



End User License Agreement

Updated May 1, 2020

THIS PORTWORX END USER LICENSE AGREEMENT (THE "AGREEMENT"), IS BETWEEN THE ENTITY RECEIVING THE ACCOMPANYING SOFTWARE (DEFINED BELOW) ("LICENSEE") AND PORTWORX, INC., A DELAWARE CORPORATION LOCATED AT 4940 EL CAMINO REAL, SUITE 200, LOS ALTOS, CALIFORNIA 94022 ("PORTWORX"), AND CONSISTS OF THE TERMS AND CONDITIONS GOVERNING LICENSEE'S USE OF THE SOFTWARE, AND ALL OTHER DOCUMENTS DESCRIBED BELOW, WHICH ARE INCORPORATED IN FULL BY THIS REFERENCE. PORTWORX IS WILLING TO LICENSE THE SOFTWARE AND OTHER DOCUMENTATION DESCRIBED BELOW TO LICENSEE ON THE CONDITION THAT LICENSEE ACCEPTS AND AGREES TO ALL OF THE TERMS AND CONDITIONS IN THIS AGREEMENT. LICENSEE AND PORTWORX ARE HEREINAFTER REFERRED TO AS A "PARTY" AND, JOINTLY, AS THE "PARTIES."

PLEASE READ THE FOLLOWING TERMS AND CONDITIONS. BY CLICKING "ACCEPT," ACCESSING, DOWNLOADING, INSTALLING OR USING THE SOFTWARE, LICENSEE ACKNOWLEDGES AND AGREES THAT LICENSEE HAS CAREFULLY READ THROUGH THIS AGREEMENT, UNDERSTANDS IT AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS. LICENSEE ALSO CONFIRMS AND WARRANTS THAT IT HAS THE AUTHORITY TO BIND THE ENTITY ON WHOSE BEHALF IT IS ACCEPTING, DOWNLOADING, INSTALLING OR USING THE SOFTWARE. IF LICENSEE DOES NOT AGREE TO THESE TERMS AND CONDITIONS, DO NOT CLICK "ACCEPT," ACCESS, DOWNLOAD, INSTALL OR USE THE SOFTWARE.

1. DEFINITIONS

- 1.1 "Confidential Information" means any and all non-public, confidential or proprietary information disclosed by a party ("Discloser") to the other party ("Recipient") including, without limitation, business, marketing and technical information, the Software and related Documentation, source code and specifications, trade secrets, development plans, content, business forecasts and strategies, and information regarding personnel, customers, suppliers and its business partners, which is either (a) labeled or identified as "confidential" or "proprietary" or (b) is reasonably understood to be confidential or proprietary under circumstances.
- 1.2 "Documentation" means the standard end-user technical documentation and specifications that Portworx provides or makes available with the Software, as revised by Portworx from time to time.
- 1.3 "Intellectual Property Rights" means copyrights, trademarks, service marks, trade secrets, patents, patent applications, moral rights, contractual rights of non-disclosure or any other intellectual property or proprietary rights, however arising, throughout the world.
- 1.4 "Orders" means the ordering document issued by Licensee and accepted by Portworx or Portworx's authorized reseller, as applicable, that describes the Software Portworx will provide to Licensee, the fees and any other applicable commercial terms.
- 1.5 "Software" means the Portworx proprietary software set forth in an Order, the Documentation, and any Update thereto if and when such Updates are made available by Portworx, and excludes Third Party Software and Open Source Software (each as defined in Section 2.4).
- 1.6 "Subscription Term" means the term of the subscription license to the Software, as set forth on the applicable Order. The Subscription Term for the Software with pay-as-you-go billing is set forth in Section 3.5.
- 1.7 "Update" means an update of the Software that Portworx makes generally available at no additional charge to other customers that receive support, including, if and when available, bug fixes, patches, maintenance releases, new point releases, and new major version releases. Updates include only the Software licensed by Licensee hereunder, and do not include any new options, new or future product, or any upgrade in features, functionality or performance of the Software that Portworx licenses separately from the Software or offers only for an additional fee.

