



Novell PartnerNet Program Agreement (Last Revised November 2009)

This PartnerNet Program Agreement ("Agreement") is made between your organization applying to participate in the Novell PartnerNet Program ("Partner") and the Novell entity defined below ("Novell"). By applying to participate in the Novell PartnerNet Program, the Partner agrees to be bound by this Agreement.

"Novell" means the Novell entity named below depending on Partner's country of residence:

Country	Novell Entity
Denmark	Novell Danmark AS
Finland	Novell Finland OY
France	Novell S.A.R.L.
Germany	Novell GmbH
Italy	Novell Italia srl
Netherlands	Novell Nederland B.V.
Spain	Novell Spain SA
Sweden	Novell Svenska AB
Switzerland	Novell AG
United Kingdom	Novell UK Limited
Elsewhere in Europe, the Middle-East or Africa	Novell Ireland Software Limited
Countries in the Americas and Asia Pacific	Novell, Inc.

1. Purpose. To promote End User customer satisfaction, Novell has developed and maintains the Novell PartnerNet Program, with program tracks and levels of participation designed to ensure that entities which support and sell Novell software product licenses ("Products"), entities that consult with End Users regarding such Products and entities that develop with or to Products have the necessary expertise and resources. The levels of participation and program tracks may be changed from time to time. Each Partner is appointed at a specific level within a program track. A Partner may belong to one or more tracks at the same or different participation levels. This Agreement and the applicable Novell PartnerNet Program Guide ("Program Guide") set forth the terms and conditions under which Partner is authorized to participate in the Novell PartnerNet Program and/or to acquire and resell licenses to Novell's Products. In the event of a conflict between this Agreement and the Program Guide or any other Novell PartnerNet Program literature, this Agreement will prevail.

2. Authorization. If accepted by Novell, Novell grants Partner authorization as a Novell Silver Partner, Novell Gold Partner, or Novell Platinum Partner, and as a Novell Solution Provider, Novell System Integrator, Novell Technology Partner, or Novell Training Partner, as indicated in the authorization notice received from Novell. Novell maintains a separate Program Guide for each program track in the PartnerNet Program. Partner's continued authorization is based on its compliance with this Agreement and the Program Guide applicable to its level of participation. The authorization is non-exclusive and is personal to Partner's legal entity or branch office that applied for the PartnerNet Program and effectively meets its requirements.

2.1. Term. This Agreement, and the authorization granted hereunder, are effective when the Novell PartnerNet Program Application is accepted by Novell, and shall remain in effect until terminated as provided in this Section and Section 14. Partner's continued authorization is always subject to compliance at all times with this Agreement and other PartnerNet Program requirements and obligations. From time to time Novell may update this Agreement, in which case Partner will receive prior written notice of at least thirty (30) days requesting Partner to accept the revised Agreement on line. If Partner does not accept the revised Agreement within that time, Novell may terminate this Agreement and Partner's authorization for convenience under Section 14.2.

3. Program Changes. Partner agrees to review the information available on the Novell PartnerNet web site on a regular basis. Novell reserves the right, in its sole discretion and without any compensation to Partner, to change the Program Guide, as well as any requirements, benefits or other features of the Novell PartnerNet Program at any time. Any such changes become effective immediately upon written notice, which may take the form of publication on the Novell PartnerNet web site. Partner may terminate this Agreement and its authorization following such changes under Section 14.2.

4. Eligible Products and Customers. This Agreement authorizes Partner to acquire eligible Products from a Novell authorized distributor or OEM which has the contractual right to sell licenses to the Products in the Sales Territory. All payment, credit, shipping and other direct purchase terms shall be between Partner and the authorized distributor or OEM from which Partner acquires the Products. Partner is authorized to market and resell licenses to the Novell Products only to End User customers. "End User" means a person or entity acquiring the Products for its own internal use. End User does not include an entity that sells or resells licenses to, or rents or leases the Products to other parties in the regular course of business. Nothing in this Agreement shall oblige Novell to sell any Novell software products directly to Partner.

4.1. Training Partner. If Partner is accepted as a Novell Training Partner, the term "Products" in this Agreement refers to Novell-authorized educational training and course products. Ordering and delivery terms applicable to such Training Partners are set forth in Section 11 below.

