

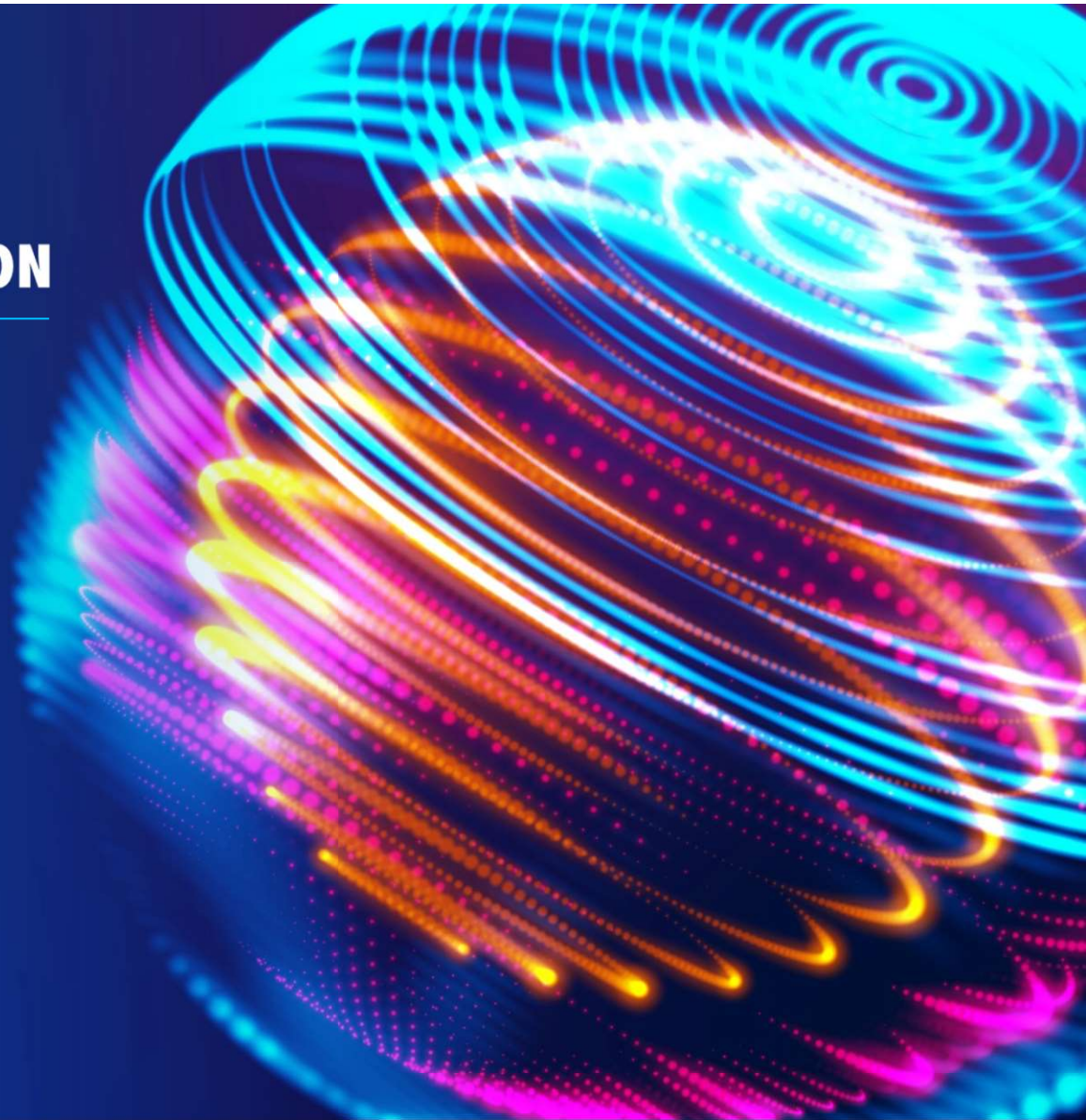
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WEBINAR SERIES

NEGOTIATING XAAS CONTRACTS

February 8, 2022

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Presenters



Peter M. Watt-Morse



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Before we begin

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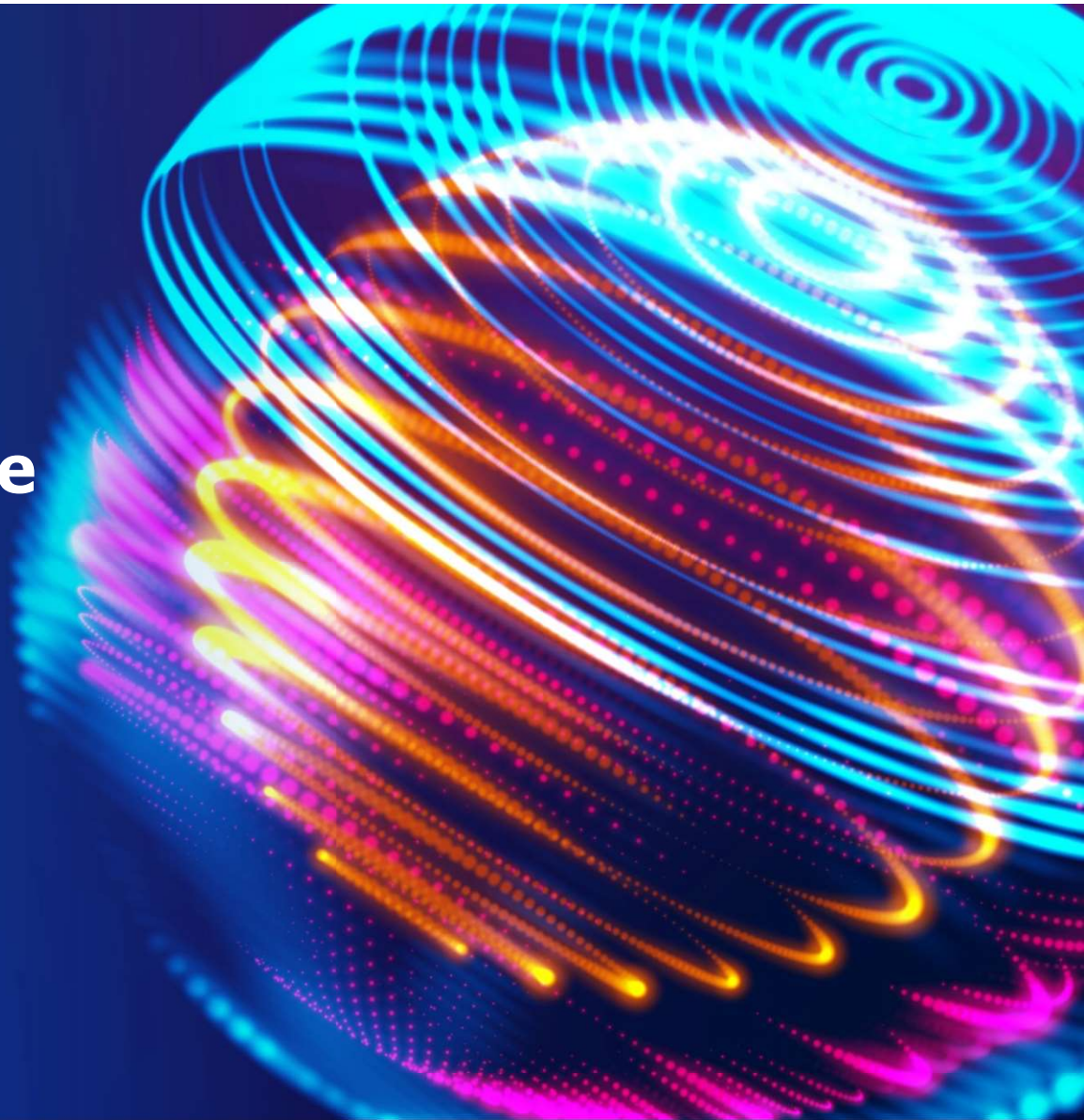
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Agenda

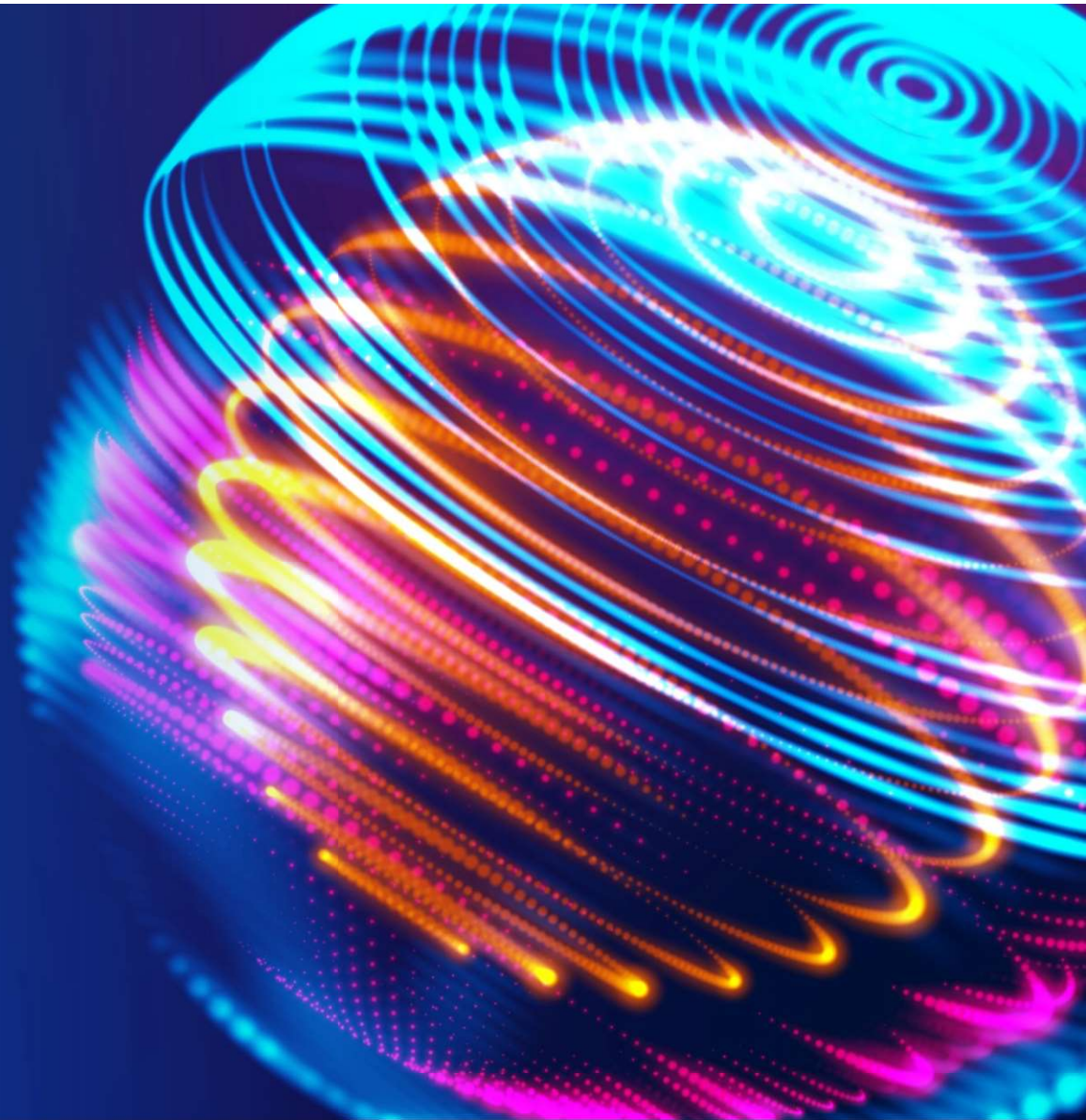
1. **Scene Setting**
2. **Vendor due diligence**
3. **Transition**
4. **Service levels**
5. **Data rights**
6. **Remedies**



