



## PARTNER SPHERE AGREEMENT (COMMERCIAL)

This **Partner Sphere Agreement** is entered into by and between **You** (as defined herein) and **NetApp, Inc.** and **NetApp Ireland Ltd.**, each on behalf of itself and its Affiliates (collectively "**NetApp**”):

### 1. YOUR APPOINTMENT; SCOPE

- 1.1. As used herein, the terms “You” and “Your,” primarily, refer to the entity seeking enrollment in the NetApp Partner Sphere Program that you represent but, where context indicates, may refer to you, individually, but only in your capacity as a representative of the entity you represent. Capitalized terms not defined herein shall take the meaning set forth for such terms in the Attachments.
- 1.2. By completing and submitting the NetApp Partner Application Form, You expressly agree that such enrollment / participation in, access to and utilization of the NetApp Partner Sphere Program, in any way, as well as Your purchase of NetApp Products and/or Services whether through a NetApp authorized Distribution Partner or direct from NetApp, including for resale to an End User, (a) is expressly governed by this Partner Sphere Agreement, inclusive of all Program Guide(s) (as defined herein), Attachments and subsequent amendments (collectively “Partner Agreement”) and (b) the Partner Agreement expressly supersedes and replaces any and all prior oral or written agreements or understandings between the Parties with respect to the subject matter contained herein.
- 1.3. The relationship between You and NetApp is that of independent contractors and You must not act or represent Yourself as an agent of NetApp. You are not permitted, under any circumstances, to assign or transfer Your appointment as a NetApp Partner, any rights and obligations in relation to it, and/or this Partner Agreement without the prior written consent of NetApp.
- 1.4. As a NetApp Partner, You may also place orders for NetApp Products or Services for Your use, and not for resale. NetApp Product or Services that You purchase for Your use and not for resale are exclusively governed by the Channel End User Terms, available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>, and in each such instance You shall be deemed the End User notwithstanding Your NetApp Partner status.

### 2. PROGRAM GUIDE(S)

- 2.1. The NetApp Partner Sphere Program and incentive benefits are governed by the then current NetApp Partner Sphere Program Guide as well as any incentive, benefit, or certification specific guide, as published by NetApp, applicable to such incentive benefit or certification (each a “Program Guide”) and this Partner Agreement. At all times pertinent hereunder, the current, governing version of each Program Guide shall be available to You at [partners.netapp.com](https://partners.netapp.com). Together, each such Program Guide and this Partner Agreement replace and supersede any prior agreements between You and NetApp in relation to participation in any NetApp incentive benefits, certification, or technology alliance program, including the NetApp Partner Sphere Program.
- 2.2. You agree that NetApp may update its Program Guides from time to time, without notice, and at least once, annually.

### 3. STRUCTURE; ATTACHMENTS

- 3.1. Different or additional terms apply to certain NetApp Products or Services, incentive benefits and/or sales motions, as set forth in the following attachments (each an “Attachment”):

<b><u>Attachment:</u></b>	<b><u>Description / Application:</u></b>
Direct Order Terms	Terms governing the placement of orders directly with NetApp, where Partner has been separately authorized in writing by NetApp to do so
Resale Terms	Terms governing the resale of NetApp Products, whether purchased direct from NetApp or through a NetApp authorized Distribution Partner
Keystone Flex Subscription: Sell To Partner Terms	Terms governing the purchase of a Keystone Flex Subscription by a Partner, including for use in a managed service offered to Partner's End User(s)
Keystone Flex Subscription: Sell Through Partner Terms	Terms governing the purchase of a Keystone Flex Subscription for resale

- 3.2. At all times pertinent hereunder, the current, governing version of each Attachment shall be available to You at <https://fieldportal.netapp.com/content/2212287>.
- 3.3. You acknowledge that not all NetApp Products and/or Services are available in all countries and/or regions, and that prior to providing a quotation to an End User, Partner should confirm availability of the Product or Service in the relevant country or region with a NetApp representative first. In the event of a conflict between the terms set forth in the main body of this Partner Agreement and any Attachment, the Attachment will prevail with respect to the subject matter contained therein. In the event of a conflict between the terms of Attachments, the Product or Service specific Attachment(s) will prevail over the more general Attachment(s).

#### 4. TRAINING

Following your submission of the Partner Application Form, NetApp may require that You complete certain qualifying training, as set forth in more detail at [https://netapp.sabacloud.com/Saba/Web\\_spf/NA1PRD0047/app/me/learningeventdetail/cours00000000044163?regId=regdw000000005076526](https://netapp.sabacloud.com/Saba/Web_spf/NA1PRD0047/app/me/learningeventdetail/cours00000000044163?regId=regdw000000005076526) ("Training"). If You are required to complete training, and provided Your application is granted preliminary approval, You will have thirty (30) days from the date set forth on the preliminary approval notification to complete the training ("Training Period"). If, by the conclusion of the Training Period, You have not completed the Training, You will be removed from the NetApp Partner Sphere Program and this Partner Agreement will terminate. For Your convenience, NetApp will retain Your application materials and information for a period of ninety (90) days, during which You may re-apply ("Grace Period"). If You have not re-applied to the NetApp Partner Sphere Program within the Grace Period or, if You do re-apply, but do not complete the Training during the Training Period subsequent to re-applying, NetApp will remove You from the NetApp Partner Sphere Program, including Your application materials and information, the Partner Agreement will terminate, there will be no subsequent Grace Period and You will need to restart the application process if You desire to participate in the NetApp Partner Sphere Program.

#### 5. INTELLECTUAL PROPERTY

- 5.1. As a NetApp Partner, NetApp grants You a limited, non-transferable, nonexclusive license to use NetApp's trademarks for the purposes of identifying Yourself as a NetApp Partner and for advertising and promotion purposes. Details of Your permitted usage of NetApp's name and trademarks, and the terms governing such usage, are fully set forth at the following website: <https://www.netapp.com/us/legal/tmguidelines.aspx>.
- 5.2. If a claim for infringement of any third party's patent, trademark or copyright is brought against You in relation to any NetApp Products and Services that You have resold, distributed or are using, You will allow NetApp to defend or settle any such claim as NetApp thinks appropriate. NetApp will pay any settlement amounts or any damages and costs awarded by a court against You to the extent such damages and costs are

specifically attributable to the infringement claim, but only if You: (a) promptly notify NetApp in writing of any infringement claim; (b) provide information and assistance to NetApp to enable NetApp to defend such infringement claim; and (c) provide NetApp with sole control of the defense or settlement negotiations. This is the extent of NetApp's liability to You in relation to any infringement claim.

- 5.3. Subject to the terms and conditions of this Section, NetApp will defend or settle any third party claim brought against You, alleging that Hardware, Software, Documentation, Cloud Service Enabling Software and/or Cloud Services You have resold, distributed or are using, subject to this Partner Agreement and/or the Channel End User Terms (available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>) (individually or collectively, "Covered Products") infringe any patent, trademark, or copyright ("IP Claim"). NetApp will pay settlement amounts or, if applicable, damages and costs finally awarded by a court of competent jurisdiction (collectively, "Damages") against Partner to the extent such Damages are specifically attributable to the IP Claim, provided that Partner: (a) promptly notifies NetApp in writing of the IP Claim; (b) provides information and assistance to NetApp to defend such IP Claim; and (c) provides NetApp with sole control of the defense or settlement negotiations.
- 5.4. NetApp may, at its option, substitute or modify the applicable Covered Products, or the relevant portion thereof, so that it becomes non-infringing; procure any necessary license; or replace the applicable Covered Products. If NetApp determines that none of these alternatives is reasonably available, then NetApp may, in its sole discretion, accept return of the Covered Products or termination of an affected subscription to a Cloud Service, and provide a pro rata refund of pre-paid fees received by NetApp for such Covered Product(s), as applicable to the End User.
- 5.5. Notwithstanding anything to the contrary in this Partner Agreement, NetApp has no obligation or liability for any IP Claim related to the Covered Products that arises from or relates to: (a) NetApp's compliance with, or use of, designs, specifications, inventions, instructions, or technical information furnished by or on behalf of Partner or an End User; (b) modifications to the Covered Products made by or on behalf of Partner or an End User without NetApp's prior written authorization; (c) an End User's failure to upgrade or use a new version of the Covered Products, to make a change or modification requested by NetApp, to implement or configure the Covered Product in a manner set forth by NetApp, or to cease using the Covered Products if requested by NetApp; (d) the Covered Products, or any portion thereof, in combination with any other product or service (including a NetApp Cloud Provider's services); (e) Third-Party Branded Products or Third-Party Branded Services; (f) any content or information stored on or used by Partner, End User or a third party in connection with a Covered Product; or (g) Partner's or End User's breach of the use limitations prescribed by NetApp.
- 5.6. Notwithstanding anything to the contrary in this Partner Agreement, this Section states NetApp's entire liability and Partner's sole and exclusive remedies for IP Claims.

## 6. CONFIDENTIAL INFORMATION

- 6.1. Confidential Information disclosed to the Receiving Party will remain the exclusive property of the Disclosing Party. The Receiving Party may use the Disclosing Party's Confidential Information solely for the purpose of fulfilling its obligations under this Partner Agreement. The Receiving Party agrees to disclose the Disclosing Party's Confidential Information only to those employees or agents who have a need to know in furtherance of this Partner Agreement and who are required to protect such Confidential Information against unauthorized disclosure under terms no less restrictive than those set forth herein. The Receiving Party will protect the Confidential Information from unauthorized use, access, or disclosure in the same manner as it protects its own proprietary information of a similar nature, and in any event with at least a reasonable degree of care.
- 6.2. Confidential Information does not include any information that: (a) is already known to the Receiving Party without restrictions at the time of disclosure; (b) is or becomes known to the general public through no act or omission of the Receiving Party in breach of this Partner Agreement; (c) is disclosed to the Receiving Party

by a third party who is not, to the knowledge of the Receiving Party, in breach of an obligation of confidentiality; or (d) is independently developed by employees and/or contractors of the Receiving Party who did not have access to, and without use of, the Disclosing Party's Confidential Information.