4.2. Technology Partner. If Partner is accepted as a Novell Technology Partner, Partner may then either (a) enter a separate agreement directly with Novell that provides for the pricing, bundling and distribution of Novell products (e.g., Novell Open Business OEM agreement), which shall prevail over this Agreement in the event of conflicting terms; or (b) acquire Novell products listed on the then-current Novell Open Business OEM Price List through Novell authorized distributors, in which case please also

refer to Section 12 below. This Agreement is intended only to enable Technology Partners to participate in certain Novell technical support, development, and co-marketing benefits/obligations as set forth in the applicable Program Guide. Acceptance of this Agreement by the Technology Partner shall not obligate nor shall it in any way represent the Technology Partner's intent to enter into a separate agreement for the purpose of distributing or reselling Novell products. All separate arrangements that may be in effect between Partner and any Novell entity will remain in force according to their own terms notwithstanding this Agreement.

5. End User Satisfaction. The Products that Partner markets are technically complex and require high-quality, individualized pre-sale and post-sale support. This support is necessary to achieve and maintain high End User satisfaction. Partner agrees that high End User satisfaction is a condition of its continued authorization by Novell. To ensure high End User satisfaction, Partner agrees not to market the Products directly or indirectly through mail order. In addition, Partner agrees to:

- Ensure that each Product marketed to the End User is appropriate to the End User's requirements;
- Report promptly to Novell all suspected and actual problems with any Product;
- Maintain an End User report for each Product sold/licensed (each End User report to include the name and address of the End User, date of the sale, the Product sold/licensed, and the serial number, if applicable);
- Retain all End User reports for two years after the date of sale, and assist Novell in tracing a Product to an End User to distribute critical product information, locate a product for safety reasons, or to discover unauthorized marketing or infringing acts;
- Conduct business in a manner which reflects favorably at all times on the products, goodwill and reputation of Novell;
- Avoid deceptive, misleading or unethical practices which are or might be detrimental to Novell or its products;
- Refrain from making any false or misleading representations with regard to Novell or its products;
- Refrain from making any representations, warranties, or guarantees to customers or other third parties with respect to the specifications, features or capabilities of Products that are inconsistent with the literature distributed by Novell, or with the software license agreements accompanying the Products; and
- Refrain from disclosing passwords and access codes for the Novell PartnerNet Program to any unauthorized third party, and notify Novell immediately of any such unauthorized use of which Partner may become aware.

6. Trademark Usage. Partner is authorized to use the Novell trademarks applicable to the Products marketed under this Agreement and the other Novell Partner marks, as applicable, but only in accordance with the then current Novell Trademark Usage Guide, which may be subject to change from time to time, and only while this Agreement is in effect. Partner is not authorized to do business under any Novell trade names. Upon Agreement termination, Partner agrees to cease all display, advertising and use of any and all Novell trademarks. Partner agrees not to alter, erase or overprint any notice provided by Novell and not to attach any additional trademarks without the prior written consent of Novell or affix any Novell trademarks to any non-Novell product. Partner recognizes Novell's ownership and title to the trade names and trademarks and the goodwill attaching to the trade names and trademarks. Partner agrees that any goodwill that may accrue because of Partner's use of the Novell trademarks will become Novell's property. Partner agrees not to contest Novell's trademarks or trade names, or make application for registration of any Novell trademarks or trade names without Novell's prior written consent. Partner agrees not to use, employ or attempt to register any trademarks or trade names which, in the opinion of Novell, are confusingly similar to Novell's trademarks or trade names. In Yellow Pages and similar advertising or on its web site, Partner agrees not to use Novell's trademarks or trade names in a way that could cause customers to mistakenly believe that they are calling Novell by calling Partner's listed number, or that they are visiting Novell's web site. Partner will not register or use any internet domain name which contains Novell's trademarks (e.g. "Novell", or "NetWare") in whole or in part or any other name which is confusingly similar thereto.

7. Internal Use of Novell Software. This Agreement also provides the terms under which Novell licenses its software products to Partner for internal use, to assist Partner in familiarizing itself with Novell software to improve its ability to promote and market such software to End Users. The software products available under this section for internal use, as defined below, are those Novell software products Novell makes available from its VLA price list, but excludes any third-party products unless otherwise agreed by Novell in writing as well as certain excluded Novell products ("Internal Use Products"). As long as Partner is participating in a program track that includes as a benefit subscriptions to the Novell Software Evaluation and Development Library (NSEDL), or the Novell Technical Subscription (aka Tech Select), Novell agrees to provide licenses to the Internal Use Products to Partner, as well as any Upgrades or Updates released by Novell (defined by Novell in its sole discretion), free of charge during the term of this Agreement. However, any media and documentation for the Internal Use Products will be made available to Partner according to Novell's standard VLA list prices. Novell is under no obligation to provide any technical support to Partner for the Internal Use Products except as may be provided in the Program Guide, or to fix errors, imperfections, or incompatibilities found in the Internal Use Product.

