

## Terms

### 1. Definitions

“ATs” or “Additional Terms” (formerly “ALPs” or “Additional Licensing Provisions”) means licensing terms and conditions for the Product on the “Additional Terms” label affixed to the Runtime License Envelope. Courtesy copies of the ATs are available for Company review from MS Distributor. If there are conflicting or inconsistent terms between the AT on the Runtime License Envelope and the courtesy text presented by MS Distributor, the former shall control.

“Additional Rights Agreements” means additional agreements that incorporate the terms of this Agreement, including

- the Microsoft OEM Customer License Agreement for Use of Third Party Brand Names and Trademarks,
- the Microsoft OEM Customer License Agreement for Outsource Manufacturers, and
- the Microsoft OEM Customer License Agreement for Field Upgrades.

“Additional Software” means software that is added to the Embedded System (after installation of the original Image) and that supports the functions of the Embedded Application.

“APM” means associated product materials MS designates from time to time as a part of the Product. Examples of APM include documentation, external media containing software and/or other tangible materials related to the Product. APM does not include COAs.

“COA” or “Certificate of Authenticity” means a non-removable sticker designated by MS as specific to the Product.

“Channel” means Company’s distributors, dealers, resellers, and others in Company’s distribution chain for Embedded Systems.

“Company Binaries” means all software, other than MS Binaries, installed by or on behalf of Company on an Embedded System. Company Binaries include Embedded Applications.

“Contractors” mean individuals under Company's direct supervision and control. Contractors must be engaged to perform services under a contract that includes appropriate non-disclosure and other promises sufficient to satisfy Company's obligations under this Agreement. All Contractor services must be performed on Company’s sites.

“DOC” means the Digital Operations Center located at <https://ops.microsoftoem.com> (or any successor URL provided by MS).

“Default Charge” means an amount owed as liquidated damages for the unauthorized distribution of Product software, recovery media, or COAs. The Default Charge for each Product is 130% of the royalty for the Product (excluding discounts and rebates), less any royalty paid.

“Deliverables” means the Product software, OPK (including tools and utilities), APM, COAs, and other items identified by MS as Deliverables. Deliverables are used for reproducing, configuring, and/or installing MS Binaries as part of an Image. Company shall acquire Deliverables from MS Distributors.

“Desktop Functions” means consumer or business tasks or processes performed by a computer or computing device. This includes email, word processing, spreadsheets, database, network/Internet browsing, scheduling, and personal finance. Desktop Functions may include features and functions derived from the MS Binaries or the Company Binaries.

“Documentation” means the documentation that MS includes with the Deliverables for a Product.

“ECE” means the Mobile & Embedded Communications Extranet, which is the Internet site located at <https://ece.partners.extranet.microsoft.com/ece/> (or any successor URL provided by MS). The ECE is made available to Company as an informational resource.

“Embedded Application” means an industry- or task-specific software program and/or functionality with all of the following attributes:

- a. It provides the primary functionality of the Embedded System.
- b. It is designed to meet the functionality requirements of the specific industry into which the Embedded System is marketed.
- c. It offers significant functionality in addition to the Product software.

“Embedded System” means a computing system or device with an Image that is designed for and distributed with an Embedded Application.

“End User” means a person, company or other legal entity that acquires an Embedded System for its use.

“Enterprise Customer” means an End User that:

- a. Obtains Embedded Systems either directly from Company or via the Channel for its internal use; and
- b. Does not:

1. Resell, lease or otherwise transfer the Embedded System to non-employees/contractors,
2. Purchase Embedded Systems through retail channels or public web sites, or
3. Purchase Embedded Systems solely for personal use by employees.

“Excluded License” means any license that requires as a condition of use, modification or distribution of software subject to such license, that such software or other software combined and/or distributed with such software be (a) disclosed or distributed in source code form; (b) licensed for the purpose of making derivative works; or (c) redistributable at no charge.

“Force Majeure Event” means fire, disaster caused by forces of nature, riot, terrorist act, war, labor dispute, material changes in applicable law or regulation, or decree of any court. Force Majeure Event does not include theft.

“Image” means the MS Binaries and the Company Binaries.

“Integrator” has the meaning described in the Third Party Integrator Schedule.

“License Terms” or “EULA” means an end user license agreement or terms of use between Company and an End User. It must include the terms provided for each Licensed Product posted on the ECE at the following URL:  
<https://ece.partners.extranet.microsoft.com/ece/Licensing/MSSoftwareLicenseTerms/>.

“Media Guidelines” means the Media Packaging Guidelines posted on the ECE. They describe how Company will package and label certain media containing the Product. MS reserves the right to modify the Media Guidelines with 90 days notice.

“Misappropriate” has the same meaning as in the Uniform Trade Secrets Act.

“MS Affiliate” means any entity that directly or indirectly controls, is controlled by, or is under common control with MS, including without limitation MSCORP.

“MS Binaries” means the redistributable portions of the Product software, in object code form, that Company includes in an Image.

“MS Distributor” means an MS-authorized distributor of Products. MS may amend the list of MS Distributors posted on the ECE from time to time.

“MS Parties” means MS, Suppliers, and/or their respective officers, employees, and agents.

“MSCORP” means Microsoft Corporation, a company organized under the laws of the State of Washington, U.S.A.

“Outsource Manufacturer” or “OM” is defined in the Additional Rights Agreement entitled “OEM Customer License Agreement for Outsource Manufacturers”.

“OPK” means the OEM preinstallation kit for a Product that includes, where applicable, installation instructions, utilities, Product software and/or Supplements delivered to Company for installing the applicable Product software on the Embedded System.

“Products” means the Microsoft products licensed under this Agreement (including the applicable ATs). Product includes where applicable, MS Binaries, Sample Code, other software, COA, APM, and any Supplement. With the exception of some Sample Code, MS does not provide Product in source code form.

