

# PARTNER AGREEMENT

## AUGUST 2020 - REV20200828

This Partner Agreement is by and between OpenNebula Systems (“ONE”) and Partner as identified on the Partner Subscription Order Form (the “Order Form”). This Partner Agreement and the Order Form collectively make up the Entire Agreement (the “Agreement”) of the parties concerning the OpenNebula Partner Program (the “Program”). This Agreement is effective as of the Effective Date of the Order Form.

### 1. Definitions

“**Business Hours**” means 9:00 a.m. - 6:00 p.m. Central European Time or 8:00 a.m. - 5:00 p.m. Eastern Standard Time of Business Days excluding ONE company holidays published at the ONE Customer Portal. The Order Form can define a different time range and zone.

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

“**ONE Customer Portal**” means the Customer Portal listed at the Order Form.

“**Deployed**” means one copy of Product sold, shipped, or distributed as part of an Integrated Solution (Solution Provider Partners).

“**Distributor**” means a third party authorized to distribute an Integrated Solution.

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

“**End User**” means an end user of a Partner Solution (Solution Provider Partners) that is an end customer of the Partner.

“**End User Subscription**” means the subscription paid by Solution Provider Partners to ONE for each Product copy deployed in a Partner Solution for each End User, as agreed on the Order Form. At any time during an End User Subscription Term, Partner can update or upgrade a Deployed Product copy of the end user and receive third level support for End User incidents. The default pricing model for the End User Subscription is per-server.

“**End User Subscriber**” means a company with an active End User Subscription. End User Subscribers do not have direct access to a ONE Customer Portal.

“**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 Order Form signed by the parties or otherwise accepted by ONE.

“**Partner**” means a ONE partner with an active partner agreement.

“**Partner Program Guide**” means the then-current Partner Program Guide description available at the ONE Customer Portal. In the event of any conflict between the Agreement and the Program Guide information applicable to Partner, the Partner Program Guide will control.

“**Partner Solution**” means the software, hardware, system, service or other partner-owned solution that integrates the ONE software Product, as described on the Order Form. Solution Providers can be VARs (Value Added Resellers), OEMs (Original Equipment Manufacturers) or MSPs (Managed Service Providers).

“**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.

**“Production Use”** means using the Product with Partner’s applications to operate Partner’s ordinary business, which may include third party Partner’s access to or use of such applications. **“Non-Production Use”** means use of the Product solely in a development or testing environment for application development, proof of concept, demonstrating or quality-assurance.

**“Release”** of software can be:

- **“Upgrade Release”** means a new major release of the Product during the Term that typically includes substantial changes.
- **“Update Release”** means a new revision release of the Product during the Term that typically includes small changes and new features.
- **“Maintenance Release”** means a new incremental release of the Product during the Term that typically includes bug fixes.

**“Server”** means a single machine, which processes data using one or more CPUs. In the event such a machine contains Server Blades, each Server Blade is a separate Server.

**“Server Blade”** means a complete computing system on a single circuit board. A Server Blade will include one or more CPUs, memory, disk storage, operating system and network Connections. A Server Blade is designed to be hot-pluggable into a space-saving rack; each rack may contain many Server Blades.

**“Subscription Fee”** means the nonrefundable Term fee payable to ONE for Support, as set forth on the Order Form. Subscription Fees for subsequent Terms shall be as provided on the relevant price list.

**“Support”** means the level of ONE annual support listed on the Partner Program Guide.

**“Support Policy”** means the then-current Support Policy description available at the ONE Support Portal.

**“End User Subscription Term”** means the period in which Customer is entitled to use Product and receive support and maintenance under this Agreement. Complete upfront payment should be made at the beginning of each Term.

## 2. Partner Program

2.1 Program features, fees, rights, and obligations are as set forth in the Entire Agreement, including the Partner Program Guides. Partner’s participation in the Program is contingent on ONE’s acceptance of Partner’s Order Form, Partner’s compliance with this Agreement and the Program Guide, and Partner’s payment to ONE of the applicable annual Program and Subscription fees.

