

# Cloud Services Agreement

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This Cloud Services Agreement (CSA) and applicable Attachments and Transaction Documents (TDs) are the complete agreement regarding transactions under this CSA (together, the "Agreement") under which Client may order Cloud Services. TDs detail the specifics of transactions, such as charges and a description of and information about the Cloud Service. Examples of TDs include statements of work, service descriptions, ordering documents and invoices. Attachments provide supplemental terms that apply to certain types of Cloud Services, such as a trial or beta services. Any conflicting terms in an Attachment or TD that override other parts of this CSA will be identified in the TD or Attachment accepted by the Client and only apply to the specific transaction.

## 1. Cloud Services

- a. A Cloud Service is an IBM offering provided by IBM and made available via a network. Each Cloud Service is described in a TD. Cloud Services are designed to be available 24/7, subject to maintenance. Client will be notified of scheduled maintenance. Technical support and service level commitments, if applicable, are specified in an Attachment or TD.
- b. IBM may offer Non-IBM services, or an IBM Cloud Service may enable access to Non-IBM services, that may require acceptance of third party terms identified in the TD. Linking to or use of Non-IBM services constitutes Client's agreement with such terms. IBM is not a party to such third party agreements and is not responsible for such Non-IBM services.
- c. Client accepts an Attachment or TD by ordering, enrolling, using, or making a payment for the Cloud Service. When IBM accepts Client's order, IBM provides Client the authorizations specified in the TD.
- d. IBM will provide the facilities, personnel, equipment, software, and other resources necessary to provide the Cloud Services and generally available user guides and documentation to support Client's use of the Cloud Services. A Cloud Service may require the use of enabling software that Client downloads to Client systems to facilitate use of the Cloud Service. Client may use enabling software only in connection with use of the Cloud Service and according to any licensing terms if specified in a TD. Enabling software is provided as-is, without warranties of any kind.
- e. Client will provide hardware, software and connectivity to access and use the Cloud Service, including any required Client-specific URL addresses and associated certificates.
- f. Client may access a Cloud Service only to the extent of authorizations acquired by Client. Client is responsible for use of Cloud Services by any user who accesses the Cloud Service with Client's account credentials. A Cloud Service may not be used in any jurisdiction for unlawful, obscene, offensive or fraudulent Content or activity, 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. In addition, Client may not use Cloud Services if failure of the Cloud Service could lead to death, bodily injury, or property or environmental damage. Client may not: i) reverse engineer any portion of a Cloud Service; ii) assign or resell direct access to a Cloud Service to a third party outside Client's Enterprise; or iii) combine Cloud Services with Client's value add to create a commercially available Client branded solution that Client markets to its end user customers unless otherwise agreed.
- g. A Cloud Service or feature of a Cloud Service is considered "Preview" when IBM makes such services or features available at no charge, with limited or pre-release functionality, or for a limited time to try available functionality (such as beta, trial, no-charge, or preview designated Cloud Services). Preview services are excluded from available service level agreements. A Preview service may not be covered by support and IBM may change or discontinue a Preview service at any time and without notice. IBM is not obligated to release a Preview service or make an equivalent service generally available.

## 2. Content and Data Protection

- a. Content consists of all data, software, and information that Client or its authorized users provides, authorizes access to, or inputs to the Cloud Service. Use of the Cloud Service will not affect Client's ownership or license rights in such Content. IBM, its affiliates, and contractors of either, may access and use the Content solely for the purpose of providing and managing the Cloud Service. IBM will treat all Content as confidential by not disclosing Content except to IBM employees and contractors and only to the extent necessary to deliver the Cloud Service.
- b. Client is responsible for obtaining all necessary rights and permissions to enable, and grants such rights and permissions to, IBM, its affiliates, and contractors of either, to use, provide, store and otherwise process Content in the Cloud Service. This includes Client making necessary disclosures and obtaining consent, if required, before providing individuals' information, including personal or other regulated data in such Content. If any Content could be subject to governmental regulation or may require security measures beyond those specified by IBM for a Cloud Service, Client will not input, provide, or allow such Content unless specifically permitted in the terms of the relevant TD or unless IBM has otherwise first agreed in writing to implement additional security and other measures.
- c. IBM's Data Security and Privacy Principles for IBM Cloud Services (DSP), at <http://www.ibm.com/cloud/data-security>, apply for generally available Cloud Service offerings. Specific security features and functions of a Cloud Service may be provided in an Attachment and TDs. Client is responsible to assess the suitability of each Cloud Service for Client's intended use and Content and to take necessary actions to order, enable, or use available data protection features appropriate for the Content being used with a Cloud Service. By using the Cloud Service, Client accepts responsibility for use of the Cloud Services, and acknowledges that it meets Client's requirements and processing instructions to enable compliance with applicable laws.