“Product Keys” means a key used to install Microsoft products. Product Keys are located either on a flyer in the OPK or on the installation CD of the Product itself. Company will enter the Product Key when it installs the Product onto the Embedded System during testing and development. Some Products do not have Product Keys.

“Recovery Image” means a copy of the Image as originally installed on the Embedded System. A Recovery Image is used to reinstall the Image.

“Resource Guide” means the Mobile and Embedded Resource Guide posted on the ECE. It contains general licensing, operational, and Product ordering information, but not licensing terms. MS reserves the right to modify the Resource Guide with 90 days notice. Any part of the Resource Guide that conflicts with any term or condition of this Agreement (or an AT) shall not apply to this Agreement or that AT.

“Runtime Key” means a series of characters that serves to identify the Product. Runtime Keys are provided for each Product. The Runtime Key is used during manufacturing of the Embedded Systems.

“Runtime License Envelope” means the envelope acquired from an MS Distributor that contains the ATs for the Product. A Runtime License Envelope may contain COAs.

“Sample Code” means the software marked as “sample” or delivered in a folder marked “sample” that may be included as a part of the Product. Sample Code may be in source code or object code format. Sample Code is not “covered software” under MS’ published indemnification policy.

“Service Representatives” means service technicians employed or contracted by either the End User, Company, or a member of the Channel to perform maintenance and other service functions on the Embedded Systems.

“Standards” means telecom and CODEC standards (including any successors or derivatives) as well as any rights offered by patent pool licensing agencies such as MPEGLA, VIA Licensing and HDMI Licensing.

Examples include, without limitation:

- Global System for Mobile (Communications) (GSM)
- General Packet Radio Services (GPRS)
- Code Division Multiple Access (CDMA)
- Single Carrier Radio Transmission Technology (CDMA/1xRTT)
- MPEG (audio and video)

MS may update this list for Company's reference purposes on the ECE.

"Start Date" means the date Company executed this Agreement as indicated in the signature block above.

"Supplement" or "Supplemental Code" means a supplement to, replacement of, or re-release of any part of a Product or OPK. Additional terms for Supplements are set forth in Supplement letters ("Supplement Letters").

"Suppliers" means MSCORP and other licensors or suppliers of Product or portions of a Product.

"Support Software" means systems utilities, resource management, anti-virus software or similar software used solely for the purpose of administration, performance enhancement, and/or preventive maintenance of the Embedded System.

"Third Party Software Provider" means a third party who installs Additional Software created or rightfully licensed by that Third Party Software Provider, which supports the Embedded Application installed on a Embedded System prior to final delivery to an End User.

"Trade Secret" has the same meaning as in the Uniform Trade Secrets Act.

"Update" means an Update Image or a Supplement.

"Update Image" means an Image that consists of

- a. an updated version of the MS Binaries (such as a Supplement), or
- b. an updated version of the Company Binaries, or
- c. an updated version of the MS Binaries and an updated version of the Company Binaries.

An Update Image may include the previously distributed version of the MS Binaries or the Company Binaries, but not both.

## **2. License Grants and Limitations**

- a. MS grants to Company the following non-exclusive, limited, worldwide license rights.
  1. To order and acquire Deliverables and COAs for Products from MS Distributors.
  2. To use Deliverables to reproduce MS Binaries as part of an Image, only on Company premises by Company employees or Contractors, for installation on Embedded Systems.
  3. To use Deliverables to install one copy of the MS Binaries as part of an Image on the hard disk drive or in the non-volatile solid-state memory of an Embedded System, only on Company premises by Company employees, or Contractors.
  4. To distribute (directly and indirectly) Embedded Systems containing an Image if
    - i. a COA is included with the Embedded System in accordance with section 2.i.; and
    - ii. Company sublicenses such Image to an End User by means of License Terms.
    - iii. Company must acquire a Runtime License Envelope for the Product from an MS Distributor to distribute an Embedded System with that Product.
  5. To distribute Update Images and Recovery Images to End Users in accordance with the terms and conditions below.
- b. Embedded System Design. An Embedded System must not be marketed or useable as a general purpose personal computing device (such as a personal computer) or a multi-function server or a commercially viable substitute for one of these systems.
  1. If the Embedded System performs Desktop Functions, Company shall design the Embedded System to ensure that the Desktop Functions meet the following requirements.
    - i. Desktop Functions must be an integral/primary part of the Embedded Application.
    - ii. Desktop Functions must only be used in support of and accessed through the Embedded Application.
    - iii. Desktop Functions operate only when used with the Embedded Application.

