TOP 12 (MOST EGREGIOUS) ORACLE TERMS AND CONDITIONS

(… that can cost you millions if not re-negotiated)

Provided by:
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PREFACE

The votes are counted, and Oracle yet again wins for being perhaps the most tyrannical of all technology suppliers. The standard Oracle Terms and Conditions are legendary for their one-sidedness. What's worse, Oracle has gained an equally reviled reputation for leveraging those terms and conditions to their full and unilateral benefit at the great expense of their customers.

If you are renewing your annual maintenance with Oracle, buying new Oracle software, engaged in or concerned about an Oracle audit, considering Cloud solutions or having them forced upon you, or just thinking about how to mitigate cost and risk and improve the realization of value and benefit in your Oracle agreement, this is the quintessential guide you need to sharpen your contracting and negotiating skills and harvest massive amounts of value from the bargaining table.

In this 12-part series, NET(net) will be disclosing the most egregious terms and conditions that cost our clients millions, and how you can renegotiate these items to provide your organization with improved value and better contractual flexibility.

ORACLE'S DIRTY DOZEN SERIES:

IN THIS TWELVE (12) PART SERIES, WE WILL CHRONICLE ORACLE'S TOP 12 (MOST EGREGIOUS) TERMS & CONDITIONS THAT CAN COST OUR CLIENTS MILLIONS IF THEY ARE NOT RENEGOTIATED TO PROVIDE IMPROVED ORGANIZATIONAL VALUE AND BETTER CONTRACTUAL FLEXIBILITY.

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12. FUTURE PRICE HOLDS

We encourage all clients to seek future price protections from Oracle in the form of Price Holds, assuming they are at, or close to, the market optimized and/or original anchor deal discount levels.

What is a Price Hold? It's a provision in your contractual agreement with Oracle that protects your future purchases so that you will be able to make them at a previously agreed upon discount rate.

Why is it needed? Many of the originating anchor transactions with Oracle are sizable and often competitive, and therefore generally offer larger than normal discounts. However, if clients don't negotiate price holds for future purchases, Oracle will often take an extremely transactional view of the commercial nature of the ongoing relationship and will generally base discounts on the size of the future transaction itself, NOT the aggregate value of the purchases since the inception of the relationship. Therefore, inconceivably, discounts usually worsen over time, not get better, as most believe they should.

PRO TIP

Be sure that price holds extend to any resulting audit actions. As you probably know, Oracle is widely known as one of the most aggressive and confrontational technology suppliers on earth when it comes to auditing their customers, making enormous (and often times wildly exaggerated) claims about non-compliance and fee implications, and then strong-arming clients into making bad purchasing decisions in an attempt to make the audit problems "go away".

Clients that get a large original discount but do not negotiate a future price hold are often extremely surprised by the value grab that occurs after the first deal, when they need to buy new products or services, but no longer have the competitive environment of a selection, rather are adding capacity to a chosen infrastructural component. We routinely see massive erosion of value after the initial Oracle deal, as client options may be limited by their prior purchase and/or timebound by their need to address production considerations.

We encourage clients to demand additional consideration in exchange for more software acquired over the price hold term in the form of improved discounts for future purchases. Of course, Oracle doesn't generally appreciate this way of thinking and is highly resistant to provide this kind of a consideration. Generally, future price holds can be negotiated, and are generally granted by Oracle for not more than 3 years, and almost always aren't quite as good as the originating transaction discount percentage. Clients should always seek a price hold from Oracle for as long as possible and for as close to the original discount level as possible (if not better).

Price holds are especially useful for small incremental purchases, but Oracle often tries to set transaction size limits, which nullify their obligation to provide price holds on single transactions if they are smaller than (say) $400,000 per transaction – citing all kinds of invalid reasons why, but try not to agree to a future transaction size limitation, because going from a good discount to a terrible (or no) discount for a small transaction can be extremely punitive as you are likely to have already budgeted for the expenditure thinking that you'll get the same discounts. If the price hold discount isn't very good because your originating anchor transaction wasn't exceptionally large and/or your negotiation results weren't excellent -- or if it turns out that a secondary transaction is quite sizable, a poor price hold can actually act as double-edged sword as it can bring down the discount that Oracle will offer, so be sure to also set up the price holds as a minimum discount to apply (not a maximum).

