

SOFTWARE-AS-A-SERVICE (SaaS) AGREEMENT

CHECKLIST

Prepared by:





SAAS AGREEMENT CHECKLIST RIGHTS AND LIMITATIONS

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Software-as-a-Service (SaaS) Agreement Checklist

Scope, Limitation and Caution: This Checklist is designed to be useful in drafting, reviewing and negotiating an agreement for SaaS services. It is not intended as a substitute for consultation with your legal counsel and other professionals. The SaaS industry is evolving and terminology across providers is not standardized. Therefore, the customer is advised to clarify and define all contract terminology, rights and obligations, and solution/technical specifications in the negotiation of any agreement with a SaaS provider. In addition, the software application delivery methods and associated support services can vary across providers. It is important to incorporate your solution requirements; the SaaS Subscription Schedule and Statement of Work components referenced in this document are intended to provide guidance as to the type of information you should be specifying in your resulting agreement, but they should be modified as needed to fit your particular deal and the solution to be acquired.

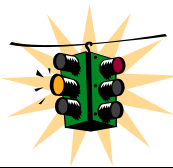
Identification of Parties to the Agreement

- ☐ Legal name and address (including division) for each party.
- ☐ For each party, the type of organization (corporation, LLC, partnership, etc.) and the state in which it was formed.
- ☐ Short reference name to be used in the agreement for each party.
- ☐ Effective date of the Agreement.

✂ *Toolbox Tip* ✂

The applicable Customer and Provider division may be included for clarity. However, don't forget that internal departmental organizations are not the same as legal entities.

Inducements/Recitals



SaaS Agreements may possibly create highly dependent relationships because the Customer is relying on the Provider and its expertise. Having the Provider acknowledge its expertise and your reliance on that expertise provides a valuable protection.

- ☐ Statements reflecting the mutual understanding of both parties:
 - The nature of Customer's business;
 - Customer's business needs as documented in the request for proposal (RFP);
 - Provider's submission of a proposal to solve Customer's business requirements;

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- Acknowledgement of Provider's expertise;
- Anything else that induced the Customer into executing the Agreement with the Provider;
- Customer's reliance on Provider's inducements; and
- The criticality of the successful provision of Provider's services to Customer's business.

✂ Toolbox Tips ✂

Negotiate parallel language into your Representations, Warranties and Covenants clauses so that a remedy will be tied to it and reinforced by the statements made in the Inducements/Recitals Section. The Provider also should guarantee the benefits claimed in the proposal made to Customer.

The Provider should indemnify and hold Customer harmless from any damage that may be sustained by reason of the Provider's failure to comply with the statements made in the inducements/recitals section.

Customer should incorporate by reference the applicable parts of any collateral material that aided it in making its decision to use the Provider or in which the vendor "promises" to meet Customer's needs. Examples include marketing material, portions of Customer's RFP and the Vendor's corresponding proposal and correspondence.

Definitions

- ☐ Most agreements contain defined terms – terms that have specific meanings within the context of the agreement. As a rule of thumb, it is better to define an ambiguous term (i.e., one susceptible to more than one interpretation) than to assume both parties will interpret it the same way. Defined terms typically have the first letter of each word capitalized. There are two main methods for organizing definitions within a contract:
 - An alphabetized list in a section toward the front of the agreement or in a glossary attached at the back of the agreement;
 - A define-as-you-go approach, (i.e., noting the definition in a parenthetical right after the term's first use in the agreement).

Subscription and Services to Be Provided

Note: A description of products/services can be incorporated into the body of the Agreement, or specified in executable documents such as schedules and other attachments that are incorporated through their construction into the overall Agreement (which can be specified as a Master Agreement). This latter approach provides flexibility for future additions and changes to the services acquired, and it is the approach used in this Checklist. However, this approach requires the

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careful management of the several documents to ensure consistency, and it also requires a robust definition of the precedence of the terms of the various documents in the event there is a conflict among them.

☐ Subscription and Services:

- Reference to Exhibits (SaaS Subscription Schedule and Statement of Work) for specification of software application access and other services to be provided, as well as service levels to be met;
- Exhibits to be agreed upon, numbered and incorporated into the overall Agreement.

✂ Toolbox Tips ✂

Many Providers will attempt to assign joint responsibility for tasks to the Customer and the Provider. All responsibilities should have a single owner – the Customer or the Provider. Joint responsibility provides the Provider with an out if the project does not succeed.

☐ Changes to the Agreement are made by an Addendum or a Change Order Request:

- Process for creating an Addendum or a Change Order Request;
- Provider's required response time for responding to a Customer request, and the form and content of Provider's response;
- Customer's process for accepting the Provider's response.

☐ Establish the order of precedence of documents in the event of a conflict of terms – list all documents that will be included in the deal and the sequence in which they will control (highest to lowest), e.g.:

- Most recent applicable SaaS Subscription Schedule;
- Most recent applicable Statement of Work;
- Other attachment or exhibit;
- The Agreement.

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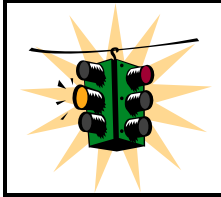
⌘ Toolbox Tips ⌘

Synchronize the list of documents here and in the Entire Agreement clause. Use this as a check and balance; if a document is included in the Order of Precedence list, make sure that the Entire Agreement provision includes the same list.