2.2 ONE may add to or modify the Program Guides at its sole discretion on a non-discriminatory basis and the additional or modified rights and obligations shall come into effect thirty (30) days after Partner receives notice of such changes.

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

2.4 Access to ONE Support Portal may be available to Partner as a Program benefit. Any such access will be subject to the terms of this Agreement and the then-current description and subscription terms and conditions available in the Program Guide. Such access will terminate immediately in the event of termination of the Agreement.

## 3. Community Edition Open-source License

3.1. OpenNebula Community Edition is a fully open-source software product released by ONE under Apache license v2.0. Anyone is free to make modifications to the software and



distribute derivative works.

#### **4. Enterprise Edition Commercial License to Partners**

4.1 The binary packages of the Enterprise Edition of OpenNebula with the production-ready version of OpenNebula and the Enterprise Tools are distributed under a commercial license governed by the OpenNebula Subscription Agreement.

4.2. The membership to the Partner Program may grant a temporal, non-exclusive and non-transferable license of the Enterprise Edition for internal development/non-production use only, allowing partners to integrate, verify or certificate their Product-based service, solution or product.

4.3. Partner 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.

4.4. ONE may allow Solution Provider Partners to distribute or use the Enterprise Edition of OpenNebula within their Partner Solution, to build, deploy, update and upgrade deployed copies, and to receive production support for end customer incidents during the End User Subscription term. Section 6 describes the End User Licenses and Services for Solution Provider Partners.

#### **5. Support Services to Partners**

5.1 Partner Program may include Expert Support as described in the ONE Support Policy and the Partner Program Guide.

#### **6. End User Licenses and Services for Solution Provider Partners**

6.1 In consideration of the fees set forth in this Agreement and subject to the terms and conditions of this Agreement, ONE grants to Partner a limited, worldwide (subject to applicable export restrictions), non-exclusive, and non-transferable license during the Term to:

- (a) Use the Product, only as may be made available at the OpenNebula Customer Portal at ONE's sole discretion, solely to facilitate the integration of the Partner Solution provided that Partner does not modify the source code other than that may automatically occur during normal compilation of source code into object code;
- (b) Reproduce, support and directly, and indirectly through Distributors, distribute copies of Product under ONE copyright and license as included in the Partner Solution, limited to the then-current quantity of Product for which End User Subscription Fees have been paid; and
- (c) Use the Product, as part of the Partner Solution, to operate managed clouds serving single client organizations (tenant), limited to the then-current quantity of Product for which End User Subscription Fees have been paid.

6.2 Partner shall not (and shall not permit third parties to):

- (a) Use (except as necessary to perform under Section 6.1(a)) or distribute (except as necessary to perform under Section 6.1(b)) the Product in any way except as part of a Partner Solution;
- (b) Use (except as necessary to offer an evaluation service at no cost or except as necessary to perform under Section 6.1(c)) the Partner Solution or the Product to operate in or as time-sharing, outsourcing, service bureau, hosting, application service provider or managed service provider environment;
- (c) Use or make available the Partner Solution or Product under a lease or rental;
- (d) Use or make available the Partner Solution or Product as a general IaaS cloud technology or pursuant to a public or open source license;
- (e) Modify the Product except as expressly permitted in Section 6.1(a);
- (f) Sublicense the Product; or
- (g) Change or delete any proprietary notices which appear in the Product.

6.3 Partner will pay to ONE an End User Subscription Fee for each Product copy deployed in a Partner Solution, as agreed on the Order Form. If, at any time during a Partner Subscription

Term, Partner increases the quantity of its End User Subscriptions, Partner shall notify ONE as agreed on the Order Form and pay the End User Subscription Fees applicable to such additional copies beginning from the first date of such utilization. All such additional End User Subscription Fees will be covered under this Agreement and shall continue for their Initial End User Subscription Terms. Thereafter, End User Subscriptions shall renew for successive Renewal Terms (each End User Subscription Term may have a different initial date), unless either party gives at least thirty (30) days notice of non-renewal prior to the expiration of the applicable Term. Downgrades from a higher level to a lower level of subscription are not possible during the Term. All payments shall be made in the quoted currency without any right of set-off or deduction and are nonrefundable.

