Software Source Code Escrow Agreement Checklist

A Practical Guidance® Checklist by Sonia Baldia, Kilpatrick Townsend & Stockton LLP

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A software source code escrow agreement is a contract that governs the deposit and storage of the source code, documentation, and other essential materials (Deposit Materials) of a specific software application in escrow. This agreement usually refers to a customer (or licensee) as the beneficiary, a software provider (or licensor) as the depositor, and a third party storing the Deposit Materials as the escrow agent.

This checklist highlights key issues in drafting and negotiating a software source code escrow agreement. For a more detailed discussion on this type of arrangement, see Software Source Code Escrow Agreements: Drafting and Negotiating the Agreement.

Recitals and parties

Consider including:

- Background and purpose of escrow arrangements
- Details of license grant
- Technical info (e.g., nature of software, operating system, associated hardware)
- Overview of software functionality and significance to business
- Acknowledgment of licensee's legitimate requirement for access to code

Ensure correct parties. Who owns IP in the code? Does the licensor have appropriate rights to deposit and fulfill obligations under agreement?

Ensure the defined terms for "code" and the "deposit materials" are sufficiently detailed and broad to include all items the licensee would reasonably need upon release to run the software as intended.

Licensor's obligations

- Code deposit obligations and timing
- Additional material deposit obligations and timing
- Warranties as to ownership and sufficiency
- Notify changes to source code
- Cooperation in any verification checks

Licensee's obligations

- Payment of escrow fees
- Keep code confidential
- Use code only for the authorized purposes upon release
- Hold media containing code safe and secure upon release

Escrow agent's obligations

- Custody and security obligations
- Confidentiality obligations
- Verify source code if agreed
- Ensure completeness and currency of code if agreed

- Release only as agreed
- Payment provisions for escrow services

Release of Deposit Materials

Crucial provisions in the escrow agreement include:

- Mechanism for resolving disputed release
- Set out release events, for example:
  - Breach of software support obligations
  - Breach of terms of escrow agreement
  - Insolvency
  - Assignment of copyright and other ownership rights in code
  - Change of control
- Set out procedure for release that escrow must follow
- License grant for use of code upon release

Liability

Take care to ensure significant boilerplate flows down from main agreement, such as:

- Limitation and exclusion clauses
- Escrow agent liability for negligence or willful misconduct
- Escrow agent indemnity

Termination and consequences

Take care to ensure significant boilerplate flows down from main agreement including:

- Circumstances under which licensor or depositor may terminate
- Circumstances under which escrow agent may terminate
- Circumstances under which licensee or beneficiary may terminate
- Associated provision regarding dealing with source code

Boilerplate

Consider boilerplate clauses including:

- Rights of third parties
- Entire agreement
- Force majeure
- Severability
- Assignment and sub-contracting
- Variation
- Change of control
- Waiver
- Set-off
- Governing law and jurisdiction

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Sonia Baldia brings business and technology savvy to her global practice, which encompasses U.S. and international commercial, transactional, and intellectual property (IP) expertise across multiple industries including life sciences, banking and finance, healthcare, energy, information technology (IT), manufacturing, and software. She advises on a wide array of sourcing, technology, and other commercial transactions and helps companies navigate legal issues raised by data, emerging technologies, and digital transformation, both on the buyer and provider side. Sonia routinely advises clients on IP strategy, management, and monetization arrangements, leveraging her technology background and registered patent attorney credentials.

In addition to her U.S. bar admissions, Sonia is also qualified to practice law in India and she leverages that combined experience on behalf of clients in India-related matters.

Prior to rejoining the firm, Sonia was a partner in the Washington, D.C. office of an international law firm where she was part of its technology, IP, international commercial, and India practices. Sonia has also served as a consultant to the U.S. Agency for International Development (USAID) and the U.S. Department of Commerce in Washington, D.C. where she advised foreign governments on IT, telecom and IP-related development projects. She has also served as associate professor of law, teaching courses in IP, technology transfer, and corporate law.

Sonia was ranked in 2022 and prior years by *Chambers USA: America's Leading Lawyers for Business* in Technology & Outsourcing and in 2020, she was recognized for her expertise in outsourcing deals involving India and her broader technology expertise. She has also been consistently recognized by *Legal 500* amongst the leading practitioners in its technology, media, and telecom outsourcing category (2009-2022; and as a "New Generation Partner" in 2020 and a "Leading Lawyer" in 2021-2022). Sonia was recognized in *The Best Lawyers in America®* for Information Technology Law in 2022 and 2023. She is a frequent speaker and writer on digital transformation, global sourcing, IP, and technology topics and she has authored many articles and book chapters.