

Netforce Analyzer Terms & Conditions

Managed Network Accounting and Vulnerability Analysis Service



These Terms and Conditions serve as a binding agreement between MainNerve, Inc. ("MainNerve") and the Customer (Customer), collectively referred to as Parties ("Parties"), for the **Netforce Analyzer Security Managed Security Services** and also called Netforce Analyzer, or Appliance (the "Appliance"). Terms are also available to be publicly viewed at the MainNerve Website and specifically viewed by typing www.mainnerve.com/analyzer/terms in a web browser.

1.0 Services Overview. MainNerve will provide Customer with the ongoing Managed Service (the "Service") in the way that it customarily performs such Service for its Customers and is described in the accompanying Netforce Analyzer Work Order or Service Order (the "Work Order").

MainNerve will operate an active data feed(s) (the "Data Feeds") that can be used to provide updates to the Netforce Analyzer Appliance (the "Appliance") as determined by MainNerve for the performance of a number of different network analysis services available in the form of software running on the Appliance which is managed by MainNerve. Services included in the Analyzer offering include monthly, quarterly, or annual network utilization reports (as specified in the Work Order) that provide detailed analysis & accounting of network assets including multiple classes of flow data as well as bandwidth accounting, user analytics, application accounting, and protocol analysis. Exclusive to the Netforce Analyzer service is the ability to perform consistent vulnerability assessments of network segments and hosts either by the Customer or MainNerve as specified in the Work Order.

MainNerve will provide up to two (2) hours of professional services per month at no cost to the Customer, and four (4) hours in the first month towards the initial setup and integration of the Service. In the event that additional MainNerve professional services labor is required or requested by Customer for the initial setup and integration, or to perform post-setup network changes that may affect the Service, Customer will be charged \$100.00 per labor-hour by MainNerve for these professional services unless another agreement for such services is agreed to by the Parties.

MainNerve shall commence the installation of the Appliance(s) within thirty (30) days of its receipt of the Work Order for the Managed Service as specified in the Agreement and will test and certify the installation as fully conforming to the specifications ("Certification"). The Service and Term of the Agreement shall commence on the "Effective Date" specified on the Work Order and continue throughout the term specified on the Work Order.

MainNerve will use commercially reasonable efforts (which permit outages due to third party events, normal updating, system maintenance and repair, outages due to events beyond the reasonable control of MainNerve, etc.) to ensure that the Service is available twenty-four (24) hours per day, seven (7) days per week and that it contains updates to the Appliance as they become available.

In the event of an Appliance failure, MainNerve will, at its discretion, provide Customer with a fully functioning Appliance at no additional cost for the length of the Term subject to supply and within a reasonable period of time.

The Service and Term of the Agreement shall commence on the "Effective Date" specified in the Work Order.

1.1 Integration. As a necessary part of the Service, MainNerve shall be permitted to install certain proprietary hardware, which includes all Appliances ("Hardware") and software ("Software") licensed and maintained by MainNerve onto the Appliance on the Customer's location. The Service

could not be performed without installation and utilization of the Hardware and Software. Subject to Customer's compliance with these Terms and Conditions, and timely payment of fees, MainNerve will allow Customer to use the Service solely for its internal use for the term of this Agreement. No rights of any kind are granted for the Hardware or in the source code of the Software.

1.2 Restrictions on Use. Customer agrees not to: (i) redistribute the Service without appropriate permits or licenses from MainNerve; (ii) cause or allow discovery of source code in any way; (iii) cause or allow alteration or modification of the Software and of the Hardware by Customer or any third parties without MainNerve's prior written consent; (iv) cause or allow Customer or any third party to gain access, transfer, assign, reproduce, grant permission to other Parties, sell, rent, lease, distribute, or use the Service or their direct derivatives except as expressly set forth herein; (v) act as a service bureau for third parties using the Service except as set forth herein; or (vi) violate any law in connection with Customer's use of the Service; (vii) use the Service at more than one location ("Drainpoint") without the written consent of MainNerve to do so; and (viii) disconnect, alter, tamper with or otherwise interfere with the Appliance(s), the Hardware or Software, as the case may be.