Modifications to the Agreement made in a Schedule, Order or other transactional document should apply only to the applicable Schedule, Order or other transactional document and not to other deals under the master agreement. A central review committee or other body should oversee the Agreement and all related documentation so that terms added or changed don't yield unintended consequences.

Right to Use

Note: While SaaS is a service and there is typically no licensing of software by the Customer, it is still important to specify an unlimited, transferable, non-exclusive right to use the subscription and services, as well as the scope of use by the Customer, i.e., who may use the SaaS subscription and services. The subscription may be sold on a per-seat, concurrent-user, geographic location or enterprise basis; all such terms should be defined in the context of the Agreement. Also important is the right of Customer's affiliates to use the subscriptions and services, so affiliates can be defined here or in the Definitions.



Failure to negotiate a scope of use broad enough is the leading cause of higher use fees. Consider all of the following specific usage rights.

- ☐ The business(s) that may use, access and order subscriptions and services now and in the future.
- ☐ The duration of the subscription and use and access rights if their term is different from the term of the agreement.
- ☐ Geographical limitations, if any.
- ☐ Customer's license to use and modify the source code and/or object code. This will be applicable if source code escrow applies.
- ☐ Scope of use limitations, if any.

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✂ Toolbox Tips ✂

Make sure that the grant to access and use the Subscriptions, Services and associated software flows down to the entity(ies) eligible under the assignment provision.

Make sure that the grant to access and use the Subscriptions, Services and associated software is broad enough to cover usage rights even if you opt not to have maintenance included as part of the Subscriptions and Services.

Make sure that as a part of the grant to access and use the Subscriptions, Services and associated software you receive a right to use the source code, modify it and create derivative works, if needed.

- ☐ Right to create derivative works from the software and deliverables for:
 - Work product provided under the Agreement but not owned by Customer;
 - Training needs (e.g., screen shots for internal training or help desk needs);
 - Presentation needs (e.g., a board of directors meeting).
- ☐ Right to access and use for non-productive purposes such as disaster recovery testing and test environments.

✂ Toolbox Tips ✂

Make sure that the Acceptance Testing and Acceptance/Evaluation of Services and associated software provisions include both non-productive/evaluation phases as well as live-production phases.

Check the Fees, Invoicing, Payment and Taxes provision to make sure that no payment is required for using the software for non-production purposes.

- ☐ Access and use of Subscriptions and Services by a divested business:
 - Duration of use;
 - “Capacity” limits;
 - No additional cost.

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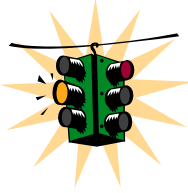
- ☐ Operating Environments – Right to run the software on multiple, different, successor or replacement operating environments at no additional cost.
- ☐ Use of Software to Interface with Other Products – More than one software product may be running simultaneously on the Customer platforms. The combination of software products is inherent, and the Provider will not obtain any ownership interest in the resulting interface. (This may be accomplished through customization.)
- ☐ New Locations to Access and Use the Subscriptions Services and Associated Software – Right to transfer these rights, without prior notice or consent of the Provider, to new users, machines or locations at no additional charge, and the right for a duplicate environment to exist during the transition.

✂ Toolbox Tip ✂

Make sure that the usage rights negotiated for the Customer transfer to all eligible entities under the Agreement during any transitions or relocations of the Subscriptions and Services.

- ☐ Successor Products – Upgraded functionality should be considered the same product with no additional subscription or licensing fee, even if the Provider changes the product's name.
- ☐ Changes in Processing Complex – Customer retains the right to use the Subscriptions, Services and associated software on a processing complex, which shall be the pricing equivalent of a single computer regardless of CPUs or tier grouping.
- ☐ Use in Dual/Multi-core Chips – Customer retains the right to access and use the Subscriptions, Services and associated software on hardware using dual/multi-core processors, which shall not impact the pricing.
- ☐ Authorization Codes – Passwords, keys and other authorization codes, if any, are to be interchangeable and permanent for the full term plus some period of time sufficient to protect the Customer.
- ☐ Expansion in Laws or Regulations – The Provider's product must comply with new or expanding regulations.
- ☐ Reverse Engineering – Customer agrees not to disassemble or decompile the Provider's software, except as reasonably required during installation or if the Customer requires an interface from the software to other systems and no application programming interface (API) is available.

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At the end of the term of the Agreement, there may be an obligation for the Customer to return to Provider all proprietary software, documentation and any other items that belong to the Provider. Some of these items may make it difficult at a later date for the Customer or its employees to understand or deal with databases or data or other products of the SaaS Service, which your company has a legal right to retain. Be sure that the Agreement allows Customer to retain and not return any documentation or other items necessary or helpful to using the databases, data or other products produced by the SaaS Subscription and Service Customer has paid for and has the right to use.

