Chocolatey® Commercial Editions - Software License Agreement

PLEASE READ THIS SOFTWARE LICENSE AGREEMENT ("AGREEMENT") CAREFULLY BEFORE ACCESSING, DOWNLOADING OR OTHERWISE USING CHOCOLATEY®, CHOCOLATEY® LICENSED EXTENSION AND/OR CHOCOLATEY® FOR BUSINESS ("SOFTWARE"). BY DOWNLOADING OR OTHERWISE USING THE SOFTWARE, YOU ACCEPT THIS AGREEMENT AND ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND AGREE TO BE BOUND BY ITS TERMS. IF YOU ARE AN INDIVIDUAL ACTING ON BEHALF OF AN ENTITY, YOU REPRESENT AND WARRANT THAT YOU HAVE THE AUTHORITY TO ENTER INTO THIS AGREEMENT ON BEHALF OF THAT ENTITY. IF YOU DO NOT HAVE SUCH AUTHORITY, YOU ARE SOLELY RESPONSIBLE FOR YOUR USE OF THE SOFTWARE. IF YOU DO NOT ACCEPT THE TERMS OF THIS AGREEMENT, THEN YOU ARE NOT PERMITTED TO ACCESS, DOWNLOAD OR OTHERWISE USE THE SOFTWARE.

This Agreement, including all referenced documents located at the URLs listed below, is between Chocolatey Software, Inc ("Chocolatey") and you, the purchaser of the license to the Software ("Customer"). For the purposes of this Agreement "Customer" is defined as both the purchaser and purchaser's Affiliates. "Affiliate" means any entity that directly or indirectly controls, is controlled by, or is under common control with a party, where "control" is defined as ownership of more than fifty percent (50%) of outstanding shares or securities, or an equivalent ownership interest. "Party" is defined as Chocolatey or Customer. This Agreement is effective ("Effective Date") as of the date that the Customer downloads the Software or proceeds forward with a purchase, whichever date comes sooner.

1. ORDERS. Customer may purchase licenses to the Software from time-to-time by submitting a purchase order (an "Order") to Chocolatey or an authorized reseller of Software, which must correspond to a valid Chocolatey quote. All such purchases are subject to the provisions of this Agreement. This Agreement supersedes any conflicting provisions on an Order, and both Chocolatey and Customer reject any additional provisions that have not been expressly agreed to in writing. The Software and this Agreement is deemed accepted upon download or use of Software, whichever comes first.

2. LICENSE. Subject to Customer's compliance with this Agreement, Chocolatey grants to Customer a worldwide, limited, non-transferable, non-sublicensable, revocable license to use the Software for the purpose of managing Customer's information technology infrastructure (whether on premises or in the cloud, and including any information technology infrastructure for the benefit of Customer's customers, so long as the Software operates on equipment that is owned or maintained by Customer). Packages may be created, acquired, or altered with Software and deployed to non-licensed instances so long as Customer counts those non-licensed instances in the total count for licensing purposes. Customer may reproduce the Software and use multiple copies concurrently, subject to the pricing terms of Section 6.

3. SOURCE CODE. The source code for the open source portions of the Software are available through https://chocolatey.org/. Portions of the source code are subject to the provisions of an "open source" license (the "Open Source Components"). The applicable license and its associated components are available upon request.

4. THIRD PARTY SOFTWARE. The Software includes components that included under license from third parties (the "Third Party Software"). Customer is subject to all terms of any third party licenses as it concerns those components. Third Party Software components and their applicable third-party license terms are available upon request.

5. RESTRICTIONS. The Software is licensed, not sold. Except as stated otherwise in this Agreement, Customer may not use the Software other than for Customer's internal business purposes, and not for the purposes of any third party nor for any timesharing, rental, Internet, or application service provider, commercial hosting services, or service bureau basis. Other than as granted in Section 2, Chocolatey and its licensors retain all right, title and interest in and to the Software, including all intellectual property rights, registered or unregistered, and wherever in the world those rights may exist (collectively, the "Chocolatey Rights"). The Chocolatey Rights include graphics, user and visual interfaces, design, structure, selection, coordination, expression, "look and feel", arrangement, trademark, logo and other distinctive brand features of the Software (collectively, the "Chocolatey Marks"). This Agreement does not permit Customer to distribute any product or service using the Chocolatey Marks, including in connection with any Open Source Components. Chocolatey shall retain title to all copies of the Software provided to Customer or made by Customer. There are no implied rights or licenses in this Agreement. All rights are expressly reserved by Chocolatey.

