

# EARLY CUSTOMER SUPPORT PROGRAM FOR SOFTWARE VENDOR ACCESS TO IBM PRODUCTS

Dedicated Fixed Monthly Cost Advanced Red Hat Enterprise Linux 5 for System z (280B-06)

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Customer Name

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Address

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Referenced Agreement No.

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Supplement No.

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The Customer and IBM agree that the following terms and conditions apply as a supplement to and amend the referenced IBM Agreement for Exchange of Confidential Information ("Agreement").

## 1.0 Scope

1.1 Under this Supplement, IBM shall provide Customer with access via the network to Red Hat Enterprise Linux 5 for System z manufactured by Red Hat, Inc., product updates thereto, IBM code, and accompanying software products ("Code"). Code may include certain materials (program code and/or selected Documentation) provided to Customer in tangible form.

When cited in this Supplement, "Documentation" refers only to IBM product publications or other descriptive materials of IBM code and other related program products required in connection with this Supplement as determined by IBM.

IBM WILL:

1.2 Provide Customer real, non-dedicated CPU time on an IBM processor for access to the Code for the payment

indicated below and, where IBM deems it appropriate, provide Customer with access to selected portions of the Code in tangible form for use solely in connection with this Supplement;

1.3 Provide Customer with setup instructions for the communication procedures; and

1.4 Provide a single IBM focal point for Customer problem resolution.

CUSTOMER WILL:

1.5 Provide the appropriate workstation hardware, software, modem, common telephone line and host connection charges.

1.6 Use the Code solely for the purposes of validating and migrating any Customer product(s) to the Red Hat Enterprise Linux 5 for System z code.

1.7 Ensure that it does not download or in any way attempt to obtain local access to Code provided by IBM without IBM's prior written permission. Code made available to Customer in tangible form shall be used by Customer only at Customer's facility, will be used only for the purposes of this Supplement and shall be disclosed to and used only by those Customer employees with a need to know. In addition, the Customer shall not reverse assemble, reverse compile or copy the Code in whole or part.

1.8 Take appropriate action by instruction, agreement or otherwise to ensure, prior to their initial access to Code, that Customer employees abide by the terms of this Supplement.

1.9 Provide IBM with a single development focal point.

1.10 Customer has control of the IBM System on which the Customer product(s) and the Code are available for access. IBM will provide Customer with instructions for rendering the IBM System inactive when the IBM System is not in use. Customer will make the IBM System inactive when it is not in use.

## 2.0 PAYMENT

2.1 IBM will provide Customer with the following access and services for a charge of **\$550** per calendar month of participation in the Dedicated Fixed Monthly Cost Advanced Red Hat Enterprise Linux 5 for System z.

- 1 Red Hat Enterprise Linux 5 for System z virtual guest system running under IBM z/VM. The virtual guest system will be configured with 10GB of user disk and a minimum of 1GB of memory.
2. At least 1 z/VM User ID from which to perform virtual guest system management related activities.
3. One virtual guest system logon user ID with full administration and security authority for the operating system.

4. Usage of up to 30 work units per month, where a work unit is the equivalent of one (1) real non-dedicated hour of total processor time on an IBM 2003-225 processor as recorded in the VM accounting records. Each additional work unit used in excess of 30 each month will be charged at the rate of \$22 USD per work unit up to a maximum work unit usage charge of \$12,000 in a single billing period.
5. Technical and operational support for the Code as determined by IBM

The above charges apply for the term of this Supplement unless IBM sends Customer written notice of a price change. IBM will send such written notice at least thirty (30) days in advance of the date that the price change becomes effective and the notice will include the effective date of the price change. After the price change Customer is obligated to pay the new price beginning on the effective date of the price change.

The initial billing period for the Red Hat Enterprise Linux 5 for System z begins when the login information is provided to Customer and ends on the last day of the calendar month. Subsequent monthly billing periods will always end on the last day of the calendar month.

