



AGREEMENT

Channel Partner Terms of Service

Last Updated: 16th March 2022

Sendmarc

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NB: This document does not need to be completed / signed unless specific alterations are required

AGREEMENT

between

Sendmarc (Pty) Ltd

Registration Number: 2018/336082/07

1 Sturdee Ave, Rosebank, Johannesburg, South Africa

And

Channel Partner: _____

Registration Number: _____

Address: _____

SIGNATURE

For: the Channel Partner

Signed By _____ at _____ on _____

Signature: _____

For: Sendmarc Pty Ltd

Signed By _____ at _____ on _____

Signature: _____

1 Definitions

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

1. **Agreement:** this agreement between the Channel Partner 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:** The authorised reseller of the Sendmarc Platform & Services defined in the Order.
5. **Confidential Information:** information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in clause 9.
6. **Customer:** the customer of the Channel Partner purchasing the Software and Services from the Channel Partner, and "End User" shall bear the same meaning.
7. **Customer 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.
8. **Documentation:** any documents made available to the End User or the Channel Partner by or on behalf of Sendmarc which sets out a description of the Services and the user instructions for the Services.
9. **Effective Date:** shall be the date on which the End User's account is marked active within the Sendmarc environment.
10. **Initial Term:** the period during which the Services will be provided as specified in the Order.
11. **Order:** The Channel Partner's order for the Software and Services resold to its Customer and submitted by a Channel Partner to Sendmarc.
12. **Platform:** The online software applications provided by Sendmarc as part of the Services also called the Software.
13. **Parties:** shall mean the Channel Partner and Sendmarc collectively, and "Party" shall refer to either of them depending on the context.
14. **Sendmarc:** Sendmarc (Pty) Ltd, a private company, with limited liability, registered and incorporated according to the laws of South Africa with registration number 2018/336082/07, and whose registered address is at 1 Sturdee Avenue, Rosebank, Johannesburg, South Africa, 2196.
15. **Services:** the subscription services provided by Sendmarc to the End User as more particularly described in the Documentation.
16. **Software:** the online software applications provided by Sendmarc as part of the Services.
17. **Subscription:** the online software application as a service (SaaS) subscribed for by each End User.
18. **Subscription Fees:** the subscription fees payable by the End User to the Channel Partner, as set out in the Order.
19. **Term:** the period during which the Services will be provided as specified in the Order.

In this 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 this Agreement, the rights and remedies provided under this Agreement are in addition to, and not exclusive of, any other rights or remedies, whether under this Agreement or provided by law.

2 Appointment

1. Subject to the terms of this Agreement, Sendmarc appoints the Channel Partner as a non-exclusive reseller of the Services and / or Software and / or Sendmarc Platform, and the Channel Partner accepts such appointment.
2. Subject to the terms of this Agreement, Sendmarc grants to the Channel Partner the non-exclusive, non-transferable right and licence to market, sell and distribute the Services and/or Software and/or Sendmarc platform to it's customers and prospective customers.

3 Terms of Services

1. This Agreement is subject to the Sendmarc License Agreement and the provisions contained in an Order.
2. The Channel Partner represents and warrants to Sendmarc that it has the ability and experience to carry out the obligations assumed by it under this Agreement and that by virtue of entering into this Agreement it is not and will not be in breach of any express or implied obligation to any third party.

4 Sendmarc Obligations

Sendmarc shall:

1. Implement, provide and support the Services and/or Software and/or Sendmarc Platform to the End Users the Channel Partner has resold same to pursuant to the provisions of this Agreement, and as particularised more fully in an Order;
2. Allow the Channel Partner full administrative rights to the Sendmarc Platform;
3. Warrant that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this Agreement;
4. Provide the Channel Partner's employees with the appropriate training, as determined by Sendmarc, in respect of the Services to enable the Channel Partner's employees and representatives to resell the Services, and the costs of such training will be borne by Sendmarc.

