vmware®

VMWARE END USER LICENSE AGREEMENT FOR U.S. FEDERAL END USERS

PLEASE NOTE THAT THE TERMS OF THIS END USER LICENSE AGREEMENT SHALL GOVERN YOUR USE OF THE SOFTWARE, REGARDLESS OF ANY TERMS THAT MAY APPEAR DURING THE INSTALLATION OF THE SOFTWARE.

THIS END USER LICENSE AGREEMENT APPLIES ONLY IF THE CUSTOMER IS AN EXECUTIVE AGENCY OF THE U.S. GOVERNMENT OR AN ELIGIBLE ORDERING ACTIVITY. THIS END USER LICENSE SHALL BE INCORPORATED IN ANY ORDERS ISSUED BY SUCH CUSTOMERS. IF THE CUSTOMER IS NOT AN EXECUTIVE AGENCY OF THE U.S. GOVERNMENT OR AN ELIGIBLE ORDERING ACTIVITY (EXCLUDING STATE AND LOCAL GOVERNMENT ENTITIES), THEN VMWARE'S END USER LICENSE AGREEMENT AT WWW.VMWARE.COM/DOWNLOAD/EULA APPLIES.

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

1. DEFINITIONS.

1.1 "**Customer**" or "**You**" means the federal government entity, or other Eligible Ordering Activity named in the Order.

1.2 "**Documentation**" means that documentation that is generally provided to You by VMware with the Software, as revised by VMware from time to time, in all cases being "commercial computer software documentation" pursuant to Defense Federal Acquisition Regulation Supplement ("DFARS") 227.7202 and Federal Acquisition Regulation ("FAR") 12.212, and which may include end user manuals, operation instructions, installation guides, release notes, and on-line help files regarding the use of the Software.

1.3 "**Eligible Ordering Activity**" means an agency or activity that is specifically authorized in accordance General Services Acquisition Regulation ("GSAR") 552.238-78 to place an Order against a GSA Schedule Contract.

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

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

1.6 "**License**" means a license granted under Section 2.1 (General License Grant).

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

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

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

1.10 "**Open Source Software**" or "**OSS**" means software components embedded in the Software and provided under separate license terms, which can be found either in the open_source_licenses.txt file (or similar file) provided within the Software or at www.vmware.com/download/open_source.html.

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

1.12 "**Parties**" means the Customer as defined in Section 1.1 and VMware.

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

1.14 "**Schedule Holder**" means the entity holding the GSA Schedule or other prime contract under which the government has placed its Order.

1.15 **"Support Services Terms"** means VMware's Support and Subscription Services ("SnS") Terms and Conditions for U.S. Federal End Customers, a copy of which is provided as Attachment A to this EULA.

1.14 **"Software"** means the VMware Tools and the VMware computer programs listed on VMware's commercial price list,in all cases being "commercial computer software" pursuant to DFARS 227.7202 and FAR 12.212, and to which You acquire a license under an Order, together with any software code relating to the foregoing that is provided to You pursuant to a Support and Subscription Service contract and that is not subject to a separate license agreement.

1.15 "**Territory**" means either:
   (a) If the Customer has been invoiced within the fifty United States of America, the fifty States of the United States of America and U.S. Government facilities outside of those fifty States. For purposes of this section, "U.S. Government Facilities" means buildings that are both 100% owned and controlled by the Customer and includes land, bases, installations, vessels, craft, and ships that are both 100% owned and controlled by the U.S. Government. In the foregoing sentence, "owned" also includes leased throughout the entire term of the Order.
   (b) If the Customer has been invoiced outside of the fifty United States of America, the country or countries in which You have been invoiced; provided, however, that if You have been invoiced within any of the European Economic Area member states, You may deploy the corresponding Software throughout the European Economic Area.

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

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

1.18 "**VMware**" means VMware, Inc., a Delaware corporation, if You are purchasing Licenses or services for use in the United States.

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

2.   **LICENSE GRANT.**

2.1 **General License Grant.** VMware grants to You a non-exclusive, non-transferable (except as set forth in Section 12.1 (Transfers; Assignment)) commercial item license to use the Software and the Documentation during the period of the license and within the Territory, solely for Your internal business operations, and subject to the provisions of the Product Guide. Unless otherwise indicated in the Order, licenses granted to You will be perpetual, will be for use of object code only, and will commence on either delivery of the physical media or the date You are notified of availability for electronic download.

