

Last Updated: May 6, 2024

This Dell APEX Subscriptions Agreement (“**Agreement**”) applies to the Dell Technologies Subscription for flexible consumption ordered by the U.S. Public Customer from the Dell Technologies entity named in the Order (“**Dell**”). “This Agreement includes and incorporates by reference each Order and references herein to Agreement include the Dell APEX Subscriptions Agreement – U.S. Public and each Order. In the event of a conflict between an Order and this Agreement, the Order (and all documents incorporated into it) prevails. The Effective Date of the Agreement is the earlier of (i) the latest date of signature on the Order or (ii) the date You first use the Subscription. Capitalized terms used in this Agreement are defined below in Section 11 ([Definitions](#)).

1. Orders and Payment.

1.1 Orders. The description of the Products, Services, additional terms and related pricing are as stated in the applicable APEX Subscriptions Order (Direct) (“**Order**”).

1.2 Ordering. You indicate acceptance of an Order by signing it, and issuing a purchase order to Dell that references the Order (unless Dell grants an exception to this purchase order requirement). Dell accepts an Order by (i) counter-signing the Order; and (ii) shipping the Products to Customer.

1.3 Payment.

A. Rates. You must pay all fees for use of the Subscription including fees for usage and other offerings according to the rates, currency and pricing stated in the applicable Order. In no event will the Fee for any Billing Period be less than the Monthly Commitment, and You are responsible to pay Dell the fees for the Monthly Commitment even if actual usage is less than the Monthly Commitment.

B. Invoicing. If Dell is obligated by applicable law to collect and remit any taxes or fees, then Dell will add the appropriate amount to Your invoices as a separate line item in accordance with statutory requirements. Dell may invoice parts of an Order separately or together in one invoice. All invoice terms will be deemed accurate unless You advise Dell in writing of a material error within 10 days following receipt. If You advise Dell of a material error, (a) any amounts corrected by Dell in writing must be paid within 14 days of correction, and (b) all other amounts must be paid by the due date. If You withhold payment because You believe an invoiced amount is incorrect, and Dell concludes that the amount is accurate, it is due immediately. You may not offset, defer or deduct any invoiced amounts that Dell determines are correct following the notification process stated above.

C. Payment Terms. You must pay Dell’s invoices in full within thirty (30) days after the date of Dell’s invoice. Dell may invoice You for Fees even if a corresponding purchase order was not received from You. Notwithstanding anything in the Agreement, Your obligation to pay the Fees for the Subscription Term is non-cancellable. In case of Your default in payment, Dell is, until arrangements as to payment or credit have been established, entitled to: (i) cancel or suspend its performance of such Order and/or (ii) withhold performance under this Agreement. Termination or expiration of this Agreement does not affect Your obligation to pay all amounts due hereunder.

D. Taxes. The charges due hereunder are exclusive of, and You must pay or reimburse Dell for all value added (VAT), sales, use, excise, withholding, personal property, goods and services and other similar taxes, governmental fees, levies, customs and duties resulting from Your purchase, except for taxes based on Dell’s net income, gross revenue, or employment obligations. If You qualify for a tax exemption, You must provide Dell with a valid certificate of exemption or other appropriate proof of exemption. If You are required to withhold taxes, then You will within 60 days of remittance to the applicable tax authority provide Dell with satisfactory evidence (e.g., official withholding tax receipts) that You have accounted to the relevant authority for the sum withheld or deducted, otherwise Dell will charge You for the amount that You have deducted for the transaction.

1.4 Purchase Orders. Unless Dell has granted an exception to the purchase order requirement, Your initial purchase order must specify an amount that is at least equal to the fee for the Monthly Commitment multiplied by the number of months in the Subscription Term. If Dell reasonably determines that the amount of Your original purchase order will not cover the actual Fee due to Reserve Usage, then Dell will notify and discuss the situation with You. Upon agreement on the



additional funds, You will promptly issue a related purchase order for that additional amount. The parties agree the terms and conditions of each Order are Confidential Information.

