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Contracting for Digital Platform Relationships



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Technology Transactions Practice



- More than 50 lawyers around the world are focused on helping clients develop and manage relationships with suppliers of critical services and technology
- Experience in 400 critical services that are sourcing deals with a total contract value exceeding \$200 billion, including data, digital, outsourcing and software



Market Recognition

“Band 1” ranking in IT/Outsourcing for 15 consecutive years
(Chambers 2004-2019)

“We have never been disappointed. They are worth their weight in gold.” ~ Chambers USA 2018

“They have current cutting-edge knowledge and are savvy about attuning their counsel to the needs of the client to arrive at a satisfactory solution to many sticky issues.”
~ Chambers USA 2017

“They are very good at being able to communicate and synthesize information in a useful and easily understandable way.”
~ Chambers USA 2016

Law360 2016 Technology Practice Group of the Year

Ranked as one of the top law firms 2009 - 2018 on World’s Best Outsourcing Advisors list for The Global Outsourcing 100™

Named “MTT Outsourcing Team of the Year” in 2014 and ranked in the top tier from 2010 through 2018

Speakers



JOE PENNELL

Joe Pennell is a partner in the Technology Transactions and Corporate & Securities practices. Joe is a frequent author and speaker on topics such as artificial intelligence, robotic process automation, fintech, data analytics and outsourcing. Joe is also the co-chair of the ABA Section of Science of Technology Law's Cloud Computing Committee, and was named a Next Generation Lawyer in Outsourcing by Legal 500 in 2018. Prior to joining Mayer Brown, Joe received his JD from Harvard Law School, where he was a Senior Editor for the Journal of Law and Public Policy.



JULIAN DIBBELL

Julian Dibbell is a senior associate in Mayer Brown's Chicago office and a member of the Technology Transactions practice. Before joining Mayer Brown in 2014, Julian worked as a journalist and author covering the Internet and other digital technologies. Julian received his JD degree in 2014 from the University of Chicago Law School, where he was a staff member of the University of Chicago Law Review and co-founder of the Law and Technology Society.



CORINA CERCELARU

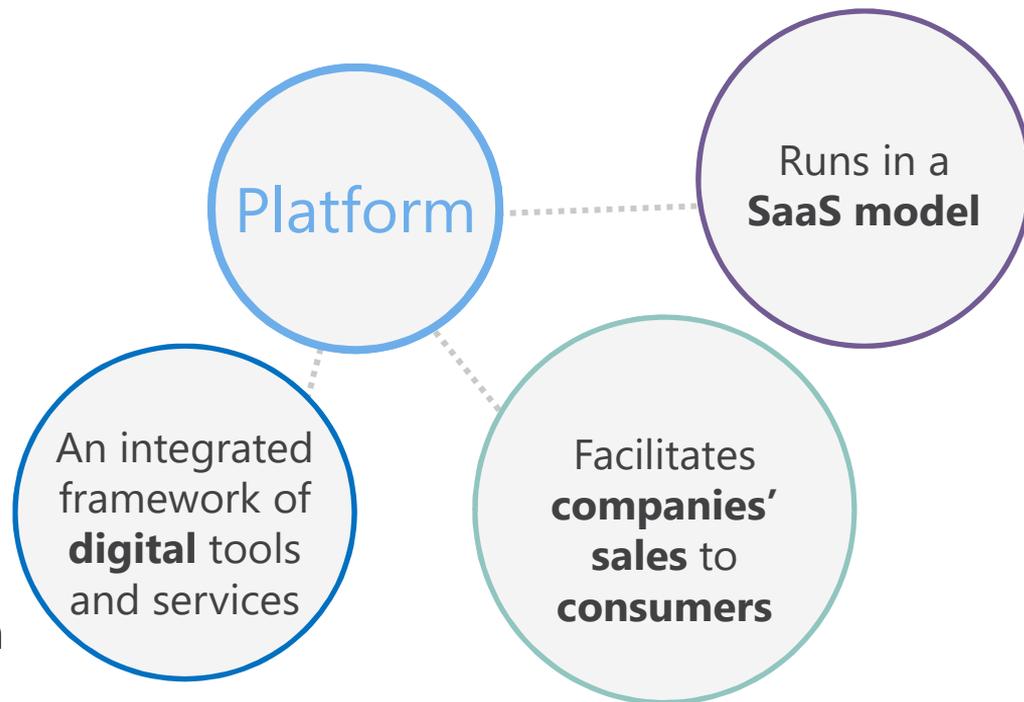
Corina Cercelaru is an associate in Mayer Brown's Chicago office and a member of the Technology Transactions practice. Before earning a J.D from the University of Chicago, Corina worked as a software engineer and business analyst consultant for American Family Insurance and Hewlett Packard.

