

# VMTURBO END–USER LICENSE AGREEMENT

Note to user: In this document, “You” means the licensee of the Software and “VMTurbo” means VMTurbo Corporation, the Licensor of the Software.

**BEFORE YOU DOWNLOAD AND USE VMTURBO VIRTUAL APPLIANCE PRODUCTS AND ANY RELATED DOCUMENTATION, INCLUDING USER MANUALS (COLLECTIVELY THE “SOFTWARE”), PLEASE CAREFULLY REVIEW ALL TERMS AND CONDITIONS IN THIS END-USER LICENSE AGREEMENT (“AGREEMENT”) AND BE SURE YOU UNDERSTAND THEM. CHOOSING “I ACCEPT”, OR PROCEEDING WITH THE DOWNLOAD AND USING THE SOFTWARE IN ANY WAY INDICATES YOUR ACKNOWLEDGEMENT THAT YOU HAVE READ THIS LICENSE AGREEMENT, THAT YOU UNDERSTAND IT, AND THAT YOU AGREE TO BE LEGALLY BOUND BY ITS TERMS. IF YOU ARE ENTERING THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER ORGANIZATION, YOU ARE REPRESENTING AND WARRANTING THAT YOU ARE AUTHORIZED TO BIND SUCH COMPANY OR ORGANIZATION. IF YOU DO NOT AGREE TO ANY OF THE TERMS AND CONDITIONS LICENSE AGREEMENT YOU MUST NOT CHOOSE “I ACCEPT” OR DOWNLOAD THE SOFTWARE.**

**1. Title, Intellectual Property Rights.** The Software furnished under this Agreement is licensed, not sold or transferred, to you and is protected by the copyright, patent and trade secret laws of the United States and international treaties, and is subject to export control laws and regulations of the United States. VMTurbo shall have sole and exclusive ownership of all right, title, and interest in and to the Software.

## **2. Licenses, Payment, Audit Rights.**

**2.1 General License Grant.** Subject to all the terms and conditions set forth in this Agreement and solely during the term, VMTurbo hereby grants to You a non–exclusive, non–transferable, non–sublicensable right and license to use the VMTurbo Core version of the Software or such other version of the Software as identified in the confirmation of purchase documentation provided by VMTurbo to You (the “Ordering Document”). Unless you are using a Free Version or Trial Version (each as defined in Section 2.2), the term of the foregoing license shall be the term set forth in the Ordering Document, unless earlier terminated in accordance with Section 7.1. If you are using a Trial Version, the license term shall be thirty (30) days, unless earlier terminated in accordance with Section 7.1. If you are using a Free Version, the license to continue based on you reactivating as required until terminated by VMTurbo, in its sole discretion.

### **2.2 Free and Trial Versions.**

(a) You may download and use the VMTurbo Virtual Health Monitor version of the Software (the “Free Version”) free of charge for a period of six (6) consecutive months, beginning upon receipt of the license key supplied by VMTurbo and terminating six (6) months later. Upon termination, the Software will cease to function. You may reactivate the Free Version by requesting and implementing a new six (6)-month license beginning ten (10) days prior to the Free Version expiration date. During the Free Version license period, you authorize VMTurbo to

(i) collect, use and analyze configuration data from the environment where the Free Version is installed, and (ii) associate configuration data with the account information you supplied in the license request process. VMTurbo may store this information at VMTurbo’s discretion for technical and business analysis purposes. VMTurbo will not disclose this information to unauthorized third parties without prior written consent.

(b) Additionally, You may, free of charge, download and use other versions of the Software on a trial basis (each, a “Trial Version”) for one (1) period of thirty (30) consecutive days (the “Trial Period”). If you are using a Trial Version, the Trial Period shall begin upon receipt of the trial license key supplied by VMTurbo and shall terminate thirty (30) days later. Upon termination of the Trial Period, the Software will cease to function.

(c) If You are using only the Free Version or a Trial Version, (i) the license granted in Section 2.1 shall be subject to termination by VMTurbo at any time in its sole discretion, (ii) Sections 2.3, 2.4 and 4 of this

Agreement shall not apply to You, and (iii) VMTurbo does not make available any support with respect to your use of the Free Version or any Trial Version.