6. FEES AND PAYMENT.
   6.1 General. If purchasing directly from Chocolatey, Customer will pay Chocolatey a fee for a license subscription and for support and maintenance (per Section 7) based on the number of "Nodes" managed by the Software. A "Node" is a single network-connected device such as a server, desktop, or laptop (virtual machines that have a unique IP address are a separate Node from the physical machine on which they reside). An active license is counted based on every Node that has a license file with the Software and every Node that uses packages created, acquired, or altered by the Software, even if those Nodes are not specifically licensed. The fee, number of Nodes, and subscription term will be stated in Customer's Order. If purchasing directly from Chocolatey, Customer agrees to pay Chocolatey all fees within 30 days of invoice date or as agreed to on the invoice. All payments shall be made in currently available funds payable at the address set forth on Chocolatey's invoice or through electronic means as set forth on Chocolatey's invoice. The license granted herein is subject to Customer

making all payments due and shall automatically terminate if Customer fails to make any payments when due, including installment payments, whether owed directly to Chocolatey or a reseller or distributor.

6.2 <u>Subscription</u>. The default subscription term is one year. Chocolatey will invoice customer within 45 days prior to the end of the subscription term. If the Customer chooses to end the subscription, the Software will cease to work at the end of the subscription term.

6.3 <u>Perpetual</u>. If term agreed is Perpetual, the Customer agrees to pay fees as agreed to in the Order, and annual maintenance fees as described in Section 7. If the Customer with a Perpetual agreement chooses to end annual maintenance fees, the Software will no longer be able to upgrade at the end of the maintenance term. At Chocolatey's discretion, a lapsed annual maintenance contract for a Perpetual term Customer may be reinstated provided all back fees are paid in addition to a 10% interest fee determined on the difference between the lapsed annual maintenance fee renewal date and the effective date of the reinstatement.

7. SUPPORT; CHANGES.

7.1 <u>Support and Maintenance</u>. In connection with any Paid License, Chocolatey will provide Customer the support and maintenance services ("Support Services") either the "Standard" or the "Premium" level, as indicated in the Order. There is no support or maintenance available in connection with a Free License. If Support Services are terminated for any reason, any later reinstatement is at Chocolatey's sole option and is conditioned on (a) Chocolatey offering Support Services to its customers generally for the Software in question, and (b) if Support Services have been terminated for more than thirty (30) days, Customer paying Chocolatey all applicable Support Services fees for the period during which Customer was off Support Services, plus fees for the new Support Services term. Support Services terms and conditions can be found at https://chocolatey.org/support and can be provided upon request.

7.2 <u>Packages and Customer Changes</u>. Chocolatey makes available packages ("Packages") that may be used in connection with the Software, either bundled with the Software (including in an update or upgrade later provided), through the community package repository website at https://chocolatey.org/packages ("<u>Chocolatey Community Packages</u>"), or through other means. There may be other package source locations, public or private, that Customer could use to install Packages. The Customer may also develop and host Packages for internal or external use. Except for Packages provided expressly by Chocolatey, Chocolatey is not liable to support any Packages, including Packages provided by employees of Chocolatey on the Chocolatey Community Repository, nor are such Packages covered by the warranty and indemnity terms of this Agreement. Furthermore, Chocolatey is not responsible to support, and is not liable under this Agreement in any way (including warranty and indemnity) for, any changes made by Customer to the Software.

8. WARRANTY; DISCLAIMER

8.1 <u>General Warranties</u>. Chocolatey represents and warrants that it has sufficient ownership or authority to grant to Customer the license stated in Section 2. Chocolatey represents and warrants that where Chocolatey utilizes any third party services, Third Party Software, intellectual property, data and information ("<u>Third Party Rights</u>") it possesses the requisite licenses and permissions for such Third Party Rights and is not in breach of such licenses or permissions by using them in the performance of this Agreement. Each Party represents and warrants that: (a) it has the full power and authority to enter into this Agreement and to carry out its obligations under this Agreement; and (b) it has complied, and will in the future comply, with all applicable laws in connection with the execution, delivery and performance of this Agreement.

8.2 <u>Product Warranty</u>. Chocolatey warrants to the Customer that the Software will perform in all material respects as specified in its accompanying documentation under normal use for a period of thirty (30) calendar days from initial receipt or access. Customer's exclusive remedy for a breach of this limited warranty is to return any allegedly defective Software and Chocolatey, at its option, will replace it or refund any fee paid for the Software.

8.3 <u>Confidentiality.</u> Chocolatey represents and warrants that it has developed, implemented and will maintain effective information security controls, policies and procedures that include administrative, technical and physical safeguards compliant with all federal, state and applicable data protection laws and consistent with then current industry standards to: (a) ensure the security and confidentiality of all data, information and intellectual property provided by, or relating to, Customer or Customer's Affiliates ("<u>Customer Confidential Information</u>"); (b) protect against anticipated threats or hazards to the security or integrity of Customer Confidential Information; (c) protect against unauthorized access or use of Customer Confidential Information; and (d) ensure the proper disposal of Customer Confidential Information.

