



## End User Licence Agreement (FCO Product)

### IMPORTANT NOTICE: PLEASE READ CAREFULLY BEFORE INSTALLING THE SOFTWARE:

This licence agreement (“**Licence**”) is a legal agreement between you (“**Licensee**” or “**you**”) and Flexiant Limited (Company Number 07081795) with registered office at One Portland Place, London, W1B 1PN, United Kingdom (“**Flexiant**”, “**us**” or “**we**”) for the computer software product, Flexiant Cloud Orchestrator (“**Software**”) and the online documentation relating to such Software, for aiding your use of it (“**Documentation**”). We licence use of the Software and Documentation to you on the basis of this Licence. We do not sell the Software or Documentation to you. We remain the owners of the Software and Documentation at all times.

**Operating System Requirements:** in order to operate the Software, the equipment and hardware on which you intend to install it must comply with the minimum hardware specification as set out on our website or within the Documentation.

By installing the Software OR clicking on the “Accept” button below, you agree to the terms of this Licence which will bind you (including any legal entity that has obtained the Software and on whose behalf it is used). If you do not agree to the terms of this Licence, we will not licence the Software and Documentation to you and, if you have commenced with the installation of the Software, you must discontinue the installation process now. In this case you must delete any Software already downloaded and return or destroy any accompanying Documentation in your possession.

**You should print a copy of this Licence for future reference.**

### 1. DEFINITIONS AND INTERPRETATION

1.1. In this Licence (except where the context otherwise requires) the following words and expressions shall have the following meanings:

“ <b>Agreed Order Form</b> ”	means: (a) where you have ordered the Software directly from Flexiant, the Licensee Order Form; or (b) where you have ordered the Software via a Registered Reseller, the Reseller Order Form, where such form relates to the Instance of the Software to which this Licence applies;
“ <b>Annual Core-based Liability Cap</b> ”	means an amount calculated by charging five pounds sterling (£5) for each Core per month on which the Software is installed, for the first twelve (12) months of the term of this Licence;
“ <b>Authorised Clusters</b> ”	means the number of Clusters specified in the Agreed Order Form as the maximum number of Clusters on which you can install the Software, or where the Software is the Evaluation Edition, one (1) Cluster;
“ <b>Authorised Cores</b> ”	means (a) the Inclusive Cores; (b) where the Banked Core Month Model is being utilised in accordance with an Agreed Order Form and the agreement of which it forms part, the Available Core Months; or, (c) where the Software is the Evaluation Edition, twenty four (24) Cores;
“ <b>Available Core Months</b> ”	means the number of Core Months available for use by you during a relevant month, being the total number of Core Months purchased less any Core Months used in each



	preceding month, all as determined in accordance with the Banked Core Month Model;
<b>“Banked Core Month Model”</b>	means the model set out in schedule 1 of this Licence;
<b>“Business Day”</b>	9 am to 5 pm, UK Local time, Monday to Friday excluding English public holidays;
<b>“Cluster”</b>	means a set of compute nodes (each of which may or may not have a different hypervisor or be located in a different geographic location), owned or under your control;
<b>“Core”</b>	means a microprocessor or component of a microprocessor capable of executing instructions, owned or under your control;
<b>“Core Month”</b>	means the right for you to have the Software configured on one Core for the period of one month;
<b>“Edition”</b>	means the edition of the Software;
<b>“Evaluation Edition”</b>	means the edition of the Software available for download from Flexiant’s website, for use on a trial basis, subject to the terms of this Licence;
<b>“Event of Force Majeure”</b>	has the meaning given to the term at clause 14.1;
<b>“Group”</b>	in relation to any Party, means that Party and its subsidiaries and holding companies and any subsidiaries of any such holding companies as the same vary from time to time and "subsidiary" and "holding company" will have the meanings given to them by s1159 Companies Act 2006
<b>“Inclusive Cores”</b>	means the maximum number of Cores on which you are entitled to install the Software in any one month, as set out in the Agreed Order Form;
<b>“Instance”</b>	means a single deployment instance of one of the Edition, each with a single management stack and single logic database;
<b>“Intellectual Property Rights”</b>	means all patents, copyrights and related rights, database rights, design rights, trademarks, service marks, trade names, domain names, rights in reputation, and other rights of a like nature (whether registered or unregistered) and all applications for such rights as may exist anywhere in the world;
<b>“Licence Fees”</b>	means, (a) where you have ordered the Software directly from the Flexiant, the fees payable by you to Flexiant in accordance with the relevant Licensee Order Form; or (b) where you have ordered the Software via a Registered Reseller, the fees payable by the Reseller to Flexiant, in



accordance with the relevant Reseller Order Form;

