

# Cloud Services Agreement

Using this agreement, Client may order Cloud Services. This agreement and applicable Attachments and Transaction Documents (TDs) are the complete agreement (Agreement) regarding transactions under this Agreement.

## Cloud Services

A **Cloud Service** is an IBM branded offering hosted or managed by IBM and made available via a network. Each Cloud Service is described in a TD or an Attachment called a Service Description. When IBM accepts Client's order, IBM provides Client the entitlements specified in the TD. Cloud Services are designed to be available 24/7, subject to maintenance. Client will be notified of scheduled maintenance. Service level commitments, if applicable, are specified in an Attachment or TD.

Client may access and use a Cloud Service only to the extent of authorizations acquired by Client. Client is responsible for use of Cloud Services by any party who accesses the Cloud Service with Client's account credentials. A Cloud Service may not be used for unlawful, obscene, offensive or fraudulent content or activity, in any jurisdiction for any user, such as advocating or causing harm, interfering with or violating the integrity or security of a network or system, evading filters, sending unsolicited, abusive or deceptive messages, viruses or harmful code, or violating third party rights. If there is a complaint or notice of violation, use may be suspended until resolved, and terminated if not resolved promptly. Unless expressly provided in an Attachment or TD, Client is not authorized to use a Cloud Service to provide hosting or timesharing services to any third party.

Each Cloud Service is designed to protect the proprietary content that Client inputs into the Cloud Service and to provide for access and use only as part of the Cloud Service. Except as otherwise specified in an Attachment or TD, IBM will only provide access and use of Client's proprietary content to IBM employees and contractors as needed to deliver the Cloud Service. IBM will not disclose Client's proprietary content and will return or destroy it upon the expiration or cancellation of the Cloud Service, or earlier upon Client's request. IBM may charge for certain activities performed at Client's request (such as delivering content in a specific format).

The description for each Cloud Service includes the security functions and features applicable to the Cloud Service. IBM Cloud Services are EU Safe Harbor certified, unless otherwise specified in an Attachment or TD. IBM will provide Client notice of any unauthorized third party access to Client's content of which IBM becomes aware and will use reasonable efforts to remediate identified security vulnerabilities. If Client's content is lost or damaged, IBM will assist Client in restoring it to the Cloud Service from Client's last available backup copy in compatible format.

The term, including any renewal term, for a Cloud Service is described in an Attachment or TD. IBM may withdraw a Cloud Service on 12 months' notice, unless otherwise stated in an Attachment or TD. IBM will either continue to provide the Cloud Service for the remainder of Client's unexpired term or work with Client to migrate to another IBM Service. IBM may suspend, revoke or limit Client's use of a Cloud Service if IBM determines there is a material breach of Client's obligations, a security breach, or violation of law. Charges will continue to accrue for the Cloud Service during any suspension. If the cause of the suspension can reasonably be remedied, IBM will provide notice of the actions Client must take to reinstate the Cloud Service. If Client fails to take such actions within a reasonable time, IBM may terminate the Cloud Service.

Any changes to the Cloud Service by IBM will be effective upon the next agreed renewal or extension. IBM may modify the computing environment used to provide a Cloud Service, without degrading its functionality or security features. IBM may offer additional customization, configuration or other Services, as detailed in an Attachment or TD.

## Warranties

IBM warrants that it provides Cloud Services using commercially reasonable care and skill in accordance with the applicable Attachment or TD. The warranty for a Cloud Service ends when the Cloud Service ends.

**IBM does not warrant uninterrupted or error-free operation of a Cloud Service or that IBM will correct all defects or prevent third party disruptions or unauthorized third party access. These warranties are the exclusive warranties from IBM and replace all other warranties, including the implied warranties or conditions of satisfactory quality, merchantability, non-infringement, and fitness for a particular purpose. IBM warranties will not apply if there has been misuse, modification, damage not caused by IBM, failure to comply with instructions provided by IBM, or if otherwise stated in an Attachment or TD. Non-IBM services are sold under this Agreement as-is, without warranties of any kind.** Third parties may provide their own warranties to Client.

## Charges, Taxes, Payment, and Verification

Client agrees to pay all applicable charges specified by IBM, charges for use in excess of authorizations, any customs or other duty, tax, levy, or fee imposed by any authority resulting from Client's acquisitions under this Agreement, and any late payment fees. Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date to an account specified by IBM. Prepaid Services must be used within the applicable period. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid.

Client agrees to: i) pay withholding tax directly to the appropriate government entity where required by law; ii) furnish a tax certificate evidencing such payment to IBM; iii) pay IBM only the net proceeds after tax; and iv) fully cooperate with IBM in seeking a waiver or reduction of such taxes and promptly complete and file all relevant documents.

Client will i) maintain, and provide upon request, records, system tools output, and access to Client's premises, as reasonably necessary for IBM and its independent auditor to verify Client's compliance with the Agreement, and ii) promptly order any required entitlements, pay additional charges at IBM's then current rates (including uses in excess of Client's authorizations or entitlements and other liabilities determined as a result of such verification). These compliance verification obligations remain in effect during the term of the Agreement and for two years thereafter.