5 Channel Partner Obligations

The Channel Partner :

1. shall ensure that all it's Customers are made aware of and agree to the Sendmarc License Agreement ;
2. shall at all times conduct its business in a manner that will reflect favourably on the Services and on the name and reputation of Sendmarc;
3. has no authority to modify the Sendmarc License Agreement and shall not make any promises, representations, warranties or guarantees in respect of the Services beyond those given in this Agreement. TheChannel Partner hereby indemnifies Sendmarc from any claims or actions arising from a failure to provide its Customer and the End-User with the Sendmarc License Agreement and/or agreeing to terms that differ/exceed the Sendamrc Terms of Service;
4. Shall not participate in any practices which would be objectively considered illegal, deceptive, or misleading including, but not limited to, disparagement of the service offering or Sendmarc or other practices which may be reasonably considered to be detrimental to Sendmarc or the public interest;
5. shall not alter, obscure, remove, interfere with, add or change the style of Sendmarc's trademarks, trading names and logos or use them in connection with any other products or services or as part of the corporate or any trade name of the Customer except as expressly agreed in writing;

6. Shall not attempt to copy, duplicate, convert, alter, adjust, modify, create derivative works from frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Service, its related software and/or Documentation (as applicable) in any form or media or by any means, unless it is entitled to do so in terms of this Agreement;
7. Shall not make any attempt to reverse engineer, disassemble, reverse compile, gain unauthorised access, attempt to discover the underlying source code or structure of the Service or otherwise reduce to human-perceivable form all or any part of the Service;
8. Shall not access all or any part of the Services in order to build a Service or service which competes with the Services and/or the Documentation;
9. Shall not take any action which could be reasonably foreseen to cause a material and adverse effect upon the goodwill of Sendmarc and/or the quality and functionality of the Services; The foregoing is not intended to limit or otherwise restrict the channel from selling competing products to Sendmarc;
10. Shall have no authority to enter into contractual obligations on behalf of Sendmarc;
11. Shall have no authority to incur any liability on behalf of Sendmarc;
12. Shall have no authority to settle or waive any claim against or by Sendmarc;
13. Shall have no authority to enter into any oral arrangements, thereby binding Sendmarc to such arrangements;
14. Shall have no authority to make any promises, representations, warranties or guarantees in respect of the Services other than those contained in these terms, the Terms of Service and the Sendmarc License Agreement;
15. may not directly or indirectly, in the name of, on behalf of or for the benefit of Sendmarc offer, promise or authorize to pay, or pay any compensation, or give anything of value to, any official, agent or employee of any government or governmental agency, or to any political party or officer, employee or agent thereof.

6 Charges and Payment

1. The Channel Partner shall make payments of the Subscription Fees to Sendmarc in accordance with the relevant Order.
2. The Channel Partner may cancel a Subscription for a Service for a Customer, however fees due from the Channel Partner in the event of cancellation of a Subscription before its Term ends, may be applied. Upon cancellation, the Customer will have ninety (90) days to migrate any Customer Data to either a new Subscription with the Channel Partner or with Sendmarc directly.
3. The Channel Partner becomes liable for all Orders it submits from the time of submission.
4. If Sendmarc has not received payment within 30 days after the due date and the Channel Partner has failed to remedy such breach with 7 (seven) days after written notice thereof, then and without prejudice to any other rights and remedies of Sendmarc, Sendmarc may disable the Channel Partner and relevant Customer's password, account and access to all or part of the Services and Sendmarc shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid;
5. All amounts and fees stated or referred to in the Order:
 - 5.1. shall be payable in currency represented in the invoice;
 - 5.2. are non-cancellable and non-refundable;
 - 5.3. are exclusive of value added tax, which shall be added to the invoice(s) at the appropriate rate and region.

7 Suspension

1. Sendmarc may disable a Customer's Subscription in terms of the provision of the Sendmarc License Agreement.
2. If Sendmarc disables a Customer's Subscription due to regulatory reasons, Sendmarc will also suspend billing to the Channel Partner for that Customer's Subscription until the Subscription is re-enabled.

