

## Master Keystone Flex Subscription Terms

*Last Updated: November 10, 2022*

This Master Keystone Flex Subscription Terms (these "**Keystone Terms**") is entered into by and between NetApp and Customer, unless Customer has entered into a separate agreement with NetApp governing the Subscription Services, and consists of these Keystone Terms, the General Terms, and the applicable Service Description (collectively, the "**Agreement**"). This Agreement is effective when Customer accepts these Keystone Terms ("**Effective Date**"). The individual who accepts these Keystone Terms represents that he or she is authorized to enter into this Agreement on behalf of the Customer. These Keystone Terms apply to all Keystone Orders under the Agreement.

**1. Definitions.** Capitalized terms used but not defined in this Agreement have the meanings set forth in the General Terms.

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

1.2 "**Customer**" means the entity identified as such on the account associated with this Agreement.

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

1.4 "**Documentation**" means NetApp supplied technical documentation describing the features and functions of the Subscription Services.

1.5 "**Fees**" means the applicable fees set forth in a Keystone Order as further described in the Service Description.

1.6 "**General Terms**" means the General Terms Global Terms for All Transactions (except Germany) available at <https://www.netapp.com/how-to-buy/sales-terms-and-conditions/> as of the Effective Date.

1.7 "**Keystone Order**" means the customer order for Subscription Services entered into by the Parties under this Agreement. A "Keystone Order" constitutes a "Purchase Order" under the General Terms.

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

1.9 "**NetApp**" means, collectively, NetApp, Inc., NetApp Ireland Limited, and/or any of their affiliates.

1.10 "**Performance Level**" has the meaning set forth in the Service Description.

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

1.12 **"Rate"** means the applicable rates set forth in a Keystone Order that are used to calculate the Fees.

**1.13 "Service Description"** means the additional applicable license terms for each Subscription Product and the and terms of service for each Subscription Service as published on the Keystone Terms and Conditions Site (as may be updated from time to time) that apply to Customer's use of the specific Subscription Service(s) and Subscriptions Product(s) ordered under a Keystone Order. The Service Description supersedes the terms of any end user license agreement that accompanies a Subscription Product.

1.14 **"Service Levels"** mean the applicable service levels described in the Service Description.

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

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

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

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

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

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

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

3.1 Subscription Products. NetApp will determine the Subscription Products used to deliver Subscription Services. In making such

determination NetApp may: (a) choose, substitute, and modify Subscription Product configurations; (b) configure, control, and direct the use of Subscription Products; (c) scale Subscription Services by adding or removing any part of the Subscription Products provided by NetApp to adjust to variations in utilization; and (d) refresh Subscription Products with new technology when reasonably deemed appropriate. Customer will cooperate with NetApp to enable the installation, documentation, and utilization, of Subscription Products, including providing such access and authorization as is reasonably necessary to complete the installation. NetApp reserves the right to deinstall Subscription Products that NetApp deems unnecessary to fulfill the Service Level requirements at any time. Notwithstanding the foregoing, NetApp will have no obligation to meet the applicable Service Levels, nor add Subscription Products needed to meet such Service Levels, if Customer increases usage of the Subscription Services during the final 90 days of the Subscription Term, unless the Parties have agreed in writing to renew or otherwise extend the Subscription Term prior to or during such final 90 day period.

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

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

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

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

5.1 Right to Subscription Products. The Subscription Services provide Customer with the right to use Subscription Products as provided in the applicable Service Description and these Keystone Terms, and do not transfer any ownership or title to Customer. The Subscription Services are provided to Customer for Customer’s use for internal business purposes in accordance with the applicable Service Description and these Keystone Terms and are not for resale or redistribution.

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

5.3 Applicable Service Description. The Service Description in effect at the start of each Subscription Term specified in the applicable Keystone Order will apply to the Subscription Services and the Subscription Products provided under such Keystone Order. NetApp may

update the Service Description periodically, but material adverse changes for a particular version will not apply during the applicable then-current Subscription Term.

(a) "Customer" in this Agreement that by their sense and context are intended to apply to the ultimate beneficiary of the Subscription Services shall include the End User designated in the Keystone Order.

