



VMware Cloud Service Offerings

TERMS OF SERVICE

Last updated: 15 May 2021

By using a Service Offering, you agree to be bound by these terms of service (“**Terms of Service**”) and by the Service Offering Documentation, which together constitute the “**Agreement**”. If you do not agree to any portion of the Agreement you must not use the Service Offering. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service and in Section 12. Section references are to the provisions of these Terms of Service.

The Agreement takes effect when you click “I accept” or similar button or check box presented to you as part of the sign-up process or when you first use the Serving Offering, whichever is earlier, and will remain in effect during the relevant Subscription Term or until terminated as specified in the Agreement.

1. THE SERVICE OFFERING.

1.1 You may use the Service Offering only for your own benefit and the benefit of your affiliates. You may not resell or sublicense your entitlement to the Service Offering.

1.2 You must not use the Service Offering (a) in a way prohibited by law or that would cause you or us to be out of compliance with applicable law, (b) to violate the rights of others, (c) to try to gain unauthorized access to, test the vulnerability of, or disrupt the Service Offering or any other service, device, data, account, or network, (d) to distribute spam or malware, (e) in a way that could harm the Service Offering or impair anyone else’s use of it, (f) in a way intended to work around the Service Offering’s technical limitations, recurring fees calculation, or usage limits, or (g) for High Risk Activities.

1.3 You must not upload into the Service Offering any content that: (a) may create a risk of harm or loss or damage to any person or property; (b) may constitute or contribute to a crime or a tort; (c) includes any data that is illegal, unlawful, harmful, pornographic, defamatory, infringing, or invasive of personal privacy or publicity rights; (d) contains any data that you do not have a right to upload into the Service Offering; (e) constitutes information governed by HIPAA unless you have signed a Business Associate Agreement (as defined by HIPAA) with us; or (f) is otherwise prohibited as specified in the Agreement.

1.4 If you are provided access to a Service Offering or to features or functionality of the Service Offering free of charge, for evaluation, trial, proof of concept, or similar purposes (an “Evaluation Service”), you must use the Evaluation Service appropriately in good faith for its intended purpose. Your use of the Evaluation Service is only permitted for 30 days (unless we specify otherwise). Use of the Evaluation Service with production data is at your own risk. Unless we agree, you will not have access to the Evaluation Service or to any data in the Evaluation Service after your authorized use period ends. The Evaluation Service is provided “AS IS” without indemnification, support, service level commitment, or warranty of any kind, express or implied. Our aggregate liability (excluding indirect damages, for which we expressly disclaim all liability) for any claim arising from your use of the Evaluation Service will not exceed \$5,000 USD (or the equivalent in local currency).

2. INTELLECTUAL PROPERTY OWNERSHIP.

2.1 Ownership of Service Offering. As between you and us, we retain all right, title, and interest in and to the Service Offering, including any On-Premises Software, all improvements, enhancements, modifications, and derivative works thereof, and all related Intellectual Property Rights. If you provide any comments or suggestions, we may use that feedback without restriction, and you irrevocably assign to us all right, title, and interest in and to that feedback. Your rights to use the Service Offering are limited to those expressly granted in the Agreement. No other rights are implied with respect to the Service Offering, any On-Premises Software, or any related Intellectual Property Rights.

2.2 Ownership of Your Content. As between you and us, you retain all right, title and interest in and to Your Content and all Intellectual Property Rights in Your Content.

2.3 Notification of Copyright Infringement Under the Digital Millennium Copyright Act (DMCA). If you believe that your copyrighted work has been copied and is accessible on the Service Offering in a way that constitutes



copyright infringement you may send a notice to our copyright agent, providing the following information: (a) a description of the copyrighted work that you claim has been infringed and a description of the infringing activity; (b) the location of the material that you claim is infringing, such as the URL where it is posted; (c) your name, address, telephone number, and email address; (d) a statement by you that you have a good faith belief that the disputed use of the material is not authorized by the copyright owner, its agent, or the law; (e) your statement under penalty of perjury that the information in your notice of infringement concern is accurate, and that you are the copyright owner or are authorized to act on the copyright owner's behalf; and (f) your electronic or physical signature, as the copyright owner or as the person authorized to act on the copyright owner's behalf. Solely for purposes of reporting copyright infringement, contact VMware's copyright agent as follows:

VMware, Inc.
Intellectual Property Counsel
3401 Hillview Avenue
Palo Alto, California 94304
United States of America
Email: copyright@vmware.com
Telephone: +1-877-486-9273

3. SECURITY MEASURES.

3.1 We are responsible for taking and maintaining steps to protect the confidentiality, integrity, and security of the Service Offering. We will implement and maintain appropriate technical and organizational security measures designed to protect against unauthorized access to, or destruction, loss, unavailability or alteration of, Your Content. We will process Your Content in accordance with the Data Processing Addendum. We will not access or disclose Your Content except as necessary to provide the Service Offering, or pursuant to Section 9.5. We will not disclose Your Content to, or permit access to Your Content by, an unauthorized third party. You acknowledge that uploading Your Content to the Service Offering does not constitute a disclosure of Your Content to us. Any breach by us of the Agreement that results in unauthorized access to Your Content is subject to Section 7.

