

Microsoft® BizSpark™ Startup Agreement

These terms are an agreement between the startup ("**Startup**") who meets eligibility requirements for the Microsoft® BizSpark™ Program ("**Program**") and wishes to enroll in the Program, and Microsoft, governing Startup's participation in the Program. Please read them.

BY CLICKING THE "I ACCEPT" BUTTON, STARTUP AGREES TO BE BOUND BY THIS AGREEMENT, THE PROGRAM GUIDE, AND THE PROGRAM WEBSITE (INCLUDING ITS TERMS OF USE, CODE OF CONDUCT, AND PRIVACY STATEMENT), AND REPRESENTS THAT IT HAS READ AND UNDERSTANDS THIS AGREEMENT. STARTUP MUST ACCEPT THIS AGREEMENT AND THE PROGRAM EULA BEFORE IT CAN PARTICIPATE IN THE MICROSOFT BIZSPARK PROGRAM.

1. Scope. The Program is designed to help startup companies engaged in software development by (a) connecting them with a global community of Network Partners and other support resources, and (b) providing them with access to Microsoft technologies to design, develop, test and demonstrate software solutions, and to deploy those software solutions as hosted web-based 'software as a service' solutions. Startup's participation in this program is voluntary. Nothing in this Agreement restricts Startup from supporting, promoting, distributing or using non-Microsoft technology.

2. Definitions.

"Agreement" means these Startup Agreement terms.

"Network Partner" means the person or organization that sponsored Startup for membership into the Program and which may provide business guidance to Startup during its participation in the Program.

"Microsoft" means Microsoft Corporation, or its affiliates as appropriate (see Section 10.11).

"Program Benefits" means any Microsoft technology (including software), services, information, materials and other benefits offered to Startup under the Program, excluding Special Offers which will be governed by separate terms and conditions per Section 4.4.

"Program EULA" means the end user license agreement for the Program Software, consisting of the (a) Microsoft Developer Network (MSDN) Subscription Not for Resale (NFR) Edition software license terms and (b) BizSpark Program Supplemental license terms. Together with this Agreement, the Program EULA governs the use rights for the Program Software.

"Program Guide" means the Startup Program Guide for the Program, located on the Program Website. The Program Guide provides additional guidance about the Program and Program requirements.

"Program Materials" means the Program Guide and the Program Website (including its Terms of Use, Code of Conduct, and Privacy Statement).

"Program Offering Fee" means the fee Startup will pay at the end of its participation in the Program, as further described in the Program Guide.

"Program Services" means support, consulting and other services or advice provided under the Program, as further described in the Program Guide, but excluding any services or advice under Special Offers which will be governed by separate terms and conditions per Section 4.4.

"Program Software" means the Microsoft software and associated documentation provided under the Program, as further described in the Program Guide and Program EULA, but excluding any software or associated documentation under Special Offers which will be governed by separate terms and conditions per Section 4.4.

"Program Website" means the website currently located at <http://www.microsoft.com/bizspark> or equivalent local site, or a successor site designated by Microsoft. The Program Website provides Program tools and information, including the Program Guide.

"Special Offers" means additional special offers for Startups participating in the Program, that may be made available (by Microsoft or others) from time to time during Startup's tenure in the Program.

"Startup Application(s)" means web-based software application(s) developed by Startup using Program Software obtained by it under the Program.

3. Program.

3.1. Program participation. Startup's participation in the Program is conditioned on its acceptance of and compliance with this Agreement and the terms applicable to specific Program Benefits, as well as its compliance with the Program Materials.

3.2. Payment. At the end of its participation in the Program, Startup will pay the Program Offering Fee, as further described in the Program Guide.

- 3.3. **Administration.** Microsoft will administer the Program and related benefits through the Program Website and Program communications. Microsoft may use the Startup information provided by Startup on the Program Website to contact Startup for matters relating to the Program and/or this Agreement.
- 3.4. **Changes.** Microsoft may change or discontinue the Program or any aspect of it, but will give Startup at least 60 calendar days email or written notice if Microsoft intends to discontinue the Program. For all other changes, Startup is responsible for checking the Program Website regularly. Startup will be bound by Program Materials changes as of the date the changes are posted, but the changes will not apply retroactively.
- 3.5. **Advertising and publicity.**
- a. Both Startup and Microsoft may reference the fact that Startup is a participant in Microsoft's BizSpark program, as long as no stylized logos of the other party are used and any referential use of word marks in plain text form complies with the respective party's external posted trademark guidelines. Microsoft's trademark usage guidelines are located at <http://www.microsoft.com/about/legal/trademarks/usage/general.mspx>.
 - b. Other than the foregoing, Microsoft will ask Startup's permission if Microsoft would like to use more detailed descriptions of the Startup, its business, or its participation in the Program in advertisements or promotions relating to the Program. Startup agrees not to unreasonably withhold or delay its permission. If Microsoft does not receive Startup's response within 30 calendar days, lack of response will signify that Startup has granted its permission.
 - c. Any use by a party of any stylized logos of the other party for publicity or promotions will be per the terms of a separate agreement.