- d. IBM's Data Processing Addendum at <http://ibm.com/dpa> (DPA) and applicable DPA Exhibit(s) apply and prevail over any conflicting terms of the Agreement, if and to the extent the European General Data Protection Regulation (EU/2016/679) (GDPR) applies to personal data contained in Content.
- e. IBM will return or remove Content from IBM computing resources 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). IBM does not archive Content, however some Content may remain in Cloud Service backup files until expiration of such files as governed by IBM's backup retention practices.
- f. Upon request by either party, IBM, Client or affiliates of either, will enter into additional agreements as required by law in the prescribed form for the protection of regulated personal data included in Content. The parties agree (and will ensure that their respective affiliates agree) that such additional agreements will be subject to the terms of the Agreement.

### **3. Changes**

- a. Client acknowledges that IBM may modify: i) a Cloud Service; and ii) the DSP, from time to time at IBM's sole discretion and such modifications will replace prior versions as of the effective date. Updates to a TD (such as a service description or statement of work) will take effect upon a new order or for TDs previously agreed by the Client will take effect upon the change effective date for ongoing services, or upon the renewal date for Cloud Services that automatically renew. The intent of any modification will be to: i) improve or clarify existing commitments; ii) maintain alignment to current adopted standards and applicable laws; or iii) provide additional features and functionality. Modifications will not degrade the security or data protection features or functionality of a Cloud Service.
- b. IBM may withdraw a Cloud Service on 12 months' notice and IBM will continue to provide the Cloud Service for the remainder of Client's unexpired term or work with Client to migrate to another IBM offering. Access to Non-IBM services may be withdrawn at any time.
- c. Since this CSA may apply to many future orders, IBM may modify this CSA by providing Client at least three months' written notice. Changes are not retroactive; they apply, as of the effective date, only to new orders, ongoing Cloud Services that do not expire, and renewals. For transactions with a defined renewable contract period stated in a TD, 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 or continuing use 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 accepted by both parties.

### **4. Warranties**

- a. IBM warrants that it provides Cloud Services using commercially reasonable care and skill. The warranty for a Cloud Service ends when the Cloud Service ends.
- b. 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, or failure to comply with instructions provided by IBM. Preview services and Non-IBM services are made available under the Agreement as-is, without warranties of any kind. Third parties may provide their own warranties to Client.

### **5. Charges, Taxes, and Payment**

- a. Client agrees to pay all applicable charges specified for a Cloud Service and charges for use in excess of authorizations. Charges are exclusive of any customs or other duty, tax, and similar levies imposed by any authority resulting from Client's acquisitions under the Agreement and will be invoiced in addition to such charges. Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date to an account specified by IBM and late payment fees may apply. 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. If IBM has not otherwise committed to pricing during the term of a Cloud Service, then IBM may change charges on thirty days' notice. Where taxes are based upon the location(s) receiving the benefit of the Cloud Service, Client has an ongoing obligation to notify IBM of such location(s) if different than Client's business address listed in the applicable Attachment or TD.
- b. 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.
- c. Based on selected billing frequency, IBM will invoice Client the charges due at the beginning of the billing frequency term, except for overage and usage type of charges which will be invoiced in arrears. One time charges will be billed upon acceptance of an order.

### **6. Liability and Indemnity**

- a. 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. IBM will not be liable for special, incidental, exemplary, indirect, or economic consequential damages, or lost profits, business, value, revenue, goodwill, or anticipated savings. These limitations apply collectively to IBM, its affiliates, contractors, and suppliers.

- b. The following amounts are not subject to the above cap: i) third party payments referred to in the paragraph below; and ii) damages that cannot be limited under applicable law.
- c. If a third party asserts a claim against Client that a Cloud Service acquired under the 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.
- d. IBM has no responsibility for claims based 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.