1.3 Third Party Resources. MainNerve shall not be responsible for securing any intellectual property rights that may be owned or retained by third parties, unless called for in the Agreement. Customer's use of any third-party intellectual property, including licensed software, shall be subject to the applicable license restrictions of such third parties. Any statement or reference in the Agreement that MainNerve is responsible for obtaining third-party resources, including services, equipment, facilities, or intellectual property rights, is subject to the availability of those resources.

1.4 Independent Contractor. For installation and maintenance services performed, MainNerve's legal relationship established by this Agreement is that of an independent contractor and not that of an employee. Except as provided in this Agreement, MainNerve shall also pay any and all costs incurred in the performance of this Agreement. Such costs include, but are not limited to, all taxes, all insurance (including but not limited to health insurance), automobile expenses, and supplies. MainNerve will be responsible for its own payroll, FICA, FUTA, SDI, SU1, federal and state withholding taxes, and any and all other taxes relating to services rendered under this Agreement, and will hold the Customer harmless from any of the above-described taxes. To the extent MainNerve provides services of its employees and agents, MainNerve warrants that all such agents and employees will have the specific skills and experience required. No joint venture, partnership, employment, or agency relationship exists between Customer and MainNerve as a result of this Agreement or use of the Service.

1.5 Scheduling. Customer will use commercially reasonable efforts to accommodate performance by MainNerve of the Service as set forth in the Agreement.

1.6 Place of Work. MainNerve's personnel will perform their work for Customer both remotely and on the Customer's premises when required by Customer. Customer agrees to provide necessary working space and facilities, and any other reasonable services and materials MainNerve or its personnel may need in order to perform the work assigned to them.

1.7 Term. The term ("Term") of this Agreement shall commence on the specified Effective Date in the Work Order and shall continue for the number of months specified in the Work Order by the Customer. Unless notice of termination is received from either party, in accordance with the section entitled

"Notices," no less than thirty (30) and no more than sixty (60) days prior to the end of the Term this Agreement shall automatically renew for a period of time equal to the initial Term in the Work Order and shall be called the Renewal Term ("Renewal Term").

1.8 Breach by MainNerve. This Agreement may be terminated by Customer if MainNerve breaches a material obligation hereunder and it is not cured within thirty (30) days after notification of the breach in accordance with the section entitled "Notices." In the event that Customer terminates this Agreement for breach, Customer will be responsible to pay for all Service provided through the date of termination plus any related termination costs including but not limited to Appliance disconnection and delivery back to MainNerve as described herein in Section 1.11.

1.9 Breach by Customer. In the event Customer is delinquent in payment as set forth in the section entitled "Payment," MainNerve shall have the right to withhold further performance under this Agreement without notice, or terminate this Agreement. In the event of a breach by Customer in any other of its obligations under this Agreement for which default is not cured within the required thirty (30) day period, MainNerve shall have the right to withhold further performance under this Agreement and declare the Agreement terminated. Upon termination due to Customer breach, Customer shall owe MainNerve the remainder of the Monthly Recurring Managed Service Fees plus other any amounts due as per this Agreement including but not limited to Appliance disconnection and delivery costs, charges and expenses reasonably incurred by MainNerve. If the Customer breaches the terms of this Agreement, the Monthly Managed Service Fees for the balance of the term shall, at the option of MainNerve, be accelerated and due and payable in full in addition to any amounts due as per this Agreement including but not limited to Appliance disconnection and delivery.

1.10 Remaining Payments. Within sixty (60) days after termination of this Agreement irrespective of the reason, MainNerve shall submit to Customer an itemized invoice for any fees or expenses accrued for work performed up to the termination date and as required by this Agreement and Customer shall pay all fees and expenses properly owing to MainNerve within ten (10) days of receipt of said invoice.