4. Program Benefits.

- 4.1. **General.** Program participants will receive certain benefits under the Program as described in the Program Guide. Program Benefits may have additional terms and conditions (including licenses) associated with them. Before using any Program Benefit, Startup must accept applicable additional terms, including the Program EULA with respect to Program Software. Startup's use of Program Benefits is conditioned on its acceptance of applicable additional terms, and Startup's use will be in accordance with those additional terms and this Agreement. If Startup does not agree, Startup is not authorized to use the Program Benefit(s).
- 4.2. **Program Services.** Startup's use of Program Services will be governed by separate terms and conditions (including regarding service deliverables, if any). Program Services include two Program Software telephone support calls for the person registered as Startup's primary contact on the Program Website, which support calls are governed by the terms at <http://support.microsoft.com/default.aspx/gp/csa> or successor site that Microsoft identifies. Otherwise, neither the Program nor this Agreement includes support services. Other Program Services may be added to the Program from time to time. Delivery of Program Services depends on Startup's full and timely cooperation, as well as the accuracy and completeness of any information Startup provides.
- 4.3. **Program Software.**
- a. **General.** The Program Software that Startup receives under the Program may only be used as expressly provided in this Agreement, the Program EULA and the Program Materials, and may not be sublicensed or otherwise transferred to others. Each of Startup's employees or principals that wish to use Program Software must accept the Program EULA prior to downloading his or her own copy of Program Software through the Program. Microsoft may conduct audits of Startup's compliance with this Agreement as provided in section 6 below, and to ensure compliance with this subsection, may also (A) otherwise contact Startup (B) collect data from the Program Website, the Program Software delivery infrastructure and/or Windows Genuine Advantage, Office Genuine Advantage or other similar programs and/or (C) take action to ensure that Startup does not use or activate more software than authorized by this Agreement or the Program.
 - b. **Program Software use rights.** Under the Program, Startups may use Program Software to design, develop, test and demonstrate Startup's software applications. Under the Program, Startups engaged in developing a new 'software as a service' offering to be delivered over the Internet to its customers may also use certain Program Software server products as follows: (i) Hosting Servers (defined in Annex B), to host Startup Applications (defined in Annex B) for the provision of Software Services (defined in Annex B) provided by those Startup Applications to Startup's customers over the Internet; and (ii) IT Operations Servers (defined in Annex B), to support Startup's provision of Software Services. Startup's rights to use Hosting Servers and IT Operations Servers to provide and support Software Services are further described in **Annex B** of this Agreement, as well as the Program EULA and the Program Guide. Hosting Servers and IT Operations Servers are identified in the Program Guide and Program EULA, as they may be updated from time to time.
 - c. **How to know what Program Software use rights apply.**

- i. *Use rights.* Together with this Agreement, the Program EULA describes the use rights for the Hosting Servers, IT Operations Servers, and other Program Software. The Program EULA consists of two parts, the Microsoft Software License Terms – *Microsoft Developer Network (MSDN) Subscription Not for Resale (NFR) Edition* terms (“MSDN NFR terms”), and Supplemental License Terms – *Microsoft Developer Network-BizSpark Program (MSDN-BZS) Subscription* terms (“MSDN-BZS terms”). Startup may only use the Program Software in accordance with these use rights. The use rights are version-specific. The Program EULA may be updated from time to time, but Microsoft will use commercially reasonable efforts to publish removals from the list of Program Software or substantive changes to Program Software use terms on the Program Website or other Microsoft designated website in advance.
- ii. *Removal of Program Software.* Should Microsoft publish on the Program Website (or other Microsoft designated website) or otherwise notify Startup of the removal of any Program Software due to an intellectual property infringement claim or a court or other governmental order, Startup will immediately cease any use of that Program Software. Unless Microsoft removes Program Software for these reasons, Startup may continue to use any removed Program Software that Startup downloaded before its removal, and the use rights applicable to the withdrawn Program Software will be those in effect at the time of removal.
- iii. *Applicability of license terms contained in product end user license agreements.* Notwithstanding anything in the MSDN NRF terms that may indicate the contrary, this Agreement supersedes and controls over any end user license agreement that may accompany Program Software (“product EULA”), even if installation of the Program Software requires Startup to “accept” a separate product EULA.
- d. *Obtaining Program Software and Software Documentation.* After accepting this Agreement and the Program EULA, Startup may obtain the Program Software and Software Documentation through the MSDN (Microsoft Developer Network) delivery infrastructure. Microsoft will provide Startup with the necessary codes to permit installation, re-installation and copying of the Program Software, subject to the terms of this Agreement. Microsoft may change the process for obtaining Program Software and Software Documentation from time to time upon at least 30 calendar days prior notice.
- e. *Counterfeit and other illegal software and infringements.* Startup will not engage, or participate with any third party, in the unauthorized manufacture, duplication, delivery, transfer or use of counterfeit, pirated, unlicensed or illegal Program Software, or otherwise infringe any of Microsoft’s intellectual property rights. Startup will reasonably cooperate with Microsoft and its affiliates in the investigation of any such activities. As soon as Startup becomes aware, Startup will report to Microsoft any suspected instances of any such activities with respect to Program Software, marketing materials, or other copyrighted materials owned by Microsoft, its affiliates and/or its licensors.
- f. *No technology transfer arrangement.* This Agreement does not create a “technology transfer” agreement, as may be defined by applicable law, because (i) the technology (including any software) made available under this Agreement is not an integrated part of a technology chain for production or management purposes and (ii) the technology (including any software) will have its own technology license. Startup will not hold itself out as Microsoft’s technology recipient and will not attempt to identify Microsoft as a technology provider under this Agreement.

4.4. *Special Offers not part of Program Benefits.* By virtue of its participation in the Program, Startup may also be eligible for Special Offers. However, Special Offers are not Program Benefits as defined in this Agreement (i.e., are not governed by this Agreement, Program Materials or the Program EULA, or covered by the Program Offering Fee), and Startup’s participation in Special Offers will be governed by the separate terms and conditions for each Special Offer (including licenses, and fees if any).

4.5. *Reservation of rights.* Microsoft owns and retains all right, title and interest in and to, the Program Software and other Program Benefits, including without limitation all intellectual property. Microsoft reserves all rights not expressly granted in this Agreement.