Agenda

- What is a digital platform?
- How are companies acquiring platform capabilities?
- What are examples of platform deals?
- What are key platform contracting issues?

What is a Digital Platform?

- Industries/Use Cases:
 - Collaboration
 - Search Engine
 - E-Commerce
 - Financial Services
 - Social Media
- 7 of the 10 most valuable companies today employ platform strategies*
- KPMG: \$7.2 trillion platform economy*



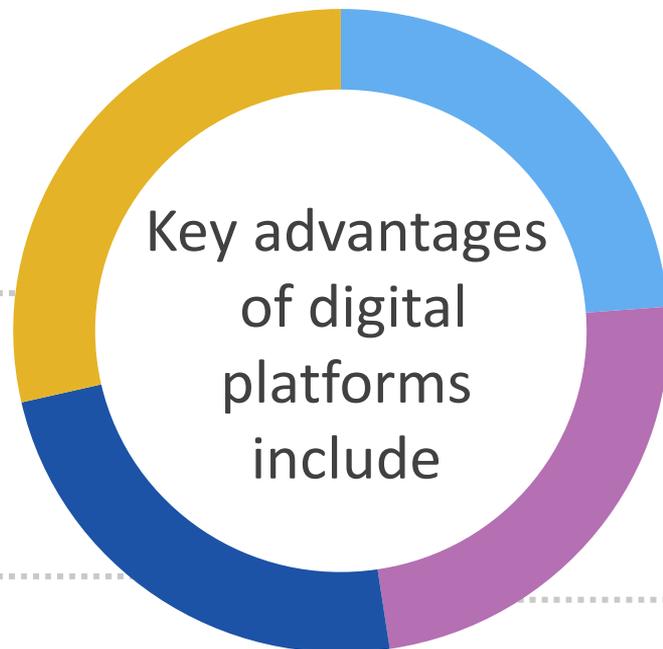
*Source: American Banker, Jan 2019

Advantages of Digital Platforms



Improved customer **experience**

Scalability and more efficient product **delivery**



Ability to leverage **data** generated by platform participants

Potentially increased **value** from network effects

Options for Acquiring Platform Capabilities



- Buy
- Build
- Contract (e.g., services agreement with existing platform provider)
 - May be a relatively low-cost investment
 - Avoids “reinventing the wheel”
 - Provides benefit of platform provider’s knowledge gained across its company/customer base
 - Involves risk of depending on a third party for a customer-facing function

