



**Gigamon Products Terms and Conditions Clickthrough Version Updated as of January 1, 2021
(for GSA)**

PLEASE READ CAREFULLY: THE INDIVIDUAL ASSENTING TO THESE GIGAMON PRODUCTS TERMS AND CONDITIONS ON BEHALF OF A CUSTOMER REPRESENTS AND WARRANTS THAT HE OR SHE HAS FULL AUTHORITY TO BIND THE CUSTOMER TO THESE TERMS AND CONDITIONS (THE "AGREEMENT"). THIS AGREEMENT GOVERNS CUSTOMER'S RIGHT TO ACTIVATE A SOFTWARE LICENSE, AND/OR DOWNLOAD, INSTALL AND USE THE GIGAMON PRODUCTS. BY ASSENTING TO THIS AGREEMENT BY SUBMITTING A PURCHASE ORDER, THE CUSTOMER ASSENTS TO THIS AGREEMENT, WHICH WILL BE DEEMED A BINDING CONTRACT BETWEEN CUSTOMER AND GIGAMON WITH A PRINCIPAL PLACE OF BUSINESS AT 3300 OLCOTT ST., SANTA CLARA, CA 95054, UNLESS CUSTOMER HAS ANOTHER VALID CONTRACT FOR THE PURCHASE AND USE OF GIGAMON'S PRODUCTS AND SERVICES. IF THE CUSTOMER DOES NOT AGREE TO OR CANNOT COMPLY WITH THIS AGREEMENT OR IF THE INDIVIDUAL DOES NOT HAVE AUTHORITY TO BIND THE CUSTOMER, THEN DO NOT ASSENT AND THE CUSTOMER WILL NOT BE AUTHORIZED TO DOWNLOAD, INSTALL OR USE THE PRODUCTS.

1. Definitions.

- a. **"Affiliate"** means a direct or indirect wholly-owned subsidiary of Customer.
- b. **"Authorized Channel Partner"** means any reseller channel partner authorized by Gigamon.
- c. **"Authorized Contractor"** means any individual or entity (other than a Gigamon competitor) that Customer authorizes to have access or use of a Product solely on behalf of and for Customer's Internal Use (as hereinafter defined).
- d. **"Documentation"** or **"Specifications"** means the technical end-user documentation published by Gigamon for the applicable Product.
- e. **"Hardware"** means any Gigamon branded hardware product that is purchased by Customer directly from Gigamon or through an Authorized Channel Partner.
- f. **"Pre-Release Software"** means any Software that is designated by Gigamon as any pre-commercial release Software (indicated by terms such as "alpha," "beta," "trial," "draft" or the like).
- g. **"Products"** means, collectively, Software, Gigamon Hardware, and/or any combination thereof.
- h. **"Software"** means any object or binary code or firmware, any accompanying Documentation, and any upgrades or updates therefor, that are provided by Gigamon or an Authorized Channel Partner on Gigamon's behalf and that are either (i) included with or embedded in the Gigamon Hardware, or (ii) provided as a separate software product.
- i. **"Support"** means having access to Gigamon's technical support and maintenance personnel and other resources for the Products as further described at www.gigamon.com/SupportAgreement.pdf (the **"Support Terms"**).
- j. **"Supported Virtualization Environment"** means any virtual computing environment supported by the applicable Software as specifically set forth in the applicable Documentation.
- k. **"Term License"** means a license granted by Gigamon to Customer for Software in which the license is limited in duration. The duration of the Term License will be the time period set forth in the applicable quote issued by Gigamon and / or in a purchase order accepted by Gigamon. If any Software is licensed under a Term License, the limited license granted in Section 2(a) will commence on the date the software is made available for download or the license key associated with the Software is issued (or as otherwise set forth on the purchase order) and will expire on the last day of the Term License. When a Term License expires, the corresponding Software may no longer function and in any event Customer shall not continue to access or use the Software (and underlying Hardware, if applicable) unless a new Term License is purchased).

2. License Grant. Software is made available by Gigamon as Pre-Release Software or commercially released Software (either with a Term License or a perpetual license). Subject to and conditioned upon Customer's compliance with the restrictions and terms set forth in this Agreement and full payment of applicable fees to Gigamon or an Authorized Channel Partner, the following license terms apply. Except as set forth in this Section 2, no other licenses are granted by implication, estoppel or otherwise.

