

APEX Reseller Agreement

Last Updated: December 14, 2022

This APEX Reseller Agreement (the “**Agreement**”) applies to the Dell Technologies “**APEX**” branded service (“**APEX Service**”) ordered on the Dell Technologies APEX Console (“**APEX Console**”) by you on behalf of your company, (“**Purchaser**”, “**You**”) from the Dell Technologies entity which invoices Purchaser for the APEX Service (“**Dell**”). By clicking “I agree” or otherwise accepting the Agreement in the APEX Console: **Purchaser agrees to be legally bound by the Agreement; and you represent to Dell that you are authorized to agree to the Agreement on behalf of Purchaser.** The “**Effective Date**” of the Agreement is the earlier of the date Purchaser accepted the Agreement or the date Customer first used the APEX Service.

1. **Definitions.**

“**Affiliate**” means (a) with respect to You, any other entity that directly or indirectly controls, is owned by, controlled by or under common ownership or control with You; and (b) with respect to Dell means Dell Inc. and its wholly-owned or wholly-controlled subsidiaries. “Control” means more than 50% of the voting power or ownership interests.

“**APEX Agreement**” means the agreement that applies to a Customer’s access, and use of the APEX Service, including the applicable Service Offering Description, and which is agreed to directly between Customer and Dell. The APEX Agreement can be found at <https://www.dell.com/apexagreement>.

“**APEX System**” means the Dell branded IT hardware (“**Equipment**”) and/or software (including microcode, firmware, operating systems, or applications) (“**Software**”) which are used to operate the APEX Service. References to the APEX Service include the APEX System.

“**Colocation Site**” means, where applicable, (a) Your Site, if the Customer ordered this Colocation Site option from You, or (b) a third-party data center Site, if the Customer ordered a Colocation Site option offered by Dell, You, or another service provider.

“**Content**” means data (including all text, sound, video, and image files), software (including machine images), and other information.

“**Customer**” means the entity that purchases the APEX Service from You for its own internal business purposes and not for resale.

“**Customer Content**” means Content Customer or End Users load or use on the APEX Service. Customer Content does not include configuration, performance, and/or usage data that Dell collects in connection with the APEX Service.

“**End Users**” means Customer’s customers or other third parties to whom Customer may provide a service using the APEX Service.

“**Order**” means Your order for the APEX Service in the APEX Console that is confirmed by Dell. You place orders by clicking “Place Order”, “I agree”, “I accept” or otherwise accepting during an online ordering process in the APEX Console. Confirmation of Orders is described in Clause 4.1.A (Order Confirmation).

“**Service Level Agreement**” or “**Service Level Objective**” means the then-current version of Dell’s performance commitments for the APEX Service. If applicable, these will be provided in the Service Offering Description.

“**Service Offering Description**” means the then-current version of the Dell document that describes the APEX Service You ordered. If there is no separate Dell document, the description in the APEX Console will apply.

“**Site**” means the location where the APEX System is installed. Unless Customer ordered the Dell offered Colocation Site option, the Site will be either Customer premises or the Colocation Site. You will provide Dell with the required Site information.

“**Subscription Term**” means the period of each APEX Service in Your Order, and any renewals. The initial Subscription Term begins as specified in the Order and/or the Service Offering Description.

“Third-Party Claim” means any third-party allegation, claim, action, demand, or lawsuit arising from or relating to: (a) Customer Content created, managed, accessed, or modified by You or Third-Party Products; (b) Your use of any APEX Service in violation of the Agreement; (c) Your misrepresentation of facts regarding an export license or any allegation made against Dell, including our Affiliates, due to Your violation or alleged violation of applicable export laws or other provisions of Clauses 16.2 (Trade Compliance) and 16.3 (Your Responsibility); (d) Your combination of the APEX Service with non-Dell products or Content, including any Customer Content and/or any Third-Party Products; or (e) Your infringement or misappropriation of Dell or Dell Affiliates’ or third parties’ intellectual property rights.

“Third-Party Products” means hardware, software, products, or services that are not Dell-branded. Third-Party Products are not embedded components of the APEX Service.

2. The APEX Service.

2.1 Scope; Right to Resell.

A. The Agreement applies to the APEX Service You ordered on the date You accepted the Agreement. The Agreement will also apply to subsequent Orders for additional services, features, functionality, and capacity for that same APEX Service during the Subscription Term (**“Subsequent Order”**). Orders for other separate APEX Services will be governed by the Agreement then in effect and accepted by You at the time of the separate Order. The Agreement does not apply to any other Dell products and services You purchase and resell pursuant to a separate resale agreement with Dell (each an **“Existing Reseller Agreement”**). The Agreement shall not be deemed to modify, supersede, or amend any Existing Reseller Agreement, and any Existing Reseller Agreement shall not apply to Your purchase and resale of the APEX Service.

B. Subject to the terms and conditions of this Agreement, You shall have the right to resell the APEX Service You ordered in the United Kingdom to the Customer identified in the Order (the **“APEX Resale Right”**). You shall cause such resale to be described in a contract separately executed between You and the Customer (the **“Customer Agreement”**). You shall not market, resell, or distribute the APEX Service (i) to any Customer outside the United Kingdom; or (ii) to any consumers without Dell’s prior written approval. You shall not market, resell, distribute, or use the APEX Service other than as expressly permitted in this Agreement.