2. Company must not distribute Embedded Systems that include both a Product and non-embedded version of a Microsoft operating system product.
  3. Company may distribute more than one Product (or copies of the same Product) on the same Embedded System, but only if all configurations of the Embedded System containing such Products (individually or in combination) comply with the terms and conditions of this Agreement.
  4. Each Embedded System must contain an Image that includes an Embedded Application. Company must own or maintain effective licenses for all Company Binaries included in the Image. Each Embedded Application must be installed on the Embedded System before delivery to the End User (or the Channel if applicable). However, for distributions to Enterprise Customers where the Embedded System is designed and marketed for one of the industries listed on the ECE under “Enterprise Customer Industry List”, the Embedded Application may be installed by the Enterprise Customer. Company shall provide Enterprise Customers with clear installation and use instructions for Embedded Applications that Company distributes to an Enterprise Customer.
- c. Additional Software for Embedded Systems
1. *Installation by End Users.* Company may allow End Users to install Support Software and Additional Software that supports the functions of the Embedded Application. Any such Additional Software must be distributed by Company. Company must provide clear installation and use instructions for any Additional Software or Support Software that Company distributes to an End User. To the extent permitted under applicable law, Company shall contractually prohibit End Users of Embedded Systems from
    - i. installing or using on the Embedded System any Additional Software that provides functions in addition to the Embedded Application, unless that Additional Software was provided by Company; and
    - ii. using Additional Software to access or use Desktop Functions other than through, in support of, and operating as a part of, the Embedded Application.
  2. *Installation by Enterprise Customers.* Company may allow its Enterprise Customers to install Support Software and Additional Software that supports the functions of the Embedded Application. Company must provide clear installation and use instructions for any Additional Software or Support Software that Company distributes to an Enterprise Customer. To the extent permitted under applicable law, Company shall contractually prohibit Enterprise Customers from accessing and using Desktop Functions other than through, in support of, and operating as a part of, the Embedded Application.
- d. Updates
1. *Distribution*
    - i. Company may distribute one copy of each Update for each Embedded System that was distributed with the supplemented Product. Company must distribute Updates only in the following manner:
      - On external media (as described in the Resource Guide) either included with or separate from the Embedded System.
      - By download from a Company website (subject to section 2.f.8.)
    - ii. Channel members may distribute one copy of each Update for each Embedded System that was distributed with the supplemented Product. The Channel must distribute Updates only on external media provided by Company, either included with the Embedded System, or separate from Embedded System. If the Channel is to distribute Updates separate from Embedded System, Company must distribute such Updates only to the members of the Channel that it has a direct business relationship with, and track such distribution, including the description of the Update and quantity.
  2. *Reproduction.* Only Company may order Updates from an MS Distributor or reproduce Updates on external media, either on Company premises (by employees or Contractors). The Channel may not do so.
- e. Recovery Images
1. *Distribution*
    - i. Company may distribute one copy of the Recovery Image for each Embedded System. Company must distribute Recovery Images only in the following manner:
      - On external media (as described in the Resource Guide) either included with or separate from the Embedded System.
      - On a separate partition of the Embedded System hard disk drive.
      - On a separate hard disk drive in the Embedded System. The separate drive must be reserved for the Recovery Image. The Recovery Image cannot be used unless the Image installed on the main drive fails.
      - By download from a Company website (subject to section 2.f.8.)
    - ii. Channel members may only distribute one copy of the Recovery Image for each Embedded System, and only in the following manner:
      - As a part of the Embedded System, as provided by Company.



- h. MS Distributor Information. The terms and conditions of this Agreement, including ATs, shall control over any conflicting or inconsistent terms regarding the Product contained in any document or information that Company may receive from any MS Distributor.
- i. COAs and APM. Unless the Product ATs indicate that a COA is not required, Company must permanently affix the applicable COA for each Product to an accessible location on each Embedded System. If this is not physically possible, Company must receive, through its MS Distributor, MS advance approval to attach the COA to one of the following alternatives: the APM, the License Terms, recovery media, or Company's end user manual distributed with the Embedded System. Company shall also distribute the APM, if any, with each Embedded System. Company must not distribute APM or COAs separate from the Embedded System or make these available through any other means or channel. For example, Company must not sell, give, or otherwise transfer APM or COAs to any third party except as required by this section 2.i.
- j. Test Units. Company may install and use copies of the MS Binaries as part of an Image used solely to test Embedded Systems. Test units are limited to 100 copies of each Product. These copies may only be used in non-production environments on Company premises. No COAs are required for these copies, but the Embedded System must be clearly marked "Test Units – Not for Sale" (or the equivalent). There is no royalty owed to MS for these copies.
- k. License Terms. Company must distribute License Terms with each Embedded System.
- l. Additional Terms and Supplements
1. Company must comply with the ATs.
  2. The following provisions apply to Supplements:
    - i. The terms and conditions of the applicable AT will apply to any Supplement made available to Company. Company is licensed for Supplement only if Company is licensed for the Product that is supplemented.
    - ii. MS will provide notice via Supplement Letter to inform Company whether the Supplement is required or optional. If it is required, Company agrees to use the Supplement and not to install, use or distribute the code that was replaced. The notice will tell Company when Company is required to start using the Supplement.
    - iii. The notice will also let Company know if there are any additional or different license terms and conditions.
      - If Company does not use the Supplement, then the additional or different terms and conditions will not apply to Company.
      - If Company uses the Supplement (or if it is a required Supplement), then Company must comply with the additional or different terms and conditions as set forth in the notice.
- m. IP Notices. Company must not remove or obscure any copyright, trademark or patent notices that appear on the Product as delivered to Company.
- n. Logos. Company use of any logo of MS or MSCORP requires a separate logo license from MSCORP. Logo licenses and standard guidelines are posted at <http://www.microsoft.com/about/legal/intellectualproperty/trademarks/usage/default.mspx>.
- o. Not a Stand-Alone Product. Company must not advertise, provide a separate price for, or otherwise market or distribute any Product or any Image as a separate item from an Embedded System.
- p. Third Party Brand Names. Embedded Systems must be marketed, licensed, and distributed only under Company's brand names and trademarks and those marks listed in a valid Microsoft OEM Customer License Agreement for Use of Third Party Brand.
- q. Channel
1. Company must enter into a contract (or other written instrument that is reasonably intended to form a contract) with each member of its Channel with which it has a direct business relationship. The contract must include the following terms:
    - i. The Channel must deliver the COA and APM together with each Embedded System; and
    - ii. The Channel must not advertise, give a separate price for, or otherwise market or distribute the Products or any part of a Product, as a separate item from the Embedded System.
  2. If Company becomes aware that a Channel member is not complying with these terms, Company must immediately notify MS.
  3. If a member of its Channel breaches these terms, Company must stop distributing Product to that member within 10 days of becoming aware of the breach (unless the Channel member has cured that breach within that time).
  4. Company must stop any distribution of Product to a Channel member immediately upon notice by MS if MS reasonably determines that
    - i. the Channel member is unlikely to cure its breach, or
    - ii. immediate action is required to protect Microsoft intellectual property.