3.2 You are responsible for: (a) ensuring that the Service Offering and its security is appropriate for Your Content and your intended use; (b) taking and maintaining appropriate steps to protect the confidentiality, integrity, and security of Your Content; (c) any use of the Service Offering that occurs under your Login Credentials; (d) Your Content; (e) your Users' compliance with the Agreement; and (f) providing any necessary notices to your Users and obtaining any legally required consents from your Users regarding their use of the Service Offering.

3.3 If you become aware that Your Content or any use by a User violates the Agreement, you must promptly remove or suspend use of that content, or suspend the User's access to the Service Offering. If you believe your account has been compromised, you must notify us as soon as possible by submitting a Severity 1 Service Request. If we reasonably believe a problem with the Service Offering may be attributable to Your Content or to your use of the Service Offering, you must reasonably cooperate with us to resolve the problem.

4. ORDERS, PAYMENT, AND TAXES.

4.1 Orders Generally.

4.1.1 You must (a) set up an authorized account, (b) provide us with all information we need to process your Order and provision the Service Offering for you, and (c) keep your registration information accurate and complete during the term of the Agreement.

4.1.2 You must pay all charges you incur for your use of the Service Offering, which may include a committed amount, charges for add-on features, and charges you incur based on actual usage of the Service Offering. We may bill you directly for any additional charges (which may include metered or "overage" charges), even if you purchase your entitlement to the Service Offering through a VMware channel partner. We may not require a purchase order to invoice you for any charges.

4.1.3 All Orders are subject to the Agreement and are not binding until we accept them. An Order will be deemed accepted when we deliver your Login Credentials to the email address associated with your account. All Orders are non-refundable and non-cancellable except as expressly provided in the Agreement. Any refunds to which you are entitled under the Agreement will be remitted to you or to the applicable VMware channel partner.



4.1.4 If a physical object is shipped in connection with the Service Offering, shipping and delivery terms are Ex Works VMware's regional fulfillment facility (INCOTERMS 2020™) or as we or your VMware channel partner may otherwise specify.

4.1.5 If you pay for a Service Offering through a credit card, you will be subject to any additional terms presented to you by our third-party credit card payment processor, which will be the merchant of record for that transaction.

4.2 Direct Orders. This Section 4.2 applies only to Orders directly with VMware. If you purchase an entitlement to the Service Offering through a VMware channel partner, different terms regarding invoicing, payment, and taxes may apply.

4.2.1 Unless you and we agree otherwise in an Order, (a) charges you incur for using the Service Offering will be governed by the applicable price list at the time of invoicing, and (b) you must pay all undisputed charges no later than 30 days after the date of invoice. If you, in good faith, dispute any charges from VMware, you must provide VMware with written notice of that dispute within 30 days of the date of the applicable invoice. The notice must specify the basis of your dispute. We will negotiate with you in good faith to resolve the dispute as soon as reasonably practicable. We will not suspend or terminate your access to the Service Offering as a result of any unpaid disputed charges while you and we are negotiating in good faith to resolve that dispute.

4.2.2 Service Offering fees are exclusive of Taxes. You must pay or reimburse us for all Taxes arising out of the transactions contemplated by the Agreement. If you are required to withhold any Tax from your payment to us, you must gross up your payment so that we receive all sums due in full and free of any deductions. If you are required to pay any Taxes to a taxing authority, you must also provide documentation to us showing that you paid those Taxes. Your contact information provided for the Service Offering or your payment method will be deemed the place of supply for sales tax, income tax, and VAT purposes.

5. WARRANTIES.

5.1 Limited Warranty: Duration and Remedy. We warrant that, during the Subscription Term, the Service Offering will perform in accordance with the applicable Service Level Agreement, if any, provided that the Service Offering has at all times been used in accordance with the Agreement. If we fail to meet this limited warranty, your sole and exclusive remedy for that failure is as specified in the Service Level Agreement.

5.2 Disclaimer. OTHER THAN THE LIMITED WARRANTY SET FORTH IN SECTION 5.1, TO THE MAXIMUM EXTENT PERMITTED BY LAW, WE, FOR OURSELVES AND ON BEHALF OF OUR SUPPLIERS, DISCLAIM ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE, RELATING TO THE SERVICE OFFERING AND TO ALL MATERIALS OR SERVICES PROVIDED TO YOU UNDER THE AGREEMENT, INCLUDING ANY THIRD-PARTY CONTENT. WE AND OUR SUPPLIERS DO NOT WARRANT THAT THE SERVICE OFFERING WILL BE UNINTERRUPTED OR FREE FROM DEFECTS OR ERRORS, OR THAT THE SERVICE OFFERING WILL MEET (OR IS DESIGNED TO MEET) YOUR BUSINESS REQUIREMENTS.

6. INDEMNIFICATION.

6.1 Indemnification by VMware; Infringement Claims.

6.1.1 We will: (a) defend you against any Infringement Claim; and (b) indemnify you from all fines, damages, and costs finally awarded against you by a court of competent jurisdiction or a government agency, or agreed to in a settlement, with regard to any Infringement Claim.

