



## VMware Cloud Service Offerings

### TERMS OF SERVICE

*Last updated: 20 September 2020*

These **Terms of Service** and the Service Offering Documentation (including the Support for VMware Cloud Service Offerings Terms and Conditions, and VMware Equipment Terms for Devices, each as modified and attached as exhibits), which together constitute the **“Agreement”** are made and entered into as of the last signature date below (“Effective Date”), by and between the State of Oregon, acting through its Oregon Department of Administrative Services (“DAS”), with its principal office located at 155 Cottage Street NE, Salem, OR 97301-3972, and VMware, Inc. located at 3401 Hillview Avenue, Palo Alto, CA 94304. **“You”** means DAS, or individually any other State of Oregon government entity, or any State of Oregon public body as defined in ORS 174.109.

These Terms of Service are entered into by DAS and VMware for the benefit of agencies of the State of Oregon and other public bodies in Oregon who wish to purchase entitlements to Service Offerings under Participating Addenda between the State of Oregon and certain VMware authorized resellers. Such Participating Addenda (each, a “Participating Addendum”) were entered into pursuant to NASPO ValuePoint Master Agreements with such resellers, which arose out of the State of Utah Solicitation CH16012, originally issued on December 21, 2015. DAS is not a party to any Order for VMware Service Offering unless DAS is the entity issuing such Order to a VMware authorized reseller under a Participating Addendum.

**“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 term of the Agreement expires three years from the Effective Date (**“Agreement Term”**). For each Order issued during the Agreement Term, the Agreement 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 Your Content, or any Third-Party Content, violates the



Agreement, you must promptly remove that Content or suspend use of that Third-Party Content. If you believe your account has been compromised, you must notify us as soon as possible by submitting a Severity 1 Service Request. If we reasonably believe a problem with the Service Offering may be attributable to Your Content or to your use of the Service Offering, you must cooperate with us to resolve the problem.

**1.2.3** You may need to install software in your on-premises environment to enable use of 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 accompanying license agreement.

**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 Optional Third-Party Content.** Some Service Offerings contemplate use of Third-Party Content, that you can use at your option. If you choose to use Third-Party Content, you are responsible for complying with any accompanying terms, including any separate fees or charges imposed by the provider of that Third-Party Content. We may discontinue making Third-Party Content available at any time, which will not be deemed a material, detrimental change to the relevant Service Offering.

**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 for a period of 30 days (unless we specify otherwise) beginning on the date we provide you Login Credentials for 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, unless the Evaluation Service explicitly provides for such continued access.

**1.5.2** We will provide the Evaluation Service: (a) free of charge; (b) without support; (c) "AS IS"; and (d) without indemnification, warranty, or service level commitment of any kind.

**1.5.3** 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.

**1.5.4** 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.

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

**1.5.6** 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 any part of 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 of a Service Offering, 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.

Notwithstanding anything to the contrary in the foregoing paragraph, during the Agreement Term, no changes to the Terms of Service after the Effective Date shall be applicable to You, except for changes (i) reasonably required to comply with a change in applicable law or regulation issued by a governmental regulator or agency; (ii) to account for new or modified Service Offerings, features or functionality, provided that such changes do not apply to any existing or unmodified services, features or functionality; (iii) reasonably required to account for changes in circumstances with respect to our suppliers; (iv) reasonably required to account for security concerns; or (v) as mutually agreed by the parties in writing.

**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. SECURITY MEASURES BY CUSTOMER.**

**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,  
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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](mailto:copyright@vmware.com)  
Telephone: +1-877-486-9273

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

**4.1 Ownership of Service Offering.** As between you and us, we own all right, title, and interest in and to the Service Offering and any related VMware Software, including all improvements, enhancements, modifications, and derivative works of them, and all Intellectual Property Rights in all of them. This includes any information we collect and analyze about your use of the Service Offering pursuant to Section 1.3 ("Monitoring"). Your rights to use the Service Offering are limited to those expressly granted in the Agreement. No other rights are implied with respect to the Service Offering, any related VMware Software, or any related Intellectual Property Rights.





