SENDMARC

AGREEMENT

License

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Sendmarc

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1. Definitions

The definitions and rules of interpretation in this clause apply in the Agreement.

1. **Agreement:** this agreement between the End User and Sendmarc.
2. **Authorised Users:** those employees, agents and independent contractors of the End User who are authorised by the End User to use the Services.
3. **Business Day:** a day other than a Saturday, Sunday or public holiday in South Africa.
4. **Channel Partner:** any authorised reseller of the Services.
5. **Confidential Information:** all information relating to either Party, its assets and affairs, including all communications (whether written, oral or in any other form) and all reports, statements, schedules and other data concerning any financial, technical, labour, marketing, administrative, accounting or other matter about that Party and irrespective of whether such information is marked "confidential" or "proprietary" or otherwise;
6. **End User:** the customer purchasing the Services from Sendmarc, either directly or via a Channel Partner. **End User Data:** the data inputted by the End User, or by its Authorised Users, the Channel Partner or Sendmarc on the End User's behalf for the purpose of using the Services or facilitating the End User's use of the Services.
7. **Documentation:** any documents made available to the End User by or on behalf of Sendmarc which sets out a description of the Services and the user instructions for the Services.
8. **Effective Date:** shall be the date on which the End User's account is marked active within the Sendmarc environment.
9. **Initial Term:** the period during which the Services will be provided as specified in the Order.
10. **Order:** The End User's order for the Services on the Sendmarc website or otherwise submitted by a Channel Partner.
11. **Platform:** The online software applications provided by Sendmarc as part of the Services also call the Software.
12. **Sendmarc:** Sendmarc (Pty) Ltd, a private company, with limited liability, registered and incorporated in South Africa with registration number 2018/336082/07 and whose registered office is at 1 Sturdee Avenue, Rosebank, 2196, Johannesburg, South Africa.
13. **Services:** the subscription services provided by Sendmarc to the End User under the Agreement, as more particularly described in the Documentation.
14. **Software:** the online software applications provided by Sendmarc as part of the Services.
15. **Subscription:** the online software application as a service (SaaS) subscribed for by each End User.
16. **Subscription Fees:** the subscription fees payable by the End User to Sendmarc or to a Channel Partner, as set out in the Order.
17. **Term:** the period during which the Services will be provided as specified in the Order.

In the Agreement, a reference to one gender shall include reference to every gender; words denoting a singular number include the plural and vice versa; references to persons shall include firms, companies and other organisations; a reference to a statutory provision includes a reference to the same as modified, re-enacted or replaced from time to time and any subordinate legislation made under it; a reference to a legal or regulatory body includes a reference to any successor body or bodies to it; headings shall not affect the interpretation of the Agreement; the words "include", "includes", "including" and "in particular" shall be construed as if they were followed by the words "without limitation". Except as expressly provided in the Agreement, the rights and remedies provided under the Agreement are in addition to, and not exclusive of, any other rights or remedies, whether under the Agreement or provided by law.

2. Subscriptions

2.1 Subject to the prompt payment of the relevant Subscription Fees, Sendmarc hereby grants to the End User a non-exclusive, non-transferable right to use the Software and the Services during the Term solely for the End User's internal business operations.

2.2 The End User shall not

a. except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties: and except to the extent expressly permitted under the Agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or

b. attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software;

c. access all or any part of the Services in order to build a product or service which competes with the Services and/or the Documentation; or

d. except with Sendmarc's prior written consent, use the Services to provide services to third parties; or

e. subject to the provisions of this Agreement that provide the contrary, , license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Authorised Users, or

f. attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this clause 2;

2.3 The End User shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify Sendmarc.

2.4 The rights provided under this clause 2 are granted to the End User only, and shall not be considered granted to any subsidiary or holding company of the End User.

2.5 Subject to Sendmarc giving the End User 5 (five) Business Days' written notice, Sendmarc shall be entitled to suspend the End User's use of the Services and Software should the End User fail to make payment of the Subscription Fees on the due date, until such time as the Subscription Fees have been paid in full.

