the Deliverables that is developed or otherwise created by or on behalf of VMware or licensed by VMware, and which may be improved or modified in the course of developing the Deliverables.
- g) **"Technology"** means algorithms, approaches, code, concepts, data, designs, developments, documentation, discoveries, expressions, inventions, know how, methodologies, multi-media files, object codes, processes, programs, skills, software, techniques, technology, text, tools, and web pages.

2. Intellectual Property.

- a) **Proprietary Rights.** All Intellectual Property Rights and all software, Prior Technology, and Deliverables developed or provided by VMware are and remain VMware property ("VMware Proprietary Works"). All written reports, analyses and other working papers delivered by VMware to Customer in the performance of VMware's obligations under this SOW ("Document Work Product"), subject to and exclusive of any Intellectual Property Rights embodied therein, belong to Customer. Nothing herein shall preclude VMware from developing, using or marketing services or materials that are similar or related to such Deliverables.
- b) **Customer Furnished Materials.** Any tangible Customer Materials furnished for use by VMware remain Customer property.
- c) **Work Product License.** Upon Customer's payment in full for Deliverables, and to the extent that VMware Proprietary Works are contained in the Deliverables, Customer is licensed to (a) use such VMware Proprietary Works internally, for the purpose for which the Deliverables were provided, on a non-exclusive, non-transferable, without rights to sublicense, royalty-free, worldwide basis, and (b) make, for internal use only, a reasonable number of copies of the original Document Work Product in amounts reasonably necessary for Customer's use. Customer shall not sublicense or otherwise transfer to any third party any VMware Proprietary Works. Other than as specifically provided herein, Customer may not modify, alter, decompile, disassemble, reverse-engineer, or create Derivative Works from the Deliverables.
- d) **Software License.** If Customer is granted a license to use software solely in conjunction with this SOW ("Project License"), such shall consist solely of a non-exclusive, non-transferable, and without rights to sublicense right to use such software only in direct connection with this SOW. The term of the Project License shall start on delivery of the software and expire upon the completion of this SOW.
- e) **VMware License.** Customer hereby grants to VMware a non-exclusive, worldwide, perpetual, personal, royalty-free, non-transferable (except for entities controlling, controlled by, or under common control with VMware) license under Customer's Intellectual Property Rights in the Customer Materials necessary for VMware to use, make, copy, modify, and create Derivative Works of the Customer Materials, for the purpose of developing and testing the Deliverables.

3. Confidentiality.

- a) The term "Confidential Information" means information or materials provided by one party to the other which are in tangible form and labeled "confidential" or the like, or, if disclosed orally, are identified as being confidential at the time of disclosure and, within two (2) weeks thereafter, are summarized, appropriately labeled and provided in tangible form. The following information shall be considered Confidential Information whether or not marked or identified as such: for VMware, its product roadmaps, source code, formulae, processes, methodologies, release dates, feature sets, and strategic business plans, and for Customer, its architecture, customer data, and strategic business plans.
- b) The receiving party shall not: (i) disclose any Confidential Information to any third party, except as otherwise expressly permitted herein; (ii) make any use of Confidential Information except: (a) to exercise its rights and perform its obligations under this SOW;

or (b) in connection with the parties' ongoing business relationship; or (iii) make Confidential Information available to any of its employees or consultants except those that have agreed to obligations of confidentiality at least as restrictive as those set forth herein and have a "need to know" such Confidential Information. The receiving party shall be held to the same standard of care as it applies to its own information and materials of a similar nature, and no less than reasonable care except for source code which shall at all times be kept in the strictest confidence. Without limiting the foregoing, the restrictions on disclosure and use set forth herein shall not restrict or limit the right of the receiving party to (a) independently design, develop, acquire, market, service or otherwise deal in, directly or indirectly, products or services competitive with those of the disclosing party; or (b) assign personnel for any purpose. The receiving party shall protect Confidential Information in the manner provided herein for three (3) years after receipt thereof, unless such obligation ceases earlier pursuant to Section 3(c) below.

c) Confidential Information excludes information that: (i) was in the public domain at the time it was disclosed or has become in the public domain through no fault of the receiving party; (ii) was known to the receiving party, without restriction, at the time of disclosure, as demonstrated by files in existence at the time of disclosure; (iii) is disclosed with the prior written approval of the disclosing party; (iv) was independently developed by the receiving party without any use of Confidential Information of the disclosing party; or (v) becomes known to the receiving party, without restriction, from a source other than the disclosing party.