2. Delivery, Site, Use, Risk, and Return.

2.1 Delivery; Site. Dell will ship the Products to the Site stated in the Order. Before arrival of the Products and during the Subscription Term, You must have arranged: (i) appropriate space at the Site; (ii) the necessary environment (power, cooling, etc.) required to support and operate the Products; and (iii) servers and network connectivity required to support Products. The Products may not be moved from the Site without Dell's prior written consent. You grant or will obtain the right for Dell's reasonable access to the Site for purposes of: (i) providing Services; (ii) metering; (iii) inspecting the Products; (iv) performing Asset Recovery; and (v) exercising Dell's other rights set forth in this Agreement. In case the Equipment is installed at a Colocation Site, You guarantee that Dell has the right to exercise its rights concerning the Products stated above. You agree to hold Dell harmless from and against any and all disputes, claims or controversies (whether in contract, tort (including negligence) or otherwise) resulting from You locating the Products at a Colocation Site. Where software is provided in a form that is embedded on the Equipment, Dell will enable any required license keys by electronic means.

2.2 Title to Products. Dell retains title to Products at all times notwithstanding the manner in which such may be attached or affixed to realty.

2.3 Risk of Loss. You are responsible for risk of loss, theft, damage or destruction of the Product(s) from the date of delivery until Asset Recovery. If any such loss occurs during the Subscription Term, You must promptly notify Dell and continue to pay all Fees until the impacted Products are repaired or replaced at Your expense. Until such time as the Products are repaired or replaced, Dell is relieved of its obligations to the extent such events impact Dell's ability to perform.

2.4 Use. You may use the Products at the Site only during the Subscription Term for your internal business operations. Your rights to use the Products provided by Dell during the Subscription Term are governed by the terms of this Agreement, the applicable Offering Specific Terms, and, for Software, the terms of the applicable end-user license agreement. Unless different terms have been agreed between the parties, the terms posted on www.dell.com/eula ("EULA") for the relevant Software product family and effective as of the date of the applicable Order apply. You agree that use of the Products will not violate any applicable law, including but not limited to: violation of the rights of others, violation of laws concerning child pornography or laws concerning illegal gambling. You will not use the Products to stalk, harass or harm anyone, including minors, or be abusive, deceptive, pornographic, obscene, defamatory, slanderous, offensive, advocate violence or encourage illegal activity.

2.5 Third Party Products. Third Party Products offered to You under an Order are subject to the standard terms, license, services, warranty, indemnity and support terms of the third-party manufacturer/supplier (or applicable direct agreement between You and such manufacturer/supplier). You agree to such terms and You will contact such third party directly for support or other offerings-related issues. In return, any warranty, damages or indemnity claims against Dell in relation to Third Party Products are excluded. **Dell makes no express warranties or conditions, and disclaims all implied warranties, including merchantability, fitness for a particular purpose, title and non-infringement as well as any warranty arising by statute, operation of law, course of dealing or performance or usage of trade even if support and licensing fees are invoiced through Dell.** The licensing terms for some Third Party Products can be found in the Offering Specific Terms. Unless otherwise provided in your license agreement with the third-party manufacturer/supplier, You acknowledge that your right to use the Third Party Products is limited to the Subscription Term and any agreed upon extension thereto in accordance with this Agreement.

2.6 Services. Scope and the details of Services and Product-specific terms are specified in the applicable standard service description that is referred in the Order and made available through the Offering Specific Terms. Such standard descriptions are from time to time referred to as "Service Description(s)", "Product Notices" or "Service Briefs." The version of the applicable document that is effective as of the date of the applicable Order, is deemed incorporated into this Agreement. Scope and details of customized Professional Services, if any, not covered by such a standard description will be documented in a mutually agreed Statement of Work ("**SOW**"). You agree that failure to comply with



this Agreement, including the applicable standard service description and the End User Operating Environment Warranty, may limit Dell's ability to provide Services. In such case, proactive support capabilities, response times or other service levels may no longer apply, and Dell may make the continuation of Services and/or the Subscription dependent on an adjustment of fees and reasonable charges for any recertification necessary for continued support.