7.1. License. Subject to the conditions stated in this Agreement, Novell grants a terminable, non-exclusive, non-transferable and restricted license to Partner to use Internal Use Products during the term of this Agreement. This right is limited to the cumulative total of licenses specified in the applicable Program Guide but not to exceed 100 users. Such use is subject to the terms and conditions of the applicable End User License Agreement ("EULA") provided with individual Internal Use Products. However, notwithstanding anything to the contrary in the EULA, Partner expressly agrees that its use of the Internal Use Product(s) is subject to the following restrictions:

- Use within Partner's company by employees for internal business, either in a testing, development or production environment.
- If the Internal Use Product is or contains a development tool, Partner shall not develop any product with the development tool or distribute any product based on any portion of the Internal Use Product. No other right to use or reproduce the Internal Use Product is granted.
- Except as expressly authorized in this Agreement, Partner may not transfer, copy, modify, or disassemble or decompile the Internal Use Products, or any documentation shipped with the Internal Use Products. Partner may not sublicense, resell, rent, lease, timeshare or otherwise distribute any of the Internal Use Products, or use them to provide hosting, outsourcing or other similar services to third parties.
- Upon termination or expiration of this Agreement, this license will terminate automatically. Partner must remove from its systems all Internal Use Products obtained under this license and must return all software media for the Internal Use Products to Novell within five (5) days after termination or expiration.

7.2. **Failure to Return.** Novell shall be entitled to consider Partner's failure to return the Internal Use Product as an order to purchase a retail license for the Internal Use Product, and Novell may invoice Partner for the retail price of the Internal Use Products used by Partner. Partner shall pay such invoices within 30 days. Late payments will be subject to a monthly 2.5% interest or the maximum rate allowed by law, whichever is less. After Partner's payment in full, Partner's use of the Internal Use Product shall be governed solely by the EULA governing use of the product by a retail end-user.

8. Intellectual Property Rights.

8.1. **Ownership.** Notwithstanding anything to the contrary in this Agreement, Novell, or the licensor through which Novell obtained the rights to distribute the Products, owns and retains all title to and ownership of all intellectual property rights in the Products, including all software programs, documentation, media, and related materials and all modifications to and derivative works from software made by Partner or any third party. Novell does not transfer any portion of such title and ownership, or any of the associated goodwill to Partner, and except as provided in Section 7, this Agreement does not grant Partner any right or license.

8.2. **Protection.** Partner agrees to take all reasonable steps to protect the Products from unauthorized copying or use. The source code of any Novell proprietary software acquired under this Agreement represents and embodies trade secrets of Novell and/or its licensors. The source code and embodied trade secrets are not licensed to Partner or any End User, and any modification, addition, or deletion is strictly prohibited. Partner agrees not to disassemble or decompile the Products to discover the trade secrets contained in the source code. This sub-section 8.2 does not apply to Product components distributed by Novell under an open source license.

8.3. **Infringement.** Partner agrees to report any instances of suspected copyright and/or trademark infringement to Novell and to give Novell reasonable assistance, at Novell's expense, in investigating and prosecuting those responsible for the infringing acts.

8.4. **Open Source.** Nothing in this Agreement shall restrict, limit or otherwise affect any rights or obligations Partner may have, or conditions to which Partner may be subject, under any applicable open source licenses to any open source code contained in the Product.

9. Limited Warranty/Limitation of Liability. NOVELL'S ENTIRE LIABILITY AND PARTNER'S EXCLUSIVE REMEDY FOR ANY CLAIMS CONCERNING THIS AGREEMENT AND PRODUCTS ACQUIRED PURSUANT TO THIS AGREEMENT ARE SET FORTH IN THIS SECTION.

9.1. **Warranty to End Users.** Novell provides, to End Users only, warranties for Novell products in the software license agreement accompanying each Novell product. Novell does not warrant non-Novell products, or open source technology incorporated in, provided with, or comprising Novell products. They are provided by Novell on an "AS IS" basis.

9.2. **Disclaimer of Warranties.** NOVELL MAKES NO WARRANTY EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 9 AND IN THE SOFTWARE LICENSE AGREEMENT APPLICABLE TO THE PRODUCT IN QUESTION. NOVELL DISCLAIMS AND EXCLUDES ANY AND ALL OTHER EXPRESS, IMPLIED, AND STATUTORY WARRANTIES, INCLUDING WITHOUT LIMITATION WARRANTIES OF GOOD TITLE, WARRANTIES AGAINST INFRINGEMENT, AND THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NOVELL DOES NOT WARRANT THAT ANY OF ITS PRODUCTS SATISFY CUSTOMER REQUIREMENTS OR THAT THE PRODUCTS ARE WITHOUT DEFECT OR ERROR OR THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED. NOTWITHSTANDING ANYTHING TO THE CONTRARY, INTERNAL USE PRODUCTS ARE PROVIDED "AS IS" WITHOUT WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED.