1.11 Post-Termination Return of Hardware and Software. Notwithstanding any termination of this Agreement, any and all rights in and to the Software and the Hardware shall terminate and Customer shall return to MainNerve any and all copies of the Software and all items of Hardware within ten (10) days of the termination date in accordance with MainNerve's disconnection and delivery instructions, which will be provided to Customer within ten (10) days of the termination date. Hardware and software not returned in accordance to this section within the ten (10) day period shall be considered purchased by Customer at the then specified value by MainNerve which shall be paid to MainNerve within (10) business days of non-return of equipment.

1.12 Reimbursement of Expenses. Except as provided in the section entitled, "Independent Contractor," Customer shall pay MainNerve its actual out-of-pocket expenses as reasonably incurred by MainNerve solely in furtherance of its performance hereunder including but not limited to sales, use or other taxes, assessments or levies imposed upon MainNerve for the Service except for MainNerve's income-related taxes, which shall remain MainNerve's responsibility. MainNerve agrees to provide Customer with copies of all such receipts, ledgers, tax bills, assessments, and other records for Customer or its accountants to verify the amount and nature of any such expenses.

1.13 Additional Work. The fees and charges for any changes, modifications, follow-on or additional work not described in this Agreement shall be pre-approved in writing by Customer and separately invoiced.

1.14 Payment. Customer shall pay all fees and expenses properly owing to MainNerve hereunder within thirty (30) days from the date of MainNerve's invoices or by the date specified in the Agreement, whichever is sooner. Interest at the rate of eighteen percent (18%), or the maximum amount allowable by law, whichever is lower, per year shall be charged on all undisputed invoices unpaid after thirty (30) days.

1.15 MainNerve Content. "MainNerve Content" shall mean all designs, discoveries, inventions, patents, products, copyrights, trademarks, computer programs, scripts, applets, procedures, improvements, developments, drawings, notes, documents, information, and materials acquired by MainNerve and any information, intelligence, partnerships, and/or alliances used to gather information relating to worms, viruses Trojans, malware or other security threats acquired by MainNerve whether acquired through data derived from Customer's network or network files, or through other sources. MainNerve Content is not a "work made for hire," as that term is defined in section 101 of Title 17 of the United States Code (the Copyright Act). MainNerve Content does not include Third-party software, as described in the section entitled "Third Party Resources" of this Agreement.

1.16 Content and Service Rights.

1.16.1 Content Rights. Customer is not permitted to rent, lease, market, or provide the MainNerve Content to third parties. Nothing in this Agreement shall be construed as granting Customer any ownership interest in the MainNerve Content. All rights not expressly granted herein are reserved by MainNerve.

1.16.2 Pre-Existing Works. Customer's right, if any, to use any of MainNerve's pre-existing software and other proprietary works that are not included in the MainNerve Content shall be the subject of a separate agreement between MainNerve and Customer.

1.17 Indemnity.

1.17.1 MainNerve Indemnity. MainNerve agrees to defend and indemnify Customer against any and all damages, costs, liabilities, expenses, and settlement amounts incurred in connection with any suit, claim, or proceeding by any third party alleging that the MainNerve Content and Service furnished and used within the scope of this Agreement infringes any patent, copyright, trademark or misappropriates a trade secret, provided that Customer gives MainNerve prompt written notice of any such claim, tenders the defense of any such claim to MainNerve, provides full cooperation for the defense of same at MainNerve's expense, and does not settle without MainNerve's prior written approval. In the event the Content or Service are held or are believed by MainNerve to infringe, MainNerve may at its sole option and expense, elect to (i) modify the MainNerve Content and Service so that they are non-infringing (ii) replace the MainNerve Content and Service with non-infringing content and services that are functionally equivalent or superior in performance, (iii) obtain legal permission for Customer to continue to use the infringing Content and Services as provided hereunder, or (iv) terminate permission for use of the infringing Content or Service.