- 6.3. The Receiving Party's obligations regarding the Disclosing Party's Confidential Information will expire three (3) years from the date of disclosure.
- 6.4. The Receiving Party may disclose the Disclosing Party's Confidential Information to the extent such disclosure is required pursuant to a judicial or administrative proceeding, provided that, unless prohibited by applicable law, the Receiving Party gives the Disclosing Party prompt written notice thereof and the opportunity to seek a protective order or other legal remedies.
- 6.5. Upon the Disclosing Party's written request, all Confidential Information (including all copies thereof) of the Disclosing Party will be returned or destroyed, unless the Receiving Party is required by law to retain such information, and the Receiving Party will provide written certification of compliance with this Section.

## **7. TERMINATION**

- 7.1. Your appointment as a NetApp Partner may be terminated upon thirty (30) days' notice in writing by either party that they wish to terminate. Upon termination You will no longer be permitted to represent Yourself, or act in any capacity, as a NetApp Partner, and any right to use NetApp's name or trademarks, or right to resell or distribute NetApp Products and Services will automatically cease.
- 7.2. Subject to, and except as otherwise set forth in each of the Attachments, either party may terminate an Order for cause: (a) upon thirty (30) days written notice to the other party of a material breach (including for Partner's failure to remit payments when due) if such breach remains uncured at the expiration of such period; or (b) if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. Termination will not (a) relieve Partner from its payment obligations with respect to any sums accrued prior to termination, which will become immediately due and payable; or (b) entitle Partner to any refund unless otherwise set forth in this Partner Agreement.

## **8. INDEMNIFICATION**

- 8.1. Partner shall defend, indemnify and hold NetApp and its directors, employees, subsidiaries, and affiliates harmless from/for any and all claims, damages, losses, costs and expenses, including attorneys' fees, arising from any third party claims asserted against NetApp, its employees, subsidiaries, and/or affiliates that are based in whole or in part on: (a) Partner's breach of the Partner Agreement; (b) any Partner service or service provider offering; or (c) any false, misleading or otherwise unauthorized statements or representations.

## **9. COMPLIANCE WITH LAWS**

- 9.1. You agree to comply with all applicable laws in transactions involving NetApp, including but not limited to applicable country laws relating to anti-corruption or anti-bribery, the requirements of the U.S. Foreign Corrupt Practices Act, as amended, the U.K. Bribery Act, and legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This means that nothing of value may be given to a third party, such as an actual or prospective customer, in connection with a NetApp transaction to get or maintain business or to encourage an official to perform his or her official duties.
- 9.2. Partner acknowledges that Products and Services are subject to export controls under the laws and regulations of the United States, the European Union, and other countries (as applicable), and that Products and Services may include technology controlled under export and import regulations, including encryption technology. Partner agrees to comply with such laws and regulations and to provide NetApp destination end use and end user information. Partner agrees to obligate, by contract or other similar assurances, the parties to whom Partner re-exports or otherwise transfers the Products and Services to comply with all obligations

set forth in this Section.

- 9.3.** In the event Partner provides NetApp with access to Personal Information in order for NetApp to provide Products or Services hereunder, the Parties will ensure that such Personal Information is disclosed and handled in accordance with all applicable data protection laws and the confidentiality provisions set forth in this Partner Agreement. To the extent that NetApp receives Personal Information from Partner, the NetApp Privacy Policy (found at <https://www.netapp.com/company/legal/privacy-policy/>) will apply to NetApp's management and usage of such Personal Information and is hereby incorporated by reference. Article 28 (1) of the European Union General Data Protection Regulation ("GDPR") requires an agreement between a controller and processor, and between a processor and sub processor, that processing of Personal Information be conducted in accordance with technical and organizational measures that meet the requirements of the GDPR and ensure the protection of the rights of data subjects. To the extent NetApp acts as a data processor of Personal Information on behalf of Partner: (a) NetApp will comply with the additional terms and conditions applicable to NetApp in the "NetApp Data Processing Addendum," available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>, and (b) NetApp will not retain, use, or disclose such Personal Information for any purpose other than providing or improving Products or Services in accordance with this Partner Agreement. NetApp certifies that it understands the foregoing restrictions and will comply with them.

## **10. GENERAL**

### **10.1. Audit**

- 10.1.1. You agree to grant NetApp and its independent accountants the right to audit and verify Your compliance with this Partner Agreement and Your role and obligations as a NetApp Partner, upon reasonable advance notice and only during regular business hours. Such audit may require You (a) giving access to Your records in relation to Your appointment as a NetApp Partner; (b) providing copies of documents or other evidence to verify Your compliance with Your obligations hereunder; (c) responding to requested assessments; and (d) providing periodic certifications. In addition, NetApp will periodically conduct check-ins with regard to Your performance as a NetApp Partner, which may result in Your appointment as a NetApp Partner being revoked or a demotion of Your partner level status if You fail to perform as expected.

### **10.2. Limitation of Liability**

- 10.2.1. To the extent permitted by applicable law, regardless of the basis of the claims (e.g., whether in contract, tort (including negligence), statute, products or strict liability, or any other form of action):
- 10.2.1.1. in no event will NetApp or its suppliers or subcontractors be liable to You for special, incidental, exemplary, indirect or consequential damages; downtime costs; loss or corruption of data; loss of revenues, profits, goodwill, or anticipated savings; procurement of substitute goods and/or services; and/or interruption of business. This exclusion is independent of any remedy set forth in this Partner Agreement;
- 10.2.1.2. NetApp's liability to You is limited to direct damages in an amount not to exceed one million dollars (US\$1,000,000) on a cumulative basis.
- 10.2.2. These limitations do not apply to liability for claims arising from: (a) death or bodily injury caused by a Party's negligence or gross negligence; (b) willful misconduct or fraud; (c) any other liability which cannot be excluded under applicable law; or (d) IP Claims for which NetApp indemnifies Partner under Section 5 (Intellectual Property).

- 10.3. Updates.** You agree that NetApp may modify and/or update this Partner Agreement, including the Attachments and Program Guides, at least once annually without prior notice to You. The current Partner Sphere Agreement and Attachments will be available to You at

<https://fieldportal.netapp.com/content/2212287>, and the current Program Guide(s) will be available to You at [partners.netapp.com](https://partners.netapp.com). At any pertinent time hereunder, the then current posted version of the Partner Sphere Agreement, Attachments and Program Guide(s) shall be the controlling terms of Your Partner Agreement with NetApp.

- 10.4. Notices.** Except as specifically stated, all notices or other communications required or permitted under this Partner Agreement must be in writing and must be delivered by personal delivery, certified overnight delivery, or registered mail (return receipt requested), and will be deemed given upon personal delivery or upon confirmation of receipt. In addition, the parties each consent to notice by email or electronic transmission sent to the email address provided by Partner and, for NetApp, to the following email address: [General.Counsel@netapp.com](mailto:General.Counsel@netapp.com). It is Partner's responsibility to update its contact information, including e-mail address(es), provided to NetApp on an on-going basis and NetApp shall be deemed to have complied with this section by delivering any notice or communication hereunder to the contact information then on file with NetApp.
- 10.5. Force Majeure.** Neither party will be liable to the other for any alleged loss or damages resulting from acts of God, acts of civil or military authority, governmental priorities, fire, floods, earthquakes, epidemics or pandemics, quarantine, energy crises, strikes, labor trouble, terrorism, war, riots, accidents, shortages, delays in transportation, or any other causes beyond the reasonable control of a party (each a "Force Majeure Event"). For the avoidance of doubt, Force Majeure Event will not relieve Partner's obligation to make payments due hereunder for Products or Services actually delivered. If the Force Majeure Event continues for more than thirty (30) days, the parties will negotiate in good faith the termination of the affected Order(s).
- 10.6. Governing Law / Venue**
- 10.6.1. This Partner Agreement, the interpretation hereof, and any dispute arising hereunder will be governed as follows:
- 10.6.1.1. Subject to and limited by Section 10.6.1.2 herein, with respect to any dispute arising from or related to Your participation in the Partner Sphere Program and/or any incentive benefits thereunder (a) the State of California, United States, if You are located in the United States, Canada or Mexico or (b) Ireland, if You are located elsewhere, and in all cases, without regard to conflict of law provisions.
- 10.6.1.2. With respect to any dispute arising from any Order, the state and/or country where the NetApp entity that accepted and/or otherwise entered the related Order is incorporated, excluding any relevant conflict of law provisions.
- 10.6.2. The United Nations Convention on Contracts for the International Sale of Goods will not apply to this Partner Agreement or any Order.
- 10.7. Entire Agreement/Amendments.** This Partner Agreement may not be changed except by an amendment signed by an authorized representative of each party. In the event of a dispute between the English and any non-English version of this Partner Agreement (where translated for local requirements), the English version of this Partner Agreement will govern, to the extent permitted by applicable laws. This Partner Agreement, including any Program Guide(s), Attachments and/or supplemental terms referenced herein, (a) represent the entire agreement and understanding between the parties with respect to participation in, access to and utilization of the NetApp Partner Sphere Program, in any way, as well as Your purchase of NetApp Products and/or Services whether through a NetApp authorized Distribution Partner or direct from NetApp, including for resale to an End User; (b) supersede any previous communications, representations or agreements between the parties; and (c) prevail over any conflicting or additional terms in any Order, acknowledgement, or similar communications between the parties or between You and an End User. Orders issued to NetApp are deemed to incorporate and be subject to this Partner Agreement, except where the parties expressly agree in writing to variations thereto. The pre-printed terms or general terms and conditions on any non-

NetApp order document, whether signed by NetApp, or other similar non-NetApp document will have no effect.

- 10.8.** Interpretation. Headings are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Partner Agreement. Any use of the word “including” in this Partner Agreement will not be deemed to limit the meaning of the preceding word or phrase. Each party has been given the opportunity to independently review this Partner Agreement with legal counsel and each party has the requisite experience and sophistication to understand, interpret, and agree to the particular language of the provisions. Therefore, in the event of any ambiguity in or dispute regarding the interpretation of this Partner Agreement, the drafting of the language will not be attributed to either party.