6.1.2 If the Service Offering becomes or in our opinion is likely to become the subject of an Infringement Claim we will, at our option and expense, either (a) procure the rights necessary for you to keep using the Service Offering, or (b) modify or replace the Service Offering to make it non-infringing without materially reducing its functionality. If (a) or (b) are not commercially feasible, we may terminate your entitlement to the Service Offering and refund any prepaid fees prorated for the remaining portion of the then-current Subscription Term.

6.1.3 We will have no obligation to you with respect to any Infringement Claim based on: (a) combination of the Service Offering with non-VMware products or content, including any of Your Content and/or any Third-Party Content; (b) use of the Service Offering for a purpose or in a manner in violation of the Agreement; (c) any modification to the Service Offering not authorized by us; (d) any claim that relates to open source software or freeware technology or



any derivative or other adaptation thereof that is not part of the Service Offering; or (e) any Service Offering provided on a no-charge basis.

6.1.4 This Section 6.1 states your sole and exclusive remedy and our entire liability for any Infringement Claims.

6.2 Indemnification by You. You will (a) defend us against any Third-Party Claim, and (b) indemnify us from all fines, damages, and other costs finally awarded against us by a court of competent jurisdiction or a government agency, or agreed to in a settlement, with respect to a Third-Party Claim.

6.3 Requirements for Indemnification. The obligations in Sections 6.1 and 6.2 are applicable only if the indemnified party: (a) provides the indemnifying party with notice of any Third-Party Claim or Infringement Claim, as applicable, within a reasonable period after learning of the claim (provided that any delay in providing the notice will relieve the indemnifying party of its indemnification obligations only to the extent that the delay prejudices the indemnifying party); (b) allows the indemnifying party sole control over the defense of the claim; and (c) reasonably cooperates in response to the indemnifying party's requests for assistance with regard to the claim. The indemnifying party will not, without the indemnified party's prior written consent, which will not be unreasonably withheld, conditioned, or delayed, enter into any settlement of any claim that obligates the indemnified party to admit any liability, to pay any unreimbursed amounts to the claimant or, with respect to a Third-Party Claim, that would affect any Service Offering or our business practices or policies.

7. LIMITATION OF LIABILITY.

7.1 Disclaimer. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL WE BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE OF THE SERVICE OFFERING FOR ANY REASON INCLUDING POWER OUTAGES, SYSTEM FAILURES, OR OTHER INTERRUPTIONS (SUBJECT TO OUR OBLIGATIONS UNDER THE APPLICABLE SERVICE LEVEL AGREEMENT), LOSS OF YOUR CONTENT, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. THIS LIMITATION WILL APPLY REGARDLESS OF WHETHER A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF THOSE DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE FOREGOING LIMITATION MAY NOT APPLY.

7.2 Cap on Monetary Liability. OUR LIABILITY FOR ANY CLAIM UNDER THE AGREEMENT WILL NOT EXCEED AN AMOUNT EQUAL TO THE TOTAL FEES PAID OR PAYABLE FOR YOUR USE OF THE PARTICULAR SERVICE OFFERING GIVING RISE TO THE CLAIM IN THE TWELVE (12) MONTHS PRIOR TO THE EVENT GIVING RISE TO THE CLAIM.

7.3 Exclusions. THE LIMITATIONS OF LIABILITY IN SECTIONS 7.1 AND 7.2 WILL NOT APPLY TO (a) VMWARE'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 6.1 OF THESE TERMS OF SERVICE OR (b) ANY LIABILITY WHICH MAY NOT BE EXCLUDED BY LAW.

7.4 Further Limitations.

7.4.1 Our suppliers have no liability of any kind under the Agreement. You may not bring a claim directly against any of them under the Agreement. Our liability with respect to any Third-Party Content used or made available as part of a Service Offering is subject to this Section 7.

7.4.2 Neither party may bring a claim under the Agreement more than eighteen (18) months after the cause of action arises.

8. TERM; SUSPENSION; TERMINATION.

8.1 Term. You have the right to use the Service Offering during the Subscription Term. You are not obligated to use the Service Offering, and you may stop using the Service Offering at any time, but you will remain liable for all fees and charges otherwise due during the Subscription Term, whether or not you use the Service Offering.

8.2 Temporary Suspension. We may suspend your use of any Service Offering if we believe that your use of the Service Offering poses a security risk to the Service Offering or to other users of the Service Offering, or if we suspect fraud or abuse related to the Service Offering. We will give you notice before suspending your use of the Service Offering if permitted by law or unless we reasonably determine that providing notice presents a risk of harm



to the Service Offering, to other users of the Service Offering, or to any person or property, in which case we will notify you as soon as feasible or permitted. We will promptly reinstate your access to the Service Offering once the issue causing the suspension has been resolved.

