# VMWARE END USER LICENSE AGREEMENT

PLEASE NOTE THAT THE TERMS OF THIS END USER LICENSE AGREEMENT ("EULA") SHALL GOVERN YOUR USE OF THE SOFTWARE, REGARDLESS OF ANY TERMS THAT MAY APPEAR DURING THE INSTALLATION OF THE SOFTWARE. IN THIS EULA, "YOU" MEANS THE "CUSTOMER" NAMED IN THE ELA ORDER FORM TO WHICH THIS EULA IS ATTACHED.

EVALUATION LICENSE. If You are licensing the Software for evaluation purposes, Your use of the Software is only permitted in a non-production environment and for the period limited by the License Key. Notwithstanding any other provision in this EULA, an Evaluation License of the Software is provided "AS-IS" without indemnification, support or warranty of any kind, expressed or implied.

## 1. DEFINITIONS.

1.1 "**Customer**" means the federal government entity named in the Order.

1.2 "**Documentation**" means that documentation that is generally provided to You by VMware with the Software, as revised by VMware from time to time, and which may include end user manuals, operation instructions, installation guides, release notes, and on-line help files regarding the use of the Software.

1.3 "**Guest Operating Systems**" means instances of third-party operating systems licensed by You, installed in a Virtual Machine and run using the Software.

1.4 "**Intellectual Property Rights**" means all worldwide intellectual property rights, including without limitation, copyrights, trademarks, service marks, trade secrets, know how, inventions, patents, patent applications, moral rights and all other proprietary rights, whether registered or unregistered.

1.5 "**License**" means a license granted under Section 2.1.

1.6 "**License Key**" means a serial number that enables You to activate and use the Software.

1.7 "**License Term**" means the duration of a License as specified in the Order.

1.8 "**License Type**" means the type of License applicable to the Software, as more fully described in the Order.

1.9 "**Open Source Software**" or "**OSS**" means software components that are licensed under a license approved by the Open Source Initiative ("OSI") or similar open source or freeware license and are embedded in the delivered Software.

1.10 "**Order**" means a purchase order, enterprise license agreement, or other ordering document issued by You to VMware or a VMware authorized reseller that references and incorporates this EULA and is accepted by VMware as set forth in Section 4.

1.11 "**Product Guide**" means the current version of the VMware Product Guide at the time of Your Order, copies of which are found at www.vmware.com/download/eula.

1.12 "**Services Terms**" means the support services terms as indicated in the applicable Order, or if the Order does not specify any support services terms, then VMware's then-current Support and Subscription Contract Terms and Conditions, copies of which are found at www.vmware.com/files/pdf/support/support_terms_conditions.pdf.

1.13 "**Software**" means the VMware Tools and the VMware computer programs listed on VMware's commercial price list to which You acquire a license under an Order, together with any software code relating to the foregoing that is provided to You pursuant to a support and subscription service contract and that is not subject to a separate license agreement.

1.14 "**Territory**" means the Territory as set forth in the applicable Order, or if the Order does not specify the Territory, then the country or countries in which You have been invoiced; provided, however, that if You have been invoiced within any of the European Economic Area member states, You may deploy the corresponding Software throughout the European Economic Area.

1.15 "**Third Party Agent**" means a third party delivering information technology services to You pursuant to a written contract with You.

1.16 "**Virtual Machine**" means a software container that can run its own operating system and execute applications like a physical machine.

1.17 "**VMware**" means VMware, Inc., a Delaware corporation, if You are purchasing Licenses or services for use in the United States and VMware International Limited, a company organized and existing under the laws of Ireland, for all other purchases.

1.18 "**VMware Tools**" means the suite of utilities and drivers, Licensed by VMware under the "VMware Tools" name, that can be installed in a Guest Operating System to enhance the performance and functionality of a Guest Operating System when running in a Virtual Machine.

2. LICENSE GRANT.

2.1 **Scope of License.** Subject to the terms and conditions of this EULA, VMware grants You, during the License Term, a non-exclusive, non-transferable License to use the Software, in executable code form only, within the Territory, for Your internal operations in accordance with (a) the Documentation; (b) the License Type for which You have paid the applicable fees; (c) other applicable limitations set forth in the Order. The License to the Software is limited to the quantities specified in each applicable Order.

2.2 **Third Party Use**. Under the License granted to You in Section 2.1 above, You may permit Your Third Party Agents to access, use and/or operate the Software on Your behalf for the sole purpose of delivering services to You, provided that You will be fully responsible for Your Third Party Agents' compliance with terms and conditions of this EULA and any breach of this EULA by a Third Party Agent shall be deemed to be a breach by You.

2.3 **Permitted Copies**. You may make one copy of the Software for archival purposes only. The copy shall: (a) be kept within Your possession or control; (b) include all titles, trademarks, and copyright and restricted rights notices in the original; and (c) be subject to this EULA. You may not otherwise copy the Software without VMware's prior written consent.

