



## VMware Cloud Service Offerings

### TERMS OF SERVICE

*Last updated: 19 November 2018*

By using a Service Offering, you agree to be bound by these terms of service between you and VMware (“**Terms of Service**”), and by the Service Offering Documentation, which together constitute the “**Agreement**”. If you do not agree to these Terms of Service or to any other portion of the Agreement you must not use the Service Offering. “**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. “**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 Limited, a company organized and existing under the laws of Ireland, if the billing address for your Order is outside the United States. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service and in Section 14 (“Definitions”). Section references in this document 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 Generally.** We may deliver the Service Offering with the assistance of our affiliates and suppliers. We will remain responsible to you for delivery of the Service Offering.

#### 1.2 Use of the Service Offering.

**1.2.1** You may use the Service Offering only (a) during the Subscription Term, (b) for your own benefit, and (c) in accordance with the Agreement. To use the Service Offering you must register and set up an authorized account with Login Credentials. You must keep your registration information accurate and complete during the term of the Agreement.

**1.2.2** You are responsible for (i) any use of the Service Offering that occurs under your Login Credentials, (ii) Your Content, and (iii) your Users’ compliance with the Agreement. If you become aware of any User’s or End User’s violation of the Agreement you must promptly suspend that User’s or End User’s access to the Service Offering. If you become aware that any of Your Content, or any Third-Party Content, violates Section 3.1 (“General Restrictions”) or Section 3.2 (“Content Restrictions”), you must promptly remove that Content or suspend use of that Third-Party Content. If you believe your account has been compromised, including any unauthorized access to or use or disclosure of any account information, passwords, user names, or Login Credentials, you must notify us as soon as possible by submitting a Severity 1 Service Request (see the applicable Support Policy).

**1.2.3** You may receive software from us, incidental to your use of the Service Offering, which must be installed in your on-premises environment to enable you to use the Service Offering. You may use that software only (a) in connection with your use of the Service Offering, (b) for the Subscription Term, and (c) in accordance with the Agreement. If that software is subject to an accompanying license agreement, you must comply with the terms of that license. If that software does not have an accompanying license agreement, then VMware’s standard end user license agreement (found [here](#)) applies.

**1.2.4** 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 cooperate with us to identify the source of the problem and to resolve the problem.



**1.3 Monitoring.** We monitor and collect configuration, performance, and usage data relating to your use of the Service Offering: (a) to facilitate delivery of the Service Offering (such as (i) tracking entitlements, (ii) providing support, (iii) monitoring the performance, integrity, and stability of the Service Offering's infrastructure, and (iv) preventing or addressing service or technical issues); and (b) to improve our products and services, and your experience. You must not interfere with that monitoring. We will not access Your Content except as necessary to provide the Service Offering, or pursuant to Section 1.9 ("Required Disclosures").

**1.4 Third-Party Content.** You may use Third-Party Content, at your option. If you choose to use Third-Party Content, you are responsible for complying with any terms that are presented to you when you access that Third-Party Content, including any separate fees or charges imposed by the provider of that Third-Party Content. Third-Party Content is available "AS IS" without indemnification, support (unless otherwise specified), or warranty or condition of any kind. We may suspend or terminate provision and hosting of any Third-Party Content at any time, and that suspension or termination will not be deemed a material, detrimental change.

**1.5 Evaluation Use.** If you use any Evaluation Service, the terms of this Section 1.5 govern that use, and control over any conflicting provision of these Terms of Service. The term "Service Offering" includes an Evaluation Service in all provisions of these Terms of Service that are not in conflict with the provisions of this Section 1.5.

**1.5.1** You may use an Evaluation Service only (a) for internal testing and evaluation purposes, and (b) for a period of 30 days (unless we specify otherwise) beginning on the date we provide you Login Credentials for or access to the Evaluation Service. You will not have access to the Evaluation Service or to any data or Content in the Evaluation Service after your authorized use period ends.

**1.5.2** Use of an Evaluation Service may be subject to additional terms from a third-party service provider.

**1.5.3** You may use the Service Offering Documentation provided with an Evaluation Service solely in support of your authorized use of the Evaluation Service.

**1.5.4** We will provide the Evaluation Service: (a) free of charge; (b) without support; (c) "AS IS"; and (d) without indemnification, warranty, or condition of any kind. No service level commitment will apply to the Evaluation Service.