(d) You may request to purchase a full license to the Software at any time by contacting us at [sales@VMTurbo.com](mailto:sales@VMTurbo.com) or 781-373-3540.

**2.3 Usage limits.** Your use of the Software is limited to the number of CPU sockets specified in the Ordering Document.

**2.4 Payment Terms.** All fees for Software are set forth in the Ordering Document, which is incorporated herein by reference. All payments shall be made to VMTurbo in U.S. Dollars and are due and payable to VMTurbo in full within thirty (30) days from the date of invoice or otherwise as set forth in the Ordering Document. All prices/fees are exclusive of any and all federal, state and local taxes, including sales, use, transaction, privilege, gross receipts, value-added, service or other similar taxes excluding taxes based on VMTurbo's net income (the "Taxes") that may be imposed or assessed on this Agreement or the support services. Any such Taxes are your responsibility. If VMTurbo is audited and assessed any such Taxes, then in that event, You shall promptly reimburse VMTurbo for any such Taxes, including interest, late fees, or penalties (if any), which VMTurbo was required to pay to the taxing authority.

**2.5 Audit Rights and Routines.** VMTurbo may, at any time, require assurances of compliance with the terms of this Agreement, including an annual usage certification. VMTurbo may audit Your use of the Software by all or some of the following measures: (a) the Software may at any time (with or without notice to You) run an automatic audit routine embedded in the Software that reports to VMTurbo the number of hosts, servers, sockets and virtual machines being monitored by the Software; and/or (b) upon reasonable notice, either by on-site review or otherwise specified. Regardless of method, VMTurbo will maintain any information gathered in confidence, using reasonable efforts to prevent unauthorized access to it. VMTurbo will not use any such information except to verify your compliance with this Agreement, to modify or improve the Software or to offer You additional software or services. VMTurbo will furnish you a copy of its audit report upon your written request. If the audit reveals that you have used the Software beyond the scope of your license, You shall be in material breach of this Agreement. You will cure such material breach by ordering any additional licenses or upgrades required to be in compliance, and paying such additional license fees as necessary to cure the breach in accordance with VMTurbo's then current Price List. If you fail to do so within thirty (30) days, VMTurbo may terminate this Agreement and all licenses and uses immediately.

**3. Restrictions.** You may use the Software only in accordance with this Agreement. You may make one (1) copy of the Software for back-up or archival purposes only (the "Archival Copy"). YOU MAY NOT OR ALLOW ANY THIRD PARTY TO: (a) copy the Software, except as provided above, (b) reverse engineer, disassemble, decompile, translate or adapt the Software, (c) modify, translate, distribute or prepare derivative works based on the Software, or any part thereof; (d) remove any proprietary notices, labels, or marks on the Software; (e) publish, display, disclose, distribute, rent, loan, lease, sublicense, transfer or make available all or any portion of the Software to any other person or entity or (f) remove or alter any copyright or other proprietary notices on the Software. You agree you will not tamper with, bypass or alter any security features of the Software or attempt to do so. Distribution of this Software via the Internet, wide area networks (WANs), bulletin board systems or any other means of distribution of any kind is expressly prohibited unless a duly authorized representative of VMTurbo consents in advance of and in writing to such distribution.

**4. Maintenance and Support.** Maintenance and support shall be provided only if selected on the Ordering Document according to the options specified therein and payment is made therefore. Further, VMTurbo will provide support for the Free Version only if you are also licensing a paid version of the Software. Maintenance and support is provided pursuant to VMTurbo's current maintenance and support policy, found at [www.vmturbo.com](http://www.vmturbo.com).

**5. Warranty Disclaimer.** YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT ANY USE BY YOU OF THE SOFTWARE IS AT YOUR OWN RISK. THE SOFTWARE IS PROVIDED "AS IS" AND WITHOUT WARRANTY OF ANY KIND. VMTURBO EXPRESSLY DISCLAIMS, TO THE MAXIMUM EXTENT ALLOWED BY APPLICABLE LAW, ALL OTHER WARRANTIES OF ANY KIND, BOTH EXPRESS AND IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED

WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT AND QUIET ENJOYMENT. VMTURBO DOES NOT WARRANT THAT THE FUNCTIONS CONTAINED IN THE SOFTWARE WILL MEET ANY REQUIREMENTS OR NEEDS YOU MAY HAVE, OR THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ANY DEFECTS OR ERRORS IN THE SOFTWARE CAN OR WILL BE CORRECTED. YOU ASSUME THE ENTIRE RISK AS TO THE RESULTS AND PERFORMANCE OF THE SOFTWARE. BECAUSE SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES, SOME OR ALL OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU.