5. Company must give MS reasonable assistance if MS chooses to investigate a Channel member's breach of these terms.
- r. **Third Party Software Providers.** Each Third Party Software Provider shall have the following rights:
1. To install Additional Software on the hard disk drive or in non-volatile solid-state memory of Embedded Systems. The Embedded Application must be preinstalled by the OEM before the Embedded System is delivered to the Third Party Software Provider.
  2. To distribute Embedded Systems on behalf of Company to: Company, the Channel, and End Users.
  3. The rights in sections 1 and 2 are subject to these conditions:
    - i. The Third Party Software Provider must distribute the Embedded System with one copy of the applicable License Terms and APM inside the sealed Embedded System package, as delivered on behalf of Company to the Third Party Software Provider.
    - ii. The Third Party Software Provider must abide by the same terms and conditions applicable to Company under this Agreement.
    - iii. The Additional Software added by the Third Party Software Provider cannot provide the primary functionality of the Embedded System.
    - iv. All of these terms must remain satisfied at all times.
- s. **No Reverse Engineering.** Company must not reverse engineer, decompile, or disassemble the Product or OPK software, except and only to the extent applicable law expressly permits the activity.
- t. **Design Restrictions on High Risk Activities.** The Products are not fault-tolerant and are not designed, manufactured or intended for any use requiring fail-safe performance in which the failure of a Product could lead to death, serious personal injury, severe physical or environmental damage ("High Risk Activities"). This includes the operation of aircraft or nuclear facilities. Company agrees not to use, or license the use of, the Product in connection with any High Risk Activities. Company shall inform its End Users in writing of the restrictions in this section 2.t.
- u. **No Representations for MS.** Company shall not make any representation or warranty (express or implied) to End Users or any other third party on behalf of MS.
- v. **Reservation of Rights.** MS reserves all rights not expressly granted in this Agreement. Except as expressly allowed in this Agreement or an OPK, Company agrees not to
1. modify or translate the OPK or the Product; or
  2. distribute, sublicense, lease, rent, loan or otherwise transfer the OPK or the Products to any third party.
  3. Company acknowledges that MS retains all copyright, patent, moral, trademark, title and other proprietary and intellectual property in the Product and OPKs.
- w. **Standards.** Company agrees that under this Agreement MS has not licensed to Company any necessary patent and other intellectual property licenses with respect to the use of any underlying intellectual property applicable to Standards implemented in Company's Embedded Systems. Company agrees that Company itself is responsible for obtaining such licenses.
- x. **Sample Code.** Subject to all terms and conditions of this Agreement, MS grants to Company a non-exclusive, limited license to modify and create derivative works of the Sample Code delivered in source code form. Sample Code may be distributed as part of an Image, Update, or Recovery Image, or on companion media provided with an Embedded System.

### **3. Nature of Product; No Warranties**

- a. **Notice Regarding Product.** The Product is complex computer software. Performance of the Product will vary depending upon hardware platform, software interactions, and Product configuration. The Product may have software bugs.
- b. **No Warranties.** The Products are licensed "as-is." Company bears the risk of using the Products. MS gives no express warranties, guarantees or conditions. To the extent permitted under applicable laws, MS disclaims all implied warranties, including any implied warranties of merchantability, fitness for a particular purpose, and non-infringement.

### **4. Company's Duties**

Company will:

- a. Determine that each Product is suitable in quality and performance for use in Embedded Systems;
- b. Provide information to End Users about the proper use of the Embedded Systems including information on how to safely operate the Embedded Systems;
- c. Ensure the Embedded System meets the relevant standard of care for such devices; and

- d. Provide appropriate notices or warnings to End Users of Embedded Systems or others who may be affected by such use.

## 5. **Limitations of Liability**

- a. **MS Liability.** MS Parties' liability is limited for each Product. Except for liabilities to and remedies of Company for MS or any MS Affiliate's unauthorized use of Company' intellectual property, total cumulative liability (if any) of MS and MS Affiliates to Company under this Agreement, and their exclusive remedy for any such liability, shall be limited to Company' direct damages incurred in reasonable reliance upon MS up to an amount not to exceed 100% of the amount having actually been paid by Company to MS for that Product under this Agreement.

This limit includes MS' duties arising under section 7. The liability limit in this section 5.a. does not apply to any attorneys' fees and expenses incurred by MS under section 7 only.

- b. **Exclusion of Certain Damages and Limitations of Types of Liability**

- 1. Company agrees that the MS Parties shall not be liable to Company or to any third party for any of the following:
  - i. Economic damages (i.e., damages from loss of profits or revenues, business interruption and loss of business information or data),
  - ii. Consequential damages,
  - iii. Special damages,
  - iv. Incidental damages,
  - v. Indirect damages, and
  - vi. Punitive damages.
- 2. Company agrees that the foregoing limitations apply:
  - i. Even if MS Parties have been advised of the possibility of such damages;
  - ii. Even in the event of any MS Parties' fault, tort (including negligence), misrepresentation, strict liability or product liability; and
  - iii. Even if any remedies fail of their essential purpose.

- c. **Release.** Company releases MS Parties from all liability in excess of the limits in this section 5. This release includes any claim for indemnification or contribution even if such claims arise under local law.

## 6. **Product Support**

Company and its Service Representatives are solely responsible for End User support. Company shall advise End Users to contact Company for support. Company will provide support under terms at least as favorable to the End User as the terms that Company provides support for its other embedded systems. At a minimum, Company must provide commercially reasonable telephone support.

## 7. **Intellectual Property Infringement**

- a. **Coverage**

MS agrees to defend, at MS' expense, Company in a lawsuit or other judicial action, and pay the amount of any adverse final judgment (or settlement that MS consents to) from such lawsuit or judicial action, for any third party claims that the Products (excluding Sample Code):

- 1. Infringe any copyright or trademark rights;
- 2. Infringe any patents (except for patents that are alleged to be infringed by or essential to an implementation of any Standard, for which no defense, payment or indemnity obligation from MS Parties applies); and
- 3. Misappropriate any Trade Secrets.