5. Startup representations and warranties. Startup represents and warrants that:

- 5.1. It has the full right and power to enter into and perform according to the terms of this Agreement, and its performance will not violate any agreement or obligation between it and any third party;
- 5.2. At the time of its initial enrollment and at each annual renewal of its enrollment in the Program, it meets all Program eligibility requirements outlined in the Program Guide, and it will immediately notify its Sponsor and Microsoft if and when it becomes ineligible to participate in this Program as outlined in the Program Guide; and
- 5.3. It will not use Program Software or other Program Benefits to provide any services to others (such as hosting, web agency, system integration or outsourced development, etc.) other than as expressly provided in this Agreement and the Program EULA.

6. **Verifying compliance.** Startup will keep accurate and adequate books and records relating to its (a) eligibility for the Program and (b) use of Program Benefits, including but not limited to its use of Program Software and the Software Services (as defined in Annex B) provided by Startup to Startup Customers (as defined in Annex B) until two years after this Agreement expires or terminates. During this same period, an independent third party designated by Microsoft (“**reviewer**”) may review Startup’s records and facilities (including Startup’s data centers), at Microsoft’s expense, to verify Startup’s compliance with this Agreement and the Program. The review will be subject to a confidentiality obligation. Verification will take place upon not less than 30 calendar days’ notice, during normal business hours and in a manner that does not interfere unreasonably with Startup’s operations. Startup must immediately correct any errors and omissions found during a review. If a review shows non-compliance with Program eligibility requirements or Program Benefits terms and conditions, this Agreement and Startup’s participation in the Program will terminate immediately, in accordance with the provisions of section 8.4. If the reviewer makes any commercially reasonable recommendations to Startup on record keeping, Startup will implement the recommendations within a mutually agreeable timeframe. Exercising Microsoft’s rights under this section will not waive any other rights Microsoft may have to enforce this Agreement or protect Microsoft’s intellectual property rights.

7. **Other warranties and limitations; warranty disclaimers; indemnification; limitations and exclusions of liability and remedy.**

7.1. Other warranties and limitations; warranty disclaimers; indemnification.

- a. Microsoft warrants that it will use reasonable care and skill to administer the Program. This limited warranty gives specific legal rights. Startup and Microsoft may have other rights, which vary by jurisdiction.
- b. Startup’s effort and resulting performance in the Program are under Startup’s sole control and are Startup’s sole responsibility. Microsoft does not warrant or guarantee Startup’s satisfaction with the Program or Startup results.
- c. Except for the express warranty in section 7.1.a, **to the maximum extent permitted under applicable law:**
 - i. **Program Benefits are provided “AS IS” and without warranty of any kind, and Startup will bear the entire risk of satisfactory quality, performance, and accuracy and effort for the Program Benefits, and**
 - ii. **Microsoft disclaims on its own behalf and on behalf of its affiliates and suppliers all other representations, warranties, and conditions, whether express, implied or statutory. This disclaimer includes, but is not limited to:**
 - any warranties of title, non-infringement, merchantability, satisfactory condition or quality, merchantability, fitness for a particular purpose, accuracy, completeness, system integration, timeliness,
 - any implied warranty or conditions arising from course of dealing or usage of trade, or
 - any common law duties relating to accuracy or lack of negligence with respect to the Program Benefits.**If applicable law gives Startup any implied warranties, guarantees or conditions despite this exclusion, those warranties will be limited to one year and Startup’s remedies will be limited by the section of this Agreement entitled “Limitations and exclusions of liability and remedy” to the maximum extent allowable.**
- d. Startup may not use the Licensed Products (defined in Annex B) contrary to section 2.e of Annex B, entitled “No High Risk Use”. **Microsoft and its suppliers disclaim any express or implied warranty of fitness for such High Risk Use.**
- e. Startup must not make any representation or warranty about any Licensed Product (defined in Annex B) to any Startup Customer (defined in Annex B) or other third party on Microsoft’s behalf. Startup is solely responsible for all claims, liabilities and damages arising from or in connection with its (i) provision of Software Services (defined in Annex B) to Startup Customers and/or (ii) use of a Hosting Partner (as defined in Annex B) to host its web-based “software as a service” Startup Applications.
- f. Startup will defend, indemnify and hold Microsoft harmless from any third-party claims (including, without limitation, reasonable attorney’s fees) arising from Startup’s (i) use of Program Software after its removal for the reasons described in Section 4.3.c.ii above and/or (ii) acts or omissions (including those of its agents) relating to Startup’s performance under this Agreement, including but not limited to those referenced in Section 7.1.d and/or 7.1.e above.

7.2. Limitations and exclusions of liability and remedy.

- a. **Neither party will be liable to the other for any loss (whether direct or indirect) of profits, data, business or anticipated savings, or due to business interruption. In addition, there is no liability for any other indirect, consequential, punitive, incidental or special damages arising out of or related to this Agreement (whether for Program Benefits, termination or otherwise).**
- b. **The only remedy that the parties may have for any claim arising out of or related to this Agreement is to terminate this Agreement, and as provided in section 7.4 below if applicable. The terms of this section 7.2 apply to the maximum extent permitted under applicable law regardless of the form or cause of action or the alleged basis of the claim (including negligence).**