3. Services

3.1 Sendmarc shall, during the Term, provide the Services to the Customer on and subject to the terms of the Agreement.

3.2 Sendmarc shall use its reasonable efforts to ensure that any maintenance activity which may interrupt access to the Services, shall not be performed during "Normal Business Hours" (9.00 am to 5.00 pm GMT +2, Monday to Friday, excluding public holidays). The Customer acknowledges that Sendmarc may interrupt access to the Services at any time to perform essential emergency maintenance.

4. End-User Data

4.1 The End User shall own all right, title and interests in and to all of the End User Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the End User Data.

4.2 If Sendmarc processes any personal data on the End User's behalf when performing its obligations under the Agreement, the parties record their intention that the End User shall be the responsible party/data controller and Sendmarc shall be a data operator/ processor and in any such case:

a.   the End User specifically acknowledges and agrees that where necessary the personal data will be hosted on Microsoft Azure and transferred or stored outside the country where the End User and the Authorised Users are located in order to carry out the Services and Sendmarc's other obligations under the Agreement;

b.   the End User shall ensure that the End User is entitled to transfer the relevant personal data to Sendmarc so that Sendmarc may lawfully use, process and transfer the personal data in accordance with the Agreement on the End User's behalf;

c.   the End User shall ensure that the relevant third parties have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable data protection legislation; and

d.   each party shall take appropriate technical and organisational measures against unauthorised or unlawful processing of the personal data or its accidental loss, destruction or damage.

4.3 The End User acknowledges that and consents to Sendmarc collecting and using anonymised aggregate data relating to its End Users' use of the Services.

5. Sendmarc's Obligations

5.1 Sendmarc undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care to be expected of a service provider in the industry.

5.2 If the Services do not conform with the foregoing undertaking, Sendmarc will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the End User with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the End User's sole and exclusive remedy for any breach of the undertaking set out in clause 5.1.

5.3 Sendmarc warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under the Agreement.

6. End User's Obligations

6.1 The End User shall provide Sendmarc with:

a.   all necessary co-operation in relation to the Agreement; and

b.   all necessary access to such information as may be required by Sendmarc;

c.   in order to provide the Services, including End User Data, security access information and configuration services;

d.   comply with all applicable laws and regulations with respect to its activities under the Agreement;

e.   carry out all other End User responsibilities set out in the Agreement in a timely and efficient manner. In the event of any delays in the End User's provision of such assistance as agreed by the parties, Sendmarc may adjust any agreed timetable or delivery schedule as reasonably necessary;

f.   ensure that the Authorised Users use the Services in accordance with the terms and conditions of the Agreement and shall be responsible for any Authorised User's breach of the Agreement;

g.   obtain and shall maintain all necessary licences, consents, and permissions necessary for Sendmarc, its contractors and agents to perform their obligations under the Agreement, including the Services;

h.   ensure that its network and systems comply with the relevant specifications provided by Sendmarc from time to time;

i.   Ensure that all fees for the use of the Services are paid timeously;

j.   be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to Sendmarc's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the End User's network connections or telecommunications links or caused by the internet.

7. Proprietary Rights

The End User acknowledges and agrees that Sendmarc and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, the Agreement does not grant the End User any rights to, or in, patents, copyright, database right, trade secrets, trade names, trademarks (whether registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.

8. Confidentiality

8.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under the Agreement. A party's Confidential Information shall exclude information that:

a. is or becomes publicly known other than through any act or omission of the receiving party;
b. was in the receiving party's lawful possession before the disclosure;
c. is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
d. is independently developed by the receiving party, which independent development can be shown by written evidence; or
e. is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.

8.2 Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of the Agreement.

8.3 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of the Agreement.

8.4 Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.

8.5 The End User acknowledges that details of the Services, and the results of any performance tests of the Services, constitute Sendmarc's Confidential Information.

8.6 Sendmarc acknowledges and agrees that the End User Data is the Confidential Information of the End User.

8.7 No party shall make, or permit any person to make, any public announcement concerning the Agreement without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including any relevant securities exchange), any court or other authority of competent jurisdiction.