**6. Limited Liability.**

6.1 YOU AGREE THAT UNDER NO CIRCUMSTANCES, INCLUDING NEGLIGENCE OR OTHERWISE, SHALL VMTURBO, ITS LICENSORS OR AFFILIATES, OR ANY OF THEIR DIRECTORS, OFFICERS, EMPLOYEES SHAREHOLDERS, REPRESENTATIVES OR AGENTS, OR THEIR RESPECTIVE SUCCESSORS, ASSIGNS, HEIRS, OR ESTATES, BE LIABLE TO YOU FOR ANY, INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, LOSS OF USE, LOSS OF BUSINESS, LOSS OF PROFITS, BUSINESS INTERRUPTION, LOST DATA, LOSS OF BUSINESS INFORMATION, HARM TO REPUTATION, AND THE LIKE), OR ENHANCED, EXEMPLARY OR PUNITIVE DAMAGES, ARISING IN ANY WAY OUT OF OR CONNECTED WITH ANY SUBJECT MATTER OF THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, DAMAGE TO PROPERTY, EVEN IF VMTURBO OR ANY VMTURBO AUTHORIZED REPRESENTATIVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS.

6.2 YOU FURTHER AGREE THAT IN NO EVENT WILL THE TOTAL AGGREGATE LIABILITY OF VMTURBO AND ITS DIRECTORS, OFFICERS, EMPLOYEES SHAREHOLDERS, REPRESENTATIVES OR AGENTS, OR THEIR RESPECTIVE SUCCESSORS, ASSIGNS, HEIRS, OR ESTATES FOR ANY CLAIMS, LOSSES, OR DAMAGES ARISING UNDER THIS AGREEMENT AND SERVICES PERFORMED HEREUNDER, WHETHER IN CONTRACT OR TORT, INCLUDING NEGLIGENCE AND STRICT LIABILITY, EXCEED THE TOTAL AMOUNT PAID BY YOU TO VMTURBO DURING THE PRECEDING TWELVE (12) MONTH PERIOD, OR, IF THE LICENSE IS A FREE VERSION OR A TRIAL VERSION, VMTURBO'S LIABILITY IS LIMITED TO \$500.00.

6.3 THE LIMITATIONS SET FORTH IN THIS SECTION SHALL NOT APPLY TO THE EXTENT THAT ANY LIMITATION IS VOID OR PROHIBITED BY LAW.

**7. Termination.**

**7.1 Termination of License.** VMTurbo may immediately terminate this Agreement if You have failed to pay the applicable license fee in a timely manner or if You have otherwise breached the terms of this Agreement, including, but not limited to, those contained in Sections 2.3 and 3 or if VMTurbo determines that the Software or use thereof may result in infringement or violation of third party rights or claims thereof. You may terminate this Agreement at any time by ceasing all use of the Software. VMTurbo may terminate your use of the Free Version or any Trial Version at any time for any reason.

**7.2 Your Obligations upon Termination.** Upon termination of this Agreement, You shall (1) immediately cease use of the Software and (2) return to VMTurbo or destroy all whole or partial copies of the Software, including any analyses, test results or other data created in connection with or while using the Software, with a certificate signed by Your duly authorized representative stating that You have returned or destroyed the original and all full and partial copies of the Software. This obligation requires permanent removal of the Software from all media and storage, regardless of form, including but not limited to computers.

**7.3 Survival.** In addition to those provisions that by their nature are intended to survive any termination or expiration of this Agreement or any license granted hereunder, Sections 1, 2.5, 3, 5, 6, 7.2, 7.3, 8, 9, and 10, shall specifically survive such termination or expiration.

