



Monday, October 25
2:30pm-4:00pm

310 - Reducing Risk for Your Company Through Cloud Computing

Orrie Dinstein
Chief Privacy Leader
GE Capital

Ieuan Mahony
Partner
Holland & Knight LLP

Constance Mitchell
Counsel
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Faculty Biographies

Orrie Dinstein

Orrie Dinstein is the chief privacy leader at GE Capital, a division of the General Electric Company. He is a member of the Compliance team and has global responsibility for data protection. Mr. Dinstein works closely with the IT and information security teams as well as other functions to establish policies, procedures, processes, and tools related to data privacy and security. He is also the lead lawyer for intellectual property matters at GE Capital.

Mr. Dinstein is a frequent speaker on privacy and technology matters and is the author of dozens of articles and book chapters on technology and intellectual property related matters.

He is a member of the bar in New York, Connecticut (In-House License) and Israel. He is also a Certified Information Privacy Professional (CIPP).

Mr. Dinstein received an LLM law degree from NYU School of Law and is a graduate of the Hebrew University of Jerusalem (LLB).

Ieuan Mahony

Ieuan G. Mahony is a partner in the law firm of Holland & Knight LLP, and concentrates his practice in information technology, intellectual property, and privacy matters, both in the licensing as well as the litigation (and alternative dispute resolution) arenas. Mr. Mahony's cloud computing engagements include representing global and national software vendors in SaaS, PaaS and IaaS projects, and representing small and medium-size businesses in the decision to move business components to the cloud.

Mr. Mahony speaks and publishes widely on these topics, and recently authored the chapter Procuring Computing Resources: IP Licensing, Outsourcing, and Cloud Computing in the Practising Law Institute's Corporate Compliance 2010 treatise. He is a member of H&K's three-partner, firmwide Technology Committee.

He is a graduate of Harvard University and Boston College Law School.

Constance Mitchell

CSC

Richard Raysman

Holland & Knight, LLP

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What is Cloud Computing?






Constance Mitchell
Counsel
Computer Sciences Corporation

What is Cloud Computing

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No matter how you define it . . .

-  **On-Demand**
-  **Network-Based Access**
-  **Pooled Resources**
-  **Rapid Provisioning**
-  **Measured Service**

"A model for enabling convenient, on-demand network access to a shared pool of configurable computing resources . . . that can be rapidly provisioned and released with minimal management effort or service provider interaction."

NIST (v15, 07 Oct 09)

Business Process as a Service

Platform as a Service

Software as a Service

Infrastructure as a Service

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What is Cloud Computing?

- On-Demand
 - Provides access to specified Service
 - Ability to dial-up and dial-down use at will
- Network-based Access
 - Access using a Web browser from anywhere in the world
- Uses Pooled Resources
 - Leveraged data center infrastructure, servers, storage
 - Computing resources often uses of virtualization / hypervisor technology
- Rapid Provisioning
 - Infrastructure delivering the Service is not designed for specific client
- Measured Service
 - Pay by Use

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The Right Cloud

- Public Cloud
 - Off client premises – location of infrastructure may be unknown
 - Available to the general public or a large industry group
 - Owned by an organization selling cloud services
- Private Cloud
 - Dedicated to one Client/Company
 - Off premises with a provider or On premises at a client site
 - May be managed by Company's internal IT or a third-party provider
 - Client has more control over security, risks

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The Right Cloud – Variations

- Infrastructure as a Service (IaaS)
 - Provides computing capacity and/or the ability of users to create a virtual hosting environment (e.g. firewalls, load balancers, servers)
- Platform as a Service (PaaS)
 - Provides containers for user's code
 - Example: Users are given access to a Microsoft .Net environment
- Software as a Service (SaaS)
 - Provides use of a specific application
 - Example: Salesforce.com
- Business Process as a Service
 - Provides a service
 - Example: User inputs data for accounts payable via web interface and Provider sends out bills.