1.17.2 Customer Indemnity. Customer will indemnify, defend and hold MainNerve harmless from any and all claims, demands, actions, liens, encumbrances, judgments, attorneys' fees, claims of employees, losses, injuries, and liabilities of whatever kind arising from or relating to MainNerve's performance under this Agreement or otherwise arising from or related to Customer's breach of any of its representations, obligations, duties, warranties, or covenants in this Agreement.

1.17.3 Limitations on Indemnity. The rights granted to the Customer under this Section 1.17 shall be Customer's sole and exclusive remedy for any alleged infringement of any patent, copyright, trademark, or other proprietary rights. MainNerve will have no liability if any alleged patent or copyright infringement or claim thereof is based upon (i) the use of MainNerve Content or Service in connection or in combination with equipment, devices, software, or data not provided by MainNerve (if such infringement or claim could have been avoided by the use of the MainNerve Content and Service with other equipment, devices, software or data), or (ii) use of other than the most current release of the MainNerve Content and Receivables if such claim would have been avoided by use of such release.

1.18 Warranties of MainNerve. MainNerve warrants that:

1.18.1 Title. MainNerve has sufficient right, title, and interest in and to the Service, exclusive of rights respecting programs, data, and materials identified as furnished to Customer by third-party vendors, including any third-party resources, to grant and convey the rights accorded to Customer under this Agreement.

1.18.2 Scope. For the duration of the Term, the Service shall provide the features, functions and produce results in material conformity with the proposal for such services. If, on the basis of written or documentary evidence submitted to MainNerve, it is shown that the Service is nonconforming, then, as the sole and exclusive remedy of Customer, MainNerve shall, at Customer's sole discretion and written request, either correct the nonconformity within (30) days or allow the Customer to cancel the service and billing for such services will cease. If it is ultimately determined that no such nonconformity exists, or that the nonconformity (or any portion thereof) is owing to actions of Customer, Customer shall compensate MainNerve for its services at MainNerve's established rates in determining the validity of such conformity.

1.19 Limitations on Warranties.

1.19.1 Third Party Limitations. THE WARRANTIES PROVIDED IN SECTION 1.18 ARE SOLELY FOR THE BENEFIT OF CUSTOMER AND CUSTOMER SHALL HAVE NO AUTHORITY TO EXTEND SUCH WARRANTY TO ANY THIRD PARTY. THE WARRANTIES ARE CONTINGENT ON THE PROPER INSTALLATION AND USE OF THE SERVICE ON THE DESIGNATED HARDWARE AND PROPER PERFORMANCE OF THIRD-PARTY SOFTWARE AND HARDWARE.

1.19.2 Disclaimer of Warranties. EXCEPT AS SPECIFICALLY SET FORTH IN SECTION ENTITLED "WARRANTIES OF MAINNERVE," CUSTOMER EXPRESSLY AGREES AND ACKNOWLEDGES THAT USE OF THE SERVICE IS AT CUSTOMER'S SOLE RISK. THE SERVICE IS PROVIDED "AS IS," WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, EXCEPT AS EXPRESSLY SET FORTH HEREIN. EXCEPT AS EXPRESSLY SET OUT HEREIN, MAINNERVE DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. MAINNERVE DOES NOT WARRANT THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS, OR THAT THE SERVICE WILL BE COMPATIBLE WITH ANY PARTICULAR HARDWARE OR SOFTWARE, OR IS COMPLETELY SECURE, OR THAT THE OPERATION OF THE SERVICE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS IN THE SERVICE WILL BE CORRECTED. EXCEPT AS SET FORTH HEREIN, THE ENTIRE RISK AS TO THE RESULTS AND PERFORMANCE OF THE SERVICE IS