Of course, the best way to ensure you get price holds that will future proof your Oracle deployments (and to learn about the rest of the 12 most egregious Oracle terms and conditions without waiting), is to contact NET(net) for a review of your specific situation and your Oracle estate. We've been optimizing and negotiating Oracle deals and renewals all over the world since 2002 and are generally able to help clients reduce risk & cost and improve the realization of value and benefit.

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11. MAINTENANCE FREEZE

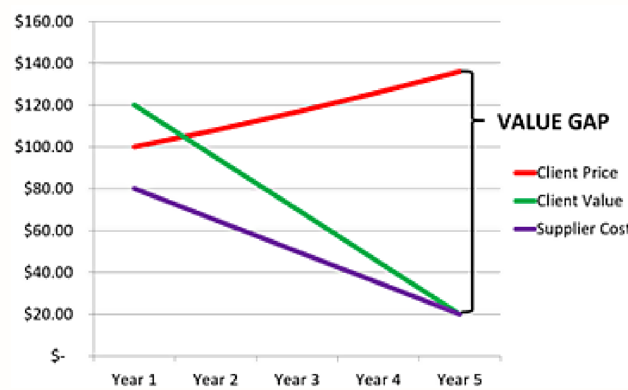
WHAT IS A MAINTENANCE FREEZE?

It's a provision in the contract to ensure that Oracle doesn't increase the annual maintenance service and support costs year over year; and on a compounding basis.

NET(net) advises all clients to strive to "lock down" every escalating cost of Oracle's annual maintenance and support services by negotiating a maintenance freeze for as long as possible. Why is a maintenance freeze needed? Across our experiences, Oracle often charges a 9% annual increase, which compounds year-over-year, and fundamentally Diminishes the Inclusive Value of the annual maintenance & support services Equation: the DIVE phenomenon.

Oracle's costs generally increase over time and client benefit generally decreases significantly over that same time period, exacerbating in the Diminishing Inclusive Value Equation (a.k.a. the DIVE Phenomenon), resulting in an ever-widening value gap year after year until costs and value are so misaligned that the correlation is no longer even recognizable.

Oracle's contention that it increases costs (the Value Gap) due to increasing labor costs is simply a silly argument; it's all about showing 'growth' to Wall Street as their renewal rates are exceedingly high as customers have a difficult decision to make – to pay Oracle another year of support, to try to support with a third party or provide self-support, or to potentially risk a complicated and expensive switch of a vital infrastructural component.



Another reason why the labor cost argument from Oracle is silly? According to Oracle co-CEO, Safra Catz, Oracle's maintenance service and support business "is basically 100% profit". A third reason: Isn't Oracle using its own technology to further digitalize and automate its business, which would result in lower people costs? A fourth reason: just look at your support logs, which generally dry up after major software initiatives mature. For those and other reasons, clients should seek a 60-month freeze on maintenance service and support fees – which means no annual increases for the first 5 years. It's not commonly agreed to by Oracle, but clients can often get a 3-year freeze.

Annual Increases @ 9%

	Y1	Y2	Y3	Y4	Y5	T
Mnt	100	109	119	129	140	597

Annual Freeze

	Y1	Y2	Y3	Y4	Y5	T
Mnt	100	100	100	100	100	500

Saving

	Y1	Y2	Y3	Y4	Y5	T
Mnt	0	9	19	29	40	97
						16%

Important Note

- **Financial Analysis.** Just a seemingly small annual increase like CPI + 5% (averaging 9% per year) can raise costs significantly over time. Compared to a frozen cost structure, it represents a 16% savings over the alternative.

Einstein once said the most powerful force in the universe was that of compounded interest, and if you experience annual increases on your Oracle maintenance costs, you too will become a believer.

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10. SUPPORT CAPS

WHAT IS A SUPPORT CAP?

A support cap seeks to place limits on the compounded effect of annual increases to the costs of the annual maintenance and support services fees beyond the Maintenance Freeze term

Why is it Important? If there is no language to govern the amount of increase after the Maintenance Freeze (#11 in our list) term, the costs of annual maintenance and support services can skyrocket and quickly get out of control. The standard Oracle contract does have limits on annual maintenance and support services cost increases, but those increases are high, and they are termed. After these support increase caps expire, we have seen annual costs increase by 20% or more. Getting support caps that limit the amount of compounded annual increases to the maintenance and support services fees is a reasonable negotiation point.

