



FLORIDA
INTERNATIONAL
UNIVERSITY

Office of the Controller – Procurement Services

Click-Through Agreements Standard Operating Procedure

Provided By Office of General Counsel

Introduction:

When encountering new computer applications, software, or other services (even “free” ones) available online, you may be required to click a button that says “yes” or “I agree” as to certain terms and conditions in order to use the application. These are “click-through” agreements. One may even receive this request to click-through when upgrading to the latest version of an existing application.

Click-through agreements have become so common it’s easy to forget that they are legal contracts. Since FIU is a public entity of the State of Florida, the University is precluded from agreeing to certain terms and conditions. Unfortunately, it’s common that standard click-through agreements contain language and terms that are not allowed by state law.

This document provides guidance on questions about how and when it is acceptable to agree to click-through terms. If the purchase has a “click-through” mechanism for terms and conditions, please follow the below instructions.

Legal Issues:

Principally, most agreements indicate that in the case of a dispute, some other state’s law will apply and the approver (the person who clicked through the agreement) agrees to litigate the dispute in another state. Other common terms that are prohibited are agreements to indemnify and hold the provider harmless in the case of a legal dispute.

Additionally, as a public entity, who and under what circumstances contracts can be entered into are governed by specific laws, rules and regulations. Very few FIU employees have been delegated the authority to enter into any such contracts on behalf of the University (please see here for a list of all authorized signatories). If you click through and “accept” any such terms without seeking the proper approvals and without having the proper authority, you could be putting yourself and the University at risk. Accordingly, University employees who are not authorized signatories should NOT accept click-through agreements without following the below process.

Instructions:

1. If you are already using an application that has been approved and want to upgrade

- it, or are being prompted by the vendor to accept new terms or upgrade to a newer version, you should contact Purchasing and seek advisement as to how to proceed.
2. If you want to use a new software application, upgrade a version of an application you are already using, or use an online service (like Google Apps), check with Purchasing or Information Technology to see if a contract already exists which can be utilized for your needs.
 3. If you have confirmed that the application is not already available to you through such existing agreements, then you must seek approval to proceed and utilize the product from your appropriate department head (Director, Dean or VP). This discussion may require approval from Information Technology and/or Purchasing. You should read the terms and conditions being presented to you by the vendor and confirm that they are acceptable to you from an operational perspective.
 4. If an agreement does not exist, and your department head agrees with your “purchase” and acceptance of the terms related to the application (even for \$0), then you should contact the vendor (either to someone directly if you have an email address for a contact of the vendor, or find a relevant email address on their website) and provide them with written notice that you are not permitted to accept click-through agreements, and request that they allow us to print, review and revise and have the contract and have it signed by both parties, per our standard contract process. Please use ***Sample Email #1*** from this procedure. If they agree, you should work with them to process the click-through like a standard vendor contract.
 5. If the vendor refuses to allow us to modify the contract, or fails to respond to your request in a timely manner, then you should reconnect with the relevant department head (Director, Dean or VP), to determine whether it is still in FIU’s best interest to proceed in accepting the terms.
 6. If you and the relevant department head agree to proceed, then you should send the vendor another email letting them know that you are not an authorized signatory for FIU and do not have the authority to enter into agreements on behalf of the University, and the agreement is not enforceable. Please use ***Sample Email # 2*** from this procedure.
 7. After waiting three (3) business days, or another time frame that is reasonable in the circumstances, if you do not receive a response from the vendor, then you may “accept” the click through terms.
 8. Please keep all emails and any additional documentation on file for your records.

Oops I clicked accept – now what do I do?

Contact the IT helpdesk immediately; they will be able to determine if software was downloaded to your device or if what you accidentally agreed to is a service on the Internet. If you downloaded software to your university owned computer, the IT organization will assist in removing all the unwanted software. If you agreed to an online service, they will work with the appropriate university departments (legal and procurement) to contact the company and explain the situation.