ASSUMED BY CUSTOMER. FURTHERMORE, MAINNERVE DOES NOT WARRANT OR MAKE ANY REPRESENTATION REGARDING THE USE OR THE RESULTS OF THE USE OF THE SERVICE IN TERMS OF ITS CORRECTNESS, ACCURACY, QUALITY, RELIABILITY, SECURITY, APPROPRIATENESS FOR A PARTICULAR TASK OR APPLICATION, CURRENTNESS, OR OTHERWISE. NO WARRANTY OR OBLIGATION TO CORRECT UNDER THIS AGREEMENT SHALL EXTEND TO ANY CHANGE, MODIFICATION, OR ENHANCEMENT TO THE SOFTWARE, HARDWARE AND/OR SERVICE, WHICH ARE PREPARED BY ANY PERSON OR ENTITY OTHER THAN MAINNERVE OR IF THERE IS ANY EVIDENCE THAT THE SEALS ON THE HARDWARE HAVE BEEN BROKEN OR TAMPERED WITH. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY MAINNERVE OR MAINNERVE'S AUTHORIZED REPRESENTATIVES SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF THE WARRANTIES GRANTED HEREIN.

1.20 Limitation of Liability. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, INDIRECT, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES FOR LOSS OF BUSINESS, LOSS OF PROFITS, LOSS OF GOODWILL OR BUSINESS REPUTATION, BUSINESS INTERRUPTION, LOSS OF DATA, OR LOSS OF BUSINESS INFORMATION) ARISING OUT OF OR CONNECTED IN ANY WAY WITH THIS AGREEMENT, OR FOR ANY CLAIM BY ANY THIRD PARTY (INCLUDING FOR INTELLECTUAL PROPERTY INFRINGEMENT), EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE TOTAL LIABILITY OF EITHER PARTY FOR ALL DAMAGES, LOSSES, AND CAUSES OF ACTION (WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE) SHALL NOT EXCEED THE TOTAL AMOUNT PAID BY CUSTOMER TO MAINNERVE HEREUNDER.

1.21 Nonconformity. If, on the basis of written or documentary evidence submitted to MainNerve, it is shown that the Service is nonconforming, then, as the sole and exclusive remedy of Customer, MainNerve shall, at Customer's sole discretion and written request, either correct the nonconformity or return a pro rata portion of the payments made to MainNerve for such nonconforming Service. If it is ultimately determined that no such nonconformity exists, or that the nonconformity (or any portion thereof) is owing to actions of Customer, Customer shall compensate MainNerve for its services at MainNerve's established rates in determining the validity of such conformity.

1.22 Loss of Data. In no event shall MainNerve be liable for loss of data or records of Customer that are stored at Customer's place of business, it being understood that Customer shall be responsible for ensuring proper and adequate back-up and storage procedures. Customer assumes full responsibility for maintaining and regularly updating back-ups of its data and records.

1.23 Customer Responsibilities. While MainNerve will complete its work in accordance with the estimated schedules and charges set forth in this Agreement, timing and cost requirements may be subject to certain factors beyond MainNerve's control, including force majeure events and delays caused by third parties and Customer. MainNerve shall not be responsible for any delays or liability resulting from such factors. To facilitate prompt and efficient delivery of the Service, Customer and its personnel shall reasonably cooperate with MainNerve and its personnel in all material respects, including, without limitation, providing information as to Customer requirements, providing access to the facilities and equipment/hardware on which the Hardware and Software are to

be installed, and providing access to all necessary information regarding Customer's systems and facilities. Customer shall be responsible for making, at its own expense, any changes or additions to Customer's current systems, software, and hardware that may be required to support operation of the Service.

1.24 Additional Value From Hiring. Without the prior written consent of MainNerve, Customer shall not recruit or solicit for employment any personnel of MainNerve until one (1) year after the termination of this Agreement, except as provided in a Direct Placement Agreement with MainNerve, if executed.

1.25 Governing Law. This Agreement shall be governed and construed in all respects in accordance with the laws of the State of Texas.

1.26 Arbitration. Any controversy or claim arising out of or relating to this Agreement, including, without limitation, the interpretation or breach thereof, shall be submitted to a single arbitrator in Austin, TX, administered and adjudicated in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Such arbitrator shall be a person with at least five year's experience in the areas of information technology and software. The award of the arbitrator shall be made in writing, with findings of fact and conclusions of law. The written decision shall be final, binding, and convertible to a court judgment in any appropriate jurisdiction. Notwithstanding the foregoing, this section shall not preclude either party from seeking temporary, provisional, or injunctive relief from any court. The parties shall share equally in such arbitration.

