

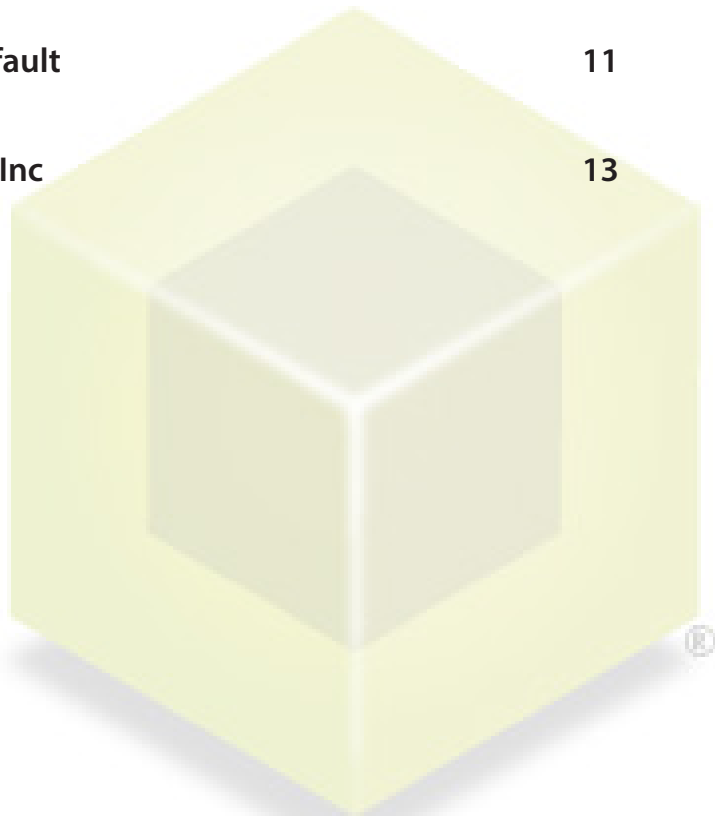
SOFTWARE ESCROW



FREE!

REPORT

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What is a Software Escrow and Why is it Needed?

In many of today's technology license agreements, companies licensing technology, Licensees, are requesting that along with the program(s), a copy of the Technology Vendor's proprietary source code also be provided. Source code contains the instructions that create the software program, which can then be transformed into an executable, in order for the software to run on your computer.

Source Codes are generally requested by Licensees simply for their own protection. With access to the source code, Licensees can maintain and enhance the software in the event that an unanticipated and/or catastrophic occurrence does not permit the Technology Vendor to continue its operations.

Many Technology Vendors' business plans, however, do not support providing a copy of their source code to their clients. If source code was provided, a great deal of maintenance revenue would be lost, due to third parties maintaining their own software. More importantly, if their source code is provided upon purchase, Technology Vendors fear that a competent programmer or independent contractor at the Licensee's location could modify the existing program and/or develop a competing program.

There is a solution however, and it is called Software Escrow. Establishing a Software Escrow Account satisfies the source code dilemma. It provides the Licensee with access to the Technology Vendor's source code and documentation, in the event that a specific, release/triggering event agreed upon by the Technology Vendor and Licensee occurs. For the Technology Vendor, establishing an escrow account protects their interests and increases the value of their product to their prospective clients.

This works by having the Technology Vendor submit a copy of the source code to an agent of a source code escrow account, who will then in turn, store the source code in a secure location. If a release/triggering event occurs, the agent will then have the right to pass the source code that was deposited into escrow to the Licensee. The account is similar to that of taking out an insurance policy in order to safeguard the rights you have to the product.

What is a Software Escrow and Why is it Needed? *(continued)*

Selecting a trusted, neutral third-party to provide Technology Escrow Services is crucial. Both the Technology Vendor and Licensee should select an organization that is professional, neutral and will attend to both parties' needs.

The company you choose to open your source code escrow account should have an appreciation of the value that both parties place on the source code.

National Software Escrow (NSE) appreciates the fact that when selecting a 'Service', you are in fact, selecting a 'Promise'... a 'Promise' that something will be completed in a manner that meets/exceeds your expectations.

