



VMware Cloud Service Offerings

TERMS OF SERVICE

Last updated: 13 September 2019

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 Unlimited Company, 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 Service 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 or trial 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 (i) an Evaluation Service or (ii) any 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. Subject to the preceding sentence regarding any feedback you provide, 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 of 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 is appropriate for Your Content and your intended use.

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) for 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, or is otherwise prohibited as specified in the Agreement.

3.3 Uploading Content. You acknowledge that uploading Your Content to the Service Offering does not constitute a disclosure of Your Content to us and, accordingly, Section 12 (Confidential Information) does not apply to Your Content.

3.4 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
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, PAYMENT, AND TAXES.

5.1 Orders Generally.

5.1.1 You must pay all charges you incur for your use of the Service Offering. Charges may consist of both a committed amount as well as additional amounts, including but not limited to charges for add-on features that you order or enable, as well as charges you incur based on actual usage of the Service Offering (metered charges, or “overages”). You must establish a method of payment to cover charges. We may bill you directly for any additional charges, even if you purchase the entitlement for the Service Offering through a VMware authorized reseller. We may not require a purchase order to invoice you for charges.

5.1.2 All Orders are subject to the terms of the Agreement and are not binding until we accept them. An Order will be deemed accepted when we deliver your Login Credentials to the email address associated with the 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. Any refunds to which you are entitled under the Agreement will be remitted to you or to the VMware channel partner from which you purchased your entitlement to use the Service Offering.

5.1.3 If a physical object is shipped in connection with the Service Offering, shipping and delivery terms are Ex Works VMware’s regional fulfillment facility (INCOTERMS 2010) or as we or your authorized VMware reseller may otherwise specify.

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

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

5.2.1 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.

5.2.2 Service Offering fees are exclusive of Taxes. You must pay or reimburse us for all Taxes arising out of the transactions contemplated by the Agreement. If you are required to 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 (other than payment) 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, 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; Infringement Claims.

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 with regard to any Infringement Claim. 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 defense of the Infringement Claim; and (iii) reasonably cooperate in response to our requests for assistance with regard to the Infringement Claim. We will not, without your prior written consent, which will not be unreasonably withheld, conditioned, or delayed, enter into any settlement of any Infringement Claim 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 the Service Offering with non-VMware products or content, including any of Your Content and/or any Third-Party Content; (b) use of the Service Offering for a purpose or in a



manner 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 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 13.13 ("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. If your billing address is in the United States, the Agreement is governed by the laws of the State of California and the federal laws of the United States. If your billing address is outside the United States, the Agreement is governed by the laws of Ireland. Conflict of law rules are expressly disclaimed. The U.N. Convention on Contracts for the International Sale of Goods does not apply.

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, nor 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.

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), or other information.

“**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 or trial basis. If you are participating in a separate VMware technical preview or beta program, then the terms of that program will apply.

“High Risk Activities” means workloads or applications used to control or operate 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 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” means 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 evidences 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. “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 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.

15.1 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.”

15.2 Add the following at the end of Section 1.2.4 (“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’).”

15.3 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.”

15.4 Replace Section 5.1.2 (“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.”

15.5 Add the following to the end of Section 5.2.2:

“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.”

15.6 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, …”

15.7 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.”

15.8 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.”

15.9 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.”

15.10 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.”

15.11 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."

15.12 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."

15.13 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."

15.14 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."

15.15 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)."

15.16 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."

15.17 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."



15.18 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.”

15.19 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 are deemed deleted and unenforceable as applied to any Orders.”



DATA PROCESSING ADDENDUM

This Data Processing Addendum (“**DPA**”) forms part of the Agreement between the party identified in the Agreement (“**Customer**”) and VMware, and applies to the extent that (i) VMware processes Personal Data on behalf of Customer in the course of providing Services and (ii) the Agreement expressly incorporates this DPA by reference. This DPA does not apply where VMware is the Controller. All capitalized terms not defined in this DPA will have the meanings set forth in the Agreement.

1. DEFINITIONS.

1.1 “Agreement” means the written or electronic agreement between Customer and VMware for the provision of the Services to Customer.

1.2 “Controller” means an entity that determines the purposes and means of the processing of Personal Data.