<b>“Licence Term”</b>	means, unless terminated earlier in accordance with this Licence, the duration of the Agreed Order Form or, where the Software is being used by you on a trial basis, a period of sixty (60) days from the date on which you agree to this Licence;
<b>“Licensee Order Form”</b>	means an order form between you and Flexiant which either together with this Licence forms an entire agreement or is entered pursuant to a direct agreement between you and Flexiant and which together with this Licence forms part of such direct agreement;
<b>“Party”</b>	Flexiant or the Licensee as the case may be (and <b>“Parties”</b> will be construed accordingly) and reference to a Party includes reference to its successors and permitted assigns;
<b>“Registered Reseller”</b>	means an entity which is authorised to resell the Software, having first entered into a valid reseller agreement with Flexiant which sets out the terms of such arrangement;
<b>“Reseller Order Form”</b>	means a paper order form or an electronic order between Flexiant and a Registered Reseller entered pursuant to and forming part of a reseller agreement between such parties (as such order form or electronic order may be amended from time to time in accordance with the terms of the reseller agreement of which it forms part), such terms having been reflected in a contractually binding agreement between you and the Registered Reseller;
<b>“Third Party Software”</b>	software owned or distributed by third parties;
<b>“Writing”</b>	includes hand-writing, facsimile and printed format.

1.2. In this Licence (except where the context otherwise requires):

- 1.2.1. headings are included for convenience only and shall not affect the construction or interpretation of this Licence;
- 1.2.2. reference to a clause or schedule is to a clause or schedule to this Licence;
- 1.2.3. words importing a particular gender or number do not exclude other genders or numbers;
- 1.2.4. any phrase introduced by the terms “including”, “in particular” or any similar expression shall be construed as illustrative and the words following any of those terms shall not limit the sense of the words preceding those terms; and
- 1.2.5. any reference to “persons” includes natural persons, firms, partnerships, bodies corporate, corporations, associations, organisations, governments, states, foundations and trusts (in each case whether incorporated and whether or not having separate legal personality).



## **2. GRANT AND SCOPE OF LICENCE**

- 2.1. Other than where the Software is the Evaluation Edition, you acknowledge that the entering into of this Licence by Flexiant is conditional upon a valid Agreed Order Form in respect of the Software being entered into between us and you, or, where you have ordered the Software via a Registered Reseller, us and such Registered Reseller. Such Agreed Order Form sets out the Edition being licensed and certain details as regards the scope of the Licence. Where the Software is the Evaluation Edition, the scope is as set out in this Licence.
- 2.2. Where you have ordered the Software directly from Flexiant, subject to clause 2.1 being fulfilled, in consideration of the timely and complete payment by you of the Licence Fees, Flexiant hereby grants to you a world-wide, non-exclusive, non-transferable, revocable licence to use the Software and the Documentation on the terms of this Licence for the Licence Term.
- 2.3. Where you have ordered the Software via a Registered Reseller, subject to the condition in clause 2.1 being fulfilled, in consideration of you agreeing to abide by the terms of this Licence, Flexiant hereby grants to you a world-wide, non-exclusive, non-transferable, revocable licence to use the Software and the Documentation on the terms of this Licence for the Licence Term.
- 2.4. Where the Software is the Evaluation Edition, in consideration of you agreeing to abide by the terms of this Licence, Flexiant hereby grants to you a world-wide, non-exclusive, non-transferable, revocable licence to use the Software and the Documentation on the terms of this Licence for the Licence Term.
- 2.5. You may:
  - 2.5.1. install and use the Software, for your internal business purposes only, on Clusters not exceeding the Authorised Clusters and on Cores, on a monthly basis, not exceeding the Authorised Cores;
  - 2.5.2. use any Documentation in support of the use permitted under this clause 2.5; and
  - 2.5.3. in respect of the Edition being licensed, receive and use any free supplementary software code or update of the Software, incorporating patches and corrections of errors as may be provided by Flexiant from time to time, where such supplementary software code or update shall, when provided, form part of the Software.
- 2.6. You permit us to inspect (both remotely and physically) and have continued access to any premises and to the computer equipment located there, at or on which the Software is being kept or used and to any records kept pursuant to this Licence, for the purpose of ensuring that you are complying fully with the terms of this Licence, at such times as are agreed with you, such agreement and access not to be unreasonably withheld or delayed.
- 2.7. The downloadable image of the Software includes Third Party Software, which are not comprised within the Software, including the Ubuntu Server distribution of the Linux operating system. All such Third Party Software is necessary in order to use the Software. Such Third Party Software is subject to the licence terms of its third party licensees, which include the GNU Public Licence (GPL). You may obtain the licence terms and source code for Ubuntu Server distribution from Ubuntu (at <http://www.ubuntu.com/>, or by using the 'apt-get source' utility). Source code for packages not provided by Ubuntu can be installed by installing the package 'extility-gpl-source'. Further information, please see our web site at <http://www.flexiant.com/> and follow the link to 'Open Source' from the support page.