2.4 **Benchmarking.** You may use the Software to conduct internal performance testing and benchmarking studies. You may only publish or otherwise distribute the results of such studies to third parties as follows: (a) if with respect to VMware's Workstation or Fusion products, only if You provide a copy of Your study to benchmark@vmware.com prior to distribution; (b) if with respect to any other Software, only if VMware has reviewed and approved of the methodology, assumptions and other parameters of the study (please contact VMware at benchmark@vmware.com to request such review and approval) prior to such publication and distribution.

2.5 **VMware Tools.** Customer shall have no right to use the VMware tools.

2.6 **Open Source Software**. Notwithstanding anything herein to the contrary, Open Source Software is licensed to You under such OSS's own applicable license terms, which can be found in the open_source_licenses.txt file, the Documentation or as applicable, the corresponding source files for the Software available at http://www.vmware.com/download/open_source.html. These OSS license terms are consistent with the license granted in Section 2, and may contain additional rights benefiting You. The OSS license terms shall take precedence over this EULA to the extent that this EULA imposes greater restrictions on You than the applicable OSS license terms.

3. RESTRICTIONS; OWNERSHIP.

3.1 **Restrictions.** You acknowledge that the Software and the structure, organization and source code of the Software constitute valuable trade secrets of VMware. Accordingly, except as expressly permitted in Section 2 or as otherwise authorized by VMware in writing, You will not and will not permit any third party to: (a) sell, lease, license, distribute, sublicense or otherwise transfer in whole or in part the Software or Documentation to any third party; (b) decompile, disassemble, reverse engineer, or otherwise attempt to derive source code from the Software, in whole or in part; (c) copy the Software, except for archival purposes, as set out in Section 2.3; (d) create, develop, license, install, use, or deploy any software or services to circumvent, enable, modify or provide access, permissions or rights which violate the technical restrictions of the Software as described in this EULA; (e) translate, modify or create derivative works based upon the Software; (f) permit any use of or access to the Software by any third party; (g) remove any product identification, proprietary, copyright or other notices contained in the Software; or (h) operate the Software on behalf of or for the benefit of any third party, including the operation of any service that is accessed by a third party.

3.2 **Decompilation**. Notwithstanding the foregoing, decompiling the Software is permitted to the extent the laws of the Territory give You the express right to do so to obtain information necessary to render the Software interoperable with other software; provided, however, You must first request such information from VMware (at info@vmware.com), provide all reasonably requested information to allow VMware to assess Your claim, and VMware may, in its discretion, either provide such interoperability information to You, impose reasonable conditions, including a reasonable fee, on such use of the Software, or offer to provide alternatives to ensure that VMware's proprietary rights in the Software are protected and to reduce any adverse impact on VMware's proprietary rights.

3.3 **Ownership.** The Software and Documentation, all copies and portions thereof, and all improvements, enhancements, modifications and derivative works thereof, and all Intellectual Property Rights therein, are and shall remain the sole and exclusive property of VMware and its licensors. Your rights to use the Software and Documentation shall be limited to those expressly granted in this EULA and any applicable Order. No other rights with respect to the Software or any related Intellectual Property Rights are implied. You are not authorized to use (and shall not permit any third party to use) the Software, Documentation or any portion thereof except as expressly authorized by this EULA or the applicable Order.

3.4 **Guest Operating Systems.** Certain Software allows Guest Operating Systems and application programs to run on a computer system. You acknowledge that You are responsible for obtaining and complying with any licenses necessary to operate any such third-party software.

4. ORDER. Your Order is subject to this EULA. No Orders are binding on VMware until accepted by VMware. Orders for Software are deemed to be accepted upon VMware's delivery of the Software included in such Order. Orders issued to VMware do not have to be signed to be valid and enforceable. The terms of this EULA related to delivery, pricing, payment, or taxes shall not apply to Your

purchases of Software Licenses and/or Services (including any renewal of Services) through VMware authorized resellers, and You shall establish such terms independently with the authorized reseller.

5.    **AUDIT RIGHTS.**

5.1    **Records**. You will, during the License Term for any Software licenses acquired under this EULA (and for a period of two (2) years from the expiration of the applicable License Term), maintain accurate records of your use of the Software sufficient to demonstrate Your compliance with the terms of this EULA and all Orders.

5.2    **Audit Rights**. During the period in which You are obligated to maintain such records, VMware, or its third party auditor, may, upon reasonable notice to You, and in compliance with all mandatory and applicable security clearance requirements, audit such records to verify that You have (a) used the Software solely in the manner authorized herein; (b) paid all applicable license fees; and (c) otherwise complied with the terms of this EULA and all Orders. VMware may conduct no more than one (1) audit in any twelve (12) month period. Audits will be conducted during normal business hours and VMware will use commercially reasonable efforts to minimize the disruption of Your normal business activities.  VMware, and any third-party auditor, shall not have physical access to Your computing devices in connection with any such audit, without Your prior written consent.  You will reasonably cooperate with VMware and/or its third-party auditor and VMware reserves the right to seek recovery of any underpayments revealed by the Audit.