- c. The terms of this section 7.2 do not apply to breaches of section 5 or of the intellectual property rights or indemnification provisions of this Agreement. This section 7.2 is enforceable to the maximum extent permitted by law.
 - d. **Startup and Microsoft total cumulative liability for loss or damage of any kind (including loss or damage caused by negligence) to the extent not excluded by this Agreement is limited to 100% of the Program Offering Fee paid or owed by Startup to Microsoft.** Such liability is reduced to the extent that the non-labile party or its agents caused or contributed to the loss or damage.
- 7.3. Business purposes. Startup confirms that it is entering this Agreement, and acquiring the Program Benefits under it, for business purposes only. Startup agrees that the provisions of any consumer protection legislation for the relevant jurisdiction will not apply to the extent that contracting out of such legislation is permitted by law.
- 7.4. Consumer rights. Nothing in this Agreement is intended to limit the rights of a consumer, as may be defined by applicable law. To the extent necessary, this Agreement is considered to be modified to reflect this intention. Consumers may have the benefit of certain rights or remedies which may not be excluded under applicable law. If applicable law gives Startup any implied terms, despite the exclusions and limitations in this Agreement, then to the extent permitted by applicable law, Startup's remedies are limited to either, at Microsoft's option, (i) repair, replacement or re-supply of Program Services or other relevant Program Benefit, or (ii) refund of the Program Offering Fee or forgiveness of Startup's obligation to pay the Program Offering Fee.

8. Term and Termination.

- 8.1. Term. This Agreement will take effect on the date that Startup accepts this Agreement by clicking the "I ACCEPT" button below, and will continue for three years from that date, unless terminated earlier pursuant to Sections 8.2, 8.3 or 8.4 below ("**Term**").
- 8.2. Termination without cause. Either party may terminate this Agreement at any time, without cause, upon 60 calendar days' notice. Neither party will be responsible to the other for any costs or damages that are a direct result of this termination.
- 8.3. Termination for cause - general. If either party breaches any provision of this Agreement, and the cause for termination is curable, the non-breaching party will give 30 calendar days' email or written notice and an opportunity to cure. If the cause for termination is not curable, termination will take effect immediately upon notice from the non-breaching party. Microsoft retains its other rights and remedies.
- 8.4. Immediate termination. This Agreement will immediately terminate without necessity of notice, if:
- a. Startup breaches of any of the representations and warranties in Section 5, or otherwise does not comply with Program eligibility or other Program requirements contained in this Agreement, Program Materials, or terms applicable to specific Program Benefits;
 - b. Startup is acquired or otherwise makes an assignment in contravention of Section 10.4;
 - c. Startup makes an initial public offering or otherwise becomes a publicly traded company;
 - d. the Program is discontinued; or
 - e. Startup ceases to do business in the normal course; admits in writing its inability to pay its debts as they become due; becomes or is declared insolvent or bankrupt; Is the subject of any proceeding under any bankruptcy act, receivership statute or the like, as they now exist or as they may be amended, related to its liquidation or insolvency (whether voluntary or involuntary) which is not dismissed within 90 calendar days, or makes an assignment for the benefit of creditors.
- 8.5. Statutory form. If Microsoft is required to use a statutory form, Microsoft reserves the right to either terminate or vary this Agreement without the use of that form and without any liability to Startup.
- 8.6. Effect of termination. In all events of termination, Startup's (a) access to further Program Benefits and (b) rights to use Hosting Servers and IT Operations Servers for Production Use (all as defined in Annex B) will end. Further, when this Agreement terminates per Section 8.4.a (Startup breaches its representations and warranties or otherwise does not comply with Program eligibility or other requirements), Startup will immediately stop using any rights and benefits granted by this Agreement and under the Program and destroy all Program Software in its possession.
- 8.7. Waiver of rights and obligations. To the extent necessary to implement the termination of this Agreement, each party waives any right or obligation under any applicable law or regulation to request or obtain intervention of the courts to terminate this agreement.
- 8.8. Survival. Sections 2 (Definitions), 4.4 (Reservation of rights), 5 (Startup representations and warranties), 6 (Verifying compliance), 7 (Other warranties and limitations; warranty disclaimers; indemnification; limitations and exclusions of liability and remedy), 8.6 (Effect of termination), 9 (Taxes), 10 (General), and this Section 8.8 (Survival) will survive the expiration or termination of this Agreement.

9. Taxes.

- 9.1. Program-related taxes. The amounts to be paid by Startup to Microsoft under the Program do not include any taxes and Startup is responsible for all of the taxes it is legally obligated to pay including paying to Microsoft any additional and applicable value added, goods and services, sales or use taxes or like taxes that are permitted to be collected from Startup by Microsoft under applicable law. If any taxes are required by law to be withheld on payments made by Startup to Microsoft, Startup may deduct such taxes from the amount owed to Microsoft and pay the taxes to the appropriate taxing authority; provided however, that Startup shall promptly secure and deliver to Microsoft an official receipt for any such taxes withheld or other documents necessary to enable Microsoft to claim a Foreign Tax Credit. Startup will make certain that any taxes withheld are minimized to the extent possible under applicable law.
- 9.2. Software Services-related taxes. Startup is responsible for and must pay all taxes resulting from Startup's provision of Software Services (defined in Annex B) or sales to Startup Customers (defined in Annex B), including but not limited to all income, property, franchise, gross receipts, goods and services, excise, sales, use, value added and transaction taxes, or any other similar taxes. Taxes also include any duties, fees, tariffs, or other governmental charges or expenses. Microsoft is not liable for such taxes, and Startup will indemnify, defend and hold Microsoft harmless from any such taxes, claims, and costs (including legal fees) related to such taxes.