After all, the supplier's cost to support a customer actually go DOWN, quite significantly, beyond the first year of deployment. What's more, the level of research and development into delivering new product functionality significantly trails off after the major features are released. One final nail in the coffin for Oracle's argument, is the fact that Oracle covers the costs of R&D in the cost of the license sale, and not in the provisioning of product maintenance.

We suggest clients push hard for a low support cap beyond the maintenance freeze and treat each new additional purchase as an opportunity to extend both the Price Hold and the Maintenance Freeze for all products in the Oracle licensed estate. **Clients are advised to agree to no more than a "CPI or 3%, whichever is less" provision that caps the amount of support cost increases beyond the maintenance freeze term assuming those other provisions are agreed to by Oracle.**

9. REDUCED MINIMUMS

WHAT ARE REDUCED MINIMUMS?

When Oracle licenses certain software by various metrics (other than their preferred metric), they are generally responding to customer demand for an improved metric designed to provide relief for non-production use. As such, they require certain minimum thresholds to be achieved in order to change the metric.

When Oracle licenses certain software by various metrics (other than their preferred metric of Processor), Oracle is responding to customer demand for an improved metric designed to provide some economic relief, generally for non-production use. Most commonly, Oracle agrees to allow its customers to license certain environments (like test or development environments) by named user, instead of by processor. In so doing, however, Oracle generally requires user minimums (a minimum number of users that have to be licensed in order to receive that benefit), so as not to give too big of a financial concession to the end customer. Reducing these contractual minimums can often generate considerable savings depending on the deployment of Oracle in an applicable client environment.

When clients consider licensing a test or development environment by Processors, it's generally considered to be a very expensive proposition, and therefore, it's fairly common for clients to look for cost relief. One of the common ways they will often find some relief is to consider licensing these environments by named user instead of by processor as the "breakeven point" (the point at which user licenses become more expensive than processor licenses) is 50 users.

In these cases, if a client has 10 developers (as an example), they could license that environment at one-fifth the (list license) cost by using a user license instead of a processor license. However, Oracle generally requires certain user minimum thresholds when licensing environments by users to prevent their customers from receiving too big of a benefit. In a case like this, the user minimum may be 25 user licenses, which could change the calculus when considering things like discount levels and administrative costs and other factors. These minimums are often mitigating factors when considering savings opportunities. For example, Oracle wouldn't be very keen to allow a customer to license only one user for a particular environment, as they might not be willing to provide the value of that capability for just 1/50th the cost of a processor license, but at half the cost, it's more palatable and addresses a client concern.

Why is it important?

It is an important issue because if clients are not achieving these certain various contracted minimum threshold requirements, they are paying for surplus capacity and not getting any value for that. Therefore, it is important to study the environment in which the Oracle software will be used to determine if the user minimums are appropriate, or if a reduced minimum could offer additional benefits. It is often advantageous to license based on users for a test and/or development environment, so these are good places to start.

In addition, if you are able to negotiate a reduction in the minimum thresholds that more closely aligns to your specific use case, you can generally capture disproportionate value which not only lowers your acquisition costs, but will also lower your ongoing operational costs since support is priced based upon the net license amount. As a result, we encourage our clients to look closely at both the production and the non-production use of Oracle software and negotiate reduced minimums where applicable.

In a typical client use-case scenario, we may see a breakeven point between processor licensing and end-user licensing at 50 users, the Oracle contracted minimums may be 25 users, and the negotiated outcome may be a 10-user minimum. At an equal discount, this represents a 50% Savings; going from full cost to half cost – by switching from processor to user, and then getting to one-fifth of the cost by negotiating a reduced minimum from 25 to 10; an 80% savings from the baseline amount of the processor cost, and 60% incremental savings from the Oracle contracted minimums of 25 named users to the negotiated contracted minimums of 10 named users.

Clients that have benefitted from reduced minimums in large-scale Oracle negotiations have saved countless millions when compared to what those costs would have been without these tactics and strategies.

