Attachment for Machine Code Update Services

The terms of this Attachment for Machine Code Update Services ("Attachment") are in addition to those of the IBM Customer Agreement (or an equivalent agreement) in effect between Customer and IBM and identified below ("Agreement"), as well as the Schedule for Machine Code Update ("Schedule") that is in effect between Customer and IBM, and govern IBM's provision and Customer's access to Machine Code Updates for qualified Target Machines. In the event of a conflict between the terms of this Attachment and the terms of the Agreement, the terms of this Attachment prevail; in the event of a conflict between the terms of this Attachment and the terms of a Schedule, the terms of the Schedule prevail.

Any capitalized terms referenced herein that are not defined in Section 1, shall be defined in the Agreement or as set forth in the IBM License Agreement for Machine Code.

1.   Definitions

a.   **Access or Accessing** - means assist or assisting Customer in receiving and installing Machine Code Updates.

b.   **Authorized Representative** - is a third party who is duly authorized by the Customer in accordance with this Attachment to Access Machine Code Updates.

c.   **Circumvent** – means to directly or indirectly, by or through any means, alter, avoid, disrupt, subvert, go around, or otherwise interfere with.

d.   **Customer** - is the party to this Attachment, who must also be the owner or lessee of the Target Machines for which Machine Code Updates are provided, accessed or used under this Attachment and the "Licensee" as defined in the Machine Code License. The Target Machines must be designated in the Schedule to be entitled to Machine Code Updates.

e.   **Order Form** – is the Customer order form annexed as an Appendix to the Schedule or its successor versions. Customer orders for Machine Code Updates must be submitted using the Order Form and must include all of the information requested in the Order Form. IBM reserves the right to modify or update the Order Form at any time.

f.   **Target Machine(s)** - is the Power Systems, System x and/or System Storage Target Machines covered by this Attachment and described in the Schedule by machine type and serial number.

g.   **Machine Code -** is defined in the Machine Code License.

h.   **Machine Code License** – is the IBM License Agreement for Machine Code as applicable for each Target Machine (provided at: http://www-947.ibm.com/systems/support/machine_warranties/support_by_product.html).

i.   **Machine Code Update(s)** – is any fix, patch or replacement provided for the Machine Code.

j.   **Services** – are the provision by IBM of Machine Code Updates as described in this Attachment for the Target Machines described in the Schedule.

k.   **Technological Measures** – all means, methods, systems, processes, checks, tests, monitoring, validations, instruments, and other measures that IBM implements for the purpose of: (i) protecting, controlling, limiting, and restricting the use of Machine Code; (ii) protecting, controlling, limiting, and restricting the access to or use of Built-in Capacity (including, for clarity, both Unauthorized Built-in Capacity and Authorized Built-Capacity); and (iii) monitoring and reporting use of the Machine Code, Authorized Built-in Capacity; and Unauthorized Built-in Capacity, including for the purpose of calculating usage-based charges for IBM products. Without limiting the generality of the preceding sentence, Technological Measures may be implemented, in whole or in part, in Machine Code, IBM programs, other code, other IBM technology, and in the data created, used or relied upon by such Machine Code, IBM programs, other code, and IBM technology.

2.   Scope of Work

Under this Attachment, IBM will provide Machine Code Updates for Customer installation on designated Target Machines and will not include System Service Representative (SSR) on-site installation or any other services not specifically described in this Attachment.   Except as otherwise agreed to in writing by IBM, then current Hourly Services terms, conditions and charges will apply to any on site or other out of scope services.

2.1 Machine Code Updates Services Support

Customer may submit up to four Order Forms during the one year term of this Attachment[1] and IBM will provide up to four Machine Code Updates per year for the Target Machines designated in the Schedule and in each Order Form, provided the Machine Code Updates are available and have been issued by IBM.

a. The Machine Code Updates are provided through the following media or methods only, as designated at IBM's discretion:

    (1)   DVD;

    (2)   USB;

    (3)   CD;

    (4)   through electronic means, using IBM-provided login credentials, password or methods; or

    (5)   otherwise as designated by IBM in the Schedule.

The eligible Target Machines are listed in the Schedule by Machine type model and serial number.

3. Charges

3.1 Machine Code Updates Ordered From IBM

The IBM Charges will be specified in the Schedule. IBM Charges:

a. include one-time charges;

b. cannot be combined with any other pricing discounts;

c. apply regardless of any price change announced by IBM;

d. include one year of Services; and

e. include shipping charges.