6.    **SUPPORT AND SUBSCRIPTION SERVICES.**  Except as expressly specified in the Product Guide, VMware does not provide any support or subscription services for the Software under this EULA.  You have no rights to any updates, upgrades or extensions or enhancements to the Software developed by VMware unless you separately purchase VMware support or subscription services.  These support or subscription services are subject to the Services Terms.

7.    **WARRANTIES.**

7.1    **Software Warranty**. VMware warrants to You that the Software will, for a period of ninety (90) days following delivery (**"Warranty Period"**), substantially conform to the applicable Documentation, provided that the Software (a) has been properly installed and used at all times and in accordance with the applicable Documentation; and (b) has not been modified or added to by persons other than VMware or its authorized representative. VMware will, at its own expense and as its sole obligation and Your exclusive remedy for any breach of the foregoing warranty, either replace the applicable Software or correct any reproducible error in the Software reported to VMware by You in writing during the Warranty Period.  If VMware determines that it is unable to correct the error or replace the Software, VMware will refund to You all License fees actually paid by You, in which case the License for the applicable Software and Your right to use such Software will terminate.

7.2    **Disclaimer of Warranties**. THE EXPRESS WARRANTY IN SECTION 7.1 ABOVE IS IN LIEU OF AND, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, VMWARE AND ITS LICENSORS DISCLAIM, ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE,  NON-INFRINGEMENT AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE) REGARDING OR RELATING TO THE SOFTWARE, THE DOCUMENTATION, OR ANY MATERIALS FURNISHED OR PROVIDED TO YOU UNDER THIS EULA. VMWARE AND ITS LICENSORS DO NOT WARRANT THAT THE SOFTWARE WILL OPERATE UNINTERRUPTED OR THAT IT WILL BE FREE FROM DEFECTS OR THAT THE SOFTWARE WILL MEET (OR IS DESIGNED TO MEET) YOUR BUSINESS REQUIREMENTS.

8.    **INTELLECTUAL PROPERTY INDEMNIFICATION**.

8.1    **Defense and Indemnification**.  Subject to the remainder of this Section 8 and 28 U.S.C 516, VMware shall defend You against any third party claim that the Software infringes any patent, trademark or copyright of such third party, or misappropriates a trade secret (but only to the extent that such misappropriation is not a result of Your actions) under the laws of: (a) the United States and Canada; (b) the European Economic Area; (c) Australia; (d) New Zealand; (e) Japan; or (f) the People's Republic of China, to the extent that such countries are part of the Territory for the License ("**Infringement Claim**") and indemnify You from the resulting costs and damages finally awarded against You to such third party by a court of competent jurisdiction or agreed to in settlement; provided that You:  (i) promptly provide VMware with notice of such Infringement Claim; (ii) allow VMware sole control over the defense thereof and related settlement negotiation; and (iii) reasonably cooperate in response to VMware requests for assistance.  You may not settle or compromise any Infringement Claim without the prior written consent of VMware.

8.2    **Remedies**.  Should the Software become, or in VMware's opinion be likely to become, the subject of an Infringement Claim, VMware will, at VMware's option and expense either:  (a) procure the rights necessary for You to make continued use of the affected Software in accordance with this EULA; (b) replace or modify the affected Software to make it non-infringing; or (c) terminate the License to the affected Software and discontinue the related support services, and, upon Your certified deletion of the affected Software, refund: (i) the fees paid by You for the License to the affected Software, less straight-line depreciation over a three (3) year useful life beginning on the date such Software was delivered; and (ii) any pre-paid service fee attributable to related support services to be delivered after the date such service is stopped. Nothing in this Section 8.2 shall limit VMware's obligation under Section 8.1 to defend and indemnify You, provided that You replace the allegedly infringing Software upon VMware's making alternate Software available to You and/or You discontinue using the allegedly infringing Software upon receiving VMware's notice terminating the affected License.

8.3 **Exclusions**. Notwithstanding the foregoing, VMware will have no obligation under this Section 8 or otherwise with respect to any claim based on: (a) a combination of Software with non-VMware products (other than non-VMware products that are listed on the Order and used in an unmodified form); (b) use for a purpose or in a manner for which the Software was not designed; (c) use of any older version of the Software when use of a newer VMware revision would have avoided the infringement; (d) any modification to the Software made without VMware's express written approval; (e) any claim that relates to open source software or freeware technology or any derivatives or other adaptations thereof that is not embedded by VMware into Software listed on VMware's commercial price list; (f) any claim that relates to Linux or Android open source software, even when it has been embedded into or distributed with the Software or (g) any Software provided on a no charge, beta or evaluation basis. THIS SECTION 8 STATES YOUR SOLE AND EXCLUSIVE REMEDY AND VMWARE'S ENTIRE LIABILITY FOR ANY INFRINGEMENT CLAIMS OR ACTIONS.