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8. LICENSE EXCHANGE

WHAT IS A LICENSE EXCHANGE?

A license exchange is a private market setup between you and Oracle, whereby you can 'trade-in' the list license value of software you no longer want or need for a list license value credit on new titles you do want.

Why is it important? It's important because absent this protection, it's exceedingly difficult to get any value from software that you no longer want or need, and in many cases, it's because the software didn't work the way you thought it was going to work, or it didn't provide the level of value you needed to justify its use. The other critical flaw in the Oracle approach to licensing management, is that they will often require you to migrate your licenses from one version to another, or even from one product to another. In the cases of license migration, you are often required to pay a migration fee and a license upgrade charge both of which carry incremental support as well as continuing to pay the full burden of the underlying original maintenance in perpetuity. This "binding" effect of legacy maintenance costs Oracle's customers millions.

In real world terms, a customer with a list license value of $2M, a net license value of $1M, and an existing maintenance obligation of $220k per year that migrates to a new net license of $500k, will not pay $110k in annual maintenance and support services costs as you might expect, rather they would pay $330k as the migrated maintenance is additive to the legacy maintenance. In our direct experiences, this policy has been enforced numerous times even when it is quite clear that the client could simply dispose of the legacy licenses, terminating the usage rights, buy the migration license at market value, and pay considerably less overall.

Amazingly, Oracle has even erected policies that attempt to prevent its customers from this very behavior, making it nearly impossible to escape punitive maintenance costs from impaired Oracle assets. NET(net) has have helped our clients avoid this trap after the fact. Obtaining a license exchange as a contractually agreed vehicle can save countless hours of headaches and countless millions of added fees.

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7. BUNDLING OF SUPPORT

WHAT IS THE BUNDLING OF SUPPORT?

The bundling of support is Oracle's long-standing policy to sell product upgrades and technical support together as a single offering, and not allow customers to buy them separately.

Why is it important? It's important because in mature deployments, many customers no longer need product upgradability, but they still want access to technical support for the appearance of risk mitigation. In those instances, they are forced to pay for one to get the other. Oracle combines technical break/fix product support with product upgradability (the rights to upgrade the product with no additional software license cost) and sells this bundled solution as its annual maintenance and support services, which is generally priced at 22% of the net license value of the underlying license it supports.

Oracle used to price these items separately at 7/22 (about 32% of the costs) for technical support and 15/22 (about 68% of the costs) for product upgradability, and would allow customers to buy one without the other. That option no longer exists. Customers are now forced into an 'all or nothing' mindset when it comes to bundled maintenance and support services. Some clients would like to continue to receive technical support but have no plans to upgrade the software, perhaps due to an environment lockdown or application sun-setting.

In this case, customers would be well served with a technical support (only) offering. This Oracle policy causes clients in this situation to overpay by more than triple the market value for the service they need. One potential option for this is to ensure your contracts clearly delineate the definition of product support between technical support and product upgradability, and allow you to buy one without the other. There is a very low probability of Oracle agreeing to such a provision, so the second option is to be sure there is a provision in the agreement that allows for third party support, which means you would be able to acquire third party product support in the event you no longer require product upgradability, and it wouldn't impair the value of the underlying perpetual software license.

6. EXTERNAL REFERENCE

In the standard Oracle agreement, Oracle refers to externally controlled websites for things such as the definition of support, and as such, they have the unilateral ability and control to fundamentally change the terms and conditions of your agreement without you even knowing about it until it is too late. Therefore, we suggest that clients (i) negotiate provisions that require notification (and approval) of changes, (ii) prohibit material reductions in maintenance and support services without the corresponding reductions in fees as mutually agreed (not to be unreasonably withheld), and (iii) have those external definitions referred to in the agreement electronically captured and put into the agreement as an attachment so that there is no confusion on these matters.

5. RE-PRICING PROVISION

WHAT IS A RE-PRICING PROVISION?

A re-pricing provision is Oracle's policy rights to re-price your annual maintenance and support services costs back to list price on the remaining products if support from part of an order is dropped.