5.4 Additional Restrictions. In addition to restrictions set forth in the General Terms, but except as expressly permitted in the applicable Service Description, Customer will not, nor will Customer permit any third party to: (a) relocate any of the Subscription Products from the Customer Site(s) without the prior written consent of NetApp, which consent will not be unreasonably withheld; (b) reconfigure, modify, add to or impair any portion of Subscription Products, whether with third party products or otherwise, except as expressly permitted in the Keystone Order or as mutually agreed in writing by the Parties; (c) publish or provide any benchmark or comparison test results that pertain to the Subscription Products or the Subscription Services; (d) reverse engineer, decompile or disassemble the Subscription Products, or otherwise reduce Subscription Software to human-readable form except to the extent required for interoperability purposes under applicable laws or as expressly permitted in open source software licenses; (e) modify, adapt, or create a derivative work of the Subscription Products or the Subscription Services; (f) remove, conceal, or modify any identification, proprietary, intellectual property, or other notices in the Subscription Products and related documentation; (g) use the Subscription Products or Subscription Services in breach or excess of any limitations prescribed by NetApp in this Agreement or the associated Keystone Order or related documentation; (h) use the Subscription Products or Subscription Services and related documentation to perform services for third parties in a service bureau, managed services, commercial hosting services, or similar environment unless otherwise agreed to in writing by NetApp; (i) assign or otherwise transfer, in whole or in part, Customer's licenses to the Subscription Services, the Subscription Products, or the related documentation to another party, unless otherwise agreed to in writing by NetApp; (j) use the Subscription Services or Subscription Products (i) in violation of laws or regulations, (ii) to violate the rights of others, (iii) to try to gain unauthorized access to or interrupt any service, device, data, account or network, or (iv) in high-risk, hazardous environments requiring fail-safe performance, including without limitation in the operation of nuclear facilities, aircraft navigation or control systems, air traffic control, or weapons systems, or any other application in which the failure of the Subscription Services or Subscription Products could lead to severe physical or environmental damages. Customer understands and acknowledges that the Subscription Services and the Subscription Products are not designed or intended for use in or in the design, construction, operation, or maintenance of a nuclear facility or similar hazardous environment. NetApp will not be liable for any damages resulting from such uses and Customer assumes the risk of any such uses.

5.5 Risk of Loss; Title. NetApp retains sole and exclusive title to the Subscription Products and all of its components. Customer is solely responsible for any loss or damage to the Subscription Products from the date of delivery to the date of final disposition of the Subscription Products as provided in Section 9.2(a) and the applicable Keystone Order. No such loss or damage will relieve Customer of any of its obligations under this Agreement or the applicable Keystone Order.

## **6. Customer Responsibilities.**

6.1 Ongoing Cooperation. Customer will, at all times during the period from the date of delivery of any Subscription Products to the date of final disposition of such Subscription Products under Section 9.2(a) and the applicable Keystone Order: (a) promptly notify

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

6.2 Portal. Customer will at all times during the Subscription Term keep the Portal remote client connection fully operational, without disabling, blocking, modifying or otherwise interfering with its functionality or its ability to communicate with NetApp. If the Portal does not function due to Customer interference or conflict with any third party products that Customer uses, then Customer will promptly remove the interference or the conflicting products. If Customer fails to do so within seven days of notice from NetApp of such failure, or if the Portal is unavailable because of the acts or omissions of Customer for more than 30 days, then NetApp may (i) suspend the provision of Subscription Services until the Portal operability is restored, or (ii) terminate the Subscription Services. In either event, Customer will owe and be invoiced for the Fees for the previous billing period, calculated by multiplying the applicable Rate by 120% ("**Holdover Rate**"), until active monitoring is restored or the Subscription Products are returned in accordance with Section 9.2(a).

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

7.1 Service Levels. NetApp will provide the Subscription Services in accordance with the Service Levels during Customer's use. Customer's remedies, if any, for breach of this warranty are described in the Service Description.

