

# ORACLE AUDIT WHITE PAPER



vmware®

**SPECIAL CONSIDERATIONS**  
AROUND VIRTUALIZATION



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Oracle frequently makes use of its right to audit the actual use of Oracle software deployed by their clients. Client often have difficulties in understanding the context of an and Oracle's requests for information. This often results in delivering everything Oracle requests, to find out later that they have been taken off-guard. As a result, many of Oracle's audits result in excessive claims than can and should be prevented.

This paper aims to untangle the labyrinth of information requests and questions, to clearly outline the rights Oracle does and does not have and what important considerations are when being under audit. The goal is to educate clients and help them to make informed decisions in dealing with the Oracle LMS audit.

### About License Consulting

License Consulting was established in 2007 to provide clients worldwide with independent expert knowledge in Oracle licensing. We have successfully mitigated hundreds of Oracle audits around the world. License Consulting has become a confidential source of knowledge in licensing compliance, support savings, auditing and contract design for businesses that deploy Oracle software. License Consulting does not (re)sell software and has no partnership with Oracle. Our clientele consists of large organizations in all industries - many with a global presence - as well as governmental organizations. By visualizing and quantifying available choices and risks, License Consulting helps clients to make informed decisions around Oracle licensing.

### Auditing expertise

Since 2007, License Consulting has assisted hundreds of Oracle clients in undergoing and/or resolving the outcomes of an Oracle audit. Prior to that, staffers were auditors at Oracle LMS and have a deep understanding of the inner workings of Oracle.

## Disclaimer

The report is an opinion based on vast industry experience gained whilst working with many clients and law firms across the globe, over an extensive period of time. We encourage clients to use this informative report to better form their own opinions and strategies, at their own discretion and risk.



## Audit Right

### Contractual Basis

The basis for Oracle to audit clients is established in the license agreement (Oracle Master Agreement (OMA) or Oracle License and Services Agreement (OLSA)). Different versions of the audit clause exist, but essentially the audit clause will express the following:

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Upon 45 days written notice, Oracle may audit Your use of the Programs. **You agree to cooperate with Oracle's audit and provide reasonable assistance and access to information.** Any such audit shall not unreasonably interfere with Your normal business operations. You agree to pay within 30 days of written notification any fees applicable to Your use of the Programs in excess of Your license rights. If You do not pay, Oracle can end (a) Program-related Service Offerings (including technical support), (b) Program licenses ordered under this Schedule P and related agreements and/or (c) the Master Agreement. You agree that Oracle shall not be responsible for any of Your costs incurred in cooperating with the audit.

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### Legal basis

In absence of an audit clause, copyright owners are protected (in most countries) by local laws: In situations where there is a motivated suspicion that copyrights are infringed, holders of such copyright can obtain a court order allowing investigations around suspected copyright infringements.



## Oracle LMS Engagement Partners

Oracle audits clients with the Oracle License Management Services department. In some countries, smaller audit campaigns are initiated by making use of “Qualified Oracle LMS Engagement Partners”. [SevenEights](#) (Formerly: Garmendia Consulting Group) is the largest partner for executing such audits, yet other Audit Partners may be assigned by Oracle in specific countries or industries. But in contrast to Microsoft, IBM and SAP, Oracle has not contractually included rights to outsource their audit rights to a 3rd party: End users may therefore choose to object against Oracle’s appointment of any 3rd party to conduct the audit, alleging that they the LMS Engagement Partner has no relevance and is not entitled to all of the information . Oracle may initially counter that argument in saying that the outsourced Audit Partner is operating under NDA, but Oracle will eventually accept the exclusion of the Audit Partner. Depending on the workload of actual Oracle LMS staff available, objecting to an Engagement Partner will abort or delay the continuation of the audit for many months.

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*Oracle LMS Engagement Partners are not paid per project or per hour. Instead they benefit financially from conducting the audit by means of a reseller and/or a kick-back fee from the eventual deal, often by pushing themselves forward as an appointed reseller to resolve any incompliance.*

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Scenario’s exist where which may constitute a benefit to keeping the Engagement Partner involved. One reason being that these partners don’t include the entire scope of Oracle products due to a lack of material expertise. Engagement Partners typically limit the scope of audits to Oracle Technology products.