Each of the foregoing are individually referred to in this Agreement as a "Claim".

- b. **Scope**

- 1. Regarding a Trade Secret Claim, MS has no duty under this Agreement if Company acquired a Trade Secret:
  - i. Through improper means;

- ii. Under circumstances giving rise to an independent duty by Company to maintain secrecy or limit the use of the Trade Secret; or
  - iii. From a person (other than MS or its Suppliers) who owed, to the party asserting the Trade Secret Claim, a duty to maintain the secrecy or limit the use of the Trade Secret.
2. Regarding a patent Claim, MS' obligations under this Agreement shall be limited to patent Claims where the Product software (excluding Sample Code) alone, without combination or modification, constitutes direct or contributory infringement of such patent Claim.
  3. Regarding any Claim, MS has no duties under this Agreement if any manufacture, use, sale, offer for sale, importation or other disposition or promotion of the Product or trademark by Company violates this Agreement (or the ATs), but only to the extent that such infringement claim results from such violation.
  4. MS has no duties under this Agreement for any Claim unless the following are satisfied:
    - i. Company must promptly notify MS in writing of the Claim;
    - ii. MS must have sole control over defense and settlement of the Claim; and
    - iii. Company shall provide MS with reasonable assistance in the defense of the Claim.

c. Other Claims

1. Regarding any claim (other than a Claim), Company shall promptly notify MS in writing of such claim. MS has no duty to defend Company or pay damages arising out of such claim.
2. Company agrees that MS has the right, in its sole discretion, to assume at any time the defense of any such claim. If MS assumes the defense of any such claim:
  - i. MS will notify Company in writing of MS' election;
  - ii. MS must have sole control over the defense and settlement of the claim;
  - iii. Company shall provide MS with reasonable assistance in the defense of the claim;
  - iv. MS will defend Company against that claim; and
  - v. MS will pay any adverse final judgment (or settlement that MS consents to) resulting from defending such claim.

d. Additional Options

In addition to the obligations in section 7.b., if MS receives information concerning a claim (including a Claim), MS may, at its expense, but without obligation to do so, undertake further actions such as:

1. Procuring for Company such copyright, patent, trademark, or Trade Secret rights or licenses to address the claim; or
2. Replacing or modifying the Product or trademark to make it non-infringing or stop the misappropriation of the Trade Secret.

e. Notices; Injunctions

1. MS may provide Company with notice of a recommendation that Company stop the manufacture, use, sale, offer for sale, importation or other disposition or promotion of Products or trademarks due to a claim (including a Claim). Company shall reimburse MS and MSCORP for all damages, costs, and expenses (including reasonable attorneys' fees) they incur if Company conducts any activities contrary to such recommendation more than 20 days after the date of MS' notice.
2. If in connection with a claim (including a Claim), a court enjoins Company from distributing Products in its inventory and:
  - i. Such injunction is not lifted within 60 days;
  - ii. MS has not procured a license that enables Company to distribute the enjoined Products; and
  - iii. MS has not modified such Products to make them non-infringing within such 60 days, then such Products will no longer be available for distribution under this Agreement. Company will return any corresponding COAs in accordance with section 8 and the then-current Resource Guide.

8. Audit

- a. COA Records. Company will maintain accurate and complete COA and APM records.
- b. COA Returns. Company may return Runtime License Envelopes. Each return must comply with the MS Distributor's return policies and the returns and destruction process and procedure on the ECE.
- c. COA Reports. Company will account for COAs in inventory on a quarterly basis. COAs in inventory include COAs at Company facilities and with OMs. The COA accounting will reconcile beginning and ending COA inventory, COA acquisitions from MS

Distributors, COA distribution with Embedded Systems, End User returns, and COAs affixed to Embedded Systems or other APM that cannot be distributed for any reason. Company will make this accounting available to MS or MS Distributor upon request.

- d. Payments. If Company discovers a discrepancy resulting in an underpayment to MS, Company will pay MS if there is a difference between the number of COAs acquired by Company from MS Distributor and:
1. The number of COAs distributed by Company and its OMs pursuant to this Agreement; plus
  2. The number of COAs that Company can verify are in the possession of Company and its OMs; plus
  3. The number of COAs properly returned to the MS Distributor.

The payment amount for each Product will be the difference in units multiplied by the royalty rate for the Product.

- e. Records. During the term of this Agreement, and for two years after, Company must keep complete and accurate records relating to its performance under this Agreement. Those records include complete financial statements and all documents related to acquisition, reproduction, installation, distribution, and other disposition of each COA and unit of APM.
- f. Compliance Audit. During the term of this Agreement and the following two year period, MS may have Company's premises audited to verify compliance with this Agreement. Company must make the premises available for audit for 45 days after MS written request. This audit includes the records listed in section 8.e. that are normally kept at that site.

In addition, MS may have Company's records for multiple sites audited to verify compliance with this Agreement. Company must make the records available at one location.