Term of the Agreement

- ☐ Term commences upon effective date.
- ☐ Duration of term in:
 - Months;
 - Years; or
 - Termination or expiration of last active SaaS Subscription Schedule or Statement of Work.
- ☐ Agreement remains effective until termination or expiration of last active SaaS Subscription Schedule or Statement of Work.
- ☐ Renewal rights:
 - Terms;
 - Renewal notice period;
 - Provider's obligation to provide Customer with written notice at least ninety days prior to the expiration of the Agreement, a SaaS Subscription Schedule or a Statement of Work;
 - Customer's and Provider's other responsibilities for providing notices;

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☐ The Provider's independent performance obligation:

- Commitment to perform under the Agreement and any SaaS Subscription Schedules or Statements for Work;
- The Provider will continue services uninterrupted in the event of a dispute for a period of at least (insert number) days (90 days minimum suggested).

✂ Toolbox Tip ✂

The Provider's obligation of ongoing performance during a dispute should be in alignment with the dispute resolution provisions.

Fees, Invoicing, Payment and Taxes

Specify what payments and taxes are to be paid, when, with the presentation of what document(s) and based on what pricing arrangements.

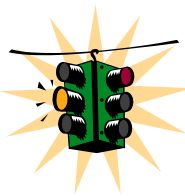
- ☐ Fees – specify the amount of the fees (or where they can be found) and when they are due; specify how, if at all, the fees will escalate during the term of the Agreement. In many instances, the actual fees will be located in the SaaS Subscription Schedules or the Statements of Work.
- ☐ Invoicing – specify the invoice format, the required information contained on the invoice and timeliness requirements.
- ☐ Payment – specify payment terms:
 - Payment made after (insert number) days of receipt of a complete, timely and accurate invoice;
 - No late fees;
 - No payment of disputed amounts until the dispute is resolved and no interest accrues with respect to the disputed amount;
 - Payment structure tied to completion and acceptance of the deliverables, the achievement of milestones or calendar dates;
 - No up front deposits, prepaid fees or expenses;
 - No mark-up for travel or other indirect expenses; the Customer will reimburse Provider only for actual costs incurred;
 - The right to offset against monies owed to the Provider;

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- The right to dispute invoices and the process to resolve invoice disputes;
 - Material holdback on deliverables until after successful completion of all deliverables that form the current project.
- ☐ Taxes – identify applicable taxes to be paid by each party:
- Applicable sales, use, personal property, value added or other taxes;
 - Provider income taxes;
 - Provider responsible for any penalties imposed due to late or non-payment of any taxes due, including situations where Customer is required to pay tax but Provider fails to file legally required information return or files it late;
 - The Customer has right to request detailed tax information from the Provider and dispute the classification or payment of the taxes;
 - Both parties agree to cooperate in determining and minimizing the other's tax liability to the extent legally permissible.
- ☐ Price Protections – cap or limit any future price or fee increases imposed by the Provider.

✂ *Toolbox Tip* ✂

The savvy Customer will know each cost point associated with the products/services it is procuring; both the individual/unbundled as well as the grouped/bundled pricing.



Acceptance testing is often the most overlooked portion of SaaS agreements. If there is any customization or other unique implementation required for accessing and using the Subscriptions, Services or associated software, the Customer should have the right to test and accept these items BEFORE any payment obligations are triggered.

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⌘ Toolbox Tips ⌘

If Provider makes an updated or upgraded version of the Subscription, Service and/or associated software publicly available during the Customer's acceptance test period, the new version is to be made available to Customer at no additional cost. Customer requires Provider to extend conditions generally applicable under maintenance or Provider risks failing Customer's acceptance testing criteria.

Make sure that Provider is obligated to fix/repair and provide upgrade protection during acceptance testing period.

⌘ Toolbox Tips ⌘

Make sure that your grant to access and use the Subscriptions, Services and associated software and scope of use provisions address your usage rights during acceptance testing.

In your Fees, Invoicing, Payment and Taxes provision, make sure that there are no fees associated with use during acceptance testing.

Make sure that the Limitation of Liability starts upon commencement of the Agreement – not upon completion of the acceptance testing or on final acceptance. Be aware that damage can and does occur during the acceptance testing and your Limitation of Liability provision should reflect that instance.

Under the termination provisions, make sure that your term of use includes the acceptance-testing phase and that your rights to terminate before the expiration date begin prior to final acceptance.

Insurance

⌘ Toolbox Tips ⌘

Make sure that the Provider's insurance coverages required under the Insurance section are in place and active as of the Agreement's effective date (rather than date of final acceptance – this avoids gaps in insurance coverage during inspection, acceptance testing, etc.).

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- ☐ The Provider is required to carry certain insurance coverage. Limits should be specified. Potential coverages include:
 - Commercial General Liability;
 - Automobile Liability;
 - Excess Liability;
 - Workers' Compensation;
 - Professional Errors and Omissions;
 - Fiduciary coverage for Provider's employees;
 - Misappropriation of intellectual property.
- ☐ Customer named as additional insured.
- ☐ Provider to provide insurance certificates and prior notice to Customer of any cancellations or reductions of coverage.
- ☐ Required rating of insurance provider, e.g., AM Best A-rating of at least Class VII.
- ☐ Remedies in the event Provider cancels or reduces insurance coverage.

✂ *Toolbox Tips* ✂

Many times the Provider will push hard to avoid naming the Customer as an additional insured. Negotiate aggressively to become an additional insured to increase your protection.