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Rewards and Risks for Users

- Rewards
 - No capital investment; cost-effective
 - Flexibility: Ability to scale up and down at will makes it easy to accommodate peak usage, such as holiday sales period, without committing to resources during non-peak periods
- Risks
 - Lack of control over IT environment
 - Security and privacy concerns
 - Moving to the Cloud may require technical / business changes

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Framing Legal and Business Issues in the Cloud

- What is being provided?
 - Drives Provider and Client Responsibilities and Liabilities
 - Example:
 - Cloud Email – Provider has complete control of level of security
 - Infrastructure as a Service – User can set firewall policies
- Does the "where" matter?
 - In the Public Cloud – location of infrastructure/data unknown
 - Can be set up so that resides in multiple locations and client accesses any available resource
 - Ability to store, access and move data at will worldwide
 - What laws and regulations apply? Are they the responsibility of the Provider or the Client?
 - If "where" does matter, may require Private Cloud

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Framing Legal and Business Issues in the Cloud

- Term
 - Users want Month-to-Month and/or terms with no cancellation for convenience fees
 - Provider needs to recoup investment in infrastructure
 - Old model – amortize hardware/software costs over life of client contract
 - Cloud model – negotiate month-to-month agreements with all hardware/software suppliers

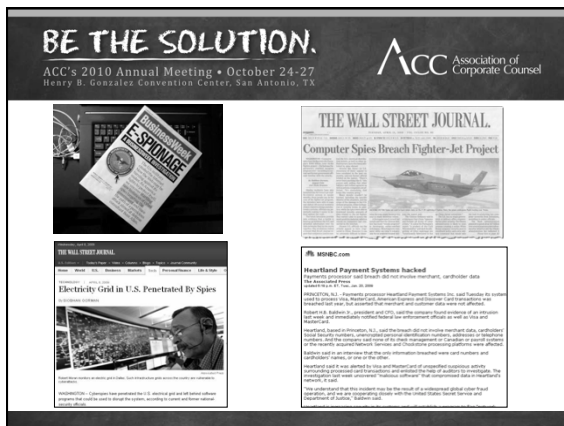
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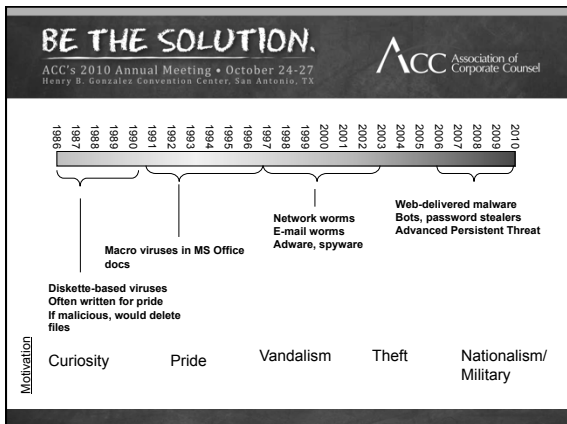
in Security in the Cloud

Orrie Dinstein, CIPP
 Chief Privacy Leader
 and Senior IP Counsel
 GE Capital









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The threats being used

- ❖ Phishing (as well as spear-phishing and whaling)
- ❖ Viruses/worms/Trojans/Backdoors/Malware
- ❖ Spyware/Scareware
- ❖ Botnets/zombies
- ❖ Hacks and online attacks (XSS; SQL injections; DDOS)
- ❖ Social engineering
- ❖ Social networking attacks (spoofing of accounts; scams)
- ❖ P2P
- ❖ Spam
- ❖ Other sophisticated attacks by organized crime, cyberespionage and country-sponsored attacks

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Lets take a look at Koobface...

- ❖ Koobface is capable of registering a Facebook (or Twitter or mySpace etc) account (breaking the CAPTCHA)
- ❖ Activates the account by confirming an email sent to an email address
- ❖ Befriending random strangers on the site, joining random Facebook groups, and posting messages on the walls of Facebook friends
- ❖ It includes code to avoid drawing attention to itself by restricting how many new friends it makes each day
- ❖ It will entice "friends" to click on links to sexy videos that result in malware being installed
- ❖ It uses the malware to steal passwords/other personal data

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Defending against the threats is getting harder: complex environment

- ❖ Multiple End-Point Storage Devices (PDAs, I-Pods, Digital Cameras, Thumb Drives, Cell Phones, CD/DVD-RW Drives, Zip Drives.....) – hard to protect, easy to lose/steal
- ❖ Installation of unauthorized software or use of pirated/unlicensed programs by employees
- ❖ Use of Instant Messaging tools
- ❖ Use of Social Media
- ❖ More complex embedded systems like printers/copiers: networked + have hard drives with data = **can be hacked**

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Lack of Network Perimeter Definition

Remote access (VPN, hotels, cyber cafes) + increased mobility (Wireless; Mobile devices) = new avenues for attack


Need to move from network-perimeter based defenses to data-centric defenses

Internet Cafe's *McDonalds* *Air Cards* *BlueTooth* *Wi-Fi* *Pushing*
Starbucks *Blackberry's* *Hotel broadband*
Wireless *DSL/Cable Broadband* *Hotspots*

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Is your cloud provider secure?

