



# M&T BANK MERCHANT SERVICES TERMS AND CONDITIONS; PROCESSING TERMS AND CONDITIONS

The following are legal documents and should be retained by you for future reference.

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## M&T BANK MERCHANT SERVICES TERMS AND CONDITIONS

These Merchant Services Terms and Conditions are between M&T Bank, having a place of business at One M&T Plaza, Buffalo, New York, 14203 (“M&T”) and the merchant entity or entities who has executed a Merchant Services Application (“Merchant”). Other parties may also be parties to this Agreement for limited purposes (e.g. Processor, Guarantor, Third Party Provider).

### 1. DEFINITIONS

The definitions are set forth in Addendum 1 to this Agreement.

### 2. SCOPE OF SERVICES

**A.** The Agreement shall govern the provision of any Merchant Services provided to Merchant from time to time in accordance with the Agreement. Merchant shall be deemed to have accepted the Terms and Conditions in the Agreement if Merchant enrolls in any Merchant Service, uses any Merchant Service, allows any other person to enroll in or use any Merchant Service on its behalf (including any servicer), or makes any payment to M&T for any Merchant Service.

**B.** Merchant may only use the Merchant Services and Merchant Deposit Accounts **(i)** for the lawful operation of the specific business that Merchant conducts, and not for any personal, family or household purpose and **(ii)** in compliance with the Agreement.

#### 2.1. SET-UP OF MERCHANT SERVICES

**A.** Prior to using any Merchant Services under the Agreement, Merchant shall complete and submit to M&T an Election Form, any additional set-up forms (“Set-up Forms”), and additional information in connection with the Merchant Services. All forms must be satisfactory to M&T in its sole discretion. Merchant hereby authorizes an Authorized Representative to sign and submit to M&T such forms.

Merchant hereby consents to M&T completing, on Merchant’s behalf, an Election Form and/or Set-up Form for any Merchant Service. In such case, Merchant shall carefully review such form prior to signing and/or submitting it to M&T to ensure the form accurately reflects Merchant’s instructions with respect to the Merchant Service. Merchant shall promptly notify M&T if any such form does not accurately reflect Merchant’s instructions and Merchant shall not use any Merchant Service referenced in the form until such form is amended to accurately reflect Merchant’s instructions and re-submitted to M&T.

If Merchant wishes to change any elections in a previously submitted Election Form or Set-up Form, Merchant must submit an updated form to M&T. If requested by Merchant, M&T may, in its sole discretion, permit Merchant to confirm to M&T the accuracy of details relating to the set-up of a Merchant Service via email or telephone call from the Merchant. In such case, M&T shall be entitled to rely on instructions provided by Merchant’s Authorized Representative(s) relating to the set-up of such Merchant Service, including any changes to the set-up of such Merchant Service. Such change shall not be effective until M&T has approved such updated form and has had a reasonable time to act to implement such change.

**B.** M&T is under no obligation to approve Merchant’s use of any Merchant Service and the decision to approve or not is at M&T’s sole discretion. Merchant may not commence using any Merchant Service until after **(i)** M&T has received from Merchant an Election Form and any Set-up Form, **(ii)** M&T has approved Merchant’s use of such Merchant Service and **(iii)** M&T has had a reasonable time to act to implement such Merchant Service (and no such form shall be effective until thereafter).

**C.** Prior to using any Merchant Service, Merchant shall ensure that it has read and understands the Merchant Service Terms and Conditions and any user guides for such Merchant Service. By using a Merchant Service, Merchant agrees to all terms and conditions that apply to such Merchant Service.

**D.** Any recommendation or suggestion that M&T or its representatives make to Merchant (whether orally or in writing) relating to the type or scope of any Merchant Service (or feature) are made in good faith to assist Merchant in its decision to use such Merchant Service. M&T provides no guarantee or representation regarding any such recommendation or suggestion. The decision to purchase or use (or not to purchase or use) a particular Merchant Service (or feature) is Merchant's sole decision, and M&T shall not be held responsible or liable in connection therewith or in connection with any such recommendation or suggestion.

**E.** M&T may decline to complete a particular Transaction or transaction included in a Merchant Service if M&T reasonably believes that it may suffer legal and/or reputational risk or that M&T may be in violation of any applicable Law or internal policy applicable to it if it completes such transaction.

## **2.2. EXCLUSIVITY**

During the term of this Agreement, Merchant represents that it shall **(i)** use exclusively M&T for providing Merchant Services, and **(ii)** submit all Transaction data to M&T in compliance with all specified formats and procedures.

## **3. TERM**

Merchant will select the initial term on the Election Form, such term being for 1 year, 2 years, or 3 years ("Initial Term"). Upon completion of the Initial Term, this Agreement will automatically renew for the same term as originally selected by Merchant, unless either party delivers notice of termination at least thirty days prior to the end of term of the Agreement. Any early termination (for whatever reason) by Merchant will incur an early deconversion fee of Five Hundred Dollars (\$500). If the Merchant does not select a term, this Agreement shall be deemed to have a month-to-month term, and, at the expiration of each month, it will automatically renew for successive one-month terms until either party delivers notice of termination to the other in accordance with the notice provisions of this Agreement.

## **4. PAYMENT OF MERCHANT OBLIGATIONS**

Merchant Obligations are immediately due and owing in full, without demand or notice to Merchant. Merchant Obligations that are not paid when due will bear interest at the rate of 1.5% per month or the maximum rate of interest allowed by Law, whichever is more.

## **5. DUTY TO HONOR CARDS AND COMPLY WITH LAW AND RULES**

Merchant will honor those Cards designated by Merchant on the Election Form. With respect to the subject matter of the Agreement, Merchant will comply with the Laws, Rules and M&T's procedures, established from time-to-time.

Merchant will resolve disputes relating to Card Transactions that arise with a Cardholder, exclusively between itself and Cardholder.

## **6. MERCHANT DEPOSIT ACCOUNT**

**A.** Merchant will maintain a Merchant Deposit Account with M&T. On terms and conditions acceptable to M&T, Merchant may maintain the Merchant Deposit Account at a financial institution other than M&T after first obtaining M&T's written consent.

**B.** Merchant must promptly notify M&T's Merchant Services Customer Service Department if

Merchant:

- i. Makes changes to the Merchant Deposit Account;
- ii. Changes its legal name or structure, d/b/a, telephone or fax number; or
- iii. Updates the information it furnished to M&T on the Merchant Services Application or its elections made on the Election Form, including but not limited to new lines or types of business, closing or liquidation of business or any location, change in Card acceptance and processing methods, voluntary or involuntary party to a bankruptcy case, and enters into a binding agreement with a third party that seeks to affect this Agreement.

