

VMware Data Processing Agreement for Microsoft AVS Customers Transferred for L3 Support

IMPORTANT - READ CAREFULLY. This VMware Data Processing Agreement for Microsoft AVS Customers Transferred for L3 Support (“DPA”) is entered into by and between VMware, Inc. (“VMware”) and the party requesting VMware technical support relating to Azure VMware Solution pursuant to the Microsoft AVS Support Agreement (“Customer”).

1. DEFINITIONS.

- 1.1 “**AVS**” means the Azure for VMware Service subscription cloud service hosted by Microsoft.
- 1.2 “**Controller**” means an entity that determines the purposes and means of the processing of Personal Data.
- 1.3 “**Data Protection Law**” means all data protection and privacy laws applicable to the processing of Personal Data under this DPA, including the GDPR.
- 1.4 “**GDPR**” means Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of Personal Data and on the free movement of such data (General Data Protection Regulation).
- 1.5 “**Microsoft AVS Support Agreement**” means an agreement between Customer and Microsoft that entitles Customer to obtain certain support services from Microsoft pursuant to the Customer’s purchased subscription for AVS.
- 1.6 “**Microsoft/VMware AVS Agreement**” means the relevant agreements between Microsoft and VMware relating to VMware’s licensing to Microsoft of certain software products for use by Microsoft in connection with the AVS Service.
- 1.7 “**Personal Data**” means any information relating to an identified or identifiable natural person that is provided by Customer to VMware, whether directly or through Microsoft, in connection with a technical support issue. “Personal Data” does not include Customer account or relationship data that VMware uses in connection with a technical support request, or data collected by VMware to verify the support entitlement.
- 1.8 “**Personal Data Breach**” means a breach of security of the Services leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to Personal Data.
- 1.9 “**Processor**” means an entity that processes Personal Data on behalf of a Controller.
- 1.10 “**Referred Request**” means a request for backline support initiated by Customer and referred by Microsoft to VMware pursuant to the Microsoft AVS Support Agreement.

1.11 “**Services**” means backline support services performed by VMware pursuant to a Referred Request.

1.12 “**Sub-processor**” means any Processor engaged by VMware or any member of its group of companies that processes Personal Data pursuant to this DPA. Subprocessors may include third parties or any member of VMware’s group of companies.

2. **SCOPE.**

2.1 Customer represents and warrants that it is party to a current, in-force Microsoft AVS Support Agreement, and Customer acknowledges that this DPA does not create any right for Customer to obtain or obligation for VMware to provide technical support services concerning AVS from VMware. Pursuant to the Microsoft/VMware AVS Agreement and related agreements between Microsoft and VMware, Microsoft may refer certain support issues concerning Customer's use of AVS to VMware. This DPA addresses in full VMware’s obligations with respect to any Personal Data that VMware processes on behalf of Customer as a Processor in response to a Referred Request. This DPA does not apply where VMware processes Personal Data as a Controller.

3. **CUSTOMER SUPPORT.**

3.1 **Submission of Personal Data.** In connection with a Referred Request, Microsoft and/or Customer may upload certain Personal Data to VMware’s systems. That Personal Data will vary depending on the product and the context of the Referred Request, but may include IP addresses and user identifiers, as well as any Personal Data contained in Customer content. Customer is solely responsible for taking steps necessary to protect any sensitive or confidential information included in Personal Data. Those steps may include Customer obfuscating or removing such information or, depending on the precise nature of the Services sought, otherwise working with Microsoft or VMware at the time of submission to limit the disclosure of such information.

3.2 **Prohibited Data.** Customer must not submit any Personal Data to VMware that: (a) Customer does not have the right to provide to VMware; (b) constitutes information that is regulated by the Health Insurance Portability and Accountability Act, as amended and supplemented, and the regulations thereunder (collectively, “HIPAA”), or any similar federal, state, or local laws, rules, or regulations; (c) contains financial information of any individual; or (d) is regulated by law or regulation without complying with the applicable laws or regulations. If Customer submits any Personal Data in contravention of this Section 3.2, then Customer is solely responsible for the consequences of that submission.

3.3 **Analytcs Data.** Notwithstanding anything to the contrary in this DPA, VMware may review and analyze data provided by Customer, including Personal Data, to address a Referred Request. VMware may use the results of that review and analysis, in combination with data VMware collects as a result of the Referred Request regarding

Customer's use of VMware products included as part of AVS (such as configuration, performance, and usage data) to provide support to Customer and to improve VMware products, services, and user experiences.