6.4 If pricing plan for End User Subscriptions is per-server and If, at any time during an End User Subscription Term, end user increases the quantity of its servers utilizing all or part of Product, Partner shall notify ONE and pay the additional Subscription Fee applicable to such additional Servers beginning from the first date of such utilization. All such additional Servers will be covered under this Agreement coterminous with End User's then-current Term. End User Subscription Fees for additional Servers during an End User Subscription Term shall be calculated at the then-current Term per-Server price prorated over the number of days remaining in such End User Subscription Term.

6.5 If pricing model for the End User Subscription is royalty fee, within 30 days after the end of each reporting period in the Order Form, Partner should provide ONE with a detailed written report thereby specifying the figures required to calculate the distribution license fees for the pricing plan specified in the Order Form.

6.6. Operation Support will solely be third-level support for end users with an active subscription and will be provided directly to Partner in the context of the ONE Customer Portal for the Partner Solution. Partner shall be responsible for providing first- and second-level support (e.g. accepting and responding to contacts and requests made by End Users). ONE shall not be obligated to support any Partner Solution.

6.7. ONE is the only provider of official OpenNebula technology support. The Partner is allowed to offer support of OpenNebula only within the context of its specific Partner Solution.

## **7. Program Fees, Taxes and Audit Rights**

7.1 Partner Program Subscription Fees are due to ONE upon the Effective Date and the anniversary thereof during the term of the Agreement. ONE will endeavor to invoice Partner at least thirty (30) days prior to the commencement of each Partner Renewal Term. Partner Program fees under this Agreement are due upon the date(s) set forth in this Agreement and are payable within thirty (30) days from the date of ONE's invoice. All payments shall be made in the quoted currency without any right of set-off or deduction and are nonrefundable.

7.2 ONE will endeavor to invoice Partner for the End User Subscription Fees at the commencement of each End User Subscription Renewal Term. End User Subscription fees under this Agreement are due upon the date(s) set forth in this Agreement and are payable within thirty (30) days from the date of ONE's invoice. All payments shall be made in the quoted currency without any right of set-off or deduction and are nonrefundable.

7.3 Any amount not paid when required to be paid under this Agreement shall accrue interest at the rate of one and one-half percent (1.5%) per month (eighteen percent (18%) per annum) on the remaining amount required to be paid, or at the highest amount permitted by applicable law (if lower), such interest to accrue on a daily basis from the payable date until the remaining amount is paid. Upon written notice, ONE may elect to discontinue Services (including Upgrades) to the Partner under this Agreement if timely payment is not received for an applicable Term, for the period such non-payment continues.

7.4 All fees are exclusive of applicable local, state, federal and international sales, value added, withholding and other taxes and duties of any kind. Partner shall be responsible for payment of such taxes and duties of any kind payable with respect to the Program benefits furnished pursuant to the Agreement.

7.5 During the term of this Agreement and for a one (1) year period following termination or expiration, ONE shall have the right (at ONE's own expense) to conduct periodic reviews of

Partner's records relating to its reproduction and use of the Product for the purpose of verifying Partner's compliance with the terms of this Agreement. ONE shall exercise this right upon no fewer than thirty (30) days' prior notice. Partner will provide ONE with reasonable accommodation for the review, including reasonable use of available office equipment and access to all relevant Partner personnel and records during normal business hours. ONE shall deliver to Partner a copy of the results of any such review. If an underpayment is identified, Partner shall immediately pay the full amount of any underpayment. Partner shall also pay ONE the cost of any review, including (without limitation) travel expenses and the costs of any attorneys and consultants, if the review determines that Partner has underpaid fees for the period audited in excess of five percent (5%) of the proper amount owed to ONE.