C. At the end of each calendar month, Merchant will receive a statement showing the activity that occurred in the Merchant Deposit Account for the previous month. If Merchant believes there is an error in the statement, Merchant may request that M&T initiate an inquiry by delivering to M&T written notice within 60 days from the date of last recorded activity on the Merchant Deposit Account statement. Merchant's failure to comply with this notice requirement will preclude Merchant from disputing the activity shown on the subject statement.

D. Merchant must maintain sufficient funds in the Merchant Deposit Account to prevent the occurrence of a negative balance. In the event that the proceeds from Merchant's settled Transactions or the balance of the Merchant Deposit Account are not sufficient to pay amounts due under the Merchant Agreement, M&T may, in addition to any other rights and remedies under this Agreement, pursue one or more of the following:

- i. Demand and receive immediate payment for such amounts;
- ii. Debit the Merchant Deposit Account for the amount of the negative balance;
- iii. Apply funds held in the Reserve Account against the negative amount; or
- iv. Withhold all or some of the Merchant's settlement funds for a Transaction and apply them against the negative amount.

## **7. GRANT OF SECURITY AGREEMENT**

In addition to other rights and interests M&T may have under this Agreement, Law, and Rules, Merchant assigns and grants to M&T a security interest in the Merchant Deposit Account and its proceeds, and all other deposit accounts and their proceeds that Merchant maintains with M&T, as security for Merchant's Obligations that are or may become due under this Agreement ("Secured Assets"). This assignment and grant of security interest are unconditional and continuing until M&T releases them in writing. On M&T's request Merchant will execute and deliver to M&T documents that M&T may require to perfect or protect the assignment and security interest. Merchant warrants and represents that no other person or entity has a security interest in the Secured Assets. If a bankruptcy proceeding is filed by or against Merchant (whether the petition is filed voluntarily or involuntarily), Merchant waives any applicable protection related to the automatic stay provisions of 11 U.S.C. §362 (or any replacement section) and consents to an appropriate reserve of funds being established between the parties to this Agreement or by court order.

## **8. RIGHT OF SET-OFF**

Merchant grants to M&T the right to set-off Merchant Obligations without notice or demand, against:

- i. Merchant Deposit Account,
- ii. Other Secured Assets,
- iii. Credit balance in favor of Merchant arising from the deposit of Transaction Records, and
- iv. Other amounts that may be owed to Merchant.

At its option, M&T may bill Merchant for the amount of set-off.

## **9. REVOCATION OF TRANSACTION RECORDS**

**A.** M&T may refuse to accept a Transaction Record and revoke its acceptance of a Transaction Record at any time, in any one or more of the following circumstances:

- (1)** Cardholder disputes its liability to M&T or an Association because **(a)** Merchant refused to issue to Cardholder a credit slip in the proper amount of the goods or services subject to the Transaction Record after the goods or services were returned, rejected, or defective, or **(b)** Merchant failed to perform its obligations in connection with the Transaction, or **(c)** the signature on the Transaction Record was not Cardholder's; or
- (2)** The Transaction represented by the Transaction Record was not made in compliance with the terms of this Agreement, Rules or Law.

**B.** If M&T revokes acceptance of a Transaction Record, Merchant will promptly repay M&T the amount M&T originally credited to the Merchant Deposit Account on account of that Transaction Record.

## **10. CONDITIONAL CREDITS**

M&T will credit the Merchant Deposit Account with the total face amount of Transaction Records that comply with the terms of this Agreement, Law and Rules, less credit slips presented at that time and offsets. Credits made to the Merchant Deposit Account are provisional and become final within the timeframes set forth in the Rules and Law.

## **11. DISPUTES**

Merchant will immediately reimburse M&T the amount of negative balance in the Merchant Deposit Account that occurs as a result of deductions for cardholder disputes, charges, fees or otherwise. To the extent that the Rules permit Merchant to resolve a dispute, Merchant will submit the proper documentation to M&T within **15 days** of its receipt of the dispute from M&T and if Merchant fails to respond within that **15- day period**, Merchant will be deemed to have waived its rights to resolve the dispute.

### **11.1. EXCESSIVE DISPUTES**

If Merchant is receiving an excessive amount of cardholder disputes, in addition to M&T's other remedies under this Agreement, M&T may do any one or more of the following:

- i.** Review Merchant's internal procedures relating to acceptance of Cards and notify Merchant of new procedures Merchant should adopt in order to avoid future disputes;
- ii.** Notify Merchant of a new rate M&T will charge to process Merchant's disputes;
- iii.** Require Merchant to replace any magnetic- stripe-only point of sale terminal or electronic cash register with an EMV chip-capable terminal, if required under the Card Association Rules
- iv.** Establish a Reserve Account; or
- v.** Terminate the Agreement in accordance with Section 21. Merchant understands that having excessive disputes may result in assessments, fines, fees, and penalties by the Card Associations. Merchant agrees to reimburse M&T immediately for any such assessments, fines, fees, and penalties imposed on M&T and any related loss, cost, or expense incurred by M&T.

## **12. DEPOSIT ACCOUNT ADJUSTMENT**

In the event of an error, dispute or circumstance requiring adjustment, Merchant authorizes M&T to credit and debit the Merchant Deposit Account, future deposits in the Merchant Deposit Account and other



deposit relationships of Merchant with M&T or its affiliates, all without prior notice to Merchant. M&T may disregard individual errors in the amount of \$1.00 or less per day, whether the errors would result in a debit or a credit to the Merchant Deposit Account.

## 12.1. FEES

Merchant:

- A. Must pay all applicable fees for all Transactions, which are calculated and payable pursuant to this Agreement and which may be adjusted from time- to-time in accordance with Section 11.2;
- B. Acknowledges that the fees payable under this Agreement and stated in the Election Form:
  - i. Are based upon Merchant's annual volume, average Transaction size, and other information provided by Merchant or contained in this Agreement;
  - ii. Are based upon the assumption that Merchant's Transactions will qualify for certain interchange rates as determined in each case by the applicable Card Association; If any of Merchant's Transactions fail to qualify for such interchange rates, M&T will process each such Transaction at the applicable interchange rate determined by the applicable Card Association; and
  - iii. Will be rounded up to the next full cent to the extent they contain a fraction of a cent; and
- C. Merchant is solely responsible for all communication expenses required to facilitate the transmission of all Transaction data to M&T.
- D. M&T may charge Merchant a fee for producing or delivering any statement, report, record and other information that Merchant requests, related to the Merchant Services, including but not limited to Merchant, the Merchant Deposit Account and Transactions.

## 12.2. FEE ADJUSTMENTS

The fees owed by Merchant under this Agreement (under the Election Form or any additional pricing supplement) may be adjusted at any time:

- i. With thirty (30) days' prior written notice for adjustments to M&T fees;
- ii. To reflect increases in interchange, assessments, or other Card Association fees;
- iii. To reflect additional fees imposed by the Card Associations; or
- iv. To reflect increases in, or additions to, third party fees.