## EXHIBIT 1 DEFINITIONS

(Capitalized terms not defined here shall take the meaning provided for such terms in the Attachments)

**Affiliate** means any entity, directly or indirectly through one or more intermediaries, that is controlled by, or is under common control with, a party hereunder, but only for so long as such relationship exists. For purposes of this definition, “control” means the ability to direct its affairs and/or to control the composition of its board of directors or ownership of more than 50% (or such lesser percent as may be the maximum that may be owned by foreign interests pursuant to the applicable laws of the country of incorporation) of (a) the shares of stock entitled to vote for directors in the case of a corporation; or (b) the equity or interests in profits in the case of a business entity other than a corporation.

**Cloud Service(s)** means a NetApp cloud-based service (which may be infrastructure, platform or software) made available to End Users as described more fully in the Cloud Services Terms.

**Cloud Service Enabling Software** means NetApp Software that is solely necessary to facilitate End User’s use of a Cloud Service.

**Confidential Information** means information (in its broadest sense) belonging to or provided by a party to this Partner Agreement, identified as “Confidential” at the time of disclosure and which does not otherwise fall within the description set forth in Section 6.2.

**Disclosing Party** means a party sharing Confidential Information hereunder.

**Distribution Partner** means an entity authorized by NetApp to distribute NetApp Products and Services through authorized NetApp partners.

**Documentation** means the then-current published documentation as published by NetApp on NetApp.com relating to the description, operation and use of NetApp Products and Services published by NetApp. Documentation includes technical program and interface documentation, user manuals, operating instructions, and release notes.

**End User** means the end user customer purchasing NetApp Products and Services for their own use.

**Engagement Document** means NetApp-approved document that describes the Professional Services NetApp will provide to Customer, including but not limited to a statement of work, service brief or service description.

**Hardware** means NetApp-branded hardware, including its components and spare parts, and excluding any firmware and Third-Party Branded Products.

**Order** means a NetApp-approved ordering document with Partner, Purchase Order, or online order describing the Products or Services that the End User is purchasing.

**Partner Sphere Application Form** means the mandatory application workflow through which Partner applies for participation to the NetApp Partner Sphere Program.

**Partner Sphere Program** means the Partner incentive benefits program, described in the then current NetApp Partner Sphere Program Guide, as published by NetApp.

**Personal Information** means any information relating to, directly or indirectly, an identified or identifiable natural person or household, or is defined as “personal data” or “personal information” by applicable laws or regulations, as further described in the NetApp Privacy Policy, which can be accessed at:  
<https://www.netapp.com/us/legal/privacypolicy/index.aspx>.

**Price List** means NetApp’s then-current list of Products and Services, and their associated prices for the country of destination.

**Products** means, collectively, Hardware, Software, and Third-Party Branded Products.

**Professional Services** means consulting, installation, implementation, and other services that are not Support Services, to be provided by or on behalf of NetApp.



**Purchase Order** means an electronic order that Partner provides to NetApp for direct purchases of Products and certain Services from NetApp.

**Receiving Party** means a party receiving Confidential Information hereunder.

**Services** means collectively, NetApp's Cloud Services, Support Services and/or Professional Services.

**Software** means NetApp-branded software in object code format, including (as applicable) operating system software, protocols, firmware, backup and recovery, disaster recovery, storage efficiency, and management software.

**Support Services** means NetApp's generally available technical support and maintenance services for Products to be provided by or on behalf of NetApp.

**Third-Party Branded Products** or **Third-Party Branded Services** means any hardware ("**Third-Party Branded Hardware**") or software ("**Third-Party Branded Software**") or services ("**Third-Party Branded Services**") manufactured, developed licensed or otherwise provided by a third party and resold by NetApp under the Third Party's brand name for use in conjunction with Hardware and Software.

**PARTNER SPHERE AGREEMENT  
ATTACHMENT 1 - DIRECT ORDER TERMS**

This Direct Order Terms Attachment to the Partner Agreement only applies to Partners that are authorized in writing by NetApp to place, and to each such Order that is placed, directly with NetApp.

**1. ORDERS AND ORDERING**

Each Order will be based on, and refer to, a valid and current price quotation (where applicable) and will include relevant Product and/or Services information, appropriate legal entities, “ship to” and “bill to” locations (where applicable) and requested delivery date where applicable. Partner will submit all Orders to NetApp electronically. Partner will only submit Order documentation for Products or Services once the End User has submitted a corresponding binding purchase order to Partner. All Purchase Orders are subject to acceptance by NetApp.

**2. CHANGES, CANCELLATION AND RESCHEDULING**

Partner may modify or cancel Purchase Orders for Products or related Support Services up to ten (10) days prior to any scheduled shipment date, and Partner may reschedule a requested delivery date for Products and related Support Services one time per Purchase Order without additional charge. Additional terms related to cancellation, changes and rescheduling for Professional Services and Cloud Services are set forth in the applicable Attachment(s), Professional Services Terms and Cloud Services – Terms of Service, available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>.

**3. DELIVERY**

Delivery of hardware and software pre-installed on the hardware occurs according to the applicable trade term specified on the NetApp price quotation or as agreed to by NetApp on a case-by-case basis. Delivery of software that is not pre-installed on hardware occurs when NetApp makes the enabling key available to End User, or if any enabling key is not required, when NetApp makes such software available for download or use by End User.

**4. RISK OF LOSS**

Risk of loss or damage to the Products and title to any hardware in the Products will pass to Partner upon delivery.

**5. ACCEPTANCE**

Acceptance by Partner of Products will occur upon delivery, and acceptance by Partner of Services will occur when such Services are rendered, unless otherwise

agreed in an Engagement Document.

**6. INVOICING**

NetApp may invoice shipments, including partial shipments, on delivery in accordance with the applicable trade term specified in the quotation or mutually executed Order.

**7. PRICING**

Prices will be as quoted from the applicable Price List. NetApp may, at its sole discretion, change the prices set forth in its Price List and add or remove Products and Services from its Price List at any time. An Order received after the effective date of a price change, but pursuant to a valid and current NetApp quotation, will be invoiced at the price stated on the NetApp quotation.

**8. PAYMENT TERMS**

Partner will make full payment in the currency specified in the invoice, without set-off and in immediately available funds, not later than thirty (30) days of the date of NetApp's invoice (unless otherwise agreed in a mutually executed Order). Fees are non-refundable and payment obligations are non-cancelable, except as provided in this Partner Agreement or where prohibited by law.

**9. REMEDIES FOR NON-PAYMENT**

Partner payment of an amount less than the invoice amount will not be deemed as acceptance of payment in full, nor will any endorsement or statement on any check or letter accompanying any payment or check be deemed an accord and satisfaction. NetApp may accept such payment or check without prejudice to NetApp's right to recover the balance of any amount due or pursue any other remedy provided for in this Partner Agreement or by law or in equity. NetApp has the right to apply any payment received from Partner to any account of Partner which is due and/or delinquent. If Partner fails to make timely payment, in addition to all other available remedies, NetApp will have the right to decline to make further deliveries of Product(s) and/or provision of Services to Partner.

**10. TAXES & DUTIES**

Partner is solely responsible for the payment of taxes (except taxes based on NetApp's net income), fees,

duties and charges, and all related penalties and interest, that arise from its utilization or NetApp's provision of the Products and/or Services. If such taxes are incurred, including any withholding taxes, the sum payable by Partner (in respect of which such deduction or withholding is required to be made) will be increased to the extent necessary to ensure that NetApp receives payment in full of an amount equal to the invoiced amount. If Partner is tax-exempt, then Partner will provide NetApp with tax exemption certificates or other documentation acceptable to the taxing authorities not later than thirty (30) days from the date Partner places an Order with NetApp. If Partner does not provide such documentation to NetApp, NetApp reserves the right to include such taxes in the invoice. Partner may not withhold tax from payments due to NetApp without proper exemption documentation from NetApp. In addition to the stated prices, Partner will be liable for all applicable duties, license fees, and taxes for Products shipped across international borders in accordance with the applicable trade term specified or as otherwise may apply.

**PARTNER SPHERE AGREEMENT  
ATTACHMENT 2 - RESALE TERMS**

This Resale Terms Attachment to the Partner Agreement applies to the resale of NetApp Products and Services, whether purchased direct from NetApp or through a NetApp authorized Distributor.

**1. RESELLER AUTHORIZATION**

1.1. You are authorized by NetApp to resell Products and Services to End Users in the Territory, as "Territory" is defined in relation to You in the current Partner Sphere Program Guide, available at [partners.netapp.com](https://partners.netapp.com), for their own internal use only (that is, not for resale, remarketing or redistribution) unless NetApp has specifically agreed otherwise in writing. Reselling to a third party that is not an End User is strictly forbidden, unless expressly approved in writing by NetApp.

1.2. NetApp Products and Services are subject to export and import control laws and regulations of the United States, the European Union and other countries and may include export-controlled technologies such as encryption. You agree to comply with such laws and regulations and maintain full, true, and accurate records of exports, re-exports, and transfers of the Products and Services purchased or deployed for a minimum of seven (7) years from the date of shipment. You must promptly notify NetApp of any violations or potential violations of customs or export laws that You become aware of.

**2. ORDERING**

2.1. Any Orders You place for NetApp Products and Services must be placed with the Distribution Partner that You selected in the Partner Application Form unless NetApp has authorized You in writing to place Orders otherwise. Only Partners authorized in writing by NetApp to place Orders direct with NetApp may do so.

2.2. All Orders placed directly with NetApp are subject to the Direct Order Terms Attachment. The terms governing orders placed with your Distribution Partner are between You and the Distribution Partner. For more information on selecting or changing Your Distributor contact NetApp by email at [partner@netapp.com](mailto:partner@netapp.com).

**3. CHANNEL END USER TERMS**

When reselling and distributing NETAPP Products and Services to End Users, You must ensure that each End User is fully aware that its purchase and use of NetApp Products and/or Services is EXCLUSIVELY subject to and governed by the NetApp Channel End User Terms, publicly available at the following link

<https://www.netapp.com/how-to-buy/sales-terms-and-conditions/> ("CEU Terms"). You must either deliver a copy of the CEU Terms to the End User as part of its order documentation with You or instruct the End User to access the CEU Terms at the web address provided in this Section. You acknowledge and agree that NetApp will not accept any liability in relation to the Products and Services over and above those set out in the CEU Terms. Further, and for the avoidance of doubt, You are not authorized to modify, negotiate or waive any provision of the CEU Terms on behalf of NetApp. If you choose to offer different terms to any End User, this is solely at Your risk, and You cannot look to NetApp to cover such risk or terms in any way. Your failure to provide the CEU Terms to an End User as described herein, and/or attempting to offer any terms with respect to the End User's purchase and/or use of NetApp Products and/or Services that differs from or modifies the CEU Terms, in any way, shall constitute breach of this Partner Agreement and is subject to the remedies set forth herein.