NSE promises your organization the following:

- Experience—Since 1986, NSE's sole line of business has been that of providing Technology Escrow Services
- Unparalleled Service—Immediate, professional attention to your needs
- The Protection of the Escrowed Materials
- A complete line of Insurance Coverage will be maintained
- Simple, no-nonsense Price Schedule



What Type of Software Escrow Arrangement is Right for Me?

The answer to this question depends on your business needs.

• Are you a Technology Vendor licensing software to one Licensee?

If so, your need for establishing a Software Escrow Arrangement may be dictated by a Licensee who is interested in licensing your software, but desires to protect their investment, in the event that your business plan does not support providing the source code to them. If that is the case, the company that you choose to open your source code escrow account can address this need by offering a “Single Beneficiary” Escrow Arrangement. In theory, this is a 3-party Escrow Agreement that is established by the Technology Vendor, the Licensee (“Beneficiary”) and the Escrow Agent.

So how do I get started? Most trusted, neutral third-party providers of Technology Escrow Services can provide you with a template 3-party Agreement, thus saving you time and money associated with hiring an attorney to draft one for you. Technology Escrow Providers usually have specialists, or retain the services of law firms who specialists in computer-related contracts understand the technical objectives of these sophisticated transactions. It is important that both the Technology Vendor and Licensee review the terms and conditions of the Agreement, in an effort to make certain that the Agreement protects the rights, interests and investments of both parties.

• Are you a Technology Vendor licensing software to multiple Licensees?

If so, you may elect to establish a unique 3-party Escrow Agreement for each and every Licensee. A different approach however, is to establish a Master Escrow Agreement for all of your Licensees. The company that you choose to open your source code escrow account can address this need by offering a “Multi-Beneficiary” Escrow Arrangement. In theory, this is a 2-party Escrow Agreement that is established by the Technology Vendor and the Escrow Agent and permits you to enroll multiple Licensees (“Beneficiaries”) to the one, universal Escrow Agreement. *(continued next page)*

What Type of Software Escrow Arrangement is Right for Me? *(continued)*

So how do I get started? Similar to the “Single Beneficiary” Agreement mentioned previously, most trusted, neutral third-party providers of Technology Escrow Services can provide you with a template 2-party Agreement, thus saving you time and money associated with hiring an attorney to draft one for you. Once the Escrow Agreement is established and your source code has been deposited into escrow, you can easily enroll a Licensee as an “escrow beneficiary” once your License Agreement with them is in place.

The advantages for establishing a “Multi-Beneficiary” Agreement are many; however, the primary one is that by having a “Multi-Beneficiary” established and in place, you demonstrate that your organization has their customers’ needs in mind.

• Are you a Licensee with an Investment to secure?

If so, you may elect to establish a unique 3-party Escrow Agreement for each and every vendor whose software you license. A different approach however, is to establish a Master Escrow Agreement for all of your vendors’ Intellectual Property. The company that you choose to open your source code escrow account can address this need by offering a “Multi-Vendor” Escrow Arrangement. In theory, this is a 2-party Escrow Agreement that is established by the Licensee (“Beneficiary”) and the Escrow Agent and permits you to enroll multiple Technology Vendors to the one, universal Escrow Agreement.

So how do I get started? Similar to the “Multi-Beneficiary” Agreement mentioned previously, most trusted, neutral third-party providers of Technology Escrow Services can provide you with a template 2-party Agreement, thus saving you time and money associated with hiring an attorney to draft one for you. Once the Escrow Agreement is established, you can easily enroll a Technology Vendor once your License Agreement with them is in place. The advantages for establishing a “Multi-Vendor” Agreement are many; however, the primary one is that by having a “Multi-Vendor” Agreement established and in place, you can have all of your Vendors’ source code deposited with one Technology Escrow Provider, and in one location.

Summary

The type of Software Escrow Arrangement that is right for you is dependent upon your organization’s business needs. Most trusted, neutral third-party Escrow Providers will offer an Escrow Arrangement that meets your needs, including a template Escrow Agreement to get you started. Review the terms and conditions of the Agreement in an effort to make certain that the Agreement protects the rights, interests and investments of both the Technology Vendor and Licensee.

The company you choose to open your source code escrow account should permit you to review their template Agreement free-of-charge, as well as permit you to tailor the Agreement to satisfy your requirements.

What Exactly can be Deposited into Escrow?