- ❖ Policies
- ❖ Data classification
- ❖ Access controls and user authentication/authorization
- ❖ Encryption
- ❖ Training and awareness campaigns
- ❖ Robust incident response plan
- ❖ How does democracy in the cloud affect your security?
 - ❖ In a multi-tenancy situation the weakest link always "wins"
 - ❖ Cloud security  security in the cloud

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Reducing Risk for Your Company Through Cloud Computing

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Richard Raysman,
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Roadmap

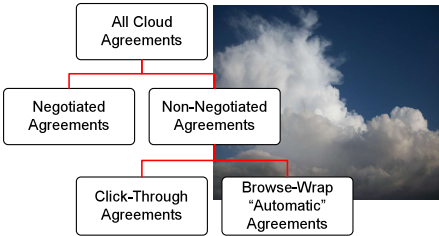
- Contracting model
- Handling specific contractual concerns



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Options for Cloud Subscription Contracts



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graph TD; A[All Cloud Agreements] --> B[Negotiated Agreements]; A --> C[Non-Negotiated Agreements]; C --> D[Click-Through Agreements]; C --> E["Browse-Wrap 'Automatic' Agreements"]
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Negotiated vs. Non-negotiated Contracts

- "Standard wisdom" = the transaction drives the type of agreement
 - Large one-time / high risk transactions = negotiated agreement
 - Mass market transactions = click-through or browse-wrap agreement
- The cloud presents challenges to "standard wisdom"
 - The cloud's promise of easy "plug & unplug" is potentially undermined by transaction costs for negotiated agreements
 - Risks potentially present in a cloud service provider – customer relationship may well warrant negotiated and tailored contract provisions

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Evolution of Contracting Model and Contract Formation

- Current model of business-to-business springs from consumer based model - "one size fits all"
 - On-line based "sign up" or "click through" is the norm
 - Cloud vendors may utilize a reseller as intermediary
- Terms not "befitting" a commercial deal?
 - Service levels, support
 - Indemnity, limitation of liability

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Software-as-a-Service (SaaS) Contracting Issues

<p>Vendor interest:</p> <ul style="list-style-type: none"> • Obtain a committed customer • Uniform update schedule for all customers • Uniform Service Level Agreements ("SLAs") • "No strings attached" termination 	<p>Customer interest:</p> <ul style="list-style-type: none"> • "Easy" access to alternative vendors • Migrate to new versions only "when ready" • SLAs tailored to customer's specific needs • Phased and assistive disengagement
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↑ specialized and tailored cloud services =
 ↑ potential for a "locked-in" relationship

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Notice of Practices v. Content of Practices

- Is notice enough?
- Options:
 - Industry self-regulating vs. outside standard-setting authority
 - Industry self-regulating and outside standard-setting authority
 - Role of subscribers
- "Truth in Cloud Computing" and transparency
 - Is "we do the right thing" sufficient?
 - Should provider give "how and why" it does the right thing?
- Let market decide

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Constraints on "Loading Up" Non-Negotiated Contracts

- Unconscionability
 - If the contract provisions are too onerous ...
 - They will not be enforced
- Competitive Constraints
 - If Cloud Service Provider A's terms are "high maintenance"
 - And Competitor B's terms are "low maintenance"

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Relative Risk of Transferring Responsibility

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Other contractual concerns

- Disaster Recovery.
- Data ownership, control - notice of request for production.
- Who pays for compliance with security-related requirements?
 - Firewalls, intrusion detection
 - Monitoring and reporting
 - SAS 70/ISO 27001
 - Private cloud and physical/logical segregation of data
 - Privileged user access
 - Encryption in transit and at rest
- Who pays when there is a security breach - investigation, compliance with state breach notice requirements, loss of data, other damages.
- Does the cost outweigh the savings of "going into the cloud"?