8.3 Termination.

8.3.1 Either you or we may terminate the Agreement with respect to the applicable Service Offering effective immediately upon written notice to the other party if that party (a) commits a breach of the Agreement and fails to cure within 30 days of notice of the breach, (b) commits a material breach of the Agreement that cannot be cured, or (c) to comply with applicable law. If you terminate the Agreement pursuant to this Section 8.3.1, we will refund any applicable prepaid Service Offering fees prorated as of the effective termination date. If we terminate pursuant to this Section 8.3.1, you will be liable for all fees due with respect to the applicable Service Offering for the remainder of the then-current Subscription Term.

8.3.2 Either you or we may terminate the Agreement effective immediately upon sending the other party notice if that party: (a) becomes insolvent, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; or (b) becomes subject to control of a trustee, receiver, or similar authority, or to any bankruptcy or insolvency proceeding; or (c) terminates or suspends its business.

8.4 Effect of Termination.

8.4.1 Upon termination of your entitlement to the Service Offering for any reason you must stop using the Service Offering. Deletion of any of Your Content remaining in the Service Offering will occur as specified in the applicable Service Description. You are responsible for ensuring that you have necessary copies of all Your Content prior to the effective termination date.

8.4.2 Any provision that, by its nature and context is intended to survive termination of the Agreement, will survive. The Data Processing Addendum (to the extent we continue to process Personal Data, as defined in the Data Processing Addendum, following termination of the Agreement) will also survive any termination of the Agreement.

8.4.3 Except to the extent you are permitted to terminate pursuant to Sections 8.3 or 9.4, or we are permitted to terminate the Agreement pursuant to Section 6.1, termination of your entitlement to the Service Offering will not entitle you to any refunds or credits, and you will be liable for all fees and charges incurred as of the effective termination date.

9. OPERATION OF THE SERVICE OFFERING.

9.1 Support. We will provide support to you for the Service Offering in accordance with the Support Policy. We will not provide support for Your Content to your Users.

9.2 On-Premises Software. If you install any On-Premises Software, VMware grants you a limited, revocable, non-exclusive, non-transferable, non-sublicensable, object code license to use the On-Premises Software and any accompanying documentation during the Subscription Term solely in connection with your use of the Service Offering. You must not, and must not allow any User or third party to: (a) except to the extent permitted by applicable mandatory law, modify, translate, enhance, or create derivative works from the On-Premises Software, or reverse engineer, decompile, or otherwise attempt to derive source code from the On-Premises Software; (b) remove any copyright or other proprietary notices on or in any copies of the On-Premises Software; or (c) violate or circumvent any technological restrictions in the On-Premises Software. The provisions in this Section 9.2 supersede any terms that may be presented to you when you install the On-Premises Software.

9.3 Open Source Software.

9.3.1 The Service Offering may use open source software, which is not considered Third-Party Content. That open source software is made available under the applicable open source licenses, found [here](#). You can obtain a copy of these licenses and any source code (and modifications) that we are required to make available under these licenses (“**Source Files**”) [here](#) or by sending a written request, with your name and address, to: VMware, Inc., Attention: General Counsel, 3401 Hillview Avenue, Palo Alto, CA 94304, United States of America. All requests must clearly specify: “Open Source Files Request”. This offer to obtain a copy of the Source Files is valid for three years from the date you last used that open source software or interacted with the open source software when using the Service Offering.



9.3.2 All provisions in these Terms of Service applicable to your use of the Service Offering govern your use of the open source software that is part of the Service Offering, and control as between you and VMware over any conflicting terms set forth in any open source software license otherwise applicable to that open source software.

9.4 Modifications; End of Availability.

9.4.1 We may from time to time make commercially reasonable modifications to the Service Offering and/or any part of the Service Offering Documentation. Any changes will become effective on the date published or as we may notify you. We may also elect to cease providing a Service Offering, in which case we will provide notice pursuant to applicable VMware policies.

9.4.2 If we deprecate any material feature or functionality of a Service Offering or make a change that has a material, detrimental impact on your use of the Service Offering, we will notify you prior to the effective date of that change. If you elect to terminate your entitlement to the Service Offering because of the material, detrimental change, you must notify us no later than 30 days after our notice date. Your notice must state the effective termination date, which must not be more than 90 days after the date of your notice, unless you and we agree to a longer period.

9.4.3. You will be responsible for all fees incurred prior to the effective termination date or end of availability. We will refund any prepaid fees prorated as of the effective termination date, as your sole and exclusive remedy under this Section 9.4.

9.5 Required Disclosures. If we are required by a subpoena, court order, agency action, or any other legal or regulatory requirement to disclose any of Your Content (a “demand”), unless legally prohibited from doing so, we will (i) provide you with notice and a copy of the demand as soon as practicable, (ii) inform the relevant government authority that we are a service provider acting on your behalf and all requests for access to Your Content should be directed in writing to the contact person you identify to us (or if no contact is timely provided, we will direct the relevant governmental authority generally to your legal department), and (iii) only provide access to Your Content with your authorization. If you request, we will, at your expense, take reasonable steps to contest any demand. In the event VMware is legally prohibited from notifying you, VMware will evaluate the demand for disclosure to determine whether it is legally valid and binding, and will challenge the demand unless VMware reasonably believes the demand complies with applicable law. We will limit the scope of any disclosure to only the information we are required to disclose and will disclose the information in accordance with applicable law.