**4. LICENSE TO DISTRIBUTE SOFTWARE**

As a NetApp Partner, NetApp grants You a limited right to distribute NetApp Software licenses to End Users as part of resale transaction, however such right does not include the right to use the Software Yourself.

**5. U.S. Public Sector Restrictions and Regulations**

You will not act as a reseller - either in the capacity of a prime contractor or a subcontractor - of Products or Services to an End User that is either a U.S. federal government entity, a U.S. state or local government entity, or a U.S. public educational institution, unless NetApp has given You express written approval to do so. This prohibition includes using NetApp Products and Services to provide a managed service to a U.S. federal government entity, a U.S. state or local government entity, or a U.S. public educational institution absent express written approval from NetApp. In the event NetApp does provide such written approval, the U.S. Federal Government Supplemental Terms and/or the State, Local Government and Higher Education Terms Attachments, as applicable, shall also apply to You

**PARTNER SPHERE AGREEMENT**  
**ATTACHMENT 3 – KEYSTONE FLEX SUBSCRIPTION RESALE TERMS**

This Keystone Flex Subscription Resale Terms Attachment to the Partner Agreement (“**Keystone Resale Attachment**”) provides additional terms and conditions regarding resale of NetApp Subscription Services (as defined below) to End Users.

1.1 **Definitions.** Capitalized terms used but not defined in this Keystone Resale Attachment have the meanings set forth in the Partner Agreement (including other Attachments) and the applicable Service Description.

1.2 **“Assignment Option”** is defined in **Section 9.2(a)**.

1.3 **“End User”** as used in the Attachment means the end user customer identified by Partner in a Partner Order as the beneficiary of the Subscription Services to be resold by Partner in accordance with this Keystone Resale Attachment.

1.4 **“End User Information”** means any information provided by or on behalf of End User, whether or not it includes Personal Information, that is uploaded onto or used with the Subscription Products.

1.5 **“End User Site”** means the specific physical location identified on a Partner Order where the Subscription Products are installed and maintained, whether such location is owned by or under the control of End User or any third party.

1.6 **“End User Terms”** means NetApp’s Keystone Channel End User Terms of Service that govern the End User’s use of Subscription Services provided by NetApp, as published on NetApp’s Keystone Terms and Conditions Website or other NetApp site identified to Partner (as may be updated from time to time). The Keystone Order or the End User Terms shall incorporate by reference the applicable Service Description.

1.7 **“Keystone Order”** means a written or electronic order or confirmation provided to Partner by the End User for the purchase of Subscription Services.

1.8 **“Keystone Terms and Conditions Website”** is found at <https://www.netapp.com/services/keystone/terms-and-conditions/>.

1.9 **“Lockout Period”** is defined in **Section 9.2(b)**.

1.10 **“Metering Tool”** means the web-based tool provided by NetApp through which usage of the Subscription Services can be monitored as further described in the Service Description.

1.11 **“Partner Fees”** means the applicable fees payable by Partner as set forth in a Partner Order. The Partner Fees will be determined in accordance with the metering and billing methodology set forth in the applicable Service Description.

1.12 **“Partner Order”** means Partner’s order for Subscription Services to be deployed by NetApp for the benefit of an End User in accordance with this Keystone Resale Attachment. Each Partner Order, together with any confirmation for additional Subscription Services provided in connection with such Partner Order, will constitute a single Partner Order.

1.13 **“Partner Service Deliverables”** is defined in **Section 5.2(a)**.

1.14 **“Rate”** means the applicable rates set forth in a Partner Order that are used to calculate the Partner Fees.

1.15 **“Recovery Fee”** means: (a) NetApp’s reasonable costs of deinstallation and repossession of the Subscription Hardware; and (b) any costs associated with any damage or loss of Subscription Hardware that occurred while in End User’s possession.

1.16 **“Replacement Value Fee”** means the cost of the replacement for such Subscription Hardware, calculated in accordance with NetApp’s then current price list.

1.17 **“Service Description”** means the description for each Subscription Service as published on NetApp’s Keystone Terms and Conditions Website (as may be updated from time to time) that apply to End User’s use of the specific Subscription Service(s) ordered by Partner under a Partner Order. Service Descriptions are provided for the benefit of End Users, and supersede the terms of any purchase, license, financing or other agreement governing an End User’s acquisition of NetApp’s products or services, including any such terms that are made available by or through Partner, except as expressly provided in this Keystone Resale Attachment and the End User Terms.

1.18 **“Subscription Hardware”** means hardware, including its components and spare parts, that is used by NetApp as part of the Subscription Services.

1.19 **“Subscription Product(s)”** means any part or all of the Subscription Hardware and Subscription Software used by NetApp as part of the Subscription Services, whether as part of the original configuration, or subsequently added in the ordinary course of NetApp’s performance of the Subscription Services. The “Subscription Products” constitute “Products” under the Partner Agreement.

1.20 **“Subscription Services”** means certain NetApp storage-as-a-service (STaaS) capacity, together with any additional services, that are purchased under a Partner Order and made available to End User on a subscription basis as described in more detail in the Service

Description. The “Subscription Services” constitute “Services” under the Partner Agreement.

1.21 “**Subscription Software**” means the software that is used by NetApp as part of the Subscription Services (whether delivered on or with Subscription Hardware or on a standalone basis).

1.22 “**Subscription Term**” means the use term specified in a Partner Order, including any renewal or extension periods.

## 2. Resale of Subscription Services.

2.1 Right to Resell to End Users. Subject to the terms and conditions herein, Partner is authorized, on a non-exclusive basis, to order Subscription Services directly from NetApp solely for resale to End Users. NetApp will provide End User with the Subscription Services identified in each Partner Order entered into by NetApp and Partner, subject to End User’s compliance with the End User Terms and Partner’s compliance with the terms and conditions of this Keystone Resale Attachment. You may not act as a reseller - either in the capacity of a prime contractor or a subcontractor - of Subscription Services to an End User that is either a U.S. federal government entity, a U.S. state or local government entity, or a U.S. public educational institution, unless NetApp has given You express written approval to do so. This prohibition includes using Subscription Services to provide a managed service to a U.S. federal government entity, a U.S. state or local government entity, or a U.S. public educational institution absent express written approval from NetApp. In the event NetApp does provide such written approval, the U.S. Federal Government Supplemental Terms and/or the State, Local Government and Higher Education Terms Attachments, as applicable, shall also apply to You.

2.2 Partner Orders. All Partner Orders are subject to acceptance by NetApp. Partner will only submit Partner Orders once the End User has submitted a corresponding binding Keystone Order for Subscription Services to Partner. Each Partner Order will contain not less than the Subscription Term, the Partner Fees, the Committed Capacity (including relevant minimum payments), the applicable Performance Level, and the applicable Rates (as such terms are defined in the End User Terms and the Service Description). Once accepted by NetApp, Partner Orders may be modified or cancelled only upon the mutual written consent of the parties.

2.3 Subscription Products. NetApp will determine the Subscription Products used to deliver Subscription Services. The respective rights and obligations of NetApp and End User, including processes for adjusting the Subscription Services, are more fully described in the applicable End User Terms and Service Description.

2.4 Risk of Loss; Title. NetApp retains sole and exclusive title to the Subscription Products and all of its components. Except as may otherwise be agreed under the Program Guide, End User is solely responsible for any

loss or damage to the Subscription Products from the date of delivery to the date of final disposition of the Subscription Products as provided in **Section 9.3(b)** and the applicable Partner Order. No such loss or damage will relieve Partner of any of its obligations under this Keystone Resale Attachment or the applicable Partner Order.

## 3. Partner Fees and Payment Terms.

3.1 Partner Liable for Partner Fees. NetApp will invoice Partner for the Partner Fees payable for Subscription Services purchased under the applicable Partner Order and resold under each Keystone Order and incurred during the applicable billing period and, subject to **Section 9.2**, Partner will pay such Partner Fees, calculated in the manner described in the Service Description, without deduction or offset. Partner’s payment of an amount less than the invoice amount will not be deemed as acceptance of payment in full, nor will any endorsement or statement on any check or letter accompanying any payment or check be deemed an accord and satisfaction. NetApp may accept such payment or check without prejudice to NetApp’s right to recover the balance of any amount due or pursue any other remedy provided for in the Agreement or by law or in equity.

### 3.2 Taxes and Duties.

(a) Partner is solely responsible for the payment of only those taxes (specifically excluding taxes based on NetApp’s net income and taxes associated with NetApp’s ownership of the Subscription Products, including personal property taxes), fees, duties and charges, and all related penalties and interest (which result directly and exclusively from Partner’s actions or omissions), that NetApp is required by law to collect from Partner. Partner will provide NetApp with a copy of its current Sales Tax Exemption Certificate upon request. If Partner does not provide such documentation to NetApp, NetApp reserves the right to include such taxes in the invoice.

(b) Solely with regard to payments of Partner Fees, Partner shall be permitted to withhold taxes from such payments and pay such taxes directly to the appropriate tax authority as required by law. Partner will supply NetApp with a receipt for such withholding taxes remitted to the tax authorities. In addition to the stated prices, Partner will be liable for all applicable duties, license fees, and taxes for Subscription Products shipped across international borders in accordance with the applicable trade terms set forth in the Partner Order, or as otherwise may apply.

### 3.3 Partner Responsible for Keystone Orders and Collection of End User Payments. Partner shall:

(a) accept and manage the Keystone Orders for Subscription Services originated by Partner; and

(b) submit Partner Orders to NetApp for Subscription Services to be resold to End Users, subject to NetApp’s acceptance.