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Other Non-privacy Jurisdiction-Specific Issues

- U.S. Export issues
 - Access to controlled data occurs when data is disclosed to a foreign national or sent or taken out of the U.S. even without access.
 - Export of encryption technology - whose encryption is it?
 - Export of "controlled data" - both parties bear risk - how to allocate.
 - Advice - keep controlled information in U.S. or out of cloud entirely.

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Other Non-privacy Jurisdiction-Specific Issues

- U.S. Government contracting issues
 - Protection of unclassified data - e.g. DoD guidance, July 31, 2009 (use closed networks, VPNs, encryption, etc.)
 - Public meeting on 4/10/10 regarding changes to DFARS relating to safeguarding of unclassified information ("protection measures commensurate with risk (i.e. consequences and probability) of loss, misuse, unauthorized access to or modification of information").
 - Protection of classified data - DoD Manual 5220.22-M.

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Facing the Challenges in Negotiating a Cloud Services Agreement

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		Richard Raysman Holland & Knight

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Modification – Vendor Starting Point

You agree that we may modify this Agreement or any policy or other terms referenced in this Agreement (collectively, "Additional Policies") at any time by posting a revised version of the Agreement or such Additional Policy on the Website or our "Developer Connection" pages. ... By continuing to use or receive the Services after the effective date of any revisions to this Agreement or any Additional Policies, you agree to be bound by the revised Agreement or any revised Additional Policies. It is your responsibility to check the Website and the Developer Connection pages regularly for changes to this Agreement or the Additional Policies, as applicable.

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Modification – Customer Starting Point

This Agreement may not be modified or altered except by a written instrument duly executed by the parties.

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**Data Security –
 Vendor Starting Point**

We strive to keep your Content secure, but cannot guarantee that we will be successful at doing so, given the nature of the Internet. ... [You acknowledge that you bear sole responsibility for adequate security, protection and backup of your Content and Applications. We strongly encourage you, where available and appropriate, to (a) use encryption technology to protect your Content from unauthorized access, (b) routinely archive your Content, and (c) keep your Applications or any software that you use or run with our Services current with the latest security patches or updates. We will have no liability to you for any unauthorized access or use, corruption, deletion, destruction or loss of any of your Content or Applications.

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**Data Security –
 Customer Starting Point**

Without limiting Cloud Service Provider XYZ's obligations under Section ___ [Confidentiality], Cloud Service Provider XYZ shall implement and shall at all times during the Term have in place a security program that will (i) ensure the security and confidentiality of Your Content and Applications, (ii) protect against any anticipated threats or hazards to the security or integrity of Your Content and Applications, and (iii) protect against unauthorized access to or use of Your Content and Applications that could result in substantial harm or inconvenience to You.

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**Limitations of Liability –
 Vendor Starting Point**

NEITHER WE NOR ANY OF OUR LICENSORS SHALL BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES, INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, DATA OR OTHER LOSSES (EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES). IN CONNECTION WITH THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY SUCH DAMAGES RESULTING FROM: (i) THE USE OR THE INABILITY TO USE THE SERVICES; (ii) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES; OR (iii) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR CONTENT. IN ANY CASE, OUR AGGREGATE LIABILITY UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID BY YOU TO US HEREUNDER FOR THE SERVICES. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. ACCORDINGLY, SOME OR ALL OF THE ABOVE EXCLUSIONS OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MAY HAVE ADDITIONAL RIGHTS.

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**Limitations of Liability –
 Customer Starting Point**

NEITHER PARTY WILL BE LIABLE UNDER THIS AGREEMENT FOR LOST REVENUES OR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, OR PUNITIVE DAMAGES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CLOUD SERVICE PROVIDER XYZ'S LIABILITY FOR ALL CLAIMS ARISING DURING THE TERM SHALL NOT EXCEED THE AMOUNTS PAID BY YOU. YOU SHALL NOT BE HELD LIABLE UNDER THIS AGREEMENT FOR MORE THAN THE AMOUNTS OWED BY YOU PURSUANT TO THIS AGREEMENT. THE FOREGOING SENTENCES SHALL NOT APPLY TO A BREACH BY A PARTY OF ITS OBLIGATIONS UNDER SECTION ____ (CONFIDENTIALITY), BREACH BY CLOUD SERVICE PROVIDER XYZ OF ITS OBLIGATIONS UNDER SECTION ____ (SECURITY), TO A PARTY'S INDEMNIFICATION OBLIGATIONS HEREUNDER OR TO PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