2.7 Ownership of Customer Content. You agree that: (i) Customer Content remains Your responsibility; and (ii) Dell does not handle, process or direct the use of Customer Content.

2.8 Return of Products; Data Migration. No later than seven (7) days after the end of the Subscription Term, You must: (i) migrate and erase (by method that does not cause damage to the Products) Customer Content from the Products and (ii) make the Products available to Dell for Asset Recovery. Unless Dell has agreed in writing to perform data migration, Dell is not responsible for removing Customer Content from the Products. If You have not deleted Customer Content from the Products, it may be deleted by Dell. At no time, will Dell be responsible for, or bear any liability for any Customer Content that is not erased or removed from the Products before Asset Recovery. To the extent permitted by applicable law, You will indemnify and defend Dell for any claims relating to any Customer Content. The parties will mutually agree on a time for Asset Recovery, but in no case will Asset Recovery occur later than seven (7) days after the end of the Subscription Term unless another date has been agreed in writing by Dell. You will continue to pay Fees until You have removed the Customer Content and Asset Recovery occurs.

2.9 Increasing Monthly Commitment / Subscription Term. During the Subscription Term, You may request to increase (i) the Monthly Commitment; or (ii) both the duration of the Subscription Term and the Monthly Commitment at the applicable Monthly Unit Rates stated in the Order by entering into an Order amendment. If the parties have mutually agreed on the increase, Dell will send You an Order amendment for execution. Once signed by You and Dell, Dell will invoice You based on the new pricing in the Order amendment. When extending the duration of the Subscription Term, the revised duration continues to be measured from the original starting date of the Subscription Term. For example, if the duration of Subscription Term was twenty-four (24) months and the Order amendment adds six (6) months, then the new Subscription Term is a total of thirty (30) months, beginning with the original Subscription Term. The revised Monthly Unit Rate commences on the first day of the first month following the month in which the Order amendment becomes effective.

2.10 Month to Month Extensions. Prior to the expiration of the applicable Subscription Term, You must notify Dell if You no longer wish to use the Products. Dell will continue to charge You and You must pay applicable Fees to Dell on a month-to-month basis until You have removed Customer Content, made the Products available to Dell for Asset Recovery, and Asset Recovery occurs.

3. Metering.

3.1 Authorization to Meter; Subscription Usage.

During the Subscription Term, Dell meters usage and collects telemetry data relating to the Products as further provided in the [Dell Telemetry Data Provision](#). Dell is authorized to meter and/or audit the usage to calculate the associated fees via electronic means in accordance with the Dell Telemetry Data Provision and through on-site inspection by Dell personnel. Dell agrees to cooperate with You to minimize the impact of any Dell on-site inspection on Your operations.

You agree that:

- A. Dell may store Measuring Equipment at the Site and to load Measuring Equipment onto Products;
- B. Dell may have reasonable access to the Measuring Equipment at the Site;
- C. You will provide and maintain equipment (a physical server or virtual machine) necessary to run storage metadata telemetry collection software and enable electronic communications between the Products and Dell;
- D. You will not disable, interfere in the operation of the Measuring Equipment, or copy or make any use of the Measuring Equipment whatsoever;

E. You will protect the Measuring Equipment from disclosure to a third-party; and

F. You must promptly install and make available for use all Products contained in each Order including all components that Dell ships to Your Site (e.g., hard drives, etc.).

3.2 Interruption of Metering Capabilities.

If, for more than seven (7) days of any calendar month, Dell is unable to meter usage due to: (i) any action by anyone other than Dell, or (ii) a failure of any communications equipment used for facilitating metering, then Your usage will be deemed to be equal to the usage during the previous Billing Period, and You must pay Fees for such deemed usage. If Dell is unable to meter for a period of more than thirty (30) days due to (i) or (ii) or You otherwise fail to comply with [Clause 3.1 \(Authorization to Meter, Subscription Usage\)](#) of this Agreement, Your usage will be deemed to be equal to the maximum capacity of the Products and You must pay Fees for such deemed usage. If Dell is unable to meter usage due to any failure which is caused by Dell (e.g., failure of the Measuring Equipment), Your usage will be deemed to be equal to the previous Billing Period and You must pay Fees for such deemed usage. Dell will promptly notify You of an inability to access the Products (electronically or physically, as applicable) and work cooperatively to reestablish access.

