

APEX Subscriptions Terms for Partner End Users – U.S. Public

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These Dell APEX Subscriptions Terms for Partner End Users – U.S. Public (the “Agreement”) establishes the terms and conditions for the Subscription. Capitalized terms used in this Agreement are defined below in Clause 8 (Definitions).

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

1.1 Delivery; Site. Prime Contractor will ship the Products to the Site stated in the Order. Where software is provided in a form that is embedded on the Equipment, Prime Contractor will enable any required license keys by electronic means. Before arrival of the Products to the Site 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 Prime Contractor’s prior written consent. You grant or will obtain the right for Prime Contractor’s and 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 Prime Contractor’s and Dell’s other rights set forth in this Agreement. In case the Equipment is installed at a Colocation Site, You guarantee that both Prime Contractor and Dell have the right to exercise their respective rights concerning the Products stated above. To the extent allowed by law, You agree to hold Prime Contractor and Dell harmless from and against any and all disputes, claims or controversies (whether in contract, tort (including negligence) or otherwise) resulting from Your locating the Products at a Colocation Site.

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

1.3 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 Prime Contractor during the Subscription Term are governed by the terms of this Agreement 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 either www.dell.com/eula (“EULA”) or, for any United States Federal Government End User(s), https://i.dell.com/sites/csdocuments/Legal_Docs/en/us/eula-us-federal.pdf (“USG EULA”) for the relevant Software product family and effective as of the date of the applicable End User Subscription Form 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 agree that 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.

1.4 Third Party Products. Third Party Products offered to You under an End User Subscription Form 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. In return, any warranty, damages or indemnity claims against Prime Contractor or Dell in relation to Third Party Products are excluded. **Neither Prime Contractor nor Dell make no express warranties or conditions, and disclaim 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 Prime Contractor or Dell.** 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.

1.5 Services. Scope and the details of Services and Product-specific terms are specified in the applicable standard service description that is referred in the End User Subscription Form. 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 End User Subscription Form, 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 Prime Contractor’s ability to provide Services. In such case, proactive support capabilities, response times or other service levels may no longer apply, and Prime Contractor may make the continuation of Services and/or the Subscription dependent on a mutually agreed upon adjustment of fees and reasonable charges for any recertification necessary for continued support.

1.6 Ownership of Customer Content. You agree that: (i) Customer Content remains the responsibility of U.S. Public End User; and (ii) neither Prime Contractor nor Dell handles, processes or directs the use of Customer Content.

1.7 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 Prime Contractor or Dell for Asset Recovery. Unless Prime Contractor or Dell have agreed in writing to perform data migration, Prime Contractor and Dell are not responsible for removing Customer Content from the Products. If You have not deleted Customer Content from the Products, it may be deleted by Prime Contractor or Dell. At no time shall Prime Contractor or Dell be responsible for, or bear any liability regarding, any Customer Content that is not erased or removed from the Products before Asset Recovery. 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 the parties. You will continue to pay Fees to Prime Contractor until Asset Recovery occurs.

2. Metering.

2.1 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 or through on-site inspection by Dell personnel. Prime Contractor and Dell agree to cooperate with You to minimize the impact of any on-site inspection to 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).

You acknowledge that Dell shares metering information including the Monthly Commitment and Reserve Usage with Partner for its billing purposes.

2.2 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 Prime Contractor or 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. If Dell is unable to meter for a period of more than thirty (30) days due to (i) or (ii) or Your failure to comply with Clause Authorization to Meter; Subscription Usage of this Agreement, Your usage will be deemed to be equal to the maximum capacity of the Products. If Dell is unable to meter usage due to any failure which is caused by Prime Contractor or Dell (e.g. failure of the Measuring Equipment), Your usage will be deemed to be equal to the usage during the previous Billing Period. Dell will promptly notify You and Prime Contractor of an inability to access the Products (electronically or physically, as applicable) and work cooperatively to reestablish access.

3. Warranty.

3.1 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 and Prime Contractor 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 may terminate the applicable Order and End User Subscription Form and You may seek a refund of any prepaid fees for the Subscription that will not be provided as a result of the termination.

3.2 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 Prime Contractor's or 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 its authorized designee 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.

3.3 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.

3.4 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 Prime Contractor and/or 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.