- a. **Commercial Software License.** Gigamon hereby grants to Customer a non-exclusive, worldwide, non-sublicensable (except as expressly set forth in Section 2(b)), non-transferable perpetual license or Term License, as applicable, to use the Software, in object code format only, for Customer's internal network visibility purposes (**"Internal Use"**) solely with Gigamon Hardware and/or a Supported Virtualization Environment. Customer's use of the Products will be based on Gigamon's applicable license metrics (e.g., number of units or capacity purchased) as set forth in a quote issued by or on behalf of Gigamon. Software licensed on a capacity basis subject to additional terms and conditions, a current copy of which is attached as Exhibit A hereto.
- b. **Sublicense Rights.** Gigamon further grants Customer the right to sublicense Customer's rights under Section 2(a) to Customer's Authorized Contractors without further sublicense rights; provided that: (i) such sublicensed rights are for the sole purpose of providing services to Customer for its Internal Use and are subject to all of the terms and conditions herein, and (ii) Customer will be liable for any actions of, or failure to act by, the Authorized Contractors as if such actions or inactions were Customer's, and any breach by Authorized Contractors of the terms or conditions herein is a breach by Customer.
- c. **Pre-Release Software License.** If the Software provided under this Agreement is Pre-Release Software, Gigamon hereby grants Customer a limited, non-exclusive, worldwide, non-sublicensable, non-transferable license to download and install such Pre-Release Software for its internal, non-production use and evaluation. Customer acknowledges that the Pre-Release Software is Gigamon confidential information and may not operate correctly, may be substantially modified prior to first commercial shipment, or may be withdrawn completely. Customer's use of the Pre-Release Software is at Customer's sole risk and expense, and Gigamon will have no liability in connection with



- any Pre-Release Software. Customer shall have no right to any Support for Pre-Release Software; provided, however, Gigamon may in its sole discretion provide Support for such Software. The limited license granted in this Section 2(c) expires thirty (30) days after download unless otherwise mutually agreed upon in writing by the parties.
- d. **Evaluation.** If a Software and/or Hardware Product is provided for “evaluation,” “trial,” or similar temporary-use purposes (“**Evaluation**”), notwithstanding anything to the contrary in this Agreement, Customer may only use such Product for its internal demonstration, test, or evaluation purposes, and not for any other purpose, including without limitation not for production or commercial purposes. Customer’s right to use the Product is for the period of time specified by Gigamon. If no period of time is specified by Gigamon, Customer’s right to use the Product is limited to thirty (30) days. Customer agrees to return to Gigamon any Hardware and/or destroy any Software, including all backup copies, and accompanying Documentation provided by Gigamon in connection with the Evaluation within thirty (30) days following the expiration of the Evaluation period. If Hardware is not returned by such date, Gigamon will invoice Customer for the Hardware at the price previously agreed upon by the parties or the then-current list price if a price was not previously agreed upon. Payment will be due within thirty (30) days of the invoice date. Customer shall be solely responsible for all customs and other delivery fees associated with the return of the Hardware. Customer shall be responsible for the replacement cost of any Hardware in the event of any damage to or loss (including theft) of such Hardware prior to receipt of such Hardware by Gigamon. Upon request by Gigamon, Customer will provide Gigamon with written certification of Customer’s discontinued use and destruction of all Evaluation Software and accompanying Documentation. Gigamon will have no liability in connection with any Evaluation Products. Customer shall have no right to any Support for Evaluation Products; provided, however, Gigamon may, in its sole discretion, provide Support for such Products.
- e. **Affiliates.** Any Affiliate may purchase Products hereunder provided that it shall be bound by and comply with all the terms and conditions of this Agreement applicable to Customer, and Customer shall remain responsible for Affiliate’s acts and omissions unless Affiliate and Gigamon have entered into separate terms and conditions.
3. **Restrictions.** Other than as expressly permitted by this Agreement, Customer is not licensed to and will not, nor will it authorize or permit any third party to:
- sublicense, copy, duplicate, disclose, distribute, modify, exploit or create derivative works of the Products;
 - commercialize the Products (or any functionality or feature of the Products) in any way, including for third parties, whether as an application service provider, or on an outsourcing, membership or subscription, rental, service bureau, or other managed, hosted or similar basis;
 - use Software that is licensed for a specific device, whether physical or virtual, on another device;
 - decompile, reverse translate, disassemble, or reverse engineer any Software (except and only to the extent permissible by applicable law despite this prohibition) or cause any Software to be subject to any open source obligations;
 - remove any proprietary markings or copyright notices from any Gigamon Hardware or Software, or translate any Software into any other format or language without Gigamon’s prior written consent;
 - publicly display, transmit or use Documentation for any other purpose other than to support Customer’s authorized use of the Products for its internal business purposes;
 - analyze, use or otherwise access the Products or any related API to create a similar or competitive product or service, to copy the Product features or functionality, or to migrate to a Gigamon Competitor’s offering;
 - analyze or use the Product for any benchmarking study or other competitive purposes unless Gigamon has reviewed and approved of the methodology, assumptions and other parameters of the study; or
 - reproduce, modify, disclose, distribute, sublicense, license or otherwise transfer any implementation of Gigamon’s application programming interfaces (APIs) except to support Customer’s Internal Use.
4. **Payment, Taxes, Delivery and Late Charges.** This Section 4 applies to purchases by Customer directly from Gigamon. If Customer chooses to purchase Products and/or Support from an Authorized Channel Partner, the purchase of such Products or Support will be subject to the terms and conditions of this Agreement, except payment, taxes and delivery terms will be agreed upon by and between Customer and the Authorized Channel Partner.
- Payment.** Customer shall pay Gigamon the fees for Products and Support within thirty (30) days of the receipt date of the applicable invoice. Unless otherwise specified in a quote issued by Gigamon, all fees are payable in US dollars. Customer agrees that its purchase of Products and Support under this Agreement is not contingent on the availability of any future features or functionality.
 - Taxes.** Gigamon shall state separately on invoices taxes excluded from the fees, and Customer agrees either to pay the amount of the taxes (based on the current value of the equipment) or provide evidence necessary to sustain an exemption, in accordance with FAR 52.212-4(k).
 - Delivery.** Hardware and any Software that is preloaded on Hardware are delivered FCA Carrier (Incoterms 2020) and deemed accepted upon delivery. Software that is not preloaded on Hardware is delivered and deemed accepted when made available for Customer to download. Title to Hardware purchased by Customer, excluding any embedded Software or preloaded Software applications, transfers to Customer upon delivery to Gigamon’s designated freight carrier.