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

2.3 **Copying Permitted.** You may copy the Software and Documentation as necessary to install and run the quantity of copies licensed, but otherwise for archival purposes only.

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

2.5 **VMware Tools.** You may distribute the VMware Tools to third parties solely when installed in a Guest Operating System within a Virtual Machine, provided that You agree to be liable for compliance by those third parties with the terms and conditions of this EULA.

2.6 **Open Source Software**. Notwithstanding anything herein to the contrary, Open Source Software is licensed to You under such OSS's own applicable license terms, which can be found in the open_source_licenses.txt file, the Documentation or, as applicable, the corresponding source files for the Software available at www.vmware.com/download/open_source.html. These OSS license terms are consistent with the license granted in Section 2 (License Grant), and may contain additional rights benefiting You. The OSS license terms shall take precedence over this EULA to the extent that this EULA imposes greater restrictions on You than the applicable OSS license terms. To the extent the license for any Open Source Software requires VMware to make available to You the corresponding source code and/or modifications (the "**Source Files**"), You may obtain a copy of the applicable Source Files from VMware's website at www.vmware.com/download/open_source.html or by sending a written request with Your name and address to: VMware, Inc., 3401 Hillview Avenue, Palo Alto, CA 94304, United States of America. All requests should clearly specify: Open Source Files Request, Attention: General Counsel. This offer to obtain a copy of the Source Files is valid for three years from the date You acquired this Software.

3. **RESTRICTIONS; OWNERSHIP.**

3.1 **License Restrictions.** Without VMware's prior written consent, You must not, and must not allow any third party to: (a) use Software in an application services provider, service bureau, or similar capacity for third parties; (b) disclose to any third party the results of any benchmarking testing or comparative or competitive analyses of VMware's Software done by or on behalf of You, except as specified in Section 2.4 (Benchmarking); (c) make available Software in any form to anyone other than Your employees or contractors who require access to use Software on behalf of You in a matter permitted by this EULA, except as specified in Section 2.2 (Third Party Agents); (d) transfer or sublicense Software or Documentation to any third party, except as expressly permitted in Section 12.1 (Transfers; Assignment); (e) use Software in conflict with the terms and restrictions of the Software's licensing model and other requirements specified in Product Guide and/or VMware quote; (f) except to the extent permitted by applicable mandatory law, modify, translate, enhance, or create derivative works from the Software, or reverse engineer, decompile, or otherwise attempt to derive source code from the Software, except as specified in Section 3.2 (Decompilation); (g) remove any copyright or other proprietary notices on or in any copies of Software; or (h) violate or circumvent any technological restrictions within the Software or specified in this EULA, such as via software or services.

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

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

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

4. **ORDER.** Your Order is subject to this EULA, except as required by applicable law or the Schedule's Order of Precedence clause. No Orders are binding on VMware unless this EULA is expressly incorporated in each Order and the Order is accepted by VMware. Orders for Software are deemed to be accepted upon VMware's delivery of the Software included in such Order.

5. **RECORDS AND AUDIT.** During the License Term for Software and for two (2) years after its expiration or termination, You will maintain accurate records of Your use of the Software sufficient to show compliance with the terms of this EULA. During this period, VMware will have the right to audit Your use of the Software, at VMware's own expense, to confirm compliance with the terms of this EULA. That audit is subject to reasonable notice by VMware and will not unreasonably interfere with Your business activities. VMware may conduct no more than one (1) audit in any twelve (12) month period, and only during normal business hours. VMware, and any third-party auditor, shall not have physical access to Your computing devices in connection with any such audit without Your prior written consent. You will reasonably cooperate with VMware and any third party auditor. VMware reserves the right to seek recovery of any underpayments revealed by the audit in accordance with the Contract Disputes Act and the Disputes clauses in the FAR, GSAR, or other applicable agency supplement. No payment obligation shall arise on Your behalf until conclusion of the dispute process. In the event an audit necessitates access to classified information as that term is defined in the National Industrial Security Program Operating Manual (NISPOM), the audit will be conducted by auditor(s) possessing a personal security clearance ("PCL", as defined in the NISPOM) at the appropriate level. Classified information will be disclosed only to person(s) having a need-to-know who possess a PCL.