C. You shall ensure that the Customer Agreement, at a minimum and without contradiction, contains provisions that: (i) specify the APEX Service being ordered pursuant to this Agreement and that the applicable warranties, licensing, and use terms for such APEX Service are consistent with those provided in the APEX Agreement; (ii) are sufficient to enable Dell to access the Site to provide any warranty maintenance or support services, monitor and measure the APEX Service as described in this Agreement and the Service Offering Description, and to take possession of the APEX Service in the event of any termination of, or default under, the Customer Agreement, the APEX Agreement, or this Agreement; and (iii) name Dell as a third party beneficiary to the Customer Agreement; (iv) state the Customer’s obligation to pay You for the APEX Service is unconditional by explicitly stating such obligations are “absolute, unconditional and non-cancellable and shall not be subject to any abatement, reduction, set off, defense, delay or counterclaim for any reason whatsoever”; (v) allow disclosure of the Customer Agreement to Dell, its affiliates and funding partners; and (vi) are sufficient to satisfy Your obligations contained herein including but not limited to those obligations to include certain provisions in the Customer Agreement, and those obligations to ensure Customer’s agreement, compliance and/or cooperation, throughout this Agreement. You shall indemnify Dell from any damages or liability which arise from Your failure to meet the requirements of this Clause 2.1.C.

2.2 Site Options and Requirements.

A. **Dell Colocation Site.** If You Ordered a Dell offered Colocation Site option (where available), then (a) Dell will be responsible for arranging hosting of the APEX System in an appropriate data center environment; and (b) the following clauses of the Agreement will not apply: Clause 4.5 (Shipment), Clause 4.6 (Title to APEX System), Clause 4.7 (Risk of Loss), Clause 4.8 (Reseller Insurance Coverage), Clause 4.9 (Bankruptcy Rights), Clauses 6.4.A(b) (Generally) and 6.4.B (Additional Recovery Rights), and Clause 7.2 (Site Access).

B. **Non-Dell Colocation Site.** If You locate the APEX System at a non-Dell provided Colocation Site, including Your Colocation Site, then You and Customer will be responsible for ensuring that Dell has the level of access to the non-Dell provided Colocation Site required in Clause 7.2 (Site Access). You agree to hold Dell harmless from and against any and all disputes, claims or controversies (whether in contract, tort (including negligence) or otherwise) resulting from Customer

locating the APEX System at a non-Dell provided Colocation Site.

C. **Landlord Waiver.** If requested by Dell, You will arrange (or You will ensure that Customer arranges) for Customer Site landlord to sign a landlord waiver agreement confirming Dell's ownership of the APEX System and Dell's right to access the APEX System in connection with the APEX Service and this Agreement.

2.3 **Service Offering Description.** The scope and details of the APEX Service, including the Colocation Site option if ordered from Dell, are provided in the Service Offering Description. For purposes of this Agreement and the APEX Service You order, for pricing, billing, and ordering (including without limitation, expansion and add-ons) and cancellation purposes, references to "Customer" in the Service Offering Description shall mean You.

2.4 **Use and Ownership of the APEX Service.**

A. You may access and use the APEX Service only (i) as necessary to exercise the APEX Resale Right and (ii) as otherwise permitted by the Customer, subject to Customer's rights to grant any such access and use as provided in the APEX Agreement.

B. Customer may access and use the APEX Service only as provided in the APEX Agreement.

C. If Dell believes a problem with the APEX Service is caused by, or results from, Customer Content, or Your or Customer's use of the APEX Service, then You agree to cooperate with Dell in order to identify and resolve the problem.

D. You agree that Dell owns all rights, titles, and interests in and to the APEX Service and all improvements, enhancements, modifications, and derivative works, and all intellectual property rights in all of these. Your rights to use the APEX Service are limited to those specifically stated in writing in the Agreement. You agree that You do not have any other implied rights in, or to, the APEX Service. Dell reserves all rights not granted to You in the Agreement.

3. **Modifications.**

3.1 **Generally.** Dell may modify the APEX Service from time to time. Modifications may include optional new features for the APEX Service, which Customer may use subject to the then-current Service Offering Description or changes to components of the APEX System. Dell will inform You and Customer of material modifications, including their effective date, either by email, through the APEX Console, or directly through the APEX Service. Customer's continued use of the APEX Service after the date of any modification will be considered as Customer's acceptance of the modified APEX Service.

3.2 **Material Modifications.**

A. **Option to Terminate.** If Dell removes a material feature or materially reduces the functionality of the APEX Service, then You will have the right to terminate the Order for the APEX Service if Customer chooses to terminate its order for the APEX Service with You by notifying Dell within 30 days from the date of Dell's modification notice. If You elect to terminate that Order, then termination occurs on: (a) the date Dell receives Your notice of termination; or (b) any later date You specify in Your notice (though this date must not occur more than 90 days after the date Dell receives Your termination notice).

B. **Right to Refund.** You remain responsible for the payment of all fees incurred through the termination date. Dell will promptly refund any prepaid fees for the APEX Service that will not be provided as a result of the termination by You under Clause 3.2.A (Option to Terminate). You are not entitled to any other remedies once You are in receipt of the refund from Dell.

4. **Orders, Payment, Shipment, Title, Risk, and Insurance.**

4.1 **Orders.**

A. **Order Confirmation.** Your Orders are subject to Dell's confirmation. An Order is confirmed upon the earlier of: (a) Dell's written confirmation; or (b) as otherwise provided in the Service Offering Description. Dell is not required to provide the APEX Service until (i) You have provided all information Dell needs to process the Order and provision the APEX Service and (ii) the Customer has agreed to the APEX Agreement. Unless otherwise stated in the Agreement, all Orders are non-refundable and non-cancellable.