SCENE SETTING

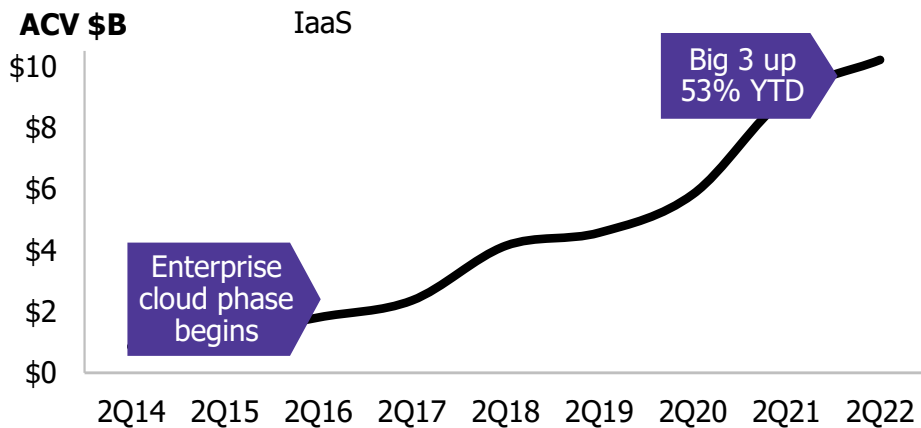
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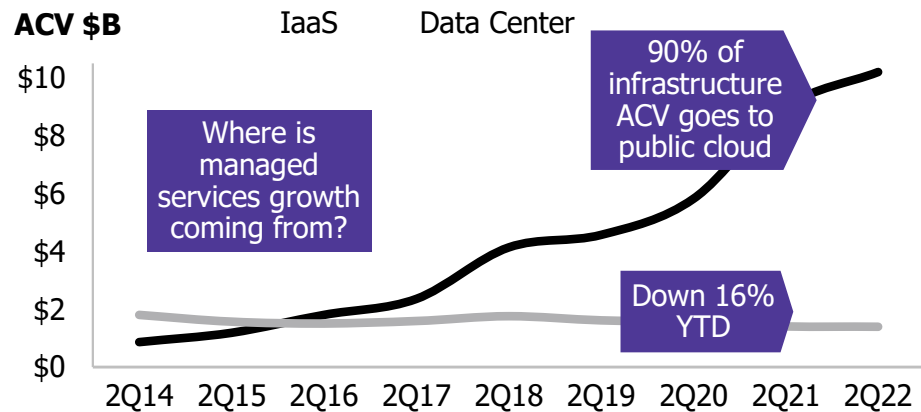




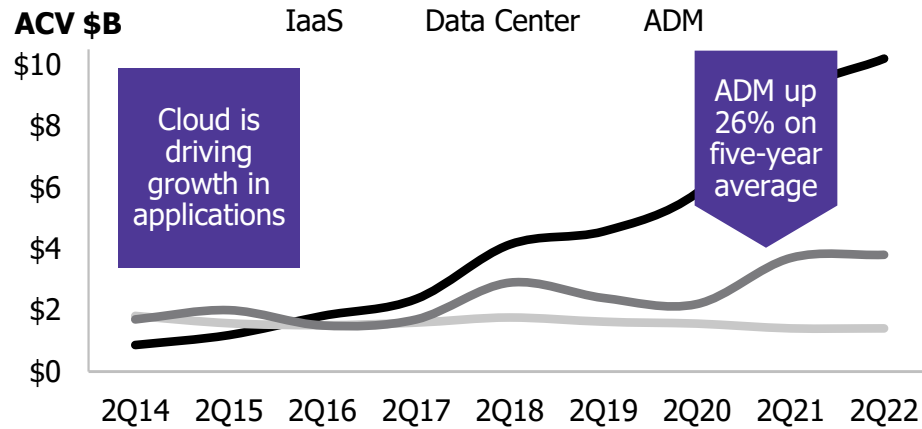
Infrastructure as a Service Growth Accelerates



While Data Center Continues to Decline

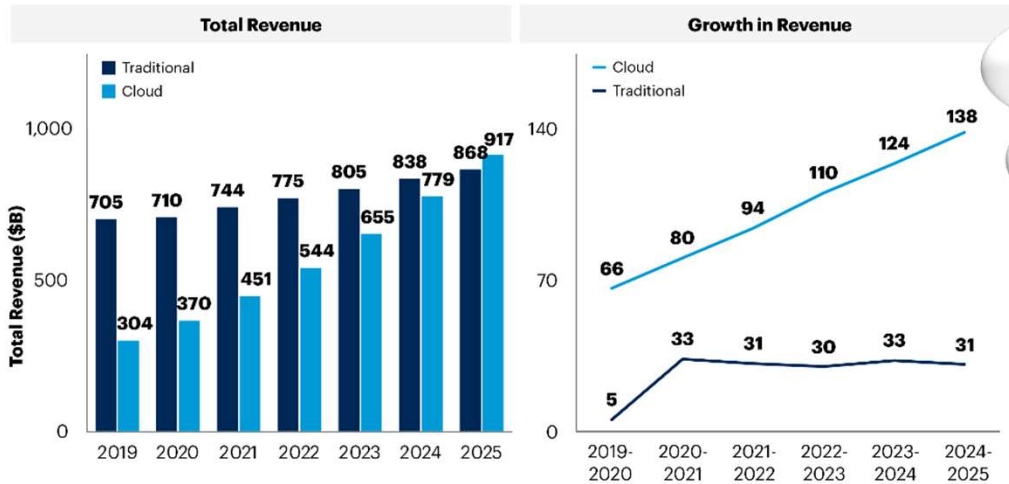


Application Data Management Growth



Source: ISG, 2022,
ACV = Annual Contract Value

Cloud Solutions: Continued Growth



Source: Gartner
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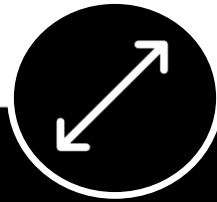
Gartner

“The pandemic sped up public-sector adoption of cloud solutions and the XaaS model for accelerated legacy modernization and new service implementations... Fifty-four percent of government CIOs responding to the 2022 Gartner CIO survey indicated that they expect to allocate additional funding to cloud platforms in 2022, while 35 percent will decrease investments in legacy infrastructure and datacenter technologies”
Gartner, June 13, 2022