Language in a sample Escrow Agreement states:

- A) **In a Software License Agreement, the Technology Vendor grants the Licensee for its use a license to use certain computer software program(s) and related documentation which are proprietary to the Technology Vendor and access to which must be restricted to protect its business.**
- B) **The Technology Vendor has maintenance and upgrade obligations to the Licensee as provided by the License Agreement.**
- C) **The Licensee must have access to those materials identified in this Agreement if Technology Vendor is unable to satisfy its obligations as set forth in the License Agreement.**
- D) **To address the respective needs of the Technology Vendor and Licensee, the Technology Vendor and the Licensee, have agreed to escrow Deposit Materials with the Escrow Agent.**

So what exactly can be deposited into Escrow? The answer to this question is directly related to what the Technology Vendor and Licensee agree to as their definition of "Deposit Materials". In a Technology Escrow Agreement, "Deposit Materials" will be that portion of a Technology Vendor's Intellectual Property that will not be provided to the Licensee; however, the Licensee wishes to safeguard.

As stated previously, the majority of Technology Escrow Agreements are established in order to resolve the 'source code dilemma'. For summary purposes, establishing a Technology Escrow Agreement provides the Licensee with access to the Technology Vendor's source code and documentation, in the event that a specific, release/triggering event agreed upon by the Technology Vendor and Licensee occurs. So, in most Technology Escrow Agreements, the term "Deposit Materials" is associated with a Technology Vendor's source code.



What Exactly can be Deposited into Escrow? *(continued)*

As it relates to a Technology Vendor's source code, the term "Deposit Materials" can be defined in a Technology Escrow Agreement as:

1.4 "Deposit Materials" means proprietary technology and other materials identified on Form 2.1. They are readable and useable in their current form or, if any portion is encrypted, the decryption tools and decryption keys must also be deposited and separately identified as such on Form 2.1 attached; and include a current version of any Source Code for all software licensed under the License Agreement and all updates thereto, together with all documentation necessary to enable a reasonably skilled programmer to maintain such licensed software, and descriptions of all compilers, assemblers and other computer programs and related documentation and other materials that are necessary or useful to use, modify and prepare derivative works of such Source Code.

Although the majority of Technology Escrow Agreements involve the deposit of source code(s), other deposits may include:

- Hardware Designs – Paper, electronic
- Development Plateaus
- Encryption keys
 - Providing encrypted source to the Licensee & depositing the encryption key with an Escrow Agent

Although it is important to have both the Technology Vendor and Licensee agree to the contents that make up the term "Deposit Materials", it is equally important that both parties understand/appreciate what WILL NOT be deposited into escrow (e.g., third-party software).

Summary

Although the majority of Technology Escrow Agreements involve the deposit of a Technology Vendor's source code(s), the fact of the matter is that Technology Escrow Agreements can be established for various types of Intellectual Property that a Technology Vendor does not want to provide to the Licensee; however, the Licensee wishes to safeguard. The company you choose to open your technology escrow account should provide you with a template Agreement that permits both parties to review/edit free-of-charge, making certain that both parties agree to the contents that will make up the deposit by defining the term "Deposit Materials" accurately.

Defining Your Defaults and Release from Escrow

The majority of Technology Escrow Agreements are established in order to resolve the 'source code dilemma'. Establishing a Technology Escrow Agreement provides the Licensee with access to the Technology Vendor's source code and documentation, in the event that a specific, release/triggering event agreed upon by the Technology Vendor and Licensee occurs.

So, what are possible release/triggering events? The answer to this question depends on the events that the Licensee is concerned about. Licensees are most concerned about events that will cause the Technology Vendor to fail to meet its warranty and maintenance obligations (e.g., insolvency, general assignment for benefit of creditors, wind-up or business liquidation); however, truth be told, there are numerous events that a Technology Vendor and Licensee can/may agree upon as valid release/triggering events.

Most trusted, neutral third-party providers of Technology Escrow Services can provide you with a template Agreement, thus saving you time and money associated with hiring an attorney to draft one for you. Within the template Agreement, various samples of release/triggering events will be defined. When establishing your Escrow Agreement, it is imperative that both the Technology Vendor and Licensee come to terms as to the specific release/triggering events that will govern the Escrow Agreement.