10. CONFIDENTIAL INFORMATION.

10.1 Protection. Either party (the “recipient”) may use Confidential Information of the other party (the “discloser”) disclosed to it in connection with the Agreement solely to exercise its rights and perform its obligations under the Agreement or as otherwise permitted by the Agreement. You and we will each use reasonable care to protect that Confidential Information in the same manner as we each protect our own Confidential Information of a similar nature, but with no less than reasonable care. The recipient may disclose the discloser’s Confidential Information only to the recipient’s employees or third parties who have a need to know the Confidential Information for purposes of the Agreement, and who are under a duty of confidentiality no less restrictive than as specified in this Section 10. Either party may disclose the other party’s Confidential Information in response to a demand in accordance with the procedures set forth in Section 9.5. Upon the discloser’s written request, or upon termination of your entitlement to the Service Offering, the recipient will promptly return or destroy (and upon request certify such destruction) any of the discloser’s Confidential Information in its possession or under its control (other than information that must be retained pursuant to applicable law.)

10.2 Exceptions. The recipient’s obligations under Section 10.1 will terminate if the recipient can show by written records that the information: (a) was, at the time of disclosure by the discloser, already rightfully known to the recipient without any obligation of confidentiality; (b) was disclosed to the recipient by a third party who had the right to make the disclosure without any confidentiality restrictions; (c) at the time of disclosure is, or through no fault of the recipient has become, generally available to the public; or (d) was independently developed by the recipient without access to or use of the discloser’s Confidential Information.

10.3 Injunctive Relief. Nothing in the Agreement limits a party’s ability to seek equitable relief for breaches of this Section 10.



11. GENERAL.

11.1 Assignment. You may not assign or transfer your entitlement to the Service Offering, or the Agreement, in whole or in part, by operation of law or otherwise, without our prior written consent. Any attempted assignment or transfer without our consent will be void and will be a breach of the Agreement. Subject to these limitations, the Agreement will bind and inure to the benefit of the parties and their respective successors and assigns.

11.2 Notices. We will give you notice: (a) by email to the email address associated with your account, if you have subscribed to this method of receiving notices, or (b) via first class mail, postage prepaid, or by recognized commercial courier to the physical address you have provided to us, or (c) by posting on either the Service Offering portal or the VMware customer portal. You must direct legal notices or other correspondence to VMware, Inc., 3401 Hillview Avenue, Palo Alto, California 94304, United States of America, Attention: Legal Department.

11.3 Waiver. Waiver of a breach of any provision of the Agreement will not constitute a waiver of any later breach of that provision, or waiver of a breach of any other provision.

11.4 Severability. If any provision of the Agreement is held to be invalid or unenforceable, the remaining provisions of the Agreement will remain in force to the extent feasible.

11.5 Compliance with Laws. Each party must each comply with all laws applicable to the actions contemplated by the Agreement.

11.6 Export Control. You acknowledge that the Service Offering is subject to the U.S. Export Administration Regulations (including “deemed export” and “deemed re-export” regulations), and may be subject to the export control laws of any other applicable country. You represent and warrant that: (a) you, and any User, are not, and are not acting on behalf of, (i) any person who is a citizen, national, or resident of, or who is controlled by, the government of any country to which the United States has prohibited export transactions; or (ii) 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, or any similar designated persons list published for the jurisdiction in which the applicable data center is located; (b) you, and any User, will not permit the Service Offering to be used for any purposes prohibited by law, including any prohibited development, design, manufacture, or production of missiles or nuclear, chemical, or biological weapons; (c) Your Content will not be classified or listed on the United States Munitions list or similar list published for the jurisdiction in which the applicable data center is located, or contain defense articles, defense services, or ITAR-related data; (d) Your Content will not require an export license or is restricted under applicable export control laws from export to any country where VMware or VMware’s service providers maintain facilities or personnel; and (e) you, and any User, are not subject, either directly or indirectly, to any order issued by any agency of the United States government revoking or denying, in whole or in part, your United States export privileges. You must notify VMware promptly if you or any User becomes subject to any order of that type. For purposes of sales to government entities in the United States, any Service Offering and the accompanying Service Offering Documentation are deemed to be “commercial computer software” and “commercial computer software documentation”, respectively, pursuant to DFARS Section 227.7202 and FAR Section 12.212(b), as applicable. Any use, modification, reproduction, release, performing, displaying, or disclosure of any Service Offering or the Service Offering Documentation, by or for the U.S. Government will be governed solely by the terms and conditions of the Agreement, in conjunction with statutes, regulations, and the terms of the GSA Schedule, and in accordance with the provisions of Section 11.13.

11.7 Force Majeure. Neither party will be liable for any delay or failure to perform its obligations under the Agreement, except for your payment obligations, due to any cause beyond the party’s reasonable control, which may include labor disputes or other industrial disturbances, systemic electrical, telecommunications or other utility failures, earthquakes, storms or other acts of nature, global pandemic, embargoes, riots, acts or orders of government, acts of terrorism, or war.