## **3. RESTRICTIONS**

- 3.1. Except as expressly set out in this Licence or as permitted by any local law, you undertake:



- 3.1.1. not to copy the Software or the Documentation except where such copying is incidental to normal use of the Software or where it is necessary for the purpose of back-up or operational security;
- 3.1.2. not to rent, lease, sub-license, loan, translate, merge, adapt, vary or modify the Software or Documentation;
- 3.1.3. not to disassemble, de-compile, reverse engineer or create derivative works based on the whole or any part of the Software nor attempt to do any such things (except to the extent that such actions are permissible, being unable to be prohibited by applicable law);
- 3.1.4. not to make alterations to, or modifications of the whole or any part of the Software nor permit the Software or any part of it to be combined with, or become incorporated in, any other programs;
- 3.1.5. to keep all copies of the Software secure and to maintain accurate and up-to-date records of the number and locations of all copies of the Software;
- 3.1.6. to supervise and control use of the Software and ensure that the Software is used by your employees and representatives in accordance with the terms of this Licence;
- 3.1.7. to include Flexiant's copyright notice on all entire and partial copies of the Software in any form;
- 3.1.8. not to provide, or otherwise make available, the Software in any form, in whole or in part (including, but not limited to, program listings, object and source program listing, object code and source code) to any person (other than your employees), without prior written consent from us: and
- 3.1.9. where the Software is the Evaluation Edition, only use such Software for the purpose of a bona-fide evaluation of Flexiant's technology in accordance with the terms of this Licence. If you wish to use the Software other than for the purposes of evaluation, or extend the time period during which you are authorised to use the Evaluation Edition, you must enter into a Licensee Order Form, subject to the terms of a corresponding licence.

#### **4. INTELLECTUAL PROPERTY RIGHTS**

- 4.1. You acknowledge that all Intellectual Property Rights in the Software and the Documentation throughout the world belong to us or our licensors (who may be members of our Group), that rights in the Software are licensed (not sold) to you and that you have no rights in or to the Software or the Documentation other than the right to use them in accordance with the terms of this Licence.
- 4.2. You acknowledge that you have no right to have access to the Software in source code form or in unlocked coding or with comments.
- 4.3. Flexiant undertakes at its own expense to defend the Licensee or, at its option, settle any claim or action brought against the Licensee alleging that the possession, use, development or modification of the Software (or any part thereof) in accordance with the terms of this Licence infringes the Intellectual Property Rights of a third party ("Infringement Claim") and shall be responsible for all reasonable losses, damages, costs (including legal fees) and expenses incurred by or awarded against the Licensee as a result of or in connection with any such Infringement Claim. For the avoidance of doubt, this clause 4.3 shall not apply where the Infringement Claim in question is attributable to possession, use, development, modification or maintenance of the Software (or any part thereof) by the Licensee other than in accordance



with the terms of this Licence or use of the Software in a manner which has not been authorised or agreed to by Flexiant.