- g. Audit Terms. MS will choose an independent and internationally recognized certified public accountant or chartered accountant to perform the audit. The auditors will preserve the confidentiality of Company's confidential information in accordance with applicable professional standards. Company agrees to give the audit team access to all of Company's relevant records and premises with the following limits:
1. Access is limited to:
    - i. those areas where COAs and APM are stored and used; where the Products are copied, stored, installed, used, and distributed, and
    - ii. the records listed in section 8.e.
  2. Company personnel may escort the auditors on Company's premises.
  3. The audit will take place during Company's regular business hours.
  4. The auditors will not unreasonably interfere with Company's normal course of business.
- h. Outsource Manufacturer Sites. MS may also inspect any OM's premises. Company will grant access to MS with the following limits:
1. MS will give Company 14 days' prior notice for audits of an OM's premises.
  2. MS' access shall be limited. MS may only access areas where COAs and APM are stored and used; where the Products are copied, stored, installed, used, and distributed; and where the OM maintains its records of these activities; and
  3. Company personnel may escort MS and third parties helping MS. MS agrees that the audit will not unreasonably interfere with the OM's normal course of business.
- i. Audit Costs. If the audit reveals a Material Discrepancy, Company must pay MS the costs of the audit, in addition to any unpaid amounts due. "Material Discrepancy" means either:
1. that Company owes MS payment exceeding US\$25,000, or
  2. an intentional breach of this Agreement.
- j. Audit Frequency. If an audit does not reveal a Material Discrepancy, MS will not conduct another audit for at least one year. MS will provide Company with a summary of the audit findings.
- k. Default Charge. Company must pay the Default Charge for each unit of Product distributed in violation of this Agreement by Company, its Channel or OMs. If MS discovers unauthorized distribution by Company or its Channel, it will make commercially reasonable efforts to notify Company. Failure to give notice will not waive the Default Charge. The parties agree that the unauthorized distribution of Product would result in damages to MS that are impractical and difficult to ascertain. The parties also agree that the Default Charge is a reasonable and genuine estimate of the loss to MS. Payment of the Default Charge shall constitute MS' sole and exclusive compensatory remedy in case of unauthorized distribution of Product software, recovery media or COAs; provided, that this does not limit MS' ability to seek equitable relief in case of unauthorized distribution of same.

## 9. Nondisclosure

Company shall keep confidential the Product, the terms of this Agreement, and any other non-public information disclosed to Company by MS Distributor, MS or an MS Affiliate. Non-public information includes, for example, pricing information; MS and MS Affiliate licensing negotiations or terms and conditions; and MS and MS Affiliate business policies, practices, and know-how.

## 10. Assignment

Neither party may assign this Agreement in whole or in part (by contract, merger, operation of law, or otherwise). Any attempted assignment in violation of this section shall have no effect. As an exception, MS may assign this Agreement to an MS Affiliate as long as the assignment does not unreasonably and materially impair performance under the assigned agreement. MS must give Company prior notice of the assignment. Failure to give notice will not affect the effectiveness of the assignment.

## 11. Term

This Agreement is effective from the Start Date until two years from the end of the calendar month in which MS signs this Agreement.

## 12. Termination

- a. MS Remedies. MS may suspend any rights granted to Company under this Agreement, require MS Distributors to refuse to fulfill or limit orders from Company, and/or terminate this Agreement in its entirety or as to any individual Product if Company:
  1. Materially breaches this Agreement or any AT;
  2. Manufactures or distributes any MS Party product that is not licensed under a valid agreement with an MS Party; or
  3. Becomes insolvent, enters bankruptcy or similar proceedings under applicable law; admits in writing its inability to pay its debts; or makes or attempts to make an assignment for the benefit of creditors.
- b. Notice for Material Breach. If Company materially breaches an AT or sections 2, 8 or 9, termination shall be effective upon notice to Company.
- c. Notice for Bankruptcy. If any of the events in section 12.a.3. occurs, then
  - Termination is effective upon notice to Company or as soon as is permitted by applicable law; and
  - Company's license rights under this Agreement will be suspended as of the date such event occurs.
- d. Cure Period. In the event of breach of any provision of this Agreement, except those identified in sections 12.b. and 12.c. (but including non-material breaches of sections 2, 8 or 9), Company shall have 30 days from the date of notice to cure such breach. If Company does not cure such breach within 30 days, MS may suspend or terminate this Agreement.
- e. Return Upon Termination or Expiration. Within 10 days after termination or expiration (if the parties do not promptly enter into a successor agreement) of this Agreement, Company shall, at Company's expense, return the Deliverables and Products, including any APM and COAs in its possession (as well as those in a Third Party Service Provider's possession) in accordance with MS Distributor's return policies. Company may keep one unit of Deliverables of each Product for support purposes only.
- f. Upon termination or expiration of this Agreement, Company, its Channel, and OMs shall stop distributing Products. Company's license rights under this Agreement shall end.
- g. Surviving Terms. Sections 1, 2.q., 3, 5, 6, 7, 8, 9, 12.e., 13, 14, 15 and 16 shall survive termination or expiration of this Agreement.

## 13. Notices

- a. All notices must be in writing on Company letterhead, and signed by an authorized representative of Company ("Company Written Notice").
- b. Company may also provide notice by sending the scanned Company Written Notice by:
  1. Fax to the fax number listed in the Notices Schedule; or
  2. Email at the email address listed in the Notices Schedule.
- c. The parties must address all notices, authorizations, and requests related to this Agreement as stated in the Notices Schedule. Notices will be deemed received seven days after any of the following occur;
  1. For a notice address in the U.S.A.: When the notice is deposited in the U.S.A. mails, postage prepaid, certified or registered, return receipt requested.

2. For a notice address in a member country of the European Union (“EU”) or European Free Trade Association (“EFTA”): When the notice is deposited in the EU or EFTA mails, prepaid recorded delivery.
  3. When the notice is sent by air express courier, charges prepaid.
  4. If the notice is by MS regarding updates or changes to MS information, instructions, or forms: Seven days after notice is sent via email or posted on MOO or the ECE.
  5. For fax or email notices sent by Company: Seven days after notice is sent via fax or email.
- d. Notices Schedule. Company shall keep all information in the Notices Schedule complete and current. Company shall notify MS of any changes as set forth in section 13.b.
  - e. If there has been a company name change, MS may require Company;
    1. to provide MS with additional information and relevant documents relating to the circumstances of the change; and
    2. to enter into a new Agreement as a result of the change, if it is determined that there has been a change in ownership.
  - f. Information posted on the ECE may change without notice until the effective date of such information. MS may correct errors in information posted on the ECE or update posted documents after the Start Date by providing notice to Company.