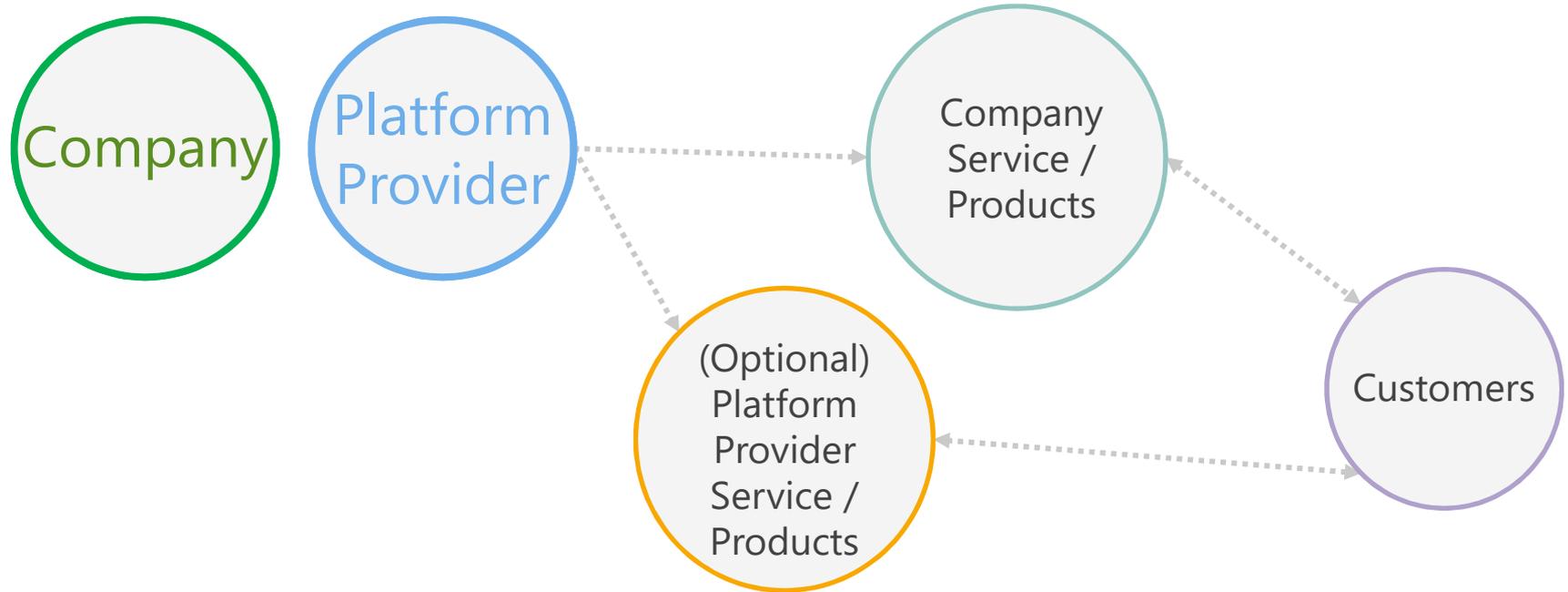




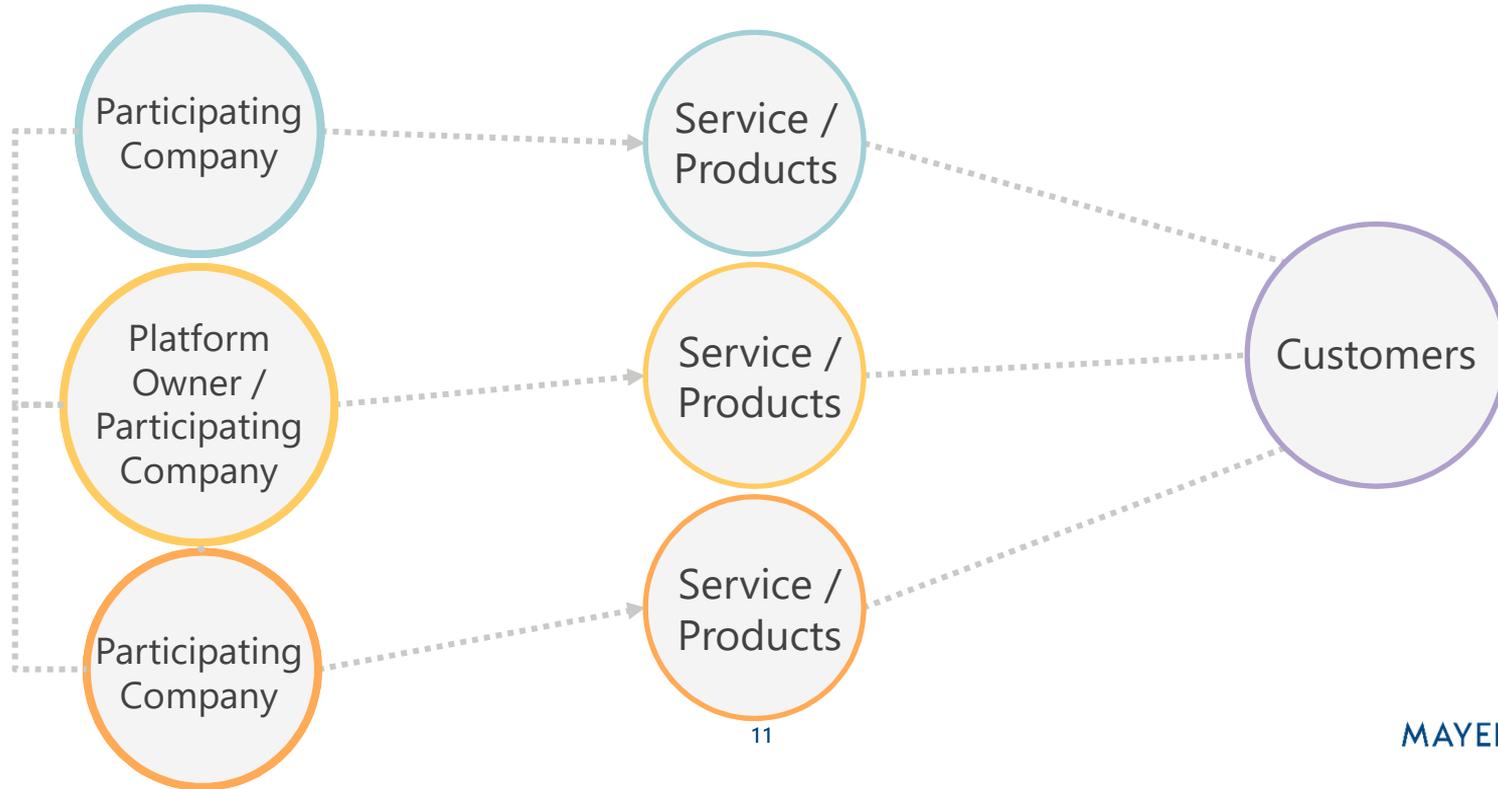
Example Platform Deals

- White-labeled/“powered by” fintech lending platforms
- Multi lender platforms (marketplace/“many-to-many”)
 - Run by technology companies or even traditional banks
- Online casino gaming platform agreements
- Connected vehicles/in-vehicle telematics platforms
- Online food ordering/delivery platforms
- Hotel mobile key platforms
- Investments in traditional assets using blockchain/cryptocurrency platforms

Example Platform Collaboration Agreement



Example Marketplace or "Many-to-Many" Platform



Contracting Considerations: Marketplace / “Many-to-Many” Platform

- If you are rolling out your company’s own marketplace or “many-to-many” platform (e.g., multi lender platform):
 - Think like a platform provider (and a bank/equipment manufacturer/insurer/etc.)
 - Create a practical contracting form



How do Platform Collaborations Differ from Traditional Tech Services?

- Platform providers perform front-office, revenue-generating, customer-facing functions (not back-office functions).
- Platform services shape customer experiences.
- The customer's use of the platform may create an independent customer-platform provider relationship (deal-dependent).
