

Rackapps

Rackapps Terms and Conditions of Sale

These Terms and Conditions of Sale, together with any Rackapps Attachment to Terms and Conditions of Sale (collectively, these "Terms") constitute the terms and conditions that apply as between **Rackapps** ("Rackapps ") and **You** (the "Customer") regarding any equipment, features, upgrades, other items (collectively, the "Products") and related services (the "Services") that are sold, licensed, rendered or otherwise provided by Rackapps to Customer from time to time. Customer's placement of an order with Rackapps constitutes acceptance of these Terms. Rackapps performance of Customer's order is expressly conditioned upon Customer's acceptance of these Terms and Customer's agreement that these Terms will supersede and take priority over any additional or inconsistent terms and conditions in any existing or future purchase order, confirmation or other similar document from Customer. Without limiting the generality of the foregoing, nothing contained in any purchase order, confirmation or other similar document will in any way modify or add to these Terms, and any terms or conditions contained in a purchase order, confirmation, or other similar document from Customer that are in any way inconsistent with or additional to these Terms are hereby rejected.

1. ORDERS AND PAYMENT TERMS

a. All prices quoted are on a per occurrence basis, unique to a specific proposal, and are subject to change without notice. All quotes are subject to termination by Rackapps at any time prior to receipt and acceptance of Customer's purchase order.

b. An accepted order can be canceled only with Rackapps written consent, and only on terms that will indemnify Rackapps against resulting losses (including, but not limited to, any costs already incurred by Rackapps in performing the order). In no event, will a cancellation be allowed after Products have shipped. A cancellation charge may be assessed to Customer in accordance with Rackapps then-current cancellation charges. Rackapps grants to Customer the right to cancel the outstanding portion of an accepted purchase order if Rackapps fails to ship the product within thirty (30) days after the scheduled ship date provided the delay in shipment is not due to credit issues or other actions taken by Customer.

c. Customer shall pay all invoices in cash. If Rackapps has, in its sole discretion, agreed to extend credit to Customer sufficient to cover the applicable invoice (and all other outstanding invoices), then Customer shall make payment within thirty (30) days from the date of invoice. Otherwise such invoice shall be payable immediately upon receipt or, if required by Rackapps in advance of shipment. Rackapps may issue partial invoices for partial shipments. Rackapps reserves the right to establish, terminate or alter credit limits and terms, to delay shipment of orders, to require full or partial prepayment or to require alternate terms and conditions based upon Customer's payment history, financial condition, or any other matter that in Rackapps determination adversely affects the likelihood that Customer will make timely payment in full. Without limiting the generality of the foregoing, if Customer fails to timely pay any invoice, or if its financial condition becomes impaired or unsatisfactory to Rackapps may require Customer to provide satisfactory security and may withhold further deliveries until such security is received. Any amount payable by Customer that remains unpaid after the applicable payment due date will be subject to a late charge equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate allowable by law from the due date until such amount is paid. Customer shall reimburse Rackapps for reasonable attorneys' fees and any other costs associated with

collecting delinquent payments. All payments will be made in U.S. dollars unless otherwise agreed by Rackapps in writing on a case by case basis.

d. Customer hereby grants, and agrees to grant, to Rackapps a continuing security interest, and a purchase money security interest, in all the Products and the proceeds thereof, to secure payment of the amounts set forth in the invoices issued by Rackapps to Customer. These security interests will be satisfied upon payment in full of all invoices. Customer authorizes Rackapps to file a copy of the invoice and/or a financing statement with appropriate government authorities at any time in order to perfect the foregoing security interests. On the request of Rackapps Customer will execute financing statements and other instruments Rackapps requires to perfect its security interests.

2. TAXES, DUTIES, AND CUSTOMS

All prices quoted and payable for Products and Services are exclusive of all taxes (including, but not limited to, withholding taxes), duties, broker charges and customs requirements in each case imposed now or in the future by any governmental authority on the transactions or amounts payable hereunder. Unless Customer submits satisfactory tax-exemption documentation to Rackapps Customer shall pay all import duties, customs fees, sales and use taxes, broker charges, value added taxes, and all other taxes except taxes on Rackapps income. Rackapps may, in its discretion, either pay such taxes, duties, and charges directly for Customer's benefit and include such amounts in an invoice, or else require Customer to pay such taxes, duties, and charges directly to the appropriate authorities. All special export packaging costs will be invoiced to Customer. Export of certain Products may be subject to government restrictions. Rackapps shall not be responsible for delays caused by third parties, including, but not limited to, customs, strike, brokerage, or other delays.