## Fishing Expeditions

Oracle sales representatives often try to extract relevant information from clients to find out if there are any arguments for ‘upsells’ or audit nominations, in particular around software virtualization. Even when placing a small order for Oracle licenses, sales representatives try to question the correctness of the order by asking for background information around the IT design. Clients have no obligation to share anything with Oracle’s representatives. In the best case, the information is used to trigger sales discussions. In the worst case, the information is used to nominate the client for an audit. Outside of regular pre-sales activities initiated by the client, it is best practice to not provide unnecessary information to sales representatives. The argument for not sharing information is as simple as saying it is company policy, or by stating that such matters are only discussed with trusted Oracle partners with intimate understanding of the client’s infrastructure. Or just say NO, as an explanation is neither required nor necessary.

It is recommended to have Non-Disclosure Agreements in place with your IT Partners, ensuring that the information cannot be leaked through “trusted” partners: Your partner is most likely also an Oracle partner, and also exposed to Oracle’s fishing expeditions. With an NDA in place your Oracle Partner is forbidden to discuss any information covered by the NDA.



## Oracle License Management Services

Oracle License Management Services (LMS) consists of a team of around 500 employees. The primary task of LMS is to initiate and conduct license compliance audits. Oracle LMS is presented as an independent organization that operates outside Oracle's sales process and only focuses on fact-finding and nothing else.

### Independence of Oracle LMS

The Oracle LMS organization is formally reporting to the Oracle Finance organization. But, the LMS headcounts are funded by the Oracle Sales organization. A Sales director assigning headcounts towards LMS consultants expects a higher ROI from an LMS consultant compared to a Sales representative: Without the increased ROI there is no business incentive for Oracle Sales to assign a budget for employing Oracle LMS consultants.

All Oracle employees will reiterate the independence of Oracle LMS staff. But LinkedIn profiles from many Oracle LMS employees draw a different scene:

#### Experience



#### **LMS Representative in CIS&EE region, Principal LMS Consultant**

Oracle

Jan 2010 - Present • 8yrs 1mo

Moscow, Russian Federation

#### Achievements

- significantly growths of revenue (more than 20 times per 7 years), the same as others KPIs (amount of projects, quality etc.);
- strongly support the quality of all activities, positively affects on reputation;
- doubly increased of simultaneous projects amount in comparison with other regions (from 20 to 40 annually);
- built relations inside of Oracle with internal organizations, i.e. sales, legal, technical support, technical assisting (PDA) etc., that allows to operate with maximum efficiency;
- built a process of forecast on regular business and weekly progress reports that support permanent progress both, the deal closure and the projects performance;
- establishing and leading the ULA certification projects in region caused growth of revenue more than twice;
- organization of work with all LoBs, partners, customers on the highest management level;
- LMS participation in more than 50% of the deals that bring main income in the region.



Clearly revenue is an important operational component for Oracle License Management Services consultants. The obvious risk is that an analysis by Oracle LMS may result in a license requirement, when in reality further interviews should be conducted prior to drawing such conclusion. It is not unreasonable to assume that due to the workload and revenue expectations, Oracle's LMS consultants are inclined to take shortcuts by presenting preliminary results in a draft report, and then wait for a client's *pushback* rather than truly assessing each detail.

An Oracle LMS report is the outcome of millions of rows of audit data, a compelling amount of unstructured data and a large quantity of email correspondence. Most clients are unable to find all of the needles in the haystack and have no choice but to – for the most part - accept Oracle's draft report and settle commercially.

### **Roleplay: Oracle LMS vs Oracle Sales**

All software vendors including Oracle follow an audit process where there is a good cop/bad cop roleplay. Without it, it would be very difficult to ever conclude an audit. With almost all audits resulting in some form of revenue and sales cycle, vendors anticipate on 'handover moment' from the auditor to Sales. Oracle Sales and Oracle LMS consultants will always agree to a roleplay strategy that is then executed during the information gathering and commercial stage that is expected to follow.

The roleplay becomes clearly visible during the audit process. In the majority of cases Sales presents itself as the good cop. At the same time, when clients understand the roleplay and escalation paths Oracle has in place, clients can greatly influence the many stakeholders and escalation paths within Oracle to establish a better position during the audit process and the negotiations that is to follow.

## Oracle's audit workflow

Oracle operates in accordance with a standard workflow during audit execution. The audit has the following components:

1. Oracle announces the audit in writing (often via email) at executive C-level, who defers the coordination to the IT or contracts department.
2. Follow up from Oracle with an introduction email from Oracle's auditor, announcing a kick-off call (or meeting) to be scheduled.
3. The operational aspects of the audit are executed at IT-management and operational level. During the call Oracle aims to discuss and agree upon:
  - a. Timelines
  - b. Escalation paths
  - c. Actions to be taken by the client (information request)
    - i. Requirements of executing audit scripts
    - ii. Provide screenshots of environments
    - iii. Provide IT architectures, in Excel or other formats
4. All of the data is expected to be uploaded to Oracle's web-portal.
5. Oracle will start with the analysis of data, often resulting in additional requests for data, scripting or clarifications.
6. A draft report is presented for the client to comment on prior to a pre-set date. Most draft reports don't include a compliance overview or contractual motivations. Clients are sometimes asked by Oracle to formally acknowledge the correctness of the draft report.
7. Final report is provided, which includes more arguments and compliance figures.
8. LMS refers clients to Oracle Sales to resolve any issues found.
9. Oracle Sales will send an initial proposal with an excessive figure with little or no discount + backdated support to the client (including C-level sponsor) to create momentum.
10. Negotiations begin.