4.4. Clause 4.3 is conditional on:

- 4.4.1. the Licensee notifying Flexiant in Writing, as soon as reasonably practicable, of any Infringement Claim of which it has notice;
- 4.4.2. the Licensee not making any admission as to liability or compromise or agreeing to any settlement of any Infringement Claim without the prior written consent of Flexiant (such consent to be determined in Flexiant's absolute discretion);
- 4.4.3. Flexiant having, at its own expense, the conduct of or the right to settle all negotiations and litigation arising from any Infringement Claim and the Licensee giving Flexiant all reasonable assistance in connection with those negotiations and such litigation.

4.5. If any Infringement Claim is made, or in Flexiant's reasonable opinion is likely to be made, against the Licensee, Flexiant may at its sole option and expense:

- 4.5.1. procure an indemnity in favour of the Licensee in relation to the Infringement Claim and notify Flexiant in Writing, as soon as reasonably practicable, of any Infringement Claim of which it has notice;
- 4.5.2. the modify the Software so that it ceases to be infringing; or
- 4.5.3. replace the Software with non-infringing Software.

## 5. WARRANTIES

5.1. Except as expressly provided in this Licence, the Parties exclude all representations, conditions and warranties whether express or implied (by statute or otherwise) to the fullest extent permitted by law.

5.2. We do not warrant that the use of the Software will be uninterrupted or error free.

5.3. You warrant to us that:

- 5.3.1. you have full capacity to enter into this Licence;
- 5.3.2. as you are aware that the Software has not been developed to meet your individual requirements, you are fully responsible for ensuring that the facilities and functions of the Software meet your requirements and are suitable to achieve your intended results; and
- 5.3.3. where the Software is the Evaluation Edition, you will only use the Software for the purposes of bona-fide evaluation.

5.4. We warrant to you that:

- 5.4.1. we have full capacity to enter into this Licence;
- 5.4.2. use of the Software and the Documentation by you as permitted by this Licence shall not infringe the Intellectual Property Rights of any third party; and
- 5.4.3. the Software shall be tested for all known viruses and other contaminants including any codes or instructions that may be or will be used to access, modify, delete or



damage and data files or other computer programs in accordance with standard industry practices.

## 6. LIMITATION OF LIABILITY

- 6.1. Nothing in this Licence will affect either Party's liability for:
- 6.1.1. death or personal injury caused by its negligence;
  - 6.1.2. fraudulent misrepresentation;
  - 6.1.3. any other type of liability which cannot by law be excluded or limited.
- 6.2. Subject to clause 6.1, we limit our liability under this License, whether such liability arises in contract, tort (including negligence) or otherwise, as follows:
- 6.2.1. where you have ordered the Software directly from us, our maximum liability for all claims under this Licence shall be an amount equal to one hundred percent (100%) of the Licence Fees paid by you to the us in connection with this Licence;
  - 6.2.2. where you have ordered the Software via a Registered Reseller, our maximum liability for all claims under this Licence shall be limited to the higher of the Annual Core-based Liability Cap or five thousand pounds sterling (£5,000); and
  - 6.2.3. where the Software is being used by you on a trial basis, our maximum liability to you for all claims under this Licence shall be limited to one thousand pounds sterling (£1,000);
  - 6.2.4. we shall not be liable for:
    - 6.2.4.1. loss of business, use, profit, anticipated profit, contracts, revenues, goodwill or anticipated savings;
    - 6.2.4.2. loss of data or use of data;
    - 6.2.4.3. loss of goodwill or injury to reputation;
    - 6.2.4.4. product recall costs;
    - 6.2.4.5. losses suffered by third parties, including Customers; or
    - 6.2.4.6. consequential, special or indirect loss or damage;even if we knew, have reason to know or have been advised of the possibility of such loss or damage.
- 6.3. The Licensee will defend indemnify and hold harmless Flexiant and each of its respective employees, officers, directors, and representatives from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable legal fees and expenses) arising out of or relating to any third party claim concerning:
- 6.3.1. the Licensee's use of the Software (including use by employees, personnel or other authorised personnel);
  - 6.3.2. breach of this Licence or violation of applicable law by the Licensee; and/or
  - 6.3.3. any claim involving alleged infringement or misappropriation of third-party rights associated with the Licensee's operation of the Software or by the use, development,



design, production, advertising or marketing of the Software.