- Platform providers are more likely to be highly leveraged start-ups.



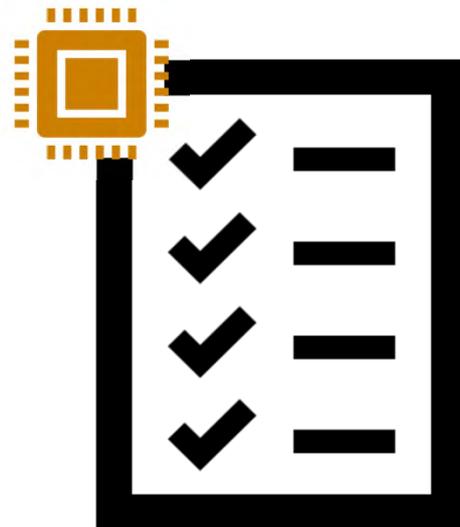
Key Risks and Issues In Negotiating Platform Agreements



- Control over the digital platform
- Scope, pricing and service levels
- Customer complaints
- Compliance with laws
- The platform decisioning process
- Antitrust, non-competition and exclusivity
- Trademarks and branding
- Data rights
- Developed IP
- Agency
- Subcontractors
- Data security and privacy
- Liability
- Platform provider financial condition
- Termination rights
- Disengagement services

Key Platform Issues: Control Over The Digital Platform

- What rights does the provider have to change the platform?
- What rights does the company have to require changes?



Key Platform Issues: Scope of Services, Pricing and Service Levels

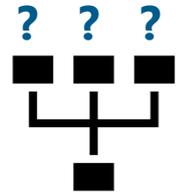


- Scope of Services
 - Detailed scripting may be required for (a) customer journey on platform and (b) platform provider personnel's interaction with customers.
 - Detailed business requirements documents may be developed.
- Pricing
 - Platform provider compensation may be based on customer sales.
 - Unlike back-office services, company's primary focus may not be on keeping charges low.
- Service Levels – heavily focused on metrics measuring customer experience.