2.2 Credit requests for billable work units as a result of Customer failure to render the IBM System inactive when it is not in use must be made to IBM by Customer in writing. IBM will in its sole discretion grant or decline credits for billable work units for time periods during which the IBM System is or was active but not used by Customer. After the first work unit credit request, each subsequent credit for billable work units requested by Customer and granted by IBM will be limited to no more than ten percent(10%) of the total monthly amount owed to IBM by Customer.

### 3.0 NON-DISCLOSURE

3.1 Customer agrees not to disclose to third parties the terms and conditions or the existence of this Supplement and the services provided to Customer under this Supplement except as required by law, provided Customer first allows IBM to review the proposed disclosure as it relates to IBM.

### 4.0 LIMITED WARRANTY

4.1 Some of the Code may be a pre-general availability version of IBM programs and documentation and may be changed by IBM prior to general availability and may not now be at the level of performance or capability of other generally available IBM products. IBM does not warrant that operability of Customer's product(s) with the Code can or will be maintained with the generally available versions of the Code. The Customer accepts all risks that the IBM Code is not available on a timely basis and is not successful commercially.

Linux and other source program(s) that were packaged with, or preloaded on to, the IBM computer system you are accessing are distributed by Red Hat, Inc., Novell, Inc., or other distributors of open source programs. IBM is not a distributor of Linux or other open source programs, but is

merely a conduit through which these companies distribute open source programs. Linux and other open source programs are licensed to you by their distributor. You receive no express or implied patent or other license from IBM with respect to Linux and other open source programs.

ALL MATERIALS AND INFORMATION PROVIDED PURSUANT TO THIS SUPPLEMENT ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

### 5.0 TERM AND TERMINATION

"Once signed by both parties, this Supplement shall remain in effect until terminated. This Supplement will terminate on the earlier of: (i) March 31, 2019 (ii) Termination of this Supplement by either party with thirty (30) days prior written notice to the other party; or (iii) Termination of the Agreement."

Either party may terminate this Supplement prior to the expiration at any time with 30 days prior written notice. IBM may immediately terminate this Supplement and/or deny Customer access to the Code if IBM believes, in its sole discretion, Customer is violating the terms of this Supplement.

Notices pertaining to this Supplement may be delivered to either party using postal service, fax, or e-mail.

IBM in its sole discretion may extend the Termination Date of this Agreement by providing Customer written notice.

### 6.0 LIMITATION OF LIABILITY

Circumstances may arise where, because of a default or other liability, a party to this Agreement is entitled to recover damages from the other. Regardless of the basis on which the party seeking to recover damages is entitled to claim damages from the other (including fundamental breach, negligence, misrepresentation, or other contract or tort claim), the entire liability of the party against whom damages is sought for all claims in the aggregate arising under this Agreement will not exceed the amount of any actual direct damages up to \$100,000.

This limit also applies to any of either party's subcontractors and, in the case of IBM, its program developers. It is the maximum for which a party and its subcontractors and, in the case of IBM, its program developers are collectively responsible. Damages for bodily injury (including death) and damage to real property and tangible personal property for which a party is legally liable are not subject to a cap on the amount of damages.

Except as expressly required by law without the possibility of contractual waiver, under no circumstances is either party, its subcontractors, or, in the case of IBM, its program developers liable for any of the following even if informed of their possibility:

1. loss of, or damage to, data;

2. special, incidental, exemplary, or indirect damages or for any economic consequential damages; or
3. lost profits, business, revenue, goodwill, or anticipated savings.

The foregoing limitations and disclaimers of liability shall not apply to the liability of either party for damages associated with i) breaches of confidentiality or, ii) infringement or violation of the intellectual property rights of the other party or its licensors with respect to licenses granted under this Agreement.

## 7.0 GENERAL

7.1 This Supplement does not modify any other existing Supplement(s) between IBM and the Customer. In the event that any of the provisions of this Supplement is in conflict with any other existing Supplement(s), the terms of this Supplement shall prevail with respect to the subject matter of this Agreement.