Sample release/triggering events follow:

- A. *The Technology Vendor is unable to correct any Operational Defect (as such term is defined in the License Agreement) in the Program which prevents it from functioning in accordance with the applicable specifications, documentation, performance criteria and other warranties and descriptions provided in the License Agreement within sixty days after the Beneficiary has notified the Technology Vendor of such failure, specifying in reasonable detail the respects in which the program fails to perform.*
- B. *The Technology Vendor is unable to discharge any of its maintenance obligations to the licensed Program in accordance with the warranties or other standards for such maintenance set forth in either the License Agreement or, if applicable, a written software maintenance agreement which may then be in effect between the Technology Vendor and the Beneficiary within sixty days after the Beneficiary's notice to the Technology Vendor specifying in reasonable detail the respects in which the program is not being properly maintained.*

Defining Your Defaults and Release from Escrow *(continued)*

C. *The Beneficiary has reasonable cause to believe that any one of the following events will cause the Technology Vendor to fail to meet its warranty and maintenance obligations:*

- (i) insolvency;
- (ii) general assignment for benefit of creditors;
- (iii) receiver appointment;
- (iv) assets become subject to insolvency proceeding;
- (v) wind-up or business liquidation; or
- (vi) death of key programmers utilized by Technology Vendor.

C.1 The Beneficiary has reasonable cause to believe that any one of the following events will cause the Technology Vendor to fail to meet its warranty and maintenance obligations:

- (i) bankruptcy;
- (ii) bankruptcy proceeding; or
- (iii) assets become subject to bankruptcy proceeding.

Summary

Most trusted, neutral-third party providers of Technology Escrow Services can provide you with a template Agreement. Within the template Agreement, various release/triggering events will be defined. When establishing your Escrow Agreement, it is imperative that both the Technology Vendor and Licensee come to terms as to the specific release/triggering events that will govern the Escrow Agreement.



Physical vs. Electronic Storage of the Escrow Materials

Once your Escrow Agreement is established and the parties agree to the contents that will make up the "Deposit Materials", the next step is to deliver the "Deposit Materials" to the Escrow Agent.

Most trusted, neutral-third party providers of Technology Escrow Services will support both "Physical" and "Electronic" deliveries/formats of the "Deposit Materials".

"Electronic Delivery" means deposit by electronic transfer such as electronic mail (email), File Transfer Protocol (FTP), or any other electronic transfer that communicates data from one storage location to another storage location. Formats for Electronic Delivery include any file format that can be stored on a computer-readable medium.

"Physical Delivery" means deposit by any non-electronic delivery manner such as, courier, courier service, postal service, mail service, hand-delivery, or any physical delivery in which data stored on tangible medium exchanges possession from one entity to another entity. Formats for a Physical Delivery can be optical disc storage (CD-ROM, Compact Disc, (CD), Digital Video Disc (DVD), etc.), removable storage, hard drive, portable storage, memory card, memory stick, or any other tangible computer-readable medium.

The type of delivery/format (Physical vs. Electronic) should be negotiated & agreed upon by both the Technology Vendor and Licensee. The reason being that in the event that the "Deposit Materials" are released (as a result of a release/triggering event agreed upon by the Technology Vendor and Licensee actually occurs), most providers of Technology Escrow Services will deliver the "Deposit Materials" to the Licensee in the same medium as delivered to the Escrow Agent by the Technology Vendor and by the same delivery method (Physical Delivery or Electronic Delivery) as delivered to the Escrow Agent by the Technology Vendor.

Upon receipt of the "Deposit Materials", most neutral-third party providers of Technology Escrow Services will issue to both the Technology Vendor and Licensee a receipt for the initial "Deposit Materials" and for each subsequent deposit. Such receipt will verify a delivery to the Escrow Agent, but not a verification of the contents of the initial "Deposit Materials" and/or for each subsequent deposit. *(continued next page)*



Physical vs. Electronic Storage of the Escrow Materials *(continued)*

The “Deposit Materials” provided to the Escrow Agent by Physical Delivery should be stored, maintained and preserved in a secure and climatized storage facility containing, at a minimum, the following:

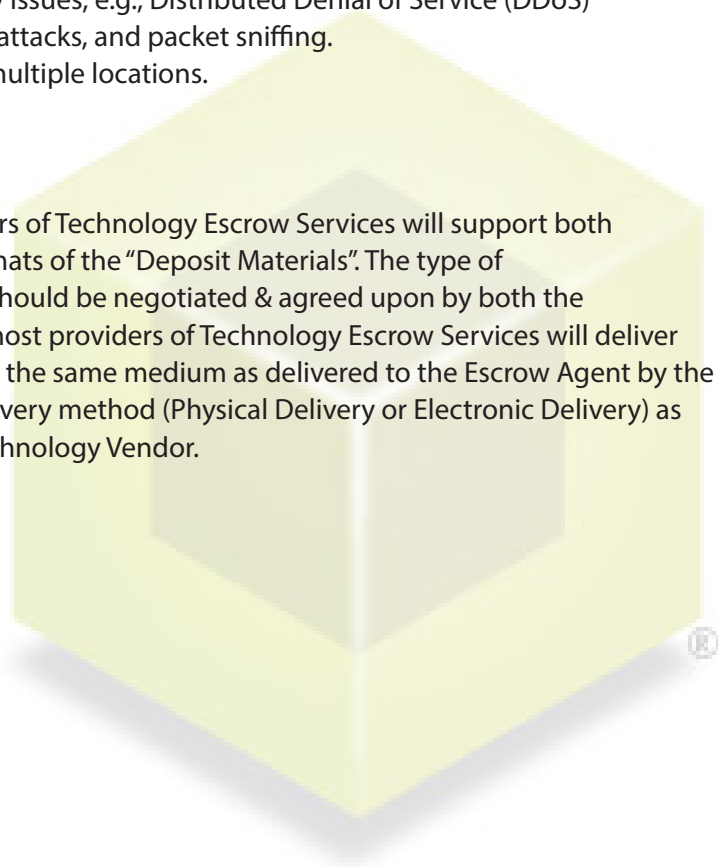
- Certified halon fire suppression system
- Computer-controlled humidity and temperature levels
- Vault and building monitored by 24-hour surveillance and security systems
- Key punch access restricting access throughout the vault
- Air filtration system

The “Deposit Materials” provided to the Escrow Agent by Electronic Delivery should be stored, maintained and preserved having, at a minimum, the following:

- File encryption using applicable and appropriate standards. Encryption for storage should be applied after files are uploaded.
- Data storage over several large-scale data centers throughout the world.
- Protection against network security issues, e.g., Distributed Denial of Service (DDoS) attacks, Man in the Middle (IMITM) attacks, and packet sniffing.
- Redundant backups for data over multiple locations.

Summary

Most trusted, neutral-third party providers of Technology Escrow Services will support both “Physical” and “Electronic” deliveries/formats of the “Deposit Materials”. The type of delivery/format (Physical vs. Electronic) should be negotiated & agreed upon by both the Technology Vendor and Licensee since most providers of Technology Escrow Services will deliver the “Deposit Materials” to the Licensee in the same medium as delivered to the Escrow Agent by the Technology Vendor and by the same delivery method (Physical Delivery or Electronic Delivery) as delivered to the Escrow Agent by the Technology Vendor.



The Submission of a Notice of Default

Establishing a Technology Escrow Agreement provides the Licensee with access to the Technology Vendor's Intellectual Property (e.g. source code) and documentation, in the event that a specific release/triggering event agreed upon by the Technology Vendor and Licensee occurs.

What if an agreed-upon release/triggering event has occurred? What is the Licensee to do? The answer to this question depends on the terms and conditions defined within the Escrow Agreement. The Escrow Agreement established by a Technology Vendor and a Licensee should not only document what are the specific release/triggering events, but also, the steps required of the Licensee to request the Technology Vendor's Intellectual Property to be released from escrow. Most template Escrow Agreements offered by trusted, neutral third-party providers of Technology Escrow Services will document the steps required of the Licensee.

Sample language within an Escrow Agreement regarding a Submission of a Notice of Default follows:

On the happening of one or more Events of Default A. B. or C., the Beneficiary shall give written Notice of Default as provided by this Agreement to both the Escrow Agent and the Technology Vendor of that Default. The Notice of Default shall be labeled a "Notice of Default," shall identify the License Agreement and this Escrow Agreement, shall specify the nature of Default, shall identify the Deposit Materials with reasonable specificity, and shall demand the delivery of a complete copy of the Deposit Materials to the Beneficiary.

