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Business-Downturn Protections in Microsoft Enterprise Agreements

By Andrew Martin

Many organizations take advantage of the volume discounts offered by software vendors in return for a commitment to purchase a pre-determined number of licenses. Microsoft typically offers these discounts through a number of different licensing programs, including Enterprise Agreement (EA), Enterprise Subscription (EAS), Select, and Services Provider License Agreements (SPLAs). The deepest discounts generally are available for those organizations that qualify for the EA and that and are willing to undertake the true-up requirements of that program. The EA also requires the licensee to maintain licenses at a minimum count regardless of need.

However, given the current state of the world economy, it is frequently the case that an EA customer is suffering through a business downturn and is no longer in a position to use the licenses it committed to at enrollment. Microsoft typically addresses business downturns in the license agreement by promising to work with its customers, in good faith, if (1) the customer divests an affiliate or an operating division, and (2) the divestiture affects the number of licenses needed by more than 10%. Note, though, that Microsoft does not make any actual license commitments in the event of a downturn – it merely says that it will work "in good faith" with the customer. Also note that this standard business downturn language may or may not be particularly helpful, depending on the licensee's corporate structure and the manner in which the business downturn is handled.

If market uncertainty is a major concern, then business-downturn language should be at the top of the list of considerations when enrolling in a new EA. Microsoft may be willing to negotiate revisions to this term in an amendment to the EA, but it will only do so for those organizations that know to ask. For instance, a business might want to specify additional circumstances that constitute a business-downturn event in addition to the standard "divestiture of an affiliate or operating division" language. Of course, Microsoft offers other licensing options that include built-in procedures by which the customer can decrease its spend if its need decreases—SPLA and EAS in particular permit companies to "float down" license counts. However, those programs do not always fit the business need. Determining which volume license fits best in a particular business circumstance requires knowledge of the broad-stroke differences between the various volume-licensing programs along with a detailed understanding of the relevant contractual provisions.

About the author Andrew Martin:

As an associate attorney with extensive prior experience advising information technology start-ups, Andrew's practice focuses on finding solutions for his clients' intellectual property issues. Due to his extensive experience in the software and technology industries, Andrew understands both the practical and legal issues involved in IP licensing agreements and disputes. In addition to licensing, Andrew helps his clients find new ways to use existing technologies to assist his clients in areas such as data privacy compliance. Andrew uses his diverse background which includes founding a record label and working for a world-wide concert promoter when counseling the firm's entertainment clients.

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