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**Data Location –
 Vendor Starting Point**

As part of providing the Service, Cloud Service Provider XYZ may store and process your data in the United States or any other country in which Cloud Service Provider XYZ or its agents maintain facilities. By using the Services, you consent to this transfer, processing and storage of your data.


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**Data Location –
 Customer Starting Point**

Cloud Service Provider XYZ agrees to store and process Your Content only in the continental United States.


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**Legal Compliance –
 Vendor Starting Point**

Cloud Service Provider XYZ shall have no obligation with respect to Your compliance with laws and regulations related to your business.


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**Legal Compliance –
 Customer Starting Point**

Cloud Service Provider XYZ does and shall at all times comply with all applicable laws and regulations; and the Services shall enable You to meet and be in compliance with all applicable laws and regulations.

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**Data Preservation –
 Vendor Starting Point**

Data Preservation in the Event of Suspension or Termination.... In the Event of Other Suspension or Termination. Except as provided in Sections AAA and BBB above [where there is no "cause" for the termination], we shall have no obligation to continue to store your data during any period of suspension or termination or to permit you to retrieve the same.

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**Data Preservation –
 Customer Starting Point**

If this Agreement terminates, then: Cloud Service Provider XYZ will provide You access to, and the ability to export Your Content and Applications for a commercially reasonable period of time (but no less than thirty (30) days) at no charge, unless You request Your Content and Applications in a non-standard format, in which case Cloud Service Provider XYZ's then-current rates for the return of such Content and Applications will apply; (ii) after a commercially reasonable period of time (but no less than thirty (30) days), Cloud Service Provider XYZ will, upon prior written notice to You, delete Your Content and Applications pursuant to the Cloud Service Provider XYZ policies; and (iii) upon request each party will promptly return or destroy all other Confidential Information of the other party.

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**Warranties and Representations –
 Vendor Starting Point**

CLOUD SERVICE PROVIDER XYZ PROPERTIES, THE MARKS, THE SERVICES AND ALL TECHNOLOGY, SOFTWARE, FUNCTIONS, CONTENT, IMAGES, MATERIALS AND OTHER DATA OR INFORMATION PROVIDED BY US OR OUR LICENSORS IN CONNECTION THEREWITH (COLLECTIVELY THE "SERVICE OFFERINGS") ARE PROVIDED "AS IS." WE AND OUR LICENSORS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE WITH RESPECT TO THE SERVICE OFFERINGS, EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW. WE AND OUR LICENSORS DISCLAIM ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE. WE AND OUR LICENSORS DO NOT WARRANT THAT THE SERVICE OFFERINGS WILL FUNCTION AS DESCRIBED, WILL BE UNINTERRUPTED OR ERROR FREE, OR FREE OF HARMFUL COMPONENTS, OR THAT THE DATA YOU STORE WITHIN THE SERVICE OFFERINGS WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. WE AND OUR LICENSORS SHALL NOT BE RESPONSIBLE FOR ANY SERVICE INTERRUPTIONS, INCLUDING, WITHOUT LIMITATION, POWER OUTAGES, SYSTEM FAILURES OR OTHER INTERRUPTIONS, INCLUDING THOSE THAT AFFECT THE RECEIPT, PROCESSING, ACCEPTANCE, COMPLETION OR SETTLEMENT OF ANY PAYMENT SERVICES

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**Warranties and Representations –
 Customer Starting Point**