5. **Ownership.** The license(s) granted in this Agreement is/are not a transfer or sale of Gigamon's or its licensors' ownership rights in the Software (including any copies) or in any of their respective intellectual property. Except for the license(s) specifically granted in this Agreement, Gigamon and its licensors retain all right, title, and interest in and to the Software, the related source code and intellectual property therein, and any and all modifications or derivatives thereof.
6. **Open Source Software.** The Software may include components subject to the terms and conditions of open source software licenses (such components, the "**Open Source Code**"). To the extent applicable, Gigamon will identify Open Source Code included with Software in or through the applicable Product itself. Some of these licenses require Gigamon to provide the Open Source Code on the terms of the open source license instead of the terms of this Agreement. In that case, the terms of the open source license will apply, and Customer will have the rights granted in such licenses to the open source software itself, such as access to source code, right to make modifications, and right to reverse engineer. Notwithstanding the foregoing, if Customer is using the Software in the form provided, in accordance with Customer's permitted scope of use, with no distribution to third parties, then none of these open source licenses impose any obligations on Customer beyond what is stated in the Agreement. To the extent required by the applicable open source license, Gigamon will make available the required source code for the Open Source Code in response to Customer's request emailed to legal@gigamon.com.
7. **Limited Warranties and Disclaimers.** Gigamon offers a Limited Hardware and Software Warranty for its Products as published at www.gigamon.com/warranty.pdf, a current copy of which is [attached as Exhibit B hereto](#). (the "**Limited Warranties**"). EXCEPT FOR THE LIMITED WARRANTIES, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE PRODUCTS AND SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS AND GIGAMON AND ITS LICENSORS DISCLAIM ALL WARRANTIES RELATING TO THE PRODUCTS AND SERVICES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. THE PRODUCTS ARE NOT FAULT-TOLERANT AND ARE NOT DESIGNED OR INTENDED FOR USE IN ANY HAZARDOUS ENVIRONMENT REQUIRING FAIL-SAFE PERFORMANCE OR OPERATION. THE PRODUCTS ARE NOT FOR USE IN THE OPERATION OF AIRCRAFT NAVIGATION, NUCLEAR FACILITIES, CRITICAL COMMUNICATION SYSTEMS, WEAPONS SYSTEMS, DIRECT OR INDIRECT LIFE-SUPPORT SYSTEMS, AIR TRAFFIC CONTROL, OR ANY OTHER APPLICATION OR INSTALLATION WHERE FAILURE COULD RESULT IN DEATH, SEVERE PHYSICAL INJURY, OR PROPERTY DAMAGE. THESE LIMITATIONS APPLY EVEN IF GIGAMON HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.
8. **Support Services.** All Support is provided to Customer for a separate fee and is subject to the Support Terms.
9. **Customer Use of Products.** Customer has the sole obligation to manage, secure, and oversee its network and tools in compliance with applicable law, and to provide notices and obtain consents, as necessary, to its users that their use of Customer's computers, electronic appliances, and devices (and those of users on Customer's network) may be monitored, inspected, or decrypted by Customer.
10. **Confidentiality.**
 - a. **Definition.** "Confidential Information" means non-public information provided by one party ("**Discloser**") to the other ("**Recipient**") that is designated as confidential or reasonably should be considered as such, excluding information that is (i) in or becomes part of the public domain (other than by disclosure by Recipient in violation of this Agreement); (ii) previously known to Recipient without an obligation of confidentiality and demonstrable by the Recipient; (iii) independently developed by Recipient without use of Discloser's Confidential Information; or (iv) rightfully obtained by Recipient from third parties without an obligation of confidentiality.
 - b. **Restrictions on Use.** Recipient shall (i) only use Discloser's Confidential Information to exercise its rights and/or to perform under this Agreement, (ii) use the same degree of care to prevent unauthorized use and disclosure of Discloser's Confidential Information as it does for its own confidential information, but in no event less than reasonable care, and (iii) with respect to Recipient's employees and Authorized Contractors, limit access only to those employees and Authorized Contractors who have a need to access such Confidential Information and who are subject to confidentiality obligations at least as restrictive as those specified herein.
 - c. **Exceptions.** Recipient may disclose Discloser's Confidential Information to the extent required by any court, governmental or regulatory body, or law or regulation, provided that, if legally permissible, Recipient shall provide prompt written notice to Discloser of such disclosure. Gigamon recognizes that Federal agencies are subject to the Freedom of Information Act, 5 U.S.C. section 552 ("FOIA"), which may require that certain information be released, despite being characterized as "confidential" by the vendor, and the Government Customer recognizes that confidential information that is "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is exempt from release under FOIA at subsection (b)(4).
 - d. **Destruction.** Upon written request of Discloser, Recipient shall return or destroy Discloser's Confidential Information, provided that Recipient may retain Discloser's Confidential Information that (i) it is required to keep for compliance purposes under applicable law, professional standards, a court or regulatory agency, or (ii) was created electronically pursuant to automatic or ordinary course archiving, back-up, security or disaster recovery systems or procedures, provided that any such retained information shall remain subject to this Agreement. Upon Discloser's request, Recipient will provide Discloser with written confirmation of destruction in compliance with this provision.
11. **Term and Termination.** This Agreement is effective as of the date of Customer's assent as set forth in the first paragraph and shall continue until terminated. To the extent required under federal law, when the End User is an instrumentality of the U.S., recourse against the United States for any alleged breach of this Agreement must be brought as a dispute under the contract Disputes Clause (Contract Disputes Act). To the extent required under federal law, during any dispute under the Disputes Clause, Gigamon shall proceed diligently with performance of this Agreement, pending final resolution of any request for relief, claim, appeal, or action arising under the Agreement, and comply with any decision of the Contracting Officer. Upon the termination of this Agreement, all definitions and Sections 1, 3, 4, 5, 7 and 9 through 21 shall