**1.5.5** The Data Processing Addendum does not apply to your use of an Evaluation Service or feature within an Evaluation Service that is not generally available to our customers.

**1.5.6** You must not put production data or data regulated by law or regulation into an Evaluation Service. If you put that data into an Evaluation Service, you do so at your own risk and we will not be responsible for the consequences of that use.

**1.5.7** Certain features or functionality of a Service Offering may not be available in an Evaluation Service. Providing any Evaluation Service, or any feature or functionality in an Evaluation Service, does not constitute our commitment to offer the Evaluation Service or that feature or functionality on a generally available basis.

**1.5.8** We may modify or terminate an Evaluation Service at any time, and any modification or termination will not be deemed a material, detrimental change.

**1.5.9** The aggregate liability (excluding indirect damages, for which we expressly disclaim all liability) of VMware, and its affiliates and suppliers, for any claim arising from your use of an Evaluation Service will not exceed \$5,000 USD (or the equivalent in local currency).

## **1.6 Open Source Software.**

**1.6.1** You may receive open source software when you use the Service Offering or any Evaluation Service. The open source software you receive, as well as open source software that you may interact with when using the Service Offering and that we are required to disclose to you, 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 received open source software or interacted with the open source software when using the Service Offering.

**1.6.2** Open source software embedded in the Service Offering will not be deemed to be “Third-Party Content”. All provisions in these Terms of Service applicable to the Service Offering (e.g., our warranty, liability, indemnification, and other obligations) will 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.

**1.7 Optional Feedback.** You may provide comments and suggestions regarding a Service Offering, but you are not required to do so. If you provide comments or suggestions, we may use that feedback without restriction, and you hereby irrevocably assign to us all right, title, and interest in and to that feedback. Providing any comments and suggestions does not grant us any rights in Your Content or your intellectual property.

## **1.8 Modifications.**

**1.8.1** We may from time to time: (a) modify the Service Offering and/or the Agreement, including any Service Level Agreement, or (b) cease providing any Service Offering. Any changes will become effective on the date published or as we may notify you, but in no case less than 30 days after the date we publish notice of those changes or modifications (except for new features or functionality, which may take effect immediately). Your continued use of the Service Offering after the effective date of any change will be deemed acceptance of the modified Service Offering or terms. It is your responsibility to check the VMware website, [here](#), periodically, for modifications to the Agreement.

**1.8.2** If we make a material, detrimental change to the Service Offering or the Agreement, we will notify you prior to the effective date of that change. If you elect to terminate the Agreement because of that change, you must notify us not later than 30 days after the date of our notice. If you terminate the Agreement pursuant to this Section 1.8.2, the termination will be effective as of: (a) the date we receive your notice of termination; or (b) any later date specified in your notice, provided that the effective termination date must not be more than 90 days after the date on which we receive your notice, unless you and we agree to some longer period. You will be responsible for all fees incurred prior to the effective date of any termination pursuant to this Section 1.8.2. If you terminate the Service Offering pursuant to this Section 1.8.2, we will refund any prepaid fees prorated as of the effective date of the termination. Termination and refund, as provided in this Section 1.8.2, is your sole and exclusive remedy if we make a material, detrimental change to the Service Offering or to the Agreement.

**1.9 Required Disclosures.** If we are required by a subpoena, court order, agency action, or any other legal or regulatory requirement to disclose any Your Content we will provide you with notice and a copy of the demand as soon as practicable, unless we are prohibited from doing so pursuant to applicable law. If you request, we will, at your expense, take reasonable steps to contest any required disclosure. We will limit the scope of any disclosure to only the information we are required to disclose.

## **2. DATA PROTECTION AND SECURITY.**

**2.1** You are solely responsible for ensuring that the Service Offering and its security (a) is appropriate for Your Content and your intended use, (b) has the appropriate or required certifications for Your Content, and (c) meets all your requirements including any legal requirements that apply to you or Your Content.

**2.2** You are responsible for taking and maintaining appropriate steps to protect the confidentiality, integrity, and security of Your Content. Those steps include (a) controlling access you provide to your Users, (b) configuring the Service Offering appropriately, (c) ensuring the security of Your Content while it



is in transit to and from the Service Offering, (d) using encryption technology to protect Your Content, and (e) backing up Your Content.