#### **14. Choice of Law; Jurisdiction and Venue; Attorneys Fees**

- a. Governing Law/Jurisdiction. The laws of Ireland govern this Agreement and any claims for breach of it, regardless of conflict of laws principles. The courts of Ireland are the exclusive venues for all disputes arising from this Agreement. Each party consents to the exercise of personal jurisdiction by these courts. Company agrees, for the benefit of MS and MS Affiliates, that the courts of Ireland will have jurisdiction to hear and determine any suit, action, or proceedings that may arise out of or in connection with this Agreement. Each party agrees that it cannot revoke this consent.
- b. Injunctive Relief. This choice of jurisdiction does not prevent either party from seeking injunctive relief with respect to a violation of intellectual property rights or confidentiality obligations in any appropriate jurisdiction.
- c. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.
- d. Attorneys Fees. If either party employs attorneys to enforce any rights related to this Agreement, the primarily prevailing party will be entitled to recover its reasonable attorneys’ fees, costs and other expenses.

#### **15. Government Regulations**

- a. Applicable Laws and Regulations. The Products and their OPKs are subject to U.S. and European Union export jurisdiction. Releases or versions of certain Products and the Deliverables may be subject to particular restrictions under the laws and regulations of a certain country or territory. MS Parties and Company will comply with all international and national laws and regulations that apply to the Products or their performance under this Agreement. These laws include:
  - i. U.S. Export Administration Regulations;
  - ii. All applicable anti-corruption laws, including the U.S. Foreign Corrupt Practices Act; and
  - iii. Importation, manufacturing, end user, end-use and destination restrictions issued by U.S. and other governments.
- b. Government Approvals. Company must obtain any required local government approvals at their own expense.
- c. Additional Information. Company may require additional information about the Products in order to comply with applicable laws and regulations. Upon request, MS will provide Company with non-confidential Product information that Company reasonably requires, if available.

#### **16. General**

- a. Entire Agreement. This Agreement and the ATs, constitute the entire agreement between the parties for the Products and the subject matter in those agreements.
- b. ECE Schedule. Company shall comply with the terms and conditions in the ECE Schedule.
- c. Relationship of the Parties. The parties agree that this Agreement will not be construed as creating a partnership, joint venture or agency relationship or as granting a franchise.
- d. Severability. If any provision of this Agreement is found illegal, invalid or unenforceable by a court of competent jurisdiction, the remaining provisions and license for Products, as applicable, shall remain in full force and effect.

- e. No Waiver. No waiver of any breach of this Agreement will be a waiver of any other breach. Any waiver must be in writing and signed by an authorized representative of the waiving party.
- f. Interpretation. The headings and titles of the provisions of this Agreement are for convenience only and do not affect the interpretation of any provision. Unless specifically stated, the plural shall include the singular.
- g. Force Majeure. Neither party will be liable for failing to perform under this Agreement to the extent that a Force Majeure Event caused the failure. The party subject to the Force Majeure Event must give the other party notice within a commercially reasonable time. As soon as the Force Majeure Event stops, the party must perform the obligations that were not performed. In no event shall the damage to, destruction or disappearance of COAs on account of a Force Majeure Event relieve Company of its payment obligations.
- h. MS Affiliate. Some provisions in this Agreement include Company's covenants and obligations to MS and MS Affiliates. Some provisions are for the benefit of MS and MS Affiliates. Company acknowledges and agrees that each MS Affiliate is entitled to its own right to require due performance by Company. To the extent necessary to establish an MS Affiliate's rights and benefits, MS enters into this Agreement, not only in its own right, but also as an agent for each MS Affiliate.

## **Third Party Integrator Schedule**

1. This Schedule sets forth the terms under which Company may engage one or more third parties to use the Deliverables only to create and test an Image or related software for an Embedded System (an “Integrator”).

“3P Contractors” mean individuals under an Integrator’s direct supervision and control. 3P Contractors are engaged to perform services under a contract that includes appropriate non-disclosure and other promises sufficient to satisfy that Integrator’s obligations under the Sublicense.

2. **Integrator Rights**

Each Integrator shall have the right to use the Deliverables only as required to create an Image, applications or software drivers in connection with the Embedded System. Such rights are subject to all of the terms in this Schedule remaining satisfied at all times.

3. **Adding New Integrators**

- a. At least 30 days before Company intends to engage a third party as an Integrator, Company shall provide MS with the name, address and business profile of that third party. The business profile must include years in business, ownership profile, tradenames used, principle business activities, and a summary of any prior experience with installing or copying MS products. All of this information must be in English.
- b. Company must receive MS’ written approval of the Integrator, prior to allowing it to begin work under this Schedule. MS written approval is not required if all of the following are true.
  1. The third party was approved as an Integrator by MS in writing under a prior Agreement between MS and Company.
  2. MS has not notified Company that such third party must be re-approved in writing under this Agreement.
  3. Company has had at least one Microsoft OEM Customer License Agreement for Embedded Systems in place at all times from the time that the applicable Integrator was approved by MS.
  4. The original Sublicense is still in effect. For the purposes of this Schedule, original Sublicense means the agreement in place between Company and its Integrator as applicable at the time MS originally approved such Integrator.
- c. Company shall notify MS promptly of any changes in the contact information of its Integrators.