SAMPLE EMAIL #1

(To be drafted on department letterhead)

VIA E-MAIL

[Date]

[Vendor Name]

[Vendor Address]

[Vendor Address]

Attn: [Vendor Contact Name, if any]

Via e-mail to [Vendor E-Mail]

RE: Click-Through Agreement with Florida International University – FIRST REQUEST

Dear [Vendor Contact Name, if none then write “To Whom It May Concern”]:

I, the undersigned employee of The Florida International University Board of Trustees (“FIU” or the “University”), am writing to you in regards to the “click-through” mechanism you require to be clicked prior to FIU’s [Choose an item listed in this drop-down box] your website, [Website].

First and foremost, I DO NOT HAVE THE AUTHORITY TO AGREE TO YOUR TERMS, as only those persons delegated such authority by FIU’s President may enter into agreements on behalf of the University (see: <https://generalcounsel.fiu.edu/signature-authority/>). I have not been delegated such authority.

Additionally, FIU, as a public university of the State of Florida, cannot and does not consent to certain provisions contained in your terms and conditions, particularly as to those that conflict with Florida law, including, but not limited to, those that relate to the jurisdiction of any state other than Florida, or as to indemnity. See Florida Attorney General Opinion 78-20.

I am hoping to address these concerns and provide you with the assurances that an agreement represents binding, legally enforceable terms. One such option is the incorporation of FIU’s supplemental addendum (see: <https://generalcounsel.fiu.edu/wp-content/uploads/sites/26/2014/07/Software-License.pdf>) into your terms and conditions, as it is incorporated into all of FIU’s agreements in order to ensure all parties’ compliance with all applicable laws, rules, regulations and policies.

Accordingly, FIU would like to enter into an agreement in which the terms are agreeable to both parties and is signed by an authorized FIU signatory. Please reply to the undersigned so that we may determine how to best proceed. I look forward to hearing from you.

Respectfully,

s/[Name]

[Title]

[Phone]

[E-mail]

[Initials of Person Drafting Letter]

cc: [Name of person(s) being cc’d, if applicable; if none please delete

SAMPLE EMAIL #2

(To be drafted on department letterhead)

VIA E-MAIL

[Date]

[Vendor Name]

[Vendor Address]

[Vendor Address]

Attn: [Vendor Contact Name, if any]

Via e-mail to [Vendor E-Mail]

RE: Click-Through Agreement with Florida International University – FINAL REQUEST

Dear [Vendor Contact Name, if none then write “To Whom It May Concern”]:

I, the undersigned employee of The Florida International University Board of Trustees (“FIU” or the “University”), contacted [Vendor Name] on [Date of contact] and [Second date of contact, if any] in regards to the “click-through” mechanism you require to be clicked prior to FIU’s [Choose an item listed in this drop-down box] your website, [Website]. In such communication(s), I provided you with notice that FIU, as a public university of the State of Florida, cannot and does not consent to certain provisions contained therein.

FIU tried to accommodate you by ensuring that an agreement represents binding, legally enforceable terms, such by incorporating FIU’s supplemental addendum (see: <https://generalcounsel.fiu.edu/wp-content/uploads/sites/26/2014/07/Software-License.pdf>). However, you have [Select One:] my offer(s) and refused to make any alterations thereto.

While I am proceeding with the “click-through” mechanism, be advised that my “acceptance” does not express FIU’s intention to be bound by or agreement to any such terms contained therein, particularly as to those that conflict with Florida law, including, but not limited to, terms that relate to the jurisdiction of any state other than Florida, or as to indemnity. See Florida Attorney General Opinion 78-20. Additionally, as previously expressed, **I DO NOT HAVE THE AUTHORITY TO AGREE TO SUCH PROVISIONS**, as only those persons delegated such authority by FIU’s President may enter into agreements on behalf of the University (see: <https://generalcounsel.fiu.edu/signature-authority/>). I have not been delegated such authority.

Accordingly, my “acceptance” of such terms by clicking through are invalid.

As expressed above, FIU was hoping to address these concerns so as to provide you with the assurances that we have agreed to binding, legally enforceable terms. Since you have [Select One:] that benefit, please note that FIU is proceeding under a reservation of all rights, including our rights to assert the enforceability of any document that is not duly approved or signed by an FIU employee with signature authority.

Respectfully,

s/[Name]

[Title]

[Phone]

[E-mail]

[Initials of Person Drafting Letter]

cc: [Name of person(s) being cc’d, if applicable; if none please delete