9.3. Limitation of Liability.

9.3.1. TO THE EXTENT ALLOWED BY APPLICABLE LAW, NEITHER PARTY SHALL BE LIABLE TO THE OTHER (WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY) FOR ANY INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS, LOSS OF BUSINESS, LOSS OF DATA, OR INTERRUPTION OF BUSINESS) SUSTAINED OR INCURRED IN CONNECTION WITH THIS AGREEMENT, WHETHER OR NOT SUCH DAMAGES ARE FORESEEABLE.

9.3.2. **Aggregate Liability.** For death or personal injury caused by the negligence of Novell or its employees, Novell's liability to Partner shall not be limited. Except in those two cases, Novell's liability to Partner for direct damages related to or arising under this Agreement shall be limited to 1.25 times the total amount paid by Partner under this Agreement or US\$5,000, whichever is higher.

9.4. WHERE IN ACCORDANCE WITH SECTION 15.1 THIS AGREEMENT IS GOVERNED BY THE LAWS OF A STATE OF AUSTRALIA, THEN THIS SECTION 9.4 APPLIES.

Trade Practices Act. WHERE ANY LEGISLATION, SUCH AS THE TRADE PRACTICES ACT, IMPLIES INTO THIS AGREEMENT ANY CONDITION OR WARRANTY AND THAT LEGISLATION AVOIDS OR PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING THE APPLICATION OF THE CONDITION OR WARRANTY, THE LIABILITY OF NOVELL FOR ANY BREACH OF THE CONDITION OR WARRANTY IS LIMITED AT THE OPTION OF NOVELL TO ANY ONE OR MORE OF THE FOLLOWING: A) IF THE BREACH RELATES TO GOODS, REPLACING THE GOODS OR THE PAYMENT OF THE COST OF ACQUIRING EQUIVALENT GOODS OR REPAIRING THE GOODS OR PAYMENT OF THE COST OF REPAIRING THE GOODS; B) IF THE BREACH RELATES TO SERVICES, THE SUPPLYING OF THE SERVICES AGAIN OR THE PAYMENT OF THE COST OF HAVING THE SERVICES SUPPLIED AGAIN. NOTHING HEREIN IS INTENDED TO RESTRICT OR EXCLUDE ANY LIABILITY OF NOVELL UNDER PART VA OF THE AUSTRALIAN TRADE PRACTICES ACT 1974. SECTION 9.3 IS SUBJECT TO THE TERMS OF THIS SECTION 9.4.

9.5. WHERE IN ACCORDANCE WITH SECTION 15.1 THIS AGREEMENT IS GOVERNED BY THE LAWS OF NEW ZEALAND, THEN THIS SECTION 9.5 APPLIES.

Fair Trading Act. WHERE ANY LEGISLATION, SUCH AS THE FAIR TRADING ACT, IMPLIES INTO THIS AGREEMENT ANY CONDITION OR WARRANTY AND THAT LEGISLATION AVOIDS OR PROHIBITS PROVISIONS IN A CONTRACT EXCLUDING THE APPLICATION OF THE CONDITION OR WARRANTY, CUSTOMER ACKNOWLEDGES THAT, IN ENTERING INTO THIS AGREEMENT, SAVE FOR THOSE EXPRESSLY STATED HEREIN, IT HAS NOT RELIED ON ANY STATEMENT, OR REPRESENTATION OR INFORMATION SUPPLIED BY NOVELL. FOR AVOIDANCE OF DOUBT, NOTHING IN THIS AGREEMENT (INCLUDING SECTION 9.3 ABOVE) EXCLUDES ANY LIABILITY OF A PARTY UNDER, OR LIMIT OR AFFECT THE APPLICATION OF, THE FAIR TRADING ACT.

Consumer Guarantees' Act. CUSTOMER ACKNOWLEDGES THAT IT ACQUIRES THE SERVICES FOR ITS BUSINESS PURPOSES AND ACCORDINGLY THE PROVISIONS OF THE CONSUMER GUARANTEES ACT DO NOT APPLY. SECTION 9.3 IS SUBJECT TO THE TERMS OF THIS SECTION 9.5.

