

# **IBM Agreement for Acquisition of Software Maintenance**

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This IBM Agreement for Acquisition of Software Maintenance (called the "Agreement") governs your acquisition of Software Maintenance ("SWM"), which may also be referred to as Subscription and Support ("S&S"). SWM may include, for example:

1. subscription, e.g. Program updates, enhancements, preventive service or new versions/releases;
2. technical assistance, e.g. assistance by telephone and, if available, electronic access, to inquiries concerning code defect-related questions; and
3. regulatory response, e.g. information on, or changes required by, government or other regulatory agencies.

SWM is provided only for those Eligible Programs installed within your Enterprise.

IBM has signed agreements with certain organizations (called "IBM Business Partners") to promote and market SWM offerings. When you order SWM marketed to you by IBM Business Partners, IBM will provide SWM to you under the terms of this Agreement. IBM is not responsible for 1) the actions of IBM Business Partners, 2) any additional obligations they have to you or 3) any products or services that they supply to you under their agreements. In the event that your IBM Business Partner is no longer able to market SWM, for any reason, you may continue to receive SWM by instructing IBM to transfer administration of SWM to either 1) another IBM Business Partner of your choice (who may require you to first execute one of their agreements) who is approved to market SWM to you, or 2) IBM.

This Agreement and its Attachments, if any, are the complete agreement between us regarding the acquisition of SWM, and replaces any prior oral or written communications between us concerning such SWM.

By your ordering or making payment for SWM and IBM's or your IBM Business Partner's acceptance of your order or payment, both you and IBM agree to the terms of this Agreement without modification. Once in effect, 1) unless prohibited by applicable local law or specified otherwise, any reproduction of this Agreement made by reliable means (for example, photocopy or facsimile) is considered an original and 2) SWM you order under this Agreement is subject to it.

Section 1 of the Agreement contains terms that are specific to a particular platform. The terms in the remaining sections are in addition to those in section 1, and apply to all platforms.

## **1. Software Maintenance**

### **1. For Programs running on zSeries (S/390) or equivalent platforms:**

- (a) **Eligible Programs:** Licensed Programs for which S&S is available are listed at [www-1.ibm.com/servers/eserver/zseries/library/swpriceinfo/](http://www-1.ibm.com/servers/eserver/zseries/library/swpriceinfo/). Click on Exhibits: Subscription and Support.
- (b) **Support Period:** One year. When you order S&S with a Program, the initial Support Period begins on the date that IBM makes the Program available to you. If you terminate S&S, IBM does not issue credit for the unused portion of a Support Period.
- (c) **Renewal:** Unless you request termination of S&S in writing prior to the end of a Support Period, IBM will automatically renew expiring S&S under the Agreement terms and charges in effect on that date. Subsequent Support Periods begin on the day following the end of the preceding Support Period.
- (d) **Anniversary Adjustment:** When you acquire S&S initially or resume it, or prior to the end of the then current Support Period for renewals, you may request that the Support Period duration be adjusted to end at a month of your choice. If you do not choose a date, IBM will inform you of the end date. The Support Charge will be pro-rated accordingly.
- (e) **Subscription and Support:** For the unmodified portion of a Program, and to the extent problems can be recreated in the Specified Operating Environment, includes:
  - (i) **Code Corrections:** code to correct reported, substantial deviations from the Program's then applicable Specifications;
  - (ii) **Fixes:** existing Code Corrections, restrictions or known bypasses for reported problems;
  - (iii) **Program Updates:** periodic releases of collections of Code Corrections, Fixes, functional enhancements (including modifications to accommodate applicable statutory or regulatory changes) and new versions and releases to the Program and documentation.
  - (iv) **Technical Assistance:** a reasonable amount of remote assistance via telephone, mail, facsimile (fax) or e-mail to address suspected Program defects. Technical assistance is available from the IBM support center in your country. Details, including hours of operation, are outlined in the Software Support Handbook at [techsupport.services.ibm.com/guides/handbook.html](http://techsupport.services.ibm.com/guides/handbook.html)