## **7. TERMINATION**

- 7.1. We may terminate this Licence with immediate effect from service on you of notice in Writing if you are in breach of any material obligation under this Licence and, if the breach is capable of remedy, you fail to remedy such breach within fourteen (14) days of receipt of notice so to do.
- 7.2. The Licensee acknowledges that Flexiant may, in the event of termination of this Licence remotely disable use of the Software.
- 7.3. Either Party may terminate this Licence at any time by written notice if the other:
  - 7.3.1. is unable to pay its debts (within the meaning of section 123 of the Insolvency Act 1986), or becomes insolvent, or is subject to an order or a resolution for its liquidation, administration, winding-up or dissolution (otherwise than for the purposes of a solvent amalgamation or reconstruction), or has an administrative or other receiver, manager, trustee, liquidator, administrator or similar officer appointed over all or any substantial part of its assets, or enters into or proposes any composition or arrangement with its creditors generally, or is subject to any analogous event or proceeding in any applicable jurisdiction, provided that, where capable, such event or proceedings have not been dismissed or vacated within thirty (30) days' of such written notice; or
  - 7.3.2. ceases or threatens to cease, carrying on business.
- 7.4. Other than where the Software is the Evaluation Edition, you acknowledge and accept the fundamental importance that all Licence Fees be paid in a timely manner and agree that we shall be entitled to immediately suspend or terminate this Licence with no liability to us, if any amounts due to us in respect of this Licence or any other licence granted by us in favour of you are not received strictly in accordance with the terms of the agreements pursuant to which such amounts are payable or if the party to such agreements other than us (being either you or a Registered Reseller) commits any other breach of such agreements. You acknowledge that such suspension or termination of this Licence will entitle us, without notice, to remotely disable your ability to use the Software. Such suspension or termination of this Licence shall not remove or terminate your obligation or, where you have ordered the Software via a Registered Reseller, the obligation of such Registered Reseller to pay the Licence Fees in accordance with the terms of the agreement pursuant to which the Licence Fees are payable.
- 7.5. Upon termination or expiry of this Licence for any reason, all rights granted to you under this Licence shall cease, you shall cease all activities authorised by this Licence and you shall immediately destroy or return to us (at our option) all copies of the Software and the Documentation in your possession, custody or control and in the case of destruction, certify in writing to us that you have done so.
- 7.6. Termination or expiry of this Licence howsoever caused shall not affect the rights of either Party under the Licence which may have accrued up to the date of termination or expiry.

## **8. ENTIRE AGREEMENT**

- 8.1. Where the Software is the Evaluation Edition or where you have ordered the Software via a Registered Reseller, this Licence constitutes the entire agreement and understanding between the Parties in respect of the matters dealt with in it and supersedes any previous agreement, understanding, representations or negotiation between the Parties relating to such matters.
- 8.2. Where you have ordered the Software from us directly, this Licence may constitute part of the entire agreement and understanding between us in respect of the matters dealt with in it. Notwithstanding this clause 8.2, in respect of the matters dealt with in this Licence, the terms of





this Licence supersede any previous agreement, understanding, representations or negotiations between us relating to such matters.

- 8.3. Each Party acknowledges and agrees that in entering into this Licence it does not rely on, and shall have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Licence or not) other than as expressly set out in this Licence.

## **9. WAIVER AND REMEDIES**

Any failure to exercise or any delay in exercising a right or remedy provided by this Licence or at law or in equity shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies. A waiver of a breach of any of the terms of this Licence or of a default under this Licence shall not constitute a waiver of any other breach or default and shall not affect the other terms of this Licence.

## **10. THIRD PARTY RIGHTS**

Except where this Licence expressly provides otherwise, a person who is not a party to this Licence has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Licence but this does not affect any right or remedy of a third party which exists or is available apart from under that Act.

## **11. TRANSFER**

- 11.1. Subject to clause 11.2 below, neither Party may assign, sub-contract or transfer in any way any of its rights, liabilities and/or obligations under this Licence on a temporary or permanent basis to any third party without the prior consent in Writing of the other.
- 11.2. Flexiant may sub-contract the performance of, or assign the benefit of, any of its obligations under this Licence to a third party.