10. General.

- 10.1. Entire agreement; changes; Startup responsibility for employees and contractors. The terms and conditions of this Agreement and the Program Materials, together with terms applicable to specific Program Benefits, form the entire agreement between Microsoft and Startup concerning the Program. They replace all prior agreements and communications between Startup and Microsoft or its affiliates relating to the Program. This Agreement can only be changed by an amendment signed by both parties, but Microsoft may change the Program Materials with respect to program administration, policies, procedures, guidelines, benefits and similar changes. Startup is responsible for (a) communicating the terms of this Agreement to its employees and contractors, and (b) ensuring their compliance with the terms of this Agreement.
- 10.2. Compliance with laws.
- a. *Export restrictions.* Any Program Software or other Program Benefits that Startup receives is subject to U.S. export laws and regulations. Startup must comply with all domestic and international export laws and regulations that apply to the licensed software Startup receives as a benefit of the Program. The laws include restrictions on destinations, end-users and end use. For additional information, see <http://www.microsoft.com/exporting/>.
 - b. *Local approvals, laws and regulations.* Startup will, at its own expense, obtain all necessary government approvals and comply with all applicable local laws and regulations necessary for its performance under this Agreement.
- 10.3. Notices. All notices and requests to Startup in connection with this Agreement will be sent to the named contact person and the address Startup provides in its Program profile on the Program Website. For notices and requests to Microsoft, see the Program Guide. Notices will be considered delivered on the date shown on the confirmation of delivery, including the date of publication to the Program Website. Startup will give Microsoft prompt notice if Startup becomes insolvent or enters insolvency, bankruptcy or other similar proceedings under applicable laws.
- 10.4. Assignment. The availability of Program Benefits under the Program is personal to Startup, and Startup may not assign this Agreement or any rights or obligations under it, by operation of law or otherwise, except to an entity that:
- a. itself meets Program startup eligibility requirements, and
 - b. assumes this Agreement in its entirety (including without limitation the warranties in Section 5);
- and then only if and when Startup:
- i. provides notice of the assignment to Microsoft and the Network Partner (or other entity that sponsored the assigning Startup's initial enrollment in the Program), and
 - ii. updates its Program profile on the Program Website with the new entity's information.
- Startup's assignment will not relieve Startup of its obligations under this Agreement. Any attempted assignment in contravention of this section is void.
- 10.5. Relationship between the parties. Startup is an independent contractor for all purposes regarding this Agreement and its provisions. At no time does Startup have the power to (a) bind Microsoft, (b) vary any terms, conditions, warranties, or covenants made by Microsoft, or (c) create or purport to create in favor of any person any rights that Microsoft has not previously authorized in writing. Neither this Agreement, nor any of its provisions, will be construed as creating a partnership (as that term is used in applicable partnership laws to designate a legal partnership entity), joint venture, agency, or franchise relationship or any fiduciary duty between Startup and Microsoft.

- 10.6. Language. Microsoft offers this Agreement in several languages. The language version in which you accept this Agreement will control. If Startup is located in Canada, the parties agree that this Agreement, and any associated Program documentation, be written and accepted in English. C'est la volonté expresse des parties que la présente convention ainsi que les documents qui s'y rattachent soient rédigés en anglais.
- 10.7. Severability. If a court holds any provision of this Agreement to be illegal, invalid or unenforceable, the remaining provisions will remain in full force and effect and be construed to give effect to the stricken clause to the maximum extent possible.
- 10.8. Waiver. Any delay or failure to exercise a right or remedy will not result in a waiver of that right or remedy. Any waiver of any breach of this Agreement must be in writing and signed by an authorized representative of the waiving party, and no such waiver will be a waiver of any other breach.
- 10.9. No representations. Microsoft has not made any representation to Startup about the Program or Program Benefits on which Startup has relied in deciding to acquire them or to enter into this Agreement or participate in the Program. Startup warrants that it has relied on its own skill and judgment or that of Startup's advisers in relation to these matters. However, neither party limits or excludes liability for fraudulent misrepresentations.
- 10.10. Order of precedence. If there is any direct inconsistency between this Agreement and the Program Materials or terms applicable to specific Program Benefits (including but not limited to the Program EULA) that is not resolved expressly in those documents, this Agreement will prevail. If a particular subject is addressed in the Program Materials or in terms applicable to specific Program Benefits and not in this Agreement, the terms of the Program Materials or terms applicable to specific Program Benefits regarding that subject will prevail.
- 10.11. Microsoft Contracting Entity. The Microsoft contracting entity for this Agreement is determined by the country/region Startup is located in, as detailed below:
- a. The Microsoft entity for the **United States** is:
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052, USA
 - b. The Microsoft entity for the **Republic of Korea** is:
Microsoft Korea, Inc
6th FL. POSCO Center
892 Daechi-Dong Kangnam-Du
Seoul, 135-777, Korea
 - c. The Microsoft entity for the **countries listed under the Asia/Pacific region** on Annex A is:
Microsoft Regional Sales Corporation
A corporation organized under the laws of the State of Nevada, USA with a branch in Singapore, having its principal place of business at:
438B Alexandra Road, #04-09/12, Block B, Alexandra Technopark
Singapore, 119968
 - d. The Microsoft entity for the **countries listed under the Europe, Middle East and Africa regions** on Annex A is:
Microsoft Ireland Operations Limited
The Atrium
Block B
Carmenhall Road
Sandyford Industrial Estate
Dublin 18, Ireland
 - e. The Microsoft entity for the **countries listed under the Americas and Caribbean region** on Annex A is:
Microsoft Puerto Rico S.A.
Metro Office Park
Street 1 #18 Suite 5000
Guaynabo, 00968, Puerto Rico
- 10.12. Applicable law; attorney's fees. Applicable law, jurisdiction and venue for this Agreement are identified below. This choice of jurisdiction and venue does not prevent either party from seeking injunctive relief with respect to a violation of intellectual property rights, confidentiality obligations or enforcement of recognition of any award or order in any

appropriate jurisdiction. If either party commences litigation in connection with this Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees, costs and other expenses.