All adjustments hereunder will be effective either upon the date set forth in the written notice or upon the date the corresponding increase or additional fee is implemented by the Card Association or third party provider.

## 13. RESERVE ACCOUNT

At M&T's request and in an amount M&T requires, Merchant will promptly establish and maintain a deposit account ("**Reserve Account**") at M&T as security for Merchant Obligations under this Agreement. Merchant's obligation to maintain the Reserve Account survives termination of this Agreement for a period determined by M&T or Law, during which time M&T's security interest will continue in effect.

## 14. INDEMNIFICATION

- A. To the fullest extent permitted by Law and the courts having jurisdiction over the parties and this Agreement, Merchant will indemnify and defend M&T, its parent, subsidiaries and affiliates, along with their officers, directors, employees, shareholders, representatives and agents ("Indemnified Parties") from and against liability, judgments, arbitration awards, settlements, complaints, actions, lawsuits, claims, counter-claims, demands, losses, damages, costs including, but not limited to, court costs and

out-of-pocket costs, attorney fees, fines, penalties, and expenses relating to or arising from:

- i. Merchant accepted Transactions,
- ii. Acts and omissions of Merchant, its Authorized Representatives and its Agents,
- iii. Merchant's breach or alleged breach of a term, warranty, obligation or promise in an agreement with the Associations, this Agreement or any other agreement with M&T,
- iv. Merchant's breach of this Agreement, M&T procedures, Rules or violation of Law,
- v. Any Claim related to goods or services purchased with a Card,
- vi. Disputes between or among Merchant, its Agents and Cardholder,
- vii. Merchant Obligations,
- viii. the loss, theft, destruction or damage to a Device,
- ix. Security Breach; or
- x. Merchant's violation or alleged violation of a third party's intellectual property rights.

**B.** For purposes of this Agreement, including the obligation to indemnify and defend the Indemnified Parties, Merchant is responsible and liable to M&T for the acts and omissions of its Authorized Representatives, Agents, employees and representatives, whether or not they are acting within the scope of their duties.

## **15. LIMITATION ON LIABILITY**

UNDER NO CIRCUMSTANCES WILL M&T'S (OR ITS THIRD PARTY VENDOR'S) FINANCIAL LIABILITY ARISING OUT OF OR RELATED TO ITS PERFORMANCE OF MERCHANT SERVICES UNDER THIS AGREEMENT EXCEED THE LESSER OF (A) TOTAL FEES PAID TO M&T BY MERCHANT UNDER THIS AGREEMENT (NET OF PAYMENT BRAND FEES, THIRD PARTY FEES, INTERCHANGE, ASSESSMENTS, PENALTIES, AND FINES) FOR THE **SIX (6) MONTHS** PRIOR TO THE TIME THE LIABILITY AROSE or (B) **\$25,000**. IN NO EVENT WILL M&T (OR ITS THIRD PARTY VENDORS), DIRECTORS, OFFICERS, EMPLOYEES, OR AFFILIATES, BE LIABLE FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, REGARDLESS OF THE FORM OR ACTION AND EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

MERCHANT IS FULLY LIABLE FOR ANY FINES, FEES, PENALTIES OR ASSESSMENTS IMPOSED BY THE PAYMENT BRANDS RELATED TO MERCHANT'S ACCEPTANCE OF PAYMENT INSTRUMENTS.

NEITHER M&T NOR ITS THIRD PARTY VENDORS SHALL BE LIABLE OR RESPONSIBLE FOR THE AUTHENTICITY, ACCURACY, CORRUPTION, DISAPPEARANCE, THEFT OF, DAMAGE TO, OR TAMPERING WITH ANY DATA, INCLUDING WITHOUT LIMITATION, TRANSACTION DATA, TRANSMITTED IN ANY FORM OR FORMAT TO M&T BY OR ON BEHALF OF MERCHANT, AND M&T SHALL BE ENTITLED TO RELY ON DATA IT RECEIVED FROM OR ON BEHALF OF MERCHANT IN THE DISCHARGE BY M&T AND ITS OBLIGATIONS HEREUNDER. ALL PARTIES ACKNOWLEDGE THAT THIS IS AN AGREEMENT FOR COMMERCIAL SERVICES AND M&T HEREBY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, MADE TO

MERCHANT OR ANY OTHER PERSON, REGARDING QUALITY, SUITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE (REGARDLESS OF ANY COURSE OF DEALING, CUSTOM, OR USAGE OF TRADE) OF ANY SERVICES PROVIDED UNDER THIS AGREEMENT OR ANY GOODS PROVIDED INCIDENTAL TO SUCH SERVICES.

## 16. DISCLAIMER OF WARRANTY

EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, M&T (AND ITS THIRDPARTY VENDORS) DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE MERCHANT SERVICES, DEVICES AND PRODUCTS, WHETHER OR NOT PROVIDED BY A THIRD PARTY, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

## 17. EXCEPTION EVENTS

A. Each of the following events is an Exception Event, also deemed an event of default (“**Event of Default**”):

- i. Merchant breaches a representation or warranty given to M&T,
- ii. Merchant sells a type of good or service that has not been disclosed to M&T,
- iii. The dollar value of Merchant’s monthly dispute volume exceeds one half of one percent of Merchant’s applicable monthly sales volume,
- iv. One or more of the Associations alerts M&T to irregular Transactions or concerns with the Merchant’s activity, imposes fines or increased costs on M&T as a result of Merchant’s activities,
- v. Merchant violates or is suspected to have violated the Rules, Law or any term of this Agreement,
- vi. The occurrence of an event or circumstance whereby M&T deems itself insecure with respect to M&T’s provision of Merchant Services to Merchant;
- vii. Merchant’s level or manner of compliance with PCI Data Security Standard is not compliant with the M&T security standards and terms of the Agreement.
- viii. M&T reasonably believes fraud may be occurring (internal fraud or unrelated third party fraud), including splitting tickets, performing unauthorized returns or other forms of fraudulent activity;
- ix. Merchant’s name or Merchant’s principals’ names are listed on the MATCH (Membership Alert to Control High Risk Merchants) System or other security or credit alert systems, or Merchant is identified under an Association risk monitoring program;
- x. M&T determines that Card Transactions or the circumstances of Card Transactions have become irregular or increase M&T’s exposure to chargebacks, reputational, or other security risks;
- xi. Merchant no longer meets the eligibility requirements of an Association or Network;
- xii. Merchant’s volume in a calendar month exceeds 120% of the average annual volume indicated on the Merchant Application;
- xiii. Merchant’s non-card present transactions in a calendar month exceed 120% of the MO/TO and internet volume on the Merchant Application;
- xiv. Merchant experiences returns greater than three percent;
- xv. Merchant ceases doing the kind of business described in the Merchant Application;
- xvi. Merchant fails to pay any amount when due under the Agreement;
- xvii. M&T believes that Merchant has violated or is likely to violate the Agreement, Rules, or laws applicable to Merchant.