7.6 ONE will pay Service, Technology, Training and Reseller partners a one-time Commission, as defined in the Order Form, on the Gross Income derived from any customer introduced to ONE by the Partner. Gross Income means any income derived from the sales made during the first year by ONE to a customer introduced to ONE by the Partner of any goods, tangible or intangible property, or the provision of any services. Gross Income is income before any tax, duty or other impost. ONE must report in writing to the partner on its Gross Income from customers introduced by the Partner on each reporting period, as defined in the Order Form. Upon receipt of the gross income report, the Partner will provide ONE with a tax invoice for commission of the reported Gross Income, in accordance with this term. ONE must pay the invoice within 30 days of the date of issue, except to the extent, otherwise agreed by the parties.

7.7 Partners will pay ONE a one-time Commission, as defined in the Order Form, on the Gross Income derived from any customer introduced to the Partner by ONE. Gross Income means any income derived from the sales made during the first year by the Partner to a customer introduced to Partner by ONE of any goods, tangible or intangible property, or the provision of any services. Gross Income is income before any tax, duty or other impost. Partner must report in writing to ONE on its Gross Income from customers introduced by ONE on each reporting period, as defined in the Order Form. Upon receipt of the gross income report, ONE will provide the Partner with a tax invoice for commission of the reported Gross Income, in accordance with this term. Partner must pay the invoice within 30 days of the date of issue, except to the extent, otherwise agreed by the parties.

7.8 Training Partners will pay ONE a Commission, as defined in the Order Form, on the Gross Income derived from any Product training. Gross Income means any income derived from training by the Partner to a customer. Gross Income is income before any tax, duty or other impost. Partner must report in writing to ONE on its Gross Income from Product training on each reporting period, as defined in the Order Form. Upon receipt of the gross income report, ONE will provide the Partner with a tax invoice for commission of the reported Gross Income, in accordance with this term. Partner must pay the invoice within 30 days of the date of issue, except to the extent, otherwise agreed by the parties. In case of termination or expiry of this Agreement, the Commission must be paid for three (3) years in respect of Gross Income derived from customers introduced by the partner before termination or expiry of this Agreement.

## **8. Term & Termination**

8.1 This Agreement shall commence on the Effective Date and continue for the Initial Partner Program Term unless terminated earlier as set forth below. Thereafter, this Agreement shall renew for successive one-year Renewal Terms (unless an alternative period is agreed in writing by the parties), unless either party gives at least sixty (60) days notice of non-renewal prior to the expiration of the applicable Term.

8.2 ONE may terminate the Agreement immediately in the event Partner fails to pay Program fees when required to be paid. Either party may terminate the Agreement immediately in the event that (i) the other party commits a non-remediable material breach of the Agreement; or (ii) the other party commits a remediable material breach of the Agreement and fails to remedy that breach within thirty (30) days of receipt of notice of material breach. Either party may terminate the Agreement at any time and for any or no reason upon the provision of at least thirty (30) days notice to the other. In the event that ONE terminates the Agreement without cause, or Partner terminates the Agreement for an unacceptable modification, ONE will provide Partner with a pro rata refund of any applicable Program fees paid for the remainder of the months in the then-current term of the Agreement.

8.3 This Agreement will terminate automatically if Partner ceases to do business in the normal course, becomes or is declared insolvent or bankrupt, is the subject of any proceeding relating to the liquidation or insolvency of Partner which is not dismissed within ninety (90) days or makes an assignment for the benefit of its creditors.

8.4 ONE may terminate Partner's authorization to participate in the Program, or to do so in a given location, immediately by written notice (i) if Partner fails to meet the applicable criteria and obligations set out in the Program Guide to a material degree, or (ii) if Partner fails to meet the applicable criteria and obligations set out in the Program Guide to a non-material degree and fails to cure such failure within thirty (30) days of being notified in writing of the requirement to do so.