"Additional insured" may include less coverage than you think. Research the number of additional insureds versus the Provider's policy limits. If there are many additional insureds, it may be wiser to ask the Provider to have a separate policy for you. This increases your protection in the event of multiple claims against the same policy.

NOTE: *"Additional insured" and "additional named insured" have very different meanings and consequences. If your company is listed as an "additional named insured", it may be liable to pay insurance premiums and/or be subject to certain exclusions not applicable to "additional insured" status. Please direct questions to your company's risk management or other insurance professionals.*

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Provider Warranties

☐ Performance:

- Work performed by qualified personnel;
- Use of best efforts in completion of work under the Agreement, SaaS Subscription Schedules and Statements of Work;
- Software applications and deliverables operate as specified in SaaS Subscription Schedules or Statements of Work.

✂ Toolbox Tip ✂

Whenever possible try to use your specifications. You know why you're buying the SaaS subscription and services and what they should do. Using your own specifications will also facilitate the negotiation surrounding the typical disclaimer of Uniform Commercial Code (UCC) warranties of fitness for a particular purpose and merchantability, reducing your need for these UCC warranties.

☐ Authority – Provider has authority to enter into this Agreement.

☐ Software:

- Functions will meet Customer requirements;
- Access to and use of the software applications will be uninterrupted and error free;
- Software applications will have the capacity to meet Customer's demand during specified hours;
- Software applications will work with future releases of Customer's desktop operating environment and web browsers;
- Liability for damages Customer may suffer arising from use or inability to use software applications.

☐ Illicit Code:

- Software shall not contain illicit code and will not alter, damage or erase data or computer programs without control of a person operating the computing equipment on which it resides;
- Remedies in the event the software has any illicit code.

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✂ Toolbox Tips ✂

Make sure that the Limitation of Liability provision protecting the Customer covers any damage that occurs as a result of a breach of warranty by the Provider.

There are times when termination is not an appropriate remedy, so even if the Customer has been successful in negotiating an effective termination for convenience provision accompanied by termination assistance from the Provider, Customer may not have the time or resources to replace the Provider during the project. When all of Customer's warranties are tied to effective remedies, as well as to remedies that afford the Provider time to cure, Customer effectively limits its need to assert the rights of the termination for convenience provision and are better positioned to receive specific performance from Provider.

Maintenance/Support Services

Although typically included in the subscription fee, maintenance should be addressed somewhere in the Agreement to protect the Customer. In addition, there may be software maintenance for software provided outside the scope of the subscription but under the Agreement.

- ☐ During the term of the Agreement, maintenance and support for ancillary software should provide for:
 - Provider to support the current release and two prior versions;
 - Maintenance that begins at the end of the warranty period;
 - Maintenance fee increases, if allowed, must be capped;
 - Maintenance is optional and in no way tied to license rights;
 - Customer may discontinue support on any single product with no effect on the support or cost of the support for other licensed products.
- ☐ Provide a description of maintenance services SaaS Software and ancillary software that includes:
 - Program corrections and “fixes;”
 - Response times for critical and non-critical problems;
 - Enhancements are included;
 - Location of maintenance (e.g., on-site, Provider offices, telephone assistance, etc.);

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- Compatibility of maintenance fixes and other releases with original software and hardware (cross-reference to “Warranties by Provider”);
- Hours of maintenance coverage;
- Customer may delay installation of maintenance releases for up to 6 months with no effect on support or warranties (typically not an option for SaaS Software, but should be for the ancillary software).

Mechanisms for Identifying and Avoiding Problems

- ☐ Designation of Customer and Provider program managers:
 - List the names of the program managers or where the names can be found (e.g., on each SaaS Software Schedule and Statement of Work);
 - Describe the authority and responsibilities of the program managers.
- ☐ Scheduled Review Meeting and Status Reports – designation of frequency and location of meetings, required representatives from each party, topics for review and information to be included in Provider status reports:
 - Weekly meetings;
 - Monthly meetings;
 - Quarterly meetings;
 - Annual Meetings;
- ☐ Cooperation by Provider regarding emergency meetings as required by Customer in its discretion.
- ☐ Rolling estoppel provision.
- ☐ Provider to create and maintain help desk processes and documentation; process documentation to be provided to Customer.
- ☐ Customer remedies in the event Provider fails to meet service levels:
 - Strictly enforce Provider’s account management obligations;
 - Require Provider, at its expense, to provide additional resources as necessary to meet or exceed the services levels;
 - Invoke the dispute resolution process;
 - Retain a proportionate percentage of the fees as credit;

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- Invoke alternative remedies as may be specified in the agreement;
- Terminate agreement for cause.

Indemnification

☐ Provider Indemnification:

- Defend, indemnify and hold harmless Customer (including its personnel, officers, directors, parent company, foreign and domestic subsidiaries and affiliates, successors and assigns) against any claim, damage, loss or expense arising from any act or omission by an agent, contractor, subcontractor, consultant or employee of Provider resulting in malicious access into any Customer data or technology;
- Defend indemnify and hold harmless against any claim that the software or services delivered by Provider infringe a patent, trademark, copyright, trade secret or other proprietary right globally; Customer remedies include requiring Provider (i) to procure Customer the right to continue using the software or services in question, or (ii) replace or modify the infringing software or service so that it becomes non-infringing so long as the functionality remains the same.