Cloud Solutions: Essential Characteristics



On-demand and self-service



Rapid elasticity or expansion, as needed



Measured service



Resource pooling

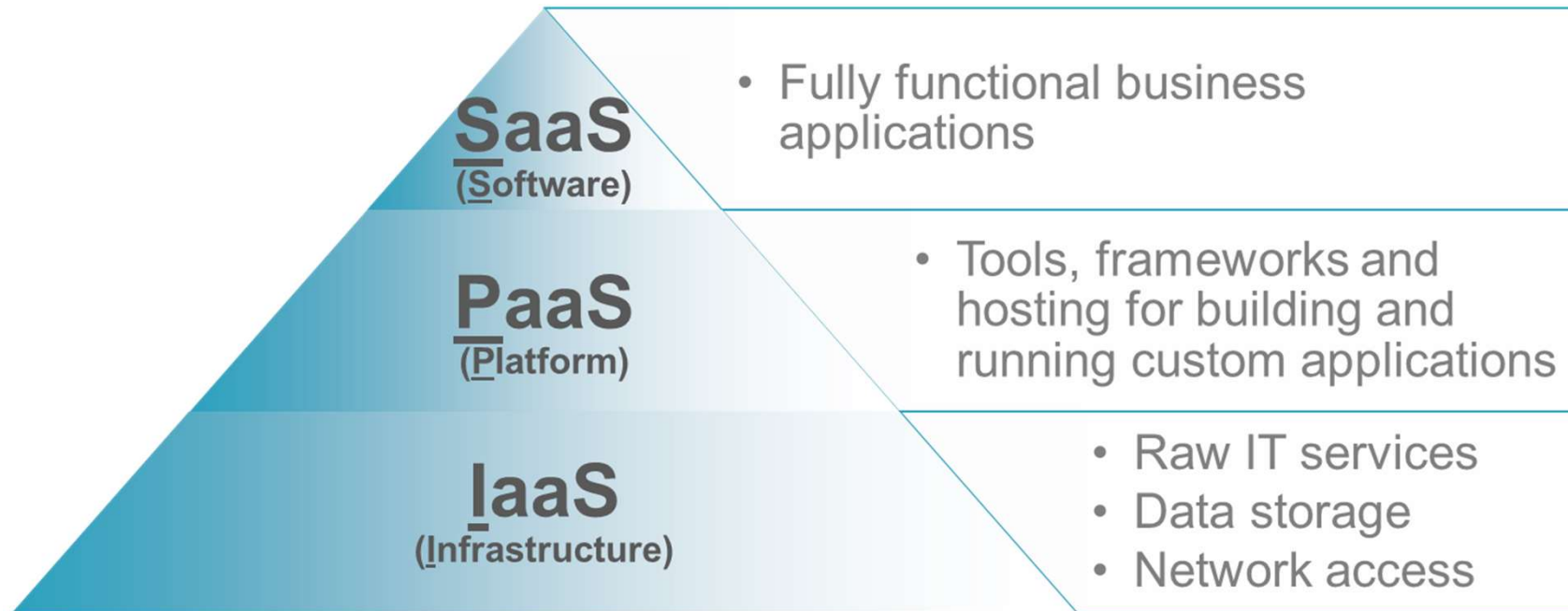


Broad network access



**Deployment Models
(public, private, hybrid)**

Types of Cloud Solutions



The Cloud – Examples



Anything As A Service outside of the Cloud



Coffee subscriptions



Home printing subscriptions

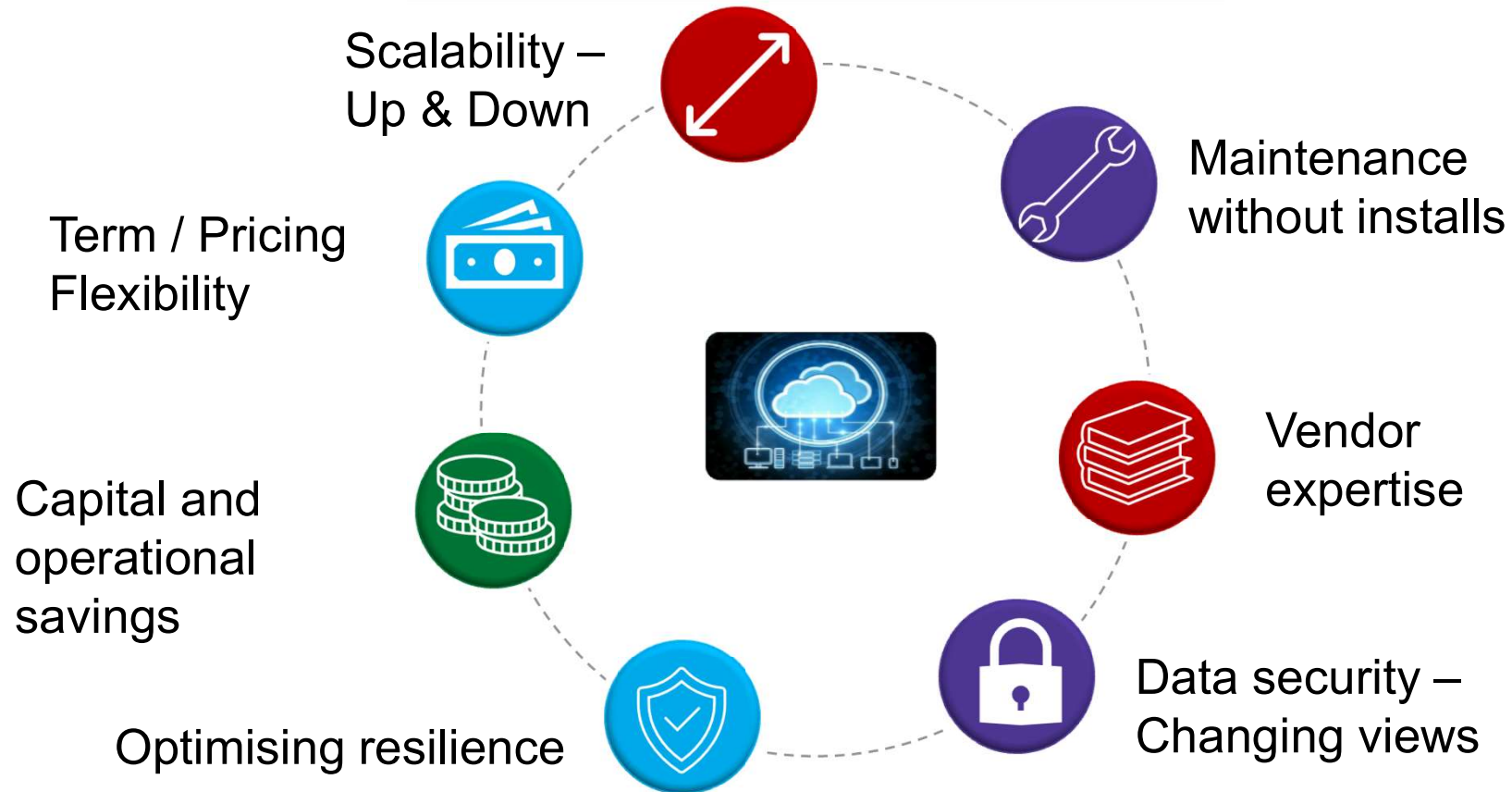


News subscriptions

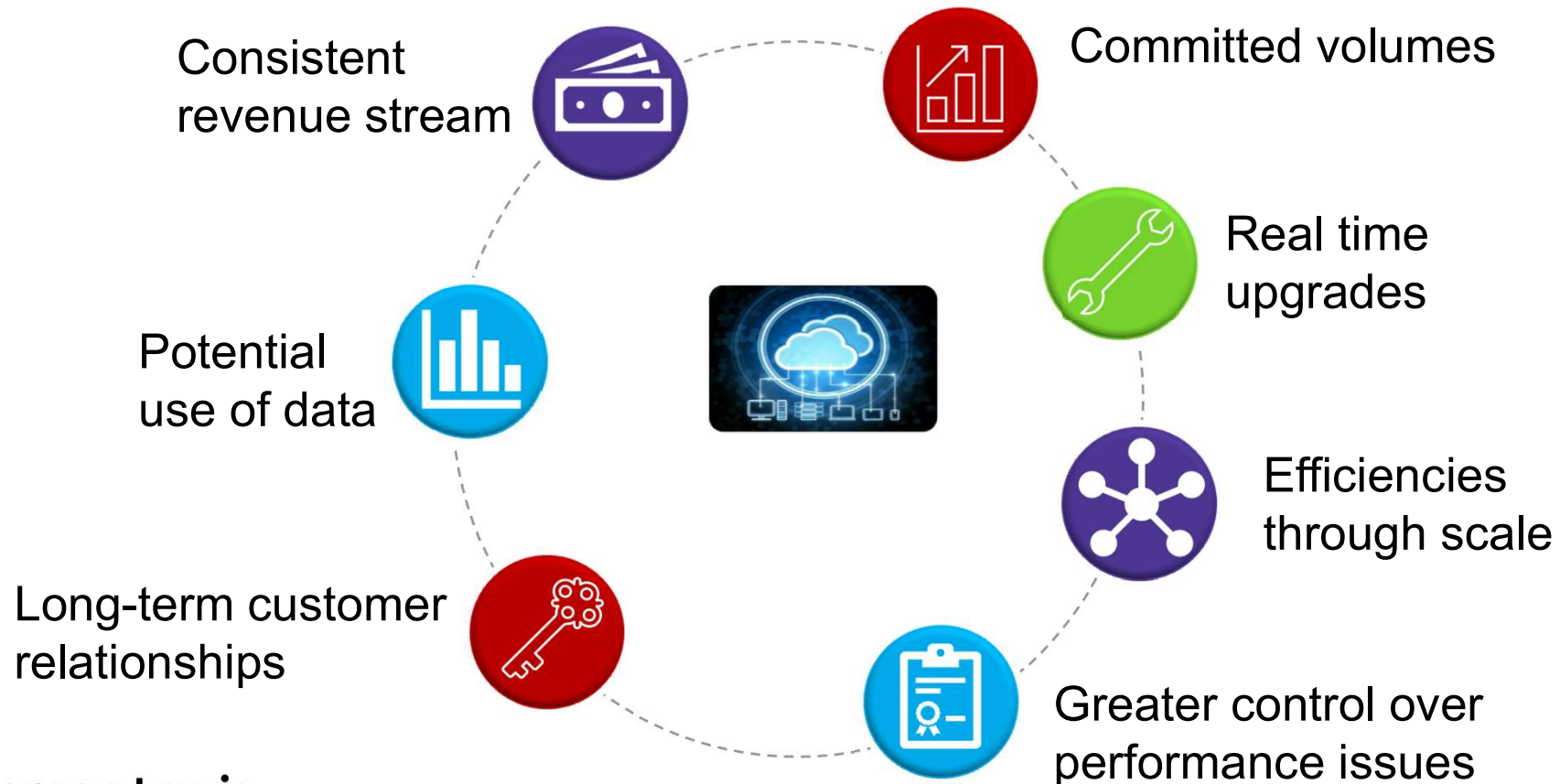
Leveraging the Cloud for Anything As A Service