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

## **8. Intellectual Property Rights and Protection.**

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

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

## 9. Termination.

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

9.2 Effects of Termination. In addition to the terms set forth in the General Terms:

(a) Upon termination or expiration of this Agreement, the Agreement, or any applicable Keystone Order, Customer will: (i) promptly discontinue use of, and delete, all data uploaded on the Subscription Products by Customer within the affected Subscription Services; and (ii) return in accordance with the guidelines provided or otherwise make available to NetApp any Subscription Hardware provided by NetApp as part of the affected Subscription Services in the same condition as when originally delivered, ordinary wear and tear excepted. Customer must either (1) be responsible for erasing, without destroying or damaging the storage media, all Customer Information from the Subscription Hardware before it is returned to NetApp or (2) if Customer has purchased the Non-Returnable Disk ("NRD") option, it will not return defective or failed diskssolid state drives and other non-volatile memory components as defined on the NetApp Support Site that are part of the Subscription Hardware. Customer will retain such non-volatile components and remain solely responsible for their disposal or destruction and will promptly deliver a certificate of destruction certifying that Customer has destroyed or disabled such components. Customer agrees that if components covered by the NRD option are returned to NetApp, NetApp shall have no obligation or liability whatsoever associated with any data remaining on such components. NetApp will treat such components like other returned parts and convey them into the NetApp supply chain for repair and/or destruction. Failure to return the Subscription Hardware within 15 calendar days following the expiration of the Subscription Term in accordance with the guidelines provided to Customer will entitle NetApp, in its sole discretion, to invoice Customer for (A) the cost of the replacement for such Subscription Hardware, calculated in accordance with NetApp's then current price list, or (B) the Fees accruing (at the Holdover Rate) until final return. For purposes of (B) in the previous sentence, the Fees will not be less than the applicable minimum payment amounts payable immediately prior to the expiration of the Subscription Term. Customer must also, at NetApp's request, promptly return or destroy all copies of the Subscription Software and related Documentation, including any license enablement keys, in Customer's possession or under Customer's control, with all Customer Information or proprietary and confidential information removed. Customer acknowledges that any Customer Information remaining on any Subscription Hardware returned to NetApp may be disposed of or destroyed by or on behalf of NetApp without any liability to NetApp, and NetApp disclaims all liability for the removal or for the protection of any such Customer Information. All Customer use of the Subscription Services after the scheduled expiration of the Subscription Term will be subject to Fees calculated and billed at the Holdover Rate until the return of all related Subscription Products to NetApp.

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

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

**9.3 Survival.** In addition to such terms that survive by their nature, the following Sections will survive termination or expiration of this Agreement: 1, 3.2, 4, 5.5, 6.1, 7.2, 8, 9.1, 9.2, and 10.

## **10. Miscellaneous.**

**10.1 Assignment.** Notwithstanding anything to the contrary in the General Terms, Customer agrees that NetApp may sell, assign or otherwise transfer all or any part of its rights, title and interest in a Keystone Order, the Fees and/or the Subscription Products without notice to or the consent of Customer. Customer will, upon receipt of written notice from NetApp, pay the Fees and such other amounts that may become due under a Keystone Order directly to the NetApp's assignee without abatement, deduction or set-off. Customer hereby waives its right to, and will not for any reason, assert any claim or right of set-off against NetApp's assignee. Customer acknowledges that such NetApp assignee will not be obligated to perform any duty, covenant or obligation of NetApp under such Keystone Order.

**10.2 General.** These Keystone Terms, together with the Keystone Order, the General Terms, and the applicable Service Description (a) represent the entire agreement and understanding between the Parties with respect to the Subscription Products and Subscription Services; (b) supersede any previous communications, representations or agreements between the Parties; and (c) prevail over any conflicting or additional terms in any quote, purchase order, acknowledgement, or similar communications between the Parties. Changes to the Service Description will apply as provided in these Keystone Terms. Changes to these Keystone Terms and any other terms will not apply until Customer accepts them. NetApp may require Customer to accept revised or additional terms before processing a new Keystone Order. These Keystone Terms will take precedence over any conflicting terms in other documents that are part of this Agreement that are not expressly resolved in those documents, except that conflicting terms in the Service Description take precedence over these Keystone Terms as to the applicable Subscription Services and Subscription Products. Terms in an amendment control over the amended document and any prior amendments concerning the same subject matter. Keystone Order(s) and the applicable Service Description will be deemed to incorporate and be subject to this Agreement, except where the Parties expressly otherwise agree in writing. Customer will deliver to NetApp such information, instruments and documents (including waivers from third parties with ownership or possessory interests in real property upon which the Subscription Products may be located) and will do all such things from time to time as NetApp may reasonably request to carry into effect the provisions and intent of this Agreement, and to comply with all applicable statutes and laws.

**10.3** NetApp and Customer agree that, from time to time, an Affiliate of Customer may execute a Keystone Order under this Agreement as "Customer," and such Keystone Order will incorporate all of the terms and conditions contained herein and bind such Affiliate hereto. It is agreed that, unless expressly agreed in writing, the party accepting this Agreement as Customer shall: (a) without notice or demand from NetApp, be jointly and severally liable with such Affiliate for all of the terms and conditions of any Keystone Order executed by it, including, without limitation, all terms and conditions negotiated by such Affiliate with respect thereto and the prompt payment of Fees thereunder, and (b) hold NetApp and any assignee harmless from and against any and all liability, losses, damages

and expenses which NetApp may incur by reason of any failure to so perform. "**Affiliate**" means any entity which, directly or indirectly, controls, is controlled by, or is under common control with, a party, where "control" means the power to direct or cause the direction of the management and policy of any entity.