9. **LIMITATION OF LIABILITY.**

9.1 **Limitation of Liability.** TO THE MAXIMUM EXTENT MANDATED BY LAW, IN NO EVENT WILL VMWARE AND ITS LICENSORS BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, LOSS OF DATA, OR ANY OTHER INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO YOU. VMWARE'S AND ITS LICENSORS' LIABILITY UNDER THIS EULA WILL NOT, IN ANY EVENT, REGARDLESS OF WHETHER THE CLAIM IS BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, EXCEED THE LESSER OF (1) THE LICENSE FEES YOU PAID FOR THE SOFTWARE UNDER THIS EULA, IF ANY, OR (2) ONE MILLION U.S. DOLLARS ($1,000,000.00 USD). THE FOREGOING LIMITATIONS SHALL APPLY REGARDLESS OF WHETHER VMWARE OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. This clause shall not impair the U.S. Government's right to recover for fraud or crimes arising out of this Agreement to no greater extent that permitted under any applicable federal fraud statute, including the False Claims Act, 31 U.S.C. 3729-3733.

9.2 **Further Limitations**. VMware's licensors shall have no liability of any kind under this EULA and VMware's liability with respect to any third party software embedded in the Software shall be subject to Section 9.1. You may not bring a claim under this EULA more than eighteen (18) months after the cause of action arises unless mandated otherwise by the Contract Disputes Act of 1978, amended (41 U.S.C. 7101-7109).

10. **TERMINATION**.

10.1 **License Term.** This EULA will terminate in its entirety upon the termination of the License Term, unless terminated earlier under this Section 10.

10.2 **Termination for Breach**. In accordance with FAR 52.212-4(l) and FAR 52.233-1, VMware may request You terminate this EULA in its entirety effective immediately upon written notice to You if: (a) You breach any provision in Section 3 and do not cure the breach within thirty (30) days after receiving written notice thereof from VMware; or (b) You breach any other provision of this EULA and don't not cure the breach within thirty (30) days after receiving written notice thereof from VMware.

10.3 **Termination for Insolvency**. VMware may terminate this EULA in its entirety effective immediately upon written notice to You if You: (a) terminate or suspend your business; (b) become insolvent, admit in writing Your inability to pay Your debts as they mature, make an assignment for the benefit of creditors; or become subject to control of a trustee, receiver or similar authority; or (c) become subject to any bankruptcy or insolvency proceeding.

10.4 **Effect of Termination**. If this EULA is terminated pursuant to the rights herein: (a) all Licensed rights to all Software granted to You under this EULA will immediately cease to exist; and (b) You must promptly discontinue all use of all Software, and (destroy all copies of the Software and all License Key(s)) and return, or if requested by VMware, destroy, any related VMware Confidential Information in Your possession or control and certify in writing to VMware that You have fully complied with these requirements. Sections 1 (Definitions), 2.6 (Open Source Software), 3 (Restrictions; Ownership), 5.1 (Records), 5.2 (Audit Rights), 7.2 (Disclaimer of Warranties), 9 (Limitation of Liability), 10 (Termination), 11 (Confidential Information) and 12 (General) will any survive termination of this EULA.

11. **CONFIDENTIAL INFORMATION.**

11.1 **Definition.** "**Confidential Information**" means information or materials provided by one party ("**Discloser**") to the other party ("Recipient") which are in tangible form and labeled "confidential" or the like, or, information which a reasonable person knew or should have known to be confidential. The following information shall be considered Confidential Information whether or not marked or identified as such: (a) License Keys; (b) information regarding VMware's pricing, product roadmaps or strategic marketing plans; and (c) non-public materials relating to the Software.

11.2 **Protection.** Recipient may use Confidential Information of Discloser; (a) to exercise its rights and perform its obligations under this EULA; or (b) in connection with the parties' ongoing business relationship. Recipient will not use any Confidential Information of Discloser for any purpose not expressly permitted by the EULA, and will disclose the Confidential Information of Discloser only to the employees or contractors of Recipient who have a need to know such Confidential Information for purposes of the EULA and who are

under a duty of confidentiality no less restrictive than Recipient's duty hereunder.  Recipient will protect Confidential Information from unauthorized use, access, or disclosure in the same manner as Recipient protects its own confidential or proprietary information of a similar nature but with no less than reasonable care.