8.4 <u>Disclaimer</u>. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 8, CHOCOLATEY DISCLAIMS ANY AND ALL WARRANTIES AND REPRESENTATIONS WITH RESPECT TO THE SOFTWARE, INCLUDING THE WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, TITLE, MERCHANTABILITY AND THOSE THAT MAY ARISE FROM ANY COURSE OF DEALING OR PERFORMANCE.

9. INDEMNIFICATION.

9.1 <u>Obligation</u>. Subject to the conditions and exceptions listed below, Chocolatey will defend Customer and Customer's shareholders, directors, and employees (the "<u>Defendants</u>") against a third party's claim that Customer's use of the Software (in the form delivered to Customer and as authorized in this Agreement) infringes or misappropriates the third party's copyright or United States trade secret rights, or directly infringes a valid United States patent that issued as of the Effective Date (in each case, a "<u>Claim</u>"), and will further indemnify the Defendants against any damages, fees (including reasonable attorney fees), costs and expenses which are included in a final award, judgment or settlement of a Claim.

9.2 <u>Conditions</u>. Chocolatey's obligations in Section 9.1 are conditioned on (a) Customer notifying Chocolatey within 10 days upon receiving a Claim and providing Chocolatey with a written copy of the Claim, (b) Customer cooperating with Chocolatey in the defense or settlement of the Claim, and (c) Customer providing Chocolatey with all necessary authority for Chocolatey to defend or settle the claim. Customer may participate in the defense or settlement of the Claim at its own expense. Following notice of a Claim, or if in its discretion Chocolatey determines that a Claim is likely, Chocolatey may, at its sole option, procure for Customer the right to continue to use the Software as furnished, or replace or modify the Software to make it non-infringing, or terminate this Agreement and refund to Customer any amounts that Customer pre-paid for an unused license and support and maintenance term.

9.3 <u>Exceptions</u>. Chocolatey has no obligation under Section 9.1 with respect to any Claim based upon or otherwise relating to: (a) any use of the Software that is not authorized by this Agreement; (b) the combination of the Software with other products, services, equipment, software, or data not supplied by Chocolatey; (c) any modification of the Software by any person other than Chocolatey or its authorized agents; or (d) any Third Party Software.

9.4 THIS SECTION REPRESENTS CHOCOLATEY'S ENTIRE LIABILITY TO CUSTOMER FOR INDEMNITY OF THIRD PARTY INTELLECTUAL PROPERTY CLAIMS.

10. LIMITATION OF LIABILITY. EXCEPT AS STATED BELOW, EACH PARTY'S LIABILITY TO THE OTHER UNDER THIS AGREEMENT IS LIMITED AS FOLLOWS: (A) NEITHER SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES (INCLUDING ANY DAMAGE TO BUSINESS REPUTATION, LOST PROFITS, LOST DATA OR LOST SAVINGS); AND (B) NEITHER SHALL BE LIABLE TO THE OTHER FOR ANY AMOUNTS IN EXCESS OF THE GREATER OF FIVE HUNDRED DOLLARS ($500) OR THE AMOUNTS PAID BY CUSTOMER TO CHOCOLATEY IN THE TWELVE (12) MONTHS PRIOR TO THE EVENT GIVING RISE TO LIABILITY. THESE LIMITS DO NOT APPLY TO ANY LIABILITY THAT ARISES FROM ANY CLAIM FOR UNPAID FEES OR THE UNLICENSED USE OF THE SOFTWARE. THESE LIMITS APPLY REGARDLESS OF THE FORM OF CLAIM (CONTRACT, TORT OR OTHERWISE) AND EVEN IF THIS SECTION 10 IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. SOME JURISDICTIONS MAY NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR OTHER DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY. IN SUCH EVENT, LIABILITY WILL BE LIMITED TO THE GREATEST EXTENT PERMITTED BY APPLICABLE LAW.

11. INSPECTION. If Chocolatey has a good faith reason to believe that Customer has incorrectly reported the number of Nodes in production and non-production environments ("Productive Use"), Chocolatey has the right to have its personnel inspect once per year the number of Nodes being managed by the Software, following this protocol: (1) identify all unique Chocolatey installations; (2) monitor the logins of Customer's personnel to each Chocolatey installation or through the Chocolatey Console when and if it is available to the customer; and (3) record the active Nodes. Any such inspection will take place only during normal business hours and upon not less than ten (10) business days' written notice.

