

HOW TO

Improve Your Company's Form Software License Agreement

PART 8: PRICE AND PAYMENT TERMS



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ATTORNEYS

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KEY TAKEAWAYS

Form software license agreements should:

- 1 *address both license fees and professional services fees (if applicable) with precision,*
- 2 *ensure clarity with respect to fee structure and payment terms, and*
- 3 *address taxes.*

When licensing software, customers typically pay for:

- (1) the license to use the software, and
- (2) various professional services associated with the license to use the software.

In most cases, payment of fees by the customer is the central benefit of the bargain for the licensor. Accordingly, the price and payment terms of the agreement are critical for the licensor. Nevertheless, these sections don't always receive the attention that they deserve.

There is a great variety of pricing structures for the license to use software. Some licensors license software under annual flat fee arrangements. Others license software under variable fee arrangements based on the number of transactions, users, seats, etc. As always, the goal of pricing language should be precision. We can use a very simple example to illustrate the nuances of pricing language that sometimes go unnoticed by business teams and attorneys alike. In this example, we will assume the software license agreement provides for a usage fee based on the number of transactions. Often, one will see such license fee pricing terms in a table like the one to the right, with little or no additional detail.

Transactions	Price Per Transaction
0 to 500,000	\$3.00
500,001 to 1,000,000	\$2.00
1,000,001 to 5,000,000	\$1.00
5,000,0001 +	\$0.50

Various questions may come to mind when pricing terms like those set forth above are included in a software license agreement, only some of which are set forth below:

- Are there any minimum license fee payment obligations?
- Can customer simply not use the software to execute any transactions and owe \$0.00?
- Does the "transaction meter" ever go back down to 0 at any point after contract signature?

- What is the definition of a “transaction”?
- If the customer uses the software to execute 3,000,000 transactions, are all 3,000,000 transactions at the \$1.00 rate?
- How often are payments due?
- How soon after the date (or receipt) of the applicable invoice must customer pay the invoiced amounts?
- How are the number of transactions reported and confirmed?

Your form software license agreement should ensure that there is no ambiguity regarding any of these issues.

Payment structures for professional services (implementation services, maintenance and support services, training services, etc.) similarly have a great deal of variety. However, they tend to fall into two general categories (or a combination thereof):

- (1) time and materials, and
- (2) flat fee.

Both fee arrangements have advantages and disadvantages. A time and materials price structure seems fair and straightforward (customer pays for work performed), but customers assume the risk that a certain task takes significantly more time than the customer anticipated (whether fair or not). Flat fee arrangements provide certainty to both licensor and customer, but disputes over “scope creep” (i.e. what services are covered by the flat fee and what services are subject to additional fees) often arise. Again, the key is precision. Often, one will see professional services fee pricing terms in a table like the one below, with little or no more detail. Are these flat fee arrangements or time and materials fee arrangements? What happens if licensor has spent 200 hours performing implementation services and implementation is not complete? All of these issues should be addressed in detail.

Services	Fees
Implementation	\$50,000 200 hours at \$250/hr
Training	\$5,000 20 hours at \$250/hr

Another matter that licensors may consider addressing in their form software license agreement is payment disputes. Many form software license agreements do not address payment dispute matters because licensors don’t want to proactively grant the customer the right to dispute invoiced amounts. However, proactively addressing such matters in a form agreement does have some advantages. First, the form agreement can provide a short period of time (ex. 5 days after the date of the applicable invoice) during which customer must provide formal written notice of a fee dispute. Also, the form agreement can provide that the customer forever waives its right to dispute an invoice if it fails to provide timely written notice of dispute in accordance with the agreement. The form agreement may also give licensor the right to suspend performance under the agreement, or “shut off” the software if technically able to do so, without liability if the customer disputes an invoice and such dispute is not resolved within a certain period of time. The licensor can be even more aggressive by requiring customer pay all amounts invoiced (whether disputed or not) and seek refunds of amounts successfully disputed.

Finally, a form software license agreement should always address taxes. Tax obligations, especially sales taxes and value added taxes, applicable to a software license arrangement that also contains the provision of professional services can be very complicated to determine. Software licensors would be well served to ensure that they are in compliance with all of their tax obligations. A discussion of such obligations is beyond the scope of this article, but the licensor’s form software license agreement should ensure that all fees under the agreement do not include such taxes and that customer will pay all such taxes, except to the extent forbidden under applicable law.

This article is one part of a ten-part article published by Koley Jessen to help software licensors improve their form software license agreements.

Please contact Koley Jessen’s Commercial and Technology Contracts Practice Group for further assistance.