B. Payment of Fees. You must pay all APEX Service fees Customer incurs. Fees may consist of a committed amount as well as additional amounts, including fees for add-on features that You order or You or Customer enable, and fees based on actual usage of the APEX Service. Prior to placing an Order, You must establish a method of payment to cover all fees.

C. Credit Card Payments. If You pay for the APEX Service using a credit card (to the extent available), then: (a) You authorize Dell to periodically charge Your credit card for the APEX Service fees; (b) You will be subject to any additional terms presented to You by the third-party credit card payment processor (which will be the merchant of record for that transaction); and (c) You are responsible for keeping Your credit card information up to date. You agree that Dell may request that Your credit card payment issuer pre-authorize and hold an amount equal to the next recurring fee (or an estimate if the fee is variable) for the APEX Service in advance of its due date.

D. Additional Fees. You agree that Dell may invoice You for fees even if a corresponding purchase order was not received from You.

E. Customer Evidence. Dell may request, and You agree to provide, evidence (excluding confidential terms and pricing) that a final binding purchase order has been placed by the Customer for the APEX Services being ordered. Your submitted evidence will be subject to Dell's approval and will not include letters of intent, purchases conditional on a future event, internal distributor documentation, or awards of public tender offers.

4.2 Payment Terms. Except for credit card payments charged by Dell on the invoice date, You must pay all APEX Service fees within the time period noted on Dell's invoice or, if not noted, then within 30 days from the date of invoice, subject to maintaining credit approval with Dell, and in the currency agreed in the Order. Interest on late payments will accrue after the due date at the lesser of 1.5% per month or the highest lawful rate. If You default on payments for the APEX Service, then Dell may suspend the APEX Service until such time as all payments due and owing are paid in full.

4.3 Taxes. The fees invoiced for the APEX Service are exclusive of all taxes (including VAT, sales, use, or other equivalent taxes), governmental fees, levies, customs, and duties resulting from Your Order (other than taxes on Dell's income or employees). If Dell is required to collect and remit any taxes, then Dell will add the appropriate amount to Your APEX Service invoices as a separate line item. You agree to pay the taxes to Dell in addition to the APEX Service fees. If You are tax exempt, You must promptly provide a valid tax exemption certificate or other appropriate proof of exemption at the time of onboarding to the APEX Console. If You are required to withhold taxes, You will: (a) provide Dell with 10 days' notice of intent to withhold taxes and the applicable withholding tax rate based on local tax laws and relevant tax treaties; (b) provide Dell with satisfactory evidence (e.g., official withholding tax receipts) of withheld taxes within 60 days from the date You remitted them to the applicable tax authority.

4.4 Invoice Errors. If You find a material error in an invoice, then You must notify Dell in writing within 10 days from its receipt. Any amounts Dell and You both agree in writing to correct must be paid before the later of: (a) 14 days following the date of Dell's corrected invoice; (b) the original due date; or (c) the due date as provided in the corrected invoice. If You withhold payment on the basis that an invoice is incorrect and Dell finds that the amount is accurate, then You must pay interest on the unpaid disputed amount from the invoice due date until Dell receives payment. You may not offset, defer, or deduct any invoiced amounts that Dell determines are correct following completion of this process.

4.5 Shipment. Dell will ship the APEX System to the Site when included as part of the APEX Service. The terms and process for shipment and delivery of the APEX System will be stated in the applicable Service Offering Description.

4.6 Title to APEX System. Dell owns all rights, title, and interest in the APEX System (including any replaced parts), and the APEX System must be returned to Dell at the end of the Subscription Term (or promptly upon replacement with respect to replaced Equipment or parts). The APEX System will be identified as Dell's and You or Customer will not remove, cover, or alter plates, labels or any other markings placed upon the APEX System by Dell. The APEX System is NOT subject to any of the liens and security interests of Your or Customer's lender(s). Further, You or Customer cannot use the APEX System as collateral for a loan or as security against any debt. You will immediately notify Dell in writing if Your lenders or creditors or other third parties claim any rights to, or seek to take possession of, the APEX System.

4.7 Risk of Loss. As between Dell and You, the entire risk of loss, theft, damage or destruction of the APEX System transfers to You upon Dell's delivery of such to the Site until the time the APEX System is returned to Dell. If any loss, theft, damage or destruction to the APEX System occurs during the time You bear such risk, Dell shall be relieved of its APEX Service obligations to the extent such event impacts Dell's ability to provide such APEX Service until such time as the APEX System is repaired or replaced. Charges shall continue to accrue during this period of such interruption. If the APEX System

is materially damaged, stolen or destroyed, You shall ensure Dell is promptly notified.

4.8 **[Reserved]**

4.9 **Bankruptcy Rights.** If this Agreement is determined to be anything other than a services agreement from Dell to You, then You grant Dell a first priority security interest in the APEX System (and all proceeds thereof) and Dell retains the first lien and security interest in the APEX System and all proceeds. You agree that Dell may file protective documents with government or other authorities in Your jurisdiction of incorporation or other applicable locations in order to inform third parties and lenders that Dell owns the APEX System at the Site.

4.10 **Financial Statements.** You agree to furnish Your and/or Customer's financial statements (prepared in accordance with generally accepted accounting principles) and other financial information, relating to the Agreement within five (5) business days as Dell may from time to time reasonably request and subject to the applicable confidentiality terms as provided for in the Agreement.