Why is it important? Oracle's ability to re-price can effectively eliminate any product pricing discounts off list, should you cancel a partial license set. Even with a price hold, Oracle leverages its support policies drawn into the contract by External Reference (#6 on our List) to re-price your annual maintenance and service support costs to effectively eliminate your discounts and make your costs as high as list price if you terminate partial orders.

If you were to buy 100 licenses at a 50% discount, and you were paying $100,000 of annual maintenance service and support charges, you would think that if you terminated 50 of those licenses (maybe you no longer had the need for them), you could pay $50,000 per year instead of $100,000 per year, but Oracle doesn't think so. Their standard policy allows them to re-price the annual maintenance service and support costs associated with any order with any partial termination. Their logic is that perhaps they wouldn't have given such a large discount on that order if the volumes were less.

In this example, under the standard Oracle terms, they would have the ability to 're-price' your annual maintenance and support services costs to $100,000 per year, effectively eliminating any chance you have of getting a support reduction even though you are now only supporting half the number of licenses. This is why, even with a price hold, we strongly encourage all clients to negotiate a provision in the agreement that ties any re-pricing resulting from termination of a partial order back to an effective discount of the price hold in effect. This is fair. In most cases, the originating transaction would have had a slightly better discount than the price hold, so it represents a slight unit cost increase in support for the lesser volume, but not such a huge value grab whereby it completely erodes any discount as is the case with the standard Oracle contract language.

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4. MATCHING SERVICE LEVELS

WHAT ARE MATCHING SERVICE LEVELS?

This is an Oracle policy that requires customers to maintain a matching level of annual maintenance and support services across a product in its entirety even if a customer has a varying level of need for a host of good business reasons.

Why is it important? It's important because many of our clients have multiple operating environments in different business units, sometimes in different geographies or even countries, and sometimes these are unrelated businesses that just so happen to be owned by the same company. In many cases, there is no relation between the needs of the operating environments, and therefore any policy to enforce equal treatment is unjustly onerous and costs our clients dearly.

The business reason Oracle cites is to prevent customers from having many similar licenses, but only supporting a few of them, which makes it difficult for Oracle to determine if the customer calling for support will use the support only for the supported licenses and not for the other licenses that are not supported. This policy seems like a reasonable approach, but in this case, let's say the customer is a sun-setting a major application that uses Oracle database licenses in one business unit and no longer needs to have those licenses supported because the environment is highly stable, will introduce no changes, and will eventually turn off after some time.

In this case, another unrelated business unit actively uses Oracle's database and wants to continue to have these licenses supported. Oracle's response to this is to require the customer to match service levels, so either both environments have to be fully covered, or neither can be. This generally forces customers to continue to support licenses that do not require it because they cannot risk de-supporting critical environments.

In addition, as the older editions enter into extended support, Oracle will commonly increase the cost of support by as much as 5 basis points (a 23% increase). Changing this policy to one that makes sense for the needs of the customer can represent a significant improvement in what has proven to be a very difficult, if not tyrannical construct.

3. BUSINESS TRANSACTION PROTECTION

WHAT IS BUSINESS TRANSACTION PROTECTION?

Business Transaction Protection is language in the agreement that provides some much needed flexibility in the event of a business transaction that significantly alters the value of the Oracle software deployment.

Why is it Important? These business transactions are often the source of many audit demands, and the standard Oracle language is vague and limited on what rights a customer has with regard to these types of transactions. We suggest clients include language in the agreement that gives added protections and flexibility for business transactions like mergers, acquisitions, divestitures, carve-outs, etc. Transition Service Agreements (TSAs) should be constructed to allow the divesting entity to serve as a service bureau for a reasonable period of time during a transition, but then the divested entity should be able to acquire its license capacity from the divesting entity (and pick up the pro-rata portion of the support cost) and the divesting entity should experience a reduction in its entitlements, but it should also get a pro-rata reduction of its annual maintenance service and support costs.

Oracle agreements do not currently offer this protection, and a divested entity has no ability to buy from its divesting entity and a divesting entity has no ability to reduce ongoing support costs once a divestiture is complete.

2. PROTECTION FROM AUTO-INSTALL

WHAT IS AUTO-INSTALL?

Auto-Install is an executable file in the Oracle software kit that activates when a customer installs certain software and automatically loads various options that may or may not be included in the purchase price of the acquired software.