4. Warranty.

4.1 Warranty and Remedy. During the initial Subscription Term, Dell will exercise reasonable care to maintain a Product's ability to perform substantially in accordance with the corresponding standard documentation issued by Dell for the applicable Product under normal usage and with regular recommended service and provide Services in a workmanlike manner. You will promptly provide Dell with written notice of any failure to conform with the foregoing warranty but within ten days after the date on which such failure first occurs for Services. Dell's entire liability and Your exclusive remedies for any failure to comply with this warranty are as follows: Dell will make reasonable efforts to correct the non-conformance within a reasonable period of time, not to exceed 30 days from receipt of Your notice (the "**Cure Period**"); and (a) if Dell is unable to correct the non-conformance during the Cure Period for reasons for which Dell is responsible, then Dell will replace the non-conforming Product or reperform the applicable Services; or (b) if Dell, at its sole discretion, determines such is not reasonably possible, then You or Dell may terminate the applicable Order and You may seek from Dell a refund of any fees You prepaid to Dell for the Subscription that will not be provided as a result of the termination.

4.2 Limitations. The warranties set forth in this clause do not cover problems that arise from: (i) accident or neglect by You or any third party; (ii) any third party items or services with which the Product is used or other causes beyond Dell's control; (iii) installation, operation or use not in accordance with Dell's instructions and the applicable documentation; (iv) use in an environment, in a manner or for a purpose for which the Product was not designed; (v) modification, alteration or repair by anyone other than Dell personnel or (vi) causes attributable to normal wear and tear (e.g., cosmetic damage that doesn't affect the Product's functionality). Dell has no obligation for: (1) Software installed or used beyond the licensed use, or (2) Product whose original identification marks have been altered or removed. Products and Services are not fault-tolerant and are not designed or intended for use in hazardous environments requiring fail-safe performance, such as any application in which the failure of the Products or Services could lead to death, bodily injury, or physical or property damage (collectively, "**High-Risk Activities**"). You agree that You are not relying on delivery of future functionality, public comments or advertising by Dell, or product roadmaps when purchasing a Subscription.

4.3 Warranty Disclaimer. Other than the warranties set forth in this clause, and to the maximum extent permitted by applicable law, Dell and Dell's Affiliates: (i) make no other express warranties; (ii) disclaim all implied warranties, including merchantability, fitness for a particular purpose, title and non-infringement; and (iii) disclaim any warranty arising by statute, operation of law, course of dealing or performance, or usage of trade. Dell expressly disclaims any express or implied warranty of fitness for High-Risk Activities. Dell is not liable for delays, interruptions, service failures or other problems inherent in use of internet and electronic communications or for issues related to Colocation Sites.

4.4 End User's Operating Environment Warranty. You agree to operate the Products: (i) with reasonable care, (ii) in accordance with the documentation and configuration provided by Dell, and (iii) in accordance with industry standards

(including but not limited to maintaining a regular data back-up system for Customer Content). You agree to keep the Products located at the Site free and clear from any liens or encumbrances. You must give immediate written notice of any attachment or judicial process affecting the Products or Dell's ownership.

5. Term and Termination.

5.1 Agreement Term and Termination. This Agreement commences on the Effective Date and continues until terminated pursuant to this Section. A party may terminate this Agreement for convenience by sending written notice of termination to the other party. Such termination becomes effective forty-five (45) days after receipt of the notice. Such termination does not terminate any Order already in effect and does not impact any renewal provisions of such Orders. Any provision that by its nature or context is intended to survive any termination or expiration, including but not limited to provisions relating to confidentiality, payment and liability, survives.