8.5 Upon the termination of the Agreement for any reason, Partner will immediately cease (i) use of ONE Marks and other Program benefits and return to ONE any and all copies of all promotional materials provided by ONE; and (ii) marketing the ONE Enterprise offering. All Sections, but 3, 4, 5 and 6 about Licenses and Services will survive any termination of the Agreement.

8.6 Product Provider Partners shall immediately discontinue distribution of Integrated Products upon expiration or termination of this Agreement. However, expiration or termination of this Agreement for any reason will not terminate the rights of existing End Users on whose behalf Partner has paid applicable Distribution License Fees.

## **9. Proprietary Rights and Confidentiality**

9.1 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 Partner 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 Partner without ONE's express authorization. OEM partner shall include in the Integrated Applications a notice that the Integrated Products include software whose copyright is owned by, or licensed from, ONE.

9.2 ONE and Partner 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.

9.3 Notwithstanding Section 9.2, ONE and Partner 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.

## **10. Trademarks and Promotion**

10.1 The Program Guide states which, if any, ONE Marks may be used by Partner as a Program benefit and how any such ONE Marks may be used. ONE reserves all rights in the ONE Marks and Partner granted no right title or license to, or an interest in, any ONE Mark. Partner agrees that ONE owns all right, title and interest in the ONE Marks and should Partner acquire any rights in the ONE Marks (by operation of law or otherwise), it shall immediately at no expense



to ONE assign to ONE all such rights and associated goodwill, applications and registrations. The ONE Marks may be used only as expressly authorized by ONE in the Program Guide and in ONE's then-current trademark policy and only during the term of the Agreement.

10.2 ONE reserves the right to change the ONE Marks that may be used by Partner as a Program benefit from time to time, and Partner will update its use of the applicable ONE Marks as soon as possible (in the case of authorized use with a Partner solution, no later than the next release of such application).

10.3 During the term of the Agreement, Partner grants to ONE a non-transferable, non-exclusive, license to reproduce and display Partner's Marks so that ONE may refer to Partner as a participant in the Program should ONE so desire, such as on a portion of the ONE website, in press releases and in other marketing materials.

10.4 Each party represents it has all the rights and power to license its Marks as set forth in the Agreement. Each party will not (i) alter, modify or change any Mark of the other party in any way; (ii) assert the invalidity or unenforceability, or contest the other party's ownership, of the other party's Marks in any action or proceeding of any kind or nature; and (iii) take any action that may prejudice the other party's rights in their Marks, render such Marks generic, or otherwise weaken their validity or diminish their associated goodwill. Any and all goodwill arising from a party's use of the other party's Marks will inure exclusively to the benefit of the other party.

10.5 Partner agrees that the domain name for Partner's web site(s) does not and will not contain the "ONE" and "OpenNebula" Marks, or any variation of "Open" and "Nebula" together in the same context. Partner's sites will not frame any portion of the ONE website and will not in any way copy any content from, or resemble the look and feel of, the ONE website, nor will Partner create the impression that any of Partner's sites are the ONE site or are part of the ONE site. Partner also agrees not to purchase or otherwise contract with a third party to exploit any of the ONE Marks for the purpose of causing Partner's sites to appear as a search engine result or for any other reason unless explicitly permitted in a separate writing from ONE.

10.6 Partner acknowledges that a material breach of its obligations in this Section is likely to cause irreparable harm to ONE for which damages would not be an adequate remedy. Therefore, in addition to its rights and remedies available at law, including without limitation, the recovery of damages for breach of this Agreement, ONE shall be entitled to seek (i) immediate equitable relief, specifically including, but not limited to, both interim and permanent restraining orders and injunctions; and (ii) to such other and further equitable relief as the court may deem proper under the circumstances.

## **11. Partner Conduct**

11.1 Partner 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. ONE will likewise reciprocate with similar conduct toward the Partner and its products.

