

TESTIMONY OF

Tag Anderson, Director Risk Management Division

Chairman Schauer and members of the committee, my name is Tag Anderson. I am the Director of the Risk Management Division of the Office of Management and Budget (OMB). I appear today in support of SB 2072.

Large software or other IT contracts are typically negotiated directly with a vendor, and otherwise legally impermissible or unfavorable terms are removed through normal negotiation processes. Similarly, when agencies purchase routine electronic equipment and software that goes on or is used by most state employee computers, it is typically done pursuant to statewide or cooperative contracts that are available to all agencies.

This legislation is not designed to by-pass that process and the need for the State Procurement Office with assistance from NDIT and the Attorney General's Office to have appropriate terms. However, the way electronic services or systems are delivered and made available continues to change, with web-based applications and services becoming common. Many of these applications use third-party software that are included in the click-through agreements or end-user license agreements (EULA). Click-through agreements are defined as a digital contracts that require users to agree to terms and conditions before they can use a website, software, or online service. Users typically agree to the terms by clicking a button or checking a box that says, "I agree." Often there is no meaningful way of reaching out to the third-party vendor and negotiating appropriate terms. Some embedded third-party software or applications are essentially free, whether used in the vendor's application or directly by a state agency.

In prior legislation we addressed the often-contentious limitation of liability provisions that are found in adhesive click through or EULA agreements. This legislation would allow an agency, in consultation with the Attorney General's Office, OMB and NDIT to agree, or ignore, other provisions in third-party click-through agreements and terms that would otherwise be impermissible. This will allow agencies to properly negotiate appropriate terms consistent with state law when necessary or feasible but allow for the purchase or use of the products when there is no real risk of these impermissible terms becoming operable and enforced against the state.

Chairman Schauer and committee members, this concludes my testimony. I ask your support for SB 2072. I would be happy to answer any questions.

Thank you.