3. DELIVERY, SETUP, AND INSTALLATION

a. All deliveries shall be: for deliveries within the United States F.O.B. Origin; for those outside of the United States Supplier's Dock (FCA: Supplier's Dock, Incoterms 2000). Title and risk of loss will pass to Customer on delivery of the Products to a common carrier. Customer shall be solely responsible for obtaining appropriate insurance coverage for such shipments, unless insurance is included in a written quotation provided by Rackapps and accepted by Customer. Unless otherwise agreed by the parties, Rackapps shall arrange shipping on Customer's behalf to the destination specified by Customer in its order. Customer will be responsible and will reimburse Rackapps for any shipping charges incurred by Rackapps including, but not limited to, transportation charges and all taxes, V.A.T, duties, and any other governmental assessment applicable to any shipment.

b. Delivery and shipping dates are approximate only, and Rackapps will not be liable for any damage, loss or expense incurred by Customer if Rackapps fails to meet the specified shipping dates. All goods will be packaged in the manner determined by Rackapps unless otherwise requested by Customer and agreed to in writing by Rackapps. Rackapps reserves the right to make partial shipments. In the event of any default by Customer, Rackapps may decline to make further shipments without in any way affecting Rackapps rights under these Terms.

c. Subject to the licensing requirements set forth below in subparagraph (d), at the Customer's request, Rackapps may perform additional Services after delivery of the Products. These Services may include: (i) loading a disk image approved and provided by the Customer, (ii) cabling and labeling servers within the rack (iii) configuring basic network settings on each machine per Customer's reasonable written instructions; (iv) configuring serial concentrators per Customer's reasonable written instructions. Customer shall pay Rackapps for the time spent in performing any such tasks at Rackapps then-current standard hourly rates, plus reasonable travel and other out of pocket expenses. If billable, the specifics of Services to be

performed and rates applicable to such Services shall be laid out in an appropriate Statement of Work signed by the parties. Rackapps' then-current standard hourly rates for setup and installation Services are available upon request. Customer may request estimates of cost for such Services provided, however, that Customer understands that all such estimates are not binding on Rackapps.

d. If Customer requests that Rackapps perform any setup, installation or other Service, Customer shall ensure that any software duplication through the loading of disk images is legal, that it has obtained the applicable licenses for Rackapps to load and execute such disk images and software and information contained therein onto Customer's servers, and that each copy of software and information embodied in such disk image(s) is legally licensed for Customer's actual and contemplated uses. Customer indemnifies and holds Rackapps harmless from and against any and all third-party allegations, claims, damages, assertions, losses and liabilities of any kind or nature arising from or based in whole or in part upon Rackapps' performance of Services for Customer. Rackapps reserves the right to request written proof that the foregoing license rights for Rackapps have been obtained, and if Rackapps determines that such license rights have not been obtained, Customer shall be responsible for all non-hardware setup tasks.

4. WARRANTY

Rackapps' standard warranty ("Limited Warranty Statement"), which can be viewed at <http://rackapps.com/warranty-and-support.html>, is hereby incorporated as though fully set forth herein.

5. LIMITATIONS OF LIABILITY

IN NO EVENT, SHALL Rackapps BE LIABLE FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL OR INDIRECT DAMAGES, OR FOR ANY LOSS OF BUSINESS, SALES OR PROFITS, WHETHER SOUNDING IN CONTRACT, TORT, STRICT LIABILITY OR OTHER LEGAL THEORY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS. IN ADDITION, IN NO EVENT WILL Rackapps' TOTAL CUMULATIVE LIABILITY ARISING FROM OR RELATED TO THE PRODUCTS OR SERVICES, THESE TERMS OR THE SUBJECT MATTER HEREOF, WHETHER IN CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EXCEED THE AMOUNTS RECEIVED BY RACKAPPS FROM CUSTOMER FOR THE PRODUCTS AND SERVICES THAT ARE THE BASIS FOR THE LIABILITY.

Customer acknowledges that Rackapps has set its prices and entered into these Terms in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth herein, and that the same form an essential basis of the bargain between the parties. Customer agrees that the limitations and exclusions of liability and disclaimers specified in these Terms will survive and apply even if found to have failed of their essential purpose.

6. NOTICES

Any notice required to be given hereunder shall be in writing and shall be deemed to have been delivered when deposited in the United States mail as registered or certified mail with a return receipt requested, with adequate postage affixed and addressed to Rackapps to the attention of Rackapps CFO, 48761 Kato Road, Fremont, CA 94538 (or such future address as Rackapps may specify in writing), or if to Customer at the address set forth on Customer's purchase order or any address at which the Products have been delivered (unless a different notice address has been provided in writing by Customer).

7. FORCE MAJEURE

Neither party will incur any liability to the other party for any loss or damages resulting from any delay or failure to perform its obligations (other than the obligation to pay money due and owing) under these Terms if such failure is caused by events beyond its reasonable control (a "Force

Majeure Event"), provided however if the Force Majeure Event continues for a period of 30 days or longer, either party may terminate these Terms upon written notice to the other party. Inability to timely make payment shall not in any event be deemed a Force Majeure Event.

