

Licensing Implications of Oracle's NetSuite Acquisition

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On July 28, Oracle announced that it had entered into an agreement to acquire NetSuite for approximately \$9.3 billion. NetSuite was founded in 1998 and is one of the very first, enterprise-level, cloud-services providers, delivering various, hosted enterprise resource planning (ERP), customer relationship management (CRM), e-commerce and professional services automation (PSA) solutions to its customers.

Oracle and NetSuite have a long relationship, though that relationship in the past may not have been apparent to NetSuite's customers. Early in its history, NetSuite received \$125 million in initial financial backing from Oracle founder Larry Ellison, and the Ellison family owned nearly half of NetSuite's common stock as of 2014. NetSuite also traditionally has been based on an infrastructure that is reliant on Oracle Database.

However, with Oracle now set to formally acquire the company, NetSuite's customers soon may notice some pretty significant changes, at least on the purchasing and contracting side. Oracle sells its existing cloud services generally subject either to its standard-form Cloud Services Agreement (CSA) or to a cloud-services schedule to its standard-form Master Agreement (OMA). Both the CSA and the OMA contain terms that are notoriously pro-Oracle in many important respects, including confidentiality protections, limitations of liability and audits. By contrast, NetSuite's current Terms of Service document takes a more balanced approach, including:

- Identifying all electronic data or information submitted

to and stored in the NetSuite service as “Confidential Information,” subject to the agreement’s non-disclosure provisions.

- Excluding indemnification obligations from the agreement’s limitation of liability and subjecting confidentiality claims to double the monetary liability cap applied to other kinds of claims.
- No audit rights in favor of NetSuite.

Once NetSuite’s formal assimilation into Oracle’s cloud services business is complete, we would expect to see Oracle insist on applying the standard-form CSA or OMA to new or extended NetSuite service orders.

Current NetSuite customers therefore should work closely with their legal counsel to scrutinize the terms of their current NetSuite agreements in advance of any new or renewal NetSuite orders. Those efforts will better equip them to seek appropriate amendments to the CSA or the OMA in the event that Oracle refuses to process the orders under the legacy agreements. In addition, companies that may be considering getting started with NetSuite in the future may want to consider saving a copy of the current NetSuite Terms of Service (available publicly with other, service-specific terms at the above link), so that they can remain mindful of the terms that have historically applied to NetSuite’s offerings.