7.2 The parties agree to comply and to reasonably assist the other in complying with applicable government export and import laws and regulations. Further, each party agrees that unless authorized by applicable government license or regulation, including but not limited to U.S. authorization, both parties will not directly or indirectly export or reexport, at any time, any technology, software and/or commodities furnished or developed under this or any other, Agreement between the parties, or its direct product, to any prohibited country (including release of technology, software and/or commodities to nationals, wherever they may be located, of any prohibited country) as specified in applicable export, embargo, and sanctions regulations. You also agree to comply with U.S. prohibitions on delivery of technology, software and/or commodities and providing services to certain end users and for certain end uses including, but not limited to, the following end uses/end users: nuclear

facilities, space or missile, and weapons systems (including chemical and biological).

Further, you understand and acknowledge that IBM may use its global resources, including but not limited to the use of non-U.S. nationals and/or hosting of data in non-U.S. countries for delivery of Services under this agreement.

You warrant that none of your product(s) (including data) exported to, or otherwise accessible by, IBM under this Agreement is controlled as a defense article under the U.S. International Traffic in Arms Regulation (ITAR) or under any other country's laws or regulations. You further warrant that none of your product(s) (including data) exported to or otherwise accessible by IBM under this Agreement requires an export license.

This section will survive after termination or expiration of this Agreement and will remain in effect until fulfilled.

7.3 IBM will not access or copy Customer's products except for weekly backup. If you do not want to participate in the weekly backup cycle, please notify us and we will remove your company from the weekly backup cycle.

7.4 You and IBM acknowledge and agree that, by entering into this Agreement and participating in the Dedicated Fixed Monthly Cost Advanced Red Hat Enterprise Linux 5 for System z, you are not disclosing any of your confidential information or trade secrets to IBM or any third party, and that IBM has not accepted and is not accepting any of your confidential information or trade secrets.

7.5 Customer agrees not to place or allow any content within the engagement that require or impose any legal or regulatory compliance by IBM.

7.6 This Supplement shall be construed, and the legal relations between us shall be determined in accordance with the laws of the State of New York, U.S.A..

THE CUSTOMER ACKNOWLEDGES THAT CUSTOMER HAS READ THE REFERENCED AGREEMENT TOGETHER WITH THIS SUPPLEMENT AND AGREES TO BE BOUND BY THEIR TERMS AND CONDITIONS. FURTHER, THE CUSTOMER ACKNOWLEDGES THAT THE AGREEMENT AND THIS SUPPLEMENT, TOGETHER WITH ANY OTHER AGREEMENTS SPECIFICALLY REFERENCED HEREIN, ARE THE COMPLETE AND EXCLUSIVE STATEMENT OF AGREEMENT BETWEEN THE PARTIES WHICH SUPERSEDES ALL PROPOSALS OR PRIOR AGREEMENTS, ORAL OR WRITTEN, BETWEEN THE PARTIES RELATING TO THE SUBJECT MATTER OF THE AGREEMENT AND THIS SUPPLEMENT.

If the foregoing is in accordance with your understanding of the Agreement between us, please indicate your acceptance thereof by signing and returning this Supplement to IBM. After IBM has signed the Supplement, one copy will be

returned to you. The signed Supplement may be delivered to IBM or the Customer using e-mail, fax, or postal service. IBM can be contacted at:

IBM Corporation  
Manager, Dallas ISV z Center  
Mail Room  
1177 South Belt Line Rd.  
Coppell, TX 75019  
USA

Fax: +1 (845) 491-5885  
E-mail: [etpadmin@us.ibm.com](mailto:etpadmin@us.ibm.com)

IN WITNESS WHEREOF, the parties have caused this Supplement to be executed below by their duly authorized representatives as of the last date set forth below. Once signed, any reproduction of this Supplement or Exhibit, made by a reliable means (for example, digital image, photocopy or facsimile), is considered an original.

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ACCEPTED AND AGREED TO:

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ACCEPTED AND AGREED TO:

Customer: \_\_\_\_\_

International Business Machines Corporation

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Signature

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Signature

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Name (type or print)

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Name (type or print)

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Title

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Title

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Date

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Date

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