Upon the occurrence of an Exception Event, which is deemed an Event of Default, M&T may exercise any right or remedy in this Agreement without notice.

B. Upon the occurrence of an Exception Event/Event of Default, M&T may take such action it deems necessary to protect its interests including but not limited to any one or more of the following:

- i. Terminate this Agreement and demand payment immediately, in full, of all outstanding Obligations Merchant owes under the Agreement,
- ii. Suspend or terminate provision of some or all of the Merchant Services and revise the

- pricing,
- iii. Require Merchant to provide M&T with a written explanation of the Exception Event,
- iv. Require Merchant to provide collateral for Merchant Obligations,
- v. Require Merchant to establish a Reserve Account,
- vi. Require Merchant to adopt revised security and verification procedures; and
- vii. Restrict and prohibit withdrawals from the Merchant Deposit Account and Reserve Account, whether such Merchant Deposit Account and Reserve Account is held at M&T or at another financial institution; Additionally, Merchant agrees to pay M&T (i) any unpaid invoices or charges related to unreturned equipment; (ii) any damages, losses, expenses, fines, fees, penalties, chargeback amounts, and adjustments M&T incurs in connection with the Agreement. Merchant authorizes M&T to debit the Merchant Account or to deduct amounts Merchant owes M&T under this Section from the settlement funds. Merchant is responsible for any collection fees, legal fees, and other expenses M&T may incur in recovering delinquent amounts.

## 18. INFORMATION SECURITY

A. In addition to security measures Merchant and its Agents are required to implement and maintain under the Rules and Law, Merchant will for its own account, and will require its Agents, to comply with the following:

- i. Not disclose Cardholder Information except as permitted in this Agreement, authorized by Law, or authorized in writing by Cardholder,

Maintain security measures in accordance with Law, the Rules and PCI Data Security Standards to protect Cardholder Information,

- ii. protect against anticipated threats or hazards to the security or integrity of Cardholder Information;
- iii. protect against unauthorized access to or use of Cardholder Information regardless of whether it is on Merchant's or Agent's systems and facilities, or in transit,
- iv. Not store the contents of any track information from the magnetic stripe on the back of a Card or the Card validation codes.

In the event of a Security Breach, Merchant will immediately notify M&T by telephone or other immediate means, which must be promptly followed in writing no later than within 12 hours of Merchant's knowledge of the Security Breach, and provide M&T with the pertinent facts surrounding the Security Breach. In the case of Security Breach involving unencrypted Cardholder Information, Merchant will also notify each Cardholder of the Security Breach in accordance with the notice requirements in this section and Laws.

Merchant will cooperate with M&T, regulatory agencies, Associations and law enforcement agencies; and conduct periodic audits and risk assessments of its and its Agents' security procedures, systems and networks, and, on reasonable notice, permit M&T and Associations access to them for inspection and audit.

B. Merchant and its Agents will comply with the requirements of the Payment Card Industry Data Security Standard, as may be amended from time- to- time (**PCI Data Security Standard**). The PCI Data Security Standard is available directly to Merchant from Visa, MasterCard, Discover, American Express and Other Networks at their respective websites listed in the Card Acceptance Guide, as well as on the PCI Security Standards Council Website. M&T reserves the right to charge Merchant a reasonable fee if M&T believes Merchant is not fully compliant with Laws, Rules, PCI Data Security Standards, or if Merchant fails to provide compliance upon request. This fee will be in addition to other amounts payable under this Agreement.

## **B. Customer Data Protection Requirements for E-commerce Merchants:**

If Merchant operates an electronic commerce website through which Transactions are generated, in addition to any requirements otherwise set forth in this Agreement, Merchant shall:

- (a)** Display the following on each electronic commerce website:
  - i.** Merchant's name and the name that will appear on the Customer's Payment Card statement;
  - ii.** Merchant's customer data privacy policy;
  - iii.** A description of its security capabilities and policy for transmission of payment instruction information; and
  - iv.** The address of Merchant's fixed place of business (regardless of website or server location); and
- (b)** Offer its Customers a data protection method such as 3-D Secure or Transport Layer Security (TLS v1.1 or higher).
- (c)** If Merchant operates an e-commerce website, M&T is obligated under the Card Association Rules to investigate the contents of such website, either directly or through review of screen shots presented to M&T by Merchant (the "Website Inspection"). M&T may suspend the settlement of Merchant's Transactions until a Website Inspection can be completed and approved by M&T.

## **19. CONFIDENTIALITY**

Merchant will keep this Agreement and its terms, information relating to M&T's and its Processor's methods, techniques, programs, devices and operations confidential and may only share them with Merchant's professional advisers that agree to accept the disclosed information under condition of keeping it confidential.

## **20. TRADEMARK LICENSES AND COPYRIGHTS**

Unless expressly provided in this Agreement otherwise, Merchant does not obtain rights or title to, or interest in the Merchant Services or other services that M&T may provide by or through third party providers under this Agreement. M&T and its third-party providers, as the case may be, retain all right, title and interest to the Merchant Services and other services that M&T may provide by or through third party providers under this Agreement. Merchant will make no attempt to duplicate or otherwise ascertain the components, circuit diagrams, logic diagrams, flow charts, source and object codes, schematics or operation of, or otherwise attempt to reverse engineer the Merchant Services or other services M&T may provide by or through third party providers under this Agreement or their related equipment and software.

## **21. FINANCIAL INFORMATION**

At M&T's request Merchant will provide M&T in form and detail satisfactory to M&T financial and other information of Merchant that represents its operations, cash flows and financial position, certified by an officer of Merchant that the information was prepared in accordance with generally accepted accounting principles and that it is correct, complete and in accordance with Merchant's records. Merchant will permit M&T's officers, employees, attorneys and other agents to **(a)** visit and inspect each of Merchant's premises, **(b)** examine, audit, copy and extract financial information from Merchant's records, and **(c)** discuss Merchant's business, operations, assets, affairs or condition (financial or other) with its responsible officers, employees, attorneys and independent accountants.

Additional Financial Information. Upon **five (5) days'** written notice at any time, Merchant, and each Guarantor (if any), agrees to furnish to M&T all financial statements and information as M&T may reasonably request. Merchant's and each Guarantor's signature on this Agreement authorizes M&T to perform any credit check deemed necessary with respect to Merchant and each Guarantor, as applicable.

## **22. TERMINATION**

At the end of an Initial Term or subsequent term, Merchant may terminate this Agreement by delivering no less than **30 days** prior written notice to M&T. M&T may terminate this Agreement with 30 days prior written notice to Merchant, unless sooner, as set forth below.