3.4 Disclosure of Personal Data. If VMware is required by a subpoena, court order, agency action, or any other legal or regulatory requirement, to disclose any Personal Data, VMware will provide Customer with notice and a copy of the demand, as soon as practicable, unless VMware is prohibited from doing so pursuant to applicable law or regulation. If Customer requests, VMware will, at Customer's expense, take reasonable steps to contest and to limit the scope of any required disclosure.

4. **PROCESSING.**

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

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

4.3 VMware Processing of Personal Data.

4.3.1 VMware will comply with Data Protection Law applicable to its processing Personal Data disclosed as a result of a Referred Request in accordance with Customer's documented instructions. Customer agrees that this DPA is its complete and final instructions to VMware in relation to the processing of Personal Data. Processing any Personal Data outside the scope of this DPA will require prior written agreement between VMware and Customer by way of written amendment to this DPA, and will include any additional fees that may be payable by Customer to VMware for carrying out such instructions. Upon notice in writing, Customer may terminate this DPA if VMware declines to follow Customer's reasonable instructions that are outside the scope of, or changed from, those given or agreed to in this DPA, to the extent such instructions are necessary to enable Customer to comply with Data Protection Laws.

4.3.2 Without limiting the generality of the foregoing, to the extent the California Consumer Privacy Act of 2018, as amended, Cal. Civ. Code § 1798.100 et. seq. ("CCPA"), applies to any Personal Data, such Personal Data will be disclosed by Customer to VMware for a 'business purpose' and VMware will act as Customer's 'service provider', as such terms are defined under CCPA. VMware will not retain, use or disclose Personal Data for a commercial or any other purpose other than for

attempting to perform its support obligations to Microsoft pursuant to a Referred Request, or as otherwise permitted by the CCPA.

4.4 **Processing of Personal Data Details.**

- 4.4.1 Subject matter. The subject matter of the processing under this DPA is the Personal Data that Microsoft or Customer provides to VMware in the course of the Services, as described in this DPA.
- 4.4.2 Duration. The duration of the processing under this DPA is determined by Customer and as set forth in this DPA.
- 4.4.3 Purpose. The purpose of the processing under this DPA is for VMware to perform the Services.
- 4.4.4 Nature of the processing. VMware and/or its Sub-processors are providing Services as described in this DPA. These Services may include the processing of Personal Data by VMware and/or its Sub-processors on systems that may contain Personal Data.
- 4.4.5 Categories of data subjects. Customer determines the data subjects, which may include Customer's end users, employees, contractors, suppliers, and other third parties.
- 4.4.6 Categories of data. Customer determines the categories of data that it submits and is made available to VMware pursuant to a Referred Request.

5. **SUBPROCESSING.**

- 5.1 **Use of Sub-Processors.** VMware engages Sub-processors to provide certain services on its behalf. Customer consents to VMware engaging Sub-processors to process Personal Data under this DPA. VMware will be responsible for any acts, errors, or omissions of its Sub-processors that cause VMware to breach any of VMware's obligations under this DPA.
- 5.2 **Obligations.** VMware will enter into an agreement with each Sub-processor that obligates the Sub-processor to process the Personal Data in a manner substantially similar to the standards set forth in the DPA, and at a minimum, at the level of data protection required by Data Protection Law (to the extent applicable to the services provided by the Subprocessor).
- 5.3 **Notice.** VMware will provide a list of Sub-processors that it engages to process Personal Data upon written request by Customer or as otherwise made available by VMware on its website.
- 5.4 **Changes to Sub-processors.** VMware agrees (i) to provide prior notice to Customer of any new engagement of a Sub-processor to process Personal Data if the Customer has subscribed to receive notification via the mechanisms that VMware provides for the

specific Service; and (ii) if Customer objects to a new Sub-processor on reasonable data protection grounds within ten (10) days of receiving the notice, to discuss with Customer those concerns in good faith with a view to achieving resolution.

6. **SECURITY MEASURES.**

6.1 **Security Measures by VMware.** VMware will implement and maintain appropriate technical and organizational security measures to protect against Personal Data Breaches and to preserve the security and confidentiality of Personal Data processed by VMware on behalf of Customer in the provision of the Services (“Security Measures”). The Security Measures are subject to technical progress and development. VMware may update or modify the Security Measures from time to time provided that any updates and modifications do not result in material degradation of the overall security of the Services.

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

7. **PERSONAL DATA BREACH RESPONSE.**

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

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

9. **DATA TRANSFERS AND EXPORTS.**

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

9.2 **Data Transfers from the EEA and Switzerland.** The parties acknowledge that VMware has achieved Binding Corporate Rules (“BCR”) approval for Personal Data that it processes as a Processor. A copy of VMware’s BCR is available at <https://www.vmware.com/help/privacy/binding-corporate-rules.html> and evidence of

VMware's approval is available on the European Commission's website at http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=613841. VMware will process all European Economic Area (including the UK) or Switzerland Personal Data transferred to it for processing under this DPA in accordance with its BCR, including when such Personal Data is processed outside of the European Economic Area by VMware, any member of its group of companies, or any external Sub-processor appointed by VMware.