12. EXPORT CONTROL. As required by the laws of the United States and other countries, Customer represents and warrants that Customer: (a) understands that the Software and its components may be subject to export controls under the U.S. Commerce Department's Export Administration Regulations ("EAR"); (b) is not located in a prohibited destination country under the EAR or U.S. sanctions regulations; (c) will not export, re-export, or transfer the Software to any prohibited destination or persons or entities on the U.S. Bureau of Industry and Security Denied Parties List or Entity List, or the U.S. Office of Foreign Assets Control list of Specially Designated Nationals and Blocked Persons, or any similar lists maintained by other countries, without the necessary export license(s) or authorization(s); (d) will not use or transfer the Software for use in connection with any nuclear, chemical or biological weapons, missile technology, or military end-uses where prohibited by an applicable arms embargo, unless authorized by the relevant government agency by regulation or specific license; and (e) understands that countries including the United States may restrict the import, use, or export of encryption products (which may include the Software and the components) and agrees that Customer shall be solely responsible for compliance with any such import, use, or export restrictions.

13. GOVERNMENT USERS. The Software contains "commercial computer software" as that term is described in DFAR 252.227-7014(a)(1). If acquired by or on behalf of a civilian agency, the U.S. Government acquires this commercial computer software and/or commercial computer software documentation subject to the terms of this Agreement as specified in 48 C.F.R. 12.212 (Computer Software) and 12.11 (Technical Data) of the Federal Acquisition Regulations and its successors. If acquired by or on

behalf of any agency within the Department of Defense, the U.S. Government acquires this commercial computer software and/or commercial computer software documentation subject to the terms of this Agreement as specified in 48 C.F.R. 227.7202 of the DOD FAR Supplement and its successors. Chocolatey abides by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a).

14. TERMINATION. This Agreement begins on the Effective Date and continues in force until terminated by mutual agreement or by either Party for any reason or no reason, on 45 days written or electronic notice, unless Customer or Chocolatey elects in writing to terminate it sooner due to (a) the other Party's material breach, provided that the terminating Party gives the breaching Party at least 30 days written notice and opportunity to cure, or (b) the other Party making a general assignment for the benefit of creditors, suffering or permitting the appointment of a receiver for its business or assets, or availing itself of or becoming subject to any proceeding under the US Federal Bankruptcy Act or any other foreign or domestic statute, law, rule or regulation relating to insolvency or the protection of rights of creditors, or (c) if Chocolatey shall: (i) dissolve, transfer, sell, assign, mortgage, encumber, pledge, or otherwise dispose of all or substantially all of its assets, or any controlling interest in its business (whether in the form of stock or otherwise); or (ii) consolidate with or merge into one or more other corporations or other entities or permit one or more other corporations or other entities to consolidate with or merge into it. All fees are non-refundable. If Chocolatey elects to terminate the agreement prior the end of a subscription term outside of circumstances described in (a), (b) and (c) of Section 13, Customer will receive a pro-rata refund of the unused subscription period that was pre-paid by Customer. Upon termination, Customer must uninstall the Software from Customer's computer systems. The following Sections survive termination: 3, 4, 5, 8, 9, 10, 11, 14 and 16.

15. ASSIGNMENT. Neither Party may assign or otherwise transfer this Agreement or any of its rights hereunder, nor delegate any of its obligations hereunder, to any third party without the prior written consent of the other Party; provided, however, either Party with notice may assign this Agreement and all of such Party's rights and obligations to any affiliate of such Party or to any third party which succeeds by operation of law or purchases or otherwise acquires all or substantially all of the assets of such Party or an affiliate of such Party (whether by way of merger, consolidation, sale of assets, or other corporate reorganization or combination) and assumes such Party's obligations hereunder. Any attempted or purported assignment, transfer or delegation without any required consent having first been obtained shall be null and void and a material breach of this Agreement. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the Parties and their respective successors and permitted assigns.

16. GENERAL. This contract will be governed and construed in accordance with the laws of Delaware, excluding Delaware's choice-of law-principles, (and excluding the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act) and all claims relating to or arising out of this contract, or the breach thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of Delaware, excluding Delaware's choice-of-law principles. Customer agrees to exclusively resolve all disputes, claims and controversies arising from or relating to this Agreement in the Delaware Court of Chancery, and Customer irrevocably waives any objection to such exclusive jurisdiction. Customer agrees that any breach of Section 5 or other infringement or misappropriation of the Chocolatey Rights will result in immediate and irreparable damage to Chocolatey for which there is no adequate remedy at law. Customer and Chocolatey agree that Chocolatey may obtain a restraining order without waiving rights to any other remedies existing under law. Customer and Chocolatey may only amend or modify this Agreement, or waive any right under this Agreement, in a writing that is signed by both parties and that expressly references this Agreement. No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions. Headings are used in this Agreement for reference only and will not be considered when interpreting this Agreement. As used in this Agreement, "includes" (or "including") means without limitation. This Agreement constitutes the entire agreement between the parties with respect to the Software and its related support and maintenance, and supersedes all prior and contemporaneous agreements or communications.