2. LICENSE GRANT

- 2.1 Software License. Subject to Licensee's compliance with the terms and conditions of this Agreement, Portworx grants Licensee a non-transferable, non-sublicensable, non-exclusive license to use the Software during the Subscription Term, solely for Licensee's internal use, in executable object code format only, in accordance with the Documentation.
- 2.2 Evaluation License. This Section 2.2 shall apply only when Portworx licenses the Software for an initial evaluation period (not to exceed 30 days unless Portworx approves an extension in writing). The license granted herein may only be used for

evaluation purposes during the initial evaluation period. Portworx reserves the right to terminate the evaluation of the Software at any time in its sole discretion. In the event the Licensee wishes to enter into a standard license with Portworx for non-evaluation purposes, Licensee shall enter into an Order with Portworx and the terms and conditions of this Agreement shall continue in full force and effect. In the event Licensee determines not to enter into a licensing transaction with Portworx at the end of such evaluation period, then Licensee's rights under this Agreement shall terminate and Licensee shall promptly delete all Portworx evaluation Software. For evaluations of the Software, only Section 1, 2, 4.2, 5, 6, 7, 9, 11, and 12 of this Agreement shall apply. NOTWITHSTANDING ANYTHING TO THE CONTRARY, SOFTWARE LICENSED FOR EVALUATION UNDER THIS SECTION IS PROVIDED TO LICENSEE "AS IS," WITHOUT ANY WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED.

2.3 Use Restrictions. Licensee shall not (and shall not allow any third party to), except to the extent expressly authorized in writing by Portworx: (a) decompile, disassemble, or otherwise reverse engineer the Software or attempt to reconstruct or discover any source code, underlying ideas, algorithms, file formats or programming interfaces of the Software by any means whatsoever (except and only to the extent that applicable law prohibits or restricts reverse engineering restrictions, and then only with prior written notice to Portworx); (b) commercialize, distribute, sell, sublicense, rent, lease or use the Software (or any portion thereof) for time sharing, hosting, service provider or like purposes; (c) remove any product identification, proprietary, copyright or other notices contained in the Software (including any reports or data printed or exported from the Software); (d) modify any part of the Software, create a derivative work of any part of the Software, incorporate or embed the Software into or with other software, or use the Software (or any part thereof) to provide any product or service to a third party; (e) publicly disseminate performance information or analysis (including, without limitation, benchmarks) from any source relating to the Software; (f) use the Software if Licensee is a direct competitor of Portworx, except with Portworx's prior written consent; (g) use the Software for or on behalf of public cloud service providers; or (h) offer the Software as part of Licensee's solution within the Licensee's client environment, where Licensee is a consulting company.

2.4 Third Party and Open Source Software. The Software may be distributed with or contain or use certain third party proprietary software ("Third Party Software") and certain "open source software" or "free software" ("Open Source Software"), which may be identified in the Documentation or by other means. Such Third-Party Software and Open Source Software are (i) not subject to the terms and conditions of Sections 2.1 (Software License) or 10 (Indemnification) and (ii) licensed under the terms of the end-user license that accompanies such software.

3. PAYMENT; TAXES; PAY-AS-YOU-GO

3.1 Reseller Purchase. If Licensee purchased Software from a Portworx authorized reseller, this Section 3 does not apply to Licensee and all commercial terms including fees, payment, and taxes shall be agreed between Licensee and the authorized reseller.

3.2 Payment Terms. Licensee shall pay all amounts invoiced under this Agreement in U.S. dollars within thirty (30) days from date of invoice. Any invoices not paid when due will be subject to a late charge of one and one-half percent (1 ½) per month on the unpaid balance or the maximum rate allowed by law, whichever is less.

3.3 Taxes. The fees and charges covered under this Agreement are exclusive of any taxes, duties, or tariffs imposed or levied on the Software and any services that may be provided under the Agreement. Licensee is responsible for, and will promptly pay in full, all taxes and duties of any kind including, but not limited to sales, use, and withholding taxes, except for taxes based on Portworx's net income.