d) Notwithstanding anything to the contrary herein, neither party shall disclose the terms and conditions of this SOW to any third party, without the prior written consent of the other party. Notwithstanding the foregoing each party may disclose the terms and conditions of this SOW without the prior written consent of the other party: (a) as required by any court, administrative agency, or other governmental body, but only if the receiving party provides prompt written notice thereof to the disclosing party to enable the disclosing party to seek a protective order or otherwise prevent or restrict such disclosure; (b) as otherwise required by law; (c) to legal counsel of the parties; (d) in confidence, to accountants, banks, and financing sources and their advisors; (e) in connection with the enforcement of this SOW or rights under this SOW; or (f) in confidence, in connection with an actual or proposed merger, acquisition, or similar transaction.

e) Notwithstanding the obligations of this Section 3, either party will be free to use for any purpose the general know-how, skills and experience, as retained in the unaided memories of the persons who have had access to the Confidential Information, resulting from access to or work with such Confidential Information, provided that such party (i) has not intentionally memorized any such information for the purpose of misappropriation and (ii) shall maintain the confidentiality of the Confidential Information as provided herein.

4. Warranty and Limitation of Liability.

a) **VMware Warranty.** VMware warrants that the Consulting Services to be performed hereunder will be done in a workmanlike manner and shall conform to standards of the industry. Customer must notify VMware of any failure to so perform within ten (10) days following the commencement of the Acceptance Period (as defined below). VMware's entire liability and Customer's sole remedy for VMware's failure to so perform shall be for VMware to, at its option, (i) use reasonable efforts to correct such failure, and/or (ii) terminate this SOW and refund that portion of any fees received that correspond to such failure to perform.

b) **Customer Warranty.** Customer hereby represents and warrants that it either owns or has the rights to all Customer Materials it provides to VMware necessary to grant the rights and licenses granted by Customer to VMware hereunder. Customer further warrants that it has the ability to meet its payment obligations under this SOW.

c) **Disclaimer of Additional Warranties.** THE EXPRESS WARRANTIES SET FORTH ABOVE ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE WITH RESPECT TO THE CONSULTING SERVICES AND DELIVERABLES, OR AS TO THE RESULTS WHICH MAY BE OBTAINED THEREFROM, AND VMWARE DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. VMWARE WILL NOT BE LIABLE FOR ANY THIRD-PARTY SERVICES OR PRODUCTS IDENTIFIED OR REFERRED TO CUSTOMER BY VMWARE.

d) VMware shall not be liable for any incidental, consequential, exemplary, special or indirect damages (including, but not limited to, loss of profits, revenues, data and/or use), even if advised of the possibility thereof, under this SOW. VMware's total liability under this SOW shall not exceed the fees paid for the Consulting Services and Deliverables provided by VMware under this SOW.

5. Acceptance.

a) Customer will acknowledge receipt and acceptance/rejection of all Consulting Services and Deliverables associated with this SOW within ten (10) business days (not including Federal Holidays) following the (i) completion of each individual milestone or (ii) submission of timesheets for Consulting Services performed as described in the SOW, as is applicable

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to the specific engagement ("Acceptance Period"). Upon the commencement of the Acceptance Period, VMware will, as is applicable, present Customer with (i) a Project Milestone Completion Form, or (ii) timesheets. Customer will execute and return to VMware such Project Milestone Completion Form or timesheets within the Acceptance Period.

b) If Customer reasonably believes that VMware did not complete the Consulting Services and Deliverables in substantial conformance with the scope of work described in this SOW, Customer will notify VMware in writing, with specific reasons delineated, of its rejection of the Consulting Services and Deliverables within the Acceptance Period. VMware will address Customer's issues and then re-present, as is applicable, the Project Milestone Completion Form or timesheets for Customer's execution in accordance with the requirements of this Section 5.

c) If VMware does not receive the signed Project Milestone Completion Form, signed timesheets, or a written notification of the specific reasons for the rejection of the Consulting Services and Deliverables from Customer within the Acceptance Period, the absence of Customer's response will constitute the Customer's affirmative acceptance of the Consulting Services and Deliverables, and a waiver of any Customer right of rejection.