**2.3** You are responsible for providing any necessary notices to Users and obtaining any legally required consents from Users regarding their use of the Service Offering.

### **3. ACCEPTABLE USE.**

**3.1 General Restrictions.** You must not: (a) resell or sublicense the Service Offering; or (b) use the Service Offering (i) in a way prohibited by law or that would cause you or us to be out of compliance with applicable law, (ii) to violate any rights of others, (iii) 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, (iv) to distribute spam or malware, (v) in a way that could harm the Service Offering or impair anyone else's use of it, (vi) in a way intended to work around the Service Offering's technical limitations, recurring fees calculation, or usage limits, or (vii) to host or run any applications that control or are involved in any High Risk Activities.

**3.2 Content Restrictions.** You must not upload into the Service Offering any Content that: (a) may create a risk of harm or any other 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; or (e) constitutes information governed by HIPAA unless you have signed a Business Associate Agreement (as defined by HIPAA) with us. If you use the Service Offering for data regulated by law, then you are solely responsible for the consequences of that use.

**3.3 Notification of Infringement Concerns.** 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, please 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](mailto:copyright@vmware.com)  
Telephone: +1-877-486-9273

### **4. INTELLECTUAL PROPERTY OWNERSHIP.**

**4.1 Ownership of Service Offering.** As between you and us, we own all right, title, and interest in and to the Service Offering and any related VMware Software, including all improvements, enhancements, modifications, and derivative works of them, and all Intellectual Property Rights in all of them. This includes any information we collect and analyze about your use of the Service Offering pursuant to Section 1.3 ("Monitoring"). 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 related VMware Software, or any related Intellectual Property Rights.



**4.2 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. Our rights to access and use Your Content are limited to those expressly granted in the Agreement.

## **5. ORDERS, DELIVERY, PAYMENT, AND TAXES.**

**5.1 Orders Generally.** All Orders are subject to the terms of the Agreement and are not binding until we accept them. Your Order will be deemed accepted when we deliver your Login Credentials to the email address associated with your account. We are not required to provide the Service Offering to you until you provide to us all information we require for processing your Order and provisioning the Service Offering for you. All Orders are non-refundable and non-cancellable except as expressly provided in the Agreement. If we ship a physical object in connection with the Service Offering, shipping and delivery terms are Ex Works VMware's regional fulfillment facility (INCOTERMS 2010) or as we may otherwise specify.

**5.2 Direct Orders.** This Section 5.2 applies only to Orders directly with VMware. If you purchase the Service Offering through a VMware authorized reseller, different terms regarding invoicing, payment, and taxes may apply.

### **5.2.1 Invoicing and Payment.**

(a) You must pay all fees you incur for use of the Service Offering. Unless you and we agree otherwise, (i) charges you incur for using the Service Offering will be governed by the applicable price list at the time of invoicing, and (ii) you must pay all charges no later than 30 days after the date of invoice. VMware will not require a purchase order to invoice you for charges you incur by your use of the Service Offering.

(b) If a Service Offering permits or requires payment through a credit card, then those payments 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.

**5.2.2 Taxes.** 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 pay or withhold any Tax for payments due under the Agreement, you must gross up your payments to us 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. You confirm that we can rely on the name and address you provide to us when you register for the Service Offering or in connection with your payment method as being the place of supply for sales tax and income tax purposes, or as being the place of supply for VAT purposes where you have established your business.

## **6. TEMPORARY SUSPENSION.**

**6.1 Generally.** We may, at our option, suspend your use of any Service Offering if: (a) you are in breach of the Agreement and do not cure that breach within 10 days after we notify you of that breach; (b) any payment is not received when due; (c) 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 (d) we suspect fraud or abuse. 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 suspend your access only to the Service Offering that is the subject of the issue giving rise to the suspension. We will promptly reinstate your access to the Service Offering once we have determined that the issue causing the suspension has been resolved.

**6.2 Effect of Suspension.** You will remain responsible for all fees incurred before and during any suspension. You will not be entitled to any service credits under the applicable Service Level Agreement that you might have otherwise accrued during any suspension.





## 7. TERMINATION.

**7.1 Generally.** You have the right to use the Service Offering during the applicable Subscription Term. You may stop using a Service Offering at any time, but you will remain liable for all fees and charges otherwise due during the applicable Subscription Term.