- a. *Generally.* Except as provided in section 10.12b below, this Agreement is governed by the laws of the State of Washington. The parties consent to exclusive jurisdiction and venue in the courts sitting in King County, Washington. Startup waives all defenses of lack of personal jurisdiction and forum non conveniens.

- b. *Other Terms.* If Startup's principal place of business is in one of the countries or regions listed below, the corresponding provision applies, which supersedes Section 10.12.a to the extent that it is inconsistent:

- i. If Startup's principal place of business is in **Australia or its external territories, India, Indonesia, Malaysia, New Zealand, Philippines, Singapore, Thailand or Vietnam**, the following applies:

This Agreement is construed and controlled by the laws of Singapore.

If Startup's principal place of business is in **Australia or its external territories, Malaysia, New Zealand or Singapore**, Startup consents to the non-exclusive jurisdiction of the Singapore courts.

If Startup's principal place of business is in **India, Indonesia, Philippines, Thailand or Vietnam**, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, must be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC"), which rules are deemed to be incorporated by reference into this Agreement. The Tribunal shall consist of one arbitrator to be appointed by the Chairman of SIAC. The language of the arbitration shall be English. The decision of the arbitrator shall be final, binding and incontestable and may be used as a basis for judgment thereon in India, Indonesia, Philippines, Thailand or Vietnam (as appropriate), or elsewhere.

- ii. If Startup's principal place of business is in **Japan**, the following applies:

The Agreement shall be construed and controlled by the laws of Japan, and Startup consents to exclusive original jurisdiction and venue in the Tokyo District Court. In any action to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs and other expenses.

- iii. If Startup's principal place of business is in the **countries listed under the Europe, Middle East and Africa regions** on Annex A , the following applies:

The Agreement is governed by and construed in accordance with the laws of Ireland and Startup consents to the jurisdiction of and venue in the Irish courts in all disputes arising out of or relating to this Agreement.

- iv. If Startup's principal place of business is in the **People's Republic of China** (for the purpose of this Agreement, the People's Republic of China does not include Hong Kong S.A.R., Macao S.A.R., or Taiwan), the following applies:

The Agreement shall be construed and controlled by the laws of the People's Republic of China, and Startup consents to submit any dispute arising out of or in relation to the Agreement and any addendum to the binding arbitration at the China International Economic and Trade Arbitration Commission in Beijing (CIETAC) in accordance with its rules in effect from time to time.

- v. If Startup's principal place of business is in **Colombia or Uruguay**, the following applies:

All disputes, claims or proceedings between the parties relating to the validity, construction or performance of this Agreement shall be settled by arbitration in accordance with UNCITRAL Arbitration Rules as presently in force. The appointing authority shall be the International Chamber of Commerce ("ICC") acting in accordance with the rules adopted by the ICC for this purpose and the place of arbitration will be Seattle, Washington, U.S.A. There shall only be one arbitrator. The award shall be in law and not in equity and shall be final and binding on the parties. The parties hereto irrevocably agree to submit all matters and disputes arising in connection with this agreement to arbitration in Seattle, Washington, U.S.A.

- vi. If Startup's principal place of business is in the **Republic of Korea**, the following applies:

The Agreement shall be construed and controlled by the laws of Republic of Korea, and Startup consents to the exclusive original jurisdiction and venue in the Seoul District Court. In any action to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs and other expenses.

- vii. If Startup's principal place of business is in **Taiwan**, the following applies:

The terms of this Agreement shall be governed by and construed in accordance with the laws of Taiwan. The parties hereby designate the Taipei District Court as the court of first instance having jurisdiction over any disputes arising out of or in connection with this Agreement.

ANNEX A
COUNTRY/REGION
(for purposes of Section 10.11, “Microsoft Contracting Entity”)

Region	Country	Region	Country	Region	Country	Region	Country
ASIA / PACIFIC		EUROPE		MIDDLE EAST AND AFRICA		AMERICAS AND CARIBBEAN	
Asia	Armenia		Albania		Afghanistan	North & Central America, Caribbean	Anguilla
	Azerbaijan		Andorra		Algeria		Antigua and Barbuda
	Bangladesh		Armenia		Angola		Aruba
	Bhutan		Austria		Bahrain		Bahamas
	Brunei		Azerbaijan		Benin		Barbados
	Cambodia		Belarus		Botswana		Belize
	China		Belgium		Burkina Faso		Bermuda
	Georgia		Bosnia and Herzegovina		Burundi		Canada
	Hong Kong		Bouvet Island		Cameron		Caribbean Region
	India		Bulgaria		Cape Verde		Cayman Islands
	Indonesia		Channel Islands		Central African Republic		Costa Rica
	Japan		Croatia		Chad		Curacao
	Kazakhstan		Cyprus		Comoros		Dominica
	Kyrgyzstan		Czech Republic		Congo, Dem. Rep. of the		Dominican Republic
	Laos		Denmark		Congo, Republic of the		El Salvador
	Macau		Estonia		Djibouti		Grenada
	Malaysia		Faroe Islands		Egypt		Guadeloupe
	Maldives		Finland		Equatorial Guinea		Guatemala
	Mongolia		France		Eritrea		Haiti
	Myanmar		Georgia		Ethiopia		Honduras
	Nepal		Germany		Gabon		Jamaica
	Philippines		Gibraltar		Gambia, The		Martinique
	Russia		Greece		Ghana		Mexico
	Singapore		Greenland		Guinea		Montserrat
	Sri Lanka		Hungary		Guinea-Bissau		Netherlands Antilles
	Taiwan		Iceland		Iraq		Nicaragua
	Tajikistan		Ireland		Israel		Panama
	Thailand		Isle of Man		Ivory Coast (Cote d'Ivoire)		Puerto Rico
	Turkmenistan		Italy		Jordan		Saint Kitts and Nevis
	Uzbekistan		Latvia		Kenya		Saint Lucia
	Vietnam		Liechtenstein		Kuwait		Saint Pierre and Miquelon
	Kyrgyzstan		Lithuania		Lebanon		Saint Vincent and the Grenadines
South Pacific	American Samoa		Luxembourg		Lesotho		St. Barthelemy
	Australia		Macedonia		Liberia		St. Croix
	Christmas Island		Malta		Libya		Tortola
	Cocos Island		Moldova		Madagascar		Trinidad and Tobago
	Cook Islands		Monaco		Malawi		Turks & Caicos Islands
	Fiji		Netherlands		Mali		Virgin Islands (British)
	French Polynesia		Norway		Mauritania		Virgin Islands (US)
	French Southern Territories		Poland		Mauritius	South America	Argentina