11.8 Construction. The section headings in these Terms of Service are for convenience and are not for use in interpreting these Terms of Service. As used in these Terms of Service, the word “including” means “including but not limited to”.

11.9 Language. The Agreement is in English, and the English language version governs any conflict with a translation into any other language.

11.10 Governing Law. If your billing address is in the United States, the Agreement is governed by the laws of the State of California and the federal laws of the United States. If your billing address is outside the United States,



the Agreement is governed by the laws of Ireland. Conflict of law rules are expressly disclaimed. The U.N. Convention on Contracts for the International Sale of Goods does not apply.

11.11 Third Party Rights. Other than as expressly provided in the Agreement, the Agreement does not create any rights for any person who is not a party to it, and only persons who are parties to the Agreement may enforce any of its terms or rely on any exclusion or limitation contained in the Agreement.

11.12 Independent Parties. We and you are independent contracting parties, and the Agreement will not be construed to create a partnership, joint venture, agency, or employment relationship between us. Neither you nor VMware, nor any of our respective affiliates, officers, directors, or employees, is an agent of the other for any purpose, nor has the authority to bind the other.

11.13 Order of Precedence. The terms of the Agreement will supersede any conflicting or additional terms and conditions of any purchase order or other purchasing-related document issued by you relating to any Order for the Service Offering. If there is a conflict between these Terms of Service and the Service Offering Documentation, then the Service Offering Documentation will control.

11.14 Entire Agreement. The Agreement is the entire agreement between you and VMware regarding its subject matter. The Agreement supersedes all prior or contemporaneous communications, understandings and agreements, whether written or oral, between you and VMware regarding its subject matter.

12. DEFINITIONS.

“Account Information” means information about you that you provide to us in connection with creation or administration of your account, including names, usernames, phone numbers, email addresses, and billing information associated with your account.

“Confidential Information” means your Login Credentials, and any non-public technical, business, or other information or materials disclosed by either party to the other party regarding the Agreement or the Service Offering, that are in tangible form and labeled “confidential” or the like, or are provided under circumstances reasonably indicating confidentiality.

“Data Processing Addendum” means the then-current version of the VMware Data Processing Addendum, found [here](#)

“High Risk Activities” means workloads or applications used to control or operate activities with a likelihood of injury or death, which may include controlling aircraft or other modes of human mass transportation, nuclear or chemical facilities, life support systems, implantable medical equipment, motor vehicles, weaponry systems, or any similar scenario where failure could lead to personal injury, death, or environmental damage.

“HIPAA” means the United States Health Insurance Portability and Accountability Act of 1996, as amended and supplemented, and the regulations issued pursuant to that Act.

“Infringement Claim” means any claim by a third party that the Service Offering infringes any patent, trademark, or copyright of that third party, or misappropriates a trade secret of that third party (but only to the extent that the misappropriation is not a result of your actions), under the laws of: (a) the United States, (b) Canada, (c) European Economic Area member states, (d) the United Kingdom, (e) Australia, (f) New Zealand, (g) Japan, or (h) the People’s Republic of China, to the extent that your instance of the Service Offering is provisioned in a data center located in the applicable country (e.g., the laws of Japan would control regarding an Infringement Claim based on a Service Offering instance provisioned in a data center located in Japan).

“Intellectual Property Rights” means all worldwide intellectual property rights, including copyrights, trademarks, service marks, trade secrets, patents, patent applications, moral rights, and all other proprietary rights, whether registered or unregistered.

“Login Credentials” means any passwords, authentication keys, or security credentials that enable your access to and management of the Service Offering.

“On-Premises Software” means the VMware software included with the Service Offering (if any) which is installed in a customer’s on-premises environment and is necessary to use or access the Service Offering. It does not include any VMware Software.



“**Order**” means the ordering document that evidences your purchase of an entitlement to the Service Offering. If you use the Service Offering on an on-demand basis, “Order” means the applicable VMware web page(s) describing the Service Offering.

“**Party**” means either you or VMware, and “**parties**” refers collectively to both you and VMware.

“**Service Description**” means the then-current version of the Service Description for the particular Service Offering, found [here](#)

“**Service Level Agreement**” means the then-current version of the Service Level Agreement for the particular Service Offering, found [here](#). Certain Service Offerings may not have a Service Level Agreement.

“**Service Offering**” means the VMware cloud service offering specified in your Order, and any Evaluation Service.

“**Service Offering Documentation**” means: (a) the VMware Data Processing Addendum, which is applicable to all Service Offerings, (b) the specific Service Description, (c) the Service Level Agreement (if any) for the Service Offering, and (d) the Support Policy.

“**Subscription Term**” means the initial term of your authorized use of the Service Offering, as set forth in the applicable Order, together with any renewal terms (if applicable). The initial term begins on the earlier of (a) the date on which you start using the Service Offering or (b) the date you complete the registration process; or as otherwise specified in the Order or in the applicable Service Description. For any Service Offering you use on an on-demand basis, “Subscription Term” means the period during which you are using the Service Offering, for which you will be billed, as specified in the applicable Service Description.