11.3  **Exceptions.**  Recipient's obligations under Section 11.2 with respect to any Confidential Information will terminate if Recipient can show by written records that such information:  (a) was already known to Recipient at the time of disclosure by Discloser; (b) was disclosed to Recipient by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is, or through no fault of Recipient has become, generally available to the public; or (d) was independently developed by Recipient without access to, or use of, Discloser's Information.  In addition, Recipient will be allowed to disclose Confidential Information to the extent that such disclosure is required by law or by the order of a court of similar judicial or administrative body, provided that Recipient notifies Discloser of such required disclosure promptly and in writing and cooperates with Discloser, at Discloser's request and expense, in any lawful action to contest or limit the scope of such required disclosure.  You may disclose terms and conditions of this EULA to other Federal Government agencies solely as necessary for the performance of this EULA.  To the extent Confidential Information becomes subject to the Freedom of Information Act (5 U.S.C. 552), the parties agree that such Confidential Information and this EULA shall be considered VMware trade secrets which would cause undue business hardship and a waiver from disclosure will apply.

12.  **GENERAL.**

12.1  **Assignment.**  This EULA and any Orders, and any of Your rights or obligations thereunder, may not be assigned, subcontracted or transferred by You, in whole or in part, whether voluntary, by operation of contract, law or otherwise, without the prior written consent of VMware.  Any attempted assignment or transfer in violation of the foregoing will be null and void.  VMware may assign this EULA to any successor to all or substantially all its business or assets to which this EULA relates, whether by merger, sale of assets, sale of stock, reorganization, when such assignment meets one or more of the following criteria: (1) a transfer occurs "by operation of law" 2) an assignee is determined responsible in accordance with FAR 9 (3) a duly warranted Contracting Officer grants a waiver of the Anti-Assignment Act requirements when such waiver is determined to be in the Government's best interest; (4) a transfer does not represent a threat to the national security. Any attempted assignment or transfer in violation of the foregoing will be null and void.Subject to the foregoing, this EULA will be binding upon and will inure to the benefit of the parties and their respective successors and assigns.

12.2  **Notices.**  Any notice delivered by VMware to You under this EULA will be delivered via mail, email or fax.

12.3  **Waiver**.  The waiver of a breach of any provision of this EULA shall not constitute a waiver of any other provision or any subsequent breach.

12.4  **Severability.**  If any provision of this EULA is held to be illegal, invalid or unenforceable, the provision will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remaining provisions of this EULA will remain in full force and effect.

12.5  **Compliance with Laws; Export Control; Government Regulations.** Each party shall comply with all laws applicable to the actions contemplated by this EULA. You acknowledge that the Software is of United States origin, is provided subject to the U.S. Export Administration Regulations, may be subject to the export control laws of the applicable territory, and that diversion contrary to applicable export control laws is prohibited. You represent that (1) you are not, and are not acting on behalf of, (a) 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 (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List; and (2) you will not permit the Software 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. The Software and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation", respectively, pursuant to DFAR Section 227.7202 and FAR Section 12.212(b), as applicable.  Any use, modification, reproduction, release, performing, displaying or disclosing of the Software and documentation by the U.S. Government shall be governed solely by the terms and conditions of this EULA.

12.6  **Construction.** The headings of sections of this EULA are for convenience and are not to be used in interpreting this EULA. As used in this EULA, the word 'including' means "including but not limited to."

12.7  **Governing Law.**  The EULA is governed by the applicable Federal laws of the United States of America, excluding its conflict of law principles. The UN Convention on International Sale of Goods shall not apply.

12.8  **Third Party Rights**.  Other than as expressly set out in this EULA, this EULA does not create any rights for any person who is not a party to it, and no person who is not a party to this EULA may enforce any of its terms or rely on any exclusion or limitation contained in it.

12.9  **Product Guide.** In addition to the above sections, Your use of the Software is subject to the terms and conditions of the Product Guide, which is incorporated herein by reference.  The EULA shall govern Your use of the Software to the extent that language in the EULA is not in conflict with the language contained herein and to the extent that terms and conditions in the EULA are consistent with applicable, mandatory, and controlling Federal Law,. (To the extent the terms and conditions in the EULA are inconsistent with the Federal Law (See FAR 12.212(a)), they shall be deemed deleted and unenforceable under any resultant federal order.

12.10  **Order of Precedence**. In the event of conflict or inconsistency among the Product Guide, this EULA and the Order, the following order of precedence shall apply: (a) the Product Guide, (b) this EULA and (c) the Order. With respect to any inconsistency between this EULA and an Order, the terms of this EULA shall supersede and control over any conflicting or additional terms and conditions of any Order,

acknowledgement or confirmation or other document issued by You, unless the parties execute a written agreement expressly indicating: (i) that such Order shall modify this EULA; or (ii) that the terms of such Order shall supersede and control in the event of any inconsistency.

12.11 **Entire Agreement.** This EULA, including accepted Orders and any amendments hereto, and the Product Guide contain the entire agreement of the parties with respect to the subject matter of this EULA, namely the licensing of Software, and supersede all previous or contemporaneous communications, representations, proposals, commitments, understandings and agreements, whether written or oral, between the parties regarding the subject matter hereof. This EULA may be amended only in writing signed by authorized representatives of both parties.