5.2 Events of Default. The occurrence of any of the following constitute an “**Event of Default**”: (i) Your failure to pay the fee when due under the Order; (ii) Your failure to perform any provision, covenant, condition contained in this Agreement, which failure continues for 30 days from Dell's notice thereof; or (iii) Your Bankruptcy.

5.3 Remedies. If an Event of Default occurs, Dell may exercise any one or more of the following remedies: (i) immediately terminate any or all Orders; (ii) by notice in writing to You, declare immediately due and payable, and You are obliged to immediately pay (1) all outstanding unpaid Fees owed for all Orders plus, (2) as a mutually agreed pre-estimate of damages and not a penalty, all remaining Monthly Commitment fees payable under any Orders for the remainder of the Subscription Term (notwithstanding any early termination) for all then current Orders; and (iii) require Customer to make Products available for Asset Recovery at the Site as provided in [Clause 2.8 \(Return of Products; Data Migration\)](#) of this Agreement. The parties will reasonably cooperate for Dell to recover the Products. You are responsible for the payment of the actual documented costs and reasonable attorney's fees incurred by Dell in retaking possession of the Products and/or seeking to recover amounts due.

5.4 Appropriation of Funds. Customer may terminate an Order in whole, but not in part by giving at least sixty (60) days notice prior to the end of the then current Fiscal Period (as defined in the Customer's Secretary/Clerk's Certificate or other such documentation as reasonably requested by and provided to Dell) certifying that: (1) sufficient funds were not appropriated and budgeted by Customer's governing body or will not otherwise be available to continue the Order beyond the current Fiscal Period; and (2) that Customer has exhausted all funds legally available for payment of the Order beyond the current Fiscal Period. Notwithstanding the foregoing, Customer agrees that, without creating a pledge, lien or encumbrance upon funds available to Customer in other than its current Fiscal Period, it will use its best efforts to take all action necessary to avoid termination of an Order, including making budget requests for each Fiscal Period during each applicable Subscription Term for adequate funds to meet its obligations hereunder and to continue the Order in force. Upon termination of an Order, Customer must make the Products available for Asset Recovery at the Site as provided in [Clause 2.8 \(Return of Products; Data Migration\)](#).

5.5 Essential Use/Intent. Customer agrees that early termination of an Order is highly unlikely because the acquisition, quantity and use of APEX Subscriptions are deemed to be essential to Customer's operations. Customer agrees that it will take all reasonable affirmative steps to ensure all payments during Order and the Subscription Term are made.

6. Indemnity.

6.1 Indemnification by Dell. Dell will: (i) defend You against any third party claim that Products or Support Services (but excluding Third Party Products, any Product provided for evaluation or without charge, and open source software) infringe that party's patent, copyright, or trade secret enforceable in the country where You purchased the Subscription from Dell (“**Claim**”); and (ii) indemnify You by paying: (a) the resulting costs and damages finally awarded against You by a court of competent jurisdiction to the extent that such are the result of the third party Claim; or (b) the amounts stated in a written settlement negotiated and approved by Dell. In addition, should any Product or Support Service become, or in Dell's opinion be likely to become, the subject of such a Claim, Dell may, at its expense and in its discretion: (1) obtain a right for You to continue using the affected Product or Support Service; (2) modify the affected Product or Support Service to make them non-infringing; (3) replace the affected Product or Support Service with non-infringing substitutes; (4) notify You to return the Product and discontinue Support Services, and, upon receipt of the Products,

refund the remaining portion, of any, of any prepaid Fees. Except as otherwise provided by law, this Clause 6.1 (Indemnification by Dell) states Your exclusive remedies for any third party intellectual property claim relating to the Products or Support Services, and nothing in this Agreement or elsewhere will obligate Dell to provide any greater indemnity.