### 7.2 Termination for Cause.

**7.2.1** We may, at our option, elect to terminate the Agreement effective immediately upon written notice to you (i) if we have the right to suspend under Section 6.1 (“Temporary Suspension; Generally”) or (ii) to comply with applicable law.

**7.2.2** Subject to Section 7.2.1, either you or we may terminate the Agreement 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, or (b) commits a material breach of the Agreement that cannot be cured, or (c) terminates or suspends its business.

**7.2.3** If you terminate the Agreement pursuant to Section 7.2.2, we will refund any prepaid Service Offering fees prorated as of the effective date of the termination.

**7.3 Termination for Insolvency.** 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.

### 7.4 Effect of Termination.

**7.4.1** Upon termination of the Agreement for any reason: (a) you must stop using the Service Offering, and (b) you must return or, if we request, destroy, any Confidential Information of VMware or our suppliers in your possession or under your control (other than information that must be retained pursuant to law). Deletion of any Content remaining in the Service Offering will occur as specified in the applicable Service Description. As between you and us, you are responsible for ensuring that you have necessary copies of all Your Content prior to the effective date of any termination.

**7.4.2** Any provision that, by its nature and context is intended to survive termination or expiration 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 any termination of the Agreement) will also survive any termination or expiration of the Agreement.

**7.4.3** Except to the extent you or we are permitted to terminate the Agreement pursuant to Sections 1.8 (“Modifications”), 7.2 (“Termination for Cause”), or 10.2 (“Indemnification by VMware”), any termination of the Agreement will not entitle you to any refunds, credits, or exchanges, and you will be liable for all fees incurred as of the effective termination date. If we terminate the Agreement prior to expiration of a Subscription Term pursuant to Section 7.2, you will be liable for all fees due with respect to the Service Offering for the remainder of the then-current Subscription Term.

**8. SUPPORT.** We will provide support to you for the Service Offering in accordance with the applicable Support Policy, and as specified in the applicable Service Description. We will not provide support for Your Content to your End Users.

## 9. WARRANTIES.

**9.1 Limited Warranty: Duration and Remedy.** We warrant that the Service Offering will perform in accordance with the applicable Service Level Agreement, if any, during the Subscription Term, 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.



**9.2 Disclaimer.** OTHER THAN THE LIMITED WARRANTY SET FORTH IN SECTION 9.1, 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.

## **10. INDEMNIFICATION.**

**10.1 Indemnification by You.** Subject to the remainder of this Section 10.1, you will (a) defend us against any Third-Party Claim; and (b) indemnify us from all fines, damages, and other costs finally awarded by a court of competent jurisdiction or a government agency, or agreed to in settlement. We will: (i) provide you with notice of any Third-Party Claim within a reasonable period after learning of the claim (provided that any delay in providing the notice will relieve you of your indemnification obligations only to the extent that the delay prejudices you), and (ii) reasonably cooperate in response to your requests for assistance. You will have sole control over the defense of any Third-Party Claim. You may not, without our prior written consent, which will not be unreasonably withheld, conditioned, or delayed, settle any Third-Party Claim if that settlement obligates us to admit any liability or to pay any unreimbursed amounts to the claimant, or would affect any Service Offering or our business practices or policies.

### **10.2 Indemnification by VMware.**

**10.2.1** Subject to the remainder of this Section 10.2, 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 settlement. The foregoing obligations are applicable only if you: (i) provide us with notice of any Infringement Claim within a reasonable period after learning of the claim (provided that any delay in providing the notice will relieve us of our indemnification obligations only to the extent that the delay prejudices us); (ii) allow us sole control over the claim's defense; and (iii) reasonably cooperate in response to our requests for assistance. We will not, without your prior written consent, which will not be unreasonably withheld, conditioned, or delayed, enter into any settlement that obligates you to admit any liability or to pay any unreimbursed amounts to the claimant.

**10.2.2** 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: (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; or (c) terminate the Agreement and refund any prepaid fees, prorated for the remaining portion of the then-current Subscription Term.

**10.2.3** We will have no obligation under this Section 10.2 or otherwise with respect to any Infringement Claim based on: (a) combination of VMware Software 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 not permitted by the Agreement; (c) any modification to the Service Offering made without our express written approval; (d) any claim that relates to open source software or freeware technology or any derivative or other adaptation thereof that is not embedded by VMware into the VMware Software; or (e) any Service Offering provided on a no-charge basis.