## Considerations for Oracle's audit scripts

During the audit kick-off meeting, Oracle presents the requirement of having to run scripts as a pre-requisite for the audit to commence. There are multiple arguments that should be considered by clients prior to executing and sharing information.

### Privacy and Data Protection

Oracle has a vast variety of audit scripts for different product lines and license metrics, and what they extract varies. In general, and in most situations, many if not all of the following information is extracted:

1. Computer hostnames
2. Usernames identifying individuals (DBA\_Users table)
3. IP Addresses
4. Connect strings
5. Database names

None of these elements have any relationship with the license agreement, but Oracle will extract the data using the audit scripts. At no time concerns around privacy and data protection are addressed, such as:

- Who at Oracle is accessing the data?
- How the data is being used?
- Where the data is stored?
- How the data is protected?
- If, how and when is the data is being deleted?
- How can the client be reassured that all of the above is governed?

Clients are expected to upload the data to a software vendor employing over 130000 employees. Thereafter, clients have *no* control what happens with the data at Oracle. Clients who address this phenomenon don't get a satisfactory answer other than that Oracle have an encrypted / masked version of the scripts.

However, Oracle's encryption contains errors and is based on the outdated MD5 algorithm. Clients may also be referred to the confidentiality clause in their agreement, but that clause does not address any of the issues above.

### Liability considerations

When executing Oracle's scripts, users are prompted with a license agreement. Staff members who execute the scripts are highly technical who, unsurprisingly, accept many electronic license agreements on a daily basis without having read a single one. Even so, the agreement of Oracle's audit script states that Oracle's liability is limited to USD 1,000, and that Oracle is not responsible for any impact the scripts may have on the business operation:

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#### LIMITATION OF LIABILITY

In no event shall oracle be liable for any indirect, incidental, special, punitive or consequential damages, or any loss of profits, revenue, data or data use, incurred by you or any third party. Oracle's entire liability for damages arising out of or related to this agreement, whether in contract or tort or otherwise, shall in no event exceed one thousand u.s. dollars (u.s. \$1,000).

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Oracle's license agreement does not reflect that the client has only to provide 'reasonable assistance and [reasonable] access to information'. By running scripts that are mostly executed with root or system privileges, the client's systems are clearly exposed to outside risks. *Unreasonably*, Oracle does not assume full and unlimited liability for the proper workings of their scripts.

## Case Law

French supermarket Carrefour had a dispute with Oracle around the requirement of having to run Oracle's audit scripts. The verdict from the court was that by executing Oracle's audit scripts, the information collected would reach much further than the scope of the license requirement and that Carrefour's confidentiality was not protected. In the verdict, the court ruled that the audit clause does not assume any requirement for scripts to be executed. The takeaway is that Oracle may only request and consider information that is directly related to the agreement, and not any other information they may find relevant.

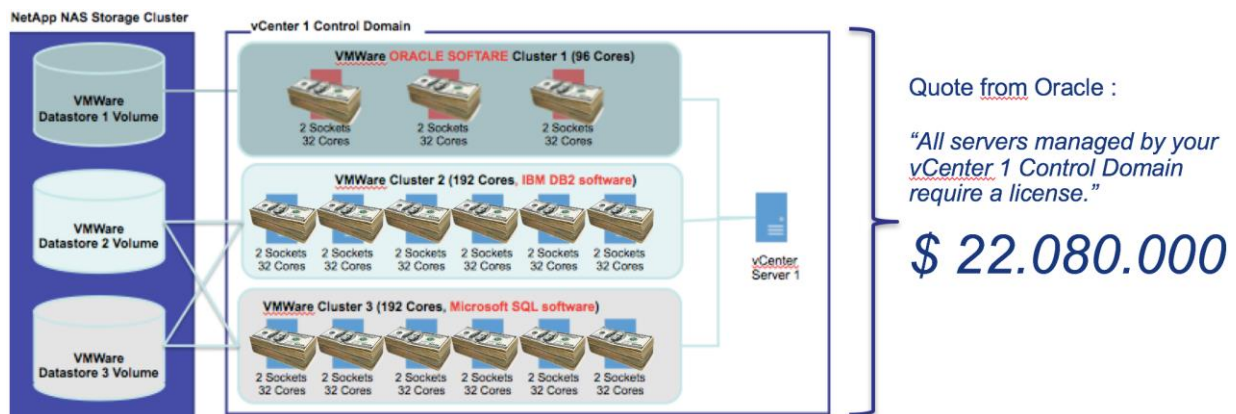
The court ordered that no information from Oracle's audit scripts had to be shared with Oracle. In the end, only contractually relevant information was collected and analysed by external experts appointed by the court. None of the data had to be shared with Oracle.