4. **Written Sublicenses**

Company must enter into a written agreement (“Sublicense”) with each Integrator. MS provides sample Sublicenses on the ECE. MS may change them from time to time. The Sublicense must meet these requirements:

- a. It must provide that MS is an intended third party beneficiary with rights to enforce the Sublicense.
- b. Each Sublicense must require the Integrator:
  1. To consent to venue and jurisdiction in those jurisdictions specified in this Agreement for resolving disputes between MS and Company.
  2. To maintain complete records of its activities under the Sublicense. These records must be kept on its premises.
  3. To allow access to its premises by audit or inspection teams sent on behalf of MS or Company. Such teams may audit the third party’s records or inspect its premises to determine compliance with the Sublicense. Access must be provided with or without notice.
  4. To suspend all activities under the Sublicense upon notice from Company or MS. MS will notify Company before requiring an Integrator to suspend its activities.
  5. To return, at no expense to MS, all Deliverables (including APM and COAs, and any portions of these) within 10 days after the Sublicense terminates. All returns shall be to Company, a specified MS Distributor or MS, as directed.
  6. To pay MS’ or Company’s attorneys’ fees if either employs attorneys to enforce any rights arising from the Sublicense.
- c. Each Sublicense with an Integrator must require the Integrator:
  1. To use the Deliverables only on the Integrator’s premises.

2. To only allow its employees and 3P Contractors to access and use the Deliverables. Access and use must take place on Integrator's premises.
3. To comply with requirements that are the same as those imposed on Company by this Agreement.
4. To deliver the Image, applications, and software drivers it creates only to Company.

**5. Termination/Suspension**

- a. Company shall promptly terminate or suspend any affected Sublicense if:
  1. Company knows that an Integrator has breached a material provision of a Sublicense;
  2. MS notifies Company of such a breach; or
  3. An Integrator has caused Company to be in breach of a material provision of this Agreement or an AT.
- b. Company may resume using services under a suspended Sublicense, provided that:
  1. Any breach of the Sublicense is completely cured; and
  2. MS confirms in writing that any breach has been cured.

**6. Performance Guarantee**

Company guarantees the performance of each Integrator under its Sublicense. Such guarantee is unconditional and irrevocable.

**7. Indemnification**

Company shall defend, indemnify, and hold harmless MS and its Suppliers from all damages and liabilities of any kind in connection with a breach of this Schedule or any Sublicense by Company, or an Integrator.

**8. Copies of Sublicenses**

On MS' request, Company shall provide a copy of each executed Sublicense to MS. If the Sublicense is not in the English language, Company shall provide a complete English translation. If a Sublicense expires, terminates or is modified, Company shall promptly notify MS. If a Sublicense is modified, then Company shall provide MS with a copy of the executed Sublicense and any executed amendments.

**9. Termination of Main Agreement/ Survival**

If this Agreement terminates, then Company must terminate all Sublicenses. Sections 7, 8 and 9 of this Schedule shall survive termination of this Agreement.

## DOC, MOO and ECE Schedule

1. **Definitions.** For purposes of this section

“Company Administrators” means the Users designated by Company on the Notices Schedule. Company must give MS not less than 48 hours’ notice prior to changing the designation. Notices for those changes should be sent to [MOOHelp@Microsoft.com](mailto:MOOHelp@Microsoft.com) or [ecehelp@microsoft.com](mailto:ecehelp@microsoft.com) (email aliases for MOO and the ECE respectively).

“Password Information” means passwords, encryption keys or other identifiers used for the Sites’ security.

“Sites” means DOC, MOO and the ECE.

“User” means an officer, employee, consultant, or other person or agent of Company who has, or who creates the appearance of having, authority from Company to use the Sites on Company’s behalf.

2. **Terms of Use.** This section, the terms of use in the Resource Guide, and the terms posted on the Sites apply to Company’s use of the Sites. MS may update those terms from time to time. Company must

- i. cause its Company Administrators and Users to comply with those terms, and
- ii. not cause any harm to the Sites.

3. MS may suspend or terminate authorities, or suspend or block access to all or any part of the Sites or to any information. Whenever possible, MS will provide prior notice of such action.

4. Company agrees neither MS nor any of its agents shall have any liability for any failure to provide a level of security greater than that generally afforded by the use of Windows Integrated Security and SSL 128-bit encryption in connection with the Sites. Company and its Users shall not cause any harm to the Sites.

5. **No Warranty and Limited Liability.** MS provides each of the Sites “as is.” The warranty disclaimers, damage exclusions, and limitations of remedies in this Agreement apply to each of the Sites and to their information, functionality, services, and availability or lack thereof. Company will not rely on or treat any information on the Sites as an express warranty.

6. MS reserves the right to change or discontinue all or any portion of the ECE at any time. Users may make a copy of the ECE information to document Company’s transactions or other information. MS will retain 2 years of transactional records. MS will have no duty to retain or make available the ECE information or records for later access.

7. The Sites are not open to the public and the way they functions and all information on them shall be treated as confidential information under section 9 of this Agreement.

8. **Responsibility for Use of the Sites**

- a. All actions taken by any User at or in relation to the Sites will legally bind Company if any of the following are true:
  1. the User has supplied Password Information;
  2. Company or Users failed to keep Password Information secure and that failure caused or contributed to creation of an appearance that actions taken on a Site were being taken by, or on behalf of, Company; or
  3. Company approved, allowed, or accepted benefits or use of the Site by a person purporting to be Company’s agent.
- b. However, if a person obtains Password Information by means that could not be prevented by Company’s compliance with these terms of use and uses it to cause harm or damage to Company or MS, then those acts taken with the Password Information will not be attributed to Company because of this Agreement. However, those acts may be attributed to MS, Company or others under principles of equity or law.

9. **DOC.** MS may provide additional or successor online tools or websites to be used by Company in the normal course of its business with MS. Company agrees to use such resources for all intended purposes.

**10. Access to Sites**

Only the Company Administrators may grant or terminate Users' access to, or other authorities for, MOO and ECE. Company Administrators must keep Password Information secure from unauthorized access.

- 11. Electronic Signature Tool.** As part of the MS OEM operations initiative, MS may provide an online tool or website to be used by Company for digital signatures of OEM channel documents. If Company elects to use the tool, Company agrees to use such resource for all intended purposes.