survive termination for any reason and all other licenses and obligations shall terminate. Nothing contained herein shall limit any other remedies that either party may have for the default of the other party under this Agreement nor relieve either party of any of its obligations incurred prior to any expiration or termination of this Agreement. Upon termination of this Agreement, Customer will stop using equipment with embedded Software and destroy or delete all copies of downloaded Software from any of its devices or storage devices.

12. **Limitation of Liability.** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT FOR: (i) PERSONAL INJURY, DEATH OR TANGIBLE PROPERTY DAMAGE; (ii) MISUSE OR VIOLATION OF A PARTY'S INTELLECTUAL PROPERTY RIGHTS BY THE OTHER PARTY; (iii) PAYMENT OBLIGATIONS FOR PRODUCTS, SUPPORT OR SERVICES; (iv) GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR FRAUD BY A PARTY, ITS EMPLOYEES OR AGENTS AND/OR (v) AMOUNTS PAYABLE TO THIRD PARTIES UNDER SECTION 15 ("INTELLECTUAL PROPERTY INDEMNIFICATION") IN NO EVENT WILL:

(a): GIGAMON OR ITS LICENSORS OR CUSTOMER BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, OR PUNITIVE DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS, DATA OR INFORMATION, COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, OR BUSINESS INTERRUPTION) ARISING OUT OF OR RELATED TO THIS AGREEMENT AND ANY PRODUCTS OR SERVICES, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; AND

(b) EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT AND ANY PRODUCTS OR SERVICES EXCEED THE FEES PAID BY CUSTOMER IN THE TWELVE (12) MONTHS PERIOD BEFORE THE EVENT GIVING RISE TO SUCH LIABILITY.

THESE LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY SPECIFIED IN THIS AGREEMENT. MULTIPLE CLAIMS SHALL NOT EXPAND THE LIMITATIONS SPECIFIED IN THIS SECTION 12.

13. **Usage Reporting.** Customer will provide information regarding Product licenses activated or deployed to Gigamon within five business days of any written request, so long as Gigamon does not make more than one request during any 12-month period. If Customer has used the Software in excess of the number of devices or other units of measurement permitted on the applicable Supplement, quote and / or purchase order, Customer will (i) promptly comply with this Agreement, and (ii) pay the additional fees due at the price previously agreed upon by the parties or Gigamon's then-current list price if a price was not previously agreed upon.
14. **Intellectual Property.** The Gigamon name, its logo, and all other names, logos, or icons identifying Gigamon and its programs, products, and services are proprietary, and user thereof without Gigamon's express written permission is strictly prohibited. If Customer or its Authorized Contractors, in their discretion, provide any feedback to Gigamon concerning the functionality and performance of the Products or any services (e.g., identifying potential errors, enhancements and improvements) ("**Feedback**"), Gigamon shall be entitled to use Feedback for any purpose without restriction or remuneration of any kind with respect to Customer and/or its representatives.
15. **Intellectual Property Indemnification.**