3.4 Orders. All Orders are subject to Portworx's written acceptance. All Orders are non-cancellable and non-refundable.

3.5 Pay-As-You-Go. In addition to the terms and conditions of the Agreement, this Section 3.5 shall only apply if Portworx offers a usage based (i.e. pay-as-you-go) billing option for the Software and Licensee chooses to purchase such Software license with pay-as-you-go billing.

3.5.1 Monthly Usage Fees. During the Term of this Agreement and on a monthly basis, Portworx will charge or invoice Licensee a Monthly Usage Fee as defined hereafter. "Monthly Usage Fee" is the greater of the monthly minimum commitment ("Monthly Minimum") or the hourly usage of Software in accordance with pricing provided by Portworx at <https://portworx.com/products/features/>. For the avoidance of doubt, each calendar month Licensee will owe at minimum, the Monthly Minimum fee, regardless if hourly usage was below the Monthly Minimum. For the first month of the Software, the Monthly Minimum will be prorated to cover the remaining days of the first month. For example, Portworx will charge 50% of the Monthly Minimum if Licensee starts the Software subscription on the 15th day of a calendar month in a 30-day month in addition to any hourly usage that exceeds such Monthly Minimum. On the first day of the calendar month after the initial pay-as-you-go Software month and each month renewed thereafter, Portworx will charge the full Monthly Usage Fee on a monthly basis. In addition, each calendar month's hourly usage will not rollover to the next calendar month. For example, if in Month 1 the hourly usage exceeded the Monthly Minimum by 600 hours and in Month 2 Licensee did not use the entire Monthly Minimum by 500 hours, Licensee may not apply Month 1's 600 hours to meet Month 2's Monthly Minimum.

3.5.2 Payment; Invoicing. Licensee shall pay the Monthly Usage Fee monthly in arrears and such payment is due immediately at the end of the calendar month in which the Monthly Usage Fee applies. If an electronic payment method is required by Portworx, then Licensee authorizes Portworx to automatically charge the payment method provided to Portworx's third party payment processor. If Portworx approves Licensee for credit terms (i.e. a monthly invoicing option), Portworx will invoice Licensee for the Monthly Usage Fee monthly in arrears and Licensee shall pay the Monthly Usage Fee within 30 days after the end of the calendar month in which Monthly Usage Fee applies. Taxes owed are set forth in Section 3.3. All fees under this Section are in U.S. dollars.

3.5.3 Term; Termination. The term for Software is monthly and shall automatically renew on a monthly basis until terminated. In addition to the termination rights under Section 4, either party may terminate the Software subscription by providing at least 1-day notice to the other party. In the event of termination by Licensee or by Licensor for Licensee's material breach, Licensee shall pay the full Monthly Usage Fee (regardless if usage was below the Monthly Minimum) and any usage fees that exceed the Monthly Minimum for the month in which notice of termination was provided. Upon termination under this Agreement, Licensee shall cease using the Software, and return or destroy all Portworx Confidential Information. All Monthly Usage Fees owed as of the date of termination shall become immediately due. All Monthly Usage Fees are non-refundable and payment obligations survive any termination.

4. TERM; TERMINATION

4.1 Term; Termination. This Agreement is effective until terminated. The parties may terminate this Agreement immediately upon written notice to the other party: (a) in the event that the other party materially breaches any of the terms hereof and fails to cure such breach within thirty (30) days written notice; or (b) if a party becomes insolvent or makes an assignment of this Agreement for the benefit of creditors or is subject of a bankruptcy or similar proceeding. If Licensee materially breaches this Agreement (including failing to pay overdue fees), Portworx may, with 7 days' notice, suspend the licenses until such breach is cured by Licensee and such suspension will not affect the duration of Subscription Term or amounts owed.

