

SOURCE CODE ESCROW AGREEMENTS

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If you are licensing software that is critical to your business, then you should consider requiring the software vendor to escrow the source code for the software with a third-party escrow agent. This will allow you to have access to the source code under certain situations. The source code is important if you ever need to make bug fixes, updates or enhancements to the software.

In order to escrow the source code, the software vendor, escrow agent and you need to enter into an escrow agreement. The escrow agreement will provide the conditions under which you will receive a copy of the source code. The most common release conditions are (1) the software vendor ceases business or goes bankrupt and (2) the software vendor ceases to provide support and maintenance services. However, other release conditions you should consider include (1) a force majeure event (e.g., a terrorist attack or hurricane) that keeps the software vendor from providing support and maintenance, (2) a breach of the license or support agreement by the software vendor that is not cured (or multiple breaches over a set time period), (3) failure of the software vendor to fix priority 1 issues within a set time period and (4) sale of the software vendor's business or the software you are licensing to one of your competitors.

In addition to negotiating appropriate release conditions, it is important that the escrow agreement provide a detailed procedure for how the source code will be released upon the occurrence of a release condition. The standard release procedure requires the licensee to provide the escrow agent and licensor notice if the licensee believes a release condition has occurred. If the licensor does not dispute whether a release condition has occurred, then the source code is released to the licensee. If the licensor does dispute whether a release condition has occurred, then the source code is not released until the dispute is resolved. The problem with the standard release procedure is that the licensee will not have access to the source code until the dispute is resolved, which can take months or even years. If the software is critical to your business, then having to wait until the dispute is resolved can have dire consequences on your business. An alternative release procedure is to require the source code to be released during the dispute proceeding. If the dispute is resolved in favor of the licensor, then the licensee must return the source code, pay the costs incurred by the licensor in connection with the dispute and pay a wrongful release fee. The benefit of the alternative release procedure is that the licensee will have immediate access to the source code.

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