6.2 Limitations. Dell has no obligation under [Clause 6.1 \(Indemnification by Dell\)](#) above: (i) if You are in material breach of this Agreement or the Order; or (ii) for any Claim resulting or arising from: (a) any combination, operation or use of a Product or Support Service with any other products, services, items, or technology, including Third Party Products and open source software; (b) use for a purpose or in a manner for which the Product or Support Service was not designed, or use after Dell notifies You to cease such use due to a possible or pending Claim; (c) any modification to the Product made or Support Service performed by any person other than Dell or its authorized representatives; (d) any modification made to the Product or Support Service performed by Dell pursuant to instructions, designs, specifications or any other information provided to Dell by You or on Your behalf; (e) use of any version of a Product when an upgrade or newer iteration of the Product or Support Service made available by Dell would have avoided the infringement; (f) services provided by You (including Claims seeking damages based on any revenue or value You derive from Your services); or (g) any data or information that You or a third party records on or utilizes in connection with the Product or Support Service including Customer Content.

6.3 Other Indemnity. Dell will defend and indemnify You against any third party claim or action for personal bodily injury, including death, to the extent directly caused by Dell's gross negligence or willful misconduct in the course of performing its obligations under this Agreement. "**Claim**" includes a third party claim under this Clause 6.3 (Other Indemnity).

6.4 Indemnification Process. Dell's duty to defend and indemnify under this Agreement is contingent upon You: (i) sending prompt written notice of the Claim to Dell and taking reasonable steps to mitigate damages; (ii) granting to Dell the sole right to control the defense and resolution of the Claim; and (iii) cooperating with Dell in the defense and resolution of the Claim and in mitigating any damages.

7. Limitation of Liability.

7.1 Limitations on Damages. Your, and Dell's (including Dell's suppliers and Affiliates) maximum liability for all disputes arising under the Agreement ("**Disputes**") is limited, to the extent permitted by law, to the greater of: (a) \$100,000 USD (or the equivalent in local currency); or (b) the amount You paid to Dell for the Subscription during the 12 months immediately before the events giving rise to any dispute. This limitation applies even if any limited remedy in the Agreement is found to have failed in its essential purpose. In addition, neither You nor Dell (including Dell's suppliers and Affiliates) are liable to the other for any special, consequential, exemplary, punitive, incidental, or indirect damages, or for lost profits, loss of revenue, loss or corruption of data, loss of use, or procurement of substitute products or services, even if the party alleged to be liable has knowledge of the possibility of such damages. The foregoing limitations and exclusions do not apply to: (i) Your obligation to pay for the Subscription, (ii) Your obligation to pay for damage to or loss of the Products, (iii) Your violation of the restrictions on use of the Products, (iv) Your violation or misappropriation of the Dell's intellectual property rights, (v) a party's indemnity obligation stated in this Agreement; or (vi) where prohibited by applicable law. Dell, Dell's suppliers and Dell's Affiliates have no liability for any damages resulting from Your use or attempted use of Third Party Products, or Free Software or Development Tools (both as defined in the [EULA](#)).

7.2 Prevention and Mitigation. You are solely responsible for Customer Content and for maintaining an IT architecture, as well as processes, enabling You to prevent and mitigate damages in line with the criticality of the Customer Content for Your business and its data protection requirements, including a business recovery plan. You will: (a) provide for a backup process in accordance with industry standards including but not limited to backup relevant data before Dell performs any remedial, upgrade or other works on the Products or Your IT systems; (b) monitor the availability and performance of Your IT environment, including the Products; and (c) promptly react to messages and alerts received from Dell or through notification features of the Products and immediately report any issue You identify to Dell. To the extent that Dell has any liability for loss of Customer Content made available by applicable law, Dell will only be liable for the cost of commercially reasonable and customary efforts to recover the lost Customer Content from Your last available backup.

8. Trade Compliance. You are subject to and responsible for compliance with the export control and economic sanctions laws of the United States, the European Union and other applicable jurisdictions (collectively, "**Applicable Trade Laws**").