4.2 Termination Effect. Upon any such termination, Licensee shall (a) immediately cease using the applicable Software and Documentation, and (b) certify to Portworx within fifteen (15) days after termination that Licensee has destroyed, or has returned to Portworx, such Software and Documentation, and all copies thereof. The following sections shall survive termination or expiration of this Agreement: 1, 2.3, 3, 4.2, 5, 7, 9, 11, and 12.

5. DATA; PRIVACY POLICY

5.1 Data. Portworx may accumulate and aggregate certain anonymous statistical and related data in order to improve the performance and functionality of its Software, to develop new products and/or Software or to analyze the usage of the Software. Portworx may use aggregated anonymous data for such purposes as Portworx, in its sole discretion, deems to be appropriate.

5.2 Usage Data. Licensee agrees that Portworx may, to the extent permitted by law, receive and use certain usage data collected in connection with the Software licensed under Section 3.5 (i.e. pay-as-you-go) including cluster UUID, cluster ID, number of nodes and node types to provide billing information and usage information pursuant to this Agreement. This data may also be used to evaluate and improve Portworx products, for product sales and marketing initiatives (without identifying Licensee). Such information may be shared with service providers, vendors or agents only for the purpose of performing services on Portworx's behalf.

5.3 Personal Data. Licensee agrees that access to the Software requires its designated users to register on Portworx's registration web page and PX- Central. Such registration requires user's full name, company name and email address. Licensee further agrees that Portworx may, to the extent permitted by applicable law, receive and use such data in order to respond to Licensee support requests, to contact Licensee regarding products and/or services, and to perform its obligations under this Agreement. For more information regarding Portworx's processing of Licensee's personal data and rights related thereto, please visit Portworx's Privacy Policy located at <https://portworx.com/privacy-policy/> (as may be updated from time to time).

6. AUDIT

Portworx may at its expense but no more than once per year for on-site audits, audit Licensee's use of the Software. Any such audit shall either be conducted by means of remote access from a Portworx location or on-site during regular business hours at Licensee's facilities and shall not unreasonably interfere with Licensee's business activities.

7. PROPRIETARY RIGHTS

7.1 Ownership. The Software and Third-Party Software are licensed and not sold to Licensee. Portworx and its suppliers exclusively own all Intellectual Property Rights in and to the Software and Third-Party Software, and any modifications, improvements, enhancements, customizations, Updates, or derivative works thereof. No title or ownership or the Intellectual Property Rights passes under this Agreement, and all rights not expressly granted to Licensee in this Agreement are reserved.

7.2 Feedback. Licensee may provide suggestions or improvements to Portworx in connection with this Agreement ("Feedback"). Portworx shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable, perpetual license to use or incorporate into the Software any such Feedback.

8. WARRANTIES; DISCLAIMER

8.1 Software Warranty. Portworx warrants that the Software will operate substantially in accordance with this Agreement and the Documentation for ninety (90) days from the earlier of the date of first download of the Software. Licensee's exclusive remedy and Portworx's sole liability for breach of this warranty is that Portworx shall, at its own expense, use commercially reasonable efforts to correct or replace the Software. This warranty will only apply if there is no modification, alteration or addition has been made to the Software by any person other than Portworx or its authorized agents.

8.3 Disclaimer. EXCEPT FOR THE EXPRESS WARRANTIES ABOVE AND TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, PORTWORX AND ITS SUPPLIERS HEREBY DISCLAIM ALL OTHER WARRANTIES FOR THE SOFTWARE AND RELATED SERVICES, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. LICENSEE AGREES THAT NEITHER PORTWORX NOR ITS SUPPLIERS MAKE ANY WARRANTY THAT THE SOFTWARE WILL BE ERROR FREE, OPERATE WITHOUT INTERRUPTION OR WILL FULFILL ANY OF LICENSEE'S PARTICULAR PURPOSES OR NEEDS. EXCEPT AS STATED ABOVE, PORTWORX AND ITS SUPPLIERS PROVIDE THE SOFTWARE ON AN "AS IS" BASIS. Licensee shall have the benefit of any third-party warranties, service agreements and infringement indemnities contained in the purchase agreements or licenses applicable to the Third-Party Software and Open Source Software.