Key Platform Issues: Customer Complaints

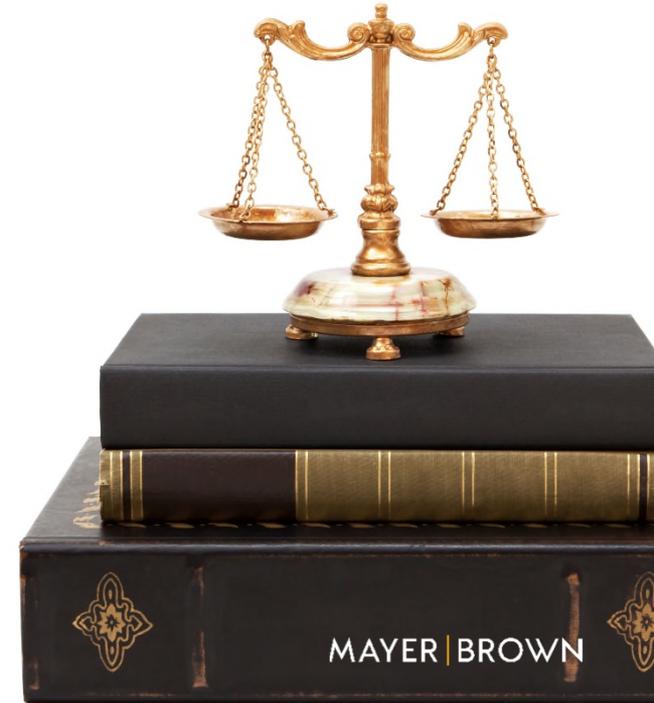


- Direct customer contact may increase the risk of a reputational or regulatory issue.
- Which party will handle customer complaints?



Key Platform Issues: Compliance with Laws

- Your company will be liable for the platform's non-compliance.
- Platform provider will only want to comply with laws applicable to its provision of services.
- Potential compromises:
 - Platform provider must comply with company's compliance instructions.
 - Platform provider is responsible for contract breaches that result in company being non-compliant with any laws.



Key Platform Issue: The Platform Decisioning Process



- Dangers of decisioning process (e.g., loan or insurance decisions)
 - Inaccurate decisions
 - Non-compliant decisions
- Visibility into the decisioning process
 - Who makes the decisions – people, RPA software, AI?
 - Is decisioning model static based on the company's policies?
 - Is decisioning model subject to change over time (e.g., as a result of machine learning)?

Key Platform Issues: Antitrust, Non-Competition, And Exclusivity



- Can companies participating on a marketplace platform see other participants' pricing or other competitively sensitive information?
- What reasonable restrictions can you apply to the platform provider's contact with your customers?
- Can the platform provider sell its own products to your customers (e.g., "Turn-Down Program")?
- What can be done (via contract or operationally) to prevent (and avoid the appearance of) collusion?
- Elizabeth Warren proposal: "If you run a platform where others come to sell, then you don't get to sell your own items on the platform."

Key Platform Issues: Trademarks and Branding



- Continuum of branding options
 - True white-label with Company's brand only
 - Company branding with "powered by" or co-branding by Provider
 - Company is one of many participants/brands on a "Many-to-Many" platform that is Provider-branded
- Trademarks and branding: company must reserve quality control/approval rights over mark usage.

Key Platform Issues: Data Rights



- Data is the fuel for AI, and obtaining access to platform data is critical
- US IP laws protect software, specifications, designs, analyses, processes, methodologies, concepts, inventions, secrets, know-how, etc. ***that are produced using human creativity***
- US IP laws generally do not protect data
- Data ownership and use rights
 - Which party has ownership rights in the data?
 - What rights do the provider and company have to use data generated by company's use of the platform?

Key Platform Issues: Developed IP



- Opening Company position on ownership of developed IP:
 - Company owns all Developed IP except for derivatives of provider's IP
- Rights upon termination or expiration
 - Can developed IP containing both parties' sensitive materials be practically separated upon termination?
 - If not, do both of the parties (or neither of the parties) get post-termination ownership/use rights?
- Ownership of AI output
 - Like data, "IP" developed by machine learning or other non-human processes is generally not protected by US IP laws

Key Platform Issues: Agency

- How is the platform provider allowed to market on the company's behalf?
- Clearly define the scope of any representative or agency authority granted to the platform provider in the agreement.



