

Software License Negotiation Checklist

We have developed a software licensing and implementation checklist. This checklist* is designed to be used to verify that significant issues are considered and, as applicable, addressed.

Scope of License Grant:

- Correct licensee identified
- Exclusive/nonexclusive license/perpetual
- Sublicensing
- Transferable/nontransferable
- Third party access
- Third party products
- License metric
 - User based/type of user/scope of use
 - Revenue
 - Site/Location
 - Hardware
 - Operating system
 - Other
- Access to source code/source code license
- Open source
- Correct/accurately described products licensed
- Documentation licensed
- License to updated, enhancements releases
- Disaster recovery/additional copies/backups
 - Scope of coverage
 - Term
 - Fees

Delivery and Acceptance:

- When does delivery occur, pre-live/post-live
- When does acceptance occur pre go-live/ post go-live
- Acceptance testing criteria
- Process for accepting/rejecting
- Vendor obligation to remedy
- Effects of failure to accept

Payment Terms:

- Form of payment, amount, schedule
- What is being purchased
- Payment tied to milestones/acceptance
 - Revenue recognition
- Maintenance
 - Cap on maintenance increases
- Segregation of licenses from services and other fees
- Future options
- Discounts off of list
- Suspension of maintenance
- Ability to shelve unused licenses

Purchase of hardware:

- Compatibility with software
- Warranties/pass-through
- Indemnity issues
- Upgrade
- Installation

Implementation Services:

- Consider separate agreements
- Scope of services to be provided
- Location where services to provided
- Cost of services/discount/cap on fee increases
- Project plan/milestones/deliverables
- Change orders
- Acceptance testing process/criteria
- Dispute resolution process
- Services warranty
- Indemnification
- Definition of vendor implementation team
 - Experience
 - Ability to replace
- Definition of licensee implementation team and scope of involvement

Warranty:

- Performance warranty for software
- Services warranty for maintenance services
- Length of warranty
- Scope
- Pass through warranties for third party products
 - Express remedies for breach
 - Exclusions/carve outs
 - Fraud/Negligent misrepresentation issues
- Infringement

Remedies:

- Scope of available remedies
- Events giving rise to remedies
- Failure of essential purpose

Indemnification:

- Types
- Scope
- Triggering events
- Limitations

Limitation of Liability:

- Mutual
- Direct Damages cap
 - Fees paid
 - Multiple of fees paid
 - Is amount of recovery depreciated
 - Calculation of damages cap
 - Exclusions from cap
- Carve outs to cap on damages

Confidential Information:

- Scope/Definition
- Standard of care
- Duration of obligation
- Disclosure to third parties
- Return/destruction
 - Triggering event
- Publicity/Terms of agreement
- Other issues (HIPPA/GLB etc.)

Term and Termination:

- Perpetual license or term license
- Ability to terminate:
 - For cause/convenience
 - Force majeure
 - Scope of triggering event
 - Other
- Termination notice
- Obligations upon termination
 - Transitional use rights/support
 - Return of software
 - Termination fees

Source Code Escrow:

- Escrow agent
- When deposited/updated
- Triggering events
- Fees

Miscellaneous:

- Bankruptcy Code §365(n)
- Force majeure
- Assignment
 - Fees
 - Transitional use rights
 - Permitted assignee
- Formal mechanism for dispute resolution
- Integration/Entire Agreement
 - Properly incorporate appendix/schedules, addenda
- Big boy clause
- Applicable law, venue, forum
- Attorneys fees/costs of litigation/arbitration
- Insurance
- Non-solicitation
- Non-compete
- Survival
- Waiver
- Security interest in hardware of software
- Authority to enter into agreement
- Taxes

For more information, please contact:



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*This checklist is for informational purposes only, and it should not be construed as legal advice. Receiving the checklist does not constitute or create an attorney-client relationship. You should contact a Saul Ewing Arnstein & Lehr attorney to obtain advice with respect to any particular issue or problem.

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