4.11 **Reseller Pricing.** You are free to determine and set your resale pricing to the Customer of the APEX Service.

5. **Suspension.**

5.1 **Generally.** Dell may suspend all APEX Services subject of a current Order if: (a) You are in material breach of the Agreement (including failure to pay invoices when due) and have not cured that breach within 10 days from Dell's notice (or such other period as may be specified in the notice); (b) Customer is in material breach of the APEX Agreement and has not cured that breach within 10 days from Dell's notice (or such other period as may be specified in the notice); or (c) with immediate effect if You or Customer breach Dell's [Acceptable Use Policy](#), including all Dell updates to the Acceptable Use Policy during the Subscription Term ("**AUP**"). Dell will give You notice before suspending the APEX Service(s) if permitted by law, unless Dell reasonably believes that providing notice presents a risk of harm to the APEX Service(s), to other users of the APEX Service(s), or to any person or property, in which case, Dell will notify You as soon as feasible or permitted. Dell will promptly reinstate the APEX Service(s) once Dell agrees that the issue(s) causing the suspension has been resolved.

5.2 **Effect of Suspension.** You must pay all applicable fees incurred before and during any suspension. You will not be entitled to any service credits under an applicable Service Level Agreement or Service Level Objective during any suspension.

5.3 **Termination for Suspension.** If Dell has the right to suspend the APEX Service(s) under Clause 5.1(c) (Suspension - Generally), then Dell also has the right to terminate the APEX Service(s): (a) immediately upon written notice to You in the event of a breach of the AUP; or (b) as provided under Clause 6.2(c) (Termination) provided that the 30 day cure period is considered to start from the date of Dell's first notice under Clause 5.1(a) or Clause 5.1(b) (Suspension, Generally).

6. **Term and Termination.**

6.1 **Agreement Term.** This Agreement commences on the Effective Date and continues until terminated in compliance with this Clause.

6.2 **Termination.** You may only terminate the Agreement as authorized in this Agreement. Either party may terminate the Agreement for cause, if: (a) the other party becomes insolvent, admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors; (b) the other party becomes subject to control of a trustee, receiver, or similar authority, or to any bankruptcy or insolvency proceeding; (c) the other party commits a material breach of the Agreement and has failed to cure the breach within 30 days from the other party's written notice; or (d) if (i) Customer has terminated the APEX Agreement solely due to Dell's material breach of Dell's warranty obligations under the APEX Agreement; and (ii) such material breach and resulting termination has been confirmed in writing by Dell.

6.3 **[Reserved]**

6.4 Effects of Termination.

A. **Generally.** When the APEX Service expires, terminates, or is rejected for any reason, You must: (a) stop using the APEX Service and ensure the Customer stops using the APEX Service; (b) ensure that Customer returns the APEX System in compliance with the Service Offering Description, or if the Service Offering Description requires Dell to recover the APEX System, then You will ensure that Customer provides Dell with prompt access to the Site or Colocation Site to recover the APEX System; and (c) return or, if requested by Dell, destroy, any of Dell's Confidential Information in Your possession or under Your control (other than information that applicable law requires You to retain). The Service Offering Description will state when Dell will delete any Customer Content. You are responsible for notifying Customer that the Customer is required to have copies of all Customer Content prior to the date of any termination.

B. **Additional Recovery Rights.** You agree that upon expiration or termination of the APEX Service for any reason: (a) Dell may seek a court order to enforce Dell's right to recover the APEX System from the Site or Colocation Site, and You agree to reasonably cooperate with Dell to enforce Dell's rights with Customer under any such court order; and (b) Dell is entitled to recover from You the reasonable attorney fees resulting from this enforcement action. You are liable for any return costs and shall reimburse Dell for the reasonable value of the APEX System (or any part thereof) that is not returned or is returned in a condition that evidences damage in excess of reasonable wear and tear.

C. **Refunds.** You may be entitled to a refund of pre-paid fees for the APEX Service that will not be provided as a result of a termination in the following cases: (a) If Dell terminates the APEX Service under Clause 15.2(2) (Indemnification by Dell); and/or (b) If You terminate the APEX Service under Clauses 3.2 (Material Modifications) or 6.2 (Termination). Any other termination/rejection of the APEX Service will not entitle You to any refunds, credits, or exchanges. If: (i) Dell terminates the APEX Service due to Your material breach or following Dell's suspension of the APEX Service; or (ii) You or Customer returns or surrenders the APEX System without Dell's prior permission before the end of the Subscription Term, then You will promptly pay Dell all fees due for the APEX Service through the remainder of the Subscription Term.

D. **Survival.** The provisions relating to payment of outstanding fees, confidentiality, liability, and the Partner DPA (as defined in Clause 11.2 (Data Processing)) so long as Dell continues to process Your "**Personal Data**" (as defined in the Partner DPA), all rights of action accruing prior to termination, along with any other provision of this Agreement that, expressly, or by its nature and context, is intended to survive, will survive termination.

7. Support Services.

7.1 **Generally.** The APEX Service includes the support and maintenance services described in the Service Offering Description ("**Support Services**").

7.2 **Site Access.** Dell requires the right to access the APEX System in a timely way and as provided in the Service Offering Description to provide the Support Services. Failure to ensure that Customer provides Dell with timely access to a Site will relieve Dell of the Support Services obligations and Dell may also, at Dell's discretion, suspend the APEX Service.