Gigamon will, at its cost and expense, (i) have the right to intervene to defend any claim brought against Customer by an unaffiliated third party alleging that the Product infringes such third party's copyright, patent or trademark rights, and (ii) pay any settlement of such claim or any damages finally awarded to such third party by a court of competent jurisdiction as a result of such claim. Gigamon's obligations above are conditioned on Customer notifying Gigamon promptly in writing of the claim or threat thereof and giving Gigamon sole control and authority over, and information for and assistance with, the defense and settlement thereof. Gigamon will have no liability for any claim based upon (a) the combination, operation or use of any Product supplied hereunder with equipment, devices or software not supplied by Gigamon; (b) alteration or modification of any Products; (c) the failure to install any update or revision made available by Gigamon; or (d) Gigamon's compliance with Customer's specifications, designs, or instructions. Customer may participate in the defense or settlement of any claim at its cost. If an injunction or order is obtained against Customer's use of any Product by reason of such allegations of infringement, Gigamon will, (or if in Gigamon's reasonable opinion the Product is likely to become the subject of a claim of infringement, Gigamon may), at its expense: (1) procure the right to allow Customer to continue to use the applicable Product; (2) replace the applicable Product with a non-infringing functionally equivalent product at no cost to Customer, (3) modify the applicable Product or take other action so that the applicable Product becomes non-infringing; or (4) if none of the foregoing remedies are commercially practical, terminate this Agreement, and, upon Gigamon's receipt of the infringing Product from Customer, refund the applicable fees for such Product received by Gigamon subject to straight-line depreciation over a three (3) year period from purchase. THE FOREGOING STATES THE ENTIRE OBLIGATION OF GIGAMON AND CUSTOMER'S SOLE REMEDY WITH RESPECT TO INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS OF ANY KIND. Nothing contained herein shall be construed in derogation of the U.S. Department of Justice's right to defend any claim or action brought against the U.S., pursuant to its jurisdictional statute 28 U.S.C. section 516.

16. **Compliance with Laws and Export Restrictions.** Each party shall comply with all laws and regulations that apply to its performance of the Agreement or use of the Products. The Products and Documentation may be subject to U.S. and foreign import and export control laws and regulations. Customer acknowledges and agrees the Products and Documentation shall not be used, transferred, or otherwise exported or re-exported to countries as to which the United States maintains an embargo (collectively, "**Embargoed Countries**"), or to or by a national or resident thereof, or any person or entity on the U.S. Department of Treasury's List of Specially Designated Nationals or the U.S. Department of Commerce's Table of Denial Orders (collectively, "**Designated Nationals**"). Customer represents and warrants that Customer is not located in, or is under the control of, or a national or resident of, an Embargoed Country or Designated National.
17. **Third Party Agreements.** Customer is responsible for obtaining and maintaining all telecommunications, broadband, computer equipment, and services needed to access and use the Products and for paying all charges related thereto. Products may contain features designed to interface with applications or services that are separately provided or made available by third parties ("**Third-Party Services**"). In order to use



a feature in connection with a Third-Party Service or the Third-Party Service, Customer must have an agreement with the provider of the relevant Third-Party Service. If the Third-Party Services are no longer available or if the applicable third-party provider no longer allows the Third-Party Services to interface with a Product, then such features will no longer be available or function with a Product. Gigamon and the provider of the applicable Third-Party Service disclaim all warranties, indemnities, obligations, and other liabilities in connection with any interface or integration with the Third-Party Service. Further, Gigamon disclaims all warranties, indemnities, obligations, and other liabilities in connection with any Third-Party Service.

18. **US Government Rights.** The Products and Documentation are "commercial items," as that term is defined in FAR (48 C.F.R.) 2.101, consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in FAR 12.211 and 12.212. Consistent with FAR 12.211 and 12.212 and DFARS (48 C.F.R.) 227.7202 -1 through 227.7202-4, the Products and Documentation are being licensed to U.S. government end users under the license(s) customarily provided to the public as forth in this Agreement. If this Agreement fails to meet the Government's needs or is inconsistent in any way with Federal law, and the parties cannot reach a mutual agreement on terms for this Agreement, the Government agrees to terminate its use of the Products and return such Products and any other software or technical data delivered as part of the Products, unused, to Gigamon. In addition, DFARS 252.227-7015 (Technical Data - Commercial Items) applies to technical data acquired by Department of Defense agencies. This U.S. Government Rights clause in this Section is in lieu of, and supersedes, any other FAR, DFARS, or other clause, provision, or supplemental regulation that addresses Government rights in computer software or technical data under this Agreement.
19. **Reserved.**
20. **Force Majeure.** In accordance with GSAR Clause 552.212-4(f), neither party shall be liable for, nor shall either party be considered in breach of this Agreement due to any failure to perform its obligations under this Agreement (other than its payment obligations) as a result of a cause beyond its control, including but not limited to, act of God or public enemy; act of terrorism; act, order, requirement or advisory of any military, civil or regulatory authority; change in any law or regulations; fire, flood, earthquake, storm, epidemic, pandemic, viral or communicable disease outbreak, quarantine, national emergency, or other like event; shortages or stoppages based on reasonable fear for the safety of personnel due to any of the foregoing events; supply chain disruption; disruption of transportation systems; disruption or outage of communications, power or utility; labor problem; lack of or inability to obtain fuel, power, components or materials; or any other cause, whether similar or dissimilar to any of the foregoing, that could not have been prevented with reasonable care.
21. **General.** This Agreement and performance by the parties hereunder shall be construed in accordance with the Federal laws of the United States. The Uniform Computer Information Transactions Act and the United Nations Convention on the International Sale of Goods shall not apply. Neither party may assign this Agreement without the prior written consent of the other party. Any assignment in violation of this Section shall be void. Subject to the foregoing, all rights and obligations of the parties under this Agreement shall be binding upon and inure to the benefit of and be enforceable by and against the successors and permitted assigns. This Agreement, the Support Terms and any applicable Supplement is the entire agreement between Customer and Gigamon and supersedes any other communications with respect to the subject matter of this Agreement. Additional or conflicting terms on any purchase order or other document issued by Customer or any Authorized Channel Partner will have no force or effect. If any provision of this Agreement is held invalid or unenforceable, such provision will be deemed replaced by the provision permitted by law that most closely effectuates the parties' original intent as documented hereunder, and the remainder of this Agreement will continue in full. No waiver by either party of any rights under the Agreement will be effective unless such waiver is in a writing signed by the party against whom enforcement is sought. All notices relating to this Agreement must be in writing and delivered to Gigamon Inc., Attention: Legal Department, 3300 Olcott Street, Santa Clara, CA 95054 or by email to legal@gigamon.com. Notices and will be effective (1) when personally delivered, (2) on the reported delivery date if sent by a recognized international or overnight courier, (3) five business days after being sent by registered or certified mail (or ten days for international mail), or (4) when the intended recipient responds acknowledging receipt if delivered by email.