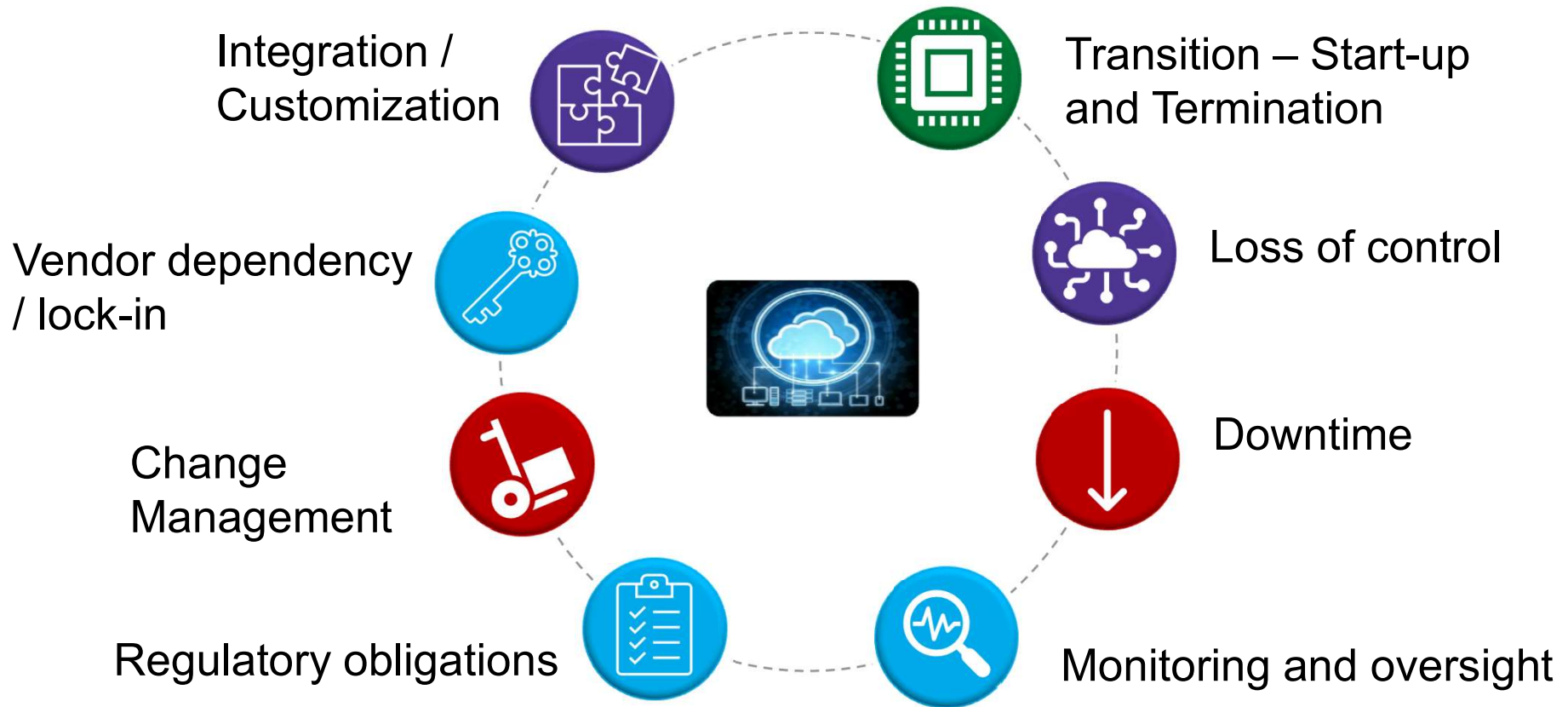
Benefits of As A Service: customers



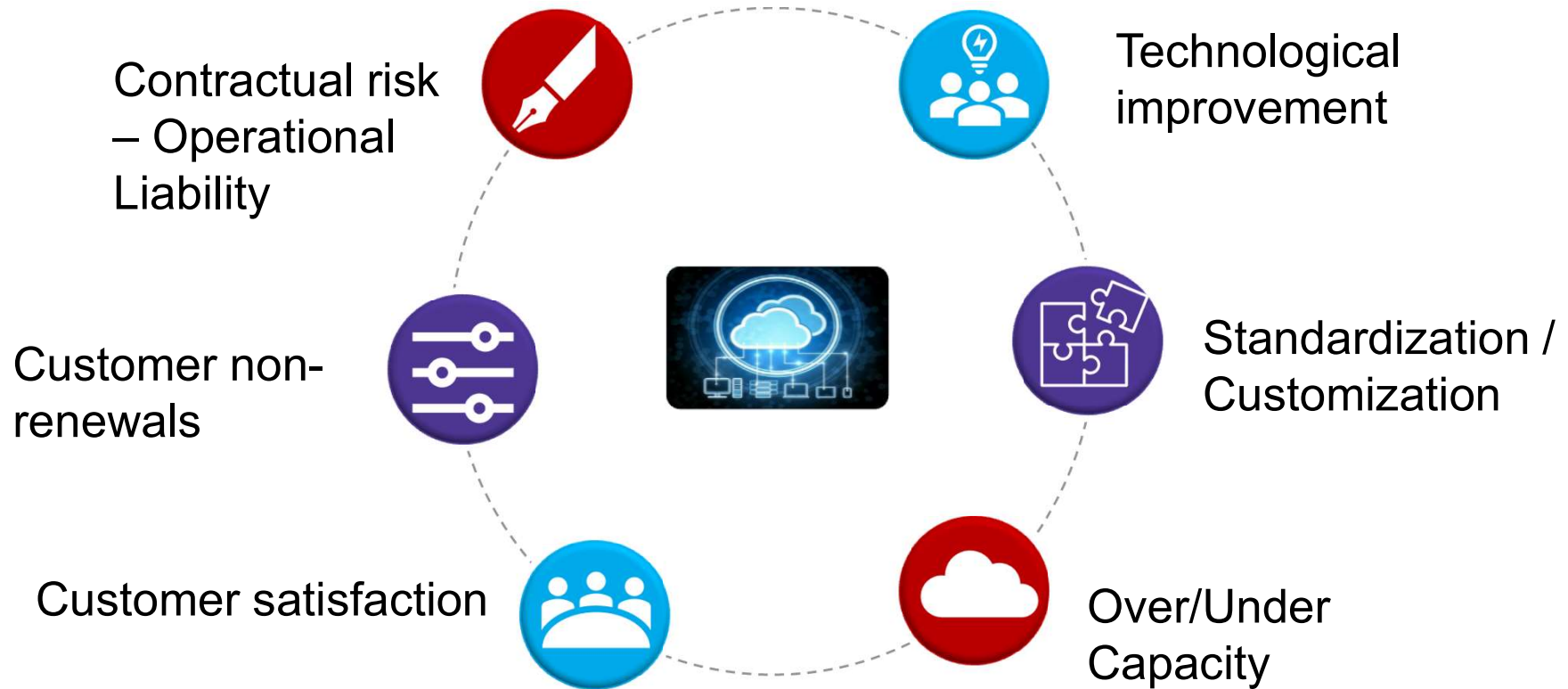
Benefits of As A Service: vendors



Challenges of As A Service: customers



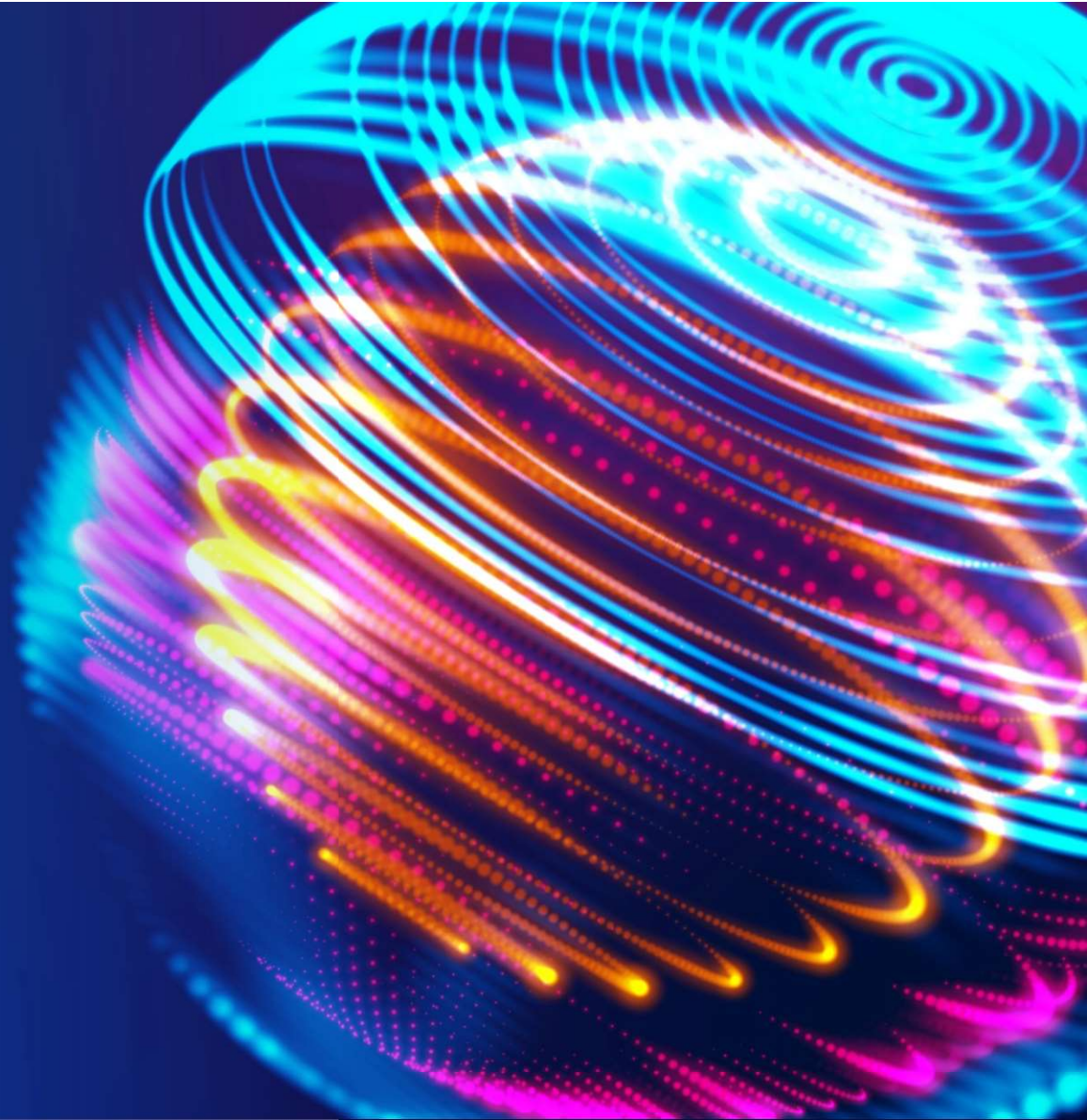
Challenges of As A Service: vendors



VENDOR DUE DILIGENCE

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Vendor Due Diligence: What to look for



Proposed solution

- User experience
- Vendor security
- Customized?
- Connected with other products?
- Longevity of vendor / solution



