

# EVALUATION SUPPORT AGREEMENT

## APRIL 2021 - REV20210428

This Evaluation Support Agreement (the "Evaluation Agreement") is by and between OpenNebula Systems S.L. ("ONE") and Evaluator as identified on Evaluation Order Form (the "Order Form"). This Evaluation Agreement and the Order Form collectively make up the Entire Agreement (the "Agreement") of the parties concerning the Evaluation Support Program (the "Program"). This Agreement is effective as of the Effective Date of the Order Form.

### 1. Definitions

**"ONE Website"** means the web sites created and managed by ONE under the domains OpenNebula.io and OpenNebula.pro.

**"ONE Support Portal"** means the web pages listed at the Order Form.

**"Evaluator"** means a ONE Evaluator with an active Evaluation Program.

**"Effective Date"** means the date on which ONE transmits written, faxed, or e-mailed acceptance of an Order Form.

**"Mark"** means a trademark, trade name, service mark, logo, designs, trade dress or other brand designations owned by a party to the Agreement.

**"Order Form"** means the applicable Quote or Order Form signed by the parties or otherwise accepted by ONE.

**"Product"** means a complete and unchanged copy of the code of the ONE software product(s) listed on the Order Form, limited to the listed version(s) and limited to the code obtained from the Enterprise Repository. Product includes any Upgrade, Update or Maintenance Releases made generally available by ONE during the Term.

**"Subscription Guide"** means the then-current Subscription Guide description available at the ONE Customer Portal. In the event of any conflict between this Agreement and the Support Guide information applicable to Customer, the Subscription Guide will control.

**"Support"** means the level of ONE annual support listed on the Subscription Guide for Customers.

**"Support Policy"** means the then-current Support Policy description available at the ONE Customer Portal.

### 2. Evaluation Subscription Program

2.1 Program features, rights, and obligations are as set forth in the Entire Agreement, including the Subscription Guide. Evaluator's participation in the Program is contingent on ONE's acceptance of Order Form, and Evaluator's compliance with this Agreement and the Program Guide.

2.2 Order Form states which service level applies to Evaluator. Evaluator's participation in the Program shall be limited, non-transferable (except as expressly stated in the Agreement), and non-exclusive.

2.3 Access to ONE Customer Portal is available to Evaluator as a Program benefit. Any such access will be subject to the terms of this Agreement and the then-current description and terms and conditions available in the Program Guide. Such access will terminate immediately in the event of termination of the Agreement.

### 3. Licenses

3.1 Membership to the Evaluation Subscription Program grants a temporary, non-exclusive and non-transferable Product license for the exclusive purpose of its evaluation. Evaluator shall

obtain its updated copy of Product by download from the ONE Enterprise Repository. Evaluator shall not copy Product onto any public or distributed network or otherwise distribute or disclose Product to any third parties; or change any proprietary rights notices which appear in Product.

#### **4. Services**

4.1 ONE will provide Support to Evaluator and Evaluator agrees it will use or apply such Services only for the exclusive purpose of evaluating the Product. Any unauthorized use of Services will be deemed to be a material breach of this Agreement. The scope of Services provided to the Evaluator under this Agreement is subject to the then-current Services details set forth at the ONE Support Policy and the Subscription Guide. Any support will terminate immediately in the event of termination of the Agreement.

#### **5. Program Fees**

5.1 Evaluation Support Program fee is defined in the Order Form.

#### **6. Term**

6.1 This Agreement shall commence on the Effective Date and continue for the Term in the Order Form unless terminated earlier as set forth below.

#### **7. Termination**

7.1 ONE is entitled to terminate the Agreement at any time and with immediate effect and to stop the services with immediate effect, when the Evaluator acts or behaves in a way not complying with the exclusive purpose of this agreement of evaluating the service and the Product.

#### **8. Proprietary Rights and Confidentiality**

8.1 The intellectual property and proprietary rights of whatever nature in the Product and related documentation, including derivative works, are and shall remain the exclusive property of ONE and/or its suppliers. Except as expressly set forth in this Agreement, nothing in this Agreement should be construed as transferring any aspects of such rights to Evaluator or any third party. ONE and its suppliers reserve any and all rights not expressly granted in this Agreement. ONE trademarks shall not be used by Evaluator without ONE's express authorization.

8.2 ONE and Evaluator will retain in confidence all information and know-how transmitted by the other party during each Term, and for a period of five (5) years beyond the Term, that is clearly designated as being proprietary and/or confidential or that, by the nature of the circumstances surrounding the disclosure, ought reasonably to be treated as proprietary and/or confidential, and will make no use of such information and know-how except to further the purposes set forth in this Agreement. Services, Commercial Software, and Upgrades thereof are the confidential information of ONE.