**10.2.4** This Section 10.2 states your sole and exclusive remedy and our entire liability for any Infringement Claims.



## 11. LIMITATION OF LIABILITY.

**11.1 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, OR LOSS OF ANY CONTENT FOR ANY REASON INCLUDING POWER OUTAGES, SYSTEM FAILURES, OR OTHER INTERRUPTIONS (SUBJECT TO OUR OBLIGATIONS UNDER THE APPLICABLE SERVICE LEVEL AGREEMENT), 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.

**11.2 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 TO US 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. THE LIMITATION OF LIABILITY IN THIS SECTION 11.2 WILL NOT APPLY TO (i) VMWARE'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 10.2.1 OF THESE TERMS OF SERVICE OR (ii) ANY LIABILITY WHICH MAY NOT BE EXCLUDED BY LAW.

### 11.3 Further Limitations.

**11.3.1** 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 11.

**11.3.2** You may not bring a claim under the Agreement more than eighteen (18) months after the cause of action arises.

## 12. CONFIDENTIAL INFORMATION.

**12.1 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 in any event with not less than reasonable care. The recipient may disclose the discloser's Confidential Information only to the recipient's employees, or to 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 12. The recipient may also disclose the discloser's Confidential Information in accordance with the procedures set forth in Section 1.9 ("Required Disclosures").

**12.2 Exceptions.** The recipient's obligations under Section 12.1 with respect to any of the discloser's Confidential Information 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.

**12.3 Injunctive Relief.** Nothing in the Agreement limits either party's ability to seek equitable relief.





## 13. GENERAL.

**13.1 Assignment.** You may not assign or transfer the Agreement, in whole or in part, by operation of law or otherwise, without our prior written consent. Any attempted assignment or transfer of the Agreement 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.

**13.2 Notices.** Any notice by us to you under the Agreement will be given: (a) by email to the email address associated with your account, if you have subscribed to this method of receiving notices, or (b) by posting on either the Service Offering portal or the My VMware 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.

**13.3 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.

**13.4 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.

**13.5 Compliance with Laws.** You and we must each comply with all laws applicable to the actions contemplated by the Agreement.

**13.6 Export Control.** You acknowledge that the Service Offering is of United States origin, is provided 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) no Content will 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) no Content will 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 13.12 (“Order of Precedence”).

**13.7 Force Majeure.** Neither you nor VMware 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 your or our reasonable control including labor disputes or other industrial disturbances, systemic electrical, telecommunications or other utility failures, earthquakes, storms or other acts of nature, embargoes, riots, acts or orders of government, acts of terrorism, or war.



**13.8 Construction.** The headings of sections of 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”.

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

**13.10 Governing Law.** The Agreement is governed by the laws of the State of California (excluding its conflict of law rules), and the federal laws of the United States, subject to the modifications set forth in Section 15, below. The U.N. Convention on Contracts for the International Sale of Goods does not apply.

**13.11 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.

**13.12 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 or has the authority to bind the other.

**13.13 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. Unless provided otherwise, if there is a conflict between the provisions of these Terms of Service and any other document constituting the Agreement, these Terms of Service will control.

**13.14 Entire Agreement.** The Agreement as it may be modified from time to time 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.

## **14. 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 or otherwise made available by either you or us 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. Your Confidential Information does not, for purposes of the Agreement, include Your Content. If you disclose Your Content to us or if we access Your Content as permitted by the Agreement, including for purposes of providing support to you, we will use the same standard of care with respect to that data as we use to protect our own Confidential Information.

**“Content”** means any data, including all text, sound, video, or image files, and software (including machine images).

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

**“End User”** means a user of a Service Offering who is not your employee, or onsite contractor or agent. End Users include your customers (e.g., persons to whom you provide a service, and with whom you are in a commercial contractual relationship).

**“Evaluation Service”** means any Service Offering, or a feature or functionality of a Service Offering, that we offer on an evaluation basis. If you are participating in a separate VMware beta program, then the terms of that program will apply.



**“High Risk Activities”** means activities with a likelihood of injury or death, including but not limited to 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 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, or any VMware Software used to provide 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) Australia, (e) New Zealand, (f) Japan, or (g) 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.