**4.2 Ownership of Your Content.** As between you and us, you retain all right, title and interest in and to Your Content and all Intellectual Property Rights in Your Content. Our rights to access and use Your Content are limited to those expressly granted in the Agreement.

**5. ORDERS, 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 (which may be metered charges, or “overage” charges for use in excess of any committed use). 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 30 days after we notify you of that breach; (b) any payment is not received by VMware (or by a VMware channel partner if you are purchasing the Service Offering through a VMware channel partner) within 30 days after the date on which payment is due, provided that VMware will give 10 days’ notice before suspending your access to the Service Offering because of that delinquent payment; (c) we reasonably 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 reasonably 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.**

(i) We may, at our option, elect to terminate the Agreement effective immediately upon written notice to you if we have the right to suspend under Section 6.1 (“Temporary Suspension; Generally”) or (ii) to comply with applicable law. Either party may terminate this Agreement pursuant to any other provision of the Agreement that provides a party the right to terminate this Agreement.

**7.2.1** 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, or (d) to comply with applicable law.

**7.2.2** 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.

**7.3.1** Nothing in this Agreement may be construed to permit any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Your payment for services performed or fees due after the last calendar day of the current biennium is contingent upon you receiving funding, appropriations, limitations, allotments or other expenditure authority from the Oregon Legislative Assembly (including its Emergency Board) sufficient to allow you, in the exercise of your reasonable administrative discretion, to continue to compensate us. You may immediately terminate this Agreement upon written notice if you fail to receive funding, appropriations, limitations, allotments, or other expenditure authority as contemplated by your budget or spending plan and you determine, in your assessment and ranking of the policy objectives explicit or implicit in your budget or spending plan, that it is necessary to terminate this Agreement.

### **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 Support Policy. 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 with respect to a Third-Party Claim. 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. Your indemnity obligations under this Agreement are subject to Article XI, Section 7 of the Oregon Constitution and the Oregon Tort Claims Act (ORS 30.260 to ORS 30.400).

### **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, subject to the statutory approval authority of the Oregon Attorney General, over the defense of the Infringement Claim; and (iii) reasonably cooperate in response to our requests for assistance with regard to the Infringement Claim. VMware shall have primary control of the defense provided that you and the Oregon Attorney General shall have the right to participate in any litigation and/or settlement negotiations at your own expense. Nothing herein shall limit the Oregon Attorney General’s statutory



authority to represent the State of Oregon. We will not, without your (or the Attorney General's where applicable) 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 EITHER PARTY 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.** NEITHER PARTY'S LIABILITY FOR ANY CLAIM UNDER THE AGREEMENT WILL 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.

**11.3 Exclusions.** OTHER THAN TO THE EXTENT THE FOLLOWING LIABILITY IS LIMITED BY ARTICLE XI, SECTION 7 OF THE OREGON CONSTITUTION AND THE OREGON TORT CLAIMS ACT (ORS 30.260 TO ORS 30.400), THE LIMITATION OF LIABILITY IN SECTIONS 11.1 and 11.2 WILL NOT APPLY TO (a) YOUR VIOLATION OF INTELLECTUAL PROPERTY RIGHTS, OR YOUR USE OF THE OFFERINGS IN A MANNER NOT EXPRESSLY AUTHORIZED BY THIS AGREEMENT; (b) EITHER PARTY'S INDEMNIFICATION OBLIGATIONS UNDER THE AGREEMENT; (c) EITHER PARTY'S BREACH OF SECTION 12 (CONFIDENTIAL INFORMATION); (d) YOUR PAYMENT OBLIGATIONS; (e) ANY DAMAGES ARISING OUT OF A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT; OR (F) ANY LIABILITY WHICH MAY NOT BE EXCLUDED BY LAW.