8.3 Notwithstanding Section 8.2, ONE and Evaluator shall not have an obligation to maintain the confidentiality of information that (a) is now or subsequently becomes generally known or available by publication, commercial use or otherwise through no fault of the recipient; (b) is known by the recipient at the time of disclosure and is not subject to restriction; (c) is independently developed by the recipient without use of the discloser's confidential information; (d) is not designated as proprietary and/or confidential or would not reasonably be considered as such; or (e) is lawfully obtained from a third-party who has the right to make such disclosure. Further, the recipient may disclose confidential information as required by government or judicial order, provided the recipient gives the disclosing party written notice prior to such disclosure and complies with any protective order (or equivalent) imposed on such disclosure. The terms of confidentiality under this Agreement shall not be construed to limit either party's right to independently develop or acquire products without use of the other party's confidential information.

## **9. Evaluator Conduct**

9.1 Evaluator will not send unsolicited commercial e-mail ("spam") that makes reference to ONE or any products, services or programs of ONE, or that includes a link to ONE, an Evaluator referral code or all or any part of a ONE URL. Evaluator also will not force visitors to the ONE, website via any mechanism that acts as an automatic transport, such as "meta refresh" or "forced exit" scripts.

9.2 Evaluator will (i) conduct business in a manner which reflects favorably at all times on the products, goodwill and reputation of ONE; (ii) avoid deceptive, misleading or unethical practices which are or might be detrimental to ONE or its products; and (iii) refrain from making any false or misleading representations, warranties, or guarantees with regard to ONE or its products.

9.3 Evaluator will comply with all applicable laws and regulations in performing its obligations under the Agreement including, without limitation, all applicable data privacy laws and regulations.

9.4 The Agreement will terminate immediately without written notice if Evaluator breaches any portion of this Section.

## **10. Disclaimer of Warranties**

10.1 ONE MAKES NO EXPRESS OR IMPLIED WARRANTIES OR REPRESENTATIONS WITH RESPECT TO THE PROGRAM, THE ONE MARKS, THE ONE WEBSITE, OR ANY PRODUCTS, SERVICES OR OTHER ITEMS OFFERED, SOLD OR LICENSED THROUGH THE PROGRAM, INCLUDING (WITHOUT LIMITATION) IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, SYSTEM INTEGRATION, NON-INTERFERENCE AND ACCURACY OF INFORMATIONAL CONTENT.

10.2 ONE warrants that during the Term it will use its commercially reasonable efforts to ensure that Services are conducted in a workmanlike manner by qualified personnel. Except for the foregoing, PRODUCT IS PROVIDED TO EVALUATOR "AS IS," WITHOUT ANY WARRANTIES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, WARRANTIES CONCERNING THE INSTALLATION, USE OR PERFORMANCE OF PRODUCT. ONE AND ITS SUPPLIERS DISCLAIM ANY AND ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY FITNESS FOR A PARTICULAR PURPOSE AND/OR NON-INFRINGEMENT. ONE AND ITS SUPPLIERS DO NOT WARRANT THAT PRODUCT WILL MEET EVALUATOR'S REQUIREMENTS OR THAT THE OPERATION THEREOF WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ERRORS WILL BE CORRECTED. Without limiting the generality of the foregoing disclaimer, Product is not specifically designed, manufactured or intended for use in the planning, construction, maintenance, control, or direct operation of nuclear facilities; aircraft navigation, control or communication systems; weapons systems; or direct life support systems.

## **11. Limitation of Liability**

11.1 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL ONE BE LIABLE TO LICENSEE OR ANY OTHER USERS OF THE PRODUCT FOR ANY INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OR LOSS (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS) AS A RESULT OF USING, MODIFYING OR DISTRIBUTING THE PRODUCT, OR ANY DERIVATIVE THEREOF, EVEN IF ADVISED OF THE POSSIBILITY THEREOF.

## **12. Miscellaneous**

12.1 Severability. If any part of the Agreement is held by a court of competent jurisdiction to be illegal or unenforceable, the validity or enforceability of the remainder of the Agreement shall not be affected and such provision shall be deemed modified to the minimum extent necessary to make such provision consistent with applicable law and, in its modified form, such provision shall then be enforceable and enforced.

12.2 Assignment. Evaluator may not assign the Agreement or its rights or obligations under the

Agreement to any person or party, whether by operation of law or otherwise, without ONE's prior consent (at ONE's sole discretion). Any attempt by Evaluator to assign the Agreement without ONE's prior consent shall be null and void. In the event of the direct or indirect taking over or assumption of control of Evaluator or of substantially all of its assets by any government, governmental agency or other third party, ONE may terminate this Agreement upon written notice to Evaluator. Subject to the foregoing conditions, the Agreement shall be binding upon and inure to the benefit of each party and its respective successors and assigns. There are no intended third party beneficiaries of the Agreement.