Key Platform Issues: Subcontractors

- What agreement provisions can the platform provider realistically flow down to subcontractors?
 - Cloud-based infrastructure subcontractors (e.g., AWS)
 - Data aggregators
- Risk mitigation strategies
- Subcontracting vs. entering into direct contracts for platform-related services



Key Platform Issues: Data Security and Privacy

- Risks to customer data on the platform
- Risks to your competitively sensitive IP/data on the platform
 - Your company's competitors may be on the same platform
- Risks to your company's compliance with data privacy laws

Key Platform Issues: Liability Provisions



- There are no clear market standards for limitations of liability in platform collaboration deals yet.
- In the customer-facing context, standard back-office service contract assumptions and rationales about liability provisions may no longer apply.
 - Example: lost profits arising from breach of contract may be considered direct damages under applicable state law.
- Indemnities for platform's sale of its own products to your customers.
- Company may want to retain the right to control the defense of customer and regulator claims that are subject to indemnification by the platform provider.

Key Platform Issues: Provider Financial Condition



- Does the platform provider have the financial wherewithal to be a successful partner?
- Risk mitigation approaches include:
 - Diligence up-front
 - Regular financial reporting



Key Platform Issues: Termination and Disengagement



- Platform provider degraded financial condition termination right
- Reputational termination right
- Non-compliance with laws termination right
- Disengagement assistance

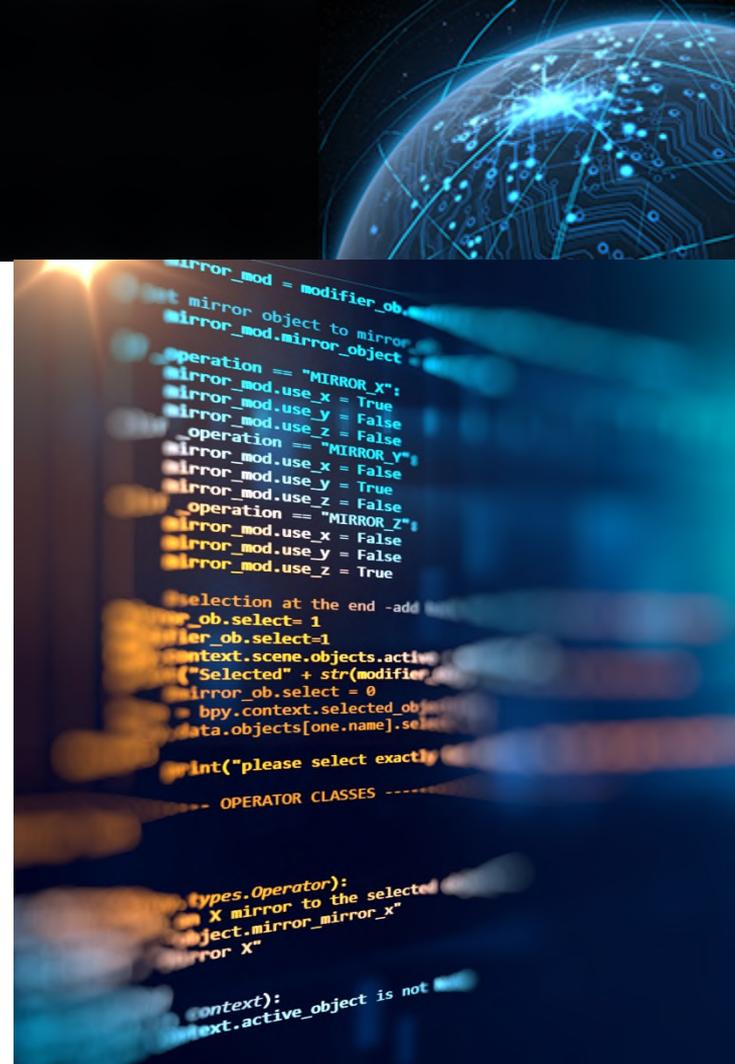
Other Key Platform Issues

- Audit and regulatory examination rights
- Employee background checks
- Agile software development



Conclusion

- Digital platforms provide huge advantages but involve substantial risks, including:
 - Direct customer contact
 - Platform provider financial stability concerns
- Mitigating those risks contractually and operationally sets the stage for transformative opportunities.





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