The Subscription and any other products or services are for Your authorized use under this Agreement, and may not be used, sold, leased, exported, imported, re-exported, or transferred except in compliance with the Applicable Trade Laws. You represent and warrant that You are not the subject or target of, or located in a country or territory that is the subject or target of economic sanctions under the Applicable Trade Laws. To the extent permitted by applicable law, Customer will defend and indemnify Dell against any third party claim resulting from a breach of any of the foregoing. For further information about geographical restrictions and compliance with Applicable Trade Laws, visit [Dell Trade Compliance](#).

9. Confidentiality.

9.1 Scope. “Confidential Information” means any information, pricing, technical data or know-how furnished in connection with the scope of this Agreement, whether in written, oral, electronic, website-based, or other form, by a You or Your Affiliate to Dell or a Dell Affiliate or vice versa and that: (i) is marked, accompanied or supported by documents clearly and conspicuously designating such documents as “confidential”, “internal use” or the equivalent; (ii) is identified by the discloser as confidential before, during or promptly after the presentation or communication; or (iii) should reasonably be known by the recipient to be confidential. Confidential Information does not include information that is: (a) rightfully in the receiving party’s possession without prior obligation of confidentiality from the disclosing party; (b) a matter of public knowledge (or becomes a matter of public knowledge other than through breach of confidentiality by the other party); (c) rightfully furnished to the receiver by a third party without confidentiality restriction; or (d) independently developed by the receiver or its Affiliates without reference to the discloser’s Confidential Information.

9.2 Protection. Each party will ensure that, where it or one of its Affiliates is the receiver of Confidential Information hereunder, the receiver will (a) use Confidential Information of the discloser only for the purposes of exercising rights or performing obligations in connection with this Agreement or any Order hereunder; and (b) protect from disclosure to any third parties any Confidential Information disclosed by the discloser, both for a period commencing upon the date of disclosure until 3 years thereafter. Subject to the terms of this Section 9, the foregoing obligations will never expire in relation to technical information about a discloser’s products and services or any information about possible unreleased products or services, and survive any termination or expiration of this Agreement.

9.3 Exceptions. Notwithstanding the foregoing, either party and its Affiliates may disclose Confidential Information (1) to an Affiliate, or to a subcontractor used by Dell to provide Services under this Agreement, as long as the Affiliate or subcontractor has a need-to-know and complies with the foregoing; (2) to either party’s directors, officers, employees, and professional advisors and those of its Affiliates, and (3) if required by law or regulatory authorities provided the receiver has given the discloser prompt notice.

10. General.

10.1 Governing Law; Jurisdiction. This Agreement is governed by the laws of the State in which Customer is located. Subject to applicable state and local laws, the exclusive venue for all litigation arising between the parties related to this Agreement and any Orders issued hereunder shall be in the federal courts sitting within the State in which Customer is located. BOTH PARTIES HEREBY WAIVE TRIAL BY JURY.

10.2 Notices. The parties will provide all notices under this Agreement in writing. Customer must provide notices to Dell at the Dell address on the Order.

10.3 Assignment. The assignment or transfer, whether by operation of law or otherwise, of a party’s right(s) or delegation of obligation(s) under this Agreement, require the consent of the other party. Notwithstanding the foregoing, Dell may use Dell Affiliates or other qualified subcontractors to perform its obligations hereunder, provided that Dell remains responsible for the performance thereof, and either party may assign the rights to payment arising under an Order without the consent of the other party.

10.4 Entire Agreement. This Agreement and each Order hereunder comprise the complete statement of the agreement between You and Dell regarding the subject matter thereof and may be modified only by written agreement.

10.5 Force Majeure. Neither party is liable to the other for any delay or failure to perform any of its obligations (other than for the payment of fees) caused by Force Majeure. If such delay or failure lasts longer than 30 days, then the other party may immediately terminate, in whole or in part, the relevant Order by giving written notice to the delayed party. “Force Majeure” refers to circumstances beyond a party’s reasonable control including, without limitation, act of God, war, riot, civil commotion, terrorist acts, malicious damage, governmental or regulatory actions, accident, breakdown of plant or machinery, local or national emergency, explosions, fire, natural disasters, severe weather or other catastrophes, epidemics/pandemics, general import/export/customs process problems affecting supplies to Dell or to You, shortages in materials, failure of a utility service or transport network, embargo, strike, lock out or other industrial dispute (whether involving Dell’s workforce or any other party), or default of suppliers or subcontractors due to any of the preceding events.