## **12. SEVERABILITY**

If any part of this Licence is found by a court of competent jurisdiction or other competent authority to be invalid or unenforceable then such part shall be severed from the remainder of this Licence which shall remain valid and enforceable to the fullest extent permitted by law.

## **13. NOTICES**

- 13.1. Any notice given under or in relation to this Licence will be in Writing and signed by or on behalf of the Party giving it and may be served by:

13.1.1. delivering it personally or by sending it by pre-paid first class post, or recorded delivery or registered post; or

13.1.2. by facsimile transmission

to the address and for the attention of the individual of the relevant Party in accordance with clause 13.2.

- 13.2. Notices shall be sent to the following addresses and/or facsimile numbers:

13.2.1. in the case of Flexiant:

Flexiant Limited



One Portland Place, London, W1B 1PN, UK

Fax number: +44 1506 606 013

Attention of: Partner Marketing Manager

13.2.2. in the case of the Licensee, to the contact address and/ or facsimile number, as provided by you to us from time to time.

13.3. Any such notice will be deemed to have been received:

13.3.1. if delivered personally, at the time of delivery;

13.3.2. in the case of pre-paid first class post or recorded delivery or registered post, 48 hours from the date of posting if from and to an address in the United Kingdom or Northern Ireland and 5 days from the date of posting if from and to an address elsewhere;

13.3.3. in the case of facsimile 24 hours after the time of transmission provided an error-free transmission has been received by the sender.

#### **14. FORCE MAJEURE**

14.1. A Party shall not be liable to the other for any delay in performing or failure to perform any of its obligations under this Licence (other than a failure to pay Fees) which is due to any cause beyond its control and which is unknown to, and cannot reasonably be anticipated by the affected party, including acts of civil or military authority, national emergencies, pandemics, fire, flood or catastrophe, acts of God, insurrection, employee actions (including strikes), war or riots (an "Event of Force Majeure") and such party's obligations under this Licence shall be suspended for so long as the Event of Force Majeure continues and to the extent that it is so delayed. For the avoidance of doubt any act or omission by any sub-contractor shall not of itself be an Event of Force Majeure.

14.2. Each of the Parties agrees to immediately give written notice to the other upon becoming aware of an Event of Force Majeure, such notice to contain details of the circumstances giving rise to the Event of Force Majeure, the likely effects of the Event of Force Majeure on its ability to perform its obligations under this Licence and the likely period of the delay. The Party affected by the Event of Force Majeure shall use its best endeavours to mitigate the extent of an Event of Force Majeure and its adverse consequences on the performance of its obligations under this Licence.

14.3. If the Party affected by the Event of Force Majeure does not comply with clause 14.2 it shall forfeit its rights under this clause 14.

14.4. The Party affected by the Event of Force Majeure shall as soon as possible after the end of the Event of Force Majeure, notify the other Party when the Event of Force Majeure has ended and recommence performance of the affected obligations as soon as practicable.

#### **15. GOVERNING LAW AND JURISDICTION**

This Licence will be governed by and construed in accordance with English law and each Party hereby submits to the non-exclusive jurisdiction of the courts of England and Wales.



## Schedule 1

### Banked Core Month Model

This is a method of procuring Core Months for use by the Licensee which involves Core Months being purchased in advance, either directly by the Licensee or by a Registered Reseller for use by the Licensee during subsequent months.

For each Core on which the Software is configured during a month, one Core Month will be used. At the end of each month, Flexiant calculates the number of Core Months used during that month and this figure will be deducted from the total number of Core Months available for use at the start of that month, leaving a reduced number of Core Months available for use in the following month and subsequent months thereafter. The number of Core Months available shall be increased by the Licensee or a Registered Reseller making further advance purchases of Core Months from time to time.

Worked Example:

	Number of Core Months bought at beginning of month (One off Core Month purchase)	Number of Core Months available at beginning of month	Number of Cores on which an Instance is deployed during month (and thus number of Core Months used during month)	Remainder of Core Months available at end of month
Month 1	10,000	10,000	2,000	8,000
Month 2	-	8,000	3,000	5,000
Month 3	5,000	10,000	4,000	6,000
Month 4	-	6,000	5,000	1,000
Month 5	10,000	11,000	6,000	5,000
Month 6	20,000	25,000	7,000	18,000