8.8 This clause 8 is severable from the rest of this Agreement and shall remain in full force and effect notwithstanding any termination or cancellation of this Agreement, or any part thereof.

9. Performance Warranty

9.1 Sendmarc warrants that the Services and the Software will substantially conform to the specifications and the Documentation.

9.2 Sendmarc does not warrant that the End User's use of the Services will be uninterrupted or free from minor defects or errors that do not materially affect such performance; or9.2 that the Services, Documentation and/or the information obtained by the End User through the Services will meet the End User's requirements; and

9.3 Sendmarc is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the End User acknowledges that the Services may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

9.4 Provided End User notifies Sendmarc in writing with a specific description of the Software's nonconformance and Sendmarc validates the existence of such nonconformance, Sendmarc will:

a. repair or replace the non-conforming Software. This is End User's sole and exclusive remedy under this warranty. End User's written notification of any nonconformance must include sufficient detail for Sendmarc to analyse the alleged nonconformance. End-User must provide commercially reasonable assistance to Sendmarc in analysing and remediating any nonconformance of the Software.

9.5 The warranty does not apply:

a. if the Services have not been used and provided for in this Agreement or the Software is not used in accordance with the Documentation; or
b. to any End User unlicensed activities.

9.6 Express Disclaimer: Sendmarc and its licensors disclaim all other representations, warranties, conditions or guarantees with respect to the software express or implied, including without limitation, any implied warranties of merchantability, quality or fitness for a particular purpose except to the extent that any warranties implied by law cannot be validly waived.

10. Third-Party Claims

10.A: INFRINGEMENT AND DEFENCE OF END-USER

10.1 Sendmarc will, at its sole discretion, either defend the End User against or settle any claim brought against End User if such claim is brought by any owner of the Intellectual Property giving rise to the claim and alleges that End User's use of the Software, in accordance with the terms and conditions of this Agreement, constitutes a direct infringement or misappropriation of such owner's patent claim(s), copyright, trademark or trade secret right.

10.2 Sendmarc will pay damages finally awarded against End User (or the amount of any settlement Sendmarc enters into) with respect to such claims. Provided that:

a. Sendmarc is given prompt notice of any such claim;
b. the End User provides reasonable co-operation to Sendmarc in the defence and settlement of such claim, at Sendmarc's expense; and
c. Sendmarc is given sole authority to defend or settle the claim.

10.3 In the defence or settlement of any claim, Sendmarc may procure the right for the End User to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate the Agreement immediately without any additional liability or obligation to pay liquidated damages or other additional costs to the End User.

10.4 In no event shall Sendmarc, its employees, agents and sub-contractors be liable to the End User to the extent that the alleged infringement is based on:

a. a modification of the Services or Documentation by anyone other than Sendmarc; or

b. the End User's use of the Services or Documentation in a manner contrary to the instructions given to the End User by Sendmarc; OR

c. the End User's use of the Services or Documentation after notice of the alleged or actual infringement from Sendmarc or any appropriate authority.

10.5 The foregoing states the End User's sole and exclusive rights and remedies, and Sendmarc's (including Sendmarc's employees', agents' and sub-contractors) entire obligations and liability, for infringement of the intellectual property right or right of confidentiality.

10.B INDEMNITY BY THE END USER IN RESPECT OF THEIR USE OF THE SERVICES

10.6 Subject to clause 10.A above, the End User shall defend, indemnify and hold harmless Sendmarc against claims, actions, proceedings, losses, damages, expenses and costs (including court costs and reasonable legal fees) arising out of or in connection with the End User's use of the Services and/or Documentation, provided that:

a. the End User is given prompt notice of any such claim;

b. Sendmarc provides reasonable co-operation to the End User in the defence and settlement of such claim, at the End User's expense; and

c. the End User is given sole authority to defend or settle the claim.