9.6. WHERE IN ACCORDANCE WITH SECTION 15.1 THIS AGREEMENT IS GOVERNED BY THE LAWS OF SINGAPORE, THEN THIS SECTION 9.6 APPLIES.

Contracts (Rights of Third Parties) Act (Cap 53B). A PERSON WHO IS NOT A PARTY TO THIS AGREEMENT SHALL HAVE NO RIGHT UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT (CAP 53B) TO ENFORCE ANY OF ITS TERMS.

10. Verifications. Partner agrees that Novell may, at its own expense, verify Partner's use of Internal Use Products as well as Partner's business activities related to the PartnerNet Program, to determine Partner's compliance or non-compliance with this Agreement and the applicable PartnerNet Program requirements including, if applicable, any related business plans or other specific arrangements between the parties. Such verifications will take the form of requests for information, documents or records, on-site visits, or both. Any on-site visit will occur during regular business hours at Partner's offices, and will not interfere unreasonably with Partner's business activities. For an on-site visit, Novell will give Partner at least 10 days prior written notice of the date of each visit. All information obtained during the verification will be kept confidential.

11. Purchase Terms for Training Partners. This section applies only to Novell Training Partners purchasing Products (e.g., course materials) directly from Novell.

11.1. Ordering. Partner may purchase Novell materials from Novell at the prices listed in the then-current price list. Novell may change the prices listed in the price list or add or remove price list items at any time. Any order submitted under this Agreement using Partner's electronic password on Novell's web-based ordering system shall have the same validity and effect as if Partner had submitted the order to Novell on a paper order form signed by an authorized representative. Any Product supplied by Novell shall be deemed accepted by Partner unless notice in writing of defect or nonconformity is received within 10 days of receipt of the Product at Partner's designated receiving address.

11.2. Payment Terms. All payments are due in full 30 days from the date of invoice. Late payments will be subject to a monthly 2.5% interest or the maximum rate allowed by law, whichever is less. Partner agrees to give Novell written notice of any dispute Partner may have concerning any invoice issued by Novell within 30 days from the date of the invoice. If Partner fails to do so, Partner agrees that Novell may conclusively presume the invoice to be accurate.

11.3. Availability / Shipping Designations. Novell will use reasonable efforts to fill Partner's orders for Novell Products and meet Partner's request for shipment dates, subject to material inventory availability and consistent with Novell production and supply schedules. Orders not filled or completely filled by Novell within 90 days of the order date will be deemed to have lapsed and removed from Novell's order entry system. Unless otherwise agreed in writing, Novell will ship Novell Products to Partner's designated offices. Novell will not be liable for any damages to Partner or to any third party for Novell's failure to fill any orders or for any delay in delivery or error in filling any orders for any reason whatsoever.

11.4. Delivery & Risk of Loss.

11.4.1. Delivery. For delivery from the U.S. to destinations within the U.S.A., delivery terms are FCA Novell's Dock (INCOTERMS 2000). Novell will ship ground only and prepay freight from Novell's Dock to Partner's forwarder or named destination. All other freight arrangements will be billed to Partner. For delivery from the U.S. to destinations outside the U.S.A., delivery terms are DDU-POE (Delivery Duty Unpaid – Port of Entry) as defined in INCOTERMS 2000. Novell will select a carrier and will prepay shipping and handling charges. You will be responsible for all applicable import duties and value added tax, goods and services tax, or other similar taxes and fees. For delivery within Europe, the Middle-East and Africa (EMEA), delivery terms are CARRIAGE PAID TO (CPT) Destination (as defined in INCOTERMS 2000). Novell will prepay the freight and invoice Partner for freight and any management costs. Destination for European Union countries will be Partner's nominated delivery point. For non-European Union countries, destination will be the point of import. The term CPT Destination does not include payment of taxes or duties.

11.4.2. Title and Risk of Loss. For shipment within the United States, title to any deliverables, exclusive of Novell's rights to intellectual property, and risk of loss will pass to Partner upon delivery to Partner's carrier. For shipments from the U.S. to outside the U.S., title to and risk of loss will remain with Novell until the shipment arrives at the importing country's entry port (or at a bonded warehouse within Canada or Mexico if Partner so requests shipment). For shipment within EMEA, risk of loss shall pass to Partner upon delivery to Partner's carrier. Notwithstanding the above provisions, no title to Master Software is transferred to Partner.

11.4.3. Electronic Delivery. For Products delivered by electronic means directly to Partner, delivery is deemed to occur where the initial download is completed successfully at the destination computer. The Product is considered delivered DDU-POE (as defined in INCOTERMS 2000).