### **11.4 Further Limitations.**

**11.4.1** Our suppliers have no liability of any kind under the Agreement. You may not bring a claim directly against any of them under the Agreement. Our liability with respect to any Third-Party Content used or made available as part of a Service Offering is subject to this Section 11.





**11.4.2** 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.

**12.4 Public Records Laws.** You may disclose VMware Confidential Information to the extent required by Oregon Public Records Law (ORS 192.311 to ORS 192.478).

## **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. Any notice by us to you will be given by one of the methods described above.

**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. Without limiting the foregoing:

**13.5.1 Non-Discrimination.** If the anticipated total value of the Service Offerings to be provided under this Agreement is \$150,000 or more, We certify that we have a written policy and practice that meets the requirements described in 2017 Oregon Laws, chapter 212, (codified at ORS 279A.212) for preventing sexual harassment, sexual assault, and discrimination against employees who are members of a protected class. We agree, as a material condition, to maintain such policy and practice in force during the term of these Terms of Service and any Service Offering provided hereunder. Our failure to maintain such policy and practice constitutes a breach entitling you to terminate this Agreement for cause.



**13.5.2 Pay Equity.** As required by ORS 279B.235, we shall comply with ORS 652.220 and not unlawfully discriminate against any of our employees in the payment of wages or other compensation for work of comparable character on the basis of an employee's membership in a protected class. "Protected class" means a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. Our compliance with this section is a material term of this Agreement, and our failure to comply constitutes a breach entitling you to terminate this Agreement for cause.

**13.5.3 Wage Discussions.** As required by ORS 279B.235, we may not prohibit any of our employees from discussing the employee's rate of wage, salary, benefits, or other compensation with another employee or another person. We shall not retaliate against an employee who discusses the employee's rate of wage, salary, benefits, or other compensation with another employee or another person.

**13.5.4 Tax Compliance Certificate.** By entering into this Agreement, the undersigned certifies under penalty of perjury that the undersigned is authorized to act on our behalf and that, to the best of the undersigned's knowledge, we are not in violation of any Oregon Tax Laws. For purposes of this certification, "Oregon Tax Laws" means a state tax imposed by ORS 305.380(4), ORS 305.620 and ORS chapters 316, 317, and 318; (ii) Any tax provisions imposed by a political subdivision of this state that apply to us, to our property, operations, receipts, or income, or to our performance of or compensation for any work performed by us; (iii) Any tax provisions imposed by a political subdivision of this state that apply to us, or to goods, services, or property, whether tangible or intangible, provided by us; and (iv) Any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions.

**13.5.5 Oregon Statutes.** To the extent applicable, we agree to comply with ORS 279B.220, 279B.230 and 279B.235.

**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 Oregon without regard to principles of conflicts of laws. The U.N. Convention on Contracts for the International Sale of Goods does not apply. Nothing herein shall be construed as (i) a waiver of the State of Oregon's sovereign or governmental immunity, whether derived from the Eleventh Amendment to the United States Constitution or otherwise, or of any defenses to Claims or jurisdiction based thereon, or (ii) consent by either party to the jurisdiction of any court.

**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 you submit to VMware or a VMware authorized channel partner 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, (ii) the specific Service Description and Service Level Agreement (if any) for the Service Offering, and (iii) the Support Policy; 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 VMware cloud service offering support policies 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.

IN WITNESS WHEREOF, DAS and VMware have caused these Terms of Service to be signed by their duly authorized representatives.

**VMWARE, INC.**

By: Katrina W. Tuel

Name: Katrina W. Tuel

Title: Public Sector Contracts Director

Date: June 8, 2021

**OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES**

By: Debbie Davis

Name: Debbie Davis

Title: State Procurement Analyst

Date: June 9, 2021

**OREGON DEPARTMENT OF JUSTICE**

By: John McCormick approved via email dated 6/08/2021

Title: Assistant Attorney General