1.3 “Data Protection Law” means all data protection and privacy laws applicable to the processing of Personal Data under the Agreement.

1.4 “GDPR” means Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of Personal Data and on the free movement of such data (General Data Protection Regulation).

1.5 “Personal Data” means any information relating to an identified or identifiable natural person contained within Customer’s Content as defined in the Agreement.

1.6 “Personal Data Breach” means a breach of security of the Services leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to Personal Data.

1.7 “Processor” means an entity that processes Personal Data on behalf of a Controller.

1.8 “Services” means any cloud service offering or customer support services provided by VMware to Customer pursuant to the Agreement.

1.9 “Sub-processor” means any Processor engaged by VMware or any member of its group of companies that processes Personal Data pursuant to the Agreement. Sub-processors may include third parties or any member of VMware’s group of companies.

2. PROCESSING.

2.1 Role of the Parties. As between VMware and Customer, VMware will process Personal Data under the Agreement only as a Processor acting on behalf of the Customer. Customer may act either as a Controller or as a Processor with respect to Personal Data.

2.2 Customer Processing of Personal Data. Customer will, in its use of the Services, comply with its obligations under Data Protection Law in respect of its processing of Personal Data and any processing instructions it issues to VMware. Customer represents that it has all rights and authorizations necessary for VMware to process Personal Data pursuant to the Agreement.

2.3 VMware Processing of Personal Data. VMware will comply with its processor obligations under Data Protection Law and will process Personal Data in accordance with Customer’s documented instructions. Customer agrees that the Agreement is its complete and final instructions to VMware in relation to the processing of Personal Data. Processing any Personal Data outside the scope of the Agreement will require prior written agreement



between VMware and Customer by way of written amendment to the Agreement, and will include any additional fees that may be payable by Customer to VMware for carrying out such instructions. Upon notice in writing, Customer may terminate the Agreement if VMware declines to follow Customer's reasonable instructions that are outside the scope of, or changed from, those given or agreed to in the Agreement, to the extent such instructions are necessary to enable Customer to comply with Data Protection Laws.

2.4 Processing of Personal Data Details.

2.4.1 Subject matter. The subject matter of the processing under the Agreement is the Personal Data.

2.4.2 Duration. The duration of the processing under the Agreement is determined by Customer and as set forth in the Agreement.

2.4.3 Purpose. The purpose of the processing under the Agreement is the provision of the Services by VMware to Customer as specified in the Agreement.

2.4.4 Nature of the processing. VMware and/or its Sub-processors are providing Services or fulfilling contractual obligations to Customer as described in the Agreement. These Services may include the processing of Personal Data by VMware and/or its Sub-processors on systems that may contain Personal Data.

2.4.5 Categories of data subjects. Customer determines the data subjects which may include Customer's end users, employees, contractors, suppliers, and other third parties.

2.4.6 Categories of data. Personal Data that Customer submits to the Services.

3. SUBPROCESSING.

3.1 Use of Sub-Processors. VMware engages Sub-processors to provide certain services on its behalf. Customer consents to VMware engaging Sub-processors to process Personal Data under the Agreement. VMware will be responsible for any acts, errors, or omissions of its Sub-processors that cause VMware to breach any of VMware's obligations under this DPA.

3.2 Obligations. VMware will enter into an agreement with each Sub-processor that obligates the Sub-processor to process the Personal Data in a manner substantially similar to the standards set forth in the DPA, and at a minimum, at the level of data protection required by Data Protection Law (to the extent applicable to the services provided by the Sub-processor).

3.3 Notice. VMware will provide a list of Sub-processors that it engages to process Personal Data upon written request by Customer or as otherwise made available by VMware on its website.

3.4 Changes to Sub-processors. VMware agrees (i) to provide prior notice to Customer of any new engagement of a Sub-processor to process Personal Data if the Customer has subscribed to receive notification via the mechanisms that VMware provides for the specific Service; and (ii) if Customer objects to a new Sub-processor on reasonable data protection grounds within ten (10) days of receiving the notice, to discuss with Customer those concerns in good faith with a view to achieving resolution.