4. Customer's Responsibilities

Customer will:

a. have in effect with IBM the IBM Customer Agreement or any equivalent agreement between Customer and IBM;

b. utilize IBM's Fix Central website solely to identify and research (but not download or obtain) the Machine Code Updates applicable to the Target Machines and identify those Machine Code Updates when ordering them from IBM in accordance with this Attachment;

c. up to four times during the one year term of this Attachment, complete and submit to IBM an Order Form to order Machine Code Updates for up to all of the Target Machines;

d. have a valid Machine Code License for all Target Machines described in the Schedule at the time of the Target Machine purchase and at all times while receiving the Services;

e. install and use the Machine Code Updates only for the specific Target Machines type and model, identified by serial number, for which the Machine Code Updates are designated for use. Use of a Machine Code Update provided for one Target Machine on any other Target Machine or on any other machine is prohibited;

f. understand that any machines under warranty are not eligible for Machine Code Update Services under this Attachment;

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[1] In cases where a Machine Code Update that is otherwise available on Fix Central has been designated by IBM as addressing a safety, security, data integrity, or other critical matter (e.g. IBM Power System HIPERs), but where the Machine Code Update has not been included on the list of Fix Central Machine Code Updates available for installation on select machine types that do not require the machine to be covered under warranty or an IBM hardware maintenance service agreement ("Critical Fix"), Customer may complete and submit an Order Form to request that IBM provide one or more Critical Fixes on an expedited basis. Where an Order Form includes only Critical Fixes, it shall not be counted against the maximum four Order Forms for Machine Code Updates as described herein. Customer is responsible for indicating on the Order Form that Customer is requesting one or more Critical Fixes. IBM will endeavor to ship or otherwise provide access to the Critical Fixes within a target of three (3) business days after receipt of a valid Order Form that includes only Critical Fixes.

g.   exclusively use the Machine Code Updates only as allowed by the Machine Code License Agreement for Machine Code and the Agreement and only for use within the Enterprise for those specified Target Machines as outlined in the Schedule;

h.   agree that IBM may process the business contact information of Customer's employees and contractors and information about Customer as a legal entity (contact information) in connection with IBM Products and Services or in furtherance of IBM's business relationship with Customer. This contact information can be stored, disclosed internally and processed by International Business Machines Corporation and its subsidiaries, Business Partners and subcontractors wherever they do business, solely for the purpose described above provided that these companies comply with applicable data privacy laws related to this processing. Where required by applicable law, Customer has notified and obtained the consent of the individuals whose contact information may be stored, disclosed internally and processed and will forward their requests to access, update, correct or delete their contact information to IBM who will then comply with those requests.

i.   obtain any necessary consents and take any other actions required by applicable laws, including but not limited to data privacy laws, prior to disclosing any of Customer's employee information to IBM. Customer also agrees that with respect to data that is transferred or hosted outside of the United States, Customer is responsible for ensuring that all such data transmitted outside of the United States adheres to the laws and regulations governing such data;

j.   prior to making the facilities, software, hardware, networks or other similar resources available to IBM, promptly obtain any licenses or approvals necessary for IBM or its subcontractors to use, access and modify such resources to the extent necessary for IBM to perform the Services, including the development of any Materials; IBM will be relieved of its obligations to the extent Customer's failure to promptly obtain such licenses or approvals adversely affects IBM's ability to perform its obligations. If a third party asserts a claim against IBM as a result of Customer's failure to promptly obtain these licenses or approvals, Customer agrees to reimburse IBM for any costs and damages that IBM may reasonably incur in connection with such claim;

k.   be responsible for:

   (1)   the content of any database, the selection and implementation of controls on its access and use, backup and recovery, and the security of the stored data. This security will also include any procedures necessary to safeguard the integrity and security of software and data used in the Services from access by unauthorized personnel;

   (2)   the identification and interpretation of any applicable laws, regulations, and statutes that affect the existing application systems, programs, or data to which IBM will have access during the Services. It is your responsibility to ensure that the systems, programs, and data meet the requirements of those laws, regulations and statutes;

   (3)   obtaining those products (such as any required software or hardware) and services upon which IBM is relying to provide the Services;

   (4)   the physical installation and cabling of all hardware devices;

   (5)   providing and paying for internet access service or telecommunications transport circuits; and

   (6)   the Customer's own network security policy and security violation response procedures.

l.   ensure that any login credentials (e.g. ID and password) provided by IBM to Customer to obtain Machine Code Updates is used only to obtain Machine Code Updates for the Target Machines and for no other purpose. Customer is responsible to make IBM whole for any misuse of such credentials, including by Customer's Authorized Representative. The login credentials are valid only during the term of this Attachment.