4. Term and Termination

4.1. Term. This Agreement is effective on the Effective Date provided in the End User Subscription Form and continues until the earlier of termination or Asset Recovery.

4.2 Effects of Termination.

A. Generally. When the Subscription expires, terminates or is rejected for any reason, You must: (a) stop using the Products; (b) make the Products available for Asset Recovery and provide prompt access to the Site to recover the Products; (c) return, or if requested by Dell, destroy any confidential information in Your possession or under Your control (other than information that applicable law requires You to retain). You are responsible for making sure that You have copies of all Customer Content You require prior to the date of any termination in accordance with Clause 1.7 above. You are responsible for the payment of the actual documented price of any component(s) of the Products You do not return and for any damage to Products beyond normal wear and tear.

B. Survival. The provisions relating to confidentiality, liability, and all rights of action accruing prior to termination, along with any other provision of the Agreement that, expressly, or by its nature and context, is intended to survive, will survive termination.

4.3. Essential Use/Intent. You agree that early termination of the applicable Order is highly unlikely because the acquisition, quantity and use of the Subscription are deemed to be essential to U.S. Public End User's operations and You agree have U.S. Public End User complete an Essential Use Certificate if required by Prime Contractor.

5. 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 Prime Contractor or Dell perform 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 Prime Contractor.

6. 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. For further information about geographical restrictions and compliance with Applicable Trade Laws, visit [Dell Trade Compliance](#).

7. Disclosure of End User Agreement. You agree Prime Contractor may disclose the End User Agreement to Dell and Dell's Affiliates.

8. Definitions.

- 8.1 “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.
- 8.2 “APEX End User Subscription Form (Indirect)” or “End User Subscription Form”** means the form listing the Products and Services included in the Subscription and this Agreement.
- 8.3 “Asset Recovery”** of a Product means Prime Contractor or Dell taking possession of the Product.
- 8.4 “Billing Period”** means the period of time identified in an Order for which Prime Contractor will invoice You for the Subscription.
- 8.5 “Colocation Site”** means, where applicable, a third-party Site.
- 8.6 “Customer Content”** means data (including but not limited to 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 Prime Contractor or 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.
- 8.7 “Dell”** is the Dell Technologies entity which enters into a resale agreement with Prime Contractor and which is the Original Equipment Manufacturer (OEM) of the APEX Subscriptions offer.
- 8.8 “End User”, “You” or “Customer”** purchased the Subscription from Prime Contractor for Your own internal purposes.
- 8.9 “End User Agreement”** means the Prime Contract agreement between You and the Prime Contractor for the Subscription.
- 8.10 “Fee”** means the fees for the Monthly Commitment and the Reserve Usage.
- 8.11 “Measuring Equipment”** means the equipment, software and programming needed for Dell to track usage levels and perform Support Services.
- 8.12 “Monthly Commitment”** means the minimum amount of usage the Partner commits to paying for each month as specified in an Order regardless of the actual usage.
- 8.13 “Order”** means Your order to Prime Contractor for the Subscription.
- 8.14 “Prime Contractor”** refers to the entity to whom you have awarded a contract for the APEX Flex on Demand offering.
- 8.15 “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.
- 8.16 “Professional Services”** are consulting, implementation and any other services that are not Services.
- 8.17 “Reserve Usage”** means the amount of Your flexible consumption usage above the Monthly Commitment.
- 8.18 “Services”** are Dell’s standard service offerings for maintenance and support of Products (“Support Services”) and deployment services (“Deployment Services”).
- 8.19 “Site”** means the location of the Product installation as identified on an Order and the End User Subscription Form.
- 8.20 “Subscription”** means the use of a Product on a flexible consumption basis as measured by the description and metrics from Your Prime Contractor and this Agreement.

8.21 "Subscription Term" means the time period identified on an Order and the End User Subscription Form for use of the Products, and any 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 End User delays the installation process or if End User's 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.

8.22 "Third Party Products" means hardware, software, products, or services that are not "Dell" or "Dell EMC" branded.

8.23 "United States Federal Government End User(s)" means any department, agency, division or office of the United States federal government.

8.24 "U.S. Public End User(s)" means either (a) a United States Federal Government End User or (b) any U.S. state or local government (i) department, agency, division, or office, (ii) public or higher education institution, or (iii) healthcare entity.