☐ Customer Indemnification:

- Limited to Customer defending indemnifying and holding harmless Provider against claims by third parties alleging IP infringement arising out of Customer use of the software in a manner violating use and access or license granted by Provider, with specified exclusions to Customer defense and indemnification obligation.

☐ Conditions:

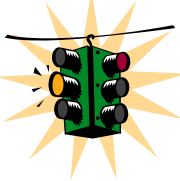
- Requirements for notification of claim to the indemnifying party;
- Right of indemnifying party to control the defense of such claims;
- Cooperation by the parties in the event of a claim.

Toolbox Tip

Check with your lawyer to determine whether the Provider should defend your interests in a lawsuit. In many instances it will be acceptable, and you'll want to include the obligation to defend you along with a requirement to indemnify and hold you harmless. However, in other instances you may want to choose your own counsel and be involved in the management of the lawsuit, including settlement discussions.

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Limitation of Liability

	<p>A limitation of liability provision severely reduces the amount of protection you receive from the Provider. Negotiate aggressively for limits that are consistent with the magnitude of the deal.</p>
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- ☐ Specify each party's limitation of liability, including any exceptions, e.g.:
 - Losses by either party for bodily injury or damage to real property;
 - Indemnification obligations;
 - Claims against Provider for the presence of illicit code;
 - Liability resulting from the gross negligence or willful misconduct of a party;
 - Any breach of confidentiality obligations contained in the Agreement;
 - Death or bodily injury if Provider will be on Customer's property;
- ☐ Specify any items considered direct damages by Provider, e.g.,:
 - Cost of recreating or reloading any of Customer's lost, stolen or damaged information;
 - Cost of implementing a work around plan resulting from failure by Provider to perform its obligations;
 - Cost of replacing lost, stolen or damaged equipment, software and materials;
 - Cost to correct errors in software, maintenance and enhancements provided as part of Provider's performance under the Agreement;
 - Cost to procure from an alternate supplier, all or any part of the services if Provider is in default or fails to meet its obligations, the performance of which is the obligation of Provider under the Agreement;
 - Cost due to loss of income, profit, interest or savings.

✂ Toolbox Tips ✂

Make sure that the Limitation of Liability starts upon commencement of the Agreement – not upon completion of the acceptance testing or on final acceptance. Be aware that damage can and does occur during the acceptance testing and your Limitation of Liability provision should reflect that instance.

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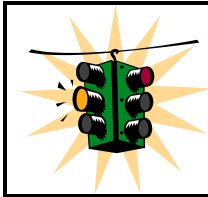
Default and Remedies

☐ Determination of default:

- Provider Default – if Provider fails to perform or comply with any material term or condition of the Agreement;
- Customer Default – if Customer fails to make required payment within payment term dates of any correct, accurate, timely and undisputed invoice, or fails to perform or comply with any material term or condition of the Agreement;
- Default by Either party – if the party ceases to do business as a going concern.

☐ Default Notice – define process for notice of default by non-defaulting party to defaulting party, and termination of the Agreement by the non-defaulting party if default not cured within the cure period.

☐ Remedies:



Every warranty should have an exercisable remedy.

- Provider default – customer may terminate the Agreement, pursue actual damages arising out of such default, seek specific performance by Provider of its obligations under the Agreement; and/or invoke alternative remedies as may be specified in the Agreement;
- Customer default – Provider may collect the sum of all correct, accurate, timely and undisputed invoices not paid by Customer for the period Customer is determined to be in default.

☐ No Exclusive Remedies:

- Rights and remedies provided in the Agreement are cumulative and not exclusive of any rights or remedies Customer may have at law or in equity or otherwise;
- Customer's remedies with respect to any matter under the Agreement are not limited to the remedies set forth in the Agreement;
- Neither party can receive duplicative recoveries;
- Each party has a duty to mitigate damages for which the other party is responsible;
- A default by one party under the Agreement does not relieve that party of its obligations to, nor adversely affect the rights of, the other party under the Agreement.

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Termination and Termination Support

- ☐ Termination for convenience by Customer in its sole discretion, upon (insert number) days' prior written notice to Provider.
- ☐ Termination for cause by Customer if Provider fails to perform any of its obligations or breaches any representations or warranties and fails to cure within (insert number) calendar days after written notice is given to Provider.
- ☐ Termination for insolvency by either party.
- ☐ Provider is obligated to continue to perform regardless of a dispute related to any claims by Provider that Customer has materially breached its obligations.
- ☐ Obligations of the parties upon termination – return or destruction of materials.
- ☐ Termination does not affect the parties' confidentiality and non-disclosure obligations.
- ☐ Termination assistance to be provided by Provider upon termination or expiration of the agreement:
 - Assignment to Customer of all third-party licenses used to provide software, subscription and services to Customer;
 - Provider to provide Customer applicable requirements, standards, policies, operating procedures and other documentation relating to the software, subscription and services;
 - Provider to provide Customer necessary access to the systems and sites from which the software, subscription and services were provided;
 - Provider to provide Customer final export of Customer data in a format specified by Customer, and certification of the destruction of any Customer data within the possession of Provider.
- ☐ Escrow Agreement:
 - Provider to place in escrow the most current version of the source code for the application software, including all updates, improvements and enhancements;
 - Terms for release of the source code to Customer;
 - Terms of use for source code released to Customer;
 - Escrow terms and conditions survive the termination of the Agreement.

Software-as-a-Service (SaaS) Agreement Checklist

✂ Toolbox Tips ✂

Make sure that the grant to access and use the Subscriptions, Services and associated software has provisions addressing Customer's usage rights and access to the source code in the event of a release condition.

In the Fees, Invoicing, Payment and Taxes provision, make sure that the fees for use associated with source code are separate and distinct from normal subscription and license fees.

Make sure that the Limitation of Liability provision covers any damage that can occur as a result of using the source code.

Provider should warrant that the source code on file with either Customer or an escrow agent is current and accompanied by the current operating documentation.

Under the Term and Termination provisions, make sure that if you have prepaid maintenance but during that term a source code release event occurs, you receive a refund for the balance of the maintenance term. Make sure that only the Agreement is being terminated and your rights to the source code remain intact even if a source code release event occurs just before the end of the term, especially if Provider is providing Customer with mission critical software. Additionally and if applicable under your agreement, Customer is still entitled to receive "termination assistance" no matter when during the term, the source code release condition occurs.

Consider executing an Under Seal Agreement if the following criteria are met: i) Customer wants a two-party agreement between itself and Provider in order to eliminate any third-party escrow agent, ii) Provider is a small company and provides Customer with mission critical software, iii) Customer receives and monitors source code updates from Provider and Provider periodically and upon request of Provider performs a comprehensive knowledge transfer of the source code.

Proprietary Rights

- ☐ Provider proprietary information remains property of Provider unless the information is in the public domain; Provider grants Customer a perpetual, irrevocable, royalty free, unrestricted right to use, modify, transfer and maintain the Provider information.
- ☐ Customer proprietary information remains property of Customer; Customer grants Provider the right to access and use Customer data for the purpose of complying with its obligations under the Agreement.

Software-as-a-Service (SaaS) Agreement Checklist

☐ Provider work product

- Customer owns work product prepared by Provider under the Agreement;
- For any Provider work product not deemed “work for hire” by law, Provider assigns ownership to Customer;
- Provider will provide a current copy of any work product to Customer upon Customer’s request and upon termination or expiration of the Agreement, and Provider will destroy all copies of work product in its possession upon termination or expiration of the Agreement.

General Provisions

☐ Nondisclosure

- Each party will retain in confidence the other party’s proprietary information identified as such and will use the information only as required under the terms of the Agreement;
- Each party will obtain written nondisclosure agreements with its employees and consultants as needed to comply with the Agreement, and each party will disclose information internally on a need-to-know basis only;
- Exception for information that is: received from a third party prior to receipt from the disclosing party (and the third party is not under any duty to protect that information), disclosed by the disclosing party to a third party without obligation for confidentiality, in the public domain, or developed independently by the receiving party;
- Each party will safeguard the other’s proprietary and confidential information with the same or greater degree of care used to safeguard its own proprietary and confidential information;
- Each party’s non-disclosure obligation will extend for a period of (insert number) years following termination or expiration of the Agreement.

✂ Toolbox Tips ✂

To avoid any inadvertent exposure of your confidential, personal and/or proprietary information to your competitors and/or unintended Provider affiliates, be sure to get the Provider to provide you with a current and comprehensive list of all subcontractors, third-party vendors and any other companies the Provider uses to provide the products/services to you during the term of the Agreement. This list should be updated periodically to reflect any and all changes made to it during the term of the Agreement; it must be acknowledged (signed off) by Customer.

Be sure to include a warranty and remedy regarding the Provider’s failure to disclose its use of subcontractors and other vendors.

Software-as-a-Service (SaaS) Agreement Checklist

☐ Assignment:

- Provider may not assign the Agreement in whole or in part without Customer's written consent;
- Customer may assign the Agreement in whole or in part to any affiliate or subsidiary of Customer upon prior written notice to Provider;
- If Provider is acquired, Provider will provide written confirmation that Provider will not provide services to Customer from a facility of any current or future competitor to Customer, or provide services to Customer under a shared environment with third parties unless a process is in place to restrict access to Customer's confidential information by Provider and its agents providing such services to Customer competitors.

☐ Governing Law:

- Name of the state whose law will govern the Agreement;
- UCITA expressly and specifically excluded from controlling.

☐ Dispute Resolution and Arbitration – The agreement might include provisions as follows:

- In the event of dispute, the parties will first meet and negotiate in good faith to resolve;
- If the parties cannot resolve the dispute through negotiations, the parties may pursue;
 - Formal mediation,
 - Nonbinding arbitration,
 - Binding arbitration,
 - Litigation.

Toolbox Tip

Build in formal dispute resolution procedures for the parties to follow starting with (i) either party giving the other party notice of any dispute not resolved in the normal course of business, (ii) providing a stated time for delivery and written response of that notice, (iii) scheduling a meeting of party executives and if the executives fail to meet or resolve the matter within a stated period, either party may commence legal action with respect to the dispute or claim. During this process each party must continue to perform its obligations under the Agreement except that payment by the Customer of amounts disputed in good faith is suspended. This clause does not prevent either party from terminating the Agreement or the affected schedule pursuant to the termination clause.

Software-as-a-Service (SaaS) Agreement Checklist

☐ No Waiver:

- No waiver of a breach of any provision of the Agreement constitutes a waiver of any other breach of a provision of the Agreement;
- Waivers must be in writing;
- Any provision held to be invalid will be modified to remedy such invalidity but will not affect the validity of the remaining provisions.

☐ Severability:

- If any provision in the Agreement conflicts with any law or is invalid, it will be re-stated in a manner avoiding the conflict but remaining as close to original intent of parties as possible; all other provisions will remain in full force and effect.

☐ Force Majeure:

- Neither party will be liable for delays or failures due to causes beyond its reasonable control, e.g., natural catastrophe, government legislation, labor strikes.

✂ Toolbox Tips ✂

The provision should contain a reasonable time limit (such as 15 or 30 days) before the contract can be terminated or services sought from other vendors.

Depending upon the nature of any services being received from the Provider, certain acts typically listed in a force majeure clause should be deleted. For example, if the Provider has built in redundancy, a fire, flood or other natural disaster should NOT act to relieve it from its obligation to perform.

☐ Disaster Recovery:

- Provider responsible for disaster recovery services such that Customer is not denied access to its data and services for more than (insert number) hours in a disaster;
- Provider's failure to restore the services within (insert number) hours of the initial disruption to service, or Provider's declaration of more than (insert number) disasters in any (insert number)-month period may be deemed a default by Provider;
- Provider will pay Customer all costs incurred by Customer in obtaining alternative services.

Software-as-a-Service (SaaS) Agreement Checklist

☐ Disaster Recovery Backup:

- Provider will provide off-site storage on a (daily/weekly) basis of all backup disks, data and materials.

☐ Notice:

- Notices must be in writing with delivery methods specified.

☐ Hiring:

- Customer and Provider won't hire the other's employees for the term of the Agreement plus (insert number) months/years.

☐ Survival:

- Terms, provisions, representations and warranties contained in the Agreement that are intended to survive expiration or termination of the Agreement will survive.

✂ Toolbox Tip ✂

There are other contract provisions that, by their nature and substance, must naturally survive the end of the Agreement. These provisions typically are: definitions, scope of agreement, separate agreements, license grant/scope of use, source code, injunctive relief, audit/review of records, use of names and logos, notices, and miscellaneous/general provisions.

☐ Audit:

- Customer's Data – Provider will cooperate with Customer in any audit required by a regulatory authority; if Provider is unable to produce Customer information previously in Provider's possession but which Provider has failed to retain, Provider will reimburse Customer for costs resulting from Provider's failure to provide the information;
- Records – specification of Provider records, e.g., internal memoranda, maintenance logs, usage reports, accounting records, written policies deemed necessary by Customer, and all documentation related to the provision of services under the Agreement; Provider's records are open to inspection audit during normal working hours during the Agreement term and for (insert number) years thereafter;
- Security – Customer has the right to enter Provider's premises unannounced, but within site security guidelines, for the purpose of verifying data security access procedures.

Software-as-a-Service (SaaS) Agreement Checklist

SaaS Subscription Schedule Checklist

Identification of Parties to the Schedule

- ☐ Legal name and address (including division) for each party.
- ☐ Reference to Master Agreement or underlying Agreement.

Provider Service

- ☐ Description of service solution to be provided by Provider.

Payment Schedule, Invoicing Terms

- ☐ Specify currency and amounts payable in periodic installments or as appropriate.
- ☐ Payment to commence after Customer acceptance.
- ☐ If they are not included in the underlying Agreement, include invoice specifications, e.g., issued on the (insert day – e.g., 1st, 2nd, 3rd, 4th, etc.) of the month following the calendar month of service; correct, accurate, timely and undisputed invoices paying (insert number) days after receipt.
- ☐ Pricing is valid for the initial period and through the (insert number) renewal period inclusive or exclusive, as negotiated, of taxes.
- ☐ After expiration of the (insert number, e.g., 1st, 2nd, 3rd, 4th, etc.) renewal term, prices may not increase more than (insert number)% per year.
- ☐ Specification of “invoice-to” information and format (electronic, paper) that Customer prefers.

Subscription Fee and Payment Schedule

Delineation of software application, periodic payments, user levels or pricing levels, fees and due date of payments, e.g.:

ITEM	DESCRIPTION	NAMED USERS	QUANTITY	FEE	PAYMENT DUE
1	Software Application: “Module Name”	Full Read Only	NN NN		
2	Subscription MM/DD/09 thru MM/DD/10		Year Term	\$0.00	MM/DD/10
3	Subscription MM/DD/10 thru MM/DD/11		Year Term	\$0.00	MM/DD/11
TOTAL SUBSCRIPTION FEES				\$.00	

Additional Users

- ☐ Specification of fees for adding users during the current and future renewal terms.