“**Support Policy**” means the then-current version of the VMware cloud service offering support policies found [here](#)

“**Taxes**” or “**Tax**” means any sales, VAT (value-added tax), GST (goods and services tax), use, gross receipts, business and occupation, and other taxes (other than taxes on our income), export and import fees, customs duties, and similar charges imposed by any government or other authority.

“**Third-Party Claim**” means any third-party claim or demand arising from or relating to (a) Your Content, or (b) your use of any Service Offering, including an Evaluation Service, in violation of the Agreement.

“**Third-Party Content**” means content (including open source software) provided by a third party, that interoperates with the Service Offering, but that is not part of the Service Offering. Third-Party Content is used at your option, and is subject to the third-party terms accompanying the Third-Party Content. Third-Party Content is not licensed by VMware. VMware and its suppliers may provide links to Third-Party Content through the Service Offering, a marketplace, or otherwise. As an example, Third-Party Content may include an application that is listed on a marketplace or in a catalog.

“**User**” means any person who is authorized to access or use the Service Offering or Your Content directly under your Login Credentials, and may include your employees, contractors, service providers, and affiliates.

“**You**” means you individually or the entity that you represent (and, as applicable, your Users). If you are entering into the Agreement for an entity, you represent that you have the authority to bind that entity.

“**Your Content**” means content uploaded by you or any User into the Service Offering for processing, storage, or hosting, but does not include (a) Third-Party Content, or (b) Account Information. For purposes of this definition, “content” means any data, including all text, sound, video, or image files, and software (including machine images).

“**VMware**”, “**we**”, or “**us**” means VMware, Inc., a Delaware corporation, if the billing address for your Order is in the United States, or VMware International Unlimited Company, a company organized and existing under the laws of Ireland, if the billing address for your Order is outside the United States.

“**VMware Software**” means the software products listed in our commercial price list.

13. TERMS APPLICABLE TO UNITED STATES FEDERAL, STATE, AND LOCAL GOVERNMENT CUSTOMERS. If you are a U.S. Federal User or a U.S. state or local government customer, the following terms and conditions supersede or modify the referenced provisions of these Terms of Service.

13.1 Replace the preamble with the following:

“If you are an executive agency or a juridical body of the U.S. Government or a state or local government agency, then, in order to be applicable, these terms of service between you and VMware (“**Terms of**



Service) must be incorporated into any Order for a Service Offering. These Terms of Service incorporate by reference the applicable Service Description, Data Processing Addendum, Support Policy, and Service Level Agreement, all of which together constitute the **“Agreement”**. The incorporation of these additional documents does not diminish your rights under these Terms of Service. If you do not agree to these Terms of Service or to any other portion of the Agreement, or if this Agreement is not incorporated into the Order, you must not use the Service Offering. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service and in Section 12. Section references are to the provisions of these Terms of Service.

“The Agreement takes effect when you click “I accept” or similar button or check box presented to you as part of the sign-up process or when you first use the Service Offering, whichever is earlier, and will be in effect until the earlier of (1) the end of the term specified in the Order or (2) the date on which the Agreement is terminated as permitted in the Agreement.”

13.2 Add the following at the end of Section 1.2:

“We may ask you to act within a reasonable time to correct a violation, and if you fail to comply with our request, we may suspend your account pursuant to Section 8.2.”

13.3 Replace Section 4.1 with the following:

“All Orders are subject to the terms of the Agreement, except as required by applicable law or, if applicable, the GSA Schedule’s Order of Precedence clause, and are not binding until accepted by VMware. We are not required to provide any Service Offering to you until you provide to us all information, we require for processing your Order and provisioning the Service Offering for you. Your Order will be deemed accepted when we provide your Login Credentials.”

13.4 Add the following to the end of Section 4.2.2:

“This Section 4.2.2 does not apply to you to the extent you are exempt from any Taxes. If you are a state or a local government entity you shall, upon issuing an Order for a Service Offering, provide documentation reasonably acceptable to VMware evidencing your tax-exempt status.”

13.5 Replace Section 5.2 with the following:

“5.2 Disclaimer. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, WE, FOR OURSELVES AND ON BEHALF OF OUR AFFILIATES AND SUPPLIERS, EXPRESSLY DISCLAIM ALL WARRANTIES RELATING TO THE SERVICE OFFERING OR TO ANY MATERIALS OR SERVICES PROVIDED TO YOU UNDER THE AGREEMENT, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY WARRANTIES OF TITLE AND NON-INFRINGEMENT, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE. WE AND OUR AFFILIATES AND SUPPLIERS DO NOT WARRANT THAT THE SERVICE OFFERING WILL BE UNINTERRUPTED OR FREE FROM DEFECTS, OR THAT THE SERVICE OFFERING WILL MEET (OR IS DESIGNED TO MEET) YOUR BUSINESS REQUIREMENTS. WE DO NOT COMMIT TO FIXING ALL ERRORS.”