11.5. Limited Warranty for Course Materials. The warranties set forth below only relate to the Novell course materials. Any other warranties provided by Novell are stated in Section 9.

11.5.1. Media. Novell warrants that if the course materials media is in a damaged or physically defective condition at the time of Novell PartnerNet Program Agreement
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delivery, Novell will provide Partner with replacements at no charge if the media is returned to Novell (postage prepaid) within 90 days of delivery.

11.5.2. **Novell Materials.** Novell further warrants that it will use commercially reasonable efforts to prepare the course materials so that they do not contain substantive material mistakes. If any material inaccuracy or mistake is reported by Partner in the Novell course materials obtained under this Agreement, Novell's responsibility and Partner's sole remedy is the correction or replacement of the course materials by Novell.

11.5.3. **Disclaimer.** EXCEPT AS EXPRESSLY SET FORTH IN THIS SUB-SECTION 11.5, NOVELL MAKES NO WARRANTIES FOR THE NOVELL COURSE MATERIALS. NOVELL DISCLAIMS AND EXCLUDES ALL OTHER EXPRESS, IMPLIED, AND STATUTORY WARRANTIES, REPRESENTATIONS, AND CONDITIONS, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, GOOD TITLE, AND NON-INFRINGEMENT.

11.6. **Taxes.** Prices are exclusive of applicable taxes, including value-added or sales tax. Partner agrees to pay and bear the liability for any taxes associated with this Agreement, including sales, use, value-added, excise and all customs, duties or governmental impositions, but excluding: i) taxes based upon Novell's net income, capital, or gross receipts, or ii) any withholding taxes imposed if such withholding tax is allowed as a credit against income taxes of Novell such as a withholding tax on a royalty payment made by Partner where such withholding is required by law. If Partner is required to withhold taxes, Partner shall furnish Novell receipts and documentation substantiating such payment. If Novell is required by law to remit any tax or duty on behalf, or for the account, of Partner under this Agreement, Partner agrees to reimburse Novell within 30 days after Novell notifies Partner in writing of such remittance. If Partner claims a tax exemption, Partner must provide Novell in advance with valid tax exemption certificates.

12. Additional Terms for Technology Partners. The following additional terms apply solely to Technology Partners who acquire, for resale to End Users, licenses of Novell Linux software products through a Novell authorized distributor under the Novell' Open Business OEM program and price list. Except as authorized below, a Novell Technology Partner must bundle all Novell Software with either Partner's own hardware (brand personal computer or Partner's own brand personal computer server) or software products and sold as a bundled unit only ("Bundled Package"). If Partner violates this restriction, the licenses Partner sells to End Users (either directly or through your approved resellers) will be an illegal license and Novell shall be entitled to require Partner to purchase a legal license and seek damages against Partner in a court of law. Notwithstanding the above, Partner may purchase stand-alone Upgrade licenses or Maintenance without the bundling obligation provided that the purchase is a renewal for End Users already using Novell Software that has been bundled by Partner so that End Users can receive the upgrade of the Novell Software. In addition, the following additional terms apply:

- Partner must sell all Novell Software licenses only to bona fide End Users or to Partner's authorized resellers for onward sale to End Users.
- Partner must not disclose the individual pricing of the Novell Software when selling it as part of a Bundled Package.
- Partner must ensure that all Bundled Packages include the standard Novell End User License Agreement ("EULA") in the package.
- Partner must not use, copy, modify, or otherwise transfer the Novell Software or documentation, or any copy, modification or merged portion, in whole or in part, except as expressly provided for in this Agreement.
- For any Novell Software that is open source software, the price includes the right for End Users to receive upgrades (i.e. new versions) of the Novell Software ("Maintenance") for periods ranging from one year to five years from the registration, depending on the years of Maintenance purchased by End Users, on the Novell Customer Center portal at https://secure-www.novell.com/center/regadmin/jsps/home_app.jsp. Partner must therefore inform each End User of such Maintenance right and necessity to register on the Novell Customer Center portal prior to receiving such upgrades.
- Partner agrees not to engage in the manufacture, use, distribution, supply, marketing or promotion of any counterfeit, pirated or illegal software whether directly or indirectly and will assist Novell to all extent reasonably required by Novell in the investigation of any such activities.
- Partner is responsible to provide all technical and other support to End Users who acquire licenses of Novell Software as part of a Bundled Package. Notwithstanding anything to the contrary in the applicable EULA, Maintenance does not include technical or installation support from Novell to the End User.