4.1.1 Mutual Responsibilities

IBM and Customer will each: (1) comply with applicable export and import laws and regulations, including those of the United States that prohibit or limit export for certain uses or to certain end users; (2) cooperate with the other by providing all necessary information to the other, as needed for compliance; and (3) provide the other with advance written notice prior to providing the other party with access to data requiring an export license.

5. Other Terms and Conditions

5.1 Disclaimer

Customer understands and agrees that:

a. the Machine Code License applies to all Target Machines as of the date of this Attachment, and Customer hereby accepts the terms of the Machine Code License for each Target Machine and all Machine Code and Machine Code Updates on such Target Machines;

b. it is solely within Customer's discretion to use or not use any of the information provided pursuant to the Services hereunder. Accordingly, IBM will not be liable for any actions that Customer takes or chooses not to take based on the Services performed and/or deliverables provided hereunder;

c. IBM does not provide legal services or represent or warrant that the services or products IBM provides or obtains on Customer's behalf will ensure compliance with any particular law, including but not limited to any law relating to safety, security or privacy;

d. it is Customer's sole responsibility to provide appropriate and adequate security for the company, its assets, systems and employees;

e. new technology, configuration changes, software upgrades and routine maintenance, among other items, can create new and unknown security exposures. Moreover, computer "hackers" and other third parties continue to employ increasingly sophisticated techniques and tools, resulting in ever-growing challenges to individual computer system security. It is Customer's sole responsibility to maintain the security of Customer's computer systems. IBM's performance of the Services does not constitute any representation or warranty by IBM about the security of Customer's computer systems including, but not limited to, any representation that Customer's computer systems are safe from intrusions, viruses, or any other security exposures. IBM does not make any warranty, express or implied, or assume any legal liability or responsibility for the accuracy, completeness, or usefulness of any information provided as part of the Services.

6. Authorized Representatives

Subject to the following conditions, IBM consents to Customer's use of Authorized Representatives to Access Machine Code Updates for Target Machines ("IBM's Consent").

6.1 Orders for Machine Code Updates

Customer must order Machine Code Updates from IBM directly. Authorized Representatives may not order Machine Code Updates on the Customer's behalf. Upon written request, IBM will ship Machine Code Updates to Authorized Representatives for installation on Customer's qualified Target Machines.

6.2 Customer's Additional Responsibilities for Authorized Representatives

Customer agrees that it will:

a. notify IBM in writing of the authorization by Customer of an Authorized Representative and the withdrawal, expiration or termination of any such authorization in whole or in part;

b. cause Authorized Representatives to comply with all of the requirements, (i) of the Licensee under the Machine Code License, and (ii) of Authorized Representative under this Attachment; and

c. be fully responsible to IBM for all acts or omissions of Authorized Representatives in connection with Authorized Representatives' Access to Machine Code Updates or otherwise relating to this Attachment, including use by Authorized Representatives of any non-IBM products or services on or in conjunction with a Target Machine.

6.3 Indemnification Against Third Party Claims and Losses

In addition to damages for which Customer is liable under applicable law and the terms of this Attachment, Customer agrees to defend and indemnify IBM against, and hold IBM harmless from, any claims, losses, damages, or claims brought by any third party (including an Authorized Representative) that are caused by, result from, or arise out of Customer's conduct under this Attachment, including, (i) Customer's authorization or use of an Authorized Representative under this Attachment, or (ii) any acts or omissions of an Authorized Representative in connection with the activities contemplated by this Attachment.

6.4   IBM Intellectual Property

Before authorizing a third party to act as its Authorized Representative, and as an ongoing condition of IBM's permission for Authorized Representative to Access Machine Code Updates, Customer must obtain written assurances from the third party that the third party:

a.   has not directly or indirectly infringed or violated any IBM intellectual property rights in any Machine Code or Machine Code Updates;

b.   will not directly or indirectly infringe or violate any IBM intellectual property rights in any Machine Code or Machine Code Updates;

c.   has not directly or indirectly, by or through any means, Circumvented or attempted to Circumvent any Technological Measures in any Machine Code, or used a third party or third party product to do so;

d.   will not directly or indirectly, by or through any means, Circumvent or attempt to Circumvent any Technological Measures in any Machine Code, or use a third party or third party product to do so;

e.   has not Circumvented or attempted to Circumvent and will not Circumvent or attempt to Circumvent any access control to any IBM intellectual property or content; and

f.   will not directly or indirectly suggest or represent that it is in any way affiliated with IBM or authorized or certified by IBM to provide repair services or maintenance services.