10.6 Independent Contractors. The parties are independent contractors for all purposes under this Agreement and cannot obligate any other party without prior written approval. The parties do not intend anything in this Agreement to allow any party to act as an agent or representative of a party, or the parties to act as joint venturers or partners for any purpose. No party is responsible for the acts or omissions of any other.

10.7 Third Party Rights. There are no third party beneficiaries to this Agreement or any Order under any laws.

10.8 Waiver and Severability. Failure to enforce a provision of this Agreement will not constitute a waiver of that or any other provision of this Agreement. If any part of this Agreement or an Order is held unenforceable, the validity of the remaining provisions will not be affected.

11. Definitions.

11.1 “Affiliate” or “Affiliates” means any other entity that controls, is owned by, controlled by or under common ownership or control with You, and with respect to Dell, “Affiliate” means Dell Technologies Inc. and its wholly-owned subsidiaries. “Control” means more than 50% of the voting power or ownership interests.

11.2 “Asset Recovery” of a Product means Dell taking possession of the Product.

11.3 “Bankruptcy” means bankruptcy, receivership, examinership, insolvency, reorganization, dissolution, liquidation, or other similar proceedings or statutory process instituted by or against the applicable entity, or all or any part of its property under the applicable law where such entity is organized, and such entity consents thereto or fails to cause the same to be discharged as per local legal requirements.

11.4 “Billing Period” means the period of time identified in an Order for which Dell will invoice Partner for the Subscription.

11.5 “Colocation Site” means, where applicable, a third-party Site.

11.6 “Customer Content” means data (including all text, sound, video, and image files), software (including machine images), and other information You or Your end users store, use or make available to Dell through use of the Subscription. Customer Content does not include System Data relating to Your use of the Products and which is described in the Dell Telemetry Data Provision.

11.7 “Fee” means the fees for the Monthly Commitment and the Reserve Usage.

11.8 “Measuring Equipment” means the equipment, software and programming needed for Dell to track usage levels and perform Support Services.

11.9 “Monthly Commitment” means the minimum amount of usage You commit to paying for each month as specified in an Order regardless of the actual usage.

11.10 “Offering Specific Terms” means those terms available at www.dell.com/offeringspecificterms.

11.11 “Order” or “APEX Subscriptions Order (Direct)” means Your order to Dell for the Subscription that is confirmed by Dell.

11.12 “Products” means (i) Dell-branded IT hardware products (“Equipment”) or (ii) Dell-branded generally available software, whether microcode, firmware, operating systems or applications (“Software”). Products exclude Services and Third Party Products.

11.13 “Professional Services” are consulting, implementation and any other services that are not Services.

11.14 “Reserve Usage” means the amount of Your flexible consumption usage above the Monthly Commitment.

11.15 “Services” are Dell’s standard service offerings for maintenance and support of Products (“Support Services”) and deployment services (“Deployment Services”).

11.16 “Site” means the location of the Product installation as identified on an Order.

11.17 “Subscription” means the use of a Product on a flexible consumption basis as measured by the description and metrics in Your Order and this Agreement.

11.18 “Subscription Term” means the time period identified on an Order for use of the Products, and any Dell approved extension(s) thereto. The Subscription Term commences on the first day of the month following the date the Products have been installed at the Site, or, if You delay the installation process or if Your Site is not prepared for the installation of the Products, the first day of the second month following the Product’s arrival at the Site.

11.19 “Third Party Products” means hardware, software, products, or services that are not “Dell” or “Dell EMC” branded.

11.20 “U.S. Public Customer”, “Customer” or “You” means the U.S. state or local government (a) department agency, division or office, (b) public or higher education institution, or (c) healthcare entity placing an Order with Dell for an APEX Subscriptions.