1.27 Non-Disclosure. At all times, both during the Term of the Agreement and after its completion, both parties will keep in strict confidence and will not disclose any confidential or proprietary information relating to the business of the other party or of any client, customer, or business partner of a party hereto, to any person or entity, or make use of any such confidential or proprietary information for its own purposes or for the benefit of any person or entity, except as may be necessary in the ordinary course of providing the Service or pursuant to a court order.

1.28 Notices. All notices required or permitted hereunder shall be given in writing addressed to the respective parties as set forth herein, unless another address shall have been designated in writing, and shall be delivered by hand or by registered or certified mail, postage prepaid.

1.29 Press Releases/Client Roster. Each party agrees to work in good faith with the other party to develop mutually agreed upon public announcements and press releases announcing the relationship between the parties created by this Agreement. Each party may distribute such press releases and public announcements at such time as the parties mutually agree in writing on the content of such releases and announcements. All other press releases or public announcements regarding the relationship created by this Agreement or otherwise referencing the other party must be reviewed and approved in writing by the non-distributing party prior to distribution, such approval not to be unreasonably withheld. MainNerve may include Customer's name and/or logo on MainNerve's list of customers including, but not limited to, lists or announcements of customers on MainNerve's website.

1.30 Export. Customer agrees that it will not export or re-export the Service without obtaining at its own risk and expense the appropriate licenses, permits, or authorizations from the United States Government or any other government. If Customer uses the Service or provides access to the Service from outside the United States of America, Customer is solely responsible for carrying out all customs formalities for the importation or exportation of the Service and for the transit of such through any other countries and for compliance with all

applicable laws, including without limitation export and import regulations of other countries.

1.31 General. This Agreement may be changed only by agreement in writing of authorized representatives of both parties. No text or information set forth on any other preprinted form or document shall add to or vary the Terms and Conditions of this Agreement. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, then such provision(s) shall be construed, as nearly as possible, to reflect the intentions of the invalid or unenforceable provision(s), with all other provisions remaining in full force and effect. The failure of a party to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by that party in writing. Either party will be excused for any delay or failure in performance hereunder (except for the payment of money) caused by any occurrence or contingency beyond its reasonable control. The obligations and rights of the party so excused will be extended on a day-to-day basis for the time period equal to the period of such excusable delay.

1.32 Copyright. All content appearing on the MainNerve Website or in the Interface used in providing the product (the "Interface") to which the Customer will have access, is the property of MainNerve, Inc., 18534 Forty Six Parkway, Suite 2, Spring Branch, TX 78070, Copyright © 2001-2009, all rights reserved. As a user, you are authorized only to view, copy, print, and distribute documents, reports or findings from the Interface on so long as (1) the document is used for informational purposes only, and (2) any copy of the document (or portion thereof) includes the following copyright notice: Copyright ©2009 MainNerve, all rights reserved.

1.33 Trademarks All brand, product, service, and process names appearing on the MainNerve Website and the product Interface are trademarks of their respective holders. Reference to or use of a product, service, or process does not imply recommendation, approval, affiliation, or sponsorship of that product, service, or process by MainNerve. Nothing contained herein shall be construed as conferring by implication, estoppels, or otherwise any license or right under any patent, copyright, trademark, or other intellectual property right of MainNerve or any third party, except as expressly granted herein.

1.34 Use of Interface. The product Interface may contain other proprietary notices and copyright information, the terms of which must be observed and followed. Information on the interface may contain technical inaccuracies or typographical errors. Information, including product pricing and availability, may be changed or updated without notice. MainNerve and its subsidiaries reserve the right to refuse service, terminate accounts, and/or cancel orders in its discretion, including, without limitation, if MainNerve believes that customer conduct violates applicable law or is harmful to the interests of MainNerve and its subsidiaries.