8. PUBLICITY

Neither party shall disclose any of the terms and conditions of these Terms without the prior written consent of the other except to (a) its attorneys, accountants, and other professional advisors under a duty of confidentiality, (b) as required by law, or (c) in connection with a proposed merger, financing, or sale of such party's business provided that any third party to whom the terms of this Agreement are to be disclosed is under a duty of confidentiality. Customer grants to Rackapps the right to use Customer's name and logo on Rackapps' promotional materials (including, without limitation, on Rackapps' web site) for the sole purpose of identifying Customer as one of Rackapps' customers.

9. APPLICABLE LAW; VENUE

These Terms are deemed to be entered into in the State of California, U.S.A. The parties agree that these Terms shall be governed by and construed in accordance with the laws of the State of California, U.S.A. without regard to any conflict of laws rules that would require the laws of another jurisdiction to apply. The U.N. Convention on the International Sale of Goods shall not apply to the sale of Products hereunder or otherwise to these Terms. Customer consents to the jurisdiction of, and venue in, the state court of Santa Clara County, California, U.S.A., or the federal court of the Northern District of California, U.S.A.

10. NO WAIVER

The failure of either party at any time to require performance by the other party of any provision hereof will not affect, in any way, the full rights to require such performance at any time thereafter, nor will the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

11. EXPORT AND IMPORTANT REGULATION

Customer will comply fully with all relevant export laws and regulations of the United States, including without limitation the U.S. Export Administration Regulations (collectively "Export Controls"). Without limiting the generality of the foregoing, Customer will not and shall require its representatives not to, export, direct, or transfer Products, or any direct product thereof, to any destination, person, or entity restricted or prohibited by the Export Controls. Customer shall promptly provide all information and certifications reasonably requested by Rackapps (including without limitation certification of end-user identity and associated information) as may be necessary or desirable for Rackapps to fulfill its obligations under the Export Controls. Customer shall comply fully with all relevant import laws and regulations of the country or countries to which Products are delivered, and shall provide all necessary information concerning actions that Rackapps must take in order to comply with such foreign laws and regulations to Rackapps prior to Rackapps acceptance of any order.

12. ASSIGNMENT

Customer may not assign, delegate, or transfer these Terms or any right or obligation hereunder without the prior written consent of Rackapps and any attempt by Customer to assign these Terms without such consent will be null and void. Subject to the preceding sentence, these Terms will bind each party and its permitted successors and assigns. Rackapps may assign any of its rights or obligations under these Terms without the consent of Customer.

13. LICENSES; NO IMPLIED RIGHTS

Software programs and other information embodied in the Products are licensed, not sold, for Customers' limited use as specified in the applicable license agreement. The applicable license agreements will be provided with the Products at delivery, and are also available from Rackapps

upon request. Customer shall comply with all such license agreements, and any breach by Customer of any such license agreements shall be deemed a breach of these Terms. Nothing in these Terms or the sale of the Products shall imply any other license or other rights with respect to any intellectual property rights of Rackapps or its suppliers except as may be set forth in a written license agreement supplied by Rackapps or its suppliers as applicable, and Rackapps reserves all rights in the Products.

14. PRODUCT CHANGES & DISCONTINUATION

Rackapps reserves the right, from time to time and in its discretion, to modify, alter, change, improve, or discontinue Products.

15. TECHNICAL DATA

Customer shall not, without Rackapps prior written consent, use, duplicate, or disclose any technical data or information, or any information related to the functionality, performance, or construction of the Products delivered or disclosed by Rackapps to Customer, for any purposes other than for the purposes of installation, operation, or maintenance of Products by persons who have agreed to preserve the confidentiality of such technical data and information. All such technical data and information shall remain the confidential information and sole property of Rackapps.

16. ACTIONS

Any action resulting from any alleged breach by Rackapps must be commenced within one (1) year after the cause of action has accrued. The prevailing party in any action to enforce these Terms shall be entitled to recover its attorneys' fees, court costs, and other collection expenses, in addition to any other relief it may receive.

17. NO THIRD-PARTY BENEFICIARIES

There are no third-party beneficiaries to these Terms, and these Terms do not provide a third party with any remedy, claim, liability, reimbursement, cause of action or other right or privilege.

18. ENTIRE TERMS

These Terms, the Rackapps ' Sales Order Acknowledgment, and any applicable software license agreements, constitute the complete agreement between the parties and supersede all prior or contemporaneous agreements or representations, written or oral, concerning the subject matter of these Terms. In the event of any conflict, ambiguity, or inconsistency between these Terms and the terms contained in the other documents referenced herein, the terms contained in the Rackapps ' Sales Order Acknowledgment or the applicable software license agreement, as the case may be, shall control with respect to the subject matter referenced on Rackapps Sales Order Acknowledgment or the applicable software license agreement.

19. AUTHORITY; EXECUTION AND MODIFICATION

The only persons authorized to amend or modify these Terms on behalf of Rackapps are the President, Chief Financial Officer, Controller, or General Counsel of Rackapps and any such amendment or modification must be in writing signed by one of such officers of Rackapps and Customer; the signature of any other officer, employee or agent below shall not bind Rackapps. No signature, promise, act, document, usage, or custom will be deemed to amend or modify these Terms except as expressly provided above.