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## **IMPORTANT ISSUES TO CONSIDER WHEN NEGOTIATING SOFTWARE-AS-A-SERVICE, CLOUD SERVICES, AND SOFTWARE LICENSE AGREEMENTS**

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The primary goals of NYU's Office of General Counsel ("OGC") and Procurement in reviewing software-as-a-service ("SaaS"), cloud services, and software license agreements are to ensure that the agreements fulfill the NYU stakeholder's goals and expectations and will allow NYU to use the software and services as intended by NYU's stakeholder. Although software companies typically start from their "standard" form license agreement, virtually every vendor routinely considers requests for amendments to those standard terms. It is rare that one version of a vendor's software license is suitable for all applications.

OGC has developed and uses an issue list that facilitates the undertaking of due diligence by OGC, Procurement, and the department or unit involved with the goal of ensuring that the terms of the license will suit the needs of NYU and its stakeholder. Please note that insurance and indemnification provisions are reviewed separately by the NYU Department of Insurance Programs ("Insurance"). To minimize delays, please have Insurance review those provisions simultaneously with the OGC and Procurement review.

The issue list addresses various issues grouped into the following categories: business issues, liability issues, data issues, technical issues, and corporate issues. The review process requires a dialogue between OGC and/or Procurement and the department or unit in question. OGC and Procurement strive to move the negotiations as expediently as possible and ordinarily are successful in negotiating terms that can better ensure that the stakeholder's goals are met and that the stakeholder and NYU are properly protected. To better enable stakeholders at NYU to undertake their negotiations with vendors, some of the more significant considerations are identified below.

### **Business Issues**

- Is the grant of rights included in the license adequate to suit NYU's needs (e.g., worldwide usage may be required, including uses by portal campuses and study away sites, use by students and other NYU community members who are not NYU employees, right to sublicense, right to create derivative works)? Does the license term suffice? Are there

exclusivity issues?

- Does the agreement contain references to additional documents? (e.g., an Acceptable Use Policy, Service Level Agreement, Data Security Policy, Terms of Use, Privacy Policy, or additional exhibits, appendices or scope of work documents)? If so, have these documents been reviewed? Are the documents attached to the agreement or simply referenced (e.g., by listing a URL)? Does the agreement contain any limitations on how the vendor may change them? These documents often spell out important terms applicable to NYU's use of the software or service. For example, Acceptable Use Policies may contain restrictions on how NYU can use the software/service. Other documents may contain important specifications or performance requirements.
- Does NYU require any additional development or customization of the software/service, training, or other implementation services from the vendor? Does the agreement address this?
- Once NYU has purchased the software/service, what are the terms for "accepting" the software/service, and what opportunities does NYU have to ensure that it is functional? Is testing needed?
- Does NYU need to acquire the right to modify the software/service for any specific purposes? This is often prohibited under the terms of the license and needs to be carefully considered.
- How much support is expected from the vendor? Are there adequately defined service level agreements ("SLAs") that define the level of service the vendor is agreeing to, including (1) uptime guarantees, (2) how and when service and support will be provided, and (3) response time goals and proper escalation procedures when errors are discovered? If the vendor fails to meet the SLAs, what is the nature and extent of penalties on the vendor, including financial, and is there a right to terminate? Are there exceptions to the SLAs, and if so, are they reasonable?
- Are there provisions promising that NYU will have the use of later enhancements made by the vendor to the software/service?
- How are license fees calculated? If on a usage or user basis, how are those numbers calculated? Does NYU self-report, or is the vendor able to measure? If the vendor can measure, do they have access to NYU's systems in order to do so? Are there limits on users/locations/"seats"? If so, does NYU require flexibility to change these limits during the contract's term?
- For any agreements with multi-year terms or automatic renewal, does the agreement appropriately address pricing in future years? There should be a balance between the length of time NYU is able to lock in rates and the ability of NYU to renegotiate other key terms of the agreement several years after signature.
- Does the agreement contain an audit provision permitting the vendor to access NYU's records or IT infrastructure to verify compliance with the agreement? Does the

provision contain appropriate limits on frequency of audits and requirements to notify NYU in advance? What are the consequences of non-compliance discovered through an audit?

### **Liability Issues**

- What warranties has the vendor made regarding performance of the software/service? These may include anything from the performance of the software/service to the adequacy of the documentation.

- If the software/service malfunctions, has the vendor limited NYU's ability to seek an appropriate recovery? Are these "limitation of liability" terms acceptable to the department/unit? Who bears the financial responsibility for such limitations? In certain cases, software/service failure can literally be catastrophic -- sometimes to a research program and sometimes to an entire unit or department or school. Liability can easily be in the millions of dollars. Is the language of the license sufficient to protect NYU and its stakeholders in the event of a failure?