**“Law”** includes any statute, ordinance, regulation, or governmental requirement, order, or decree.

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

**“Order”** means the internet order page, or other ordering document, that specifies your purchase of a Service Offering, whether you purchase a subscription or use the Service Offering on an on-demand basis.

**“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, including services to host Software, on your behalf, to enable you to use VMware Software in a production environment via internet-based consoles. “Service Offering” includes an Evaluation Service.

**“Service Offering Documentation”** means: (i) the VMware Data Processing Addendum, which is applicable to all Service Offerings, and (ii) the specific Service Description, Support Policy, and Service Level Agreement (if any) for the Service Offering; all as revised by VMware from time to time.

**“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: (i) the date on which you start using the Service Offering or (ii) the date you complete the registration process; or as otherwise specified in the Order or in the applicable Service Description. For purposes of any on-demand Service Offering, “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 Support Policy for the particular Service Offering, found [here](#).

**“Taxes”** 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 (i) Your Content, or (ii) your use of any Service Offering, including an Evaluation Service, in violation of the Agreement.

**“Third-Party Content”** means Content provided by a third party, that interoperates with the Service Offering, including open source software, but that is not embedded in or required for use of the Service Offering. 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 other third parties, but does not include your End Users.

**“Your Content”** means Content uploaded into the Service Offering for processing, storage or hosting, by you or by any User, but does not include (i) Third-Party Content, (ii) Account Information, or (iii) data we collect as specified in Section 1.3 (“Monitoring”).

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

**15. TERMS APPLICABLE TO DATA CENTERS OUTSIDE THE UNITED STATES.** If the Service Offering is provisioned at a data center located in the countries listed below, the following provisions replace or supplement the referenced sections of these Terms of Service.

**15.1 Australia:**

**15.1.1** Supplement Section 9.2 (“Warranties; Disclaimer”) with the following additional paragraph:

“Nothing in these Terms of Service (including this Section 9 and Section 1.6) excludes, restricts or modifies any consumer guarantee, right or remedy conferred on you by the Australian Consumer Law or any other applicable law that cannot be excluded, restricted or modified by agreement. Subject to the preceding sentence, any condition, warranty, guarantee, right or liability which would otherwise be implied in these Terms of Service or imposed by law is excluded. VMware’s liability for any breach of any consumer guarantee, right or remedy conferred by the Australian Consumer Law which cannot be excluded is limited, at VMware’s option, to supplying the applicable service again or to the payment of the cost of having that service provided again.”

**15.1.2** Replace the first sentence of Section 13.10 (“Governing Law”) with the following:

“The Agreement is governed by the laws of New South Wales, Australia, without regard to conflict of law principles.”

**15.2 France:**

**15.2.1** Replace Section 7.3 (“Termination for Insolvency”) with the following:

**“7.3 [Reserved]”**

**15.2.2** Replace Section 9.2 (“Warranties; Disclaimer”) with the following:

“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, INCLUDING ANY WARRANTIES OF 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.”

**15.2.3** Replace the last sentence of Section 11.2 (“Cap on Monetary Liability”) with the following:

“THE LIMITATIONS OF LIABILITY IN THIS SECTION 11.2 WILL NOT APPLY TO VMWARE’S INDEMNIFICATION OBLIGATIONS UNDER THE AGREEMENT. NOTHING IN THE AGREEMENT SHALL LIMIT OR EXCLUDE ANY PARTY’S LIABILITY FOR DEATH OR PERSONAL INJURY, FOR FRAUDULENT MISREPRESENTATION, OR FOR ANY OTHER LIABILITY WHICH MAY NOT BE LIMITED OR EXCLUDED BY APPLICABLE LAW.”

## 15.3 Germany:

### 15.3.1 Replace the last sentence of Section 1.4 (“Third-Party Content”) with the following sentence:

“Except as permitted under Sections 6 (“Temporary Suspension”) and 7 (“Termination”) of these Terms of Service, we will suspend or terminate Third-Party Content during a Subscription Term only upon thirty (30) days prior notice, in which case we will provide a pro-rata refund of pre-payments (if any) made for such suspended or terminated Third Party Content.”

### 15.3.2 In Section 1.5.4 (“Evaluation Use”), add the following to the end of the first sentence:

“..., except insofar as defects have been fraudulently concealed by us.”