Legal terms

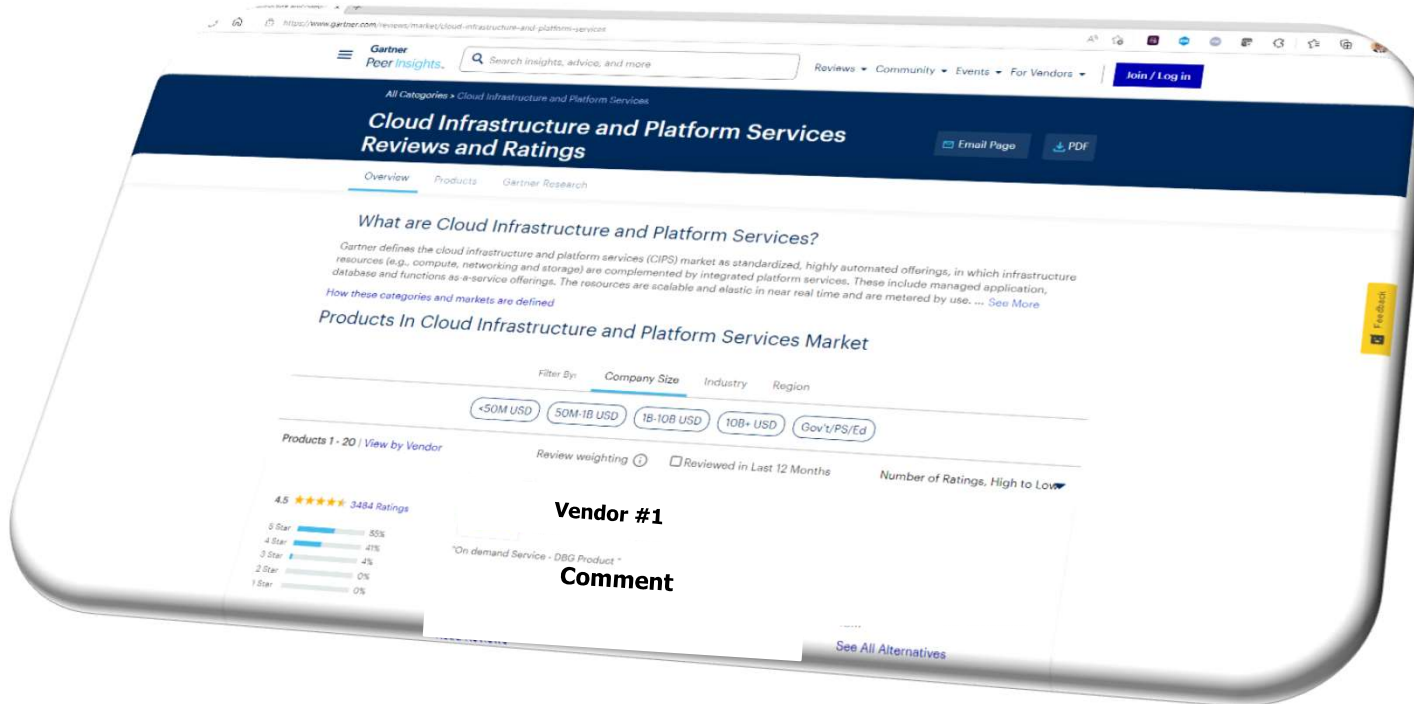
- Vendor form agreement - negotiable?
- Scope and term
- SLAs
- Hyperlinked documents
- Liability risks / indemnification
- Warranty disclaimers
- IP / Technology protections
- Subcontracting rights
- Insurance requirements



Commercial terms

- Flat fee? Usage based?
- Project pricing – fixed / not-to-exceed.
- Ability to adjust prices (e.g., indexation, increased costs).

Vendor ratings: Gartner

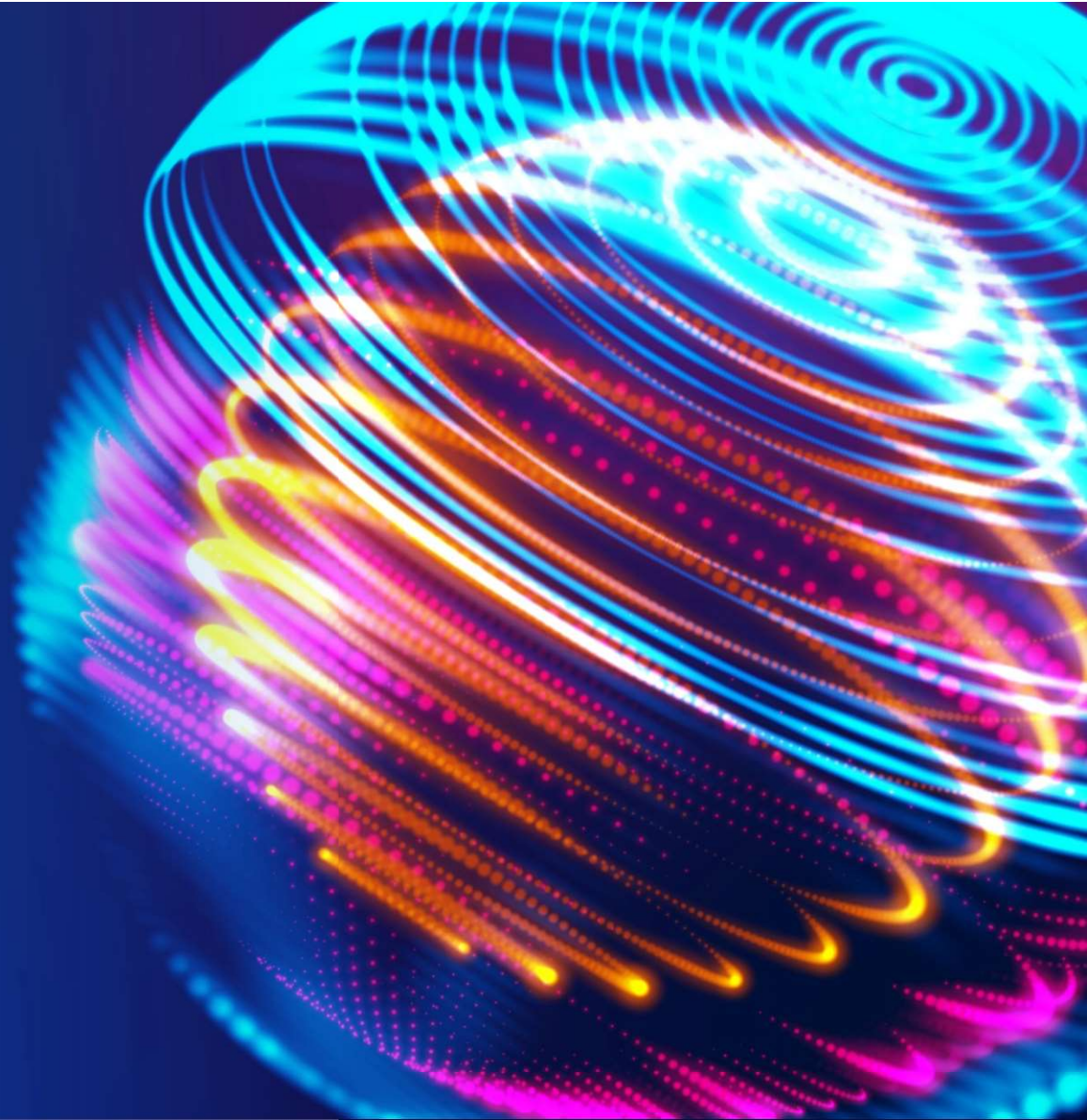


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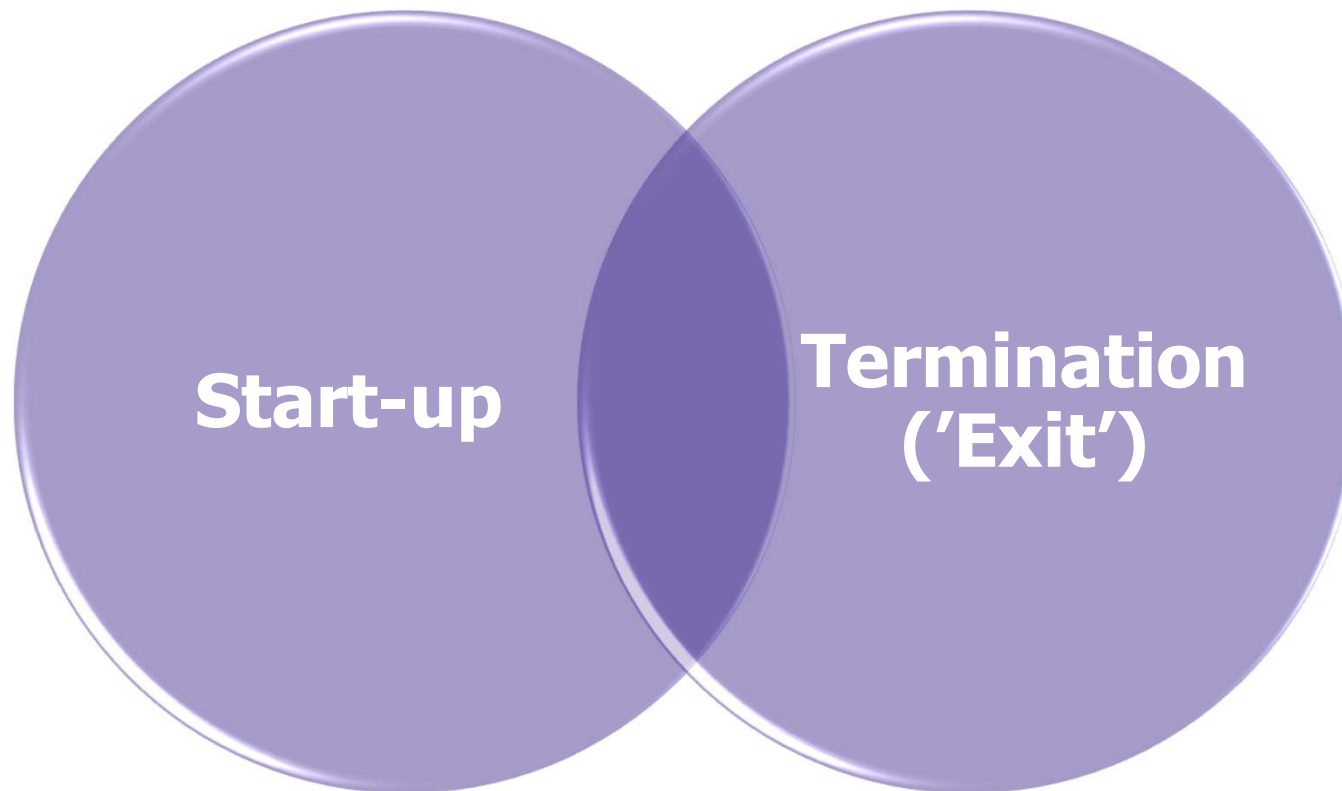
TRANSITION