3.4 Credit Review. With respect to each Partner Order submitted to NetApp for approval, NetApp may obtain from Partner and/or the End User such information as NetApp may reasonably request in connection with reviewing the creditworthiness of such End User and with assessing the economics and other terms of the proposed transaction, including without limitation, financial statements, credit references, and the essential terms and conditions of the proposed Keystone Order. To the extent permitted under applicable law and subject to any confidentiality obligations owed by Partner to the End User, Partner shall provide such End User credit information which is in the possession of Partner, but Partner shall have no obligation to procure any information from or regarding prospective End Users on behalf of NetApp. As between Partner and NetApp, neither party is liable to the other party for the credit risk of an End User except as otherwise expressly agreed by the parties in **Section 9.2** of this Keystone Resale Attachment.

#### **4. Use Rights for Subscription Products; End User Terms.**

4.1 Right to Use Subscription Products. The Subscription Services provide End User with the right to use Subscription Products as set forth in the End User Terms, and do not transfer any ownership or title to either Partner or End User.

4.2 Pass Through End User Terms. When reselling Subscription Services to End Users, Partner will provide each End User with the End User Terms and state in its agreement with such End User that the Subscription Services are governed by and delivered pursuant to the End User Terms (including the applicable Service Description). Partner agrees to include an affirmative End User acknowledgement in its agreement with each End User Terms that state that the End User Terms shall be the sole and exclusive terms that apply to the Subscription Services and form an agreement directly between the End User and NetApp with respect to such Subscription Services as if such End User and NetApp had executed such End User Terms.

4.3 Changes to End User Terms. NetApp will not accept any liability in relation to any supplemental services to be performed by Partner over and above the Subscription Services set out in the End User Terms. If Partner chooses to offer better or different terms to any End User, it is solely at Partner's risk and Partner cannot look to NetApp to cover such risk or terms.

4.4 Applicable Service Description. The Service Description in effect at the start of each Subscription Term specified in the applicable Keystone Order will apply to the Subscription Services and the Subscription Products provided thereunder. NetApp may update the Service Description periodically, provided that the Service Description in effect with respect to any individual Partner Order will remain in effect for such Partner Order for the duration of the applicable Subscription Term.

#### **5. Partner Responsibilities, Representations and Warranties.**

5.1 Partner undertakes:

(a) to actively promote the Subscription Services to End Users;

(b) not to make any claims or other representations about NetApp, its Affiliates or its Subscription Services, other than the current information published by NetApp, the applicable Service Description, the Documentation, any express guidelines or instructions approved, published or otherwise made available by NetApp, or as set forth in this Keystone Resale Attachment;

(c) not to accept gifts or offer other advantage to decision makers within the End User organization to ease or reward the selection of NetApp, whether in its own name or on behalf of NetApp;

(d) to disclose to the End User the Partner's participation in the Subscription Services program;

(e) not to promote the Subscription Services in a form, manner and content inconsistent with the applicable Service Description, or with any express guidelines or instructions approved, published or otherwise made available by NetApp; and

(f) to comply with the requirements of the Keystone Subscription Incentive Guide.

5.2 Partner Services.

(a) Partner may deliver (i) certain portions of Subscription Services to eligible End Users as described in the relevant Program Guide, and/or (ii) such other categories of supplementary value-added services as may be mutually agreed by the parties (collectively, "Partner Service Deliverables"); provided that:

(i) Partner has attained and continues to maintain the appropriate Services Certified track as governed by and defined in such Program Guide; and

(ii) Partner agrees to indemnify and hold NetApp, its officers, agents and employees harmless from any liability, loss or damage they may suffer as a result of third party claims, demands, costs or judgments against them arising out of any Partner Service Deliverables. In claiming any indemnification hereunder, NetApp must promptly provide Partner with written notice of any claim which NetApp believes falls under the scope of this Section; provided that the failure to promptly notify Partner shall not affect NetApp's right to seek indemnification if such delay did not materially prejudice the defense of such claim. NetApp may, at its own expense, assist, participate in, and support the defense if it so chooses (through legal counsel of its own choice), provided that (A) Partner shall control such defense (including selection of legal counsel) and all negotiations relative to the settlement of such indemnity claim, and (B) NetApp shall ensure that any counsel it independently retains cooperates with Partner's retained counsel. In connection



with any indemnity claim, Partner will not consent to any judgment, attachment of any lien, or any other act adverse to NetApp's interests without its express written consent, which consent shall not be unreasonably withheld.

5.3 Ongoing Cooperation. Partner agrees to promptly notify NetApp of any material information within Partner's possession related or pertaining to: (a) actual or proposed changes to the location, condition and/or performance of the Subscription Products; (b) actual or proposed changes to any of the Subscription Products, or changes caused by planned or unplanned events impacting End User's environment (such as space, power, network, security, etc.) that may impact the Subscription Products; (c) End User's compliance with or performance of its obligations under the End User Terms, including without limitation all restrictions on the use of the Subscription Services; or (d) NetApp's ability to access and monitor the Subscription Products for purposes of providing the Subscription Services, including without limitation the operability of the Metering Tool.

5.4 Compliance with Laws. Partner represents and warrants that it will comply with all laws, rules, regulations and ordinances applicable to the performance and delivery of its obligations under this Partner Agreement and under each of Partner's End User agreements related to the resale of NetApp's Subscription Services (including any Partner Service Deliverables).

## 6. NetApp Representations and Warranties; Disclaimer.

6.1 Compliance with Laws. NetApp represents and warrants that it will comply with all laws, rules, regulations and ordinances applicable to the performance, operation and delivery of the Subscription Services and the Subscription Products and its obligations under this Partner Agreement and the End User Terms.

6.2 Disclaimer of Warranties. EXCEPT AS SET FORTH IN **SECTION 6.1**, NETAPP MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE SUBSCRIPTION PRODUCTS AND SUBSCRIPTION SERVICES PROVIDED UNDER THIS KEYSTONE RESALE ADDENDUM. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAWS, NETAPP SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING. TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE SERVICE LEVEL REMEDIES SET FORTH IN THE RELEVANT SERVICE DESCRIPTION ARE THE SOLE AND EXCLUSIVE REMEDIES AVAILABLE TO PARTNER AND ANY END USER FOR ANY FAILURE ON BEHALF OF NETAPP TO PROVIDE THE SUBSCRIPTION PRODUCTS AND THE SUBSCRIPTION SERVICES IN ACCORDANCE WITH

THE SERVICE LEVEL COMMITMENTS SET FORTH THEREIN.

## 7. Intellectual Property Rights and Protection.

7.1 General. NetApp and its licensors reserve and retain all rights, title, and interest (including any intellectual property rights therein) in and to the Subscription Services and Subscription Products not expressly granted to End User.

7.2 Indemnity. The Partner Agreement shall govern NetApp's indemnity and limitations of liability related to any claim for infringement of any third party's patent, trademark or copyright that is brought against Partner in relation to any Subscription Services that Partner has resold, distributed or are using.

8. **Limitation of Liability**. Notwithstanding anything in the Partner Agreement to the contrary, except for NetApp's obligations regarding intellectual property infringement claims under the Partner Agreement or Partner's payment obligations under this Keystone Resale Attachment, the parties acknowledge and agree that for purposes of this Keystone Resale Attachment, each party's liability to the other party is limited to direct damages in an amount not to exceed THE GREATER OF: (a) THE TOTAL OF THE PARTNER FEES RECEIVED BY NETAPP UNDER THIS KEYSTONE RESALE ADDENDUM FOR THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE MOST RECENT EVENT GIVING RISE TO THE CLAIM(S), OR (b) ONE MILLION DOLLARS (USD 1,000,000). EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THE PARTNER PROGRAM AGREEMENT, NEITHER PARTY SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR INDIRECT DAMAGES (INCLUDING LOST PROFITS OR SAVINGS), EVEN IF SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF THE OCCURRENCE OF SUCH DAMAGES. THE PARTIES ACKNOWLEDGE AND AGREE THAT ANY AMOUNTS PAYABLE PURSUANT TO **SECTIONS 9.3(c), (d) and (e)** SHALL BE DEEMED DIRECT DAMAGES FOR PURPOSES OF THIS **SECTION 8**.

## 9. Assignment Option; Termination.

9.1 [RESERVED]

### 9.2 Assignment Upon End User Nonpayment.

(a) An "**Assignment Option**" is available to Partner where an End User refuses or otherwise fails to pay to Partner amounts owing for the Subscription Services under a Keystone Order, and such nonpayment continues uncured for more than ninety (90) days after the due date. Except as expressly permitted below, the availability of this Assignment Option shall have no effect on Partner's obligation (as described in **Section 3.1**) to pay the Partner Fees owing to NetApp with respect to such Subscription Services.

(b) With respect to any Keystone Order, no

Assignment Option may be exercised prior to the first anniversary of the Subscription Term (“**Lockout Period**”).

(c) Prior to exercising an Assignment Option, Partner shall have given timely written notice of any delinquency and opportunity to cure to End User (which notice and opportunity may be given at any time from the first date of delinquency) as may be required under the Keystone Order or applicable law.

(d) Subject to this **Section 9.2**, Partner may deliver written notice to NetApp requesting to exercise the Assignment Option with respect to the affected Keystone Order. Upon execution and delivery of a mutually acceptable assignment agreement to NetApp or any of its designees, and provided Partner has not breached its obligations to End User or to NetApp with respect to such Keystone Order or the applicable Partner Order (respectively), NetApp (or such designees) will (i) assume all collection, termination and other enforcement rights against End User under the Keystone Order and the End User Terms, subject to **Sections 9.3(c)** and **(e)** herein, and (ii) be entitled to exercise all available rights and remedies under applicable law, including without limitation any applicable insolvency and bankruptcy law.

(e) For purposes of collection rights, (i) Partner shall retain all collection rights with respect to amounts owing for the Subscription Services under a Keystone Order that Partner has paid to NetApp under **Sections 9.3(c)** and **(e)**; and (ii) NetApp shall have all collection rights with respect to all other amounts owing by End User under the Keystone Order for the Subscription Services.

(f) If Partner exercises the Assignment Option, then Partner shall only be obligated to pay (i) with respect to Keystone Orders that are invoiced monthly, the Partner Fees due and to become due through the period ending on the date of delivery of Partner’s notice to exercise the Assignment Option; or (ii) with respect to Keystone Orders that are invoiced annually, the Partner Fees due and to become due through the end of the twelve month billing period of such annual invoice.