4. SECURITY MEASURES.

4.1 Security Measures by VMware. VMware will implement and maintain appropriate technical and organizational security measures to protect against Personal Data Breaches and to preserve the security and confidentiality of Personal Data processed by VMware on behalf of Customer in the provision of the Services ("Security Measures"). The Security Measures are subject to technical progress and development. VMware may update or modify



the Security Measures from time to time provided that any updates and modifications do not result in material degradation of the overall security of the Services purchased by the Customer.

4.2 Security Measures by Customer. Customer is responsible for using and configuring the Services in a manner that enables Customer to comply with Data Protection Laws, including implementing appropriate technical and organizational measures.

4.3 Personnel. VMware restricts its personnel from processing Personal Data without authorization (unless required to do so by applicable law) and will ensure that any person authorized by VMware to process Personal Data is subject to an obligation of confidentiality.

4.4 Prohibited Data. Customer acknowledges and agrees that the Agreement may prohibit the submission of certain types of Personal Data (such as an individual's financial or health information) to the Services. Customer must not submit to the Services any Personal Data which is regulated by the United States Health Insurance Portability and Accountability Act unless Customer has entered into a business associate agreement with VMware.

5. PERSONAL DATA BREACH RESPONSE.

Upon becoming aware of a Personal Data Breach, VMware will notify Customer without undue delay and will provide information relating to the Personal Data Breach as reasonably requested by Customer. VMware will use reasonable endeavors to assist Customer in mitigating, where possible, the adverse effects of any Personal Data Breach.

6. AUDIT REPORTS.

VMware (or third parties engaged by VMware) audits its compliance against data protection and information security standards on a regular basis. The specific audits, and the data protection and information security certifications VMware has achieved, will necessarily vary depending upon the nature of the Services in question. Upon Customer's written request, and subject to obligations of confidentiality, VMware will make available to Customer a summary of its most recent relevant audit report and/or other documentation reasonably required by Customer which VMware makes generally available to its customers, so that Customer can verify VMware's compliance with this DPA.

7. DATA TRANSFERS AND EXPORTS.

7.1 Data Transfers. VMware may transfer and process Personal Data to and in other locations around the world where VMware or its Sub-processors maintain data processing operations as necessary to provide the Services as set forth in the Agreement.

7.2 Data Transfers from the EEA and Switzerland. The parties acknowledge that VMware has achieved Binding Corporate Rules ("BCR") approval for Personal Data that it processes as a Processor. A copy of VMware's BCR is available at <https://www.vmware.com/help/privacy/binding-corporate-rules.html> and evidence of VMware's approval is available on the European Commission's website at http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=613841. VMware will process all European Economic Area (including the UK) or Switzerland Personal Data transferred to it for processing under this DPA in accordance with its BCR, including when such Personal Data is processed outside of the European Economic Area by VMware, any member of its group of companies, or any external Sub-processor appointed by VMware.

8. DELETION OF DATA.

Following expiration or termination of the Agreement, VMware will delete or return to Customer all Personal Data in VMware's possession as set forth in the Agreement except to the extent VMware is required by applicable law to retain some or all of the Personal Data (in which case VMware will archive the data and implement reasonable measures to prevent the Personal Data from any further processing). The terms of this DPA will continue to apply to that retained Personal Data.



9. COOPERATION.

9.1 Data Protection Requests. If VMware receives any requests from individuals or applicable data protection authorities relating to the processing of Personal Data under the Agreement, including requests from individuals seeking to exercise their rights under Data Protection Law, VMware will promptly redirect the request to the Customer. VMware will not respond to such communication directly without Customer's prior authorization, unless legally compelled to do so. If VMware is required to respond to such a request, VMware will promptly notify Customer and provide Customer with a copy of the request, unless legally prohibited from doing so.

9.2 Customer Requests. VMware will reasonably cooperate with Customer, at Customer's expense, to permit Customer to respond to any requests from individuals or applicable data protection authorities relating to the processing of Personal Data under the Agreement to the extent that Customer is unable to access the relevant Personal Data in their use of the Services.

9.3 DPIAs and Prior Consultations. To the extent required by Data Protection Law, VMware will, upon reasonable notice and at Customer's expense, provide reasonably requested information regarding the Services to enable Customer to carry out data protection impact assessments ("DPIAs") and/or prior consultations with data protection authorities.

9.4 Legal Disclosure Requests. If VMware receives a legally binding request for the disclosure of Personal Data which is subject to this DPA, such request will be dealt with in accordance with the Agreement.