- In general, are there financial caps for liability arising from claims under the agreement? If so, has a determination been made that the level of the cap is sufficient? Areas where there should never be a restrictive cap include claims based upon breach of confidentiality, claims based upon infringement, and claims for security/privacy breach, especially with SaaS-based contracts.

- Do any provisions of the agreement address what happens if there is a claim that the software/service infringes the rights of third parties? If NYU is prevented from using the software/service because of infringement issues, does NYU have any remedies against the vendor? If not, is the financial risk fully understood by the department/unit? Is there a financial liability cap for such claims?

- What insurance does the vendor have and does it protect NYU? One of the largest risks from SaaS agreements is from security breaches involving access to sensitive information. Does the vendor have specific insurance coverage for "cyber risk" types of liability? This is a specific type of coverage that is necessary to cover such claims. Because the average national security breach claim is in excess of \$3 million, the level of insurance for such a vendor should be commensurate with the risk of liability. Some of NYU's key SaaS vendors have more than \$10 million in cyber risk insurance.

- What types of audit rights will NYU have? Will the vendor agree to the industry-standard types of audits for SaaS-based computing? As of 2019, this ordinarily includes the ISO 27001 audits, SSAE16/18 audits (and related SOC1 and SOC2 reports), and similar audits; however, the standards for such audits are constantly evolving, and language should reflect that.

- Does the agreement require that lawsuits related to it to be brought in a venue other than New York?

## Data Issues

- How will the software/service be used in the context of NYU's IT infrastructure? For example, will it use NYU's Single Sign-On (SSO), connect to NYU Classes, or interface with NYU's data warehouse? Will it provide data to the vendor or take in data from external sources?
- Will NYU be sharing personal or financial information with the vendor that is protected by HIPAA, FERPA, GDPR, or another privacy statute or that is subject to other confidentiality obligations? If so, are there requisite provisions in the agreement to protect that information? Has this provision of data been reviewed in the context of the NYU Data Classification chart?
- Does the agreement contain confidentiality terms? Is NYU's data required to be kept confidential? Is NYU required to keep any vendor data confidential?
- Does the agreement contain data security provisions? Are there terms regarding data retention? Is the vendor required to keep data encrypted, in transit or at rest?
- Has NYU's Office of Information Security reviewed for data/infrastructure security issues? What process will the provider follow, and what actions will it take, if there is a security incident or data security breach? Are security incidents or breaches reported to NYU?
- Does the agreement state that NYU retains ownership over the data provided by it and generated by its use of the software/service, as well as data that identifies NYU or its users?
- Are there issues with regard to the location of the servers that the vendor will be using to provide the SaaS service? Are the servers in restricted countries and what are the implications?
- Does NYU have the right to back up its data on its own servers (as a security precaution) as often as it wishes? Does it have the tools necessary to do so, and will the data be in a file format that is useful to NYU?
- Upon termination of the contract, does NYU have the rights to its data and ability to move the data to a new system? Would any special tools be needed to do so? Has there been an analysis done of the cost to NYU for such migration as a part of the business analysis for entering this contract?

## Technical Issues

- What are the specific hardware requirements and can NYU meet them? Are there "interoperability" issues NYU or the vendor must address?
- Does the software/service include the provision of web applications or digital content? If so, does the agreement guarantee that such applications/content will be made available in compliance with accessibility standards?

- Are there particular technical personnel from the vendor that NYU expects to be involved with the project? Does NYU wish to have control over the vendor's right to appoint or replace personnel? Can NYU insist on receiving the "A-team?"
- Is there a need to have source code for the software/service placed in escrow for any reason, such as if the vendor stops supporting the software? Sometimes, this can be essential to ensuring the integrity of a research program or a valuable NYU database.

### **Corporate Issues**

- What are NYU's rights if there is a bankruptcy? In that event, are there issues that need to be addressed in terms of: (1) maintaining access to the software/service and its source code; (2) maintaining access to stored data; or (3) the integrity of any research or program based on or utilizing that software/service? Will software escrow provide adequate protection, or should there be other means for protection, including the right to monitor the financial and business stability of a privately-held vendor?
- Does the vendor subcontract any key services to third parties? What is the reliability of those entities? Is the vendor responsible for non-performance by a subcontractor?
- Does NYU have concerns about the impact if the vendor merges with another company or is acquired by a competitor, etc.? These issues happen frequently and can have a significant impact on the continuity of the product and its competitiveness. Will NYU have the right to continue to obtain the same product, which includes the same functionalities, or will the merged entity have the ability to change the product specifications or pricing after the merger?

### **Further Resources**

If you have legal questions about software licenses and agreements, you can find a member of the Office of General Counsel who practices in this area by visiting our [practice areas page](#) and scrolling to "Computers, Internet and Web Legal Issues."

Replaces version dated October 22, 2018