6. Fees and Payment.

a) Payment. VMware will provide the Consulting Services as outlined in this SOW for i) a fixed price or ii) a time and materials price described herein, plus applicable taxes and travel expenses. Invoicing occurs upon Customer acceptance of each milestone or timesheet (as is applicable), or approval of travel expenses, and must be paid by Customer within thirty (30) days of the date of invoice. In the event Customer uses pre-purchased VMware Consulting and Training Credits as means of payment, upon acceptance of Deliverables, timesheets, or travel expenses, the VMware Consulting & Training Credits will be deducted from the Customer's balance. It shall be the Customer's responsibility to ensure that its purchase order ("PO") issued to VMware for the Consulting Services reflects the pricing set forth in this SOW. Once a PO from Customer has been fulfilled by VMware, VMware shall have no liability for any pricing in Customer's PO which is inconsistent with the pricing set forth in this SOW. Customer agrees that POs do not have to be signed to be valid and enforceable. Subject to these General Terms & Conditions, all fees are non-refundable.

b) Taxes. All charges and fees provided for in this SOW are exclusive of any taxes, duties, or similar charges imposed by any government. Customer shall pay or reimburse VMware for all federal, state, dominion, provincial, or local sales, use, personal property, withholding, excise or other taxes, fees, or duties arising out of this SOW or the transactions contemplated by this SOW (other than taxes on the net income of VMware). If Customer is required to pay any withholding tax, charge or levy in respect of any payments due to VMware hereunder, Customer agrees to gross up payments actually made such that VMware shall receive sums due hereunder in full and free of any deduction for any such withholding tax, charge or levy.

c) Late Payments. All amounts that are not paid by Customer as required by this SOW shall be subject to a late charge equal to one and one-half percent (1.5%) per month, or, if less, the maximum amount allowed by applicable law. If payment of any fee is overdue, VMware may also suspend provision of the Consulting Services until such delinquency is corrected.

d) Currency. All charges and fees provided for in this SOW shall be in the currency described in this SOW.

e) Cancellation. A minimum of fifteen (15) business days' written notice is required for rescheduling or canceling this SOW prior to the commencement of the Consulting Services. A full refund less any expenses (e.g., airfare) will be provided if said notice is given. The entire payment is owed if this SOW is canceled with less than said notice.

7. Term and Termination. This SOW will be in full force and effect until (i) Customer's acceptance of the final Deliverable or submission of final timesheet, or (ii) VMware and Customer mutually terminate this SOW in writing. Sections 1, 2, 3, 4, 6, 7, 8, and 9 will survive termination or expiration of this SOW.

8. Non-solicitation. During the term of this SOW, and for a period of one (1) year thereafter, Customer will not solicit or encourage any of VMware's technical or management employees to work elsewhere and Customer will not directly or indirectly hire or retain the services of any of VMware's technical or management employees without the prior written consent of VMware. In the event that Customer violates this provision, Customer will immediately remit to VMware an employment fee equal to fifty (50%) of the employee's starting salary.

9. Miscellaneous.

a) No Assignment. This SOW and any rights or obligations of Customer under it may not be assigned, subcontracted or otherwise transferred by Customer, in whole or in part, whether voluntary or by operation of law, including by way of sale of assets, merger or

consolidation, without the prior written consent of VMware, which consent will not be unreasonably withheld. Subject to the foregoing, this SOW will be binding upon and will inure to the benefit of the parties and their respective successors and assigns.

b) Independent Contractors. The relationship of VMware and Customer established by this SOW is that of independent contractors. Nothing contained herein shall constitute either party the agent of the other party, or otherwise grant either party the authority to bind the other party to any obligation, or constitute the parties as partners or joint venturers and neither party shall hold itself out as being an agent having such authority. Customer shall make no representations or warranties on behalf of VMware with respect to the Consulting Services and/or Deliverables.

c) No Warranties. No employee, agent, representative or affiliate of VMware has authority to bind VMware to any oral representations or warranty concerning the Deliverables. Any written representation or warranty not expressly contained in this SOW will not be enforceable.

d) Governing Law. This SOW will be governed by the laws of the State of California and the United States of America, without regard to conflict of law principles. The parties consent to the exclusive jurisdiction of the state and federal courts of Santa Clara County, California.