8 Limitation of Liability

1. Sendmarc shall have no liability to the Customer's or the End User's use of the Software and Services in the event that:
 - 1.1. the Software is not used in accordance with the Documentation; or
 - 1.2. the defect or liability is caused by the Customer, or the Channel Partner; or
 - 1.3. the Services and Software are used in conjunction with any third party software for which the Customer or the End User lacks sufficient rights from the third party vendor for such use; or
 - 1.4. for any Customer or End User activities not permitted under this Agreement.
2. Under no circumstances and regardless of the nature of any claim, will Sendmarc, its licensors, the Customer, the End-User or the Channel Partner be liable to each other or any other person or entity for in any amount for special, incidental, consequential, or indirect damages, loss of good will or profits, work stoppage, data loss, computer failure or malfunction, attorneys' fees, court costs, interest or exemplary or punitive damages.
3. Subject to clauses 1 and 2 above, but notwithstanding any other provision of this Agreement, Sendmarc's maximum aggregate liability to the Channel Partner, the Customer, whether in contract, delict (including negligence), breach of statutory duty or otherwise, arising under or in connection with this Agreement, shall be limited to the lower of:
 - 3.1. a sum equal to the total Fees paid to Sendmarc under this Agreement in a twelve-month period; or
 - 3.2. that proportion of the loss or damage (including interest and costs) suffered by the Channel Partner, which is ascribed to Sendmarc by a Court of competent jurisdiction or Arbitrator allocating a proportionate responsibility to the Channel Partner / or Customer having regard to the contribution to the loss or damage in question by the Channel Partner or any other person based upon relative degrees of fault; it being a term of this Agreement that the provisions of Section 1 of the Apportionment of Damages Act, 1956 will apply to all claims between the Parties and "fault" and "loss or damage" as used herein shall respectively be deemed to fall within the meanings of "fault" and "damage" as contained in Section 1 of the Apportionment of Damages Act, 1956.
 - 3.3. For the avoidance of doubt, any reference in this Clause 7 to "arising under or in connection with this Agreement" (or any similar expression) shall include a reference to all Orders made under or in connection with this Agreement.
 - 3.4. Sendmarc and Channel Partner shall each use commercially reasonable efforts to mitigate any Losses or other liabilities they may suffer or incur arising under or in connection with this Agreement.

9 Agreement Term and Termination

9.1 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 month's notice in writing to the other party.

10 Breach and Dispute Resolution

1. Should any Party to this Agreement commit a breach of any of the terms and conditions hereof, and remain in default for a period of seven (7) days after receipt by it of written notice from the other Party/Parties calling for such breach to be remedied, without prejudice to any other rights they may have hereunder or in law, to terminate this Agreement by written notice to that effect given to the defaulting Party.
2. Either Party may summarily terminate this Agreement, at any time, by providing to the other ("the defaulting Party") notice of such termination if:
 - 2.1. the defaulting Party is, other than for the purposes of reconstruction or amalgamation, placed under voluntary or compulsory winding up order, business rescue or under receivership or under the equivalent of any of the foregoing; or
 - 2.2. the defaulting Party makes any arrangement or composition with its creditors generally, or ceases or threatens to cease to carry on business;

3. In the event that this Agreement is terminated, as described herein, each Party shall forthwith return to the other all papers, materials, and other properties of the other then in its possession.
4. Any dispute which arises shall be referred to a committee consisting of one (1) member appointed by each of the Parties, or alternates appointed by them, who will use their best efforts to resolve the dispute within fourteen (14) calendar days of the dispute having been referred to them.
5. Should the committee be unable to resolve a dispute in accordance with clause 8.4 above, then such dispute may be submitted to and decided by litigation in terms of clause 18 below.

11 Variation

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

12 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.

13 Rights and Remedies

Except as expressly provided in this Agreement, the rights and remedies provided under this Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

14 Assignment

1. The Channel Partner 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.
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, provided that Sendmarc gives the Channel Partner written notice of its intention to do so.

15 No Partnership or Agency

Nothing in the Agreement shall be construed as creating a relationship of employment, agency, partnership or joint-venture, between the Parties, and neither Party shall hold itself out as being an employee, agent or partner of the other or as being in a joint venture with the other. Save as expressly provided in this Agreement, is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power), unless specifically mandated to do so in writing by the other Party.

16 Notices

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

17 Severance

1. If any provision, or part of a provision, of this 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.
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.

18 Entire Agreement

1. This Agreement, the Order and the Sendmarc License Agreement - <https://sendmarc.com/license>, constitutes the whole agreement between the parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter they cover.
2. Each of the Parties acknowledges and agrees that in entering into this 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.

19 Third Party Rights

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).

20 Jurisdiction

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).

21 Governing Law

This 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.