10. **DELETION OF DATA.** VMware will delete or return to Customer all Personal Data in VMware's possession as set forth in this DPA after the business purposes for which the Personal Data was collected or transferred to VMware have been fulfilled or earlier upon Customer's request, except to the extent VMware is required by applicable law to retain some or all of the Personal Data (in which case VMware will archive the data and implement reasonable measures to prevent the Personal Data from any further processing). The terms of this DPA will continue to apply to that retained Personal Data.
11. **COOPERATION.**
 - 11.1 **Data Protection Requests.** If VMware receives any requests from individuals or applicable data protection authorities relating to the processing of Personal Data under this DPA, including requests from individuals seeking to exercise their rights under Data Protection Law, VMware will promptly redirect the request to the Customer. VMware will not respond to such communication directly without Customer's prior authorization, unless legally compelled to do so. If VMware is required to respond to such a request, VMware will promptly notify Customer and provide Customer with a copy of the request, unless legally prohibited from doing so.
 - 11.2 **Customer Requests.** VMware will reasonably cooperate with Customer, at Customer's expense, to permit Customer to respond to any requests from individuals or applicable data protection authorities relating to the processing of Personal Data under this DPA to the extent that Customer is unable to access the relevant Personal Data in their use of the Services.
 - 11.3 **DPIAs and Prior Consultations.** To the extent required by Data Protection Law, VMware will, upon reasonable notice and at Customer's expense, provide reasonably requested information regarding the Services to enable Customer to carry out data protection impact assessments ("DPIAs") and/or prior consultations with data protection authorities.
12. **Limited Warranty.** As VMware receives no consideration from Customer for performance of the Services, which VMware owes to Microsoft, the Services are provided AS IS WITHOUT WARRANTY OF ANY KIND, WHETHER 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 PERMITTED BY LAW, THIS WARRANTY IS CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO NONCONFORMANCE OF SERVICES.

13. **Limitation of Liability.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, VMWARE WILL NOT 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, WHETHER BASED UPON CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, ARISING FROM ITS PERFORMANCE OR NON-PERFORMANCE UNDER THIS DPA. 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 DPA WILL NOT, IN ANY EVENT, EXCEED U.S.\$10,000.00.
14. **MISCELLANEOUS**
- 14.1 **Transfer; Assignment.** Customer may not assign or delegate this DPA to any third party without VMware's prior written consent.
- 14.2 **Governing Law.** This DPA is governed by the laws of the State of California without regard to conflict of laws principles. Customer and VMware consent to the exclusive jurisdiction of the state and federal courts located in Santa Clara County, California for the adjudication of any disputes under this DPA.
- 14.3 **Entire Agreement.** This DPA constitutes the entire agreement of the parties with respect to provision of the Services by VMware to Customer, and supersedes all prior written or oral communications, understandings, and agreements.
- 14.4 **Customer Forms.** Except as expressly set forth in this DPA, no terms of any purchase order or other business form that Customer may use will affect the obligations of the parties under this DPA, and any purchase order or other business form which contains additional or conflicting terms is hereby rejected by VMware. Customer agrees that purchase orders do not have to be signed by Customer to be valid and enforceable.
- 14.5 **Modification and Supplementation.** VMware may modify the terms of this DPA, in circumstances such as (i) if required to do so by a supervisory authority or other government or regulatory entity, (ii) if necessary to comply with Data Protection Law, or (iii) to implement or adhere to standard contractual clauses, approved codes of conduct or certifications, binding corporate rules, or other compliance mechanisms, which may be permitted under Data Protection Law. Supplemental terms may be added as an Annex or Appendix to this DPA where such terms only apply to the processing of Personal Data under the Data Protection Law of specific countries or jurisdictions. VMware will provide notice of such changes to Customer, and the modified DPA will become effective as provided on VMware's website].

- 14.6 **Severability.** If any provision of this DPA is found to be invalid or unenforceable, the remaining terms will continue to be valid and enforceable to the fullest extent permitted by law.
- 14.7 **Language.** The English language version of this DPA is the governing version of such document; any translation into languages other than English is for convenience only.
- 14.8 **Survival.** Any provision of this DPA that, by its nature and context is intended to survive, including provisions relating to disclaimer of warranties, and limitation of liability, will survive termination of this DPA. This DPA will continue to be effective to the extent VMware continues to process Personal Data after termination of this DPA.