### 15.3.3 Replace Section 7.3 (“Termination for Insolvency”) with the following:

“7.3 [Reserved]”

### 15.3.4 Replace Section 9 (“Warranties”) with the following:

#### “9. Limited Warranty.

“9.1 **Qualities.** During the Subscription Term, the Service Offering will substantially conform to the applicable Service Description unless otherwise stated in the Agreement. We do not commit that the Service Offering will be uninterrupted or that the Service Offering does fulfill any warranty of merchantability or fitness for a particular purpose, or will meet (or is designed to meet) your business requirements, unless stated otherwise in the applicable Service Description or individually agreed between the parties.

“9.2 **Warranty.** We will correct any defect in the aforementioned qualities of the Service Offering reported to us by you in writing. If we are unable to correct the defect, we will refund an appropriate portion of the fees paid by you with respect to the affected portion of the affected Service Offering.

“9.3 **Service Credits.** Any Service Credits (as set forth in the Service Level Agreement), will be set off against any refund for breach of warranty, if and to the extent the Service Credits are provided for the same event that entitles you to a refund for breach of warranty.

“9.4 **Sole Remedy.** Subject to Section 11, the remedies in this Section 9 are your sole and exclusive remedies for breach of warranty and our sole and exclusive liability for breach of warranty.”

### 15.3.5 Replace Section 11 (“Limitation of Liability”) with the following:

“11.1 **Limitation.** Our liability for a claim of any nature arising out of the Agreement, regardless of whether the claim is based in contract, tort, strict liability, or otherwise,

“11.1.1 will be limited to damages that are foreseeable and typical for this type of contract (“vertragstypische und vorhersehbare Schäden”) arising from a slight negligent breach of a material contractual obligation (“Kardinalpflicht”, i.e. an obligation the fulfillment of which is essential to enable the proper performance of the contract, and on which fulfillment you may rely); and

“11.1.2 will not exceed per damage event (i) EUR 250.000 (Two Hundred Fifty Thousand Euro), or (ii) if the aggregate fees paid or payable to us for your access to and use of the Service Offering in the twelve (12) months prior to the event giving rise to your claim are higher, then those fees for the specific Service Offering given rise to the claim (subject to the limit set forth in Section 11.1.3 below).



**“11.1.3** In no event will our total and cumulative liability for all claims arising out of the Agreement exceed EUR 500.000 (Five Hundred Thousand Euro).

**“11.2 Disclaimer of Liability.** In case of slight negligence, we will not be liable for any indirect or consequential damages (including but not limited to any loss of profits, business opportunity, revenue or goodwill), even if we have been advised as to the possibility of those damages.

**“11.3 Further Limitations.** Our suppliers will have no liability of any kind under the Agreement. You may not bring a claim under the Agreement more than eighteen (18) months after the cause of action arises.

**“11.4 Exceptions.** Nothing in the Agreement will limit or exclude our liability for death or personal injury, for intentional act or gross negligence, fraudulent misrepresentation, fraudulent concealment of a defect, mandatory liability under the German Product Liability Act (Produkthaftungsgesetz), or liability for any damages resulting from a breach of a given guarantee.”

## **15.4 Japan:**

**15.4.1** Replace the first sentence of Section 13.10 (“Governing Law”) with the following:

“The Agreement is governed by the laws of Japan, without regard to conflict of law principles. The Tokyo District Court will have jurisdiction over any claim under the Agreement.”

## **15.5 United Kingdom:**

**15.5.1** Replace the last sentence in Section 1.4 (“Third-Party Content”) with the following sentence:

“Except as permitted under Sections 6 and 7 of these Terms of Service, we will only suspend or terminate Third-Party Content during a Subscription Term only upon thirty (30) days prior notice, in which case we will provide a pro-rata refund of any pre-payments (if any) made for the suspended or terminated Third-Party Content.”

**15.5.2** Supplement Section 7.3 (“Termination for Insolvency”) with the following:

“or (c) if you are deemed unable to pay your debts within the meaning of Section 123 of the Insolvency Act of 1986; or (d) suffer or undergo any similar or analogous suspension or proceeding in any jurisdiction.”

**15.5.3** Add the following to the end of Section 9.2 (“Warranties; Disclaimer”):

“Any reference to ‘warranty or condition’ is deemed to refer to ‘warranty, condition or other terms’, and any reference to ‘warranties and conditions’ is deemed to refer to ‘warranties, conditions, and other terms’.”

