

Technology Escrow Agreements and Software-as-a-Service

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Formerly known as Application Service Providers (“ASP”), the ASP has been replaced by the Software-as-a-Service (“SaaS”) business model. Although the SaaS solution of today is considerably different than the ASP solution of yesterday, the risks inherent in both are the same. Both solutions put a subscriber at risk if the supplier goes out of business, sunsets the product or sells the product or the entire business and the acquiring organization decides to sunset or not support the solution. A properly drafted technology escrow agreement will protect a subscriber from losing its information and investment in the solution.

The SaaS solution is fundamentally different from the traditional software solution because the traditional software solution resides locally on the customer’s computers and the SaaS solution as well as the subscriber’s data reside on the SaaS suppliers’ computers and subscribers access the solution over the internet via a web based interface.

Security of data and supplier viability are of serious concern when deciding on whether to use a traditional software application or SaaS application for critical organizational functions. At the end of the day, when using a SaaS solution, the subscriber does not own the object code and the subscriber’s proprietary data, as mentioned above, is located and housed outside of its reach on the SaaS supplier’s computer servers. Because of this, a service disruption, business failure or business sale place a subscriber in a far more exposed position than if it had procured the solution through a traditional software license as opposed to the subscription method.

A technology escrow agreement, common business practice used for over 30 years, will mitigate risks mentioned above if choosing a SaaS solution. The technology escrow agreement allows the subscriber to access its data as well as functional, executable object code and the supporting intellectual property, including all third party tools, application programming interfaces, schematics of software components and detailed instructions on how to set up and operate the application, if pre-determined and agreed upon release conditions should occur. Simple examples of release conditions are (1) service disruption, (2) business failure and or (3) product sale and discontinuance of product support.

Key issues to be concerned with when implementing a technology escrow agreement for SaaS solutions are:

- Functional and executable object code deposit
- Data deposit
- Intellectual property deposit (instructions and third party tools etc...)
- Source code deposit
- Frequency of deposits
- Deposit method (physical or electronic)
- Data back-up and storage planning
- Verification of re-deployment

Because of the unique nature of the SaaS solution, a service disruption or business failure would have an immediate and drastic effect on any subscriber. It is important that the technology escrow agreement provides for an immediate release request of the deposit materials by the subscriber. This type of release request does not allow the supplier to object and the deposit materials are released within a reasonable time upon receipt of the written request. Additionally, as with all software-related escrow agreements, it is prudent that the escrow deposit be verified to ensure that the data and related deposit materials can be accessed and re-deployed as needed, depending on the level of risk associated with the solution(s) subscribed.

A technology escrow agreement between a SaaS supplier, a SaaS subscriber and InnovaSafe will reduce risk associated with re-deployment of a SaaS solution and assist with disaster recovery and business continuity.

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