12.3 No Waiver; Limitations. Failure by either party to exercise any right or remedy under this Agreement does not signify acceptance of the event giving rise to such right or remedy. To the extent permitted by applicable law, no action, regardless of form, arising out of this Agreement may be brought by Evaluator more than one (1) year after the cause of action has accrued.

12.4 Governing Law. If you are located in US, then you are contracting with OpenNebula Systems USA, LLC and this Agreement is governed by the laws of the Commonwealth of Massachusetts, U.S.A. without reference to conflicts of law principles. For contracts with OpenNebula Systems USA, LLC both parties consent to the exclusive jurisdiction and venue of courts in Boston, Massachusetts, U.S.A. for all disputes arising out of or relating to the use of Services. If you are not located in US, then you are contracting with OpenNebula Systems SL and this Agreement is governed by Spanish Law. Any dispute related to it will be resolved by the Courts and Tribunals of the city of Madrid. In no event shall either the United Nations Convention on Contracts for the International Sale of Goods or any adopted version of the Uniform Computer Information Transactions Act (or equivalent legislation) apply to, or govern, the Agreement. The parties shall comply at their own expense with all relevant and applicable laws related to the subject matter of the Agreement.

12.5 Notices. Unless otherwise agreed to by the parties, any notice, authorization, or consent required or permitted to be given or delivered under the Agreement shall be in writing and addressed and delivered to Evaluator at its address listed on the Order Form and to ONE at the applicable address on the Program Guide. Notice shall be deemed to have been received by a party, and shall be effective: (a) on the day given, if sent by confirmed facsimile transmission; (b) on the fifth business day after which such notice is deposited prepaid in the local postal system; or (c) on the day received, if sent with a reputable, expedited overnight or international courier or hand delivered. Either party may change its address for notice purposes upon issuance of notice thereof in accordance with this paragraph.

12.6 Attorneys Fees. Subject to Section 11, for the purposes of any action between the parties relating to the Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs.

12.7 Export Law Assurances. Evaluator acknowledges that Product may be subject to export and import control laws, and agrees to comply fully with those laws in connection with Product. Evaluator agrees that Product is not being and will not be acquired for, shipped, transferred, or re-exported, directly or indirectly, to proscribed or embargoed countries or their nationals, nor will it be used for: nuclear activities, chemical or biological weapons, or missile projects unless authorized by the U.S. government. Evaluator hereby certifies that it is not prohibited by the U.S. government from participating in export or re-export transactions.

13.8 U.S. Government Restricted Rights. If Product is being acquired by or on behalf of the U.S. Government or by a U.S. Government prime contractor or subcontractor (at any tier), in accordance with 48 C.F.R. 227.7202-4 (for Department of Defense ("DOD") acquisitions) and 48 C.F.R. 2.101 and 12.212 (for non-DOD acquisitions), the government's rights in such Product and any documentation, including its rights to use, modify, reproduce, release, perform, display or disclose Product or any documentation, will be subject in all respects to the license rights and restrictions provided in this Agreement.

12.9 Force Majeure. Except for performance of a payment obligation, neither party will be liable to the other by reason of any failure in performance of this Agreement if the failure arises out of the unavailability of communications facilities or energy sources, acts of God, acts of the other party, acts of governmental authority, fires, strikes, delays in transportation, riots, terrorism, war, or any causes beyond the reasonable control of that party.

12.10 Apache. Evaluator understands that the OpenNebula community edition, similar in name and/or functionality to the Product is generally available pursuant to the Apache License. This Agreement does not replace or otherwise amend any Evaluator rights or obligations pursuant to the Apache License with respect to any uses, distributions, or sublicensing of such other ONE software product.

12.11 Entire Agreement. The Agreement comprises the entire agreement between the parties regarding the subject matter hereof and supersedes and merges all prior proposals, understandings and all other agreements, oral and written, between the parties relating to the subject matter of the Agreement. ONE reserves the right to amend or modify the Agreement at any time and in any manner by providing reasonable notice to the Evaluator. Evaluator agrees that such reasonable notice may be provided by posting on the ONE web site, email, or other written notice. Except as otherwise set forth herein, the Agreement may be amended or modified only in a writing executed by both parties. ONE's acceptance of any document submitted by Evaluator to ONE shall not be construed as an acceptance of provisions which are in any way in conflict or inconsistent with, or in addition to, the Agreement, unless such terms are separately and specifically accepted in writing by an authorized representative of ONE. The Agreement may be incorporated in other documents or executed via facsimile or via emailed PDF-format document (or other mutually agreeable document format), and a facsimile or emailed copy of either party's signature shall be deemed and be enforceable as an original thereof. The Agreement may be executed in counterparts, both of which taken together shall constitute one single Agreement between the parties.