10. GENERAL.

10.1 Relationship with Agreement. Any claims brought under this DPA will be subject to the terms and conditions of the Agreement, including the exclusions and limitations set forth in the Agreement.

10.2 Conflicts. In the event of any conflict between this DPA and any privacy-related provisions in the Agreement, the terms of this DPA will prevail.

10.3 Modification and Supplementation. VMware may modify the terms of this DPA as provided in the Agreement, in circumstances such as (i) if required to do so by a supervisory authority or other government or regulatory entity, (ii) if necessary to comply with Data Protection Law, or (iii) to implement or adhere to standard contractual clauses, approved codes of conduct or certifications, binding corporate rules, or other compliance mechanisms, which may be permitted under Data Protection Law. Supplemental terms may be added as an Annex or Appendix to this DPA where such terms only apply to the processing of Personal Data under the Data Protection Law of specific countries or jurisdictions. VMware will provide notice of such changes to Customer, and the modified DPA will become effective, in accordance with the terms of the Agreement or as otherwise provided on VMware's website if not specified in the Agreement.



CloudHealth® by VMware®

Service Description

Last updated as of 21 February 2019

© 2019 VMware, Inc. All rights reserved. This product is protected by U.S. and international copyright and intellectual property laws. This product is covered by one or more patents listed at <http://www.vmware.com/download/patents.html>.

VMware is a registered trademark or trademark of VMware, Inc. in the United States and/or other jurisdictions. All other marks and names mentioned in this Service Description may be trademarks of their respective companies.

As used in this Service Description, "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. Terms not defined in this Service Description are defined in the Terms of Service or elsewhere in the Agreement.

VMware, Inc.
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Palo Alto, CA 94304
www.vmware.com

1. Introduction

1.1 Service Description

CloudHealth® by VMware® (“CloudHealth” or the “Service Offering”) is a cloud service management platform that enables customers to visualize, manage, optimize, and automate their cloud environments. The Service Offering collects and consolidates all a customer’s cloud environment data in a single platform to enable the customer to efficiently optimize and govern its cloud environment. The Service Offering does this by gathering data and metadata related to the customer’s cloud-based services use. The Service Offering pulls this information into a centralized data analytics platform, and provides the customer with analysis, recommendations, and trended reporting on cost, usage, performance, and security.

The CloudHealth Core Platform delivers insights into the customer’s third-party hosted cloud environments (including AWS, Microsoft Azure, and Google Cloud Platform). Customers can also purchase the CloudHealth Data Center Management add-on, that delivers insights into the customer’s data center environment running on VMware virtualization technology. Also available as an add-on is the CloudHealth Customer Success Package, that enables customer success through an initial 90-day onboarding process, and continuing services to help drive value and adoption of the CloudHealth platform.

Customers access the Service Offering through a web browser and by using scripts against a [public API](#).

The Service Offering ingests a variety of data sources that are processed and stored as time-series metrics that can be analyzed, visualized, and alerted upon for optimization, status reporting, anomaly detection, and troubleshooting of modern cloud infrastructure.

The Service Offering includes:

- A cloud-hosted, high-availability SaaS application that allows customers to gain insights into metrics visualized by business group, identify optimization opportunities, and automate governance of new and existing infrastructure.
- A cloud-hosted, high-availability, and high-performance time series database for aggregation and storage of high-volume data and metrics from the customer’s infrastructure.
- A REST API that allows users to perform a subset of the operations that they can carry out through the SaaS application. Users can enable cloud accounts, upload and report on cost and usage metrics, manage partners and partner customers, and manage business groups that the platform should use for creating views into their cloud infrastructure.
- Collector agents embedded in the customer infrastructure.