Why is it Important? It's important because generally the people who install the Oracle software are not contextually aware of all the intricacies of software licensing, nor perhaps are they even aware of the particulars of the commercial arrangement between your company and Oracle. They are, however, generally fans of the Oracle technology, and want all the added features, so when software automatically installs, they often aren't even aware they should change the settings to remove it.

It's plain to see why we strongly recommend that all Oracle customers Include language in the agreement that ensures the customer is not held responsible for software that installs automatically without proven intent from the customer, such as Partitioning, In-memory Database, Management Packs, etc. Standard Oracle contracts currently offer no such protection, and this can cost our clients millions of unexpected license fees and back maintenance charges after an audit reveals that this software was indeed 'installed'. Even if this software was never turned on or never gainfully used, Oracle has every right to charge for its use because the key trigger event to define your liability is installation, not consumption, and not use.

1. AUDIT CLAUSE

Clients are well advised to include specific language governing Oracle audits. Most importantly is the ability to purchase any compliance licenses as a result of an audit action at the contractual price hold discounts (#12 on this list), and in the event that the price hold expires, at a mutually agreeable discount at the prevailing discounts available in the market for similar deals not to be unreasonably withheld.

The current contract language in the standard Oracle agreement requires clients to purchase compliance licenses at list price. In the case of a 75% price hold discount, this would mean you are acquiring the licenses at 25% of the cost you would have to under the standard language, which represents a 400% cost increase absent this protection.

In addition, we suggest that strong language be included to prevent Oracle from being able to charge for compliance licenses unless it can be proven that those licenses were actually used. In most cases, clients find themselves in the audit crosshairs not because they used and didn't pay for licenses, but rather because unused software was automatically installed on their machines (#2 on this list) and they unknowingly ran afoul of Oracle's compliance policies.

Whatever the results of the audit, have your supplier (and/or the auditor) explain any discrepancies, the likely root causes of such, and what best practices you may want to reference to prevent the same issues from happening again in the future.

Further, we suggest that at least a compliance action would have to rise to the standard of Gross Negligence or Willful Misconduct on the part of the customer to result in responsibility to pay punitive licensing fees, which can sometimes be inflated by several hundred thousand if not millions of dollars. Strong audit protections should also include provisions that govern the notice period (suggest 90 days, not the standard 30 in the agreement), as well as a clause that says it should not unreasonably interfere with your business.

TO LEARN MORE:

To learn more about how to craft a more reasonable audit provision, check out our article, "Know your Software Audit Rights".

To learn more about how to protect yourself from an Oracle Audit, check out our Whitepaper, "Top 10 Ways to Defend Yourself from an Oracle Audit".

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Finally, when an audit action is initiated, Oracle should be required to give a specific scope (what are they looking for), a specific and credible charge, a duration (how long will it take), and a mutually agreed on escalation process to challenge any finding before they become "final".

SUMMARY

Negotiating all 12 of these improvements will undoubtedly dramatically improve the amount of value you receive from your Oracle investments and will most assuredly protect you from vast amounts of loss from unexpected increased costs.

We hope you enjoyed this series, the most comprehensive review of the most egregious Terms & Conditions that can cost our clients millions if they are not renegotiated to provide improved organizational value and better contractual flexibility.

ABOUT NET(NET)

Founded in 2002, NET(net) is the world's leading IT Investment Optimization firm, helping clients find, get and keep more economic and strategic value. With over 2,500 clients around the world in nearly all industries and geographies, and with the experience of over 25,000 field engagements with over 250 technology suppliers in XaaS, Cloud, Hardware, Software, Services, Healthcare, Outsourcing, Infrastructure, Telecommunications, and other areas of IT spend, resulting in incremental client captured value in excess of $250 billion since 2002. NET(net) has the expertise you need, the experience you want, and the performance you demand. Contact us today at info@netnetweb.com, visit us online at www.netnetweb.com , or call us at +1-866-2- NET-net to see if we can help you capture more value in your IT investments, agreements, and relationships. NET(net)'s Website/Blogs/Articles and other content is subject to NET(net)'s legal terms offered for general information purposes only, and while NET(net) may offer views and opinions regarding the subject matter, such views and opinions are not intended to malign or disparage any other company or other individual or group.

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