EXHIBIT A
TIERED-VOLUME LICENSE SUPPLEMENTAL TERMS AND CONDITIONS



**TIERED-VOLUME LICENSE SUPPLEMENTAL TERMS TO
THE
GIGAMON TERMS AND CONDITIONS**

These Supplemental Terms (the “**Supplement**”) for the use of any Gigamon Products provided on a Tiered Volume License basis contains terms and conditions for the use of such Products that are in addition to the Gigamon Terms and Conditions to which this Supplement is attached and set forth at <https://www.gigamon.com/content/dam/resource-library/english/user--support-documentation/gigamon-terms-and-conditions.pdf> or in a separately executed agreement between the Customer and Gigamon (in either case, the “**Agreement**”). This Supplement is hereby incorporated by reference into the Agreement. Capitalized terms used herein and not defined shall have the meanings assigned to them in the Agreement.

RECITALS

WHEREAS, Gigamon offers certain of its Software Products on a Tiered-Volume License basis to enable customers to monitor network traffic in their public and private cloud environments.

WHEREAS, if a Software Product is provided on a Tiered-Volume License basis, Customer’s use of such Product is subject to the terms and conditions set forth in the Agreement and the additional terms and conditions set forth in this Supplement.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Additional Definitions.

- 1.1. “95th Percentile Utilization”** is a method to determine whether Customer has exceeded its Daily Data Limit over a given period. It is calculated for each three month period as follows: the Daily Data ingested by all instances of the Customer’s Tiered-Volume License Product that are managed by the same instance of GigaVUE-FM Fabric Manager will be sorted from highest to lowest for each day in such period and the top 5% of such Daily Data entries will be discarded. If the next highest Daily Data entry (the 95th percentile) is greater than the contracted Daily Data Limit, Customer has exceeded its Daily Data Limit for such period.
- 1.2. “Daily Data”** means the quantity of data, expressed in PetaBytes (“**PB**”) or Terabytes (“**TB**”), that is ingested each day by all of Customer’s instances of the applicable Tiered-Volume Licensed Product that are managed by the same instance of GigaVUE-FM Fabric Manager.
- 1.3. “Daily Data Limit”** means the maximum quantity of data, expressed in PB or TB, for which Customer has paid to be monitored each day by all of Customer’s instances of the Tiered- Volume License Product that are managed by the same instance of GigaVUE-FM Fabric Manager.
- 1.4. “Subscription Period”** means a period of one (1) year from the Order date unless a different duration is set forth in the applicable Order.
- 1.5. “Tiered-Volume License”** means the right to use multiple instances of the Product to monitor up to the Daily Data Limit identified on the Order for such Product, provided all instances of the Product are managed by the same instance of GigaVUE-FM Fabric Manager.



2. Supplemental Terms.

2.1. Product License. Upon purchase of a subscription for a Product on a Tiered-Volume License basis, Customer shall receive a Term License to use, and the right to receive Support for, such Product for the duration of the Subscription Period. Subject to the limitations in Section 2.2, Customer may copy, deploy and use an unlimited number of copies of Tiered-Volume License Software solely for Customer's Internal Use during the Subscription Period. Tiered-Volume Licenses are non-cancellable and non-refundable for the duration of the Subscription Period.

2.2. Daily Data Limit. The maximum quantity of Daily Data that the Customer is permitted to monitor across all copies of the Tiered-Volume Licensed Product without incurring additional charges is limited to the Daily Data Limit. After a Subscription Period begins, Customer may increase the Daily Data Limit at any time by purchasing the right to monitor additional Daily Data for the remainder of the Subscription Period. The initial Daily Data Limit purchased by Customer and any increases in the Daily Data Limit purchased pursuant to the preceding sentence or pursuant to Sections 2.4 ("Quarterly True-Forward") or 2.5 ("Monthly True-Forward") are non-cancellable, non-refundable, and may not be reduced for the remainder of the Subscription Period. The fees paid for the initial or any increased Daily Data Limit are not creditable against any future fees.

2.3. Usage Reports. Customer agrees to generate a report each month (with a "month" defined as each monthly anniversary of the applicable Order date) using Gigamon's GigaVUE-FM Fabric Manager console that discloses the quantity of Daily Data monitored each day in the prior three (3) month period (the "**Usage Report**"). Usage Reports will be emailed to Gigamon at vbl-reports@gigamon.com at the end of each such month. The Usage Report will also include the Customer's name, the three (3) month period covered by the report, the 95th Percentile Utilization over such three (3) month period, and the Daily Data usage for each day in such period.