13.6 Replace Section 6.1.1 with the following:

“6.1.1 Subject to the remainder of this Section 6.1 and to the provisions of 28 U.S.C. 516 if you are a federal government entity, or the applicable state statute governing control of litigation if you are a state or local government entity, we will (a) defend you against an Infringement Claim, and (b) indemnify you from costs and damages finally awarded against you by a court of competent jurisdiction or a government agency or agreed to by us in settlement of the claim. You will: (i) provide us with notice of any Infringement Claim within a reasonable period after learning of the claim; (ii) allow us the opportunity to participate in the claim’s defense and settlement as provided in applicable laws, rules or regulations; and (iii) reasonably cooperate in response to our requests for assistance. You must make every effort to permit us to participate fully in the defense or settlement of any Infringement Claim; however, we acknowledge that such participation will be under the control of the U.S. Department of Justice if you are a federal government entity, or may be under the control of the applicable state attorney general’s office if you are a state or local government entity.”

13.7 Replace Section 6.1.4 with the following:

“To the extent permitted by law, this Section 6.1.4 states your exclusive remedy for any Infringement Claims.”



- 13.8** Modify Section 6.2 by adding the following language to the end of the section:
“Notwithstanding anything to the contrary in this Section 6.2, the maximum amount of all fees and damages paid in connection with your indemnification of VMware shall not exceed the amount of appropriated funds available at the time payment must be made.”
- 13.9** Add the following to the end of Section 7.2:
“THIS CLAUSE SHALL NOT IMPAIR THE U.S. GOVERNMENT’S RIGHT TO RECOVER FOR FRAUD OR CRIMES ARISING OUT OF THE AGREEMENT AS PERMITTED UNDER ANY APPLICABLE FEDERAL FRAUD STATUTE, INCLUDING THE FALSE CLAIMS ACT (31 U.S.C. 3729-3733).”
- 13.10** Replace Sections 8.3.1 and 8.3.2 with the following:
8.3.1 You may terminate the Agreement effective immediately upon written notice to VMware if we (a) commit a breach of the Agreement and fail to cure within 30 days of notice of the breach, or (b) commit a material breach of the Agreement that cannot be cured, or (c) terminate or suspend our business.
8.3.2 You may terminate the Agreement for your sole convenience in accordance with FAR 52.212-4(l) or GSAR 552.212-4(l) if either clause is applicable to the relevant Order. You may terminate the Agreement in accordance with FAR 52.212-4(m) or GSAR 552.212-4(m) if either clause is applicable to the relevant Order in the event of our default under the Agreement.”
- 8.3.3** Subject to and to the extent not prohibited by 41 U.S.C. chapter 71 (Contract Disputes) and FAR 52.233-1 (Disputes), we may terminate the Agreement if it is determined that you failed to comply with the terms of the Agreement.”
- 13.11** Replace the first sentence of Section 8.4.1 with the following:
“Upon expiration of the Agreement, or in the event of termination of the Agreement in accordance with 41 U.S.C. chapter 71 (Contract Disputes) and FAR 52.233-1 (Disputes): (a) all rights granted to you under the Agreement, including your ability to use the Service Offering, will be terminated; and (b) you must promptly discontinue your use of the Service Offering and delete or destroy any VMware or our licensors’ Confidential Information in your possession.”
- 13.12** Add the following at the beginning of the first sentence of Section 9.4.1:
“Subject to and to the extent not prohibited by 41 U.S.C. chapter 71 (Contract Disputes) and FAR 52.233-1 (Disputes) or applicable state law prohibiting a contractor from suspending performance of a contract, ...”
- 13.13** Replace Section 11.1 with the following:
“Except to the extent transfer may not legally be restricted, you must not assign the Agreement, any Order, or any right or obligation under the Agreement, or delegate any performance, without our prior written consent, which consent will not be unreasonably withheld. We may assign our right to receive payment in accordance with the Assignment of Claims Act (31 U.S.C. 3727) and FAR 52.212-4(b), and we may assign the Agreement to the extent not prohibited by the Anti-Assignment Act (41 U.S.C. 15). Subject to the requirements of FAR 42.12 (Novation and Change-of-Name Agreements), you must recognize our successor in interest following a transfer of our assets or a change in our name. Any attempted assignment or transfer in violation of the foregoing will be void. Subject to the foregoing, the Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns.”
- 13.14** Replace Section 11.10 with the following:
“If you are a federal government entity, the Agreement is governed by the applicable federal laws of the United States. If the federal laws of the United States are not dispositive, then to the extent permitted by federal law, the Agreement will be governed by the laws of the State of California, excluding its conflict of law principles. If you are a state or local government entity, the Agreement is governed by the laws of your state, excluding its conflict of laws principles. The Agreement does not affect statutory rights that cannot be waived or changed by contract.”
- 13.15** Add the following to the end of Section 11.11:
“Notwithstanding the foregoing, for any Orders placed with a VMware channel partner, the partner may, at our request, bring a claim against you on our behalf to enforce the terms of the Agreement.”



13.16 Replace Section 11.13 with the following:

“Your use of the Service Offering is subject to the Agreement to the extent that all such terms and conditions are consistent with federal law and regulations that are applicable, mandatory, and controlling. To the extent terms and conditions of the Agreement are inconsistent with federal law and regulations that are applicable, mandatory, and controlling (see FAR 12.212(a)), they are deemed deleted and unenforceable as applied to any Orders.”