1.2 Technical Documentation and Training

A Quick Start guide, conceptual guides on key areas of the platform, workflow guides for navigating through key features, and FAQs are available only to logged in customers at the CloudHealth Help Center, at <https://help.cloudhealthtech.com>

Public documentation that explains how to get started with the API and examples for various API calls is provided at the CloudHealth API Guide, at <https://apidocs.cloudhealthtech.com>

Self-paced training and webinars are available to logged in customers at CloudHealth Academy. The training site is accessible from the Service Offering, at:
https://apps.cloudhealthtech.com/docebo/sso_login

1.3 Legal Terms

Use of the Service Offering is subject to the Terms of Service, that can be found at the VMware end user terms landing page, at:

<https://www.vmware.com/download/eula.html>

or directly at:

<https://www.vmware.com/content/dam/digitalmarketing/vmware/en/pdf/downloads/eula/vmware-cloud-services-universal-tos.pdf>

2. Service Operations

The following outlines VMware's roles and responsibilities in providing the Service Offering. While specific roles and responsibilities have also been identified as being owned by you, any roles or responsibilities not contained in this Service Description are either not the duty of VMware or are assumed to be your responsibility.

2.1 Service Provisioning

VMware will provide the following provisioning services:

- VMware will create an instance of the Service Offering for you.
- VMware will create a corresponding service account and send an email or other notification to the contact that you identified in your Order inviting that contact to the newly created instance. A URL to access the Service Offering will be provided within that notification.
- VMware will ensure that the identified contact can create additional user accounts for other users, as needed.

Your responsibilities include:

- Deploying and configuring data agents and the proxy to collect and route data into the Service Offering as needed.
- Configuring the Service Offering to gather metrics from cloud-based services (for example, Amazon Web Services) as needed.

2.2 Support

For assistance in identifying and resolving errors, and to answer questions related to the operational use of the Service Offering, see the VMware Cloud Service Support Policies page, at <https://www.vmware.com/support/policies/saas-support.html>.

2.3 Disaster Avoidance and Disaster Recovery

The Service Offering should not be considered the database of record for your data, and you should not rely on or consider the Service Offering as the sole source of your data, nor a complete copy of your data.

2.5 Incident and Problem Management

VMware will provide incident and problem management services (detection, severity classification, recording, escalation, and return to service) pertaining to:

- Infrastructure over which VMware has direct, administrative access and control, including servers and services used to provide the Service Offering.

You are responsible for incident and problem management (e.g., detection, severity classification, recording, escalation, and return to service) pertaining to:

- Your account settings in the Service Offering administrative management console.
- User-deployed and user-configured assets such as proxy agents.
- Anything else not under VMware's direct control and administration.

2.6 Change Management

VMware will provide the following change management elements:

- Processes and procedures to release new code versions and bug fixes.

You are responsible for:

- Management of changes to your tagging process, alert settings, dashboards and other content.
- Administration of self-service features provided through the Service Offering's system console and user portal, up to the highest permission levels granted to you.
- Changes in the data collection agents used.
- Cooperating with VMware when planned or emergency maintenance is required.

2.7 Data Privacy

Data Collection by Google Analytics

The Service Offering utilizes Google Analytics to collect data directly from any browsers used to view or receive the Service Offering. The data collected and inferred is used by VMware to diagnose and improve its products and services and to fix issues. Further information on how Google collects and uses this data when you use the Service Offering can be found at: www.google.com/policies/privacy/partners/. This data collection is made possible using cookies. Detailed descriptions of the types of cookies we use can be found in the VMware Privacy Notice, and policies linked from that Privacy Notice. More information on how to choose whether to accept certain cookies used by VMware websites and solutions can also be found from the VMware Privacy Notice. The VMware Privacy Notice can be found at: <https://www.vmware.com/help/privacy.html>. You agree to provide the information in this paragraph to all end users of the Service Offering.

Deletion of Personal Data

Following expiration or termination of the Agreement, all Content, and all personal data contained in Content, in VMware's possession will be deleted from VMware's primary database and (if applicable) back-up database, as described in the "Termination" section, below. The only exception would be if and to the extent that VMware is required by applicable law to retain any of the personal data (in which case VMware will implement reasonable measures to isolate the personal data from any further processing).

2.8 Data Retention

During the Subscription Term, data transmitted to the Service Offering by you will be retained and available for querying and alerts. Data is retained for 13 months from the date and time the data was originally ingested into the Service Offering.

3. Business Operations

Billing and Usage Metering

Purchasing the Service Offering

The Service Offering is purchased through a committed term subscription of one, two, or three years. Committed charges for the entire term, which are determined based on the pricing tier specified in your Order, are payable up front. Overage charges are payable monthly. You can purchase subscriptions to the Service Offering directly from VMware, or from an authorized VMware reseller. Consult your VMware sales representative for guidance on how to purchase a subscription.