7.3 **Changes.** You or Customer may not relocate the APEX System without Dell's prior written approval. If the applicable Service Offering Description allows Customer to perform the following actions, then You must notify Dell before Customer does so: (a) make changes to the APEX System configuration; or (b) deactivate the remote support features of any components of the APEX System. Dell will review all requests and may approve or deny them in Dell's sole discretion. Additional fees may apply.

8. Warranty.

8.1 **DELL MAKES NO WARRANTIES TO YOU UNDER THIS AGREEMENT.** Dell's limited warranty for the APEX Service is for the Customer only and is provided in the APEX Agreement. You shall not make any warranty on Dell's behalf, and You shall indemnify and hold Dell harmless from any claims related to any warranty You grant that is beyond the Dell Customer warranties described in this Clause 8. You understand and agree that the APEX Service is not fault-tolerant and is not designed for, and must not be used in, hazardous environments requiring fail-safe performance, including any application where the failure of the APEX Service could lead to death, bodily injury, or physical or property damage (collectively, "**High-Risk Activities**") and You shall defend and indemnify Dell from any claims made by third parties resulting from any such High-Risk Activities.

8.2 Notwithstanding anything in the Agreement, the APEX Agreement, or any pass-through terms and conditions: Dell shall not be responsible for, and shall have the right to charge You for, and You shall promptly pay any charges for, APEX Service related problems that arise from (i) accident or neglect by You, Customer or any third party; (ii) any third party items or services with which the APEX Service is used or other causes beyond Dell's control; (iii) installation, operation or use not in accordance with Dell's instructions or the Service Offering Description; (iv) use in an environment, in a manner or for a purpose for which the APEX Service was not designed; (v) modification, alteration or repair by anyone other than Dell or its authorized representatives; or (vi) causes not attributable to normal wear and tear. Dell has no obligation whatsoever for software installed or used beyond the licensed use, or for APEX Service which was moved from the Site without Dell's consent or whose original identification marks have been altered or removed.

8.3 **Other than the warranty set forth in this Clause 8 (Warranty), and to the maximum extent permitted by applicable law, Dell: (a) makes no other express warranties; (b) disclaims all implied warranties, including merchantability, fitness for a particular purpose, title and non-infringement; and (c) disclaims any warranty arising by statute, operation of law, course of dealing or performance or usage of trade. Dell does not warrant that the use of APEX Service will be uninterrupted or error-free. Dell is not liable for delays, interruptions, service failures, or other problems inherent in use of the internet and electronic communications or for issues related to non-Dell provided Colocation Sites. You agree that You are not relying on delivery of future functionality, public comments or advertising by Dell, or product roadmaps when ordering the APEX Service.**

9. **APEX Trial Services.** Dell may provide You with the ability to allow a Customer to evaluate free of charge certain APEX Services or a feature of the APEX Service ("**Trial Service**"). For Trial Services ordered from Dell in the APEX Console (subject to Dell's acceptance), each Trial Service commences on the date Dell first provides Customer with access to the Trial Service and the duration of the Trial Service is stated in the APEX Console ("**Trial Term**"). For the purpose of Customer's use of Trial Services, You agree that:

- (a) Use of a Trial Service is subject to the applicable Service Offering Description;
- (b) You must not disclose to any third party the results of any comparisons that You or Customer make between the Trial Service and any competitive offerings; and
- (c) Except as provided in this Clause 9 (APEX Trial Services) or otherwise stated in the Agreement, Trial Services are "APEX Services" for the purpose of other Clauses of the Agreement.

10. **Third-Party Offerings.** Dell may offer Third-Party Products for use with the APEX Service through an online marketplace on the APEX Console, or using Dell's then-current Third-Party Product resale programs (e.g. "Extended Technologies Complete", "Software & Peripherals (S&P)"). Third-Party Products You order from Dell through these resale programs are referred to as "**Third-Party Offerings**". You may offer Third-Party Offerings to Customer for Customer's use, at Your option, if available. If You choose to offer Third-Party Offerings to Customer for Customer's use, You and Customer are responsible for complying with any terms applicable to the Third-Party Offerings, including any separate fees imposed by the provider of that Third-Party Offering (whether payable to Dell or directly to the third-party provider). You agree to comply with the standard license, services, warranty, indemnity, and support terms of the third-party manufacturer/supplier (or an applicable direct agreement between You and the third-party manufacturer/supplier) for the Third-Party Offering. Even if Dell invoices for them, Dell does not provide support services for Third-Party Offerings. You must contact the applicable third-party directly for support. **Third-Party Offerings are provided "AS IS". Any warranty, damages or indemnity claims against Dell for Third-Party Offerings are expressly excluded.** Dell may suspend or terminate provision and hosting of any Third-Party Offerings at any time, and that suspension or termination will not be deemed a material change to the APEX Service for the purpose of Clause 3.2 (Material Modifications).

11. **Data Protection.**

11.1 **Dell Security Measures.** Without limiting Dell's obligations under this Data Protection Clause, Dell will provide the APEX Service in compliance with reasonable and appropriate security measures stated in the [APEX Information Security Measures Addendum](#), including all updates during the Subscription Term ("**AIMSA**"). The AIMSA and the applicable Service Offering Description define the administrative, physical, technical and other safeguards applied to Customer Content residing in the APEX Service.

11.2 Reseller Security Measures. Through the APEX Console, You may have access to Customer and/or End User data. You agree to implement commercially reasonable technical and organizational security procedures and measures, that are no less stringent than those required of Dell in the AISMA, to preserve the security and confidentiality of such data.

