



## Additional Software Terms

These Additional Software Terms are a part of the written agreement pursuant to which customers of Flexential Corp., a Delaware corporation formerly known as Peak 10, Inc. or its affiliated entities including without limitation Flexential Colorado Corp., a Colorado corporation formerly known as ViaWest, Inc. ("Flexential") receive Services from Flexential (the "Agreement"). These terms and conditions concern the use of various software products/services provided Customers by Flexential as described below. Please note that not all terms and conditions contained herein may apply to you or the Services you are receiving. Please consult your Agreement and/or your account manager.

### I. General Definitions.

- a. "Customer" or "you" means an entity receiving Services from Flexential pursuant to the Agreement.
- b. "Documentation" means technical documentation and operating instructions made available to Customer related to Software.
- c. "Services" means the services you receive from Flexential pursuant to the Agreement.
- d. "Software" means any third party software services/products provided to you via Flexential for your use in connection with the Services.

**II. General Terms.** The following terms apply to any Software provided by Flexential in connection with the Services:

- a. Customer will not, and will not permit others to: (i) except as may be permitted with any Documentation provided by Flexential, transfer, copy or sublicense any Software; (ii) rent, lease, loan, auction or resell the Software and Documentation; (iii) modify, adapt, translate, or create derivative works of Software or related Documentation; (iv) remove, modify or obscure any copyright, trademark or other proprietary notices; (v) and (iii) reverse engineer, decompile, disassemble, modify, adapt or create derivative works from, Software or otherwise attempt to reconstruct or discover the source or object code or underlying ideas, algorithms, file formats, programming or interoperability interfaces; or (vi) use Software other than as specifically described in, and in accordance with, Documentation.
- b. Software may not be exported or re-exported without the appropriate United States or foreign government licenses. Software may be subject in certain jurisdictions to import laws or regulations and Customer is responsible for determining how and if Customer needs to comply with such laws or regulations.
- c. Upon the expiration or termination of the Agreement or if the Services are modified so that the Software is no longer provided, you will delete and destroy any software, including, without limitation, activation and serial numbers, documentation and all copies of such Software and you will make no further use of, or allow further use of, the Software. Software may only be used in connection with the Services.

- d. No ownership rights, including intellectual property rights, in any Software are transferred to you. The right to use any Software is non-exclusive.

### III. Microsoft Terms.

To the extent you receive Microsoft software, which includes computer software provided to you by Flexential as described below, and may include associated media, printed materials, and “online” or electronic documentation (individually and collectively “Products”) these additional Microsoft Terms apply. Flexential does not own the Products and the use thereof is subject to certain rights and limitations which Flexential needs to inform you. Your right to use the Products is subject to the Agreement, and to your understanding of, compliance with and consent to the following terms and conditions, which Flexential does not have the authority to vary, alter or amend. To the extent this Section III conflicts with any other terms and conditions in these Additional Software Terms, the more restrictive obligation will apply.

#### a. Definitions

“Client Software” means software that allows a Device to access or utilize the services or functionality provided by the Server Software.

“Device” means each of a computer, workstation, terminal, handheld PC, pager, telephone, personal digital assistant, “smart phone,” or other electronic device.

“Server Software” means software that provides services or functionality on a computer acting as a server.

“Software Documentation” means any end user document included with server software.

“Redistribution Software” the software described in Paragraph III d (Use of Redistribution Software”) below.

**b. Ownership of Products.** The Products are licensed to Flexential from an affiliate of the Microsoft Corporation (“Microsoft”). All title and intellectual property rights in and to the Products (and the constituent elements thereof, including but not limited to images, photographs, animations, video, audio, music, text and “applets” incorporated into the Products) are owned by Microsoft or its suppliers. The Licensed Products are protected by copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. Your possession, access, or use of the Products does not transfer any ownership of the Products or any intellectual property rights to you.

**c. Use of Client Software.** You may use the Client Software installed on your Devices by Flexential only in accordance with the instructions, and only in connection with the services, provided to you by Flexential.

**d. Use of Redistribution Software.** In connection with the services provided to you by Flexential, you may have access to certain “sample,” “redistributable” and/or software development (“SDK”) software code and tools (individually and collectively called “Redistribution Software”). YOU MAY NOT USE, MODIFY, COPY, AND/ OR DISTRIBUTE ANY REDISTRIBUTION SOFTWARE UNLESS YOU EXPRESSLY AGREE TO AND COMPLY WITH SERVICES PROVIDER USE RIGHTS (“SPUR”) APPLICABLE TO FLEXENTIAL, WHICH TERMS MUST BE PROVIDED TO YOU BY FLEXENTIAL. Microsoft does not permit you to use any Redistribution Software unless you expressly agree to and comply with such additional terms, as provided to you by Flexential.