Notwithstanding anything to the contrary in the preceding sentence, if Merchant believes an Exception Event/Event of Default has occurred, M&T may terminate this Agreement in its entirety or with respect to any part of Merchant' Services by delivering prior notice to Merchant orally or in writing, which termination will be effective immediately on receipt. In the event of an immediate termination made by oral notice to Merchant, M&T will send written confirmation to Merchant within a reasonable time. Merchant Obligations under this Agreement prior to the effective date of termination survive termination.

### **22.1. ACTIVE ACCOUNT**

Merchant's Deposit Account will be considered "Active" as long as Merchant continues to make on-time payments of all amounts owed under the Agreement. If Merchant goes more than 90 consecutive days without posting Transactions under this Agreement, Merchant must notify M&T that it is terminating the Merchant Deposit Account and this Agreement. Until such time as M&T receives notice of termination by Merchant and had a reasonable time to act upon such notice, Merchant shall pay all fees, charges and expenses owed M&T under this Agreement, notwithstanding the fact that the Merchant's Deposit Account may be inactive. M&T may, at its sole discretion:

- i.** Consider the Merchant's account as not Active;
- ii.** Terminate this Agreement immediately; and
- iii.** Collect any termination fee and all or a prorated portion of any of any signing bonus and/or the estimated retail value of any equipment provided to Merchant in promotion of this Agreement.

### **22.2. POST TERMINATION**

The termination of this Agreement will not affect either party's rights or obligations with respect to Transactions submitted prior to termination. Therefore, the provisions governing processing and settlement of Transactions, all related adjustments, fees, and other amounts due from Merchant, and the resolution of any related disputes, or other issues involving Transactions, will continue to apply for all Transactions made prior to termination.

Upon termination of this Agreement, Merchant must:

- i.** Continue to be responsible for all disputes, fees, fines, assessments, credits, and adjustments resulting from Transactions processed pursuant to this Agreement before termination; and
- ii.** Be responsible for all amounts then due or which thereafter may become due to M&T under this Agreement.
- iii.** Upon termination or notice of termination of this Agreement, M&T may, in its sole discretion and without waiving any of its rights or Remedies under this Agreement.
- iv.** Establish a Reserve Account; and
- v.** Process Transaction Records submitted by Merchant after termination in accordance with and subject to all of the terms of this Agreement.

## **23. AMENDMENT**

M&T may amend this Agreement by delivering to Merchant prior written notice of the terms of the amendment. If the amendment is unacceptable to Merchant, Merchant must terminate this Agreement by delivering written notice of termination to M&T **within 3 business days** of the date of the notice of amendment. If Merchant does not terminate this Agreement in strict compliance with this section, Merchant will continue to be bound by this Agreement as amended. This Agreement or any of M&T's rights and remedies under this Agreement or Law may not be amended by a course of dealing between the parties. M&T has the right to make Association and Other Network changes and increases in interchange, fees, or assessment without providing prior notice.

## **24. MERCHANT'S SUBCONTRACTORS AND AGENTS**

If Merchant uses a third party subcontractor or agent ("**Agent**") to perform any of Merchants obligations under this Agreement, Merchant represents and warrants that at all times this Agreement is in effect, its Agents will comply with Laws and Rules. If Merchant's Agents will perform any functions that include generating, processing, storing or transmitting Cardholder Information then at M&T's request, Merchant will submit information in writing to M&T describing the nature of services its Agents will perform and promptly cooperate with M&T in submitting any documentation that M&T requests to effect the necessary registrations and filings with the Associations and pay Association fees now or later imposed in connection with the Agent's registration and services.

## **25. NO AGENCY**

Neither Merchant nor M&T may act as an agent for the other.

## **26. NOTICE**

Unless otherwise permitted in this Agreement, the parties will deliver notices to the other in writing. Notices will be deemed given when postmarked or if overnight or similar courier is used, then when delivered. Notice to M&T by email or facsimile is not valid notice. M&T's communications to Merchant may be delivered via email, facsimile (effective upon transmission confirmation), ordinary or certified mail, reputable overnight courier, or report, message or communication via Portal Service, or invoice (effective when made available).

## **27. FORCE MAJEURE**

M&T is released from liability to the extent that its, its agents, subcontractors and the Networks' failure or delay in performing any of their respective obligations under this Agreement is the result of an act of God, government order, Law or rule and other causes beyond their reasonable control. In the event of a force majeure, M&T will resume provision of the affected component of the Merchant Services as soon as practically possible.

## **28. GOVERNING LAW AND JURISDICTION**

This Agreement will be interpreted in accordance with the laws of the State of New York excluding its conflict of laws rules. Merchant irrevocably consents to the exclusive jurisdiction of any state or federal court in Erie County, State of New York. M&T may send service of process by nationally recognized overnight courier service directed to Merchant at Merchant's address and service will be deemed to be completed on the business day after deposit with the courier. Nothing contained in this Agreement will prevent M&T from bringing an action, enforcing an award or judgment, or exercising its rights against Merchant and its property outside of Erie County, State of New York. The venue provided is the most convenient forum for both M&T and Merchant and Merchant waives any right it may have to **(i)** object to venue; **(ii)** assert a counterclaim, set-off or defense based on a statute of limitations, laches or any other legal theory; and **(iii)** waives its right to appeal a final judgment that is obtained as a direct or indirect result of any action.

### **29. WAIVER OF JURY TRIAL**

Merchant knowingly, voluntarily, and intentionally waives its right to a jury trial in connection with this Agreement, any document executed in connection with this Agreement, or any transaction conducted hereunder. Merchant represents and warrants that no representative or agent of M&T has represented, expressly or otherwise, that M&T will refrain from enforcing this jury trial waiver. THIS IS A KNOWING AND VOLUNTARY WAIVER.

### **30. WAIVER OF SOVREIGN IMMUNITY**

IF MERCHANT HAS OR MAY HAVE ANY RIGHT OF SOVEREIGN IMMUNITY OR SIMILAR RIGHT, MERCHANT REPRESENTS AND WARRANTS THAT IT HAS EXPRESSLY INFORMED M&T IN WRITING, PRIOR TO ENTRY INTO THE AGREEMENT.

WITH RESPECT TO ANY DISPUTE OR CONTROVERSY RELATING TO THE AGREEMENT, SERVICES AND/OR ACCOUNTS, MERCHANT HEREBY WAIVES ANY RIGHT OF SOVEREIGN IMMUNITY OR SIMILAR RIGHTS AS TO IT OR ITS PROPERTY WITH RESPECT TO M&T'S ENFORCEMENT OF THE AGREEMENT AND ANY OTHER RIGHTS AND/OR REMEDIES M&T MIGHT HAVE AGAINST MERCHANT OR ITS PROPERTY RELATING TO THE AGREEMENT, MERCHANT SERVICES AND/OR ACCOUNTS. IF THIS PROVISION DOES NOT EFFECTIVELY WAIVE SUCH IMMUNITY OR RIGHT, MERCHANT SHALL PROMPTLY DELIVER TO M&T SUCH DOCUMENT(S) AS IS NECESSARY TO EFFECTIVELY WAIVE SUCH IMMUNITY OR RIGHT.

