

## CLOUD INSTANT BACKUP RECOVERY TERMS AND CONDITIONS

Cloud Instant Backup Recovery (Cloud IBR) will provide the Subscriber with access to the Cloud IBR software (Services) on a Subscription basis, in accordance with the terms and conditions set forth in these Terms and Conditions.

### 1. DESCRIPTION OF SERVICES

Cloud IBR provides the End-User Customer and/or Reseller (collectively called the Subscriber) with access to the Cloud IBR software which enables them to recover their Veeam server backups to a secure bare metal cloud infrastructure.

### 2. TERM OF AGREEMENT; SERVICES

The Effective Date shall be the date that the Subscriber subscribes to this Service. These Terms and Conditions shall remain in effect for so long as the Subscriber has an active subscription. The initial subscription Term is for one (1) year, unless otherwise agreed to separately in the form of a Purchase Order (PO) or Services Agreement or Statement of Work (SOW), and the parties agree that either party may elect not to renew the Services for an additional Term, provided such party opts not to renew the Service from within the Cloud IBR software via the Do Not Renew button, prior to the annual renewal date of the then current Term. The failure to terminate the Service prior to the renewal of the term shall result in an automatic renewal for one (1) year, under the same terms and conditions as the initial Term.

### 3. SUPPORT

The Cloud IBR software includes support for any issues/bugs within the platform and any issues with the Bare Metal Cloud (BMC) infrastructure. Direct End-User Customers (EUC) of Cloud IBR shall receive support directly from the Cloud IBR support team and will create support tickets via the "Open A Support Ticket" option within the Cloud IBR SaaS platform. Resellers agree to provide all first level support to their respective EUC's. Reseller's EUC's who create support tickets via the "Open A Support Ticket" option within the Cloud IBR SaaS platform will generate a support ticket to their respective Reseller. Reseller's may open a ticket directly with Cloud IBR should they determine the issue is related to the above supported items and is not a Veeam backup or restore related issue. If an EUC or Reseller requires support for the Veeam Software product, they may purchase hourly consulting services from Cloud IBR for troubleshooting or onboarding at a rate of \$250.00USD/hour or contact their Reseller or [Veeam Software](#) for support. Platinum subscription EUC's shall receive a dedicated 24/7 phone number for support during an emergency Disaster recovery declaration and will receive direct support from the Cloud IBR support team to bypass the above support protocol.

#### 4. CHARGES

Upon the Effective Date, Cloud IBR shall charge the annual subscription fee to the Subscriber's credit card provided by the Subscriber during registration. At any time during your paid subscription or free trial, you may click the 'Do Not Renew' button on the Manage Membership page if you do not wish to have your annual subscription automatically renew or free trial become billable. If you do not click the 'Do Not Renew' button prior to your annual renewal or free trial expiration, your annual renewal fee will automatically be billed to your credit card on the annual renewal date and free trials will convert to an annual subscription and automatically be billed to your credit card when the free trial expires. Free trial accounts will automatically have their credit card charged for the initial annual Silver Subscription at the then current market price published on the Cloud IBR website.

PhoenixNAP shall bill Subscriber's credit card for hourly usage of the PhoenixNAP Bare Metal Cloud during recovery tests and during an actual Disaster recovery. Fees range from \$0.08 (8 cents) to a few dollars per hour per physical server plus \$0.12 (12 cents) per hour per TB of storage and ancillary fees for IP addresses, Windows Server licensing, etc. You can use our [DR Testing Fees Calculator](#) to estimate your hourly usage fees and view the hourly pricing for different hardware platforms [here](#). You can also see two monthly usage statement examples for actual Cloud IBR recovery environments [here](#) and [here](#).

#### 5. TAXES

The prices applicable to the services do not include sales, use, excise, value added, or similar taxes. Consequently, in addition to the specified prices, the amount of any present or future sales, use, excise, value added or other similar tax applicable to the sale of services, specifically excluding taxes on the gross income of Cloud IBR, shall be paid by Subscriber or in lieu thereof, Subscriber shall provide Cloud IBR with a tax-exemption certificate acceptable to the taxing authorities.