13. Confidential Information. The parties agree that any Confidential Information provided under the Agreement will be held and maintained in strict confidence. Each party agrees to protect the confidentiality of such information in a manner consistent with the way a reasonable person would protect similar Confidential Information. "Confidential Information" means the information and materials noticed or marked by Novell or Partner as confidential and proprietary. "Confidential Information" does not include information that (a) is already known to the receiving party at the time it is disclosed and has not been obtained wrongfully, (b) becomes publicly known without fault of the receiving party, (c) is independently developed by the receiving party, (d) is approved for release in writing by the disclosing party, (e) is disclosed without restriction by the disclosing party to a third party, or (f) is disclosed pursuant to legal obligations beyond the control of the disclosing and receiving parties. The recipient of Confidential Information retains the right to use its knowledge and experience (including processes, ideas, and techniques) learned or developed in the course of providing any services. All Confidential Information is provided "AS IS" WITHOUT WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED.

14. Termination

14.1. **Termination for Cause.** Either party may terminate this Agreement for the substantial breach by the other party of a material term. The terminating party will first give the other party written notice of the breach and a reasonable period of at least fourteen (14) days in which to cure the alleged breach. If a cure is not achieved during the cure period, then the non-breaching party may terminate this Agreement upon written notice.

14.2. **Termination for Convenience.** Either party may terminate this Agreement (and Partner's authorization hereunder) for convenience and without showing cause at any time upon thirty (30) days' prior written notice to the other party.

14.3. Insolvency, Assignment, or Bankruptcy. Either party may terminate this Agreement upon written notice to the other party if the other party (a) is not paying its debts as such debts generally become due, (b) becomes insolvent, (c) files or has filed against it a petition (or other document) under any bankruptcy law or similar law, that is unresolved within 60 days of the filing of such petition (or document), (d) proposes any dissolution, liquidation, composition, financial reorganization or recapitalization with creditors, (e) makes a general assignment or trust mortgage for the benefit of creditors, or (f) if a receiver, trustee, custodian or similar agent is appointed or takes possession of any of its property or business.

14.4. Effect of Termination. Termination of this Agreement for any reason will immediately terminate Partner's participation in the Novell PartnerNet Program, including eligibility to the program benefits. Within 45 days after the date of the termination notice, Partner shall cease referring to itself as a Novell Silver Partner, Novell Gold Partner, or Novell Platinum Partner (as applicable), or any other title associated with the PartnerNet Program, and using those titles, trademarks, logos and brands in any communication and advertising or on Partner's websites. Partner shall destroy all materials, documents, brochures, tools and software (including any copies thereof) that Partner may have obtained from Novell (or its fulfillment agent) in connection with its participation in the Novell PartnerNet Program. Regardless of any other provision of this Agreement, no fees will be refunded and Novell will not by reason of the termination of the Agreement be liable for compensation, reimbursement, or damages on account of the loss of prospective profits or on account of expenditures, investments, or commitments in connection with Partner's business or goodwill, or otherwise.

15. General Provisions.

15.1. Choice of Law. Choice of law and jurisdiction for this Agreement shall be as follows. To the extent their exclusion is permissible, the terms of the United Nations Convention on the International Sale of Goods will not apply, even where adopted as part of the domestic law of the country whose law governs this Agreement.

15.1.1. For Partners located in Europe, the Middle-East or Africa (EMEA), this Agreement will be governed by the substantive laws of the country in which Partner has its principal residence, where that country is (a) a member state of the European Union or (b) a member state of the European Free Trade Association or (c) the Republic of South Africa. For a Partner with principal residence in any other country in EMEA (except South Africa) the applicable law will be the law of England. An action at law under this Agreement may only be brought before a court of appropriate jurisdiction in the state whose law governs this Agreement under the terms of this section.

15.1.2. For Partners located in the Americas and Asia Pacific, unless subsection(s) (i) to (iii) applies, this Agreement shall be governed by the substantive laws of the State of Utah and applicable federal (U.S.) laws, without regard to any conflict of laws provisions. If either party initiates legal proceedings to enforce a term of the Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees. Each party will, at its own expense, comply with any applicable law, statute, ordinance, administrative order, rule and regulation.