### **31. ARBITRATION AGREEMENT FOR CLAIMS INVOLVING AMERICAN EXPRESS ONLY**

You agree to comply with the American Express Program terms provided in the Card Association Rules, and the American Express Merchant Operating Guide, which can be located at <http://www.americanexpress.com/merchantopguide>.

### **32. SURVIVAL**

Sections 5, 6, 7, 8, 9, 10, 11, 11.1, 11.2., 12, 13, 14, 15, 16, 18, 19, 27 and 28 survive termination of this Agreement.

### **33. FINAL AGREEMENT**

These Terms and Conditions, the Merchant Services Application, the Election Form, the Acceptance and Processing Terms applicable to those elections made by Merchant on the Election Form, the Rules, Guaranty (if applicable) as each may be amended and delivered to Merchant from time-to-time, constitute the entire agreement between Merchant and M&T with respect to the Merchant Services. All negotiations, promises, representations, warranties and prior agreements with respect to Merchant Services are merged into this Agreement.

### **34. MERCHANT TAXPAYER CERTIFICATION AND M&T REPORTING OBLIGATIONS**

Pursuant to 26 USC 6050W, M&T is a "payment settlement entity", obligated to collect and report certain taxpayer information to the United States Internal Revenue Service. Therefore, in conjunction with the execution of this Agreement, Merchant must provide M&T with the appropriate taxpayer certification documentation, via Internal Revenue Service (IRS) Form W-9 (or the appropriate versions of Form W-8, if applicable). Merchant must promptly notify M&T if there are any changes in this information. M&T may deduct withholding taxes, if any, from proceeds payable to Merchant or any entity that is a party to this agreement where required under applicable law. M&T may, in accordance with applicable law and from time- to-time during the term of this Agreement, request Merchant to



recertify its taxpayer certification hereunder. Furthermore, Merchant is responsible for any penalties related to the reporting obligations of M&T hereunder to the extent such penalties accrue based on the actions or inactions of Merchant despite reasonable notice from M&T.

### **35. MISCELLANEOUS**

**A.** M&T's failure or delay to exercise a right or power it has by way of this Agreement or Law will not operate as a waiver of that right or power or preclude M&T's subsequent exercise of that or any other right or power. M&T does not waive and is not stopped from enforcing its rights under this Agreement or at any future time as a result of any course of dealing between the parties.

**B.** In this Agreement, the singular includes the plural and the plural the singular.

**C.** References to Law and the Rules include provisions consolidating, amending and replacing the subject Law and Rule.

**D.** Section headings are only for descriptive purposes.

**E.** Each provision of this Agreement is severable. The invalidity or unenforceability of any particular provision will not affect the validity or enforceability of another provision.

**F.** This Agreement is binding on and will inure to the benefit of Merchant's and M&T's respective administrators, heirs, executors, successors and assigns. Merchant may not assign or transfer any of its rights or delegate its duties hereunder without the prior written consent of M&T.

**G.** Additional Provisions for Personal Identification Number (PIN) Debit Cards. M&T will process PIN debit Card transactions if Merchant elects PIN Debit in the Election Form. Sponsorship for PIN debit Card transactions may be by M&T, Processor or a third-party bank and to the extent Processor and/or a third-party bank provide sponsorship, they will be a party to the Agreement. In that event, the PIN debit services will be deemed to be a Processor Reseller Service subject to H below. M&T will charge the Transaction Fee for PIN Debit Card transactions set forth on the Election Form for each PIN Debit Card transaction submitted regardless of whether such transaction is approved, declined, or determined invalid. In addition, Merchant will be assessed for each PIN debit Card transaction all debit network interchange fees and other fees, sponsorship, switch and gateway fees. In addition to the charges set forth on the Election Form, Merchant agrees to pay for all PIN debit network setup fees, chargeback fees and adjustment fees, including but not limited to, late fees that may be imposed by the debit networks. Merchant hereby delegates to M&T and Processor the authority to decide to which debit network a given PIN debit Card transaction will be routed.

**H.** Certain of the Merchant Services, including, but not limited to, PIN debit sponsorship and TSYS authorizations, are provided by Processor or third parties that require Processor to have a direct relationship with Merchant ("Processor Reseller Services"). Processor is a party to this Agreement solely in connection with the Processor Reseller Services that Merchant elects to receive now or in the future, and will be deemed to have accepted this Agreement upon Merchant's use of a Processor Reseller Service. For purposes of providing applicable Processor Reseller Services, Processor has all rights, benefits, and protections that M&T has and receives under this Agreement, including without limitation, the provisions of Sections 14, 15, 18, and 19, and, subject to applicable law, has the right to initiate enforcement of the terms of this Agreement against Merchant, solely in connection with the Processor Reseller Services. The Processor Reseller Services may be immediately terminated if necessitated by Processor's arrangement with the applicable third party.

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## **PROCESSING TERMS AND CONDITIONS**

### **1. APPLICABILITY**

These Acceptance and Processing Terms are part of the Agreement between M&T and Merchant for Merchant Services and apply to Merchant and its level of participation in and use of Merchant Services.

### **2. ASSOCIATION RULES**

These Acceptance and Processing Terms are not a full reproduction of the Rules that are applicable to Merchant in its use of Merchant Services. Merchant is responsible for maintaining compliance with the Rules as they may be amended from time-to-time, regardless of whether those Rules are reproduced in this Acceptance and Processing Terms and regardless of whether Merchant may receive from M&T information regarding the Rules. The Rules are available in their entirety at each Association's respective websites as set forth in the Terms and Conditions.

### **3. DISPLAY OF CARD NAMES AND SYMBOLS**

For those Cards that Merchant accepts and unless exempt from doing so under the Rules, Merchant will display the Cards' name and symbol on its promotional materials to inform the public that the Cards are honored at Merchant's places of business, including its internet sites and catalogues, if applicable. Merchant's right to use and display the Cards' name and symbol will terminate on the earliest of the date the Agreement expires or an Association or M&T notifies Merchant to cease use of the name or symbol. Other than expressly permitted in the Agreement, Merchant obtains no rights to M&T's or the Associations' names and symbols.

### **4. TRADEMARKS AND SERVICE MARKS**

Merchant is granted a limited non-exclusive right to use on its signs and other displays and in advertising or promotional materials the trademark or service mark of each Network in which it elected to participate. Merchant will not use any symbol, word or other mark that is similar to or likely to be confused with a Network trademark or service mark. Merchant will use the Network trademark and service mark only in connection with its participation in the Network and only as M&T or the Network may direct from time-to-time, and permit the Network and M&T to inspect the manner in which Merchant is using the trademark or service mark. If M&T or the Network requests, Merchant will submit to M&T and Network samples of its use of the trademarks and service marks along with a descriptions of its use. Merchant may not do or cause to be done anything that contests, impairs or otherwise adversely affects the Network's right, title and interest in and to the trademarks and service marks. On termination of this Agreement or earlier if M&T or the Network requests, Merchant's right to use the trademarks and service marks will end and Merchant will cease using the trademarks and service marks.