#### 6. AVAILABILITY

In the event of a Disaster (as defined below) Subscriber will have use of the Cloud IBR software. A "Disaster" shall herein be defined as any act of God, civil disorder, flood, tornado, hurricane, fire, earthquake, explosion, sabotage or any other catastrophic unplanned event or any condition that renders Subscriber unable to use its office facilities or the equipment situated there for its intended computer processing and business related purposes. Furthermore, Subscriber may, in its reasonable judgment, treat a forecasted imminent Disaster as a Disaster. Platinum Subscribers may provide notification of a Disaster verbally and shall specify the nature of the Disaster that has occurred and affected services needed, and the name of another designated representative of Subscriber who can verify the Disaster. Subscriber shall provide

written confirmation, if available, of the relevant information, as reasonably requested by Cloud IBR. Immediately following verbal notification by Subscriber, Cloud IBR shall supply the Services.

#### 7.UNANTICIPATED CHANGES

Subscriber is responsible for maintaining its production environment in good working order, including taking preventative measures against malware and data corruption. It is understood that changes to the Subscriber's software or production environment caused by malware, viruses, or other computer contaminants may adversely impact upon the operating system and may result in data corruption. In the event that the Subscriber's data or system is infected by a virus or subject to malware rendering Cloud IBR unable to perform its duties, the Subscriber agrees to fully indemnify and pay Cloud IBR for any and all loss or costs incurred to correct the modification to Cloud IBR's Services. These indemnification and reimbursement apply to all reasonable costs incurred by Cloud IBR to address and correct the condition caused by ineffective or corrupt software and production environment provided by the Subscriber. Each party hereby agrees to hold harmless the other party for any claim or damage, whether actual, incidental, or consequential, of any nature whatsoever, resulting from any malfunction, corruption, or modification of the software or any other intellectual property supplied by such party to the other party.

#### 8.FORCE MAJEURE

Cloud IBR will not be liable for failure to deliver or delay in delivering or performing services provided hereunder that are the result of force majeure, including but not limited to, "Acts of God", war, the failure of third parties or any causes beyond its reasonable control. Subscriber will be notified in writing of such a force majeure and will have the option either to extend the term of the Subscription for the period of the event at no additional charge for such extension (unless such event results from an act or omission of Subscriber, in which case such remedies shall not apply).

#### 9.LIMITATION OF LIABILITIES AND REMEDIES

Cloud IBR represents and warrants that when used as instructed, the Cloud IBR software shall perform in material conformity with its applicable documentation, and that in the course of performing its functionality, the Cloud IBR shall act in all applicable legal obligations, and without breach of an obligation or duty imposed by law or contractual agreement to any third party. For any claim concerning the performance or nonperformance by Cloud IBR pursuant to, or in any other way related to the subject matter of these Terms and Conditions, Subscriber shall be entitled to recover actual damages to the limit set forth herein. EXCEPT AS SPECIFICALLY SET FORTH IN THESE TERMS AND CONDITIONS, CLOUD IBR MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR

PURPOSE OR CONFORMITY TO ANY REPRESENTATION OR DESCRIPTION. The liability of Cloud IBR for damages (regardless of the form of action, whether in contract or in tort) shall in no event exceed the amount paid by Subscriber to Cloud IBR during the preceding one (1) month under the Subscription. Cloud IBR will not be liable to Subscriber, or to any other person, for any claim or damage arising, directly or indirectly, from the furnishing of services or equipment pursuant to these Terms and Conditions or from interruption or loss of use thereof, from the loss or corruption of data (whether temporary or permanent) or the inability to restore data due to the Subscriber losing Subscriber's encryption keys or passwords, or from any other cause whatsoever. IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY LOSS OF BUSINESS OR PROFITS OR OTHER SPECIAL OR CONSEQUENTIAL DAMAGES EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM AGAINST SUBSCRIBER BY ANY OTHER PARTY.

#### 10.CONFIDENTIALITY

Any proprietary information relating to the business operations of either party, or their respective parent or affiliated companies, obtained by the other party as a result of the performance hereunder, including but not limited to, the Cloud IBR software, the identity of the other party's or its affiliates' Subscribers and suppliers, business processes and techniques, pricing and guidelines, research and development, shall be deemed confidential and shall not be disclosed by either party to any third party without prior written consent, unless said third party is an agent of the disclosing party and is provided the proprietary information only as reasonably necessary in connection with its role as agent to the disclosing party. These provisions may be enforced by injunction without the necessity of proving actual damages or posting a bond. Cloud IBR will destroy any Subscriber confidential information stored by Cloud IBR, as requested by Subscriber, and provide Subscriber with written confirmation. See the Cloud IBR Privacy Policy [here](#).