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

7. **WARRANTIES.**

7.1 **Software Warranty, Duration and Remedy.** VMware warrants to You that the Software will, for a period of ninety (90) days following notice of availability for electronic download or delivery ("**Warranty Period**"), substantially conform to the applicable Documentation, provided that the Software: (a) has been properly installed and used at all times in accordance with the applicable Documentation; and (b) has not been modified or added to by persons other than VMware or its authorized representative. VMware will, at its own expense and as its sole obligation and Your exclusive remedy for any breach of this warranty, either replace that Software or correct any

reproducible error in that Software reported to VMware by You in writing during the Warranty Period. If VMware determines that it is unable to correct the error or replace the Software, VMware will refund to You the amount paid by You for that Software, in which case the License for that Software will terminate.

7.2 **Software Disclaimer of Warranty.** OTHER THAN THE WARRANTY ABOVE, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, VMWARE AND ITS SUPPLIERS MAKE NO OTHER EXPRESS WARRANTIES UNDER THIS EULA, AND DISCLAIM ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. VMWARE AND ITS LICENSORS DO NOT WARRANT THAT THE SOFTWARE WILL OPERATE UNINTERRUPTED OR THAT IT WILL BE FREE FROM DEFECTS OR THAT IT WILL MEET YOUR REQUIREMENTS.

8. **INTELLECTUAL PROPERTY INDEMNIFICATION**.

8.1 **Defense and Indemnification**. Subject to the remainder of this Section 8 (Intellectual Property Indemnification) and 28 U.S.C. § 516, in the event of any third party claim that the Software infringes any patent, trademark, or copyright of such third party, or misappropriates a trade secret (but only to the extent that the misappropriation is not a result of Your actions) under the laws of: (a) the United States and Canada; (b) the European Economic Area; (c) Australia; (d) New Zealand; (e) Japan; or (f) the People's Republic of China, to the extent that such countries are part of the Territory for the License ("Infringement Claim"), VMware shall indemnify You from the resulting costs and damages finally awarded against You to such third party by a court of competent jurisdiction or agreed to in settlement approved by VMware; provided that You: (i) promptly notify VMware in writing of the Infringement Claim; (ii) allow VMware such opportunity to participate in the defense of such Infringement Claim and any settlement negotiations as is offered by applicable laws, rules, or regulations; and (iii) reasonably cooperate in response to VMware requests for assistance. You shall make every effort to permit VMware to participate fully in the defense and/or settlement of any such Infringement Claim; however, VMware understands that such participation will be under the control of the U.S. Department of Justice.

8.2 **Remedies**. Should the Software become, or in VMware's opinion be likely to become, the subject of an Infringement Claim, VMware will, at VMware's option and expense, do one of the following: (a) procure the rights necessary for You to make continued use of the affected Software; (b) replace or modify the affected Software to make it non-infringing; or (c) if VMware determines that the foregoing alternatives are not reasonably available, You agree to terminate the License to the affected Software and discontinue the related support services on VMware's written request, and upon Your certified deletion of the affected Software, VMware will refund: (i) the fees paid by You for the License to the affected Software, less straight-line depreciation over a three (3) year useful life beginning on the date such Software was delivered; and (ii) any pre-paid service fee attributable to related support services to be delivered after the date such service is stopped. Nothing in this Section 8.2 (Remedies) shall limit VMware's obligation under Section 8.1 (Defense and Indemnification) to defend and indemnify You, provided that You replace the allegedly infringing Software upon VMware's making alternate Software available to You and/or You discontinue using the allegedly infringing Software upon receiving VMware's written request to terminate the affected License. This is subject and limited to the Government's right to require continued use of the Software pursuant to 28 U.S.C. § 1498. In the event of such continued use, You agree to notify VMware in writing and undertake at Your expense the defense of any Infringement Claim against You, and VMware shall have no further indemnification obligation; however, VMware may participate at its own expense in the defense of any such action if such claim is against VMware.