### **5. TRANSACTION RECORDS**

- A.** For each Transaction completed, Merchant must prepare and deliver to Cardholder the Transaction Record or a copy of it.
- B.** Alterations to the Card number and stray marks such as circles or underlines on the Transaction Records are prohibited after the Transaction is completed and the Transaction Record is signed.
- C.** Card numbers that are displayed on a terminal window or printers must match the Card number embossed on the Card. Merchant must call the Authorization center to verify Transactions that do not meet these requirements.
- D.** Merchant must refuse to accept a Card if it appears to be counterfeit, altered or otherwise disfigured; not yet effective or expired; does not include Cardholder's signature; or when Merchant has

received a communication requesting that it not be honored.

**E.** Merchant must process Transactions in a manner that complies with M&T procedures and the Rules using acceptable equipment.

**F.** Merchant must verify the true identity of each Cardholder, regardless of whether it is a Card present Transaction.

**G.** Each Transaction Record must contain the following information:

- i.** Card account number in the manner required by Law and Rules. Transaction Records may not include the Card expiration date or any more than the last four digits of the Card number,
- ii.** Card imprint. An imprint is the process using a manual imprinting machine to make an impression of a Card on a Transaction Record. An imprint is not a printout from a printer attached to Device. Merchants are not required to imprint Cards for Transactions where electronic Devices (e.g., authorization and draft capture terminal, cash register, POS Device, etc.) are used to read and capture Card information via the magnetic stripe or embedded microprocessor chip,
- iii.** If a Device fails to read the magnetic stripe or chip or a voice authorization is required, Merchant must imprint the Card on the Transaction Record and obtain Cardholder's signature,
- iv.** Manual entry of cardholder PIN code, or in instances in which it not required, cardholder's signature, except that Merchants Participating in MasterCard's Quick Payment Service Program, Visa's Small Ticket, Visa/Discover Network No Signature Program, and certain Discover Network transactions are not required to obtain the Cardholder's signature under certain conditions set forth by each program,
- v.** Transaction date,
- vi.** Amount of the Transaction, including the approved currency of the sale,
- vii.** Description of the goods and services that are the subject of the Transaction. Numerous items may be combined into one description (e.g., "clothing" instead of "one pair of pants, one shirt"),
- viii.** A valid authorization code; and
- ix.** Merchant's d/b/a, city, state and Merchant account number

## **6. AUTHORIZATIONS**

An Authorization must be obtained for each Transaction processed. M&T reserves the right to refuse to process any Transaction Data presented by Merchant unless it includes a proper authorization. If required by the Associations, each authorization request must include the Payment Card's expiration date.

Merchant acknowledges: **(a)** the authorization of a Transaction indicates only that the Payment Card contains a valid account number and has an available balance sufficient for the amount of the Transaction; and **(b)** that authorization of a Transaction does not constitute a representation from M&T, a Payment Brand or a card issuing bank that a particular Transaction is, in fact, valid or undisputed by the actual customer.

## **7. SETTLEMENT AND DELIVERY OF TRANSACTION RECORDS**

**A.** Each business day Merchant will electronically transmit Transaction information to M&T's operating center or other processing center as M&T may instruct. Transmission must be completed prior to 1:00 a.m. of the calendar day immediately following the Transaction date. Late delivery may result in Transactions being processed the following business day.

**B.** Merchant's transmission will be rejected without being processed for correction and re-submission if any information transmitted is incorrect, incomplete or electronically illegible or the Transaction or Transaction Record fails to comply with the Terms and Conditions of this Agreement for that type of Transaction.

**C.** M&T will directly credit Merchant's Deposit Account for the amount of the Transaction, less Merchant issued credits, applicable discounts and any unpaid sums. Transactions will be credited on the second business day following the Transaction date, except when (i) delayed due to banking holidays and Association holidays, (ii) mechanical, electronic, electrical, or communication failures, and (iii) factors beyond M&T's control. Merchant will furnish M&T Card sales and credits (data) by electronic transmission, the method of such transmission to be designated by M&T.

**D.** Merchant will review its outgoing sale and credit data to assure that it is not submitted to M&T twice. If Merchant inadvertently supplies the same data twice, it will promptly upon discovery notify M&T and assist M&T in identifying the subject Transactions.

## **8. RETENTION AND RETRIEVAL OF TRANSACTION RECORDS**

**A.** Merchant is responsible for storing and retrieving originals and copies of Transaction Records for the period of time required by Laws and Rules, but in no event for less than **18 months**.

**B.** Within **3 business days** of M&T's request, Merchant will provide originals or legible copies of Transaction Records. If Merchant fails to provide Transaction Records that have been credited to Merchant's Deposit Account, M&T will adjust the Merchant Deposit Account accordingly.

**C.** Merchant may transmit only accurate information and will maintain sufficient back-up information and data to reconstruct any information or data lost due to system malfunction.

## **9. TRANSACTION RECORDS – REPRESENTATIONS AND WARRANTIES**

Upon presentment of a Transaction Record to M&T, Merchant represents and warrants to M&T that:

- i.** The Transaction is and the Transaction Record represents Merchant's bona fide sale for goods or services to a purchaser in the ordinary course of business,
- ii.** Merchant has performed or will perform its obligations to Cardholder in connection with the Transaction,
- iii.** The Transaction represented by the Transaction Record does not involve credit for a purpose other than the Transaction,
- iv.** The Transaction is and the Transaction Record represents a Transaction directly between a Cardholder and Merchant,
- v.** The Transaction was made using a valid, authorized, non-expired Card,
- vi.** If a Card present Transaction which prompts for a signature, Cardholder signed the Transaction Record and the signature on the Transaction Record matches the signature appearing on the Card,
- vii.** If the Transaction Record is not for the full sale price of the goods or services, the remaining portion of the sale price was paid with cash, check or another Card,
- viii.** The Transaction Record is a valid and legally enforceable obligation of Cardholder named on it and M&T will not be subject to claims, counterclaims, defenses or set-offs,
- ix.** The goods sold, services performed and the Transaction Record comply with Laws and regulations, including the Rules; and
- x.** The goods and services that are the subject of the Transaction Record are free and clear of security interests, liens and other encumbrances.