**9.3 Effects of Termination.** In addition to the terms set forth in the Partner Agreement:

(a) Upon termination or expiration of the Partner Agreement, or any applicable Partner Order, all of Partner’s rights to resell Subscription Services herein shall immediately cease. Notwithstanding the foregoing, but subject to this **Section 9**, each party shall continue to provide services contemplated under this Keystone Resale Attachment to existing End Users for the remainder of such then current Subscription Term, which, if the Partner Agreement has already terminated, will not be renewable. Nothing in this Keystone Resale Attachment permits either Partner or NetApp to terminate any End User Terms for convenience.

(b) In the event of termination or expiration of a Partner Order, NetApp may also, in its sole discretion but

subject to End User’s rights, (i) cease the supply of the Subscription Services under any or all affected Partner Orders, (ii) suspend or terminate delivery of the Subscription Services, and terminate all rights to use the Subscription Software and related Documentation, (iii) enforce its rights against the End User under the End User Terms, as appropriate, and (iv) require End User to disable use of and/or access to the Subscription Products, and return or otherwise make available any Subscription Hardware provided by NetApp as part of the affected Subscription Services in the same condition as when originally delivered, ordinary wear and tear excepted. Upon termination or expiration of the Partner Order or the related End User Terms (other than upon exercise of the Assignment Option in accordance with **Section 9.2**), Partner will promptly direct End User, at NetApp’s request, to promptly comply with the conditions and obligations set forth in the End User Terms pertaining to the disposition of the Subscription Products.

(c) If NetApp terminates an applicable Partner Order for cause, or if NetApp terminates the related End User Terms for cause, Partner will promptly pay to NetApp: (i) any past due amounts; and (ii) the Partner Fees and any other amounts that are to become due for the remaining Subscription Term; and (iii) any amounts payable pursuant to **Section 9.3(e)**, if applicable. NetApp may, at its sole and absolute discretion, terminate Partner’s authority to provide the services as provided in **Section 3.3** upon termination by NetApp for cause as described in **Section 9.1**. If Partner exercises an Assignment Option pursuant to **Section 9.2(d)**, then Partner shall deliver to NetApp any and all related court filings, proofs of claim, business and legal correspondence, status reports, collection records and other applicable books and records concerning amounts owing for the Subscription Services under the Keystone Order (other than such amounts that Partner retains collection rights for), together with any related documentation held by Partner to enable NetApp to exercise its collection rights and to preserve its rights with respect to such amounts and its ownership interests in the related Subscription Products.

(d) If an End User terminates its End User Terms with NetApp for cause or insolvency (as permitted in such End User Terms), (a) Partner will promptly pay to NetApp any past due amounts and any Partner Fees that are due and payable through the effective date of such termination, and (b) Partner shall have no further obligation to pay any other Partner Fees or other amounts that are to become due for the remaining Subscription Term.

(e) Subject to the express terms in the Keystone Order permitting the retention of some or all of the Subscription Hardware, if End User fails to return the Subscription Hardware within 15 calendar days following the expiration or earlier termination of the Subscription Term or termination of the applicable End User Terms, then NetApp, in its sole discretion, may invoice Partner an amount equal to the greater of either: (A) the

Replacement Value Fee, or (B) the sum of the Partner Fees accruing until final return, which will not be less than the applicable Minimum Payment amounts payable immediately prior to the expiration of the Subscription Term or termination of the applicable End User Terms. Until the return of the Subscription Hardware as required in **Section 9.3(b)**, NetApp retains all of its rights and remedies in this Keystone Resale Attachment and the End User Terms, including the right to repossess the Subscription Hardware from such End User, and Partner shall on behalf of such End User be liable to NetApp for, and NetApp shall be entitled to charge Partner the Recovery Fee.

9.4 Cumulative Rights. All rights and remedies of the parties set forth in this Keystone Resale Attachment and the Partner Agreement (as applicable) shall be cumulative and shall not exclude any rights or remedies which they may have under any other agreement, by operation of law, or otherwise. No failure to exercise and no delay in exercising any right, remedy, power or privilege hereunder by any party shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

9.5 Survival. In addition to such terms that survive by their nature, the following Sections will survive termination or expiration of this Keystone Resale Attachment: **1, 3, 5, 6, 7, 8, 9 and 10**.

## **10. Miscellaneous.**

10.1 Assignment. Notwithstanding anything to the contrary in the Partner Agreement, Partner agrees that NetApp may sell, assign or otherwise transfer all or any part of its rights, title and interest in the Partner Fees under a Partner Order and/or the Subscription Products without notice to or the consent of Partner (but not its

obligations, duties or covenants thereunder, which shall remain with NetApp unless otherwise expressly agreed). Partner will, upon receipt of written notice from NetApp, pay the Partner Fees and such other amounts that may become due under a Partner Order directly to NetApp's assignee without abatement, deduction or set-off. Partner hereby waives its right to, and will not for any reason, assert any claim or right of set-off against NetApp's assignee. Partner hereby: (a) waives its right to, and will not for any reason, assert any claim or right of set-off against NetApp's assignee, and (b) acknowledges that such assignee of NetApp's interests will not be obligated to perform any duty, covenant or obligation of NetApp under such Partner Order.

10.2 General. This Keystone Resale Attachment, together with the Partner Order and the Partner Agreement: (a) represent the entire agreement and understanding between the parties with respect to the Subscription Products and Subscription Services; (b) supersede any previous communications, representations or agreements between the parties; and (c) prevail over any conflicting or additional terms in any quote, purchase order, acknowledgement, or similar communications between the parties. Except as otherwise provided for in this Keystone Resale Attachment, to the extent there is a conflict between the Partner Order and this Keystone Resale Attachment, or between the Partner Agreement and this Keystone Resale Attachment, this Keystone Resale Attachment will control. Partner Order(s) will be deemed to incorporate and be subject to this Keystone Resale Attachment, except where the parties expressly otherwise agree in writing. Each party will deliver to the other party such information, instruments and documents and will do all such things from time to time as the other party may reasonably request to carry into effect the provisions and intent of this Keystone Resale Attachment, and to comply with all applicable statutes and laws.

**PARTNER SPHERE AGREEMENT**  
**ATTACHMENT 4 - KEYSTONE FLEX SUBSCRIPTION (SELL TO) TERMS**

This Keystone Flex Subscription (Sell To) Terms Attachment (“**KFS Sell To Attachment**”) provides the additional terms and conditions regarding purchase and use of NetApp’s Subscription Services (as defined below).

**1. Definitions.** Capitalized terms used but not defined in this KFS Sell To Attachment have the meanings set forth in the Partner Agreement (including other Attachments).

1.1 “**Committed Capacity**” means the amount of data storage capacity that is specified in a Keystone Order. Committed Capacity is defined in the type of Performance Level and the units increments identified in the Service Description.

1.2 “**Consumed Capacity**” has the meaning set forth in the Service Description

1.3 “**Customer**” means Partner, subject to Section 5.3(a) herein.

1.4 “**Customer Information**” means any information provided by or on behalf of Customer, whether or not it includes Personal Information, that is uploaded onto or used with the Subscription Products.

1.5 “**Documentation**” means NetApp supplied technical documentation describing the features and functions of the Subscription Services.

1.6 “**Fees**” means the applicable fees set forth in a Keystone Order as further described in the Service Description.

1.7 “**Keystone Order**” means the customer order for Subscription Services entered into by the Parties under this KFS Sell To Attachment. A “Keystone Order” constitutes a “Purchase Order” under the Partner Agreement.

1.8 “**Keystone Terms and Conditions Website**” means <https://netapp.com/services/keystone/terms-and-conditions/> or a successor site.

1.9 “**Performance Level**” has the meaning set forth in the Service Description.

1.10 “**Portal**” means the web-based tool provided by NetApp through which usage of the Subscription Services can be monitored as further described in the Service Description.

1.11 “**Rate**” means the applicable rates set forth in a Keystone Order that are used to calculate the Fees.

1.12 “**Service Description**” means the applicable description for each Subscription Service as published on the Keystone Terms and Conditions Website (as may be updated from time to time) that apply to Customer’s use of the specific Subscription Service(s) ordered under a Keystone Order. The Service Description supersedes the terms of any end user license agreement that accompanies a Subscription Product.

1.13 “**Service Levels**” mean the applicable service levels described in the Service Description.

1.14 “**Subscription Hardware**” means hardware, including its components and spare parts, that is used by NetApp as part of the Subscription Services.

1.15 “**Subscription Product(s)**” means any part or all of the Subscription Hardware and Subscription Software used by NetApp as part of the Subscription Services, whether as part of the original configuration, or subsequently added in the ordinary course of NetApp’s performance of the Subscription Services.

1.16 “**Subscription Services**” means certain NetApp storage and/or compute capacity, together with any additional services, that are purchased under a Keystone Order and made available to Customer on a subscription basis as described in more detail in the Service Description. The “Subscription Services” constitute “Services” under the Partner Agreement.

1.17 “**Subscription Software**” means the software that is used by NetApp as part of the Subscription Services (whether delivered on or with Subscription Hardware or on a standalone basis).

1.18 “**Subscription Term**” means the use term specified in a Keystone Order, including any renewal or extension periods.

**2. Scope of Keystone Flex Subscription.** Subject to Customer’s compliance with the terms and conditions of this KFS Sell To Attachment, NetApp will provide Customer with the Subscription Services identified in each Keystone Order entered into by the Parties. At a minimum, each Keystone Order will set forth the Subscription Term, the Committed Capacity (including relevant minimum payments), the applicable Performance Level, and the applicable Rates. Keystone Orders may be modified or cancelled only with NetApp’s express written consent. Customer acknowledges and agrees that a Keystone Order is binding and sufficient for NetApp to calculate and invoice Customer for the related Fees. Purchase orders submitted by Customer may (but need not) be accepted by NetApp as an administrative accommodation to Customer, but will not be a necessary condition for invoicing.