12.12 **Contact Information.** Please direct legal notices or other correspondence to VMware, Inc., 3401 Hillview Avenue, Palo Alto, California 94304, United States of America, Attention: Legal Department. If You have any questions concerning this EULA, please send an email to info@vmware.com.

# VMware, Inc. Support and Subscription Services "SnS" Terms and Conditions

VMware, Inc., a Delaware corporation, or VMware International Limited, a company organized under the laws of Ireland, as applicable ("**VMware**"), shall provide Technical Support and Subscription Services (as defined herein) (collectively, the **"Services"**) to the Customer, per the terms of this Agreement (the "**Agreement**") and as set forth at the VMware Support Services Website, at http://www.vmware.com/support/services/. The applicable VMware entity, **Effective Date**, **Software**, and Services level will be set forth on the applicable enterprise license agreement, SnS order form, Customer's purchase Order, or, if Customer has purchased support on a per-incident basis ("**Per Incident**"), in the registration form completed by Customer upon such purchase (collectively the "**Order**").

## 1. Definitions.

**1.1** "**Error**" means a failure in the Software to materially conform to the specifications described in the applicable product documentation ("**Documentation**").

**1.2** "**Modified Code**" means any modification, addition and/or development of code scripts deviating from the predefined product code tree(s)/modules developed by VMware for production deployment or use. Modified Code excludes customizable Software options for which VMware offers Services on the applicable VMware price list.

**1.3** "**Services Fees**" means the fees for Services specified in a corresponding VMware or reseller invoice.

**1.4** "**Services Period**" means the period for which Customer has purchased the Services and any subsequent renewal periods and shall commence: (a) for Software Licenses for which Services are mandatory, on the date the applicable Software License Key(s) are made available for download, and (b) for Software Licenses for which Services are optional, on the date of purchase of the Services.

**1.5** "**Severity**" is a measure of the relative impact an Error has on the use of the Software, as determined by VMware. The following Severity levels apply to all Software:

(a) "**Severity One**" means Customer's production server or other mission critical system(s) are down and no workaround is immediately available and (i) all or a substantial portion of Customer's mission critical data is at a significant risk of loss or corruption; (ii) Customer has had a substantial loss of service; or (iii) Customer's business operations have been severely disrupted.

(b) "**Severity Two**" means that major functionality is severely impaired such that (i) operations can continue in a restricted fashion, although long-term productivity might be adversely affected; (ii) a major milestone is at risk; ongoing and incremental installations are affected; or (iii) a temporary workaround is available.

(c) "**Severity Three**" means a partial, non-critical loss of functionality of the software such that: (i) the operation of some component(s) is impaired but allows the user to continue using the Software; or (ii) initial installation milestones are at minimal risk.

(d) "**Severity Four**" means (i) general usage questions and cosmetic issues, including errors in the documentation, and (ii) cases opened via email for Zimbra Software.

**1.6** "**Software**" means software offered on the VMware price list, and all components shipped with the Software, including Open Source components.

**1.7** "**Subscription Services**" means the provision of Maintenance Releases, Minor Releases and Major Releases (each defined below), if any, to the Software, as well as corresponding Documentation, to Customer.

(a) "**Maintenance Release**" or "**Update**" means a generally available release of the Software that typically provides maintenance corrections or fixes only, designated by VMware by means of a change in the digit to the right of the second decimal point (e.g. Software 5.0 >> Software 5.0.1), or for certain Software, by means of a change in the digit of the Update number (e.g. Software 5.0 Update 1).

(b) "**Minor Release**" means a generally available release of the Software that (i) introduces a limited amount of new features and functionality, and (ii) is designated by VMware by means of a change in the digit to the right of the decimal point (e.g., Software 5.0>>Software 5.1).

(c) "**Major Release**," also known as an "**Upgrade**," means a generally available release of the Software that (i) contains functional enhancements or extensions, and (ii) is designated by VMware by means of a change in the digit to the left of the first decimal point (e.g., Software 5.0 >> Software 6.0).

**1.8** "**Technical Support**" means the provision of telephone or web-based technical assistance by VMware to Customer's technical contact(s) with respect to installation and Errors, at the corresponding Services level purchased by Customer.

**1.9** "**Third Party Products**" means any software or hardware that (i) is manufactured by a party other than VMware and (ii) has not been incorporated into the Software.

## 2. Service Terms.

**2.1** **Provision of Services.** Subject to the terms of this Agreement, VMware shall, during the Services Period, provide Customer with Services at the applicable Services level purchased.

**2.2** **End of Availability.** VMware may, at its discretion, decide to retire Software and/or Services from time to time ("**End of Availability**"). VMware shall post notice of End of Availability, including the last date of general commercial availability of the affected Software and the timeline for discontinuing Services, at https://www.vmware.com/support/policies/lifecycle.html. VMware shall have no obligation to provide Services for Software that is outside of the applicable Service life.