- (f) **Resumption Fee:** Equal to the total of all Support Charges that you would have paid during the lapsed interval (i) had you not declined S&S at the time you acquired the license for a Program and you now wish to acquire S&S or (ii) if you wish to resume S&S that you had previously terminated. A Support Period in such an instance begins on the date that IBM accepts your order.
  - (g) **Support Upgrade:** If you upgrade S&S due to an increase in the level of use of a license, any increase to the Support Charge will be pro-rated to the next anniversary.
  - (h) **Changes to Support Charge:** IBM may increase the Support Charge at any time. An increase applies to charges due on or after the effective date IBM specifies. You receive the benefit of a decrease in the Support Charge for amounts which become due on or after the effective date of the decrease.
- 2. For Programs running on distributed platforms (iSeries, pSeries, xSeries, RSS, other):**
- (a) **Eligible Programs:** Licensed Programs for which Software Maintenance is available are listed at [www-1.ibm.com/services/sl/swm/](http://www-1.ibm.com/services/sl/swm/) for Retail Store Solutions (RSS) and for all other Programs at [www-1.ibm.com/servers/eserver/iseries/sftsol/subscribe2.htm](http://www-1.ibm.com/servers/eserver/iseries/sftsol/subscribe2.htm) or may be obtained from your IBM marketing representative or IBM Business Partner.
  - (b) **Initial Support Period:** You must choose either one year, the charge for which may be included with the Program, or, for an additional charge, three years of Software Maintenance at the time you order a Program. The Initial Support Period begins on the date that IBM makes the Program available to you. If the Program is part of an iSeries grouped offering, then the Initial Support Period duration will be adjusted so that the expiration coincides with that of the other Programs in the group. In such event, the Initial Support Period may be less than one year.
  - (c) **Subsequent Support Periods (under this Agreement):** One or three years, at your option. For iSeries and pSeries, if you terminate SWM, IBM does not issue credit for the unused portion of a Support Period.
  - (d) **Renewal (under this Agreement):** It is your responsibility to renew SWM at the end of each Support Period. IBM will renew expiring SWM under the Agreement terms and charges in effect on that date, if it receives your order to renew (e.g., order form, order letter, purchase order) not later than the expiration date. Subsequent Support Periods begin on the day following the end of the preceding Support Period.
  - (e) **Software Maintenance:**
    - (i) IBM makes available to you the most current commercially available version, release, or update to all of the Programs for which you acquire SWM under this Agreement, should any be made available. For pSeries Programs under this Agreement, you may obtain upgrades to any current commercially available version, release or update.
    - (ii) IBM provides you assistance for your 1) routine, short duration installation and usage (how-to) questions; and 2) code-related questions.
    - (iii) IBM provides assistance via telephone and, if available, electronic access, only to your information systems (IS) technical support personnel during the normal business hours (IBM published prime shift hours) of your IBM support center. This assistance is not available to your end users. IBM provides Severity 1 assistance 24 hours a day, every day of the year. Consult the IBM Software Support Guide, which may be found at [techsupport.services.ibm.com/guides/handbook.html](http://techsupport.services.ibm.com/guides/handbook.html) for details.
    - (iv) In some instances, IBM may request that you allow it to remotely access your system to assist you in isolating the software problem cause.
    - (v) SWM does not include assistance for 1) the design and development of applications, 2) your use of Programs in other than their specified operating environment or 3) failures caused by products for which IBM is not responsible under this Agreement.
  - (f) **Software Maintenance After License Fee:** The charge to resume SWM if you
    - (i) did not renew it prior to the end of the then current Support Period or
    - (ii) terminated it.
 A Support Period for a resumption of SWM begins on the date that IBM accepts your order.
  - (g) **Transfer of IBM Software Maintenance on iSeries and pSeries Machines:** In addition to the provisions of Section 3. Software Maintenance Transferability below, SWM for Programs running on iSeries or pSeries machines
    - (i) applies to a designated machine (type, model and serial number); and

- (ii) may be transferred only to another machine that is licensed for the same operating system at the same or a more recent release level.
- (h) **Changes to Support Charge:** IBM may increase the Support Charge without notice. An increase will not apply to you if IBM receives your order for SWM before the announcement date of the increase and within three months of receipt by IBM of your order IBM makes SWM available to you. You receive the benefit of a decrease in the Support Charge for amounts which become due on or after the effective date of the decrease.

## 2. Charges and Payment

If you return a Program for refund as allowed under its license terms, IBM or your Business Partner will terminate, and refund any charges paid for, SWM ordered with the Program.

### **Software Maintenance acquired from an IBM Business Partner**

When you acquire SWM from an IBM Business Partner, the IBM Business Partner sets the charges and the terms governing charges. You will pay your IBM Business Partner directly.

### **Software Maintenance acquired directly from IBM**

1. Charges for SWM during each Support Period, called the Support Charge, are invoiced in advance.
2. The Support Charge may vary, depending on, for example, the machine (type/model), the Program or group of Programs.
3. Amounts are due and payable upon receipt of invoice. You agree to pay accordingly, including any late payment fee.
4. If any authority imposes a duty, tax, levy or fee, excluding those based on IBM's net income, upon SWM IBM supplies under this Agreement, then you agree to pay that amount as specified in the invoice or supply exemption documentation.

## 3. Software Maintenance Transferability

You may transfer SWM only to a location that is within your Enterprise and within the United States. An "Enterprise" in this Agreement is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent.