## **7. Term and Termination**

- a. The term of a Cloud Service begins on the date IBM notifies Client that Client can access the Cloud Service. IBM will specify whether the Cloud Service renews automatically, proceeds on a continuous use basis, or terminates at the end of the term. For automatic renewal, unless Client provides written notice to IBM or the IBM Business Partner involved in the Cloud Service not to renew at least 30 days prior to the term expiration date, the Cloud Service will automatically renew for the specified term. For continuous use, the Cloud Service will continue to be available on a month to month basis until Client provides 30 days written notice to IBM or the IBM Business Partner involved in the Cloud Service of termination. The Cloud Service will remain available to the end of the calendar month after such 30 day period.
- b. IBM may suspend or limit, to the extent necessary, Client's use of a Cloud Service if IBM determines there is a material breach of Client's obligations, a security breach, violation of law, or breach of the terms set forth in section 1(f). 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. Failure to pay is a material breach.
- c. Either party may terminate this CSA: i) without cause on at least one month's notice to the other after expiration or termination of its obligations under the Agreement; or ii) immediately for cause if the other is in material breach of the Agreement, provided the one who is not complying is given notice and reasonable time to comply. Any terms that by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to successors and assignees. Termination of this CSA does not terminate TDs, and provisions of this CSA as they relate to such TDs remain in effect until fulfilled or otherwise terminated in accordance with their terms.
- d. Client may terminate a Cloud Service on one month's notice: i) at the written recommendation of a government or regulatory agency following a change in either applicable law or the Cloud Services; ii) if IBM's modification to the computing environment used to provide the Cloud Service causes Client to be noncompliant with applicable laws; or iii) if IBM notifies Client of a modification that has a material adverse effect on Client's use of the Cloud Service, provided that IBM will have 90 days to work with Client to minimize such effect. In the event of such termination, IBM shall refund a portion of any prepaid amounts for the applicable Cloud Service for the period after the date of termination. If the Agreement is terminated for any other reason, Client shall pay to IBM, on the date of termination, the total amounts due per the Agreement. Upon termination, IBM may assist Client in transitioning Client's Content to an alternative technology for an additional charge and under separately agreed terms.

## **8. Governing Laws and Geographic Scope**

- a. 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 defense trade control regime of any jurisdiction, including the International Traffic in Arms Regulations and 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.
- b. 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 Client or any user exports or imports Content or use of any portion of the Cloud Service outside the country of Client's business address, IBM will not serve as the exporter or importer, except as required by data protection laws. 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 the Agreement.

## **9. General**

- a. 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. IBM is an information technology provider only. Any directions, suggested usage, or guidance provided by IBM or a Cloud Service does not constitute medical, clinical, legal, accounting, or other licensed professional advice. Client and its authorized users are responsible for the use of the Cloud Service within any professional practice and should obtain their own expert advice. Client is responsible for its use of IBM and Non-IBM products and services. Each party is responsible for determining the assignment of its and its affiliates personnel, and their respective contractors, and for their direction, control, and compensation.
- b. IBM maintains a robust set of business conduct and related guidelines covering conflicts of interest, market abuse, anti-bribery and corruption, and fraud. IBM and its personnel comply with such policies and require contractors to have similar policies.

- c. IBM, its affiliates, and contractors of either, may, wherever they do business, store and otherwise process business contact information (BCI) of Client, its personnel and authorized users, for example, name, business telephone, address, email, and user ID for business dealings with them. Where notice to or consent by the individuals is required for such processing, Client will notify and obtain such consent. The IBM Privacy Statement at <https://www.ibm.com/privacy/> provides additional details with respect to BCI and Account Data described below.
- d. Account Data is information, other than Content and BCI, that Client provides to IBM to enable Client's use of a Cloud Service or that IBM collects using tracking technologies, such as cookies and web beacons, regarding Client's use of a Cloud Service. IBM, its affiliates, and contractors of either, may use Account Data for example to enable product features, administer use, personalize experience, and otherwise support or improve use of the Cloud Service.
- e. IBM Business Partners who use or make available IBM Cloud Services are independent from IBM and unilaterally determine their prices and terms. IBM is not responsible for their actions, omissions, statements, or offerings.
- f. Neither party may assign the Agreement, in whole or in part, without the prior written consent of the other. Assignment of IBM rights to receive payments or assignment by IBM in conjunction with the sale of the portion of IBM's business that includes a service is not restricted.
- g. This CSA applies to IBM and Client and their respective Enterprise companies who acquire Cloud Services under this CSA. The parties shall coordinate the activities of their own Enterprise companies under the Agreement. Enterprise companies include: i) companies within the same country that Client or IBM control (by owning greater than 50% of the voting shares); and ii) any other entity that controls, is controlled by or is under common control with Client or IBM and has signed a participation agreement.
- h. All notices under the Agreement must be in writing and sent to the business address specified for the Agreement, 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.
- i. No right or cause of action for any third party is created by the Agreement or any transaction under it. Neither party will bring a legal action arising out of or related to the 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.
- j. IBM may use personnel and resources in locations worldwide, including contractors to support the delivery of the Cloud Services. IBM may transfer Content, including personal data, across country borders. A list of countries where Content may be processed for a Cloud Service is described in the TD. IBM is responsible for the obligations under the Agreement even if IBM uses a contractor and will have appropriate agreements in place to enable IBM to meet its obligations for a Cloud Service.
- k. IBM may offer additional customization, configuration or other services to support Cloud Services, as detailed in a TD.

Agreed to:	Agreed to:
<b>Client Company Name:</b>	<b>International Business Machines Corporation</b>
By _____	By _____
Authorized signature	_ Authorized signature
Title:	Title:
Name (type or print):	Name (type or print):
Date:	Date:
Client number:	Agreement number:
Enterprise number:	
Client address:	IBM address: