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Licenses in the "Cloud"



Anatomy of a Software License – PBI

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**Game Plan**

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- How are Cloud Agreements Different?
- Discuss Cloud Market and Environment
- Review Unusual/Crucial Provisions in Sample Agreement
- Questions?

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How are Cloud Agreements Different?

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- Description/Scope of Services/License
- Increased dependence on Vendor's platform and internet generally
- Increased vulnerability for data?
- Better backup/disaster recovery
- No hardware/infrastructure costs
- No deployment/integration costs
- Single code base to maintain and update

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### Cloud Market and Environment

- Many small to mid-sized companies are intimidated by selection of providers and menu of services
- Growing industry of consultants to assist with evaluation of cloud service providers and transition "to the cloud"
- Some software companies missed the wave and are rushing to catch up

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### Description of Services

- A "subscription" or right to use and access versus a traditional license
- Right for vendor to make changes to underlying services/platform, since it is a customer-wide system, not an implementation
  - Alternative provisions from vendor and client side
    - Vendor wants discretion
    - Client wants to ensure the changes will not materially (negatively) impact the services
  - Requirements for unilateral changes

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### Description of Services (cont.)

- If Vendor will provide software, include additional license with limited scope to use for the purpose of enabling Client to use the Services.
- Additional Service/License Restrictions
  - Client will not use the Services for the benefit of any third party
  - Requirement to keep passwords and other access methods confidential
  - Possible restrictions on "designated users"
  - Will not use for illegal purposes, including to transmit infringing material or viruses
  - Client is responsible for compliance with laws, including export (to be discussed in more detail)

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### Client Responsibility -- Beware

- Client responsibility for Client-caused problems
  - Additional fees
  - No vendor liability
- Client must comply with all laws
  - Export laws present an issue, since Client does not have insight into any export classifications/restrictions with respect to systems provided by the Vendor
  - Data privacy laws are an issue for both parties
    - Vendor does not have insight into the data put on the system by Client
    - Client does not have insight where servers are located, which could technically trigger a "transfer" under data protection laws

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### Client Responsibility (cont.)

- Except in relation to the Services, Client responsible for the security of the Client data
  - Vendor will provide the Services in accordance with best practices in the cloud services industry (consider industry standards, which vary, but generally keep liability very limited in agreements)
  - Once Vendor fulfills this obligation, Client's data is "at its own risk"
  - While Client's data is "Confidential Information" under the agreement, it is often subject to the limitation on liability, unless expressly carved out

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### Limitation on Liability

- Vendor is not liable for Client-caused problems or problems caused by third party components, which can comprise the major of the Services (internet connectivity, servers, firewall applications, etc.)
- Inadvertent disclosure – Essentially, often Vendor is not liable without negligent acts
- Does the limitation on liability carve out breach of confidential information or intellectual property rights, as well as indemnifications obligations? Not many vendors will agree to this carve out – without it, liability is limited as provided under the agreement (amounts paid in previous 12 months, \$100, \$10, etc.)

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### Indemnification

- Vendor indemnification often limited to breach of warranties, which only provides that Services are provided in accordance with industry standards/professional workmanlike manner
  - Indemnification is often exclusive remedy for third party claims, despite the breach of the agreement
  - Subject to the limitation on liability
- Client indemnification is often more broad, covering all acts except those arising from Vendor's breach of the agreement
  - Leaves an open hole regarding liability caused by third party systems, even if provided by Vendor – a liberal reading would make Client's responsibility

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### Downtime, Suspensions

- Since the internet is the baseline transmission system, unscheduled and unplanned delays could arise without any sense of duration of downtime
- Scheduled maintenance – when can it happen?
- Emergency suspensions for denial of service or other attacks
- Who is responsible for backup or hot site environments?

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### Termination

- Client's dependence on system should require high thresholds for termination, which needs to be balanced with Vendor's need to keep the system secure for other customers
- Vendor's upfront investment in additional storage may trigger early termination fees
- Providing data at the end of the term
  - Will data be provided in a useable format?
  - Ability to transition to a new system
  - Option to destroy or return all copies
  - Information that may not be possible to purge and obligation to keep confidential

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### Privacy

- Consider applicable privacy laws based on nature of data and territory
  - In the United States, HIPAA, GLB and COPPA (Alphabet soup), among others, including state laws that vary widely
  - Outside the United States, European and Canadian Privacy Directives are much more comprehensive
  - Sarbanes, Cable Communications Policy Act and other regulatory and industry security requirements
- What is personal information?
  - Personally identifiable information
  - Usage and activity data, which may not be personally identifiable, but it can be proprietary and valuable, particularly in aggregated form

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### Miscellaneous

- Waiver of right to jury trial
- No third party beneficiaries
- Geographic scope
- Use of subcontractors
- Right to audit
  - Crucial depending on nature of data
  - Actual access versus certification to standards
- Assignment – Vendor is entrusted with crucial systems and/or sensitive data, so need to have comfort

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### Work Order Particulars

- Storage Levels
  - Notice if storage is running low
  - Vendor is not liable if Client does not increase storage after notice
- Security Standards, if any
- Service Levels (uptime requirements, response times and credits)
- Fees
  - Monthly recurring fees
  - Additional storage fees
  - One time set up fees
  - Fees for Client-caused problems
- Work Order-specific provisions for termination
- Support Services

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## Questions?

- We are delighted to discuss in more detail!

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