

# General Terms and Conditions for Consulting Services (U.S.)

Last updated: April 2024

## 1 Scope of Application

- 1.1 These General Terms and Conditions ("**GTC**") govern the performance of consulting services by Checkmk, Inc. ("**Provider**").
- 1.2 Services under these GTC are available only to Customers with a currently valid subscription for Checkmk Software.

## 2 Consulting Services

- 2.1 The consulting services are described in the consulting order.
- 2.2 The Customer acknowledges that fulfillment of its duties of cooperation is a basic prerequisite for the performance of the services of the Provider and as a result constitutes a contractual obligation. The Customer must make available, free of charge, the premises, technical environments, system access, contact persons and documentation required by the Provider for the purpose of performing its services. The Customer will, among other things, ensure that security systems (in particular firewalls) do not hinder the performance. If consulting services are not provided on the Customer's premises, the Customer must enable access to a user's screen via screen sharing. The Customer must also make any necessary decisions regarding the implementation and scope of the project without delay and inform the Provider accordingly. In addition, the Customer must examine changes suggested by the Provider without delay.
- 2.3 The Customer will, on a timely basis, make available all technical and other documentation and information required for a successful outcome. In the event that the Customer breaches or fails to properly perform any duty or obligation and thus interferes with the performance of the services of the Provider, agreed execution deadlines will be extended by a period equal to that of any delay incurred plus an appropriate time for resumption of work.

## 3 Payment and Invoicing

- 3.1 Consulting Services will be billed on the basis of time worked at the current rates or at a fixed price. All prices provided will be estimates unless fixed prices are expressly agreed.
- 3.2 If a maximum effort is defined, the Provider will stop the work when this limit is reached. As soon as the Provider realizes that the maximum effort will be exceeded, the Provider informs the Customer accordingly. In this case, the parties shall adjust the project planning by mutual agreement so as not to exceed the agreed maximum effort or extend the order.
- 3.3 For services provided on the Customer's premises, a travel allowance will be charged in addition. The travel allowance depends on the location and the number of assignments. Travel expenses and the cost of accommodations will not be itemized. A consultant day corresponds to up to eight hours of work by one employee on one calendar day.

- 3.4 Invoicing takes place after completion of the services. Invoices will be due immediately upon receipt and payable within fourteen (14) days.
- 3.5 All payments required are exclusive of federal, state, local and foreign taxes, duties, tariffs, levies, withholdings and similar assessments including sales taxes, use taxes and value added taxes, and the Customer agrees to bear and be responsible for the payment of all such charges, excluding taxes based upon The Provider's net income. All amounts due hereunder shall be grossed-up for any withholding taxes imposed by any foreign government. If the Customer claims exemption from any tax, then it shall furnish the Provider with a valid tax exemption certificate issued by or acceptable to the applicable taxing jurisdiction or entity. The Customer will indemnify and hold the Provider harmless from, any such tax (excluding taxes on the Provider's net income) as well as the collection or withholding thereof, including penalties and/or interest.
- 3.6 If the Customer fails to make any payments when due, the Provider reserves the right to add a late charge of 1.5% per month, or the maximum allowable under applicable law, whichever is lower, from the original due date until paid. The Customer will also reimburse the Provider for all amounts incurred by the Provider (including reasonable attorneys' fees) in collecting amounts due hereunder.

#### **4 Rights of Use**

Where the Provider delivers software or copyrightable works in connection with any services under these GTC, the respective rights of use will be governed by the provisions of the EULA. The Provider will otherwise retain all rights of use and exploitation.

#### **5 Confidentiality**

The confidentiality agreement between the parties shall apply accordingly to information exchanged in connection with development and consulting services.

#### **6 LIMITED WARRANTIES; DISCLAIMER OF WARRANTIES**

- 6.1 **Service Warranty.** The Provider warrants to the Customer that it will perform the Consulting Services in a professional and workmanlike manner; provided, that, the Customer must report any non-compliance with this warranty within 30 days of delivery of the applicable Consulting Services.
- 6.2 **Exclusive Remedies.** The Customer's exclusive remedy and the Provider's entire liability for any breach of the above warranties shall be the re-performance of the Consulting Services, or if the Provider is unable to perform the Consulting Services as warranted, the Provider shall refund the fees paid to the Provider for the nonconforming Consulting Services.
- 6.3 **Disclaimer.** EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, THE CONSULTING SERVICES ARE PROVIDED ON AN "AS IS" BASIS.

## **7 Limitation of Liability**

- 7.1 IN NO EVENT WILL (A) EITHER PARTY (INCLUDING, IN THE CASE OF THE PROVIDER, ITS SUPPLIERS) BE LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR OTHER DAMAGES, INCLUDING LOSS OF DATA OR USE, COST OF COVER, OR LOSS OF PROFITS, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, AND WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, AND (B) THE PROVIDER AND ITS SUPPLIERS BE LIABLE IN THE AGGREGATE FOR AN AMOUNT EQUAL TO THE FEES PAID BY CUSTOMER FOR THE CONSULTING SERVICES.
- 7.2 THE FOREGOING LIMITATIONS IN SECTION 7.1 WILL NOT APPLY TO CLAIMS RESULTING FROM A PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.
- 7.3 THE LIMITATIONS OF LIABILITY SET FORTH HEREIN ARE INDEPENDENT OF EACH OTHER AND ANY LIMITED REMEDY AND WILL APPLY NOTWITHSTANDING ANY FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE LIMITATIONS OF LIABILITY REFLECT A DELIBERATE AND BARGAINED FOR ALLOCATION OF RISKS BETWEEN THE PROVIDER AND THE CUSTOMER AND CONSTITUTE THE BASIS OF THE PARTIES' BARGAIN, WITHOUT WHICH THE PROVIDER AND THE CUSTOMER WOULD NOT HAVE AGREED TO THE TERMS AND CONDITIONS OF THE AGREEMENT.

## **8 Final Provisions**

- 8.1 These GTC and the consulting order comprise the entire agreement between the parties concerning the subject matter hereof and supersede any prior agreements between them. Any provisions in the Customer's general terms and conditions which conflict with, vary from or add to these GTC will only become part of the contract if and to the extent that the Provider has expressly consented to them. This requirement of consent will apply in any case, even if the Provider, for example, provides goods and services without reservation despite being aware of the Customer's general terms and conditions. The registration of the Provider at a supplier portal of the Customer or another platform, which is necessary for the execution of the contractual relationship and which requires consent to terms and conditions of the Customer, shall not be considered as explicit consent. Such terms and conditions will not become part of the contract.
- 8.2 To the extent there is a conflict between different elements of the agreement, the following precedence will apply: (1) the consulting order; (2) these GTC; and (3) the other Appendices and referenced documents.
- 8.3 Performance by Provider is subject to the condition that no obstacles based on national or international provisions of foreign trade law or embargos and/or other sanctions stand in the way of performance.
- 8.4 Amendments or additions will only be effective if the Provider has made the relevant declaration of intent at least in text form (e.g., by postal mail, e-mail or fax). The same applies to any waiver of the text form requirement.

- 8.5 Should any provision be or become invalid in whole or in part, this shall not affect the validity of the remaining provisions. The parties agree to substitute for any such invalid provision a valid provision that most closely approximates the economic effect and intent of the invalid provision.
- 8.6 The Provider may use the Customer's name and logo on the Provider's website, customer lists and marketing materials to represent that the Customer is a user of Checkmk Software.
- 8.7 The Customer may only set off counterclaims that are undisputed or non-appealable.
- 8.8 **Governing Law.** The agreement will be exclusively governed and construed in accordance with the laws of the State of Delaware without regard to conflicts of laws. The United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transactions Act as it may be enacted in the applicable jurisdiction will not apply to the agreement. The parties agree to submit to the personal and exclusive jurisdiction of the courts located within Delaware. If either party employs attorneys to enforce any rights arising out of or related to the agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees and costs from the other party. For purposes of this Section only, "**prevailing party**" means the party that prevails on a majority of causes of action in such dispute.
- 8.9 **Force Majeure.** Except for the Customer's obligations to pay the Provider hereunder, neither party will be liable to the other party for any failure or delay in performance due to causes beyond its reasonable control, including fire, earthquake, war, riot, epidemic, act of God or governmental action
- 8.10 **Injunctive Relief.** The breach of the EULA or of section 9 would cause irreparable harm to one or both parties, the extent of which would be difficult to ascertain. Accordingly, in addition to any other remedies to which such other party may be legally entitled, each party will have the right to obtain immediate injunctive relief in the event of a breach of such sections by the other party without the requirement of posting a bond.
- 8.11 **Relationship of the Parties.** The parties to the agreement are at all times independent contractors, and nothing in the agreement will be construed as creating a partnership, employment, agency or other joint venture relationship. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.
- 8.12 **Subcontract.** The parties acknowledge that the Provider may delegate performance of some or all of its obligations under the agreement to subcontractors; provided, however, that the Provider shall remain responsible for the performance of such obligations.
- 8.13 **Third Party Beneficiaries.** Unless otherwise expressly agreed in writing by the parties, no provisions of the agreement are intended or will be construed to confer upon or give to any person or entity other than the Customer and the Provider any rights, remedies or other benefits under or by reason of the agreement.

- 8.14 **Assignment.** The Customer may not transfer, assign or delegate any of its rights or duties under the agreement without the prior written consent of the Provider.
- 8.15 **No Waiver.** The failure by either party to enforce any provision of the agreement will not constitute a waiver of future enforcement of that or any other provision.
- 8.16 **Notices.** All notices, demands or consents required or permitted under the agreement will be in writing, including email, and will be deemed to have been fully given and received on the earlier of actual receipt or: (a) when sent by confirmed facsimile, (b) when sent by email (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered (c) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one business day (two business days for international addresses) after deposit with an express commercial courier, with written verification of such receipt. All communications will be sent to the party's official address, or at such address as the party may specify herein or may specify later in writing for such purposes.
- 8.17 **Survival.** The rights and obligations of the parties contained in sections 3, 5, 6, 7, and 8 and any other provisions that may reasonably assumed to be intended to survive termination, will survive termination of the consulting order.
- 8.18 **Headings.** The headings used in these GTC are for reference only and do not change the meaning of any provision of the agreement, and will not be used in interpretation of any provision of the agreement. When used herein, the term "includes" or "including" means "including but not limited to".