**e. Copies.** You may not make any copies of the Products; provided, however, that you may (a) make one

(1) copy of Client Software on your device as expressly authorized by Flexential; and (b) you may make copies of certain Redistribution Software in accordance with Paragraph 4 (Use of Redistribution Software). You must erase or destroy all such Client Software and/or Redistribution Software upon termination or cancellation of your agreement with Flexential or upon transfer of your Device to another person or entity, whichever occurs first. You may not copy any printed materials accompanying the Products.

**f. Limitations on Reverse Engineering, Decompilation and Disassembly.** You may not reverse, engineer, decompile, or disassemble the Products, except and only to the extent that applicable by law, notwithstanding this limitation expressly permits such activity.

**g. No Rental.** You may not rent, lease, lend, pledge or directly or indirectly transfer or distribute the Products to any third party, and may not permit any third party to have access to and/or use the functionality of the Products except in the form of software services in accordance with the terms of this agreement and any agreement between you and Flexential.

**h. Termination.** Without prejudice to any other rights, Flexential may terminate your rights to use the Products if you fail to comply with these terms and conditions. In the event of termination or cancellation, you must stop using and/or accessing the Products, and destroy all copies of the Products and all of its component parts.

**i. No Warranties, Liabilities or Remedies by Microsoft.** ANY WARRANTIES, LIABILITY FOR DAMAGES AND REMEDIES, IF ANY, ARE PROVIDED SOLELY BY FLEXENTIAL AND NOT BY MICROSOFT OR ITS AFFILIATES OR SUBSIDIARIES.

**j. Product Support.** Any product support for the Products is provided to you by Flexential and is not provided by Microsoft or its affiliates or subsidiaries.

**k. Not Fault Tolerant.** THE PRODUCTS MAY CONTAIN TECHNOLOGY THAT IS NOT FAULT TOLERANT AND ARE NOT DESIGNED, MANUFACTURED, OR INTENDED FOR USE IN ENVIRONMENTS OR APPLICATIONS IN WHICH THE FAILURE OF THE PRODUCTS COULD LEAD TO DEATH, PERSONAL INJURY, OR SEVERE PHYSICAL, PROPERTY OR ENVIRONMENTAL DAMAGE.

**l. Export Restrictions.** The Products are of U.S. origin for purposes of U.S. export control laws. You agree to comply with all applicable international and national laws that apply to the Products, including the U.S. Export Administration Regulations, as well as end-user, end-use and destination restrictions issued by U.S. and other governments. For additional information see <http://www.microsoft.com/exporting/>.

**m. Liability for Breach.** In addition to any liability you may have to Flexential, you agree that you will also be legally responsible directly to Microsoft for any breach of these terms and conditions.

**IV. Double-Take Solutions Software.** To the extent Customer receives Double-Take Software, the following terms and conditions apply.

- a. The "Usage Meter" is software developed and owned by Flexential or its licensor, Vision Solutions, Inc. ("**Vision**") and is installed on the "target servers". Customer agrees to maintain an active internet connection for the Usage Meter to report and exchange connection information. The information collected by the Usage Meter is used by Flexential or its licensor to invoice Customer for service use. The Usage Meter may cause Customer's computer or computer systems, without additional notice, to automatically connect to the internet and to communicate with a Vision website or server for the purposes of, but not limited to, license validation, product activation and invoicing information retrieval. Once connected, the software will transmit information to Vision via an internet connection.

- b. **Intellectual Property and Confidentiality.** Customer agrees that any efforts to circumvent or disable any copyright protection mechanisms or the Usage Meter violate the intellectual property rights of Flexential or its licensor.
- c. **Disclaimer.** The Usage Meter, any updates thereto, and all third-party software are distributed on an "AS IS" basis, without any warranty. FLEXENTIAL MAKES NO OTHER WARRANTIES OR REPRESENTATIONS AS TO THE USAGE METER OR ANY ASSOCIATED SOFTWARE PROVIDED HEREUNDER, AND HEREBY DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE, AND NON-INFRINGEMENT. FLEXENTIAL DOES NOT WARRANT THAT THE USAGE METER OR ANY THIRD PARTY SOFTWARE WILL MEET CUSTOMER'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION OR BE ERROR FREE. Some jurisdictions do not allow the disclaimer of certain warranties, so all or part of the above limitation may not apply. These disclaimers are in addition to the disclaimers set forth in the MSA.
- d. **Indemnification.** Customer shall indemnify Flexential and Vision against any damage, loss, liability or expense (including reasonable attorneys' fees) ("Damages") that Flexential or Vision may incur: (i) with respect to any damages caused by Customer's willful misconduct or negligent act or omission; or (ii) any modifications to the services/Software described hereunder made without Flexential's approval.
- e. **Limitation on Liability.** Notwithstanding anything to the contrary in the MSA, Flexential's entire liability in connection with Double-Take Software shall be limited to the amount received by Flexential during the twelve (12) month period prior to the date the cause of action arose.
- f. **Information Sharing.** Flexential may share with Vision basic information about Customer, including Customer name, address, contact information and any End User records related to the fees paid for the services described hereunder.