11.2 Both Partner and ONE 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.

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

## **12. Disclaimer of Warranties**

12.1 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.

12.2 ONE warrants that during each 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 PARTNER "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 PARTNER'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.

### **13. Limitation of Liability**

13.1 IN NO EVENT WILL EITHER PARTY OR THEIR SUPPLIERS HAVE ANY LIABILITY UNDER THE AGREEMENT FOR CONSEQUENTIAL, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL OR PUNITIVE DAMAGES, INCLUDING (WITHOUT LIMITATION) ANY LOST PROFIT OR LOST SAVINGS (WHETHER RESULTING FROM IMPAIRED OR LOST DATA, SOFTWARE OR COMPUTER FAILURE, SERVICES FAILURE, OR ANY OTHER CAUSE), EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT FOR PARTNER'S INFRINGEMENT OR MISAPPROPRIATION OF ONE'S INTELLECTUAL PROPERTY RIGHTS, IN ANY EVENT, AND NOTWITHSTANDING ANY OTHER PROVISION IN THE AGREEMENT, THE AGGREGATE LIABILITY OF A PARTY FOR ANY REASON AND UPON ANY CAUSES OF ACTION UNDER THIS AGREEMENT SHALL BE LIMITED TO (i) FOR ONE'S LIABILITY, THE AMOUNT PAID TO ONE UNDER THIS AGREEMENT; AND (ii) FOR PARTNER'S LIABILITY, THE AMOUNT PAID OR OWING TO ONE UNDER THIS AGREEMENT.

### **14. Indemnification**

14.1 ONE will defend Partner from any unaffiliated third party claim that Partner's use of the ONE-certified Product, when used within the scope of this Agreement during a Coverage Period (as defined below), infringes or misappropriates a copyright, patent, trademark, or trade secret owned by the third party in the U.S., Canada, Japan or any country that is a member of the European Union ("Claim"). ONE will pay (a) counsel hired by ONE to defend the Claim; (b) the reasonable and verifiable out-of-pocket costs incurred directly by Partner in connection with defending the Claim and/or assisting ONE in the defense thereof; and (c) subject to Section 13, any damages finally awarded to such third party by a court of competent jurisdiction (after any appeals) or any settlements of the Claim to which ONE consents. The foregoing obligations shall be subject to Partner notifying ONE promptly in writing of any claim, giving ONE the exclusive control of the defense and settlement of the Claim, and providing all reasonable assistance in connection with the Claim without prejudicing ONE in any manner. Subject to the foregoing conditions, nothing in this Agreement shall prohibit Partner from hiring separate counsel, at its own expense.

14.2 "Coverage Period" means any Term(s) for which Partner subscribed to Product at the Standard or Premium levels and paid ONE (excluding payments of any applicable taxes) an amount equal to an annual average of at least One Hundred Thousand Euros (or the then-equivalent amount in the Agreement's quoted currency) for Product.

14.3 If ONE receives information about an infringement claim related to Product, ONE may, at its expense but without obligation to do so, either: (a) procure for Partner the right to continue to use Product; (b) replace Product with a functional equivalent; (c) modify Product so that it becomes non-infringing (including disabling the challenged functionality); or (d) refund the unused portion of the Subscription Fees paid by Partner for the allegedly infringing Product during the then-current Term, and terminate the Agreement. If ONE selects option (b), (c) or (d), Partner shall immediately refrain from use of the allegedly infringing Product.

14.4 If as a result of a Claim, a court of competent jurisdiction issues a final injunction (which has not been appealed) against Partner's use of any part of Product, ONE will, at its sole



option, perform one of the remedy options listed in Section 14.3. If ONE selects option (b), (c) or (d), Partner shall immediately refrain from use of the allegedly infringing Product.