Committed term subscriptions will automatically renew at the end of the purchased subscription term for an additional 12-month term.

If you wish to purchase additional subscriptions, the Subscription Terms for those additional subscriptions may not be coterminous with subscriptions already purchased. Consult your VMware sales representative for details on purchasing additional subscriptions.

You may elect to pay applicable charges (both up-front charges and monthly overage charges) for the Service Offering through redemption of VMware's Subscription Purchasing Program (SPP) credits or Hybrid Purchasing Program (HPP) credits (collectively, "Credits").

Refer to the following websites for information on the Credit programs:

- SPP Program Guide:
<https://www.vmware.com/content/dam/digitalmarketing/vmware/en/pdf/solutions/vmware-spp-program-guide.pdf>
- HPP Program Guide:
<https://www.vmware.com/files/pdf/solutions/vmware-hpp-program-guide.pdf>.

Billing

Fees for the CloudHealth Core Platform, the CloudHealth Data Center Management Module, and the CloudHealth Customer Success Package are determined based on a customer's "Cloud Spend"; that is, the amount the customer pays to its third-party cloud service providers, as reflected in the data provided by the customer to the Service Offering for analysis. Fees for each portion of the overall CloudHealth offering are calculated as a percentage of that Cloud Spend. Based on the analysis, customers pay the fees specified in the applicable pricing tier. The applicable pricing tier can be selected by the customer, or can be determined through a trial of the Service Offering conducted by the customer and VMware. Consult your VMware sales representative for details.

Up-front charges are based on your projected monthly Cloud Spend over the Subscription Term and as specified in the applicable pricing tier in your Order. If your actual Cloud Spend for any month does not exceed the specified pricing tier amount, there is no overage charge. However, if

your actual Cloud Spend for any month exceeds that specified tier amount, you will be billed an “overage” charge for that month, based on the dollars in excess of that tier amount, at the applicable percentage rate.

By way of example only (your actual rates may differ):

- If your committed monthly Cloud Spend is \$400,000, and the applicable fee percentage is 3% of that Cloud Spend, then you would be charged \$12,000 per month for the committed subscription term. That amount (i.e., the total amount of the fees based on the committed monthly Cloud Spend) is payable up front. For example, if you purchased a one-year subscription, you would be charged \$144,000, up front, which is 12 times the monthly committed fee of \$12,000.
- If, in any month during the Subscription Term, your actual monthly Cloud Spend is \$400,000 or less, then you would not accrue any overage charges. There is no refund if your actual monthly spend would have generated committed fees less than the amount estimated, and paid, up front. For example, if your committed monthly Cloud Spend is \$400,000 but your actual Cloud Spend for a particular month is \$300,000, there is no refund or credit of the fees otherwise applicable to the \$100,000 difference between the committed Cloud Spend amount and the actual Cloud Spend amount.
- If, in any month during the Subscription Term, your actual Cloud Spend is more than \$400,000 (which is your committed Cloud Spend amount), then you will be charged for that “overage”. For example, if your actual Cloud Spend for any month is \$650,000 but your committed monthly Cloud Spend is \$400,000 then you will be billed at the specified percentage rate for the difference between \$400,000 and \$650,000. If your applicable percentage rate for that overage is 3%, then you would owe \$7,500 in overage fees (which is \$250,000 multiplied by 3%) for that month.

If you elect to procure the Service Offering through redemption of Credits, you will buy, up front, enough Credits to cover your (i) up-front payment for the Subscription Term, and (ii) estimated overage charges for the Subscription Term. If your actual overage charges exceed the amount represented by Credits purchased, then you must purchase additional Credits to cover those additional overage charges.

If you elect to pay for the Service Offering through redemption of Credits, then your Credit fund will be decremented, or charged, for your (i) up-front payment, at the beginning of your Subscription Term, and (ii) monthly, in arrears, for any accrued charges in excess of your monthly committed spend (i.e., overage charges).

Unless otherwise provided in your Order, your fees will be VMware’s published list prices.