	Guam		Portugal		Mayotte		Bolivia
	Heard Island and McDonald Islands		Romania		Morocco		Brazil
	Kiribati		Russia		Mozambique		Chile
	Marshall Islands		San Marino		Namibia		Colombia
	Mayotte		Serbia and Montenegro		New Caledonia		Ecuador
	Micronesia, Fed. States of		Slovakia		Niger		Falkland Islands (Islas Malvinas)
	Nauru		Slovenia		Nigeria		French Guiana
	New Caledonia		Spain		Oman		Guyana
	New Zealand		Svalbard and Jan Mayen		Pakistan		Paraguay
	Niue		Sweden		Qatar		Peru
	Norfolk Island		Switzerland		Reunion		South Georgia and Sandwich Islands
	Northern Mariana Islands		Ukraine		Rwanda		Suriname
	Palau		United Kingdom		Saint Helena		Uruguay
	Papua New Guinea		Vatican City		Sao Tome and Principe		Venezuela
	Pitcairn Islands				Saudi Arabia		
	Samoa				Senegal		
	Solomon Islands				Seychelles		
	Tokelau				Sierra Leone		
	Tonga				Somalia		
	Tuvalu				South Africa		
	Vanuatu				Swaziland		
	Wallis and Futuna Islands				Syria		
					Tanzania		
					Togo		
					Tunisia		
					Turkey		
					Uganda		
					United Arab Emirates		
					West East and Central Africa		
					Yemen		
					Zambia		
					Zimbabwe		

ANNEX B
HOSTING AND PRODUCTION RIGHTS

1. Definitions.

The following definitions are used in this Annex B. They may also be used elsewhere in this Agreement and/or the Program EULA. Capitalized terms used in this Annex B and not defined below have the meanings in Section 2 of the main body of this Startup Agreement.

“Customer Agreement” means the agreement between Startup and a Startup Customer governing Startup’s provision of Software Services to the Startup Customer.

“Hosting Partner” means companies identified as such and featured on the Program Website, who can provide hosting services for Startup Applications and with whom Startup has contracted to outsource the hosting of Startup Applications for Startup’s provision of Software Services to Startup Customers. *The use of Licensed Products by Hosting Partners is governed by separate agreement between the Hosting Partner and Microsoft (not this Annex B)*, and Hosting Partners will obtain directly from Microsoft the Licensed Products used by them to provide such hosting services to Startup.

“Hosting Servers” means the Microsoft server products that Startup may license and use under the Program solely to provide Software Services to Startup Customers. Hosting Servers are identified in the Program EULA.

“IT Operations Servers” means the Microsoft server products that Startup may license and use under the Program solely for Startup’s internal use to manage Hosting Servers and other IT Operations Server. IT Operations Servers are identified in the Program EULA.

“Licensed Products” means Hosting Servers and IT Operations Servers. Licensed Products are listed in the Program EULA and may also include fixes and/or automatic updates.

“Production Use” means use of Hosting Servers and IT Operations Servers as provided in this Annex B and the Program EULA.

“Software Documentation” means any documents included with a Licensed Product.

“Software Services” means components of a Startup Application, or entire Startup Applications, deployed at a hoster and delivered as a Startup service to Startup Customers over the Internet. (The hoster may be Startup itself, or a third-party Hosting Partner as described in the “Hosting Partner” definition above.) Startup must sell these “software as a service” services to Startup Customers itself and not through resellers (even if Startup outsources the actual hosting and provision of these services to a Hosting Partner), on a rental, subscription or services basis, whether or not Startup receives a fee. Software Services exclude any services involving installation of any Program Software (including but not limited to Licensed Products) on any Startup Customer device to allow Startup Customers to access or use Software Services.

“Startup Application(s)” means web-based software application(s) developed by Startup using Program Software obtained by it under the Program, that run on Hosting Servers and that contain significant and primary functionality beyond the functionality of Hosting Servers.

“Startup Customer” means a direct customer of Startup’s Software Services.

2. How Licensed Products may be used.

- a. **License grant.** Subject to the terms of this Agreement and the Program EULA, Microsoft grants Startup a non-perpetual, non-exclusive, terminable, non-transferable, worldwide and limited right during the term of this Agreement to internally install and run:
 - i. Hosting Servers, for hosting Startup Applications in order for Startup to provide Software Services to Startup Customers, and
 - ii. IT Operations Servers, for managing (A) the Hosting Servers being used by Startup to provide Software Services, and (B) other IT Operations Servers that are being used to manage those Hosting Servers,in accordance with the Program EULA and this Agreement (including this Annex B).