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

9. **LIMITATION OF LIABILITY.**

9.1 **Limitation of Liability.** TO THE MAXIMUM EXTENT NOT PROHIBITED BY LAW, IN NO EVENT WILL VMWARE AND ITS LICENSORS BE LIABLE FOR ANY LOST PROFITS OR BUSINESS OPPORTUNITIES, LOSS OF USE, LOSS OF REVENUE, LOSS OF GOODWILL, BUSINESS INTERRUPTION, LOSS OF DATA, OR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES UNDER ANY THEORY OF LIABILITY, WHETHER BASED IN CONTRACT, TORT, NEGLIGENCE, PRODUCT LIABILITY, OR OTHERWISE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO YOU. VMWARE'S AND ITS LICENSORS' LIABILITY UNDER THIS EULA WILL NOT, IN ANY EVENT, REGARDLESS OF WHETHER THE CLAIM IS BASED IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, EXCEED THE LESSER OF THE LICENSE FEES YOU PAID FOR THE SOFTWARE GIVING RISE TO THE CLAIM OR ONE MILLION U.S. DOLLARS ($1,000,000.00 USD). THE FOREGOING LIMITATIONS SHALL APPLY REGARDLESS OF WHETHER VMWARE OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. THIS CLAUSE SHALL NOT IMPAIR THE U.S. GOVERNMENT'S RIGHT TO RECOVER FOR FRAUD OR CRIMES ARISING OUT OF THIS AGREEMENT TO

NO GREATER EXTENT THAN PERMITTED UNDER ANY APPLICABLE FEDERAL FRAUD STATUTE, INCLUDING THE FALSE CLAIMS ACT (31 U.S.C. 3729-3733).

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

10. TERMINATION.

10.1 **EULA Term.** The term of this EULA begins on the notice of availability for electronic download or delivery of the Software and continues until this EULA is terminated in accordance with this Section 10.

10.2 **Termination for Breach**. Subject to, and to the extent not prohibited by, the Contract Disputes Act and FAR 52.233-1 (Disputes), VMware may terminate Your License if it is determined that You failed to comply with the terms stated herein.

10.3 **Termination for the Government's Convenience**. You may terminate Your License in accordance with GSAR 552.212-4(l), if applicable.

10.4 **Effect of Termination**. Upon termination of this EULA by either party: (a) all Licensed rights to all Software granted to You under this EULA will immediately cease; and (b) You must cease all use of all Software, and return or certify destruction of all Software and License Keys (including copies) to VMware, and return, or if requested by VMware, destroy, any related VMware Confidential Information in Your possession or control and certify in writing to VMware that You have fully complied with these requirements. Any provision will survive any termination or expiration if by its nature and context it is intended to survive, including Sections 1 (Definitions), 2.6 (Open Source Software), 3 (Restrictions; Ownership), 5 (Records and Audit), 7.2 (Software Disclaimer of Warranty), 9 (Limitation of Liability), 10 (Termination), 11 (Confidential Information) and 12 (General).

11. CONFIDENTIAL INFORMATION.

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

11.2 **Protection.** Recipient may use Confidential Information of Discloser; (a) to exercise its rights and perform its obligations under this EULA; or (b) in connection with the Parties' ongoing business relationship. Recipient will not use any Confidential Information of Discloser for any purpose not expressly permitted by this EULA, and will disclose the Confidential Information of Discloser only to the employees or contractors of Recipient who have a need to know such Confidential Information for purposes of this EULA and who are under a duty of confidentiality no less restrictive than Recipient's duty hereunder. Recipient will protect Confidential Information from unauthorized use, access, or disclosure in the same manner as Recipient protects its own confidential or proprietary information of a similar nature but with no less than reasonable care.