**3. Delivery and Consumption of Subscription Services.**

3.1 Subscription Products. NetApp will determine the Subscription Products used to deliver Subscription Services. In making such determination NetApp may: (a) choose, substitute, and modify Subscription Product configurations; (b) configure, control, and direct the use of Subscription Products; (c) scale Subscription Services by adding or removing any part of the Subscription Products provided by NetApp to adjust to variations in utilization; and (d) refresh Subscription Products with new technology when reasonably deemed appropriate. Customer will cooperate with NetApp to enable the installation,



documentation, and utilization, of Subscription Products, including providing such access and authorization as is reasonably necessary to complete the installation. NetApp reserves the right to deinstall Subscription Products that NetApp deems unnecessary to fulfill the Service Level requirements at any time. Notwithstanding the foregoing, NetApp will have no obligation to meet the applicable Service Levels, nor add Subscription Products needed to meet such Service Levels, if Customer increases usage of the Subscription Services during the final 90 days of the Subscription Term, unless the Parties have agreed in writing to renew or otherwise extend the Subscription Term prior to or during such final 90 day period.

**3.2 Location and Use of Subscription Services.** Customer may only use Subscription Services (a) on the Subscription Products used by NetApp in connection with the applicable Keystone Order, and (b) at the specific physical location identified on a Keystone Order where the Subscription Products are installed and maintained, whether such location is owned by or under the control of Customer or any third party (each such location, a “**Customer Site**”). Unless otherwise expressly permitted in a Service Description or the applicable Keystone Order, Customer will not, nor will Customer permit any third party to, combine, commingle, or otherwise use the Subscription Services or the Subscription Products with any hardware storage products or services (including any NetApp hardware storage products or services supplied by NetApp under a separate Keystone Order or agreement).

**3.3 Changes to the Subscription Services.** The processes for adjusting the Committed Capacity and the Subscription Services are described in the Service Description.

**4. Fees and Payment Terms for Subscription Services.** NetApp will invoice Customer for Fees that Customer owes for Subscription Services purchased under each Keystone Order and incurred during the applicable billing period, and Customer will pay such Fees, as described in the Service Description.

## **5. Rights of Use for and Ownership of Subscription Products**

**5.1 Right to Subscription Products.** The Subscription Services provide Customer with the right to use Subscription Products, and do not transfer any ownership or title to Customer. The Subscription Services are provided to Customer for Customer’s use for internal business purposes and are not for resale or redistribution, except as expressly permitted in accordance with Section 5.3 (if applicable).

**5.2 Right to Subscription Software.** NetApp grants Customer a non-exclusive, non-transferable and revocable right to use the Subscription Software associated with the Subscription Services during the applicable Subscription Term. The Subscription Software may include software that is openly and freely licensed under the terms of a public license designated by a third party. Nothing in this KFS Sell To Attachment grants Customer rights that supersede those contained in an applicable license for the open source software.

## **5.3 Customer as Partner (if applicable).**

(a) Subject to the relevant Program Guide, the parties agree that Customer’s “business purposes” may include use of the Subscription Services for the delivery by Customer of the Subscription Services to Customer’s own end users (“End Users”). Except as otherwise provided herein, references to “Customer” in this KFS Sell To Attachment that by their sense and context are intended to apply to the ultimate beneficiary of the Subscription Services shall include the End User designated in the Keystone Order.

(b) As between NetApp and Customer, Customer shall at all times remain primarily liable for its obligations under any Keystone Order entered into pursuant to this KFS Sell To Attachment. However, where an End User is approved by NetApp, the following conditions apply:

(i) Customer may delegate to End User certain of Customer’s responsibilities under this KFS Sell To Attachment, the Service Description and the relevant Keystone Order, including without limitation those described in Sections 5, 6 and 9, and the Service Description;

(ii) For purposes of Section 9, Customer Information will include End User information; and

(iii) Customer is obligated to obtain prior written affirmation of the rights and remedies of NetApp under this KFS Sell To Attachment and any applicable Keystone Order from its End Users and any interested third parties. Customer must supply NetApp with copies of any applicable security procedures from such End Users and interested third parties prior to the Start Date, or as soon as reasonably practicable thereafter.

(c) Customer in its capacity as Partner may deliver certain portions of Subscription Services (or other services) to eligible End Users; provided that:

(i) Customer has attained the appropriate Services Certified track status as governed by the relevant Program Guide; and

(ii) Customer agrees to indemnify and hold NetApp, its officers, agents and employees harmless from any liability, loss or damage they may suffer as a result of claims, demands, costs or judgments against them arising out of the Subscriptions Services (or any other services) performed by Customer.

**5.4 Additional Restrictions.** In addition to restrictions set forth in this KFS Sell To Attachment, and, if applicable, subject to Section 5.3 (Customer in its capacity as Partner), Customer will not, nor will Customer permit any third party to: (a) relocate any of the Subscription Products from the Customer Site(s) without the prior written consent of NetApp, which consent will not be unreasonably withheld; (b) reconfigure, modify, add to or impair any portion of Subscription Products, whether with third party products or otherwise, except as expressly permitted in the Keystone Order or as mutually agreed in writing by the Parties; (c) publish or provide any benchmark or comparison test results that pertain to the Subscription Products or the Subscription Services; (d) reverse engineer, decompile or

disassemble the Subscription Products, or otherwise reduce Subscription Software to human-readable form except to the extent required for interoperability purposes under applicable laws or as expressly permitted in open source software licenses; (e) modify, adapt, or create a derivative work of the Subscription Products or the Subscription Services; (f) remove, conceal, or modify any identification, proprietary, intellectual property, or other notices in the Subscription Products and related documentation; (g) use the Subscription Products or Subscription Services in breach or excess of any limitations prescribed by NetApp in this KFS Sell To Attachment or the associated Keystone Order or related documentation; (h) use the Subscription Products or Subscription Services and related documentation to perform services for third parties in a service bureau, managed services, commercial hosting services, or similar environment, which shall include using Subscription Products or Subscription Services to provide a managed service to a U.S. federal government entity, a U.S. state or local government entity, or a U.S. public educational institution, unless otherwise agreed to in writing by NetApp; (i) assign or otherwise transfer, in whole or in part, Customer's licenses to the Subscription Services, the Subscription Products, or the related documentation to another party, unless otherwise agreed to in writing by NetApp; (j) use the Subscription Services or Subscription Products (i) in violation of laws or regulations, (ii) to violate the rights of others, (iii) to try to gain unauthorized access to or interrupt any service, device, data, account or network, or (iv) in high-risk, hazardous environments requiring fail-safe performance, including without limitation in the operation of nuclear facilities, aircraft navigation or control systems, air traffic control, or weapons systems, or any other application in which the failure of the Subscription Services or Subscription Products could lead to severe physical or environmental damages. Customer understands and acknowledges that the Subscription Services and the Subscription Products are not designed or intended for use in or in the design, construction, operation, or maintenance of a nuclear facility or similar hazardous environment. NetApp will not be liable for any damages resulting from such uses and Customer assumes the risk of any such uses.

**5.5 Risk of Loss; Title.** NetApp retains sole and exclusive title to the Subscription Products and all of its components. Customer is solely responsible for any loss or damage to the Subscription Products from the date of delivery to the date of final disposition of the Subscription Products as provided in Section 9.3(a) and the applicable Keystone Order. No such loss or damage will relieve Customer of any of its obligations under this KFS Sell To Attachment or the applicable Keystone Order.

## **6. Customer Responsibilities.**

**6.1 Ongoing Cooperation.** Customer will, at all times during the period from the date of delivery of any Subscription Products to the date of final disposition of such Subscription Products under Section 9.3(a) and the applicable Keystone Order: (a) promptly notify NetApp if the Subscription Products or any part of them are lost, stolen, destroyed or damaged beyond repair, or are the

subject of condemnation, confiscation, seizure or requisition of title to or use of the same; (b) ensure that the Subscription Products do not suffer any loss or damage caused, whether directly or indirectly, by Customer or any party acting by or through Customer; (c) permit NetApp to inspect the Subscription Products at any time during Customer's regular business hours, with reasonable prior notice, subject to Customer's reasonable security procedures; (d) promptly notify NetApp in writing of any proposed changes to any of the Subscription Products, or of changes caused by planned or unplanned events impacting Customer's environment (such as space, power, network, security, etc.) that may impact the Subscription Products (e.g., maintenance, upgrades); and (e) provide NetApp remote access to perform implementation and monitoring services beyond basic installation.

**6.2 Portal.** Customer will at all times during the Subscription Term keep the Portal remote client connection fully operational, without disabling, blocking, modifying or otherwise interfering with its functionality or its ability to communicate with NetApp. If the Portal does not function due to Customer interference or conflict with any third party products that Customer uses, then Customer will promptly remove the interference or the conflicting products. If Customer fails to do so within seven days of notice from NetApp of such failure, or if the Portal is unavailable because of the acts or omissions of Customer for more than 30 days, then NetApp may (i) suspend the provision of Subscription Services until the Portal operability is restored, or (ii) terminate the Subscription Services. In either event, Customer will owe and be invoiced for the Fees for the previous billing period, calculated by multiplying the applicable Rate by 120% ("**Holdover Rate**"), until active monitoring is restored or the Subscription Products are returned in accordance with Section 9.3(a).

## **7. Service Levels and Disclaimers.**

**7.1 Service Levels.** NetApp will provide the Subscription Services in accordance with the Service Levels.

**7.2 Disclaimer of Warranties.** NETAPP MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE SUBSCRIPTION PRODUCTS AND SUBSCRIPTION SERVICES PROVIDED UNDER THIS AGREEMENT. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAWS, NETAPP SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING. TO THE EXTENT PERMITTED BY APPLICABLE LAWS, THE SERVICE LEVEL REMEDIES SET FORTH IN THE SERVICE DESCRIPTION ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES FOR ANY FAILURE ON BEHALF OF NETAPP TO PROVIDE THE SUBSCRIPTION PRODUCTS AND THE SUBSCRIPTION SERVICES IN ACCORDANCE WITH THE SERVICE LEVEL COMMITMENTS SET FORTH THEREIN.

## 8. Intellectual Property Rights and Protection.

8.1 General. NetApp and its licensors reserve and retain all rights, title, and interest (including any intellectual property rights therein) in and to the Subscription Services and Subscription Products not expressly granted to Customer.