11. Limitation of Liability

11.1. Sendmarc shall have no liability under this Agreement and/or the End User's use of the Software and Services in the event that:

a. the Software is not used in accordance with the Documentation; or

b. the defect or liability is caused by End User or Channel Partner; or

c. the Services and Software are used in conjunction with any third-party software for which the End User lacks sufficient rights from the third-party vendor for such use; or

d. for any End User activities not permitted under this Agreement.

11.2. Under no circumstances and regardless of the nature of any claim will Sendmarc, its licensors or end-user be liable to each other or any other person or entity for in any amount for special, incidental, consequential, or indirect damages, loss of goodwill or profits, work stoppage, data loss, computer failure or malfunction, attorneys' fees, court costs, interest or exemplary or punitive damages.

12. Agreement Term and Termination

12.1 The Initial Term of the Agreement shall commence on the Effective Date and shall continue for the term specified in the applicable Order. This Agreement shall not terminate on the expiry of the Initial Term but shall continue to endure in full force and effect thereafter on a month-to-month basis, subject to the right of either party to terminate the Agreement on one calendar months' notice in writing to the other party.

12.2 Without affecting any other right or remedy available to it, either party may terminate the Agreement with immediate effect by giving written notice to the other party if:

a. the other party is in breach of this Agreement and if the breach is capable of remedy, fails to remedy such breach within 14 (fourteen) calendar days of receipt of a notice to do so; and/or

b. the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts; enters into or applies for (or calls meetings of members or creditors with a view to) one or more of a moratorium, winding up, administration, liquidation (of any kind, including provisional), or composition or arrangement with creditors; or has any of its property subjected to one or more of the appointment of a receiver (of any kind), enforcement of security, distress, or execution of a judgment (in each case to include similar events under the laws of other countries).

12.3 On termination of the Agreement for any reason:

a. all licences granted under the Agreement shall immediately terminate;
b. each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;
c. Sendmarc may destroy or otherwise dispose of any of the End User Data in its possession unless Sendmarc receives, no later than ten days after the effective date of the termination of the Agreement, a written request for the delivery to the End User of the then most recent back-up of the End User Data. Sendmarc shall use reasonable commercial endeavours to deliver the back-up to the End User within 30 days of its receipt of such a written request, provided that the End User has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Sendmarc shall pay all reasonable expenses incurred by Sendmarc in returning or disposing of End User Data; and
d. any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination shall not be affected or prejudiced.

13. Force Majeure

Sendmarc shall have no liability to the End User under the Agreement if it is prevented from or delayed in performing its obligations under the Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including strikes, lock-outs or other industrial disputes (whether involving the workforce of Sendmarc or any other party), failure of a utility service or transport or telecommunications network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the End User is notified of such an event and its expected duration.

14. Conflict

If there is an inconsistency between any of the provisions in the main body of this Agreement and another document, the provisions in the main body of this Agreement shall prevail.

15. Variation

No variation of the Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

16. Waiver

No failure or delay by a party to exercise any right or remedy provided under the Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or

remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

17. Assignment

17.1 The End User shall not, without the prior written consent of Sendmarc, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement.

17.2 Sendmarc may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Agreement.

18. Notices

18.1 Any notice required to be given under the Agreement shall be in writing and shall be delivered by hand or sent by email. Sendmarc's email address is info@sendmarc.com.

18.2 A notice delivered by hand or email shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first business day following delivery).

19. Severance

19.1 If any provision (or part of a provision) of the Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

19.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

20. Entire Agreement

20.1 This Agreement, our Privacy Policy published at https://www.sendmarc.co.za/privacy-policy, and any other documents referred to in this Agreement, constitute the terms on which the End User may use the Services.

20.2 Each of the parties acknowledges and agrees that in entering into the Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this Agreement, other than as expressly set out in the Agreement.

21. Third-Party Rights

21.1 The Agreement does not confer any rights on any person or party (other than the parties to the Agreement and, where applicable, their successors and permitted assigns).

22. Jurisdiction

22.1 Each party irrevocably agrees that the Magistrates Courts of Johannesburg, South Africa shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

23. Governing Law

23.1 The Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of South Africa.