## 4. Your Responsibilities

You agree that when you acquire SWM for a Program:

1. you will acquire SWM at the same authorized level of use as the Program for which you are acquiring it, as well as all copies of the Program at the same location. This includes Programs you have already acquired and those you may acquire subsequently;
2. you are responsible for the results obtained from the use of the SWM;
3. you remain responsible for adequately protecting your system and all data contained in it whenever IBM remotely accesses it with your permission to assist you in isolating the software problem cause;
4. to provide sufficient, free, and safe access to your facilities for IBM to fulfill its obligations;
5. to have specified equipment or programs installed at your location if SWM is provided through a telecommunications link; and
6. not to assign, or otherwise transfer, this Agreement or your rights under this Agreement, or delegate your obligations, without IBM's prior written consent. Any attempt to do so is void.

## 5. General Principles of Our Relationship

Both of us agree that under this Agreement:

1. neither of us grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent;
2. all information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement;
3. each of us is free to enter into similar agreements with others;
4. each may communicate with the other by electronic means and such communication is acceptable as a signed writing to the extent permissible under applicable law. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;
5. IBM may provide some parts of SWM through a telecommunications link;
6. each of us will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations; You agree that this Agreement will not create any right or cause of action for any third party, nor will IBM be responsible for any third party claims against you except as permitted by the

Limitation of Liability section below for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable;

7. neither of us will bring a legal action more than two years after the cause of action arose unless otherwise provided by applicable local law without the possibility of contractual waiver or limitation;
8. neither of us is responsible for failure to fulfill any obligations due to causes beyond its control;
9. if any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions remain in full force and effect; and
10. you agree to allow International Business Machines Corporation and its subsidiaries to store and use your business contact information, including names, business phone numbers, and business e-mail addresses, anywhere they do business. Such information will be processed and used in connection with our business relationship, and may be provided to contractors acting on IBM's behalf, IBM Business Partners who promote, market, and support certain IBM products and services, and assignees of International Business Machines Corporation and its subsidiaries for uses consistent with our business relationship.

## **6. Warranty for Software Maintenance**

IBM warrants that SWM will be provided using reasonable care and skill and according to its current description.

The warranties will be voided by misuse, accident, modification, unsuitable physical or operating environment, operation in other than the specified operating environment, or failure caused by a product for which IBM is not responsible.

**THESE WARRANTIES ARE YOUR EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

IBM does not warrant uninterrupted or error-free provision of SWM.

## **7. Limitation of Liability**

Circumstances may arise where, because of a default on IBM's part or other liability, you are entitled to recover damages from IBM. In each such instance, regardless of the basis on which you are entitled to claim damages from IBM (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable for no more than:

1. damages for bodily injury (including death) and damage to real property and tangible personal property; and
2. the amount of any other actual direct damages up to the greater of U.S. \$100,000 (or equivalent in local currency) or the charges for the SWM that is the subject of the claim.

This limit also applies to any of IBM's Business Partners, subcontractors and Program developers. It is the maximum for which IBM and its IBM Business Partners, subcontractors and Program developers are collectively responsible.

### **Items for Which IBM Is Not Liable**

Under no circumstances is IBM, its Business Partners, subcontractors, or Program developers liable for any of the following:

1. third-party claims against you for damages (other than those under the first item listed above);
2. loss of, or damage to, your records or data; or
3. special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings), even if IBM is informed of their possibility.

## **8. Changes to Agreement Terms**

IBM may change the terms of this Agreement by giving you three months' written notice by letter or e-mail, either directly to you or through your IBM Business Partner. These changes are not retroactive and apply, as of the effective date IBM specifies in the notice, only to new orders and renewals.

IBM may add or withdraw Eligible Programs at any time without notice.

Otherwise, for a change to be valid, both of us must sign it.

## **9. Termination and Withdrawal**

Either of us may terminate this Agreement if the other does not comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply.

IBM may withdraw SWM for a Program by publishing a notification of withdrawal at

[www.ibm.com/software/supportlifecycle](http://www.ibm.com/software/supportlifecycle) not less than 12 months prior to its effective date. If IBM withdraws

SWM for which you have prepaid and IBM has not yet fully provided it to you, IBM will either continue to provide SWM to you until the end of the current Support Period or give you a prorated refund.

IBM may withdraw SWM in its entirety on 12 months' written notice to you by letter or e-mail.

Any terms of this Agreement which by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

## **10. Geographic Scope**

All your rights and all IBM's obligations are valid only in the United States.

## **11. Governing Law**

Both you and IBM consent to the application of the laws of the State of New York to govern, interpret, and enforce all of your and IBM's rights, duties, and obligations arising from, or relating in any manner to, the subject matter of this Agreement, without regard to conflict of law principles.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.