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

12. GENERAL.

12.1 **Transfers; Assignment.** Except to the extent transfer may not legally be restricted or as permitted by VMware's transfer and assignment policies, in all cases following the process set forth at www.vmware.com/support/policies/licensingpolicies.html, You will not assign this EULA, any Order, or any right or obligation herein or delegate any performance without VMware's prior written consent, which consent will not be unreasonably withheld. VMware may assign its right to receive payment in accordance with the Assignment of Claims Act (31 U.S.C. § 3727) and FAR 52.212-4(b), and VMware may assign this EULA 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), the Customer shall recognize VMware's successor in interest following a transfer of VMware's assets or a change in VMware's name. Any attempted assignment or transfer in violation of the foregoing will be void. Subject to the foregoing, this EULA will be binding upon and

will inure to the benefit of the Parties and their respective successors and assigns. VMware may use its affiliates or other sufficiently qualified subcontractors to provide services to You, provided that VMware remains responsible to You for the performance of the services.

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

12.3   **Waiver**. Failure to enforce a provision of this EULA will not constitute a waiver.

12.4   **Severability.** If any part of this EULA is held unenforceable, the validity of all remaining parts will not be affected.

12.5   **Compliance with Laws; Export Control; Government Regulations.** Each party shall comply with all laws applicable to the actions contemplated by this EULA. You acknowledge that the Software is of United States origin, is provided subject to the U.S. Export Administration Regulations, may be subject to the export control laws of the applicable territory, and that diversion contrary to applicable export control laws is prohibited. You represent that (1) you are not, and are not acting on behalf of, (a) any person who is a citizen, national, or resident of, or who is controlled by the government of any country to which the United States has prohibited export transactions; or (b) any person or entity listed on the U.S. Treasury Department list of Specially Designated Nationals and Blocked Persons, or the U.S. Commerce Department Denied Persons List or Entity List; and (2) you will not permit the Software to be used for, any purposes prohibited by law, including, any prohibited development, design, manufacture or production of missiles or nuclear, chemical or biological weapons. The Software and accompanying documentation are deemed to be "commercial computer software" and "commercial computer software documentation", respectively, pursuant to DFARS 227.7202 and FAR 12.212, as applicable. Any use, modification, reproduction, release, performing, displaying or disclosing of the Software and documentation by or for the U.S. Government shall be governed solely by the terms and conditions of this EULA.

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

12.7   **Governing Law.** This EULA is governed by the applicable federal laws of the United States. The U.N. Convention on Contracts for the International Sale of Goods does not apply.

12.8   **Third Party Rights**. Other than as expressly set out in this EULA, this EULA does not create any rights for any person who is not a party to it, and no person who is not a party to this EULA may enforce any of its terms or rely on any exclusion or limitation contained in it. Notwithstanding the foregoing, for any Orders placed with a VMware authorized reseller, the reseller may at VMware's request bring a claim on VMware's behalf to enforce the terms of this EULA.

12.9   **Product Guide**. In addition to the above sections, Your use of the Software is subject to the terms and conditions of the Product Guide, which is incorporated herein by reference, but only to the extent that all terms and conditions in the Product Guide are consistent with Federal Law (e.g., the Anti-Deficiency Act (31 U.S.C. § 1341 and 41 U.S.C. §6301), the Contracts Disputes Act of 1978 (41. U.S.C. § 601-613), the Prompt Payment Act, the Anti-Assignment statutes (41 § U.S.C.6405), 28 U.S.C. § 516 (Conduct of Litigation Reserved to Department of Justice (DOJ), and 28 U.S.C. § 1498 (Patent and copyright cases)). To the extent the terms and conditions in the Product Guide or this EULA are inconsistent with Federal Law (See FAR 12.212(a)), they shall be deemed deleted and unenforceable as applied to any Orders under this EULA.

GSA has not vetted or approved the contents of the Product Guide.

For each version of the Software, VMware will not change the generally applicable terms of this EULA for which the Customer obtains a license.

This EULA shall not be modified by any terms embedded in and/or delivered with any new release of the Software, including Major Releases, Minor Releases and Maintenance Releases, each as defined in the Support Services Terms, made available to You after the Effective Date of this EULA, provided, however, that any new release of the Software will be subject to the product-specific terms in the then-current Product Guide. Such product-specific terms may include the license metric for the Software and license terms related to third party code that has been incorporated in the Software. Notwithstanding any provision of the Support Services Terms, for the "Major Release" of the Software available at the time of Your Order, any change in the Product Guide to license notes for the Software for any "Minor Releases" of the Software made available to You after the date of purchase will not apply to You except to the extent that the change is required in order to comply with the license terms related to third party code that has been incorporated in the Software, and all such Product Guide license notes will be generally applicable to VMware's licensees. "Major Release" and "Minor Release" have the meaning attributed to them in the Support Services Terms.