**8. Confidentiality.** You agree to limit disclosure of the Software and related documentation to those employees, contractors or third parties who (a) have a legitimate need for access to the Software and documentation, and (b) have similarly agreed in writing to preserve and protect the Software and

documentation from unauthorized use, disclosure or access. You agree to maintain the confidentiality of the Software and related materials and to protect the Software and documentation from unauthorized use, disclosure or access by using the same degree of care that you use to protect Your information of a similar nature. Your obligation as to the nondisclosure of the Software and documentation shall survive termination of this Agreement. You agree to keep confidential any commercially valuable, non-public, proprietary and confidential information that is provided to you by VMTurbo (including the Software and related materials) (collectively, "Confidential Information"). You shall not publish, or provide any results of benchmark tests, or other evaluations of the Software without VMTurbo's prior written consent.

**9. Indemnification.** You shall indemnify, defend, and hold harmless VMTurbo and its affiliates, and their directors, officers, employees, shareholders, representatives and agents, and all of their respective successors, assigns, heirs, and estates, from and against any third party claims threatened or instituted against them arising out of any breach of this Agreement or other wrongful action or inaction by You in connection with the Software.

## **10. General.**

**10.1 No Agency.** No agency, partnership, joint venture or other joint relation is created by this Agreement. You are not authorized to obligate VMTurbo or act in the name of VMTurbo in any way.

**10.2 Entire Agreement.** This Agreement is the complete and exclusive statement of the parties' agreement concerning the subject matter of this Agreement, including, but not limited to the terms and conditions governing the licensing of the Software, and supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter hereof including, without limitation, any standard or pre-printed terms included in any purchase order, confirmation or other form you may submit to VMTurbo.

**10.3 Modification.** This Agreement may not be modified or amended except by a writing signed by authorized representatives of both parties. It is agreed that no use of trade or other regular practice or method of dealing between the parties hereto shall be used to modify, interpret, supplement, or alter in any manner the terms of this Agreement. The terms of this Agreement will supersede and be superior to any conflicting or contrary terms included in any Ordering Document or other submittal made by you.

**10.4 Waiver.** A waiver by either party of its rights hereunder shall not be binding unless contained in a writing signed by an authorized representative of the party waiving its rights. The non-enforcement or waiver of any provision shall not constitute a waiver of such provision on any other occasions unless expressly so agreed in writing.

**10.5 Severability.** If a court of competent jurisdiction deems any provision of this Agreement invalid, it shall be deemed omitted from this Agreement. If any provision is deemed unenforceable by a court of competent jurisdiction, such provision shall be valid to the extent permitted by law.

**10.6 Assignment.** This Agreement and the rights granted under it may not be assigned or transferred by you without the written consent of VMTurbo. VMTurbo may freely assign this Agreement. Any attempt to do so is void and of no force or effect. This Agreement shall be binding on the parties respective successors, permitted assigns, and heirs and estates (if applicable).

**10.7 Notices.** All notices shall be in writing and shall be sent to the parties at the addresses provided at the commencement of this Agreement (or to such other address as either party may specify in writing) by (i) first class mail, certified or registered, return receipt requested, postage prepaid, (ii) overnight courier service, (iii) messenger, or (iv) confirmed facsimile transmission.

**10.8 Governing Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Massachusetts as it applies to a contract made and performed therein, without regard to its conflict of laws principles. In no event shall either the United Nations Convention on Contracts for the International Sale of Goods or any adopted version of the Uniform Computer Information Transactions Act (UCITA) apply to, or govern, this Agreement.

**10.9 Export Compliance.** This agreement is expressly made subject to any and all laws, regulations, orders, or other restrictions on the export from the United States of America of the Software or information about the Software that may be imposed from time to time by the government of the United States of America. You shall not export the Software, including documentation, or information about the Software, including documentation, unless in compliance with such laws, regulations, orders, or other restrictions. Without in any way limiting the foregoing, You hereby (1) assure VMTurbo that You shall adhere to the

