

**From:** Lisa Georgi  
**Sent:** Thursday, February 14, 2002 3:58 PM  
**To:** Mike Oldham; Richard Fade; Jason Kap; Kurt Kolb  
**Cc:** Andree Gagnon (LCA)  
**Subject:** FW: Clarification Questions Regarding New Uniform Terms

**Attachments:** MS Uniform Terms and Conditions table.doc



MS Uniform Terms  
and Condition...

Mike-Per your request, attached is GW's feedback to the BTD and DTOS 4.0. Andree and I went through this document with GW and answered all of their questions. They primarily have 2 issues that they don't agree with which I've outlined below. GW is preparing a more formal feedback document to submit by March 15 and we don't expect them to raise any additional issues that aren't already included in this document.

BTD

1. COA returns: How will Gateway get credits for Products distributed with returned systems or those for which a repair requires a chassis replacement? Current language only allows GW to return COAs that have been damaged, not from customers returning the PC.
2. GW is concerend about limitation on MS's liability for defense of patent claims

----- Original Message -----

**From:** Fama, Tony [mailto:Tony.Fama@Gateway.com]  
**Sent:** Tuesday, January 22, 2002 10:04 AM  
**To:** Andree Gagnon (LCA); Lisa Georgi  
**Cc:** Homeister, Chris; Kahl, Gui; Leonard, David J - Supply Management; Johnson, Scott; Gattis, Jeffrey; Nolte, Jolene  
**Subject:** Clarification Questions Regarding New Uniform Terms  
**Importance:** High

Hi Andree and Lisa,

As promised, attached below is our list of questions and concerns regarding the new uniform terms. The comments regarding the Logo License Agreement are based on LLA 4.0, since we just received version 4.1 this morning.

We look forward to talking with you this afternoon.

<<MS Uniform Terms and Conditions table.doc

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Group Counsel, Partner Management  
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Poway, CA 92064  
(858) 848-3927 - phone  
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Plaintiff's Exhibit

9258

Comes V. Microsoft

MS-PCAlA 000000463262  
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**MS Uniform Terms and Conditions:  
Questions and Concerns  
January 21, 2002**

**Business Terms Document**

Section	Question/Concern	Resolution
§§1(j), 1(m), and 2(i)	There is no order of precedence specifying which document controls in the event of a conflict between the BTD, a License Agreement, the OEM Resource Guide, and any terms or conditions that accompany Supplements.	
§2(c)	As written, this section would seem to preclude any use of MS trademarks in marketing and training materials. Does §2(b) of LLA 4.0 fix this issue? Can we still use screen shots and box shots in accordance with MS's web site?	
§2(i)	What is a "large account customer"?	
§2(j)	<ul style="list-style-type: none"> <li>• Need to confirm that our arrangement with NCR does not violate this provision.</li> <li>• Under sub-paragraph (ii), does MS expect a specific warranty from Gateway at the time we do a co-branding deal, or is the statement in this section sufficient?</li> </ul>	
§3(d)	On what basis will MS determine that COMPANY's orders constitute quantities that "are greater than COMPANY will be able to" distribute or "make timely payment"?	
§3(h)(ii)(B)	What happens if the AR does not issue an RMA? Will the AR accept an RMA issued by Gateway?	
§3(h)(v)	How will Gateway get credits for Products distributed with returned systems or those for which a repair requires a chassis replacement?	
§7(c)	What happens if MS cannot procure a license or replace or modify the infringing Product? Will MS refund any royalties previously paid for Products in inventory?	
§7(d)	Why were Hong Kong, Indonesia, Malaysia, Philippines, and Singapore not included in the "Included Jurisdictions"?	
§8(a)(ii)	Why should MS's liability for IP infringement be more limited than its overall limitation of liability under Section 8(a)(i), i.e., why should the cap for IP infringement be less than 100% of all amounts paid under the applicable License Agreement?	
§8(c)	Why is the exclusion of damages not mutual, subject to carve-outs?	
§8(d)	Why should the covenant not to sue be applicable if MS manufactures or markets a hardware product that infringes a COMPANY Patent?	
§11(a)	Does COMPANY not have an express right to terminate if MS breaches a License Agreement?	
§12	Does the term "Internet mail" include use of the MOO?	

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**DTOS**

<b>Section</b>	<b>Question/Concern</b>	<b>Resolution</b>
§2(c)	Does the prohibition on marketing of replacement media preclude general statements about the availability of replacement media, particularly in product warranty documents?	
§2(d)	How would we take credits for the 500 royalty-free systems we deploy internally, since we would have to purchase COAs up front for the Products installed on those systems?	
§2(e)	Why are desktop systems sold directly to educational institutions treated differently with regard to where the COA is applied?	
§2(f)	Same concern indicated for BTD §§1(m) and 2(i) regarding an order of precedence to govern conflicts.	
§2(h)(1)	Can we use a customer-created software image if the customer has MQLP, Select or Enterprise Agreements in place with MS?	
§2(h)(3)	Why can backup media not be sent? For example, if a customer initially elects to downgrade the OS in accordance with §2(h)(2), then later upgrades to XP, what media would the customer use to do the later upgrade?	
§2(r)	Why is this provision limited to "leases intended for security," i.e., "finance leases"?	
§2(l)	With regard to the last sentence, we have the same concern as indicated for BTD §3(h)(v).	
§3(b)	When will we receive the format for the required inventory report?	

**MDP**

<b>Section</b>	<b>Question/Concern</b>	<b>Resolution</b>
§2.1(c)	See comments re Logo License Agreement §§2(a) and 6(b).	
§3(d)	Please confirm that this section only applies to the specific Customer Systems that are listed in the "Customer System table" of the DTOS Agreement.	

**Logo License Agreement**

<b>Section</b>	<b>Question/Concern</b>	<b>Resolution</b>
§§2(a), 10(a)	Does this Agreement replace and supersede all previous Logo License agreements and eliminate the right to use our existing Windows 2000/Windows 98/Windows ME combo logos for systems that were previously certified for use with those logos? If so, how should we treat remanufactured systems that have not qualified for use with Windows XP? Will MS Microsoft drop the Windows 2K logo requirement from the MDP2001, as has been done in MDP 2002, or will MS grant a waiver of compliance with Milestone 1 of MDP 2001 for remanufactured systems?	
§2(b)	As indicated with regard to BTD §2(c) is the change from "on Product" to "in relation to Product" intended to make this Agreement cover the use of MS marks in marketing materials?	
§6(a)	If we are precluded from using a Logo, will MS also reimburse the cost of existing inventory that contains that infringing Logo?	
§6(b)	Will MS grant a waiver of compliance with MDP Milestone 1 if we are forced to stop using a Logo and MS does not provide a non-infringing alternative within the 10-day period following MS's delivery of a notice to stop using that Logo?	

**TPI Agreement**

<b>Section</b>	<b>Question/Concern</b>	<b>Resolution</b>
§§1(h), 2(a)	Please that COMPANY has the right to provide the OPK to the INSTALLER.	