12.10   **Entire Agreement.** This EULA, and any amendments hereto, , and the Product Guide contain the entire agreement of the Parties with respect to the subject matter of this EULA and supersede all previous or contemporaneous communications, representations, proposals, commitments, understandings and agreements, whether written or oral, between the Parties regarding the subject matter hereof.

12.11   **Contact Information.** Please direct legal notices or other correspondence to VMware, Inc., 3401 Hillview Avenue, Palo Alto, California 94304, United States of America, Attention: Legal Department.

vmware®

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

THESE VMWARE, INC. SUPPORT AND SUBSCRIPTION SERVICES "SNS" TERMS AND CONDITIONS APPLY ONLY IF THE CUSTOMER IS AN EXECUTIVE AGENCY OF THE U.S. GOVERNMENT, OR OTHER ELIGIBLE ORDERING ACTIVITY. THESE VMWARE, INC. SUPPORT AND SUBSCRIPTION SERVICES "SNS" TERMS AND CONDITIONS SHALL BE INCORPORATED IN ANY ORDERS ISSUED BY SUCH CUSTOMERS. IF THE CUSTOMER IS NOT AN EXECUTIVE AGENCY OF THE U.S. GOVERNMENT OR AN ELIGILBLE ORDERING ACTIVITY (EXCLUDING STATE AND LOCAL GOVERNMENT ENTITIES), THEN THE VMWARE, INC. SUPPORT AND SUBSCRIPTION SERVICES "SNS" TERMS AND CONDITIONS AT WWW.VMWARE.COM APPLY.

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

1.   Definitions.

1.1   "**Customer**" or "**You**" means the federal government entity, or other Eligible Ordering Activity named in the Order.

1.2   "**Eligible Ordering Activity**" means an agency or activity that is specifically authorized in accordance General Services Acquisition Regulation ("GSAR") 552.238-78 to place an Order to be issued under a GSA Schedule Contract..

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

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

1.5   "**Schedule Holder**" means the entity holding the GSA Schedule or other prime contract under which the government has placed its Order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.   Service Terms.

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

2.2   End of Availability. VMware may, at its discretion, decide to retire Software and/or Services from time to time ("**End of Availability**"). VMware shall post notice of End of Availability, including the last date of general commercial availability of the affected Software and the timeline for discontinuing Services, at https://www.vmware.com/support/policies/lifecycle.html.   Unless prohibited by the Anti-Deficiency Act (Public Law 97-258), VMware shall have no obligation to provide Services for Software that is outside of the applicable Service life.

2.3   Purchase Requirements.

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

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

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

(d)   These Services Terms and conditions will automatically update to VMware's then-current Services terms and conditions set forth at https://www.vmware.com/files/pdf/support/support_terms_conditions.pdf upon any renewal of Services, but only to the extent that all terms and conditions set forth at https://www.vmware.com/files/pdf/support/support_terms_conditions.pdf are consistent with federal law that is applicable, mandatory, and controlling.   To the extent the terms and conditions set forth at https://www.vmware.com/files/pdf/support/support_terms_conditions.pdf are inconsistent with federal law that is applicable, mandatory, and controlling, they shall be deemed deleted and unenforceable as applied to any Orders under this Agreement.

2.4   Exclusions.

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

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

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

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

(iv) Modified Code;

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

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

(vii)   any issue not covered by Technical Support.

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

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

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

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

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

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

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

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

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

3.   Services Offerings and Fees.

3.1   Services Fee Terms.

(a)   Services Fees are payable on the date for payment as set forth in the Order. Services Fees are specified in the applicable price list and are non-refundable for Services provided.