United States Export Administration laws and regulations and shall not export, re-export or release any software, source code, technical data, or products received from VMTurbo or the direct product of such software, source code or technical data to any proscribed country listed in the United States Export Administration laws and regulations unless properly authorized by the United States Government, and (2) agree that this assurance will be honored even after expiration of this Agreement. You acknowledge that You are familiar with United States Government export policy and regulations and undertake to be and remain in full compliance with such policy and regulations. You may not export or re-export this product in violation of any applicable laws or regulations including, without limitation, United States export regulations or the laws of the country in which you reside. You assume sole responsibility for all related costs and for the violation of any applicable export law or regulation. You may not use the Software if you are a citizen, national, or resident of, or are under control of, the government of Cuba, Iran, Sudan, Libya, North Korea, Syria, or any other country to which the United States has prohibited export. Each time you use the Software you represent, warrant, and covenant that: (i) you are not a citizen, national, or resident of, nor under the control of, any such country to which the United States has prohibited export; (ii) you will not download or otherwise export or re-export the Software, directly or indirectly, to the above mentioned countries nor to citizens, nationals or residents of those countries; (iii) you are not listed on the U.S. Department of Treasury's Lists of Specially Designated Nationals, Specially Designated Terrorists, and Specially Designated Narcotic Traffickers, the U.S. Department of State's List of Statutorily Debarred Parties, or the U.S. Department of Commerce's Denied Persons List, Entity List, or Unverified List Table of Denial Orders; (iv) you will not download or otherwise export or re-export the Software, directly or indirectly, to persons on the above-mentioned lists; (v) you will neither use nor allow the Software to be used for, any purposes prohibited by United States federal or state law, including, without limitation, for the development, design, manufacture or production of nuclear, chemical, or biological weapons of mass destruction; and (vi) the Software will not be exported, directly, or indirectly, in violation of these laws, nor will the Software or Services be used for any purpose prohibited by these laws including, without limitation, nuclear, chemical, or biological weapons proliferation.

**10.10 United States Government Rights.** If You are a United States Government end-user or are acquiring the Software and documentation on behalf of the United States Government, the following provisions apply: The software and documentation are “commercial items,” as that term is defined at 48 C.F.R. § 2.101, consisting of “commercial computer software” and “commercial computer software documentation,” as such terms are used in 48 C.F.R. § 12.212 or 48 C.F.R. § 227.7202, as applicable. Consistent with 48 C.F.R. § 12.212 or 48 C.F.R. §§ 227.7202–1 through 227.7202–4, as applicable, the commercial computer software and commercial computer software documentation are being licensed to U.S. Government end-users (A) only as commercial items and (B) with only those rights as are granted to all other end-users pursuant to the terms and conditions set for the VMTurbo standard commercial agreement for this software. Unpublished rights reserved under the copyright laws of the United States.

**10.11 Third-Party Code.** Portions of the code included in or with the Software contain or are derived from third party code (“Third Party Software”), including without limitation, open source software. ALL USE OF THIRD PARTY SOFTWARE IS SUBJECT TO AND GOVERNED BY (AND YOU AGREE TO AND WILL INDEMNIFY VMTURBO AND ANY APPLICABLE THIRD PARTY LICENSOR FOR NONCOMPLIANCE WITH) THE RESPECTIVE LICENSES FOR THE THIRD PARTY SOFTWARE AVAILABLE AT <http://www.vmturbo.com/resources/documentation/third-party-licenses/>, as it may change from time to time (such link also contains information and downloads that may be required by the licenses to such Third Party Software; it is Your responsibility to check such link for changes and additions).

**10.12 Submissions.** Should You decide to transmit any materials or other information to VMTurbo (including, without limitation, ideas, concepts or techniques for new or improved services and products), whether as information, feedback, data, questions, comments, suggestions or the like (“Feedback”), then, unless otherwise agreed in writing by You and VMTurbo, You agree that such submissions are unrestricted and shall be deemed non-confidential. You agree that all intellectual property rights and all other ownership in any such Feedback are hereby assigned to VMTurbo and shall be the sole and exclusive property of VMTurbo. You agree to take any VMTurbo may reasonably request to perfect VMTurbo’s ownership in any Feedback. You agree to treat such Feedback as VMTurbo’s Confidential Information.

**10.13 Injunctive Relief.** Without in any way limiting the applicability of any equitable or other relief that might be available for any breach of this Agreement, You acknowledge and agree that money damages would not be a sufficient remedy for breach of any provisions of this Agreement relating to confidentiality

and restrictions relating to use of the Software, and that VMTurbo shall be entitled to equitable relief, including but not limited to immediate, temporary and permanent injunctive relief, and specific performance, as a remedy for any such breach, without having to post a bond or other security. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement, but shall be in addition to all other remedies available at law or equity.

**10.14 Paragraph Headings.** Paragraph headings contained herein are for information purposes only and are of no independent legal force or effect.