#### 11.INDEMNIFICATION

Each party shall indemnify and save harmless the other, its parent, subsidiaries and affiliates, and the respective directors, officers, employees and agents of any of them, and other Subscribers from any and all claims, liabilities, demands, losses, damages, and causes of action relating to personal injury, death, or property damage, including all expenses arising out of the intentional or negligent acts or omissions of either party in the performance or nonperformance of either party.

#### 12.DEFAULT TERMINATION

Failure of Subscriber to pay when due any payment of charges or fees during the term of the Subscription, or failure by any party substantially to perform, keep or observe any other term, provision, warranty or condition contained in these Terms and Conditions, unless otherwise excused by the terms of these Terms and Conditions, shall constitute

an event of default. If any party to these Terms and Conditions fails to correct its default hereunder within thirty (30) days after written notice to do so, the party providing such notice may unilaterally terminate the Subscription forthwith by providing written notification thereof. Termination of the Subscription shall not affect a party's liability hereunder by reason of any act, default, or occurrence prior to such termination. In the event of termination due to Subscriber's default, all amounts then owing and the entire remaining unpaid balance of the Subscription fee, or any Renewal Term or extension thereof, shall become immediately due and payable, and Subscriber shall also reimburse Cloud IBR on demand for Installation Charges, other contractual charges and all costs including reasonable attorneys' fees incurred by Cloud IBR in enforcing the collection of such sums. The provisions of Sections 11, 12, and 13 shall survive any such termination.

### 13.GENERAL

A. No waiver by either party of any breach or default of any provision herein contained shall be construed as a waiver of any subsequent breach of the same or any other provision. Cloud IBR reserves the right to update these Terms and Conditions at any time.

B. These Terms and Conditions or other documents referred to herein constitute the entire agreement of the parties with respect to the subject matter hereof, and supersede all prior proposals, oral and written, all previous negotiations and all other communications or understandings between Cloud IBR and Subscriber, and may not be amended except by a written amendment executed by an authorized representative of the party being bound thereby. No waiver or modification of any of the provisions hereof shall be binding upon either party unless signed in writing by a duly authorized representative of each party. These Terms and Conditions may not be assigned by Subscriber without Cloud IBR's prior written consent; provided however that no such consent is required in connection with an assignment to an entity that acquires all or substantially all of the assets of the assigning party. The Services provided under these Terms and Conditions are for the sole benefit and use of Subscriber and shall not be made available to any other persons. The relationship between Cloud IBR and Subscriber hereunder is that of independent contractors, and nothing set forth herein shall be construed as constituting a partnership, joint venture or agency between Cloud IBR and Subscriber. Any Notice or other communication, except declaration of a Disaster, to either party by the other hereunder shall be given in writing and deemed effective if mailed registered or certified postage prepaid by regular mail or airmail to the address for such party as set forth above or at such changed address as may be subsequently delivered by written notice from such party to the other party. All SOW(s), Schedules, Attachments and/or Addenda are incorporated into these Terms and Conditions and made a part hereof. In the event of conflict between these Terms and

Conditions and its SOW(s), Schedules, Attachments, and/or Addenda, the SOW(s), Schedules, Attachments and/or Addenda shall prevail. A photographic or electronic copy of these Terms and Conditions shall be as valid as the original. These Terms and Conditions will be construed in accordance with the laws of the State of New York. The Subscriber agrees that any software provided by Cloud IBR for use in connection with the Service is and will be proprietary to Cloud IBR (or third parties with whom Cloud IBR has appropriate license or other usage agreements). Subscriber will not be entitled to make any copies of any such software and the rights of Subscriber to the use thereof will be strictly limited to the use of the services in accordance with the terms of this these Terms and Conditions. The Subscriber shall at all times maintain all registrations and comply with all applicable state and federal laws as may be necessary for its use of the equipment and Service. Any disputes arising out of or in connection with these Terms and Conditions shall be resolved in the Supreme Court of the State of New York, County of Nassau. In addition, should Cloud IBR incur legal expenses, costs, and disbursements in enforcing any of its rights under these Terms and Conditions, then the Subscriber hereby agrees to pay those reasonable costs, expenses, including attorneys' fees incurred by Cloud IBR. Notwithstanding this provision, before any action is commenced by Cloud IBR it hereby undertakes to afford the Subscriber the written basis for the contemplated action and a reasonable opportunity (not to exceed twenty (20) days) to cure or correct Cloud IBR's claim if in fact the claim is subject to cure or correction.

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