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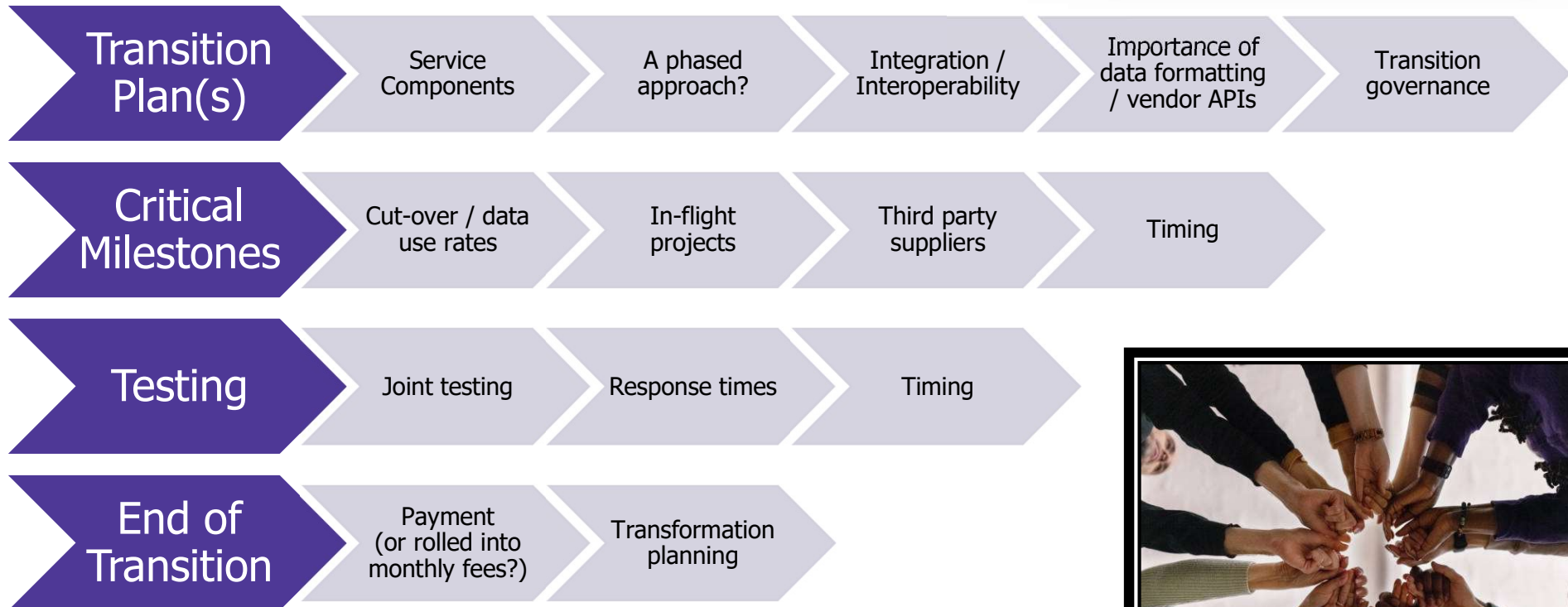
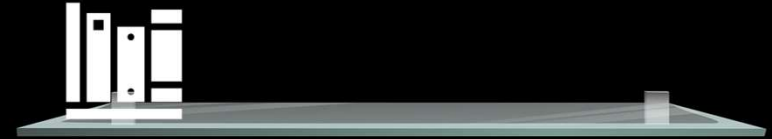
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Transition: What does it mean?



Transition: Start-up Planning



Transition Planning: Data considerations



Exit Considerations



Customer

- List all items needed if vendor 'switched off' the service
- Timings: term, renewals and notice periods
- Support time periods
- Return of data – security; data protection

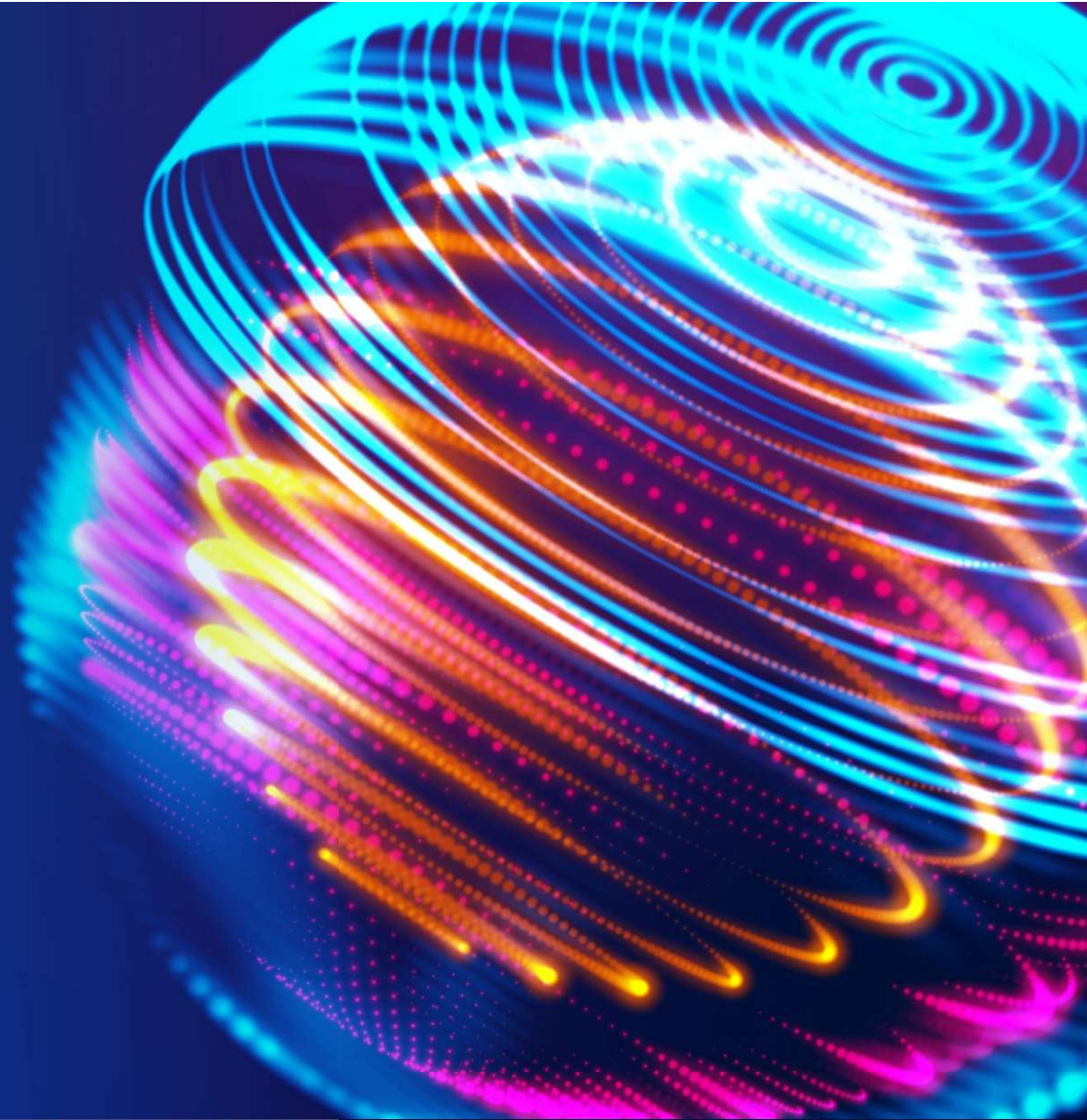
Vendor

- Payment for termination assistance / return of data
- Format of returning data
- Any continued rights of use, or relief of responsibility after return of data

DATA RIGHTS

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Data Rights

- **Confidentiality and Data Protection**

1. Security Standards

2. Audit Rights

3. Multiple Customers

Data Rights

- **Data Ownership**

1. Customer Data Ownership vs. Confidentiality

2. Operational Data – Customer specific vs. general

3. Derivative Data Ownership

Data Rights

- **Aggregation Issues**

1. What are the types of data that may be aggregated?
2. How will the data be de-identified and aggregated?
3. What is the aggregated data's scope of use (should there be any express restrictions)?
4. Who has the right to use the aggregated data, and who owns it?

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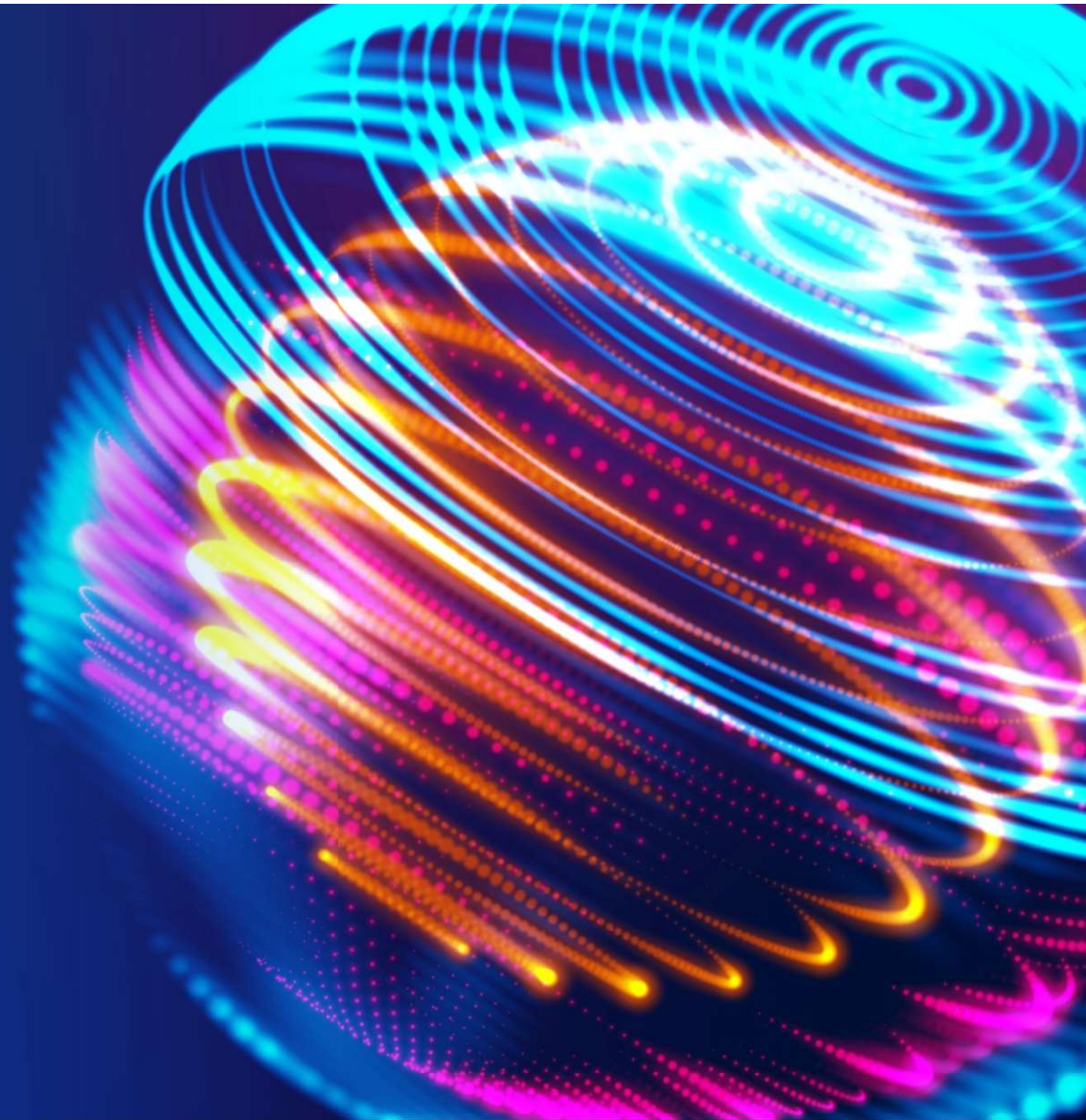
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SERVICE LEVELS