Upon receipt of the Notice of Default and payment corresponding to the Release Request Fee as detailed in Exhibit B, attached hereto and incorporated by reference as "Price Schedule," the Escrow Agent shall likewise send a copy of the Notice of Default to the Technology Vendor by certified or registered mail, return receipt requested. If the Technology Vendor desires to dispute the Notice of Default, the Technology Vendor shall, within ten days after receipt thereof, deliver to the Escrow Agent an affidavit or other sworn statement stating that in the Technology Vendor's view, no Default has occurred.

If the Escrow Agent does not receive an affidavit or other sworn written statement from the Technology Vendor stating that the Technology Vendor does not believe there has been a Default, within the time permitted, the Escrow Agent is authorized and directed by Technology Vendor to deliver the Deposit Materials to the Beneficiary. The Escrow Agent shall deliver the Deposit Materials to the Beneficiary in the same medium as delivered to the Escrow Agent by the Technology Vendor and by the same delivery method (Physical Delivery or Electronic Delivery) as delivered to the Escrow Agent by the Technology Vendor. The Escrow Agent's responsibility for the Deposit Materials ceases upon release of the Deposit Materials to the Beneficiary, and the Escrow Agent is not responsible for any inability by the Beneficiary to successfully utilize the Deposit Materials after release.

The Submission of a Notice of Default *(continued)*

Addressing Disputes

Most template Escrow Agreements offered by neutral third-party providers of Technology Escrow Services will address steps for resolving disputes (e.g. the Technology Vendor disputes the Licensee's Notice of Default).

In the event that the Technology Vendor provides to the Escrow Agent an affidavit or sworn statement in response to the Notice of Default disputing the existence of any Default, Escrow Agreements will normally stipulate that the Escrow Agent will not release the "Deposit Materials" until it receives joint instructions from the Technology Vendor and Licensee, a final non-appealable court order, or binding arbitration award requiring or authorizing such release.

What about the Bankruptcy of the Technology Vendor?

But what if the Technology Vendor is not available to confirm/dispute the Licensee's Notice of Default in the event of bankruptcy, bankruptcy proceeding or in the event that the assets of the Technology Vendor become subject to a bankruptcy proceeding?

Most trusted third-party providers of Technology Escrow Services should have language within their template Agreements to address this scenario. Upon receipt of a Licensee's Notice of Default due to an event like this, the Escrow Agent will be required to send a copy of the Licensee's Notice of Default to the Trustee in Bankruptcy of the Technology Vendor by certified or registered mail, return receipt requested. The Escrow Agent will then abide and enforce any order, instruction, or request made by the Trustee in Bankruptcy of the Technology Vendor regarding to the "Deposit Materials".

Summary

Most template Escrow Agreements offered by trusted, neutral third-party providers of Technology Escrow Services will document the steps required of the Licensee to submit a Notice of Default to the Escrow Agent. Permitting an opportunity for the Technology Vendor to either confirm/dispute a Licensee's Notice of Default should be considered, along with steps to settle any disputes that may result.

About National Software Escrow, Inc.

Whether you are a Technology Vendor with an idea to sell and protect or a Licensee with an investment to secure, National Software Escrow, Inc. (NSE) has in place the facility and legal structure to provide a secure, cost-effective escrow arrangement which ensures the protection and peace-of-mind both parties require.

Presently, NSE offers the following Escrow Arrangements:

- **Single Beneficiary** - (1 Technology Vendor / 1 Beneficiary)
- **Multi-Beneficiary** - (1 Technology Vendor / Multiple Beneficiaries)
- **Multi-Vendor** - (1 Beneficiary / Multiple Technology Vendors)

NSE's Escrow Agreements are carefully researched, sophisticated legal instruments that will protect the rights, interests and investments of both parties.

NSE appreciates the fact that when selecting a 'Service', you are infact, selecting a 'Promise'. NSE promises your organization the following:

- Experience—Since 1986, NSE's sole line of business has been that of providing Technology Escrow Services
- Unparalleled Service—Immediate, professional attention to your needs
- The Protection of the Escrowed Materials (both physical and electronic formats are supported)
- Simple, no-nonsense Price Schedule

Since 1986, over **2,000 companies** worldwide have placed their trust in **National Software Escrow, Inc.** To learn more about the services that we provide, I invite you to call us at (440) 546-9750 or visit us at **www.nationalsoftwareescrow.com**

We look forward to serving your Software Escrow needs.

Regards,
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