11.3 Data Processing. The [APEX Partner Data Processing Addendum](#), including all updates during the Subscription Term (“**Partner DPA**”) describes the parties’ respective roles for the processing and control of Personal Data the parties may exchange in the performance of this Agreement. You and Dell will act as independent controllers in respect of the data processing activities related to the data exchanged between the parties. You are responsible for providing any necessary legal notices to your personnel and/or purchasers, Customers, or End Users and obtaining any legally required consents related to Your use, collection, disclosure, sharing, cross border data transfer and processing of Personal Data.

11.4 Required Disclosures. If Dell is required by a government body or court of law to disclose any Customer Content, Dell will provide You with notice and a copy of the demand as soon as practicable, unless prohibited by applicable law. Dell will take reasonable steps at Your expense to contest any required disclosure if requested by You.

12. Confidentiality.

12.1 Scope. Information disclosed by one party to another in connection with the Agreement will be treated as “Confidential Information” if it is marked or identified as “confidential” or similar designation, or should reasonably be known by the receiver to be confidential. Confidential Information does not include information that is: (a) rightfully in the receiver’s possession without prior obligation of confidentiality from the discloser; (b) a matter of public knowledge; (c) rightfully furnished to the receiver by a third party without confidentiality restriction; or (d) independently developed by the receiver (including its Affiliates) without reference to the discloser’s Confidential Information.

12.2 Protection. The receiver will: (a) use Confidential Information of the discloser only for the purposes contemplated in the Agreement; and (b) protect Confidential Information from unauthorized disclosure to third parties for the following time periods: (i) indefinitely with respect to technical information about a discloser’s products and services (including the APEX Service) or any information about unreleased products or services; and (ii) 3 years from the date of receipt for all other Confidential Information. The obligations under this Clause will survive any termination of the Agreement.

12.3 Exceptions. Either party may disclose Confidential Information: (a) to an Affiliate, or to a subcontractor or supplier used by Dell to provide the APEX Service provided that they comply with the foregoing; and (b) if required by a government body or court of law, provided that the receiver gives the discloser reasonable notice, if permitted by law, so that the discloser may contest the disclosure or seek a protective order. In addition, Dell may disclose Confidential Information to relevant Dell distributors or Customers for the purpose of fulfilling Dell obligations to You or Customer or in connection with the Dell Technologies Partner Program or channel sale or marketing activities associated with such program.

12.4 Feedback. Any feedback, enhancement requests, corrections, or suggestions that You provide to Dell in connection with the APEX Service (“**Feedback**”) is Dell’s Confidential Information. You agree that we Dell use the Feedback without any restriction from You or compensation to You, and You assign to Dell all rights in, and to, Feedback.

13. Telemetry Data. Dell monitors the APEX Service and collects telemetry data relating to Your and Customer’s use of the APEX Service as further provided in the Service Offering Description, and You may be receiving telemetry data as provided in the telemetry notice in the Service Offering Description and You are required to comply with all restrictions as provided in such telemetry notice and with all obligations set forth in this Agreement including Clauses 11.2 (Reseller Security Measures) and 11.3 (Data Processing).

14. Limitation of Liability.

14.1 Limitation on Damages. The maximum liability of each party (including Dell’s suppliers) for all disputes arising under the Agreement is limited to the greater of: (a) \$50,000 (or the equivalent in local currency); or (b) the amount You paid to Dell for the APEX Service during the 12 months immediately before the events giving rise to any dispute. This limitation applies even if any limited remedy in the Agreement is found to have failed in its essential purpose. In addition, neither party shall be liable to the other for any special, consequential, exemplary, punitive, incidental, or indirect damages, or for lost profits, loss of revenue, loss or corruption of data, loss of use, or procurement of substitute products or services, even if the party alleged to be liable has knowledge of the possibility of such damages. The foregoing limitations and exclusions do not apply to: (i) Your obligation to pay for the APEX Service, (ii) Your obligation to pay for damage to or loss of the APEX System, (iii) Your violation of

the restrictions on use of the APEX Service, (iv) a party's indemnity obligations in the Agreement, (v) a party's violation or misappropriation of the other party's intellectual property rights, or (vi) where prohibited by applicable law. Dell (and Dell's suppliers) has no liability for any damages resulting from Your use or attempted use of Third-Party Products, or Free Software or Development Tools (both as defined in Dell's [End User License Agreement](#)).

14.3 **Limitation Period.** Except as stated in this Clause, all claims must be made within the period specified by applicable law. If the law allows the parties to specify a shorter period for bringing claims, or the law does not provide a time at all, then claims must be made within 18 months after the event(s) giving rise to a dispute occurs.

15. **Indemnities.**

15.1 **Indemnification by You.** Subject to the remainder of this Clause 15 (Indemnities), You will: (a) defend Dell against any Third-Party Claim; and (b) indemnify Dell by paying (i) the resulting costs and damages finally awarded against Dell by a court of competent jurisdiction to the extent such are the result of the Third-Party Claim; or (ii) the amounts stated in a written settlement negotiated and approved by You. You may not, without Dell's prior written consent, settle any Third-Party Claim if that settlement obligates Dell to admit any liability, to make any monetary payment, or to undertake any material obligation, or if that settlement would affect any APEX Service or Dell's business practices or policies.