2.4. Quarterly True-Forward. If Daily Data use exceeds the Daily Data Limit, as calculated using the 95th Percentile Utilization method, over the course of any rolling three (3) month period, then Gigamon, directly or through its Authorized Channel Partner, shall invoice Customer (and Customer shall pay) for the higher tier Daily Data Limit plan at an increment sufficient to cover the excess usage for the balance of the Subscription Period (a "**Quarterly True-Forward**").

2.5. Monthly True-Forward. Notwithstanding the terms of Section 2.4, if the Daily Data Limit for any single day in a month has been exceeded by fifty percent (50%) or more, then Gigamon, directly or through its Authorized Channel Partner, shall invoice Customer (and Customer shall pay) for the higher tier Daily Data Limit plan at an increment sufficient to cover the excess usage for the balance of the Subscription Period (a "**Monthly True-Forward**").

2.6. Termination. Customer's failure to pay any invoice issued pursuant to Section 2.4 ("Quarterly True-Forward") or 2.5 ("Monthly True-Forward") within thirty (30) days of receipt may result in Gigamon's termination of Customer's right to use all instances of such Tiered-Volume License Product in accordance with the contract Disputes Clause (Contract Disputes Act). In the event of any such termination, Customer will (i) immediately cease all access and use of all instances of Tiered-Volume License Product, and (ii) within ten (10) business days of such termination, Customer will permanently erase all copies and instances of Tiered-Volume License Software. Gigamon's forbearance on not assessing a Quarterly True-Forward or Monthly True-Forward for a given period shall not constitute or be deemed a waiver for any subsequent period.

3. Effect of Supplement. Except as specifically provided in this Supplement, all other terms and conditions of the Agreement shall remain in full force and effect, without modification, addition or deletion. In the event of any conflict between this Supplement and the terms and conditions of the Agreement, this Supplement shall control.



EXHIBIT B
LIMITED WARRANTY – HARDWARE AND SOFTWARE EFFECTIVE SEPTEMBER 21, 2020



Limited Warranty – Hardware and Software Effective September 21, 2020

This Limited Warranty for Gigamon Hardware and Software Products (this “**Limited Warranty**”) is available only to the original end customer entity (the “**Customer**”) and solely covers Products purchased by Customer from Gigamon or its authorized channel partners.

Definitions

- “**Defect**” means any verifiable and reproducible failure of the Product to materially conform to the Specifications that is validated by Gigamon, unless such failure is caused by (a) Customer’s failure to implement in a timely manner Software updates, improvements, or modifications to the Product made available to Customer by Gigamon; (b) a Force Majeure Event, (c) acts of government; (d) misuse or abuse, (e) Customer instructions, installation, or set up adjustments; (f) modifications of or to any part of the Product by any party other than Gigamon; (g) accident or damage; or (h) use of the Software other than as permitted in the Gigamon Terms and Conditions set forth at <https://www.gigamon.com/content/dam/resource-library/english/user---support-documentation/gigamon-terms-and-conditions.pdf> (the “**Gigamon Terms**”).
- “**Hardware**” means any Gigamon-branded hardware product that is purchased by Customer directly from Gigamon or through an authorized channel partner. For clarity, Software may be included with or embedded in Hardware, but is not included within the scope of Hardware.
- “**Products**” means, collectively, Software, Hardware, and/or any combination thereof.
- “**Software**” means any object or binary code or firmware, and any upgrades or updates therefor, that are provided by Gigamon or an authorized channel partner on Gigamon’s behalf and that are either (a) included with or embedded in the Hardware, or (b) provided as a separate Gigamon-branded software product.
- “**Specifications**” means the applicable Gigamon-published technical Product specifications.
- “**Warranty Period**” (a) for Hardware, means one (1) year from the initial date Hardware is shipped by Gigamon or its designee and (b) for Software, means ninety (90) days from the date the Software is delivered or initially made available to the Customer or its designee.

Limited Warranty for Hardware

During the Warranty Period for Hardware, Gigamon will, at its option, use reasonable efforts to repair or replace such Hardware determined to have a Defect, provided that: (a) the Hardware has been used within normal operating conditions; (b) the Customer notifies the Gigamon technical support team (“**Technical Support**”) of the suspected Defect during the Hardware Warranty Period; (c) Technical Support validates the Defect; and (d) Customer complies with this Limited Warranty. Gigamon may, at its option, repair or replace any such Hardware with a validated Defect with new or equivalent-to-new components or hardware with equivalent fit, form, and function (each a “**Replacement Unit**”). Any Hardware without a validated Defect will be returned to Customer at Customer’s expense. If Gigamon determines that it is not commercially practical to repair or replace Hardware with a validated Defect, it will refund the purchase price received by Gigamon for such Hardware. This Limited Warranty is Gigamon’s sole liability and Customer’s sole and exclusive remedy for any failure of the Product to operate in accordance with the Specifications.