9. LIMITATION OF LIABILITY

9.1 EXCEPT FOR BREACH OF SECTION 11 (CONFIDENTIALITY), SECTION 2.1 AND 2.3 (GRANT AND RESTRICTIONS), AND LICENSEE'S PAYMENT OBLIGATIONS, IN NO EVENT SHALL THE TOTAL CUMULATIVE LIABILITY OF EITHER PARTY (OR PORTWORX'S SUPPLIERS) EXCEED THE AMOUNT ACTUALLY PAID BY LICENSEE TO PORTWORX DURING THE PRIOR TWELVE (12) MONTHS UNDER THIS AGREEMENT.

9.2 IN NO EVENT SHALL EITHER PARTY (OR PORTWORX'S SUPPLIERS) BE LIABLE FOR ANY LOST PROFITS, ANY LOSS OF USE, LOST DATA, FAILURE OF SECURITY MECHANISMS, INTERRUPTION OF BUSINESS, OR INDIRECT, SPECIAL, INCIDENTAL, RELIANCE, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND, ARISING OUT THIS

AGREEMENT, REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES .

9.3 THE PARTIES AGREE THAT THE LIMITATIONS SPECIFIED IN SECTION 9 WILL SURVIVE AND APPLY EVEN IF ANY LIMITED REMEDY SPECIFIED IN THIS AGREEMENT IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE AND TO THE EXTENT PERMITTED BY APPLICABLE LAW.

10. INDEMNIFICATION

10.1 Obligations. Portworx shall defend at its own expense any claims, demands or suits brought against Licensee by a third party alleging that the Software, when used as authorized under this Agreement, infringes upon any third party U.S. copyright or U.S. patent registered or issued as of the date of first download of the Software ("Claims"). Portworx shall pay those costs and damages finally awarded against Licensee in connection with such Claims, or those costs and damages agreed to in a monetary settlement of such action provided that Licensee: (i) notifies Portworx promptly in writing of the Claims; (ii) gives Portworx sole control of the defense and settlement negotiations provided that Portworx will not settle a claim that adversely affects Licensee's interest without Licensee's consent, not to be unreasonably withheld; and (iii) cooperates and, at Portworx's request and expense, assists in such defense.

10.2 Mitigation. If the Software becomes, or in Portworx's opinion is likely to become, the subject of an infringement claim, then Portworx may (at its option and expense) either: (a) procure for Licensee the right to continue using the Software; (b) replace or modify the Software so that it becomes non-infringing; or (c) terminate Licensee's rights hereunder to use the Software and refund a portion of any price Licensee paid under this Agreement prorated over a three year period from the date of purchase.

10.3 Exceptions. The foregoing obligations of Portworx shall not apply: (a) if the Software is modified by any party other than Portworx, but solely to the extent the alleged infringement is caused by such modification; (b) if the Software is combined with products or processes not specified in the Documentation or provided by Portworx, but solely to the extent the alleged infringement is caused by such combination; (c) to any unauthorized use of the Software; (d) to any unsupported release of the Software; or (d) to any third-party code contained within the Software. THIS SECTION 10 SETS FORTH PORTWORX'S AND ITS SUPPLIERS' SOLE LIABILITY AND LICENSEE'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO ANY THIRD-PARTY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT.

11. CONFIDENTIALITY

11.1 Use. Each party agrees (a) to hold in confidence and protect such Confidential Information from dissemination to, and use by, any third party by using the same degree of care, but no less than a reasonable degree of care, as the Recipient uses to protect its own Confidential Information of a like nature against unauthorized dissemination and use, (b) not to disclose such Confidential Information to any third parties, except as described herein and (c) not to use any Confidential Information except for the purposes of this Agreement. Each party may disclose the other party's Confidential Information to its responsible employees and contractors with a bona fide need to know, but only to the extent necessary to carry out the purposes of this Agreement, and only if such employees and contractors are subject to nondisclosure obligations sufficient to protect the other party's Confidential Information hereunder.