## Liability and Indemnity

**IBM's entire liability for all claims related to the Agreement will not exceed the amount of any actual direct damages incurred by Client up to the amounts paid (if recurring charges, up to 12 months' charges apply) for the service**

**that is the subject of the claim, regardless of the basis of the claim. This limit applies collectively to IBM, its subsidiaries, contractors, and suppliers. IBM will not be liable for special, incidental, exemplary, indirect, or economic consequential damages, or lost profits, business, value, revenue, goodwill, or anticipated savings.**

The following amounts, if a party is legally liable for them, are not subject to the above cap: i) third party payments referred to in the paragraph below; ii) damages for body injury (including death); iii) damages to real property and tangible personal property; and iv) damages that cannot be limited under applicable law.

If a third party asserts a claim against Client that an IBM Service acquired under this Agreement infringes a patent or copyright, IBM will defend Client against that claim and pay amounts finally awarded by a court against Client or included in a settlement approved by IBM, provided that Client promptly (i) notifies IBM in writing of the claim, (ii) supplies information requested by IBM, and (iii) allows IBM to control, and reasonably cooperates in, the defense and settlement, including mitigation efforts.

IBM has no responsibility for claims based, in whole or part, on non-IBM products and services, items not provided by IBM, or any violation of law or third party rights caused by Client's content, materials, designs, or specifications.

#### **Termination**

Either party may terminate this Agreement: a) without cause on at least one month's notice to the other after expiration or termination of its obligations under this Agreement; or b) immediately for cause if the other is in material breach of this Agreement, provided the one who is not complying is given notice and reasonable time to comply. Failure to pay is a material breach. Any terms that by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to successors and assignees.

#### **Governing Laws and Geographic Scope**

Each party is responsible for complying with: i) laws and regulations applicable to its business and content, and ii) import, export and economic sanction laws and regulations, including those of the United States that prohibit or restrict the export, re-export, or transfer of products, technology, services or data, directly or indirectly, to or for certain countries, end uses or end users. Client is responsible for its use of IBM and non-IBM products and services.

Both parties agree to the application of the laws of the State of New York, United States, without regard to conflict of law principles. The rights and obligations of each party are valid only in the country of Client's business address. If any provision of the Agreement is invalid or unenforceable, the remaining provisions remain in full force and effect. Nothing in the Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under this Agreement.

#### **General**

Parties will not disclose confidential information without a separate, signed confidentiality agreement. If confidential information is exchanged in connection with this Agreement, the applicable confidentiality agreement is incorporated into, and subject to, this Agreement.

Client accepts an Attachment or TD by ordering, enrolling, using, or making a payment for, the product, offering or

service. Since this Agreement may apply to many future orders, IBM reserves the right to modify it by providing Client at least three months' written notice. However, changes are not retroactive; they apply, as of the effective date, only to new orders and renewals. For transactions with a defined renewable contract period, Client may request that IBM defer the change effective date until the end of the current contract period. Client accepts changes by placing new orders after the change effective date or allowing transactions to renew after receipt of the change notice. Except as provided above, all changes to the agreement must be in writing signed by both parties. If there is a conflict, an Attachment or TD prevails over the terms of this agreement.

IBM is an independent contractor, not Client's agent, joint venturer, partner, or fiduciary, and does not undertake to perform any of Client's regulatory obligations, or assume any responsibility for Client's business or operations. Each party is responsible for determining the assignment of its personnel and contractors, and for their direction, control, and compensation. IBM Business Partners are independent from IBM and unilaterally determine their prices and terms. IBM is not responsible for their actions, omissions, statements, or offerings.

Client is responsible for obtaining all necessary permissions to use, provide, store and process content in Cloud and grants IBM permission to do the same. Client is responsible for adequate content back-up. Some of Client's content may be subject to governmental regulation or may require security measures beyond those specified by IBM for an offering. Client will not input or provide such content unless IBM has first agreed in writing to implement additional required security measures.

IBM and its subcontractors may process the business contact information of Client, its employees and contractors worldwide for our business relationship, and Client has obtained the necessary consents. IBM will comply with requests to access, update, or delete such contact information. IBM may use personnel and resources in locations worldwide and third party suppliers to support the delivery of services.

Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Assignment of IBM rights to receive payments and by IBM in conjunction with the sale of the portion of IBM's business that includes the service is not restricted.

All notices under this Agreement must be in writing and sent to the address below, unless a party designates in writing a different address. The parties consent to the use of electronic means and facsimile transmissions for communications as a signed writing. Any reproduction of the Agreement made by reliable means is considered an original. The Agreement supersedes any course of dealing, discussions or representations between the parties.

No right or cause of action for any third party is created by this Agreement or any transaction under it. Neither party will bring a legal action arising out of or related to this Agreement more than two years after the cause of action arose. Neither party is responsible for failure to fulfill its non-monetary obligations due to causes beyond its control. Each party will allow the other reasonable opportunity to comply before it claims the other has not met its obligations. Where approval, acceptance, consent, access, cooperation or similar action by either party is required, such action will not be unreasonably delayed or withheld.

Agreed to:

**Client Company Name:**

By \_\_\_\_\_

Authorized signature

Title:

Name (type or print):

Date:

Client number:

Enterprise number:

Client address:

Agreed to:

**International Business Machines Corporation**

By \_\_\_\_\_

Authorized signature

Title:

Name (type or print):

Date:

Agreement number:

IBM address: