

# Terms of Service

24 July 2024

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## Sendmarc

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# 1. Definitions

These Terms of Service and the Privacy Notice(s) below (together, these "Terms") form a contract between You and Sendmarc Inc. (referred to as "Us", "We", "Our") and govern Your right to access the Websites and the use of and access to the Services by You, Your Affiliates, Users and End-Customers as part of a Subscription during the Term. By accessing or using the Services or Websites or authorizing or permitting any User or End-Customer to access or use the Services or Websites, You are agreeing to be bound by these Terms. In the event of a conflict between these Terms of Service and Our Privacy Notice, these Terms of Service shall prevail. If You are using Our Services for an organization, You are agreeing to these Terms on behalf of that organization and in these Terms, "You" or "Your" refers to that organization. If You do not have such authority, or if You do not agree with these Terms, You must not accept these Terms and should not access or use the Services and/or Websites.

In these Terms, You and We are individually referred to as a "Party" and collectively as "Parties".

The definitions and rules of interpretation in this clause apply in the Agreement, as applicable to the Services selected.

**Account:** Any Accounts or instances created by or on behalf of You for access and use of the Services. You may have multiple sub-accounts and Subscriptions which may be subject to separate and distinct Plans. For the avoidance of doubt, reference to an Account herein refers to Your Account and any sub-accounts created under Your Account.

**Affiliate:** With respect to a Party, any entity that directly or indirectly controls, is controlled by, or is under common control with such Party, whereby "control" (including, with correlative meaning, the terms "controlled by" and "under common control") means the possession, directly or indirectly, of the power to direct, or cause the direction of the management and policies of such person, whether through the ownership of voting securities, by contract, or otherwise.

**Applicable Data Protection Law:** All laws and regulations applicable to the processing of Personal Data under these Terms, including laws and regulations of the United States, European Union, the European Economic Area and their member states, South Africa and the United Kingdom, including the GDPR and any applicable national laws made under it where You are established in the European Economic Area.

**Business Day:** A day other than a Saturday, Sunday, or public holiday in the territory.

**Channel Partner:** Any authorized reseller of the Sendmarc Platform and Services as defined in the Order Form.

**Confidential Information:** Information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in Section 7 (Confidentiality).

**Data Processing Addendum:** Means the Data Processing Addendum available on our website at [Data Processing Addendum | Sendmarc](#) as updated periodically and which is incorporated into these Terms by reference; or a separate addendum that the Parties have executed in this regard, as the case may be, pursuant to which We shall Process Personal Data forming part of Your Service Data.

**DMARC:** Domain-based message authentication, reporting and conformance standard.

**Documentation:** Any written or electronic Documentation, images, video, text, or sounds specifying the functionalities of the Services provided or made available by Us to You or Users through the Services or otherwise.

**End-Customer:** Your customers and/or any person or entity other than You or Users with whom You interact using the Services.

**Order Form:** A pricing agreement or proposal referencing these Terms and executed or approved by You and Us with respect to Your Subscription, which agreement may detail, among other things, the Plan(s)

applicable to a Subscription, the associated Subscription Fees, the Subscription Term and other details of the Subscription.

**Personal Data:** Any information relating to an identified or identifiable natural person from the data which is submitted by You in respect of the provision and use of the Services, or as defined under Applicable Data Protection Law.

**Plan:** The pricing Plan and add-on(s) that You choose in connection with a Subscription for the associated functionality and Services.

**Privacy Notice:** Our Privacy Notice available on our website at [Privacy Policy and Notice | Sendmarc](#) which is incorporated into these Terms by reference.

**Sendmarc Group:** Sendmarc Inc. and its Affiliates, including and limited to:

- Sendmarc Inc., Incorporation Number 6746924, 221 W 9th St, Wilmington, Delaware, 19801, United States
- Sendmarc Europe B.V, KVK Number 87209322, Lage duin en daalseweg 33, Bloemendaal 2061 BB, Netherlands.
- Sendmarc (Pty) Limited, Registration Number 2018/336082/07, 16 Baker Street, Rosebank, South Africa, 2196.

**Services:** Our cloud-based DMARC platform and related products and services that You subscribe to, and/or any new services or features that We may introduce as a service to which You may subscribe, and any updates to the services, including individually and collectively, any software, APIs and Documentation.

**Service Data:** All electronic data, information, text, messages, or other materials, including Personal Data of End-Customers and Users, submitted to the Services through an Account in connection with Your access and use of the Services.

**Subscription:** Your Subscription to the Services through a Plan of Your choice for Your access and use of an Account. You may have multiple Subscriptions for the various Services offered by Us which may be subject to separate and distinct Plans.

**Subscription Fee:** The fee payable by You to Us for access to the Services under these Terms and any relevant Order Form(s).

**Subscription Term:** The period during which the Services will be provided as specified in the Order Form.

**Users:** Those individuals who are authorized as Users within an Account to use the Services.

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 organizations; 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. Rights to use the Services

- 2.1 **Applicability.** These Terms govern Your right to access and use the Services as part of a Subscription during the Subscription Term.
- 2.2 **Right to use the Services.** Subject to the payment as per the Order Form, of the relevant Subscription Fees, and Your compliance with these Terms, Sendmarc hereby grants You a limited, non-exclusive, non-transferable right to use the Software and the Services that you have subscribed to during the Subscription Term solely for Your internal business operations. You may use the Documentation solely in connection with Your use of the Services. Your Affiliates may be added as Users under Your Account.
- 2.3 **Channel Partners.** If You purchase the Subscription through an authorized Channel Partner, then this Agreement will apply to the Subscription ordered by You, except (a) all references to the Order Form shall refer to the ordering document entered into between You and Channel Partner (or Affiliates of either party) specifying the Service to be provided pursuant to this Agreement, (b) Section 5 (Fees and Payment) shall not apply, and (c) You are required to submit any warranty, refund or applicable Service credit claims to the Channel Partner, who will be solely responsible for issuing any refunds or Service credits.

## 3. Your Responsibilities

- 3.1 **Account Activities.** You are solely responsible for:
- 3.1.1 Your (including Your Users' and End-Customers') access and use of the Services in compliance with these Terms;
  - 3.1.2 providing Us with and keeping current complete and accurate registration and Account information;
  - 3.1.3 maintaining the confidentiality of unique login information, credentials and passwords associated with Your Account, and the privacy and security of Your Account;
  - 3.1.4 all activities that occur within Your Account and notifying Us immediately of any unauthorized access or use of Your Account, log-in information, credentials or passwords, or any unauthorized activity in Your Account;
  - 3.1.5 ensuring that Your use of the Services to store, process and transmit Service Data is compliant with applicable laws and regulations, including Applicable Data Protection Laws;
  - 3.1.6 immediately ceasing use of the Services for a prohibited activity or purpose if We inform You that a specified activity or purpose is prohibited with respect to the Services;
  - 3.1.7 the accuracy, quality and legality of Service Data, the means by which You acquired Service Data and Your use of Service Data with the Services or Other Services; and
  - 3.1.8 determining whether the Services or the information generated thereby is accurate or sufficient for Your purposes.
  - 3.1.9 ensuring that Your network and systems comply with the relevant specifications provided by Sendmarc from time to time;
  - 3.1.10 procuring and maintaining Your network connections and telecommunications links from Your systems to Sendmarc's data centers.
- 3.2 **Your Conduct While Using the Services.** You agree, on behalf of Yourself and Your Users not to:
- 3.2.1 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 Users, or
  - 3.2.2 use or permit the use of the Services or any software, hardware, application or process in a manner that interferes, disrupts, or otherwise breaches the security, integrity, policies or

- procedures of the Services, or any servers, systems or networks connected to the Services, or harasses or interferes with Our other customers' use and enjoyment of the Services or
- 3.2.3 attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form, or distribute all or any portion of software making up the Services and/or Documentation (as applicable) in any form or media or by any means; or
  - 3.2.4 remove, modify, infringe upon, or misuse any trademarks, trade names, Service marks, Service names, logos or brands, copyright or other proprietary notices on the Services or the Documentation, or add any other markings or notices to the Services or the Documentation or
  - 3.2.5 modify, port, adapt, translate or create any derivative work based upon the Services or the Documentation or use the Services to evaluate its functionality or performance for competitive purposes, including for developing any similar application, product or service; or
  - 3.2.6 except with Our prior written consent, use the Services to provide services to third parties; or
  - 3.2.7 use the Services to knowingly post, transmit, upload, link to, send or store any viruses, malware, Trojan horses, time bombs, worms or cancelbots or any other similar harmful software ("Malicious Software"); or
  - 3.2.8 attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under these Terms; or
  - 3.2.9 access or use the Services if You or your End-Customers are a competitor of the Sendmarc Group; or
  - 3.2.10 use a single Subscription for the domains of more than one End-Customer.

## 4. Intellectual Property Rights

- 4.1 All rights, title and interest in and to all of Our patents, inventions, copyrights, trademarks, domain names, trade secrets, know-how and other intellectual property and/or proprietary rights in or related to the Services, including the Documentation, and any part of it (collectively, "Our Intellectual Property Rights"), are owned or licensed by and shall remain exclusively with Us and/or the Sub-Processors. Except as expressly stated herein, the Agreement does not grant the End-User any rights to, or in, our Intellectual Property Rights (whether registered or unregistered), or any other rights or licenses in respect of the Services or the Documentation. You hereby grant Us (i) a limited license to process and disclose Service Data for the purposes of and as permitted under these Terms; (ii) a fully paid-up, royalty-free, worldwide, transferable, sub-licensable, irrevocable and perpetual license to request and incorporate any feedback, suggestions, recommendations, enhancement requests about the Services that You may provide Us; and (iii) a fully paid-up, royalty-free, worldwide, transferable license to use Your name and logo to identify You as Our customer on the Websites or in other sales or marketing materials, provided that We will not issue any press release without Your prior consent.

## 5. Fees and Payments

- 5.1 **Subscription Fees, Payment, Taxes, and Refunds.** You shall be charged the Subscription Fee based on the Plan You choose for the Services. Unless otherwise specified in these Terms or in an Order Form, the Subscription Fees are (i) payable in the currency represented on the invoice and due in full immediately upon each due date with respect to a Subscription until Your Subscription is terminated in accordance with these Terms; (ii) non-refundable; and (iii) exclusive of any taxes, levies, duties, fees or other amounts assessed or imposed by any government authority ("Taxes"), for which You are solely responsible. You authorize Us and/or Our authorized agents, as applicable, to bill and automatically charge You the Subscription Fee, including for any Renewal Subscription Term (as defined below) using the selected payment method. You must notify Us of any change in Your payment Account information, either by updating Your Account or via e-mail to [finance@sendmarc.com](mailto:finance@sendmarc.com).
- 5.2 **Delayed Payments/Non-Payment of Subscription Fees.** Where We do not receive payment towards the Subscription Fees within the due date for a Subscription, You shall be notified of such non-payment. We must receive payments within a maximum of thirty (30) days from the date of Our notice

to You, failing which, in addition to Our right to other remedies available under law, We may (i) charge an interest for late payment at 2% over the current bank lending rate per month on the outstanding balance; (ii) suspend Your access to and use of the Services until We receive Your payment towards the outstanding Subscription Fees; and/or (iii) terminate the Subscription in accordance with these Terms. In the event You in good faith dispute any charges invoiced by Us, You shall promptly pay all undisputed charges within the due date, and shall notify Us in writing of any such disputed amounts within thirty (30) days of the due date, identifying in reasonable detail Your reasons for the dispute and the nature and amount of the dispute. All amounts not timely and appropriately disputed by the due date shall be deemed final and not subject to further dispute.

- 5.3 **Suspension.** In the event of Your actual or threatened breach of these Terms, including any suspected unauthorized activity on Your Account or non-payment of Subscription Fees, We have the right to suspend all or part of Your Subscription(s). You agree to cooperate with Us in any investigation into any unauthorized activity and where Your breach remains uncured for fifteen (15) days following written notice, We reserve the right to terminate the Subscription and/or these Terms with immediate effect. We may disable Your End-Customer's Service access for legal or regulatory reasons or as otherwise permitted under this Agreement and We will notify You of such within 48 hours. In this situation, We will also suspend billing to You for that End-Customer's Subscription until the Subscription is re-activated.
- 5.4 **Price Adjustments.** We reserve the right to adjust the Subscription Fees for our Services in accordance with inflation rates for Subscriptions that have surpassed the Initial Subscription Term. Any price adjustments will be based on the Consumer Price Index (CPI) or a similar measure of inflation. We will provide you with at least 30 days' notice before any such price adjustment takes effect. Your continued use of the service after the effective date of the price adjustment constitutes your acceptance of the new Subscription Fees.

## 6. Subscription Term and Termination

- 6.1 **Subscription Term and Renewal.** Your Subscription for the Services will remain in effect throughout the Subscription Term specified on the Order Form, unless terminated as set forth below; provided however, that this Agreement shall survive with respect to any Order Form in effect at the time of such termination until expiration or termination of such Order Form. Except as otherwise specified in the Order Form, Your Subscription to the Services will automatically renew for the same period as the current Subscription Term (each, a "Renewal" or "Renewal Subscription Term"), unless either party gives the other party written notice of non-renewal at least 30 days in advance prior to the end of the then current Subscription Term. For purposes of providing the aforementioned notice, notice provided via email to [finance@sendmarc.com](mailto:finance@sendmarc.com) will suffice. For avoidance of doubt, this Agreement will automatically expire at the end of the last of Your last Subscription Term.
- 6.2 **Termination.** 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:
- 6.2.1 The other party is in breach of this Agreement and if the breach is capable of remedy, fails to remedy such breach within 30 (thirty) calendar days of receipt of a notice to do so; and/or
  - 6.2.2 the other Party becomes insolvent, makes or has made an assignment for the benefit of creditors, is the subject of proceedings in voluntary or involuntary bankruptcy instituted on behalf of or against such Party (except for involuntary bankruptcies which are dismissed within sixty (60) days), or has a receiver or trustee appointed for substantially all of its property.
- 6.3 **Effect of Termination:**
- 6.3.1 All rights granted under the Agreement shall immediately terminate. We shall not be liable to You or any other third party for suspension or termination of Your Subscription if done in accordance with these Terms.

- 6.3.2 Each party shall return and make no further use of any property, Documentation and other items (and all copies of them) belonging to the other party;
- 6.3.3 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 endeavors 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). Sendmarc shall pay all reasonable expenses incurred by Sendmarc in returning or disposing of End-User Data; and
- 6.3.4 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.

## 7. Confidentiality

- 7.1 Each of the Parties will protect the other's Confidential Information from unauthorized access, use or disclosure in the same manner as each of the Parties protects its own Confidential Information, and in any event, no less than reasonable care. Except as otherwise expressly permitted pursuant to these Terms, each of the Parties may use the other's Confidential Information solely to exercise its respective rights and perform its respective obligations under these Terms and shall disclose such Confidential Information solely to those of its respective Affiliates, employees, representatives and agents who have a need to know such Confidential Information for such purposes and who are bound to maintain the confidentiality of, and not misuse, such Confidential Information. For purposes of these Terms, Your Confidential Information includes Service Data, and Our Confidential Information includes the Services, Documentation, and the contents of these Terms and Order Form(s).
- 7.2 The receiving Party may disclose Confidential Information of the disclosing Party to the extent compelled by law or a court or other judicial or administrative body. The receiving Party shall make reasonable efforts to notify the disclosing Party of such compelled disclosure in writing (to the extent legally permitted). The receiving Party will take reasonable measures to protect the Confidential Information from undue disclosure as if it were the Party's own Confidential Information being requested.
- 7.3 Subject to the terms of these Terms, the receiving Party will return to the disclosing Party all Confidential Information of the disclosing Party in the receiving Party's possession or control and permanently erase all electronic copies of such Confidential Information promptly upon termination of the relevant Subscription(s) and/or these Terms. At the disclosing Party's request, the receiving Party will certify in writing that it has fully complied with its obligations under this Section 7 (Confidentiality).
- 7.4 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.
- 7.5 All confidentiality obligations shall remain in force and effect for the Subscription Term plus one (1) year. The provisions of this Section 7 (Confidentiality) shall supersede any non-disclosure agreement between the Parties entered prior to these Terms that would purport to address the confidentiality of Confidential Information and such agreement shall have no further force or effect with respect to Confidential Information.

## 8. Data Security and Privacy



**8.1 Security of Service Data.** We process Service Data using appropriate technical and organizational measures to protect the Service Data. We have no access to direct email flow or any of its contents. For a detailed analysis of Our data processing procedures, please refer to the Sendmarc Information Security Policy available on our website at [Information Security | Sendmarc](#). Each party shall take appropriate technical and organizational measures against unauthorized or unlawful processing of the Personal Data or its accidental loss, destruction or damage.

## 8.2 Data Privacy

- 8.2.1 You understand that the Sendmarc Group and Sub-Processors shall process Service Data (a) in accordance with these terms, Applicable Data Protection Laws, the Privacy Notice (to the extent applicable), the Data Processing Addendum and any other agreement or addendum executed by the Parties relating thereto; (b) as otherwise authorized by You; and (c) as required for compliance with applicable law. You acknowledge and agree that the Sendmarc Group and Sub-Processors may also process information about You, Your Subscription and Account, Users and End-Customers, including Service Data, to (i) provide the Services and perform its obligations under these Terms, including, without limitation, to respond to Your support requests; (ii) demonstrate new features, products, and Services (iii) comply with the law or respond to lawful requests or legal process; (iv) professionals and advisors in order to protect the Sendmarc Group or Your customers' or partners' rights or property; and (v) act on a good faith belief that such disclosure is necessary to protect the personal safety or avoid violation of applicable law or regulation.
- 8.2.2 You represent and warrant that You have the necessary consents, permissions, authorizations and right to allow Us to process and transfer Service Data in accordance with these Terms, the Privacy Notice (to the extent applicable), the Data Processing Addendum and any other agreement or addendum executed by the Parties, including processing and transfer of Service Data in and to countries which may have different privacy laws from Your country of residence or establishment.
- 8.2.3 You understand that it shall be Your responsibility to inform the Users and End-Customers (including on Our behalf, as applicable) about the processing of their Personal Data in accordance with these Terms, the Privacy Notice (to the extent applicable), the Data Processing Addendum and any other agreement or addendum executed by the Parties, and, where required, obtain necessary consent or authorization for Your or Our use of any Personal Data that You provide Us or is collected as part of Your use of the Services.
- 8.2.4 Unless We explicitly agree otherwise in writing, You shall not provide Sensitive Data at any time to the Services and We will have no liability whatsoever for and in connection with the Sensitive Data. For purposes of these Terms, "Sensitive Data" means (i) identification number, passport number, driver's license number, or similar identifier (or any portion thereof), (ii) employment, financial, genetic, biometric or health information, (iii) racial, ethnic, political or religious affiliation, trade union membership, or information about sexual life or sexual orientation, (iv) Account passwords, (v) date of birth, (vi) criminal history, (vii) mother's maiden name or (viii) any other information or combinations of information that is deemed sensitive under the legal framework of any applicable jurisdiction.
- 8.2.5 The End-Customer shall own all right, title and interests in and to all of the Service Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Service Data.

## 8.3 Other Data Services

- 8.3.1 You acknowledge that the Group and the service providers they use may aggregate and analyze technical and other data regarding Your use of the Services that is non-personally identifiable with respect to You, Users and End-Customers ("Anonymized Aggregated Data"). We will not identify You, Users or End-Customers as the source of any Anonymized Aggregated Data. The Group and the service providers they use shall process and enrich the Anonymized Aggregated Data in its systems to (i) provide, support, improve, enhance and operate the Services and its availability; (ii) develop new features, products and services; (iii) compile statistical reports and record insights into usage patterns; and (iv) perform its obligations under these Terms.

## 8.4 Sub-Processors, Other Services and Third-Party Content

- 8.4.1 We may engage certain third parties to assist in the provision of Services (each a “Sub-Processor”), whose products or services form an integral part of the Services that We provide. The products and services provided by the Sub-Processors do not include any of the Other Services (as defined below).
- 8.4.2 You may at Your discretion, (a) integrate with the Services, certain third-party products and services (“Other Services”); or (b) use links in the Services to third-party websites, resources or content (“Third-Party Content”), whereby each of such Service or content is governed by the respective third party’s terms and privacy policies. You understand that We do not warrant, endorse or assume any liability or responsibility with respect to Other Services or Third-Party Content, including Your enablement or use thereof, any sums due or transactions thereunder, or provision of any support. You agree to address any comments, queries, complaints or feedback about such Other Services and Third-Party Content with the respective third-party provider of the Other Services or Third-Party Content. By enabling the Other Services, You understand that data may flow between the Services and the Other Services.

## 9. Disclaimer of Warranties

- 9.1 Except as specifically provided, the Services and Software are provided on an “AS-IS” and “AS AVAILABLE” basis and We specifically disclaim any and all representations, conditions and warranties of any kind, whether express, implied, statutory or otherwise including but not limited to warranties of non-infringement merchantability, and fitness for a particular purpose.
- 9.2 You acknowledge that We, on behalf of Ourselves, the other Group companies and the Sub-Processors, do not warrant that access to the Services which is provided over the internet and various telecommunications networks, all of which are beyond our control, will be error-free, uninterrupted, timely, secure or free from viruses or other malicious software, will meet your quality and performance requirements, or will be corrected for any defects within a stipulated period pursuant to any service level agreement.

## 10. Indemnification

- 10.1 **By Sendmarc.** We will defend You against any claims, demands, suits or proceedings made or brought by a third party (“Claims”) against Yourself to the extent based upon an allegation that the Services, as furnished by Us hereunder and used by You within the scope of this Agreement, misappropriates any third-party trade secret or infringes any third party’s copyright or patent or trademark rights, and will indemnify and hold You harmless against damages awarded by a court or settlements agreed by Us in connection with such Claims. We shall have no liability under this Section to the extent that any Claims (a) are presented to Us by You more than two (2) years after termination or expiration of the Order Form for the subject Services; (b) are based on any modification or combination of the Services with products, services, methods, content or other elements not furnished by Us; or (c) are based on any use of the Services in a manner that violates this Agreement or the instructions given to You by Us. The foregoing states the entire obligation of Sendmarc with respect to any Claims for alleged or actual infringement or misappropriation of intellectual property rights.
- 10.2 **Mitigation.** In the event of any Claim or potential Claim covered by this Section, We may, in its discretion, seek to mitigate the impact of such Claim by modifying the Services to make them non-infringing, and/or by suspending or terminating Your or Your End-Customer’s use of the Services upon reasonable notice to You (provided, in the case of such suspension or termination, that We will refund to You a portion of Fees prepaid by Yourself for the then-current Subscription period, prorated to the portion of that Subscription period that is affected by the suspension or termination).

- 10.3 **By You.** You will defend Us against any Claims arising from Your use of the Services in violation of this Agreement or the applicable Documentation, and will indemnify and hold Us harmless against damages awarded by a court or settlements agreed by You in connection with such Claims.
- 10.4 **Process.** Each party's indemnity obligations are subject to the following: (a) the aggrieved party will promptly notify the indemnifier in writing of the applicable Claim; (b) the indemnifier will have sole control of the defense and all related settlement negotiations with respect to the Claim (provided that the indemnifier may not settle any Claim in a manner that would impair any of the aggrieved party's rights or interests without prior written consent, which will not be unreasonably withheld); and (c) the aggrieved party will, at the indemnifier's expense, provide all cooperation, information and assistance reasonably requested by the indemnifier for the defense of such Claim.
- 10.5 **Exclusive Remedy.** The foregoing states the Your sole and exclusive rights and remedies, and Our (including Our employees', agents' and sub-contractors) entire obligations and liability, for infringement of the intellectual property right or right of confidentiality.

## 11. Limitation of Liability

- 11.1 **Indirect Damages.** Except for damages payable to third parties under the indemnification obligations of section 10 or damages resulting from breach of the confidentiality obligations in section 8, to the maximum extent permitted by law, neither party, nor its respective Affiliates, officers, directors, employees, agents, suppliers, licensors or service providers (and, with respect to Chargebee, the sub-processors), shall be liable for consequential, incidental, indirect, special, punitive or other damages, or for lost profits, business interruption, loss of business or information, or costs of procuring substitute goods or services, arising out of this agreement or the use of or inability to use the Services to be provided hereunder, even if advised of the possibility of such damages or could have foreseen such damages.
- 11.2 **General Damages.** Except for our indemnification obligations under section 10 or damages resulting from breach of the confidentiality obligations in section 8, to the maximum extent permitted by applicable law, the aggregate liability of each party, its respective Affiliates, officers, employees, agents, suppliers, licensors, and service providers (and, with respect to Sendmarc, the sub-processors) relating to the Services, use thereof and these terms shall be limited to an amount equal to the Subscription Fees paid or payable by You in the six (6) months prior to the first event or occurrence giving rise to such liability, in connection with the Subscription to which the claim relates. For clarity, the above limitations shall not limit your payment obligations to Us for the Services. No claim may be pursued by You more than one (1) year after the facts giving rise to such claim have arisen.
- 11.3 In jurisdictions which do not permit the exclusion of implied warranties or limitation of liability for incidental or consequential damages, each party's liability will be limited to the greatest extent permitted by law.

## 12. Survival

- 12.1 Sections 3 (Your Responsibilities), 4 (Intellectual Property Rights), 5 (Fees and Payment), 6 (Subscription Term, Termination and Suspension), 7 (Confidentiality), 8 (Data Security and Privacy), 9 (Disclaimer of Warranties), 11 (Limitation of Liability), 12 (Survival), and **Error! Reference source not found.** (Miscellaneous) of these Terms and such other provisions that by their nature are intended to survive termination, shall survive any expiration or termination of these Terms. Expiration and/or termination of these Terms shall not limit either Party's liability for obligations accrued as of or prior to such expiration or termination, as applicable or for any breach of these Terms.

## 13. Miscellaneous

- 13.1 **Status of Parties.** Except as specifically provided for in the Order Form, nothing in these Terms shall be deemed to constitute a partnership, joint venture, employment or franchise between the Parties, nor constitute any Party as the agent of the other Party for any purpose or entitle any Party to commit or bind the other Party in any manner.
- 13.2 **Entire Agreement.** These Terms, including any Order Form(s), constitute the whole agreement between the Parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter they cover. 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. Neither commencement of performance, nor failure to object to any additional or different terms and conditions from You, nor provision of Services, by, in each case, Us or the other Group Companies shall constitute an acceptance of any terms and conditions proposed by You that are in addition to, inconsistent or in conflict with, or different than these Terms. In the event of a conflict between any Order Form and these Terms, the Pricing Agreement shall prevail to the extent it is intended to. We may amend these Terms from time to time by posting the most current version on Our Website, in which case the new Terms will supersede prior versions. Please check these Terms periodically to take notice of changes as they will be binding on You. If an amendment materially affects Your rights, We will notify You (by, for example, sending a message to the e-mail address associated with Your Account, or posting on Our blog or on the Website or as a notification inside the Services). Your continued use of the Services following the effective date of any such amendment may be relied upon by Us as Your acceptance of any such amendment. If You do not agree to an amendment, You may terminate Your use of the Services or request Us to terminate the provision of Our Services to You.
- 13.3 **Severability.** 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. 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.
- 13.4 **Variation.** No variation of the Agreement shall be effective unless it is in writing and signed by the Parties (or their authorized representatives).
- 13.5 **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.
- 13.6 **Assignment.** Neither Party may assign this Agreement without the other Party's prior written consent, which will not be unreasonably withheld. Notwithstanding the foregoing, each party may transfer this Agreement together with all Order Forms (and subject to any usage limitations therein) upon written notice to the other Party: (a) to any entity controlling, controlled by, or under common control with, the transferring Party, where "control" means direct or indirect ownership or control of more than 50% of the voting interest of the subject entity; or (b) to any entity acquiring the transferring Party, with which the transferring Party is merging or to which the transferring party sells all or substantially all of its assets. Any attempt to assign this Agreement except as permitted under this Section, will be null and of no effect. Subject to the foregoing, this Agreement will bind and inure to the benefit of each Party's successors and permitted assigns.
- 13.7 **Publicity.** Unless specifically agreed otherwise, in writing, Sendmarc shall have the right to utilize the Customer's name, likeness and comments in any marketing collateral it chooses, which may include, but not be limited to, publication on the website, social media channels, training and presentations.
- 13.8 **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).
- 13.9 **Force Majeure.** We shall not be liable for inadequacy of or irregularity in the Services caused by (i) any circumstance beyond Our reasonable control, including acts of God, acts of government, flood, fire,

earthquakes, civil unrest, acts of terror, strikes or other labor problems, technical failures (including failures in telecommunications, internet, internet service provider or hosting facilities, power shortages) or acts undertaken by third parties, including without limitation, denial of service attacks; (ii) sub-optimal functionality, availability or downtime of Your payment gateway and/or 'Other Services'; or (iii) Your, Users' or End-Customers' use of the Services in an unauthorized, improper or unlawful manner; or for any misuse or modification or damage of the Services caused by You, Users or End-Customers; or any breach of these Terms by You or Users (collectively, the "Force Majeure and Other Events").

- 13.10 **Compliance With Laws.** Each Party will comply with applicable laws, rules, regulations, decrees and/or official governmental orders of any country in which Services are used or provided hereunder relating to anti-bribery, anti-corruption and anti-money laundering. Sendmarc complies with all laws and regulations related to slavery, forced labor, child labor and human trafficking and shall not use any of the foregoing in its operations or in provision of the Subscription Services.
- 13.11 **Arbitration.** Except as otherwise provided herein, any dispute or controversy arising under or in connection with this Agreement shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) as presently in force by one (1) arbitrator appointed by the Parties. If the Parties cannot agree on the choice of arbitrator, then, an arbitrator shall be appointed by the ICC. The place of arbitration shall either be London, U.K. or New York, USA. The arbitration shall be conducted in English and the Parties agree to use all reasonable efforts to facilitate a decision and award within three (3) months from the filing of the arbitration procedure including providing full disclosure of any information and Documentation which may be relevant in the arbitrator making a decision within thirty (30) days of the filing of the arbitration procedure. The decision and award resulting from such arbitration shall be final and binding on the Parties and the Parties hereby waive all means of recourse to the courts of England or any other country. Judgment on the arbitration award may be rendered by any court of competent jurisdiction.
- 13.12 **Governing Law.** If You are located outside of South Africa then 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 England and Wales. If You are located in South Africa then 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.
- 13.13 **Notices.** All notices permitted or required under this Agreement shall be in writing, will reference this Agreement, and shall be delivered in person, by overnight courier or express delivery service, or by first class, registered or certified mail, postage prepaid, with a copy by email delivery (confirmed by a non-automated reply), to the address of the Party specified on the Order Form, legal@sendmarc.com or such other address as either Party may specify in writing. Such notice shall be deemed to have been given upon receipt. 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).