15.2 **Indemnification by Dell.** Subject to the remainder of this Clause 15 (Indemnities), Dell will: (a) defend You against any claim made by a third party to the extent it alleges that the APEX Service purchased from Dell or used by You in compliance with the Agreement infringes that party's patent, copyright, or trade secret enforceable in the country where You ordered the APEX Service from Dell (in this Clause "**Dell Indemnified Claim**"); and (b) indemnify You by paying: (i) the resulting costs and damages finally awarded against You by a court of competent jurisdiction to the extent they result from the Dell Indemnified Claim; or (ii) the amounts stated in a written settlement negotiated and approved by Dell. In addition, should any APEX Service become, or in Dell's opinion be likely to become, the subject of a Dell Indemnified Claim, Dell may, at its option: (1) modify or replace the affected APEX Service with a non-infringing substitute; or (2) terminate the APEX Service and refund any prepaid fees for the portion of APEX Service that will not be provided as a result of the termination. Dell will not be liable for any claims or damages due to Your continued resale or use of an APEX Service that Dell has modified, replaced, or terminated as provided herein. Except as otherwise provided by law, this Clause 15.2 (Indemnification by Dell) states Your exclusive remedies for any Dell Indemnified Claim relating to the APEX Service. Nothing in the Agreement or elsewhere will obligate Dell to provide You any greater indemnity.

15.3 **Limitations.** Dell will have no obligation under Clause 15.2 (Indemnification by Dell): (a) if You are in material breach of the Agreement; or (b) for any Dell Indemnified Claim resulting or arising from: (i) any combination, operation or use of the APEX Service with any other products, services, items, or technology that are not Dell-branded, including Third-Party Products and open source software; (ii) Customer Content, Third-Party Products, Trial Services, or APEX Services provided free of charge; (iii) use for a purpose or in a manner for which the APEX Service was not designed, or use after Dell notifies You or Customer to cease this use due to a possible or pending Dell Indemnified Claim; (iv) any modification to, or customized configuration of, the APEX Service performed by any person other than Dell or Dell's authorized representatives; (v) any modification to, customized configuration of, the APEX Service performed by Dell pursuant to Your instructions, designs, specifications or any other information You provided; (vi) use of any version of the APEX Service when an upgrade or newer iteration of the APEX Service made available by Dell would have avoided the infringement; (vii) services You provide (including Dell Indemnified Claims seeking damages based on any revenue or value You derive from Your services or Customer Content); or (viii) any data or information that You, Customer, or a third party records on or utilizes in connection with the APEX Service.

15.4 **Mutual Indemnity.** Each party will defend and indemnify the other party against any third party claim or action for personal bodily injury, including death, to the extent directly caused by the indemnifying party's gross negligence or willful misconduct in the course of performing its obligations under the Agreement.

15.5 **Indemnification Process.** A party's duty to defend and indemnify under the Agreement is contingent upon the other party: (a) sending prompt written notice of the Indemnified Claim to the indemnifying party and taking reasonable steps to mitigate damages; (b) granting to the indemnifying party the sole right to control the defense and resolution of the Indemnified Claim; and (c) cooperating with the indemnifying party in the defense and resolution of the Indemnified Claim and in mitigating any damages. "Indemnified Claim" in this Clause 15.5 (Indemnification Process) means any and all claims indemnified by a party under this Clause 15 (Indemnities). The parties' respective rights to Indemnified Claims under this Clause 15 (Indemnities) are in lieu of any common law or statutory indemnification rights or analogous rights, and each party waives such common law or statutory rights, if allowed by applicable law.

16. General.

16.1 **Governing Law; Jurisdiction.** The Agreement and all disputes in connection with the Agreement and/or the APEX Service are governed by the laws of England and Wales (excluding the conflicts of law rules). To the extent permitted by law, the English courts will have exclusive jurisdiction over any disputes arising out of or in connection with the Agreement or any transactions governed by it. The U.N. Convention on Contracts for the International Sale of Goods will not apply to the Agreement or any dispute.

16.2 **Trade Compliance.** Your Order of the APEX Service and access to related technology (collectively, the “**Materials**”) are intended for resale to Customer for Customer’s own use, not for further resale, export, re-export, or transfer. You are subject to and responsible for compliance with the export control and economic sanctions laws of the United States, the European Union and other applicable jurisdictions. Materials may not be used, sold, leased, exported, imported, re-exported, or transferred except in compliance with those laws, including, without limitation, export licensing requirements, end user, end-use, and end-destination restrictions, prohibitions on dealings with sanctioned individuals and entities. You represent and warrant that You are not the subject or target of, and that You are not located in a country or territory (including without limitation, North Korea, Cuba, Iran, Syria, and Crimea) that is the subject or target of, economic sanctions of the United States, European Union or other applicable jurisdictions. You agree that Dell will not be liable for any interruption to the APEX Service resulting from the action of an applicable regulator rendering the APEX Service unlawful or requiring license authorization.

16.3 **Your Responsibility.** You agree that You will obtain all necessary rights, permissions and consents associated with: (a) technology or data (including personal data) that You provide to Dell; and (b) non-Dell software or other components that You direct or request that Dell use with, install, or integrate with the APEX Service. You are solely responsible for reviewing data that will be provided by You to or accessed by Dell (to the extent you maintain control over any such data accessed by Dell) in the provision of the APEX Service to ensure that it does not contain: (i) data that is classified, ITAR (International Traffic in Arms Regulations) related data, or both; or (ii) articles, services, and related technical data designated as defense articles and defense services.