Customer will provide IBM with a copy of such written assurances upon IBM's request.

6.5   Suspension of Machine Code Updates

6.5.1   IBM Server and Storage Competitors

IBM reserves the right to suspend IBM's Consent for any Authorized Representative that is, is owned by, or is under common ownership with, a server and/or or storage manufacturer that, (i) competes with IBM, and (ii) does not make equivalent Machine Code Updates (for which such server manufacturer is the sole practical source of supply) expeditiously available to IBM customers on a stand-alone basis (i.e., not bundled with other products or offerings) and on commercially reasonable terms and conditions. IBM will provide ten days' notice to Customer of any such suspension. IBM reserves the right to terminate this Attachment where Customer is, is owned by, or is under common ownership with, a server and/or storage manufacturer that, (i) competes with IBM, and (ii) does not make equivalent Machine Code Updates (for which such server manufacturer is the sole practical source of supply) expeditiously available to IBM customers on a stand-alone basis (i.e., not bundled with other products or offerings) and on commercially reasonable terms and conditions. IBM will provide ten days' notice to Customer such termination.

6.6   Infringement of IBM Intellectual Property Rights

IBM reserves the right to terminate IBM's Consent for any Authorized Representative where Customer or the Authorized Representative has (or has used a third party or third party product to): (i) directly or indirectly infringed or violated any IBM intellectual property rights in any Machine Code Updates;(ii) directly or indirectly, by or through any means, Circumvented or attempted to Circumvent any Technological Measures in any Machine Code; or (iii) Circumvented or attempted to Circumvent any access controls to any intellectual property or content. IBM will provide ten days' notice to Customer of any such termination.

6.7   Nondisclosure

Neither party will disclose the terms of this Agreement unless both parties agree in writing to do so, or unless required by law or court order.

6.8   No Third Party Beneficiaries

No entity or person (in particular, no prospective, past, present or future Authorized Representative) will be a third-party beneficiary under this Attachment, notwithstanding any agreements contained herein that may operate to the benefit of such entity or person (including any instance of IBM's Consent), and notwithstanding any status that any entity or person may have as a third-party beneficiary with respect to any other agreement.

6.9 Equitable Relief

Customer acknowledges and agrees that monetary damages may not be a sufficient remedy for Customer's breach of its obligations under this Section 6 "Authorized Representatives", and that the failure to comply with this Section 6 may cause IBM immediate, severe, and irreparable injury. Accordingly, Customer acknowledges that IBM will be entitled in such circumstances, without waiving or prejudicing any other rights or remedies, to such injunctive or equitable relief as applicable law may grant.

7. Noncompliance

Without prejudice to an assertion by either party, that any other breach of this Attachment constitutes a material breach, and without prejudice to any other remedies available for breach, IBM and Customer expressly acknowledge that any breach by Customer of its obligations under Section 6 "Authorized Representatives" will be a material breach entitling IBM to terminate this Attachment.

8. Term and Termination of IBM Charges and Schedule

The attached Schedule describes the specific one year term of this Attachment and the associated IBM Charges. This Attachment and its Schedule are effective only upon execution of both the Attachment and Schedule. During the specific one year term of this Attachment, IBM will not provide any credits or refunds for any Target Machines on the Schedule.

Appendix A: Machine Code Update Order Form

IBM

(For use in the Economic European Area)

Customer Information

Customer Name and Title:	
Ordering Customer's Special Bid Number:	
Ship to Address:	
City/Town:	
Postcode/Zip Code:	
State/Region/Province:	
Country:	
Ship To Contact:	(Name of Customer or Authorized Representative for Shipping), fill in if electronic delivery is not available.
Phone #:	

1.   Order Information and Details

1.1   Approved Target Machine List:

Provide Machine Type, Machine Model, Machine Serial Number(s) and Machine Code Requested. Indicate "yes" in column 5 where the Machine Code Updates are available on Fix Central and have been designated by IBM as addressing a safety, security, data integrity, or other critical matter (e.g. IBM Power System HIPERs), but have not been included on the list of Fix Central Machine Code Updates available for installation on select machine types that do not require the machine to be covered under warranty or an IBM hardware maintenance service agreement ("Critical Fix").

Machine Type	Machine Model	Machine Serial Number	Machine Code Requested (Code Bundle #)	Critical Fix Designation (Yes/No)

1.1.1   Machine Code Update Comments:

Add a text description, specific levels, versions needed, or any fix information related to Machine Code Update requested. You may attach a separate file if required.

Complete the order form and email to: mcode@fr.ibm.com

By_____
Authorized Customer signature