**V. ANTI-VIRUS Software Services.** To the extent Customer receives Anti-Virus Software services, the following terms and conditions apply:

- a. The term "Anti-Virus Product" means the anti-virus software listed in the Agreement and includes any updates, improvements, corrections, modifications, revisions or new versions of the software made from time to time. The Anti-Virus Product is considered "Software".
- b. Flexential and its licensors reserve the right to take reasonable steps to prevent unauthorized access to, or use of, the Anti-Virus Product.
- c. The Anti-Virus Product may only be transferred to the U.S. Government with the prior written consent of an officer of Flexential and/or its licensors and solely with "Restricted Rights", as that term is defined in the Department of Defense ("DOD") Supplement to the Federal Acquisition Regulations ("DFARS") in paragraph 252.227-7202.32 (c)(1) if to the DOD, or, if the Product is

supplied to any unit or agency of the US Government other than DOD, the Government's rights in Product shall be no greater than those set forth in FAR 52.227-19(c)(1) or (c)(2), Commercial Computer software - Restricted Rights; or FAR 52.227-14, Rights in General Data Alternative III, as applicable. Contractor: Trend Micro Incorporated, 10101 N. De Anza Blvd., Cupertino, CA 95014. If a government agency has a need for rights not conveyed under these terms, it must negotiate with Flexential and its licensors to determine if there are acceptable terms for transferring such rights, and a mutually acceptable written addendum specifically conveying such rights must be included in any applicable contract or agreement.

- d. Customer may not, and may not authorize others to use the Anti-Virus Product to provide services to third parties.
- e. Customer is advised that it must regularly backup data and computer systems on separate media.
- f. In connection with the Anti-Virus Product, neither Flexential nor any licensor will be liable for any consequential, incidental, special or punitive damages and the entire liability of Flexential and any or any suppliers/licensors shall be limited to one-year of license fees paid or payable by Customer for use of the Anti-Virus Product.
- g. Customer acknowledges Flexential and/or its licensors may (i) use uploaded data from the Anti-Virus Product to improve products and services; (ii) share data that has been identified as malicious or unwanted content with affiliates and security partners; and (iii) use and disclose uploaded data for analysis or reporting purposes only if any such use, sharing or disclosure does not identify Customer or include any information that can be used to identify any individual person.

**VI. Red Hat Software.** To the extent Customer receives Red Hat Software (including, without limitation Red Hat Enterprise Linux and Red Hat Application Stack), the following terms and conditions apply:

- a. Customer agrees to the Cloud Services Subscription Agreement set forth at [www.redhat.com/licenses/cloud\\_cssa/](http://www.redhat.com/licenses/cloud_cssa/), (the "Red Hat Terms") which may be amended from time to time by Red Hat in its sole discretion. If Red Hat determines Customer has breached the Red Hat Terms, Customer acknowledges that Red Hat may terminate Customer's use of any and all Red Hat Software.
- b. THE RED HAT SOFTWARE IS PROVIDED "AS IS" AND WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. Flexential makes no representations or warranties on behalf of Red Hat regarding the Red Hat Software.
- c. Customer acknowledges and agrees that Red Hat Software is not specifically designed, manufactured or intended for use in (a) the planning, construction, maintenance, control or direct operation of nuclear facilities, (b) aircraft navigation, control or communication systems, weapons systems or (c) direct life support systems and will not use Red Hat Software in connection with such uses.

**VII. NetApp AltaVault Software (Cloud Storage Bridge).** Prior to utilizing Cloud Storage Bridge, Customer must install NetApp AltaVault Software. In connection with such installation, Customer will be required to agree to a NetApp End User License Agreement (the “**NetApp EULA**”). Customer agrees to the NetApp EULA, as may be updated or modified by NetApp. The NetApp EULA is incorporated into the Agreement and in the event of a conflict between the Agreement and the NetApp EULA, the NetApp EULA will control.