16.4 **Encryption.** You certify that all items (including hardware, software, technology and other materials) You provide to Dell for any reason that contain or enable encryption functions either: (a) satisfy the criteria in the Cryptography Note (Note 3) of Category 5, Part 2 of the Wassenaar Arrangement on Export Controls for Conventional Arms (Wassenaar Arrangement) and Dual-Use Goods and Technologies and Category 5, Part 2 of the U.S. Commerce Control List (CCL); or (b) employ key length of 56-bit or less symmetric, 512-bit asymmetric or less, and 112-bit or less elliptic curve; or (c) are otherwise not subject to the controls of Category 5, Part 2 of the Wassenaar Arrangement and Category 5, Part 2 of the CCL. Dell is not responsible for assessing if any Third-Party Product (including Third-Party Offerings) to be used with the APEX Service satisfies regulatory requirements of the country to which the APEX Service is to be delivered or provided. Dell will not be obligated to provide any APEX Service if the APEX Service is prohibited by law or does not satisfy the local regulatory requirements.

16.5 **Independent Contractors, Third-Party Rights.** The parties are independent contractors for all purposes under the Agreement and cannot obligate any other party without prior written approval. The parties do not intend anything in the Agreement to allow any party to act as an agent or representative of a party, or the parties to act as joint venturers or partners for any purpose. No party is responsible for the acts or omissions of any other. There are no third-party beneficiaries to the Agreement under any laws. There are no third-party beneficiaries to this Agreement under any laws, including the Contracts (Rights of Third Parties) Act 1999.

16.6 **Audit and Record-Keeping.** You will maintain legible, accurate and complete books and records relating to the Agreement or the sale, licensing, delivery, or end-use of the APEX Service for a period of 5 years from the date of creation, unless mandatory local laws require a longer record retention period. At the end of the retention period, You must dispose of all records appropriately. At Dell's request, You must cooperate and assist Dell with any audit, review, or investigation (“**Audit**”) that relates to (i) the Agreement or your compliance with law; (ii) Your sale, distribution, licensing, or delivery of the APEX Service; (iii) any amounts payable by Dell; or (iv) any amounts due to Dell. In connection with an Audit, You will deliver all records, information, and documents reasonably requested by Dell. Dell has the right to conduct onsite Audits, and You will grant Dell and its employees and representatives reasonable access to information, records, personnel, and customers (including Customer agreements and other agreements to verify your compliance with the Agreement), and provide entry and access to Your premises or other locations (during normal business hours) where such information and records are located. Failure to cooperate with an Audit or provide the information or records requested by Dell is a material

breach of this Agreement. Dell will pay the costs of an Audit except where a discrepancy of five (5) percent or more is discovered in the information disclosed by You, in which case You agree to be responsible for all reasonable costs.

16.7 Force Majeure. Except for payment of fees, neither party will be liable for failure to perform its obligations during any period if performance is delayed or rendered impracticable or impossible due to circumstances beyond that party's reasonable control. If any delay or failure lasts longer than 30 days, then the other party may immediately terminate, in whole or in part, the relevant APEX Service by giving written notice to the delayed party.

16.8 Assignment and Subcontracting. Neither party will assign, transfer, or novate the Agreement, or any right or obligation or delegate any performance without the other party's prior written consent, which consent will not be unreasonably withheld. Notwithstanding the foregoing: (a) Dell may use Affiliates or other qualified subcontractors to perform Dell's obligations, provided that Dell will remain responsible for their performance; and (b) Dell may assign rights to payments arising from the APEX Service without Your consent.

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

16.10 Notices. The parties will provide all notices under the Agreement in writing. You must provide notices to the local Dell entity which invoices for the APEX Service, or, if Your Order is not with a Dell entity, by e-mail to Dell_Legal_Notices@dell.com. You consent to receiving notices from Dell through the APEX Console or as otherwise provided in the Agreement. You are responsible for collecting Customer input in a timely manner as necessary for You to fulfill Your notice obligations in the Agreement. For clarity, it is Your obligation to notify Dell where required herein, including as provided in the Service Offering Description, regardless whether Customer has separately notified Dell.

16.11 References. You agree that Dell may identify You as an APEX Service reseller in promotional or marketing materials provided that such materials do not disclose any of Your Confidential Information.

16.12 Entire Agreement, Conflict and Order of Precedence, Modifications. The following are part of the Agreement: (a) the AUP; (b) the Partner DPA; (c) the AISMA; (d) the Service Offering Description; and (e) the Order. In the event of conflict, they will prevail in the following order: (i) the Service Offering Description (and all documents incorporated into it); (ii) the Agreement; (iii) the AUP; (iv) the Partner DPA; (v) the AISMA; and (vi) the Order. You acknowledge that You have read the Agreement, that You understand it, that You agree to be bound by its terms, and that the Agreement, is the complete and exclusive statement of the agreement between You and Dell regarding the APEX Service You are purchasing now (and subsequent add-ons to that Order). All previous representations, discussions, and writings are superseded by this APEX Agreement and the parties disclaim any reliance on them. All content referenced in the Agreement by hyperlink is incorporated into the Agreement in its entirety and is available to You in hardcopy form upon Your request. The pre-printed terms of Your purchase order or any other document that is not issued or signed by Dell do not apply to the APEX Service. You represent that You did not rely on any representations or statements that do not appear in the Agreement when accepting the Agreement. The Agreement may only be modified in writing signed by both parties; provided, however, that Dell may, in its sole discretion update the AUP, the AISMA, and the Partner DPA at any time. Dell will provide written notice if any such updates result in a material modification under Clause 3.2 (Material Modifications).