**2.3** **Purchase Requirements.**

(a) Except as otherwise provided for by VMware, Customer may purchase initial Services only for the most current, generally available release of the Software.

(b) Customer must purchase and/or renew Services at the same Services level for all of the Software in a given environment (e.g., Test, Development, QA, Production).

(c) Except as otherwise provided in the applicable price list, the minimum term for any Service offering is one (1) year.

(d) These Services Terms and conditions will automatically update to VMware's then-current Services terms and conditions set forth at https://www.vmware.com/files/pdf/support/support_terms_conditions.pdf upon any renewal of Services.

**2.4** **Exclusions.**

(a) Services do not cover problems caused by the following:

(i) accident; unusual physical, electrical or electromagnetic stress; neglect; misuse; failure of electric power, air conditioning or humidity control; failure of rotation media not furnished by VMware; operation of the Software with other media not in accordance with the manufacturer's specifications; or causes other than ordinary use;

(ii) improper installation by Customer or use of the Software that deviates from any operating procedures as specified in the Documentation;

(iii) Third Party Products, other than the interface of the Software with the Third Party Products;

(iv) Modified Code;

(v) issues relating to Software offered as a Service ("SaaS");

(vi) any customized deliverables created by VMware specifically for Customer as part of consulting services; or(viii); use of the Software with unsupported tools (i.e., Java Development Kit (JDK); Java Runtime Environment (JRE)), APIs, interfaces or data formats other than those included with the Software and supported as set forth in the Documentation; or

(vii) any issue not covered by Technical Support.

Customer may request assistance from VMware for such problems, for an additional fee.

(b) In the event that VMware suspects that a reported problem may be related to Modified Code, VMware, may, in its sole discretion, (i) request that the Modified Code be removed, and/or (ii) inform Customer that additional assistance may be obtained by Customer directly from various product discussion forums or by engaging VMware's consulting services group for an additional fee.

**2.5** **Customer Responsibilities.** VMware's obligations regarding Services are subject to the following:

(a) Customer agrees to receive from VMware communications via e-mail, telephone, and other formats, regarding Services (such as communications concerning support coverage, Errors or other technical issues and the availability of new releases of the Software).

(b) Customer's technical contact shall cooperate to enable VMware to deliver the Services.

(c) Customer is solely responsible for the use of the Software by its personnel and shall properly train its personnel in the use and application of the Software.

(d) Customer shall promptly report to VMware all problems with the Software, and shall implement any corrective procedures provided by VMware reasonably promptly after receipt.

(e) Customer is solely responsible for protecting and backing up the data and information stored on the computers on which the Software is used and should confirm that such data and information is protected and backed up in accordance with any internal or regulatory requirements as applicable, before contacting VMware for Technical Support. VMware is not responsible for lost data or information in the event of errors or other malfunction of the Software or computers on which the Software is used.

(f) Customer will have dedicated resources available to work 24X7 on Severity One Errors.

**3.** **Services Offerings and Fees.**

**3.1** **Services Fee Terms.**

(a)	Unless otherwise indicated on the Order, services Fees are payable on the Effective Date or, in the case of a renewal term, no later than the date of commencement of the applicable Services Period.  Services Fees are specified in the applicable price list and are non-refundable.

(b)	In the event that Customer renews or adds a Services offering that has a minimum term of one (1) year, Customer may elect to make Services for all or a portion of its Software Licenses coterminous with the renewed or added Services.  In such case, VMware will prorate the applicable Services Fees to extend the current Services Period to make it coterminous with such renewed or added Services.

(c)	For Software that is licensed on a perpetual basis, if a  Customer purchases Services after acquiring the Software Licenses, or had elected not to renew Services and later wishes to re-enroll in the Services, Customer must move to the then-current Major Release of the Software and must pay: (i) the applicable Services Fees for the current Services Period; (ii) the amount of Services Fees that would have been paid for the period of time that Customer had not enrolled in the Services, and (iii) a twenty-percent (20%) reinstatement fee on the sum of the Services Fees in (i) and (ii).

(d)	In cases where Customer purchases a License to migrate up from one edition of the Software to another (e.g., VMware vSphere Standard to VMware vSphere Enterprise Plus), any unused period of the Services Period on the original License will be converted and used to extend the Services Period for the newly purchased upgraded License.   This paragraph (d) shall not apply to enterprise license agreements.

(e)	If Customer originally purchased Services from a VMware Authorized Service Provider and is now renewing only Technical Support through such VMware Authorized Service Provider, Customer may purchase Subscription Services separately on a renewal basis from VMware.  The renewal fee for such Subscription Services shall be as set forth in the applicable price list.  "**Authorized Service Provider**" means a third party that is authorized under contract by VMware to provide first and/or second level Technical Support for the Software.