8.2 IP Claims. For purposes of IP Claims (as defined in the Partner Agreement), Subscription Services are included in the definition of Covered Products.

## 9. Termination.

9.1 Termination for Cause. In addition to the termination rights described in the Partner Agreement, NetApp may terminate the applicable Keystone Order if: (a) Customer fails to pay any of the Fees or other amounts when due, and such failure continues for a period of 10 days after delivery of notice in respect of such late payment; (b) Customer becomes insolvent, files, or has filed against it a petition under applicable bankruptcy or insolvency laws which is not dismissed within 90 days, proposes any dissolution, composition or financial reorganization with creditors, makes an assignment for the benefit of creditors, or if a receiver, trustee, conservator, liquidator or similar agent is appointed or takes possession with respect to any property or business of Customer; or (c) Customer experiences any material change in control, where the term "control" means the power to direct the management and policies of Customer, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise.

9.2 Effects of Termination. In addition to the terms set forth in the Partner Agreement:

(a) Upon termination or expiration of this Partner Agreement, or any applicable Keystone Order, Customer will: (i) promptly discontinue use of, and delete, all data uploaded on the Subscription Products by Customer within the affected Subscription Services; and (ii) return in accordance with the guidelines provided or otherwise make available to NetApp any Subscription Hardware provided by NetApp as part of the affected Subscription Services in the same condition as when originally delivered, ordinary wear and tear excepted. Customer must either (1) be responsible for erasing, without destroying or damaging the storage media, all Customer Information from the Subscription Hardware before it is returned to NetApp or (2) if Customer has purchased the Non-Returnable Disk ("NRD") option, it will not return defective or failed disks solid state drives and other non-volatile memory components as defined on the NetApp Support Site that are part of the Subscription Hardware. Customer will retain such non-volatile components and remain solely responsible for their disposal or destruction and will promptly deliver a certificate of destruction certifying that Customer has destroyed or disabled such components. Customer agrees that if components covered by the NRD option are returned to NetApp, NetApp shall have no obligation or liability whatsoever associated with any data remaining on such components. NetApp will treat such components like other returned parts and convey them into the NetApp supply chain for repair and/or destruction. Failure to return the Subscription Hardware within 15

calendar days following the expiration of the Subscription Term in accordance with the guidelines provided to Customer will entitle NetApp, in its sole discretion, to invoice Customer for (A) the cost of the replacement for such Subscription Hardware, calculated in accordance with NetApp's then current price list, or (B) the Fees accruing (at the Holdover Rate) until final return. For purposes of (B) in the previous sentence, the Fees will not be less than the applicable minimum payment amounts payable immediately prior to the expiration of the Subscription Term. Customer must also, at NetApp's request, promptly return or destroy all copies of the Subscription Software and related Documentation, including any license enablement keys, in Customer's possession or under Customer's control, with all Customer Information or proprietary and confidential information removed. Customer acknowledges that any Customer Information remaining on any Subscription Hardware returned to NetApp may be disposed of or destroyed by or on behalf of NetApp without any liability to NetApp, and NetApp disclaims all liability for the removal or for the protection of any such Customer Information. All Customer use of the Subscription Services after the scheduled expiration of the Subscription Term will be subject to Fees calculated and billed at the Holdover Rate until the return of all related Subscription Products to NetApp.

(b) In the event of termination or expiration of a Keystone Order, NetApp may also, in its sole discretion, (i) cease the supply of the Subscription Services under any or all affected Keystone Orders, (ii) suspend or terminate delivery of the Subscription Services, and terminate all rights to use the Subscription Software and related documentation, (iii) recover NetApp's reasonable costs of deinstallation and repossession of the Subscription Hardware and any costs associated with any damage or loss of Subscription Hardware that occurred while in Customer's possession, and (iv) require Customer to disable use of and/or access to the Subscription Products, and return the Subscription Products in accordance with this Section 9.2.

(c) If NetApp terminates an applicable Keystone Order for cause under Section 9.1, Customer will promptly pay to NetApp: (i) any past due amounts; (ii) the Fees that are to become due for the remaining Subscription Term; (iii) NetApp's reasonable costs of deinstallation and repossession of the Subscription Hardware; and (iv) any costs associated with any damage or loss of Subscription Hardware that occurred while in Customer's possession.

9.3 Survival. In addition to such terms that survive by their nature, the following Sections will survive termination or expiration of this Partner Agreement: **Error! Reference source not found.**, 3.2, 3, 5.4, 6.1, 7.2, 7, 9.1, 9.2, and 10.

## 10. Miscellaneous.

10.1 Assignment. Notwithstanding anything to the contrary in the KFS Sell To Attachment, Customer agrees that NetApp may sell, assign or otherwise transfer all or any part of its rights, title and interest in a Keystone Order, the Fees and/or the Subscription Products without notice to or the consent of Customer. Customer will, upon receipt of written notice from NetApp, pay the Fees and such other



amounts that may become due under a Keystone Order directly to the NetApp's assignee without abatement, deduction or set-off. Customer hereby waives its right to, and will not for any reason, assert any claim or right of set-off against NetApp's assignee. Customer acknowledges that such NetApp assignee will not be obligated to perform any duty, covenant or obligation of NetApp under such Keystone Order.

10.2 General. The Partner Agreement, together with the Keystone Order and this KFS Sell To Attachment (a) represent the entire agreement and understanding between the Parties with respect to the Subscription Products and Subscription Services; (b) supersede any previous communications, representations or agreements between the Parties; and (c) prevail over any conflicting or additional terms in any quote, purchase order, acknowledgement, or similar communications between the Parties. Except as otherwise provided for in this KFS Sell To Attachment, to the extent there is a conflict between the Keystone Order and this KFS Sell To Attachment, this KFS Sell To Attachment will control. Keystone Order(s) will be deemed to incorporate and be subject to this KFS Sell To Attachment, except where the Parties expressly otherwise agree in writing. Customer will deliver to NetApp such information, instruments and documents (including waivers from third parties with ownership or possessory interests in real property upon which the Subscription Products may be located) and will do all such things from time to time as NetApp may reasonably request to carry into effect the provisions and intent of this KFS Sell To Attachment, and to comply with all applicable statutes and laws.

10.3 The parties agree that for purposes of this KFS Sell To Attachment, Your approved territory is the "Territory," as defined in relation to You in the current Partner Sphere Program Guide, provided that the Subscription Services are available in such Territory. You acknowledge that NetApp Subscription Services are not available in all countries and/or regions, including in Your Territory, and that prior to providing a quotation to an End User, Partner should confirm availability of the Subscription Service in the relevant country or region with a NetApp representative first. The parties acknowledge that the provision of Subscription Services to Customer or to any Affiliate of Customer in various national jurisdictions outside the foregoing Territory or Territories may be subject to starkly varying costs, tax and/or customs and tax law risks as well as political risks. This Agreement will only apply to the provision of Subscription Services in such other jurisdictions if the parties have executed a jurisdiction-specific amendment, such amendment to appear either within the applicable *Keystone Order* or in a separate writing in the form of a participation agreement or as otherwise mutually agreed.

**APPENDIX 1**  
**U.S. GOVERNMENT END USER RIDER**

This Rider applies only to Customer's that have entered a Partner Agreement with NetApp U.S. Public Sector, Inc., to which this KFS Sell To Attachment is incorporated by reference, and Your Territory includes U.S. Federal Government End Users.

The parties agree that the following provisions shall apply to U.S. Government End Users that purchase Subscription Services via Customer:

1. Termination for convenience:  
End User may terminate for convenience at any time, upon thirty (30) day prior written notice and shall be subject to payment in full of (A) any past due amounts and (B) the Fees that are due and to become due for the remaining Subscription Term.
2. Non-Appropriation:  
If sufficient funds are not appropriated to make payments for Fees required under a Keystone Order, such Keystone Order shall terminate and End User shall not be obligated to make payments under such Keystone Order beyond the then current fiscal year for which funds have been appropriated. Upon the occurrence of such non-appropriation (an "**Event of Non-Appropriation**") End User shall, no later than the end of the fiscal year for which payments have been appropriated, deliver possession of the Subscription Products under such Keystone Order to NetApp. If End User fails to deliver possession of the Subscription Products to NetApp upon termination of such Keystone Order by reason of an Event of Non-Appropriation, the termination shall nevertheless be effective but End User shall be responsible for the payment of damages in an amount equal to the portion of payments thereafter coming due that is attributable to the number of days after the termination during which the End User fails to deliver possession and for any other loss suffered by NetApp as a result of End User's failure to deliver possession as required.
3. The Extensions/Renewals Section of the form of Keystone Order shall be removed in its entirety. The Subscription Term can only be extended in writing by the Parties.

All other terms of this KFS Sell To Attachment remain in full force and effect and shall be passed to U.S. Government End Users by Customer.

**APPENDIX 2**  
**STATE, LOCAL GOVERNMENT AND HIGHER EDUCATION END USER RIDER**

This Rider applies only to Customer's that have entered a Partner Agreement with NetApp U.S. Public Sector, Inc., to which this KFS Sell To Attachment is incorporated by reference, and Your Territory includes SLED End Users. The parties agree that the following provisions shall apply to SLED End Users that purchase Subscription Services via Customer:

1. Non-Appropriation:

If sufficient funds are not appropriated to make payments for Fees required under a Keystone Order, such Keystone Order shall terminate and End User shall not be obligated to make payments under such Keystone Order beyond the then current fiscal year for which funds have been appropriated. Upon the occurrence of such non-appropriation (an "Event of Non-Appropriation") End User shall, no later than the end of the fiscal year for which payments have been appropriated, deliver possession of the Subscription Products under such Keystone Order to NetApp. If End User fails to deliver possession of the Subscription Products to NetApp upon termination of such Keystone Order by reason of an Event of Non-Appropriation, the termination shall nevertheless be effective but End User shall be responsible for the payment of damages in an amount equal to the portion of payments thereafter coming due that is attributable to the number of days after the termination during which the End User fails to deliver possession and for any other loss suffered by NetApp as a result of End User's failure to deliver possession as required.

All other terms of the KFS Sell To Attachment remain in full force and effect and shall be passed to SLED End Users by Customer.