**15.5.4** Replace Section 10.2.4 (“Indemnification by VMware”) with the following:

“This Section 10.2 states your exclusive remedy for any Infringement Claims or any assertions or actions arising out of or related to any Infringement Claims.”

**15.5.5** Replace the last sentence of Section 11.2 (“Cap on Monetary Liability”) with the following:

“THE LIMITATIONS OF LIABILITY IN THIS SECTION 11.2 WILL NOT APPLY TO VMWARE’S INDEMNIFICATION OBLIGATIONS UNDER THE AGREEMENT. NOTHING IN THE AGREEMENT SHALL LIMIT OR EXCLUDE ANY PARTY’S LIABILITY FOR DEATH OR PERSONAL INJURY, FOR FRAUDULENT MISREPRESENTATION, OR FOR ANY OTHER LIABILITY WHICH MAY NOT BE LIMITED OR EXCLUDED BY APPLICABLE LAW.”

**16. TERMS APPLICABLE TO UNITED STATES FEDERAL, STATE, AND LOCAL GOVERNMENT CUSTOMERS.** For United States federal, state, and local government customers, the following terms and conditions supersede or modify the referenced provisions of these Terms of Service.

**16.1** 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. “**You**” means the entity accepting the Agreement. “**VMware**”, “**we**” or “**us**” means VMware, Inc., a Delaware corporation. Capitalized terms used in these Terms of Service are defined throughout these Terms of Service and in Section 14 (“Definitions”). Section references in this document 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.”

**16.2** Add the following as a new fourth sentence in Section 1.2. (“Use of the Service Offering”):

“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 6 (‘Temporary Suspension’).”

**16.3** Add the following to the end of Section 1.4 (“Third-Party Content”):

“We will use commercially reasonable efforts to provide reasonable notice of that suspension or termination, and will use commercially reasonable efforts to provide access to similar Content where necessary to maintain your uninterrupted use of the Service Offering.”

**16.4** Replace Section 5.1 (“Orders Generally”) 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.”

**16.5** Add the following to the end of Section 5.2.2 (“Taxes”):

“This Section 5.2.2 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.”

**16.6** Add the following at the beginning of the first sentence of Section 6.1 (“Temporary Suspension; Generally”):

“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, ...”



**16.7** Replace Section 7.2.1 (“Termination for Cause”) with the following:

“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.”

**16.8** Replace Section 7.2.2 (“Termination for Cause”) with the following:

“You may terminate the Agreement effective immediately upon written notice to VMware if we (a) commit a breach of the Agreement and fails 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.”

**16.9** Replace Section 7.3 (“Termination for Insolvency”) with the following:

**“7.3 Termination by You.** 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.”

**16.10** Replace the first sentence of Section 7.4.1 (“Effect of Termination”) 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.”

**16.11** Replace Section 9.2 (“Warranties; Disclaimer”) with the following:

“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.”

**16.12** Modify Section 10.1 (“Indemnification by You”) by adding the following language to the end of the section:

“Notwithstanding anything to the contrary in this Section 10.1, 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.”

**16.13** Replace Section 10.2.1 (“Indemnification by VMware”) with the following:

**10.2.1** Subject to the remainder of this Section 10.2 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. 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."

**16.14** Replace Section 10.2.4 ("Indemnification by VMware") with the following:

"To the extent permitted by law, this Section 10.2 states your exclusive remedy for any Infringement Claims."

**16.15** Add the following to the end of Section 11.2 ("Cap on Monetary Liability"):

"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)."

**16.16** Replace Section 13.1 ("Assignment") 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."

**16.17** Replace Section 13.10 ("Governing Law") 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."

**16.18** Add the following to the end of Section 13.11 ("Third Party Rights"):

"Notwithstanding the foregoing, for any Orders placed with a VMware authorized reseller, the reseller may, at our request, bring a claim against you on our behalf to enforce the terms of the Agreement."

**16.19** Replace Section 13.13 ("Order of Precedence") 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 shall be deemed deleted and unenforceable as applied to any Orders."

**16.20** Replace Section 15 titled "Terms Applicable to Data Centers Outside the United States" with the following:

"For customers procuring a Service Offering under an F-SKU, the Service Offering is provisioned from a data center located in the United States."