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

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

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

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

3.2   Advanced and Complimentary Offerings.

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

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

(c)   Services for Software made available under open source licenses may be subject to additional policies located at https://www.vmware.com/support/policies/opensource.html, but only to the extent that all terms and conditions set forth at https://www.vmware.com/support/policies/opensource.html are consistent with federal law that is applicable, mandatory, and controlling. To the extent the terms and conditions set forth at https://www.vmware.com/files/pdf/support/support_terms_conditions.pdf are inconsistent with federal Law that is applicable, mandatory, and controlling (See FAR 12.212(a)), they shall be deemed deleted and unenforceable as applied to any Orders under this Agreement.

4. Miscellaneous Terms

4.1 Payment Terms. Services Fees are exclusive of any taxes, duties, or similar charges imposed by any government. Schedule Holder, acting on behalf of VMware, shall invoice Customer for all federal, state, dominion, provincial, or local sales, use, personal property, excise, value added, withholding or other taxes, fees, or duties relating to the transactions contemplated by this Agreement (other than taxes on the net income of VMware) unless Customer is exempt from any such taxes, fees or duties, then such taxes, fees or duties shall not be charged to Customer upon VMware's receipt of documentation reasonably acceptable to VMware evidencing Customer's tax-exempt status. All invoices issued hereunder by VMware are due and payable as set forth in the Order.

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

4.3 Limitation of Liability. TO THE MAXIMUM EXTENT MANDATED BY LAW, VMWARE SHALL NOT BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED UPON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, ARISING FROM ITS PERFORMANCE OR NON-PERFORMANCE UNDER THIS AGREEMENT. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE PRECEDING LIMITATION MAY NOT APPLY TO CUSTOMER. VMWARE'S LIABILITY UNDER THIS AGREEMENT WILL NOT, IN ANY EVENT, EXCEED THE SERVICES FEES PAID BY CUSTOMER TO VMWARE UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DATE OF THE EVENT MOST DIRECTLY GIVING RISE TO THE CLAIM. THIS CLAUSE SHALL NOT IMPAIR THE U.S. GOVERNMENT'S RIGHT TO RECOVER FOR FRAUD OR CRIMES ARISING OUT OF THIS AGREEMENT TO NO GREATER EXTENT THAN PERMITTED UNDER ANY APPLICABLE FEDERAL FRAUD STATUTE, INCLUDING THE FALSE CLAIMS ACT (31 U.S.C. 3729-3733).

4.4 Termination. Subject to, and to the extent not prohibited by, the Contract Disputes Act and FAR 52.233-1 (Disputes), VMware may terminate the Agreement and all Services at any time if (1) it is discovered that Customer is currently in breach of its Software license restrictions, pursuant to Customer's Software license or (2) Customer is in material breach of this Agreement.

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

4.6 Other. Customer may not assign or delegate this Agreement to any third party without the prior written consent of VMware, except to the extent such assignment or delegation is not legally restricted or permitted. This Agreement shall be governed by the applicable Federal law., This Agreement constitutes the entire agreement of the parties with respect to the provision of the Services by VMware to Customer, and supersedes all prior written or oral communications, understandings and agreements. ... Any waiver of the provisions of this Agreement must be in writing to be effective. Except as expressly set forth herein, no terms of any purchase order or other business form that Customer may use will affect the obligations of the parties under this Agreement, and any such purchase order or other business form of Customer which contains additional or conflicting terms are hereby rejected by VMware, unless such terms and conditions are mandated by applicable federal law. If any provision of this Agreement is found to be invalid or unenforceable, the remaining terms will continue to be valid and enforceable to the fullest extent permitted by law. The version of the Technical Support guide found at https://www.vmware.com/files/pdf/support/tech_support_guide.pdf and the policies located at https://www.vmware.com/support/policies/index/ are the governing versions of such documents/policies; any translation into other languages is for convenience only. VMware may update the Technical Support guide and support policies periodically, without prior notice. VMware may assign its right to receive payment in accordance with the Assignment of Claims Act (31 U.S.C. § 3727) and FAR 52.212-4(b), and VMware may assign this 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), the Customer shall recognize VMware's successor in interest following a transfer of VMware's assets or a change in VMware's name. Any attempted assignment or transfer in violation of the foregoing will be void. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns. VMware may use its affiliates or other sufficiently qualified subcontractors to provide services to Customer, provided that VMware remains responsible to Customer for the performance of the services.

March 2017