**3.2	Advanced and Complimentary Offerings.**

(a)	Certain Services (e.g., Business Critical Support and Mission Critical Support) require that Customer also purchase a base level of support.  See the applicable price list for details.

(b)	VMware may offer complimentary Services, including VMware Complimentary Update Services for certain Software, as more fully described at the VMware Technical Support Services website.  "**VMware Complimentary Update Services**" means the provision of Maintenance Releases and Minor Releases, if any, to Customer.  This VMware Complimentary Update Service does not include the provision of any Major Releases.

(c)	Services for Software made available under open source licenses may be subject to additional policies located at https://www.vmware.com/support/policies/opensource.html,

## 4.  Miscellaneous Terms

**4.1	Payment Terms.**  Services Fees are exclusive of any taxes, duties, or similar charges imposed by any government. Customer shall pay or reimburse VMware for all federal, state, dominion, provincial, or local sales, use, personal property, excise, value added, withholding or other taxes, fees, or duties relating to the transactions contemplated by this Agreement (other than taxes on the net income of VMware).  For Orders placed direct with VMware by Customer, all invoices issued hereunder by VMware are due and payable within thirty (30) days of the date of the invoice. Subject to the Prompt Payment Act, 31 U.S.C. 3901, Amounts not paid on time are subject to a late charge equal to the lesser of one and one-half percent (1.5%) per month or the maximum amount allowed by applicable law. If payment of any Services Fee is overdue, VMware may also suspend performance until such delinquency is corrected.

**4.2	Limited Warranty**. VMware warrants that the Services to be performed hereunder will be done in a workmanlike manner and shall conform to industry standards. Upon Customer providing VMware with a reasonably detailed written notice to cure within thirty (30) days of occurrence of the nonconformance, VMware will re-perform the Services to achieve commercially reasonable conformance with the above warranty.  TO THE MAXIMUM EXTENT PERMITTED BY LAW, THIS WARRANTY IS GIVEN EXPRESSLY AND IN PLACE OF ALL OTHER WARRANTIES, STATUTORY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.  TO THE MAXIMUM EXTENT MANDATED BY LAW, THIS REMEDY WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO NONCONFORMANCE OF SERVICES.

**4.3	Limitation of Liability**. TO THE MAXIMUM EXTENT MANDATED BY LAW, VMWARE SHALL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED UPON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, ARISING FROM ITS PERFORMANCE OR NON-PERFORMANCE UNDER THIS AGREEMENT. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO CUSTOMER.   VMWARE'S LIABILITY UNDER THIS AGREEMENT WILL NOT, IN ANY EVENT, EXCEED THE SERVICES FEES PAID BY CUSTOMER TO VMWARE UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DATE OF THE EVENT MOST DIRECTLY GIVING RISE TO THE CLAIM.  This clause shall not impair the U.S Government's right to recover for fraud or crimes arising out of or related to this Contract to the extent allowed under any applicable federal fraud statute, including the False Claims Act, 31 U.S.C 3729-3733.

**4.4	Termination**. The term of this Agreement commences on the effective date and continues for a period of one year unless 1. a different period of time is stated in the Order or  2. Is terminated earlier in accordance with the provisions of FAR 52.233-1 (Disputes Act.)

**4.5**     **Data Protection**. Customer acknowledges that correspondence and log files generated in conjunction with a request for Services may contain sensitive, confidential or personal information. Customer is solely responsible for taking the steps it considers necessary to protect such data, including obfuscating the logs or otherwise guarding such information prior to sending it to VMware.

**4.6**     **Other**. Customer may not assign or delegate this Agreement to any third party without the prior written consent of VMware. This Agreement shall be governed by the applicable Federal laws of the United States of America, without regard to conflict of laws principles. The parties consent to the exclusive jurisdiction of the state and federal courts located in Santa Clara County, California. This Agreement constitutes the entire agreement of the parties with respect to the provision of the Services by VMware to Customer, and supersedes all prior written or oral communications, understandings and agreements. This Agreement may not be amended except in a written document signed by both parties. Any waiver of the provisions of this Agreement must be in writing to be effective. Except as expressly set forth herein, no terms of any purchase order or other business form that Customer may use will affect the obligations of the parties under this Agreement, and any such purchase order or other business form of Customer which contains additional or conflicting terms are hereby rejected by VMware. Customer agrees that purchase orders do not have to be signed to be valid and enforceable. If any provision of this Agreement is found to be invalid or unenforceable, the remaining terms will continue to be valid and enforceable to the fullest extent permitted by law. The version of the Technical Support guide found at https://www.vmware.com/files/pdf/support/tech_support_guide.pdf and the policies located at https://www.vmware.com/support/policies/index/ are the governing versions of such documents/policies; any translation into other languages is for convenience only. VMware may update the Technical Support guide and support policies periodically, without prior notice.