You will be billed up front for the committed fees determined by the pricing tier applicable to your subscription for the entire Subscription Term. You will be billed monthly, in arrears, for usage of the Cloud Health Platform and the Data Center Management Module in excess of the committed monthly spend pricing tier applicable to your subscription. You will be billed up front for your subscription to the Customer Success Package.

If you purchase the Service Offering directly from VMware, all payments (both initial committed spend amount and all monthly overage charges) will be made directly to VMware. If you purchase the Service Offering from an authorized VMware reseller, all payments will be made to the reseller. If you purchase the Service Offering through redemption of Credits, and you purchase those Credits from an authorized VMware reseller, you will pay the reseller for those Credits. If you need to purchase additional Credits to cover overage charges, you may purchase those additional Credits either directly from VMware or from your reseller; consult your VMware sales

representative for guidance on any additional Credits purchase.

If you are billed in a currency other than US Dollars, your fees (which are based on your Cloud Spend) may increase or decrease periodically, due to fluctuations in foreign exchange rates. VMware applies the exchange rate published by OANDA (www.oanda.com) to your Cloud Spend, and calculates your fees based on the resulting Cloud Spend, as expressed in the applicable currency. If the applicable rate, as published by OANDA on the reference date (which is the first day of the calendar month prior to the start of each VMware fiscal quarter), changes by less than the VMware stated threshold as compared to the most recent prior reference date, then there will be no change in the rate used to calculate your fees. If the applicable rate change is equal to or greater than the VMware stated threshold, then the rate used to calculate your fees will be adjusted accordingly. We will notify you of any change at least twenty-one (21) days prior to the effective date of any change. The adjustment will apply to fees accruing as of and after the effective date. The adjusted rate will remain in effect until the next adjustment. The adjustment will apply to all fees, both prepaid amounts and any monthly overage amounts due. VMware's foreign exchange rate details are available at [here](#), and VMware's fiscal year calendar is available [here](#).

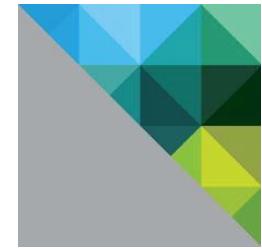
Cancellation

You cannot cancel or terminate your subscription prior to the expiration of the committed purchased Subscription Term. You are liable for all charges for the Subscription Term, regardless of whether you actually use the Service Offering for the entire Subscription Term. There is no refund for any committed charges that you paid at the time you purchased your subscription.

Termination

Termination of your Service Offering instance will result in permanent loss of access to the environments, discontinuation of services, and a deletion of the environments and configurations.

We will retain your Content in our backup systems for 90 days following the effective termination date. If you wish to extract your Content from the Service Offering (to the extent you have not already done so prior to termination of your Subscription Term), you must notify us within thirty (30) days after the effective termination date, and we will assist you in extracting Content from the Service Offering. You will be responsible for all fees associated with Content extraction. If you do not notify us within that 30-day period, your Content will be permanently deleted and will not be recoverable.



CloudHealth® by VMware

Sub-processors

Last Updated: May 30, 2019

VMware may hire other companies to provide certain services on its behalf. Sub-processors who may process Content (as defined in the Terms of Service) are itemized below. VMware affiliates may also process Content. As set forth in the Data Processing Addendum, VMware has adequate data transfer mechanisms in place with each sub-processor. The list below does not apply to pre-release versions. The list below applies whether you purchased the CloudHealth service from VMware or CloudHealth Technologies, Inc.

Subcontractor	Country	Services Performed
Amazon Web Services, Inc.	USA	Hosting provider and platform services
Auth0, Inc.	USA*	Single Sign On
Gainsight, Inc.	USA*	Customer success platform
SendGrid, Inc.	USA*	Service Email Provider

The following sub-processors are used for customer support. This list is in addition to the listing noted below for VMware Global Support Services.

Subcontractor	Country	Services Performed
Google, LLC.	USA*	GSuite
Zendesk, Inc.	USA*	Customer success platform

** The country listed is the sub-processor's primary location. VMware purchases the sub-processor's standard offering and thus the sub-processor controls the country in which data is stored.*

VMware may use additional sub-processors for customer support – see the sub-processor listing for [VMware Global Support Services](#).

If you would like to receive updates to this sub-processor list, please go <http://pages.cloud.vmware.com/sub-processor-communications>, and enable notifications for this sub-processor list.