



New Orleans

Negotiating Enterprise Agreements with Microsoft

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Speaker

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Agenda

- **Licensing Models**

- Perpetual vs. Subscription
- User vs. Device
- New SPE Offering

- **Agreement Types**

- Microsoft Business and Services Agreement
- Online Subscription Agreement
- Enterprise Agreement and Enrollments
- MPSA

- **Key Legal Issues**

- Define Requirements
- How to Build a Term Sheet
- Transitioning to Office 365
- Limitations of Liability
- True-Up Terms
- Price Protection
- Business Downturn
- Restacking your CPS
- Audit Rights
- Regulatory Compliance
- Affiliate Definition
- Acquisitions and Divestitures

Perpetual vs. Subscription

- Ability to use after payments end
- Adjustments for changes in workforce or use
- Data storage and ownership of the hardware
- Business continuity
- Accounting treatment: capital and operating expenses

User vs. Device

- **Multiple users per device**
- **Multiple devices per user**
- **Difficulty identifying number of users or devices**
- **Product specific requirements**

Microsoft's New SPE Offering

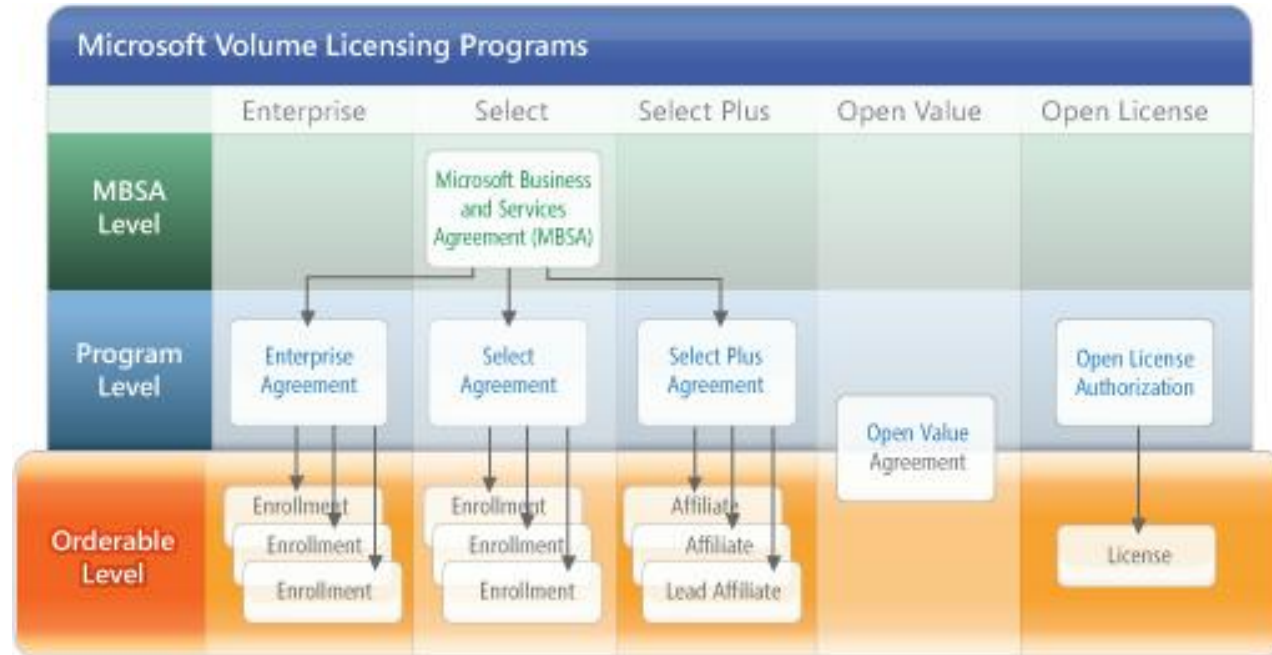
Secure Productive Enterprise (SPE) is an offering released in mid-2016 that bundles a broad array of Microsoft technologies in a device/user-centric subscription licensing model:

- Authoring (Word, Excel, PowerPoint)
- Sites & content management (SharePoint)
- Mail and social (Outlook, Exchange, Yammer)
- Meetings & voice (Skype)
- Apps & device management (Intune, Azure Active Directory)
- Analytics (Delve)
- Security & compliance (encryption, threat analytics)

The offering may prove to be a wise one for Microsoft, as it will tend to increase many customers' reliance on Microsoft's subscription-based services to cover many core IT needs. Those customers may find it difficult to migrate away from SPE after they sign up.