- i. Where the Partner's country of principal residence is Singapore, Thailand, Vietnam, the Philippines, Indonesia or Pakistan, then this Agreement will be governed by the laws, excluding the private international law rules, of Singapore. All disputes arising out of or in connection with this Agreement will finally be settled under the Rules of Arbitration of the Singapore International Arbitration Centre by a single arbitrator appointed in accordance with the said Rules. The language to be used in the arbitral proceedings will be English and the place of arbitration will be Singapore. The arbitral award made and granted by the arbitrator will be final, binding and incontestable and may be used as a basis for enforcement of the award in the place of residence or business of the parties.
- ii. Where the Partner is principally resident in China (excluding Hong Kong, S.A.R.), then this Agreement will be governed by the laws of Hong Kong, SAR. All disputes arising out of or in connection with this Agreement will be settled by arbitration at the Hong Kong International Arbitration Centre ("HKIAC") in Hong Kong under the Hong Kong Arbitration Ordinance. The arbitration will be carried out before 3 arbitrators, each of the parties will appoint one arbitrator and the third will be chosen by HKIAC in accordance with HKIAC Procedures for Arbitration. The arbitration will be conducted in the English language. Any arbitral award will be final and binding on the parties. The expense of the arbitration will be borne between the parties as determined by the arbitrators.
- iii. Where the Partner is principally resident in any of the other countries in Asia Pacific, this Agreement will be governed by the substantive law, excluding the private international law rules, of the country of principal residence of the Novell Entity and, where applicable, the state of principal residence in the country of principal residence of the Novell Entity. An action at law hereunder may only be brought before a court of appropriate jurisdiction in the state whose law governs this Agreement.

15.2. Superior Agreement. This Agreement and the Program Guide comprise the whole agreement between the parties. Unless otherwise expressly provided herein, this Agreement supersedes all prior representations or agreements between the parties relating to the same subject matter. The Agreement will not be supplemented or modified by any course of dealing or usage of trade. Variance from or addition to the terms and conditions of this Agreement in any purchase order or other written notification from Partner (including but not limited to any specification of a price different than Novell's current list price) will be of no effect.

15.3. Assignment. This Agreement may not be assigned by Partner, in whole or in part, without Novell's prior written consent. Novell will not unreasonably withhold consent to an assignment to Partner's parent company or subsidiary. Any attempted assignment without Novell's written consent will be null and void. Novell shall be entitled to assign its rights and obligations under this Agreement to Novell, Inc. or any company controlled directly or indirectly by Novell, Inc.

15.4. Independent Contractors. Any use of the term "partner" in this Agreement is in the sales and marketing sense, and the parties are not (and will not represent that they are) partners under the technical legal definition of that term. Nothing in this Agreement, and no course of dealing between the parties, shall be construed to create an employment or agency relationship or a legal partnership between a party and the other party or the other party's employees or agents. Neither party has the authority to

bind the other, to incur any liability or otherwise act on behalf of the other. Each party shall be solely responsible for payment of its employees' salaries (including withholding of income taxes and social security), workers compensation, and all other employment benefits.

15.5. Severability. If any provision of the Agreement is held invalid or unenforceable for any reason, the remainder of the provisions will continue in full force and effect as if this Agreement had been agreed with the invalid portion eliminated. The parties further agree to substitute for the invalid provision a valid provision that most closely approximates the intent and economic effect of the invalid provision.

15.6. Export Restrictions. Any products or technical information provided under this Agreement may be subject to U.S. export controls and the trade laws of other countries. The parties agree to comply with all export control regulations and to obtain any required licenses or classification to export, re-export or import deliverables. The parties agree not to export or re-export to entities on the current U.S. export exclusion lists or to any embargoed or terrorist countries as specified in the U.S. export laws. The parties will not use deliverables for prohibited nuclear, missile, or chemical biological weaponry end uses. Please consult the Bureau of Industry and Security web page www.bis.doc.gov before exporting Novell products from the U.S. Please refer to www.novell.com/info/exports/ for more information on exporting Novell software. Upon request, Novell will provide Partner with specific information regarding applicable restrictions. However, Novell assumes no responsibility for Partner's failure to obtain any necessary export approvals.

15.7. Improper Payment. Neither Partner nor its directors, employees, agents or subcontractors or their directors, employees or agents shall make any payment or give anything of value, directly or indirectly, to any government official, political party, or candidate for government office (including any director, employee or agent of any government department, agency or instrumentality) to influence his or its decision, or to gain any other advantage for Partner or Novell in connection with this Agreement. Partner shall immediately notify Novell of any violation of this subsection and shall immediately pay Novell the greater of Partner's profits or monies earned in the transaction, or an amount equal to the amount of the payment or the value of the gift to a government official which gives rise to such violation. Partner shall also hold Novell harmless for all losses and expenses arising out of such violation. In the event of any violation of this subsection, Novell may, at its sole option and in addition to Novell's other rights and remedies, terminate this Agreement at any time and notwithstanding any other provision of this Agreement, withhold any or all payments otherwise due to Partner in connection with this Agreement.