e) Equitable Relief. Each party acknowledges and agrees that in the event of a breach of Section 2 or Section 3, the non-breaching party shall be entitled to seek immediate injunctive relief in addition to whatever remedies it might have at law or under these General Terms & Conditions.

f) Force Majeure. Neither party will incur any liability to the other party on account of any loss or damage resulting from any delay or failure to perform all or any part of this SOW if such delay or failure is caused, in whole or in part, by events, occurrences, or causes beyond the control and without negligence of the parties. Such events, occurrences, or causes will include, without limitation, acts of God, strikes, lockouts, riots, acts of war, natural disaster, fire and explosions, or any other events reasonably beyond the control of either party, but the inability to meet financial obligations is expressly excluded.

g) Export Control. The Consulting Services, Deliverables, and any software provided to Customer hereunder are of United States origin and are provided subject to the U.S. Export Administration Regulations. Diversion contrary to U.S. law is prohibited. Without limiting the foregoing, Customer agrees that (1) it is not, and is not acting on behalf of, any person who is a citizen, national, or resident of, or who is controlled by the government of, Cuba, Iran, North Korea, Sudan, or Syria, or any other country to which the United States has prohibited export transactions; (2) it is not, and is not acting on behalf of, any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List; and (3) it will not use the Consulting Services, Deliverables, and software for, and will not permit the Consulting Services, Deliverables, and software to be used for, any purposes prohibited by law, including, without limitation, for any prohibited development, design, manufacture or production of missiles or nuclear, chemical or biological weapons.

h) End User License Agreement. In the event the Consulting Services involve VMware software products licensed to Customer under a separate license agreement, unless otherwise provided herein, the terms set out in such separate license agreement shall apply with respect to each such VMware software product.

i) Acknowledgment. Unless otherwise stated in this SOW, Customer acknowledges that the Consulting Services set forth in this SOW do not include significant production, modification or customization of VMware licensed software.

j) Security Clearance. Customer acknowledges that if any security resource requirements are required for the Consulting Services pursuant to this SOW, Customer will issue the appropriate security specifications and/or DD254 to VMware.

k) Counterparts. This SOW may be executed in counterparts, each of which so executed will be deemed to be an original and such counterparts together will constitute one and the same agreement. This SOW may be executed and delivered by facsimile or in Portable Document Format ("PDF") and the parties agree that such facsimile or PDF execution and delivery shall have the same force and effect as delivery of an original document with original signatures, and that each party may use such facsimile or PDF signatures as evidence of the execution and delivery of this SOW by all parties to the same extent that an original signature could be used.

l) Severability. If any provision in this SOW is found to be illegal, invalid, or unenforceable, the provision will be enforced to the maximum extent possible so as to effect the intent of the parties, and the remaining provisions of this SOW will remain in full force and effect.

m) Notices. Any notice required or permitted under the terms of this SOW or required by law must be in writing and must be (a) delivered in person, (b) sent by first class registered mail, or air mail, as appropriate, or (c) sent by overnight air courier, in each case properly posted and fully prepaid to the appropriate address set forth herein. Either party may

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change its address for notice by notice to the other party given in accordance with this Section. Notices will be considered to have been given at the time of actual delivery in person, five (5) business days after deposit in the mail as set forth above, or two (2) days after delivery to an overnight air courier service. All notices shall be directed to Customer to the address set forth in the SOW, and to VMware as follows: VMware, Inc., 3401 Hillview Ave., Palo Alto CA 94304, Attn: Chief Financial Officer (with a copy sent to the same location to the attention of General Counsel).

n) Entire Agreement. This SOW (including the Exhibits) constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all previous communications, representations, understandings and agreements, either oral or written. This SOW may not be amended except in a written document signed by both parties. No terms, provisions or conditions of any purchase order, acknowledgment or other business form that Customer may issue to VMware in connection with this SOW will have any effect on, or otherwise modify, the rights, duties or obligations of the parties under this SOW, regardless of any failure of VMware to object to such terms, provisions or conditions. VMware hereby rejects any such additional or conflicting terms and conditions on any Customer purchase order, acknowledgement or other business form, unless expressly otherwise agreed to by the parties in writing.