Software-as-a-Service (SaaS) Agreement Checklist

Customer Acceptance Specifications

- ☐ Specify acceptance process to be met prior to commencing payment of fees, e.g.:
 - Customer and Provider to mutually develop the acceptance test;
 - Provider to provide Customer with access to the Provider software on (date);
 - On (transition date), Provider to assume responsibility under the Agreement for providing ongoing Provider services;
 - After (insert number)-day period of production processing from the transition date, when all service levels have been met, services will be deemed accepted.

Effective Date of the Service Schedule

Period of Performance

- ☐ Specification of renewal periods.

Price Changes

- ☐ Provider to provide advance written notice of (insert number) days prior to any subsequent renewal period of any price changes.

Consulting, Implementation, Training and/or Support Services

- ☐ Reference to Statement of Work for services to be performed.

Desktop Specifications

- ☐ Provider warranty regarding operation of the software application on specified browser and other desktop technical components as needed; in the event future releases of the software application require use of newer browser versions, Provider to provide minimum of (insert number) days' written notice to Customer prior to general release of the application version.

Transition

- ☐ Provider warrants services to be transitioned and accepted by customer within (insert number) days of the Agreement's effective date.
- ☐ In the event that Provider fails to meet the target transition date, Provider will credit Customer (insert number)% of the fees for every week of delay in transition; if Provider misses the target date by more than (insert number) days/weeks, Provider will be in breach of this Schedule.
- ☐ If Customer is sole cause of the delay in meeting the transition date, the target dates will be extended for the same amount of time as the delay.

Software-as-a-Service (SaaS) Agreement Checklist

Service Levels and Remedies

- ☐ Security Service Level – include service levels, e.g.:
 - Provider will have staff on duty and at its site 24x7 and capable of identifying, categorizing, and responding to a security incident;
 - Provider will notify Customer of any new potential security vulnerability within 4 hours of discovery; This notification will include the probable risks;
 - Provider will implement a security fix across the application within 4 hours of approval from Customer;
 - Provider will notify the Customer security manager within (insert number) minutes if it believes that an attack is in process;
 - Provider will shut down ALL access to the application or any component of it associated with the Subscription or Services within (insert number) minutes upon request of the Customer security manager;
 - Provider will assist Customer in preparing written responses to audit requirements or findings without charge;
 - Provider warrants that it has successfully passed SAS 70 Type II Audit within the past (insert number) months, and will provide the documented audit results to Customer upon request.

✂ *Toolbox Tip* ✂

Tie breaches of Confidentiality, Personal Information and Security to remedies so that a breach will result in corrective action, monetary award, etc.

System Response Time Service Level Agreement

- ☐ System Response Service Level – include service levels, e.g.:
 - (Insert number)% of all transactions process at no more than (insert number) of a second/seconds; no single transaction takes longer than (insert number) of a second/seconds to process;
 - Customer will receive service credits in the amount of (insert number)% of the fees for that month for Provider's failure to meet the service levels for that measurement period;
 - If Provider's system response time is below the warranted level for (insert number) out of (insert number) consecutive weeks, Provider will be considered in default;
 - Performance Service Levels will be valid with up to (insert number) concurrent users of the application at any given time.

Software-as-a-Service (SaaS) Agreement Checklist

☐ Provider Service Availability Service Level Agreement:

- Availability of the services to be (insert number)% or greater;
- Customer will receive service credits in the amount of (insert number)% of the fees for that month for Provider's failure to meet the service levels for (the period of time).

Performance and Availability Scalability

- ☐ Performance and availability Service Levels will be valid up to a concurrent user increase of (insert number)% over (insert period of time).

Notifications to Customer

- ☐ Pro-active notifications to Customer regarding system maintenance downtime and system upgrades and enhancements.

Additional Environment

- ☐ Provider to provide additional environment at no charge for Customer's testing and/or training purposes.

Support and Error Resolution

- ☐ Phone support (insert number) hours/day, (insert number) days/week, from (insert time) to (insert time) pm in all time zones and pager service in all off hours, with (insert number)% of calls picked up within (insert number) seconds.
- ☐ Define severity time levels with associated phone response and issue resolution times, e.g.:
 - Severity 1 – Critical Business Impact;
 - Severity 2 – Significant Business Impact;
 - Severity 3 – Some Business Impact;
 - Severity 4 – Minimum Business Impact.

Software-as-a-Service (SaaS) Agreement Checklist

Sample Statement of Work Checklist

Identification of Parties to the Schedule

- ☐ Legal name and address (including division) for each party.
- ☐ Reference to Master Agreement or underlying Agreement.

Services to be performed

- ☐ Describe services, e.g.:
 - Description of services – scope, definitions (make reference to the applicable SaaS Subscription Service Schedule);
 - Provider’s responsibilities and tasks;
 - Transition process, timeline and milestones;
 - Deliverables and due dates;
 - Acceptance specifications;
 - Service levels;
 - Duration of project or ongoing services.
- ☐ Term of the Statement of Work.
- ☐ Sites to be supported.
- ☐ Pricing (specify pricing for all deliverables and/or services incorporating all pricing options as appropriate).
- ☐ Reports to be provided.
- ☐ Invoicing requirements.
- ☐ Customer responsibilities.
- ☐ Other specifications.
- ☐ Project Managers.