11.2 Exceptions. The restrictions set forth in this section will not apply to any Confidential Information that the Recipient can demonstrate (a) was known to it prior to its disclosure by the Discloser; (b) is or becomes publicly known through no wrongful act of the Recipient; (c) has been rightfully received from a third party authorized to make such disclosure without restriction; or (d) is independently developed by the Recipient without reference or use to Discloser's Confidential Information.

11.3 Injunctive Relief. The parties agree that a breach of this section may cause irreparable damage which money cannot satisfactorily remedy and therefore, the parties agree that in addition to any other remedies available at law or hereunder, the Discloser will be entitled to seek injunctive relief for any threatened or actual disclosure by the Recipient.

12. GENERAL

12.1 Governing law. This Agreement will be governed by and construed under the laws of the State of California without regard to its conflict of laws provisions and without regard to the United Nations Convention on the International Sale of Goods. The federal and state courts located in Santa Clara County, California will have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement.

12.2 Notices. All notices, under this Agreement must be delivered in writing by courier, by facsimile or by certified or registered mail (postage prepaid and return receipt requested) to the address listed above (for each party and shall be effective upon the earlier of receipt or three (3) business days after being deposited in the mail as required above. Notices for termination may be provided electronically to legal@portworx.com.

12.3 Relationship. The parties hereto are independent contractors. Nothing in this Agreement shall be deemed to create an agency, employment, partnership, fiduciary or joint venture relationship between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.

12.4 Assignment. Neither party may assign or transfer this Agreement or its rights and obligations under this Agreement without the other party's written consent. Notwithstanding the foregoing, Portworx may assign this Agreement in whole without the other party's consent to an entity that acquires all or substantially all of the business of the party through a merger, acquisition or corporate reorganization. In the case of any permitted assignment or transfer under this Agreement, this Agreement or relevant provisions shall be binding upon, and inure to the benefit of, the successors, representatives, administrators and assigns of the parties hereto. All purported assignment or transfers in violation of this Section shall be null and void.

12.5 Compliance with Laws. The parties will comply with all applicable laws including privacy laws, export laws and all other applicable laws, statutes and regulations. Licensee agrees not to export, re-export or import the Software in violation of any applicable laws and regulations of the U.S. or any other nation.

12.6 Force Majeure. Except for financial obligations, Portworx shall not be liable for any delay or failure to perform any of its obligations under this Agreement to the extent such failure is caused by circumstances beyond such party's reasonable control, including without limitation, acts of God, civil disturbances, earthquakes, natural disasters, acts or orders of

government, acts of terrorism or war or other similar events.

12.7 Attorney's Fees. If any legal action is brought to enforce this Agreement, the prevailing party shall be entitled to receive its attorneys' fees, court costs, and other collection expenses, in addition to any other relief it may receive.

12.8 U.S. GOVERNMENT END USERS. The Software is a "commercial item" as that term is defined at 48 C.F.R. 2.101, consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in 48 C.F.R. 12.212. The Software is provided to any federal, state or local government agency only subject to the terms and conditions of this Agreement and such additional terms as are agreed by the parties in a properly executed writing and that are consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4.

12.9 Waiver and Severability. The failure of either party to enforce its rights under this Agreement at any time for any period will not be construed as a waiver of such rights. If any provision of this Agreement is held invalid or unenforceable, such provision shall be reformed to the extent necessary to make it valid and enforceable and the remaining provisions shall continue in full force and effect.

12.10 Entire Agreement. This Agreement constitutes the complete agreement between the parties and supersedes all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of this Agreement. Without limiting the generality of the foregoing, this Agreement will supersede the terms of Licensee's form including purchase order, acknowledgment or other business forms notwithstanding Portworx's acceptance or acknowledgment of such forms. This Agreement may not be modified or amended except in writing signed by a duly authorized representative of each party. Notwithstanding the foregoing, Portworx reserves the right to amend the terms and conditions of this Agreement for future sales of products or services, at any time, by posting notice of the change or other means of communication.