This Agreement does not transfer any ownership rights in any Licensed Product. Startup’s rights to use Licensed Products do not give Startup any right to implement Microsoft patents or other intellectual property in software or devices that access the server. Microsoft reserves all rights not expressly granted. Startup’s rights under this Annex B will automatically terminate upon expiration or termination of this Agreement.

b. Restrictions on use. Startup may not:

- i. remove, modify or obscure any copyright, trademark, patent or other proprietary right notices contained in or on the Licensed Products;
- ii. reverse engineer, decompile, or disassemble the Licensed Products, except and only to the extent that applicable law expressly permits, despite this limitation;
- iii. separate the components of a Licensed Product by installing them on different servers, or by upgrading or downgrading them at different times;
- iv. allow access to or use of the Licensed Products or any other Program Software by anyone in Startup's organization other than Startup employees or principals who have each accepted their own Program EULA;
- v. use Licensed Products for its internal business operations, other than (A) to design, develop, test and demonstrate Startup's software programs per the Program EULA, and (B) to use IT Operations Servers per Section 2.a.ii above;
- vi. allow Startup Customers to directly access or use Licensed Products;
- vii. use the Licensed Products to facilitate Startup Customers' business, including Startup Customers' business transactions with third parties;
- viii. use Hosting Servers to host any software other than Startup Applications; or
- ix. use Licensed Products or any other Program Software for any commercial or production use (including but not limited to use of Program Software to provide software development or systems integration services to others), except for Production Use in accordance with, and as expressly authorized by, this Annex B and the Program EULA.

The Program Guide contains some examples illustrating the restrictions in this Section 2.b, but those examples are not exhaustive.

c. Distribution of Licensed Products and other Program Software. Startup may not distribute, transfer or otherwise make available Licensed Products or any other Program Software to Startup Customers, Hosting Partners, or anyone else.

d. Creating instances of Licensed Products and copies of Software Documentation. Startup may only create instances of the Licensed Products as necessary for Production Use in accordance with this Annex B and the Program EULA. If the Software Documentation is only in electronic form, Startup may print one copy for Startup's own use.

e. No High Risk Use. The Licensed Products are not fault-tolerant. The Licensed Products are not designed or intended for use in any situation where failure or fault of any kind of the Product could lead to death or serious bodily injury of any person, or to severe physical or environmental damage ("High Risk Use"). Startup is not licensed to use the Licensed Products in, or in conjunction with, High Risk Use. High Risk Use is STRICTLY PROHIBITED. High Risk Use includes, for example, the following: aircraft or other modes of human mass transportation, nuclear or chemical facilities, and Class III medical devices under the Federal Food, Drug, and Cosmetic Act. Startup agrees not to use Licensed Products in, or in connection with, any High Risk Use.

f. Customer Agreement requirements. Startup must maintain Customer Agreements with all Startup Customers. Startup must ensure that the Customer Agreements are effective and binding in all applicable jurisdictions. Customer Agreements must:

- i. disclaim, to the extent permitted by applicable law, any warranties by Startup's suppliers (including Microsoft) and any liability by Startup's suppliers (including Microsoft, its affiliates and suppliers) for any damages, whether direct, indirect, or consequential, arising from the use of the Software Services;
- ii. provide that Startup or a third party on Startup's behalf (and not Microsoft or its suppliers) will provide Startup Customer support for the Software Services; and
- iii. include limitations at least as protective as those stipulated in the section above entitled "No High Risk Use".

g. Trademarks. Startup has no right under this Agreement to use any Microsoft logos in any manner whatsoever. Whenever a Licensed Product is first referenced in any written or visual communication, Startup must use the appropriate trademark, Licensed Product descriptor and trademark symbol (either "™" or "®"), and clearly indicate Microsoft's (or Microsoft's suppliers') ownership of such marks. For information on Microsoft trademarks, including a listing of current trademarks, see <http://www.microsoft.com/about/legal/trademarks/usage/general.mspix>. Startup must not undertake any action that will interfere with or diminish Microsoft's (or Microsoft's suppliers') right, title and/or interest in the trademark(s) or trade name(s). At Microsoft's request, Startup must provide Microsoft with samples of all of Startup's written or visual materials that use a Licensed Product name.

- h. Anti-piracy.** Startup must not engage in the manufacture, use distribution or transfer of counterfeit, pirated or illegal software. Startup must report to Microsoft any suspected counterfeiting, piracy or other intellectual property infringement in computer programs, manuals, marketing materials or other materials owned by Microsoft, its affiliates and/or its licensors as soon as Startup becomes aware of it. Startup will cooperate with Microsoft in the investigation of any party suspected of these activities.

3. *Monthly Use Reports.*

If Startup uses a Hosting Partner to host Startup Applications for Startup's provision of Software Services to Startup Customers, Startup must submit a complete and accurate monthly use report on the BizSpark website. If Startup fails to submit a complete and accurate monthly use report by the due date each month, Startup will be in breach of this Agreement.

- a. Monthly reporting.** Startup must submit the monthly use report through the BizSpark website page called "Update Your Hosted License Totals", or an alternative specified by Microsoft. Startup must provide all applicable information requested in the monthly use report. At a minimum, each monthly use report must include the total number of Licensed Product licenses during the preceding reporting period for each Hosting Server SKU used by the Hosting Partner.
- b. Reporting format and procedures.** Microsoft may reasonably revise the format of and procedures for submitting the monthly use reports. Startup will not be required to submit more than one use report per month.
- c. Use of information.** Microsoft will use information provided in this monthly use report only for usage tracking, reporting, and compliance purposes.

4. *Technical support services.*

- a. Startup support.** This Annex B does not include any support services to Startup from Microsoft beyond those generally available under the Program as described in Section 4.2 of the main body of this Agreement.
- b. Startup Customer support.** Startup is solely responsible for all Startup Customer support in connection with Startup Applications and Software Services.