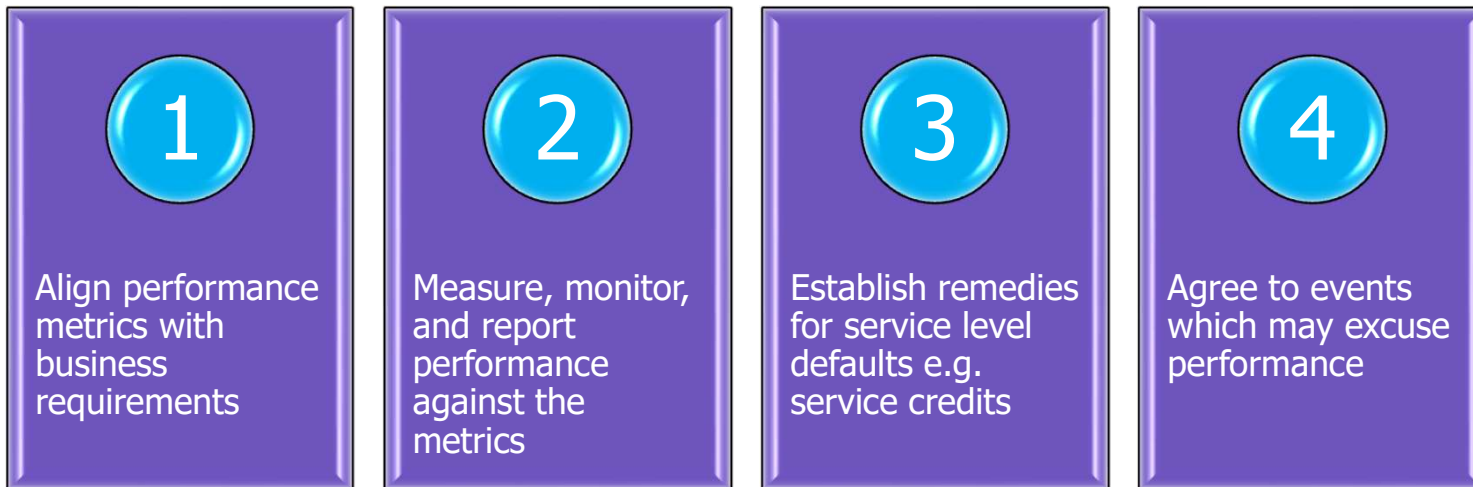
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Service Levels: Why they matter

Following the significant shift to the use of “as a service” models, cloud solutions, and outsourcing as a means of enabling scalability, improving services, and accelerating access to in-demand resources, ***vendor performance is increasingly relied upon to enable business operations***. This has underscored the importance of implementing a solid service level methodology in order to:



Service Level Methodology Basics



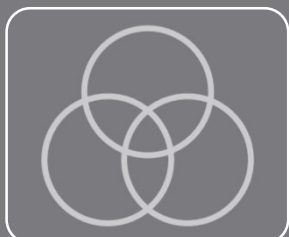
Establish metrics based on:

- Continuous availability of the services.
- Timing-based requirements (e.g. does supplier provide service at required time).
- Quantitative measures (e.g. number of errors).



Minimum metrics

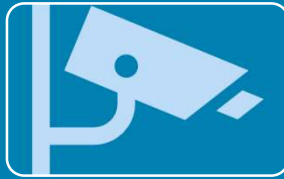
- Performance standards should meet expectations and be achievable.
- Consider differentiating between “expected” and “target” metrics which attract different remediation consequences.
- Availability vs Uptime (99.9% vs 99.5%).
- Allow for scheduled maintenance / planned downtime.



Critical vs key service levels

- Consider distinguishing between business critical and key service levels with clear consequences for missed service levels (root cause investigation, remediation, credits).

Service Level Methodology Basics



Monitoring Tools

- Monitoring tools should be able to monitor the full scope of metrics and relevant services and part of normal ongoing operations.



Reporting

- Reporting usually aligns with the metric duration; trend analyses across reporting periods are also common.



Continuous Improvement

- Improvement of performance standards through formal review processes and/or automatic increases in service levels at certain milestones.



Remediation

- Root causes analysis; rectification.
- Service credits for failures for certain critical service levels - may have ramp-up period and have potential earn-back or bonus amounts for vendors for superior performance.

Service Level Methodology Basics



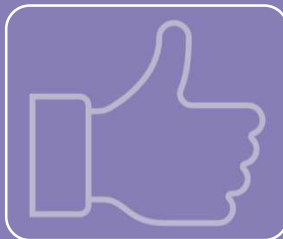
Right to make changes

- Consider rights (unilateral or with consent) to make event-specific changes to services levels, such as:
 - promotion/demotion of critical and key service levels;
 - changing the metric or at-risk amount; and/or
 - adding/deleting service levels.



Termination Rights

- Consider termination rights for certain critical services or repeated breaches, such as:
 - whether termination in whole, or in part, are permitted; and/or
 - any special notice periods for such termination rights.



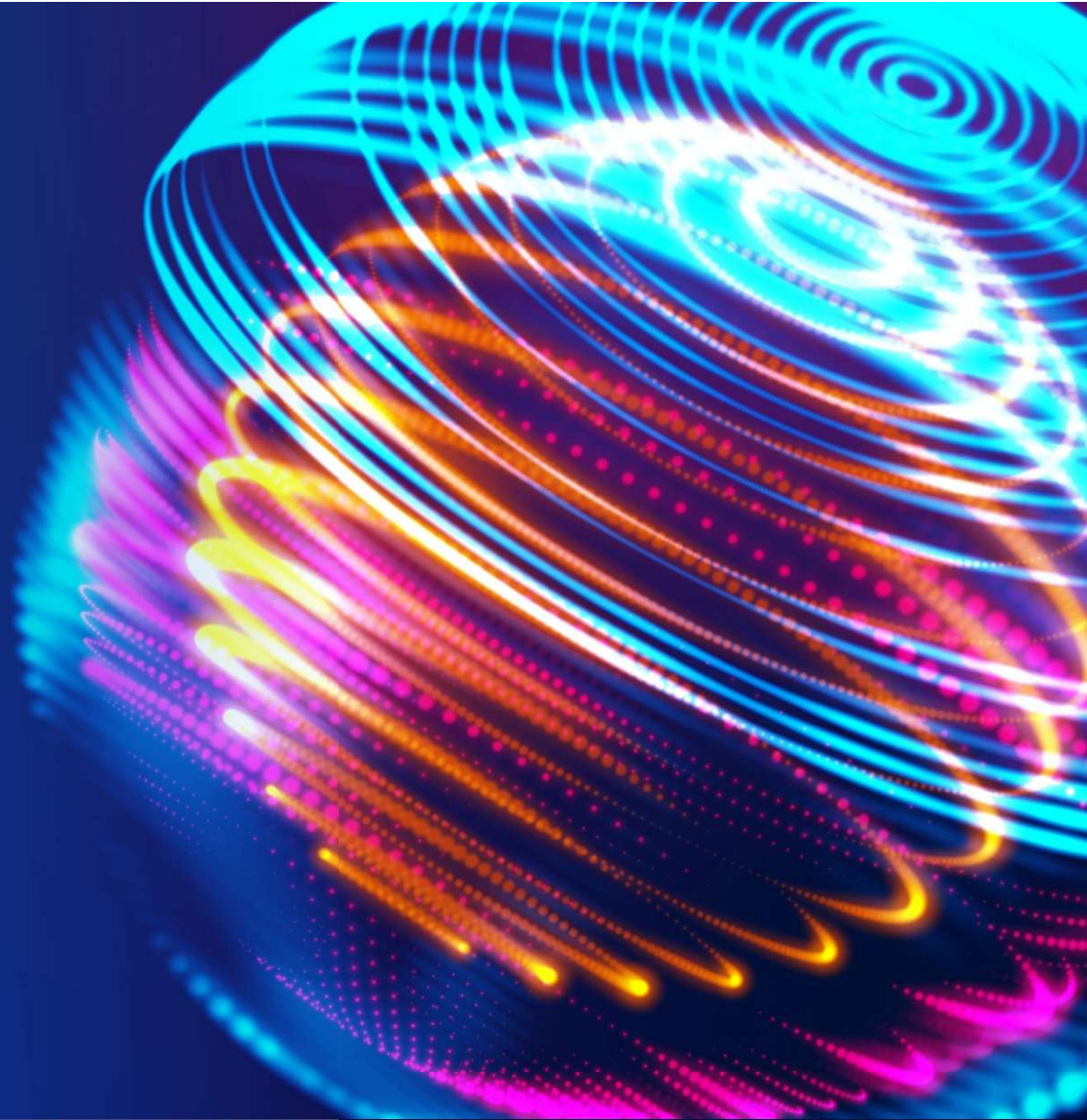
Excused events

- Consider addressing occurrences for which the supplier would be excused for missing service level metrics e.g., customer dependency failures; force majeure; appropriate adjustment of the service level metrics and any credits/incentives.