Cloud Service Provider XYZ represents, warrants and covenants that: (a) the Services and the related software and functionality shall conform in all material respects to the Specifications for the Services and the Standards for Uptime and Capacity set forth herein; (b) the Services shall not introduce any computer code designed to disrupt, disable, harm, or otherwise impede in any manner, including aesthetic disruptions or distortions, the operation of Your or any other person's software, firmware, hardware, computer system or network; (c) neither the provision of the Services or related software and functionality nor any component provided as part of the Services, including any related software and/or hardware provided by Cloud Service Provider XYZ will infringe upon any intellectual property right or other right of any third party and Cloud Service Provider XYZ has all rights and licenses necessary to provide the Services; (d) the services performed by Cloud Service Provider XYZ under this Agreement will be performed diligently in a first class, professional, workmanlike manner and in accordance with relevant best industry standards; and (f) Cloud Service Provider XYZ is capable of scaling the Services, including all related software and systems, and providing services to meet, as may be requested by You, all of Your current and future requirements as may be communicated to Cloud Service Provider XYZ. EXCEPT AS EXPRESSLY PROVIDED FOR HEREIN, NEITHER PARTY MAKES ANY OTHER WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR USE AND NON-INFRINGEMENT

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Downtime and Service Suspensions – Vendor Starting Point

Downtime and Service Suspensions. . . You acknowledge that: (i) your access to and use of the Services may be suspended for the duration of any unanticipated or unscheduled downtime or unavailability of any portion or all of the Services for any reason, including as a result of power outages, system failures or other interruptions; and (ii) we shall also be entitled, without any liability to you, to suspend access to any portion or all of the Services at any time, on a Service-wide basis: (a) for scheduled downtime to permit us to conduct maintenance or make modifications to any Service . . .

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Downtime and Service Suspensions – Customer Starting Point

During the Term, Cloud Service Provider XYZ shall be responsible for the reliability of the Services, and warrants and represents that during such periods that the Services shall be fully and properly operational for an average of ninety-five (95%) percent (95%) (the "Uptime Standard"). For the purposes of determining Uptime, the following formula shall be used:

$$\text{Uptime} = \frac{\text{Hours of Operation minus Downtime}}{\text{Hours of Operation}}$$

(expressed as a percentage)

"Hours of Operation" shall mean the number of hours in a given month. "Downtime" shall mean that period of time during Hours of Operation when the Services, or any component, is inoperable (unavailable) due to a reason other than Scheduled Downtime. Downtime for each incident shall commence from the time You place a call to Cloud Service Provider XYZ at the designated telephone number to attempt to notify Cloud Service Provider XYZ that You believe that the Services or any component is inoperable (unavailable), and shall continue until the Services, and all components are restored to fully operable condition.

If the frequency and/or duration of a specific malfunction has a material impact, You may request, and Cloud Service Provider XYZ shall provide, at no cost to You, at least one additional qualified engineering specialist to assist in resolving such malfunctions, as each develops a plan of action to prevent its recurrence.

If the Services fails to meet the Uptime Standard for any month during the Term, You, in addition to its other rights and remedies available to You hereunder and under the law, shall receive from Cloud Service Provider XYZ, for each month, liquidated damages in the amount of _____ for each and every calendar month the Services fails to meet the Uptime Standard, (massaged on a pro-rata daily basis). Such liquidated damages are agreed to as liquidated damages that You will suffer by reason of such delay and not as a penalty. Liquidated damages received hereunder are not intended to be nor shall they be treated as either a partial or full waiver or discharge of any right or remedy of You provided hereunder or by law.

Scheduled Downtime is defined as downtime scheduled at least five (5) days in advance for system upgrades and maintenance. During the Term, Cloud Service Provider XYZ warrants and represents that Scheduled Downtime shall be no more than _____ hours monthly.

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Open Source Software – Vendor Starting Point

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**The Entire Contract –
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This Customer Agreement ("Agreement" or "Cloud Service Provider XYZ Web Services Customer Agreement") is a binding agreement between Cloud Service Provider XYZ and you and, if applicable, the company or other legal entity you represent (collectively, "you"). This Agreement incorporates by reference (1) the privacy notice posted on www.cloudserviceproviderxyz_privacy.com ("Privacy Notice"), (2) the terms of use posted on cloud.service.provider.xyz_you.com ("Terms of Use"), (3) the acceptable use policy posted on cloud.service.provider.xyz_aup.com ("AUP"), (4) the service terms posted on cloud.service.provider.xyz_servicetmz.com ("Service Terms"), and (5) the trademark guidelines posted on cloud.service.provider.xyz_tm.com, as these policies and terms may be modified by Cloud Service Provider XYZ or its affiliates from time to time.

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