## VMware and other (non-Oracle) hypervisors

Oracle assumes a prerequisite to collecting other unrelated data. For example, Oracle will request information about VMware versions. Other data requests include output from Powershell scripts and vCenter screenshots. All of such information requests can be ignored, knowing that the information is only going to be used to suggest excessive noncompliance claims that the client then has to defend:

*Example of excessive claim on VMware environment:*



Source: License Consulting, VMworld Presentation

Based on an infrastructure design as illustrated above or CLI scripts that collect the same data, Oracle will claim license revenues for servers/clusters that are not designated to have Oracle programs installed and/or running at any point in time. And yet, Oracle *will* claim license revenues for clusters that execute competitive database programs from (IBM and Microsoft databases), arguing that the client *may be able to (or may have) executed* Oracle software outside the dedicated Oracle cluster.



Very similar to not having to script unrelated data on the systems, clients have no contractual obligation to provide Oracle with such Datacentre information. This is established by fact that the license agreement is agnostic towards software virtualization, and that for Oracle's Processor based licensing models the contract outlines that only the information about physical hardware / server is relevant in situations a Processor has '*Oracle Programs installed and/or running*'. Any information about other Processors is therefore outside the scope of the agreement and consequently irrelevant. No such unrelated Processor information should be submitted to Oracle in any shape or form, in order to prevent excessive claims from occurring.

When the claim illustrated above is 'settled' at 99% discount it is not the client who made a good deal: By admitting to any license requirement for servers where no Oracle programs are installed and/or running, a client may imply agreeing with Oracle's policies. This leaves the client exposed to other claims down the road, for example at the point when the client is adding servers to the dedicated IBM DB2 cluster. Had this client withheld the information and asked the simple question about the contractual relevance of the information request, no claim could have materialized.

For further information around licensing Oracle on VMware:

<https://blogs.vmware.com/vsphere/2015/04/oracle-licensing-discussion-definitive-collateral-collection.html>.



## Final thoughts

A lot has changed since our company was founded in 2007. But after having supported hundreds of Oracle clients during Oracle Audits, the following has remained the same:

1. Oracle's auditors are not impartial about Oracle's license revenue and sales figures. The risk of an auditor claiming a highly debatable license requirement is therefore always present.
2. Many information requests by Oracle during (and outside) audits are beyond what is permissible and in scope of the license agreement. Both the audit clause itself and European case law support this conclusion.
3. To manage Oracle audits in a professional and formal way, information requests should be discussed up-front. Ideally:
  - a. On the client side an internal security officer and legal counsel should participate to manage Oracle's expectations.
    - i. Operational IT staff should receive clear instructions about which information requests to permit and dismiss.
  - b. External expertise with vast experience in dealing with Oracle audits should be consulted to:
    - i. Contextually explain all the information requests and explain what the data means prior to sending it to Oracle, and
    - ii. To internally explain and quantify compliance liabilities (before they are presented by Oracle).
4. The importance of preventing excessive claims cannot be understated for the following reasons:
  - a. For Oracle Sales representatives, it is very difficult to internally explain a significant lower deal size than initially stated. As a direct result, it becomes equally difficult for clients to reduce the price point to a realistic value.
  - b. The client's C-Level executives typically have no material expertise, but responsible for corporate governance and financial reporting. They have a regulatory obligation to report compliance and financial claims to accountants and shareholders. Unsurprisingly, C-Level executives will prevent this by striking quick deals if necessary, no matter how unfounded the claim is. And Oracle knows it.

- c. Settling excessive claims may infer implicit or tacit acceptance of Oracle LMS' interpretations of the agreement over and above the actual contractual agreements in place, even when resolving them at a 99% discount. Oracle can now argue that the company already accepted Oracle's policies and interpretations, as illustrated by the prior license purchase agreed after the audit.

**CONTACT US** 

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