14.5 ONE shall have no liability for any Claim arising out of or relating to (a) Partner's use of the Covered Product after ONE notifies Partner to discontinue use due to such a Claim; (b) the combination of the Covered Product with a non-ONE application, product, data or business process; (c) damages attributable to the value of a non-ONE application, product, data or business process; (d) modifications to Software other than modifications made by ONE; (4) changes made by ONE to Product in accordance with any designs, specifications or instructions provided to ONE by or on behalf of Partner; (f) continued use of any Product for which ONE has provided Partner with modifications or substitute software if use of such modifications or substitute software would have prevented the Claim; or (g) use of the Covered Software in a manner prohibited under the Agreement. Partner shall reimburse ONE for any costs or damages that result from any of the foregoing actions.

14.6 Partner hereby agrees to indemnify ONE against any damages finally awarded against ONE by a court of competent jurisdiction in connection with: (a) an allegation that one or more of the Partner Solution infringes any copyright owned by the third party in the U.S., Canada, Japan or any country that is a member of the European Union; (b) the use of the Product in a manner prohibited under this Agreement, or in a manner for which the Product was not designed; (c) integration or use of the Product with one or more Partner applications, where use of the Product alone would not infringe; (d) changes made by Partner to the Product, where use of unmodified Product would not infringe; (e) changes made to the Product by ONE in compliance with any designs, specifications or instructions provided by or on behalf of Partner; or (f) bodily injury, property damage or any other damage or injury due to the use or inability to use an Integrated Product (subject to ONE's indemnification of Partner as provided in Section 14.1); provided that: (x) Partner is given prompt written notice of the claim; and (y) if Partner has elected to pay for defense of the claim and so notified ONE in writing: (i) Partner is given immediate and complete control over the defense and/or settlement of the claim; and (ii) ONE provides cooperation and assistance in the defense of such claim and does not prejudice in any manner Partner's conduct of such claim.

14.7 The foregoing provisions of this Section state the parties' entire obligations and liability with respect to the infringement or violation of any third-party property right, and shall be subject to the limitations in Section 13 of this Agreement.

## **15. Miscellaneous**

15.1 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.

15.2 Assignment. Partner 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 Partner 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 Partner 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 Partner. 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.

15.3 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 Partner more than one (1) year after the cause of action has accrued.

15.4 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.

15.5 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, shall signed by a person duly authorized to provide such notice, and addressed and delivered to Partner 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 attached to an email and confirmed by the party; or (b) 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.

15.6 Attorneys Fees. Subject to Section 13, 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.

15.7 Export Law Assurances. Partner acknowledges that Product may be subject to export and import control laws, and agrees to comply fully with those laws in connection with Product. Partner 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. Partner hereby certifies that it is not prohibited by the U.S. government from participating in export or re-export transactions.

15.8 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.

15.9 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.

15.10 Apache. Customer understands that OpenNebula is a fully open-source Product that is generally available pursuant to the Apache License. This Agreement does not replace or otherwise amend any Partner rights or obligations pursuant to the Apache License with respect to any uses, distributions, or sublicensing of such other ONE software product.

15.11 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 Partner. Partner 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 Partner 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.

## **16. Endorsement**

16.1 During the term of this Agreement, Partner agrees to be a reference for ONE and participate in a ONE case study, and participate in a press release regarding Partner's subscription to Product, as follows: (a) Reference. As a reference, Partner agrees to speak in good faith with media and/or ONE Partners or prospects from time to time about its use of ONE products and services. Such reference opportunities will be limited to a reasonable quantity and mutually agreed content; (b) Case Study. Partner agrees to make appropriate personnel available to be interviewed for a ONE case study that describes Partner's successful use of Product. ONE may publish the case study without limitation with respect to quantity and form. Prior to publishing the case study, ONE will provide the same to Partner for Partner's review and approval, which approval shall not be unreasonably withheld or delayed; and (c) Press Release.

16.2 ONE may issue a press release in which ONE announces that Partner has subscribed to Product. Partner, at its discretion, may also issue a press release about the mutually agreed content. Neither party shall release its press release without first providing such press release to the other party for its review and approval, which approval shall not be unreasonably withheld or delayed.