Microsoft Business and Services Agreement

- Master Agreement between Microsoft and its customers



Online Subscription Agreement

- **Online services terms**
- **Acceptable use policy**
- **Security commitments**

Enterprise Enrollments

- **Perpetual-License Enterprise Products**
 - Per device/ hybrid
 - Office suites, CALs and CAL suites, Windows upgrades
- **Enterprise Cloud Suite**
 - Per user
 - Office 365 Enterprise E3, Enterprise Mobility Suite, Windows SA per User
- **Server and Cloud Enrollment**
 - License server and cloud products across the enterprise

Microsoft Products and Services Agreement (MPSA)

- **Formerly Select Agreements**
- **Based on points system**
 - No minimum at outset but must purchase a minimum of 500 points or cloud services for at least 250 users within each active product pool in order to maintain purchasing eligibility at Level A
- **Lack of standardization across the corporation**
- **No payment commitment**
- **Allows purchase of Microsoft Online Services**
- **Allows work with multiple resellers under a single account**

Define Requirements

- **Before engaging with Microsoft, the business needs to understand its needs:**
 - Compliance status
 - Selection of products currently in use and to be used going forward
 - Current, near-term and long-term operational goals
 - Financial considerations
 - Legal terms priorities
- **With that information compiled, an informal set of deal requirements can be prepared and communicated to Microsoft to initiate negotiations.**
- **Requirements often take the form of PowerPoint presentations or slide decks that can be used as talking points during kickoff calls.**

How to Build a Term Sheet

- Microsoft's standard-form volume licensing agreements may contain language that is objectionable (e.g., audit clauses) or inadequate for the products and services being purchased (e.g., limitations of liability).
- To help guide the parties' negotiations, we often identify our proposed changes in the form of a term sheet that identifies:
 - Contract sections where objectionable language is located
 - Standard-form language
 - Proposed revised language
 - Comments regarding basis for request
- The term sheet can be exchanged through multiple iterations before agreed changes are incorporated into the contract documents (typically as a custom-terms amendment to be signed with the rest of the agreements)
- The use of term sheet is recommended for Enterprise Customers negotiating enterprise agreements.

Transitioning to Office 365

- Lower priced or transition SKUs
- Delayed payment dates
- Data privacy and protection concerns

Limitation of Liability

- **Calculating maximum liability**
 - How to calculate damages for probable claims
 - Carve-outs – certain claims are not subject to the cap
- **Liability risks related to security incidents**

True-up Terms

High-water mark for product usage:

- We recommend negotiating the true-up language to avoid the obligation to determine the “maximum” usage levels of “Additional Products” ordered under an EA for the year preceding a true-up order and to purchase additional licenses equal to the high-water mark.
- Most companies not equipped to confirm such usage levels retrospectively, and most inventory tools are incapable of confirming such counts.

Price Protection

- Especially for products licensed on a subscription basis, future pricing changes represent a significant risk, because subscriptions typically do not convey any perpetual usage rights – a company can find itself dependent on a technology that it no longer can afford.
- We recommend negotiating for a cap on pricing increases at least for the first renewal term.

Business Downturn

- **Microsoft may require an initial order of certain Enterprise Products for all of a company's users and workstation devices.**
- **While the company may be able to reduce its order counts for other products during the EA term (especially for subscription licenses), the EA typically prohibits reductions of Enterprise Products below the initial order minimums.**
- **We recommend that companies negotiate for reductions in Enterprise Product counts in the event of business downturns, to mitigate the risk of having to purchase products or services for users or devices that may be removed during the EA term.**

Restacking Your CPS

- Sometimes, businesses have an uncertain grasp of the current deployment counts or near-term requirements, making it difficult to settle on the right kinds and quantities of Microsoft products and services to include in an order.
- We recommend requesting an amendment to allow for the product selection to be “restacked” within the first year of the term, with unneeded quantities replaced by different quantities that the company can confirm will be required.
- We recommend proposing to Microsoft that the value of the restacked quantities will be equal to or greater than the value of the initial order quantities.

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Audit Rights

- What are Microsoft's audit rights?
- Auditors interpret contractual provisions in the light most favorable to Microsoft
- Calculating percentage of compliance
- Penalties for non-compliance

Regulatory Compliance

- Financial considerations under GLBA
- Health and privacy considerations under HIPAA
- Large corporations are considering migration to hosted offerings
- GTPR

Affiliate Definition

- Microsoft's license grant extends to use of products or service by "Affiliates," which are entities that own, that are owned by, or that are under common ownership with the company. "Ownership" usually requires at least 50% ownership interests.
- Some enterprises may want to use their Microsoft licenses to support usage by other entities that do not meet the 50% ownership threshold.
- In those cases, we recommend seeking a custom "Affiliate" definition that either lowers the threshold or that include specified corporate relationships.

Acquisitions and Divestitures

- We recommend negotiating custom amendments for companies with active M&A activity related to restrictions on license transfers and on the ability to allow non-Affiliates to use Microsoft products and services.
- How will after acquired affiliates be handled
- How will partial divestitures be handled
- Will customer be able to provide access to divested entity for a period of time for transition services

Questions?

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