Process: Customer must first contact Technical Support to obtain approval to return Hardware that Customer suspects has a Defect. Following Technical Support’s approval of Customer’s return of such Hardware, Technical Support will provide Customer with a Gigamon Return Materials Approval (“**RMA**”) number that Customer must include when shipping the suspect Hardware back to the location designated by Technical Support. Customer is responsible for shipping the suspect Hardware, in either its original packaging or packaging affording a reasonably equivalent degree of protection, to Gigamon’s designated location. Customer will pay the freight and any corresponding customs, taxes, duties, or other fees related to



the return of the suspect Hardware to Gigamon's designated location. Any Hardware returned to Gigamon will become Gigamon property upon shipment of a Replacement Unit to Customer or its designee.

Within 10 business days of Gigamon's receipt of the Hardware with the suspected Defect, Gigamon will ship a Replacement Unit to Customer. Each Replacement Unit is covered by this Limited Warranty for the longer of (a) the remainder of the original Hardware Warranty Period; or (b) ninety days from the Replacement Unit shipment date. Gigamon will pay the freight associated with the Replacement Unit shipment, but Customer will be responsible for any corresponding customs, taxes, duties, or related fees.

Limited Warranty for Software

During the Software Warranty Period, Gigamon will use reasonable efforts to provide the Customer a correction or workaround for any Defects in the Software provided that: (a) the Defect occurs when the Software is used within normal operating conditions and as permitted in the Gigamon Terms and subject to the other limitations therein and herein; (b) the Customer notifies Technical Support of the suspected Defect during the Software Warranty Period; (c) Technical Support reproduces and validates the Defect; and (d) the Customer complies with this Limited Warranty. If Gigamon determines that it is not commercially practical to repair or replace the Software with a confirmed Defect, it will refund the purchase price received by Gigamon for such Software. This limited warranty is Gigamon's sole liability and Customer's sole and exclusive remedy for any failure of the Product to operate in accordance with the Specifications.

Additional Information

Technical Support Contact Information: For contact details, please visit <http://www.gigamon.com/support/support-and-services/contact-support.html>. This Limited Warranty is non-transferable and only covers Defects. Further, this Limited Warranty is invalid if the factory-applied serial number has been altered or removed from the Product. Gigamon may require Customer to provide proof of purchase by Customer and the applicable shipment date.

DISCLAIMER: EXCEPT AS EXPRESSLY SET FORTH HEREIN, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE PRODUCTS ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS AND GIGAMON AND ITS LICENSORS DISCLAIM ALL WARRANTIES RELATING TO THE PRODUCTS, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, AND FITNESS FOR A PARTICULAR PURPOSE. TO THE EXTENT AN IMPLIED WARRANTY CANNOT BE EXCLUDED, SUCH WARRANTY IS LIMITED IN DURATION TO THE APPLICABLE WARRANTY PERIOD. THE PRODUCTS ARE NOT FAULT-TOLERANT AND ARE NOT DESIGNED OR INTENDED FOR USE IN ANY HAZARDOUS ENVIRONMENT REQUIRING FAIL-SAFE PERFORMANCE OR OPERATION. THE PRODUCTS ARE NOT FOR USE IN THE OPERATION OF AIRCRAFT NAVIGATION, NUCLEAR FACILITIES, CRITICAL COMMUNICATION SYSTEMS, WEAPONS SYSTEMS, DIRECT OR INDIRECT LIFE-SUPPORT SYSTEMS, AIR TRAFFIC CONTROL, OR ANY OTHER APPLICATION OR INSTALLATION WHERE FAILURE COULD RESULT IN DEATH, SEVERE PHYSICAL INJURY, OR PROPERTY DAMAGE.

LIMIT OF LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NEITHER GIGAMON NOR ITS LICENSORS WILL BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL, OR PUNITIVE DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS, DATA OR INFORMATION, OR BUSINESS INTERRUPTION) ARISING OUT OF OR RELATED TO THE PRODUCTS, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. GIGAMON'S MAXIMUM LIABILITY UNDER THIS WARRANTY IS THE PURCHASE PRICE GIGAMON RECEIVED FOR THE PRODUCT IN QUESTION. THESE LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY SPECIFIED IN THIS AGREEMENT.

Force Majeure. Gigamon shall not be liable for any failure to perform its obligations under this Limited Warranty as a result of a cause beyond its reasonable control (a "Force Majeure Event"), including but not limited to, act of God or public enemy; act of terrorism; act, order, requirement or advisory of any military, civil or regulatory authority; change in any law or regulations; fire, flood, earthquake, storm, epidemic, pandemic, viral or communicable disease outbreak, quarantine, national emergency, or other like event and any governmental orders or advisories related thereto; supply chain disruption; disruption of transportation systems; disruption or outage of communications, power or utility; labor problem; lack of or inability to obtain fuel, power, components or



materials; or any other cause, whether similar or dissimilar to any of the foregoing, that could not have been prevented with reasonable care.

Choice of Law; Venue: This Agreement is governed by the laws of the State of California, without reference to its conflict of laws principles. Any dispute regarding this Limited Warranty will be subject to the exclusive jurisdiction of the state and federal courts located in Santa Clara County, California, U.S.