



PARTNER SPHERE TERMS OF PARTICIPATION (COMMERCIAL – CHINA JV)

These **Partner Sphere Terms of Participation** are 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 the Partner Sphere Terms Of Participation, inclusive of all Program Guide(s) (as defined herein), Attachments and subsequent amendments (collectively “Program Terms”) and (b) the Program Terms expressly supersede and replace 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 these Program Terms without the prior written consent of NetApp.
- 1.4. The Program Terms exclusively govern Your participation in the NetApp Partner Sphere Program, which includes Your resale of NetApp Products and Services, and do not apply to nor govern Your purchase and use of NetApp Products or Services.

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 these Program Terms. At all times pertinent hereunder, the current, governing version of each Program Guide shall be available to You at partnerhub.netapp.com. Together, each such Program Guide and these Program Terms 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.

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”):

<u>Attachment:</u>	<u>Description / Application:</u>
Resale Terms	Terms governing the resale of NetApp Products, whether purchased direct from NetApp or through a NetApp authorized Distribution Partner

- 3.2. 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 these Program Terms 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

- 4.1. 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/cours000000000044163?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 these Program Terms 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, You will need to restart the application process 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>.

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 these Program Terms. The Receiving Party agrees to disclose the Disclosing Party's Confidential Information only to those employees, agents or subcontractors who have a need to know in furtherance of these Program Terms 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 these Program Terms; (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. The following Sections will survive termination of these Program Terms in accordance with the terms set forth herein: Section 5 (Intellectual Property), Section 6 (Confidential Information), Section 8 (Indemnification) Section 9 (Compliance with Laws), and Section 10 (General). In addition, any sections of the Program Terms which, upon a plain reading, are intended to survive termination or expiration of the Program Terms, will survive such termination or expiration.

8. INDEMNIFICATION

- 8.1. If a claim for infringement of any third party's patent, trademark or copyright is brought against You in relation to Your resale and/or distribution of NetApp Products and Services hereunder, 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.
- 8.2. 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 Program Terms; (b) any Partner service or Partner Service Provider Offering; or (c) any false, misleading or otherwise unauthorized statements or representations.

9. COMPLIANCE WITH LAWS

- 9.1. NetApp and Partner each 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 or End User, 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 these Program Terms. 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 these Program Terms. 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 or its independent accountants the right to audit and verify Your compliance with these Program Terms and Your role and obligations as a NetApp Partner, upon reasonable advance notice, but in no event less than fourteen (14) calendar days written 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. Neither Partner nor NetApp (including its suppliers or subcontractors) shall be liable to the other 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 these Program Terms;

10.2.1.2. Each Party's liability 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. The limitations in Section 10.2 do not apply to claims, or 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) indemnification claims described in Section 8.

10.3. Updates. You agree that, from time to time, NetApp may modify and/or update the Partner Sphere Terms of Participation, and, at least once annually (without prior notice to You), the Program Guides ("Updates"). The current Partner Sphere Terms Of Participation will be available to You at <https://partnerhub.netapp.com/s/partner-sphere-terms-of-participation>, and the current Program Guide(s) will be available to You at partnerhub.netapp.com. NetApp shall use commercially reasonable efforts to provide thirty (30) day notice of changes to the Partner Sphere Terms of Participation, at <https://partnerhub.netapp.com/s/partner-sphere-terms-of-participation>. At any pertinent time hereunder, the then current, posted version of the Program Terms shall be the controlling version of the Program Terms.

- 10.4. Notices.** Except as specifically stated, all notices or other communications required or permitted under these Program Terms 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. 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. These Program Terms, 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 these Program Terms or any Order.
- 10.7. Entire Agreement/Amendments.** Except for NetApp Updates, these Program Terms 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 these Program Terms (where translated for local requirements), the English version of these Program Terms will govern, to the extent permitted by applicable laws. This Program Terms, 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 these Program Terms, 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 these Program Terms. Any use of the

word “including” in these Program Terms will not be deemed to limit the meaning of the preceding word or phrase. Each party has been given the opportunity to independently review these Program Terms 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 these Program Terms, 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.

Channel End User Terms means the exclusive terms and conditions governing an End User’s use of NetApp Products and/or Services available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>.

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, available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/>.

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 these Program Terms, 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 End User, 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.

Keystone Storage-as-a-Service means NetApp’s proprietary data storage capacity, paid for by End Users on a consumption basis.

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, Keystone Storage-as-a-Service, 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 TERMS OF PARTICIPATION RESALE TERMS ATTACHMENT

This Resale Terms Attachment to the Program Terms 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 partnerhub.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.

2.3. Partner will only submit an Order for Products or Services once the End User has submitted a corresponding binding purchase order to Partner first.

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 the NetApp Products and/or

Services are EXCLUSIVELY subject to and governed by the applicable 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 ("Pass Through Requirement"). 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 these Program Terms 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.