REMEDIES

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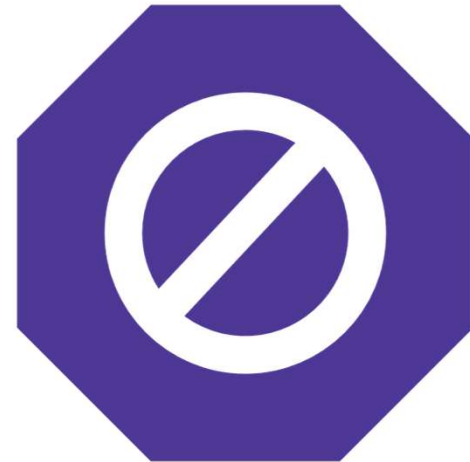
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Remedies: Suspension

As a service form agreements, particularly SaaS, may contain provisions giving the vendor favorable rights to suspend the services being provided under the contract. E.g. suspension rights relating to:

- non-payment;
- security issues;
- disruptive use of the services; and
- violation of law through use of the services.



Remedies: Impact of Suspension

If suspension of the services could have disastrous consequences for the business, review substituting suspension rights with alternative methods for addressing concerns (alternative payments (up-front, letter of credit), heightened security measures, etc.).



Remedies: Additional Suspension Considerations



Trigger: Review reasons for suspension and should they be limited? E.g. use of the services in violation of law may result in a suspension right, but non-payment does not (Dispute issues).



Discretion: Is the exercise of a suspension right at the vendor's sole, reasonable, or other standard of discretion?



Notice: Is the vendor required to give prior notice of suspension, how much notice is required, and is the customer given the opportunity to cure the issue prior to suspension?



Duration: Suspension should only last for the duration of the violation or until mitigative steps are taken and the vendor should restore the services immediately after violation is cured or threats mitigated.



Requested suspension: if applicable, may add right for customer to request that vendor suspend its services e.g. if the services pose a threat to the security of the customer's systems.

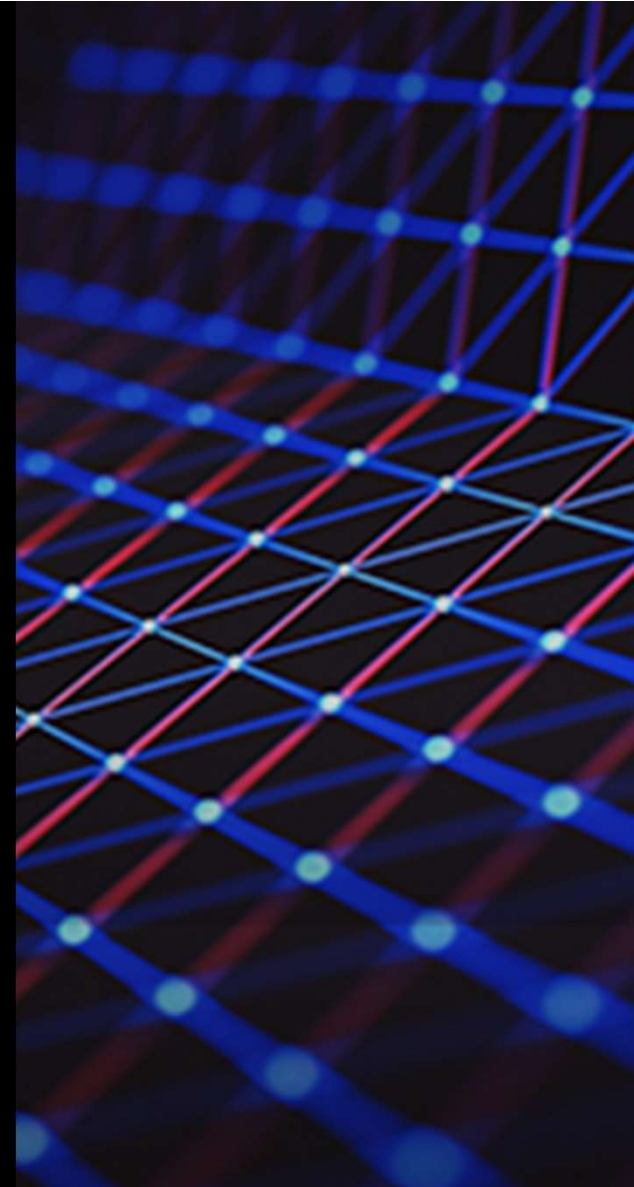
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



Biography



Peter Watt-Morse

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Peter M. Watt-Morse, one of the founding partners of the firm's Pittsburgh office, has worked on all forms of commercial and technology transactions for more than 40 years. Peter works on business and intellectual property (IP) matters for a broad range of clients, including software, hardware, networking, and other technology clients, pharmaceutical companies, healthcare providers and payors, and other clients in the life science industry. He also represents banks, investment advisers, and other financial services institutions.

Peter advises companies on business process (BP) and information technology (IT) outsourcing transactions. He also handles technology acquisition, development, licensing, and distribution agreements; strategic alliances and joint ventures; IP creation and strategy; university and governmental technology transfer issues; and general corporate and commercial matters.

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Biography



Katherine B. O'Keefe

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Katherine B. O'Keefe focuses her practice on technology, outsourcing and commercial transactions. Katherine regularly assists clients in structuring, negotiating, restructuring and terminating information technology (IT) outsourcing and business process outsourcing (BPO) agreements, technology agreements including software as a service (SaaS) and cloud deals, and commercial contracts such as supply agreements. Katherine represents clients from a diverse range of industries, including the technology, retail, financial services, and health insurance industries.

In her practice, Katherine collaborates with clients and their external consultants to structure and negotiate deals designed to meet defined business and cost objectives, mitigate risks and comply with regulatory and other legal requirements.

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Biography



James M. Mulligan

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James Mulligan advises multinational clients on technology transactions, outsourcing, and commercial contracts. His practice encompasses a broad spectrum of financial services transactions, complex IT and business process outsourcings, and technology-specific transactions, such as licensing and “as a service” arrangements. James has experience in highly regulated industries and has completed a secondment to a leading technology and financial services business, where he negotiated high-value outsourcing arrangements as part of corporate actions.

James represents a diverse client base across payments services, investment management, banking, corporate services, technology, life sciences, and sports industries.

In addition to his technology and outsourcing practice, James advises both customers and suppliers on a wide range of commercial arrangements, such as supply of goods and services agreements, agency agreements, transitional service agreements, master services agreements, intellectual property licenses and data processing agreements.

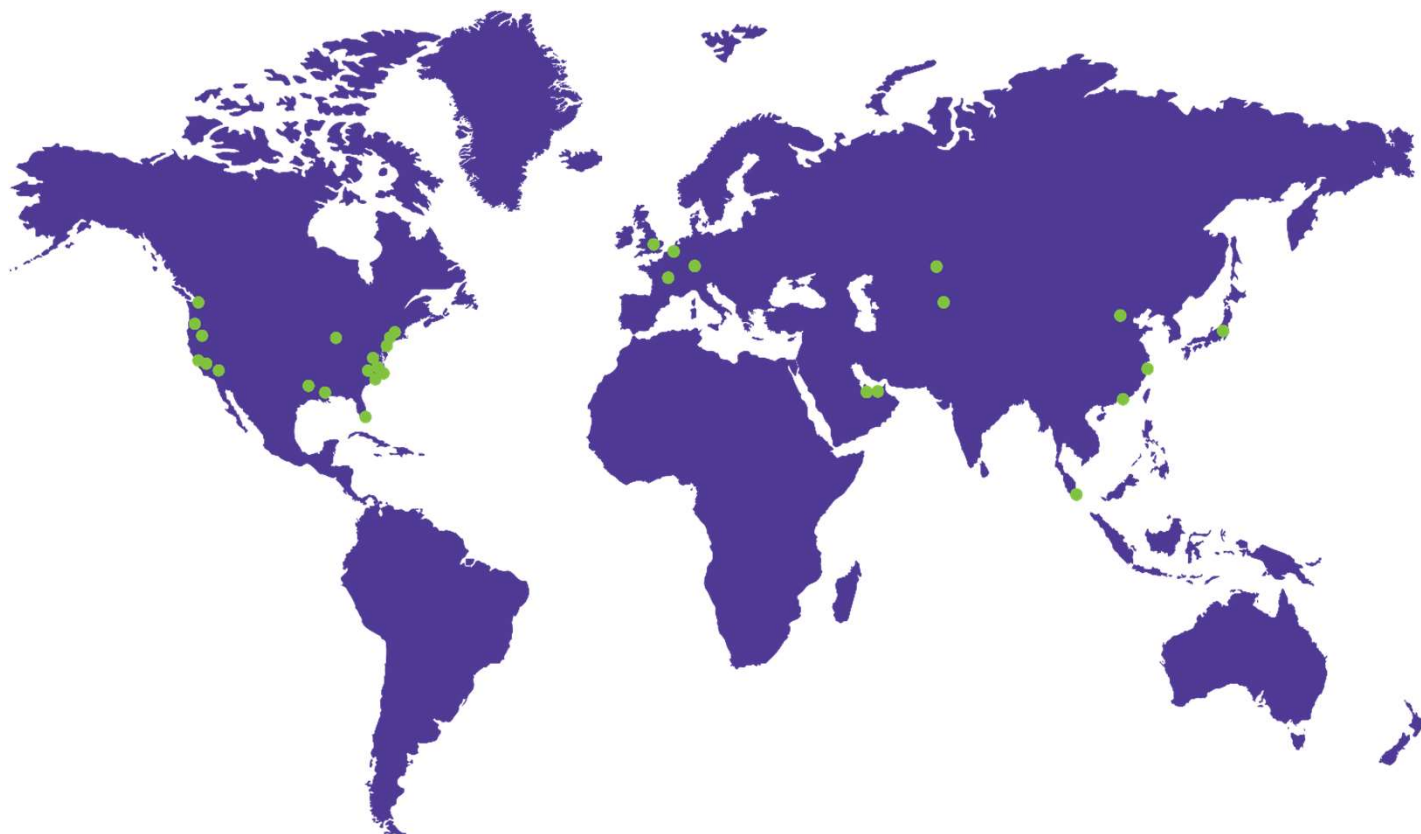
Prior to completing his training contract at Morgan Lewis, James worked in the compliance team of a global asset manager.

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