## 10. MULTIPLE TRANSACTION RECORDS AND PARTIAL CONSIDERATION

Merchant will include goods and services purchased in a single Transaction as one total amount on a single Transaction Record except:

- i. When Rules permit,
- ii. For partial payment, delayed delivery or advance deposit Transactions where Cardholders pay the balance of the amount due at the time of sale in cash, by check, with another Card; and
- iii. The goods or services will be delivered or performed at a later date and one of the Transaction Records represents payment of the balance, in which case Merchant must note on the Transaction Record - “delayed delivery,” “deposit” or “balance” as appropriate, along with the Authorization date and code.

## 11. RECURRING TRANSACTIONS

A. For each recurring Transaction Merchant accepts, Merchant must:

- i. Obtain Cardholder’s written permission, which must include the Transaction amount, frequency of the recurring charges, the duration of time for which Cardholder’s permission is granted, and whether the charge should be made against a credit account or a deposit account,
- ii. Retain Cardholder’s written permission for the duration of the recurring charges,
- iii. Provide the original written permission form to the Card issuer on the Card issuer’s request,
- iv. Cease charging Cardholder’s account on notice of cancellation, when charged back or not renewed; and
- v. Input the words “Recurring Transaction” on the signature line of the Transaction Record

B. Recurring Transactions may not include partial payments made to Merchant for goods or services purchased in a single Transaction, or periodic payments of goods or services for which Merchant assesses finance charges. Merchant must first obtain M&T’s written approval for prepayment periods longer than **30 days**. If a recurring Transaction will be charged against a consumer deposit account, as that term is defined by Federal Reserve Board Regulation E, then Cardholder has the rights afforded to consumers in connection with “pre-authorized electronic fund transfers” under Regulation E.

## 12. MAIL, TELEPHONE, INTERNET AND OTHER CARD NOT PRESENT SALES

A. Merchant may engage in mail, telephone, Internet and other Card-not-present Transactions provided they do not exceed the percentage of total payment Card volume reflected on the Merchant Services Application.

B. For each Card-not-present Transaction, Merchant will:

- i. Obtain the Card expiration date,
- ii. Imprint the Card number and effective date, Transaction date, description of the goods and services, Transaction amount including shipping, handling, insurance, etc., Cardholder’s name, billing address and shipping address, authorization code, and merchant’s name and address (city and state required),
- iii. Insert on the Transaction Record signature line “MO” for mail orders and “TO” for telephone orders,
- iv. Notify Cardholder of delivery time frames and special handling and cancellation policies. Goods must be shipped within **7 days of Authorization**, unless the order has been taken and there are known delivery delays such as out of stock, then notify Cardholder and reauthorize the Transaction when in stock,
- v. Ensure the website includes a complete description of the goods or services offered,

- Merchant's return and refund policy, customer service contact, including email address or telephone number, Transaction currency, applicable export or legal restrictions, and the web-site's security policy and procedures; and
- vi. Not submit a Transaction for processing until after goods have been shipped or the service provided to Cardholder, unless made to Cardholder's specifications, in which case it may be processed prior to delivery so long as Cardholder has been advised of the billing details.

### **13. INSTALLMENT PAYMENTS**

Merchant may offer Cardholders an installment payment option for goods and services sold in not-present Transactions under the following conditions:

- i. Merchant clearly discloses to Cardholder in writing the installment terms including, whether they are limited to certain goods or services, shipping and handling charges and applicable tax, and that each installment billing amount may vary due to currency conversion rate fluctuations if Cardholder uses currency other than Merchant's currency
- ii. Merchant ensures that the sum of installment billing does not include any finance charge or exceed the total price of the goods and services,
- iii. Merchant deposits subsequent installment billing
- iv. Transaction Records in 30-calendar day intervals or on the monthly anniversary of the shipment date; and
- v. Merchant does not deposit the first installment billing
- vi. Transaction Record with M&T until the goods are shipped or services delivered.

### **14. DELAYED DELIVERY**

Merchant will deliver Transaction Records to M&T or its designated agent within **5 calendar days** after the date of the applicable Transaction except for:

- i. Deferred delivery Transactions, in which case Merchant will deliver Transaction Records when the goods are delivered or the services performed,
- ii. Transactions in which Merchant requests and receives Authorization for delayed delivery, in which case Merchant will deliver the Transaction Record within **5 calendar days** after the date the balance of the purchase price is due; and
- iii. Circumstances in which Merchant has multiple locations and delivers Transaction Records to M&T through a central location, in which case the Transaction Records may be delivered within **5 calendar days** of Merchant's central location's receipt. Merchants with multiple locations must deliver Transaction Records in a manner that identifies the location where the Transaction originated.

### **15. PRE-AUTHORIZATION FOR TRAVEL & ENTERTAINMENT AND RESTAURANT**

Merchants that provide travel and entertainment services (e.g., car rentals, hotels, motels, etc.) or operate a restaurant business and pre-authorize Transaction must comply with the following:

- i. Merchant must notify Cardholder of the dollar amount to be pre-authorized,
- ii. If Cardholder uses another form of payment (e.g., cash, check, etc.) Merchant must delete the original Authorization through the Authorization center by providing Card account number, original dollar amount, date of the Transaction and the authorization code. If a new Transaction takes place, Merchant must imprint the Card and obtain Cardholder signature on the new Transaction Record for the exact amount and obtain a new Authorization for that amount,
- iii. If a Transaction is declined, Merchant may not attempt to authorized it in less than 24 hours,
- iv. Hotels, motels, and car rental Merchants are permitted up to a 15% (restaurants 20%)

variance above the amount pre-authorized. If the final amount charged to Cardholder exceeds the original estimate by more than 15% (restaurants 20%) above the pre-authorization, another Authorization is required for the incremental amount and the Authorization code must be written on Transaction Record,

- v. Estimated amounts of pre-authorizations for lodging accommodations must be based on the intended length of stay, the room rate, applicable taxes and service charges, and miscellaneous charges as dictated by experience,
- vi. Merchant may not add an estimated tip amount to the authorization request beyond the value of the goods provided or services rendered plus tax; and
- vii. Vehicle rental Merchant may not include potential vehicle damage or insurance deductible in a preauthorization.

## **16. MERCHANT'S RETURN POLICY**

Merchant will establish and post a fair refund policy in accordance with the Rules and will issue adjustments to Cardholders with respect to goods or services when appropriate. Merchant will not refuse to exchange, return or adjust for a Transaction if the exchange, return or adjustment is permitted for a cash Transaction. Merchant's return policy for "no refund," "exchange only," or "in-store credit only," must be legibly printed on Transaction Records in font no less than ¼ inch high and in close proximity to the space provided for Cardholder's signature.

## **17. MERCHANT ADJUSTMENTS**

Merchant may only process credits to Cardholder's account if Cardholder has returned goods or cancelled services or if Cardholder is otherwise entitled to a bona fide credit. If Merchant accepts return of a good or a service is cancelled or Merchant grants Cardholder a price adjustment (other than involuntary refunds required by Law), Merchant may not make a cash refund to Cardholder and will instead deliver to M&T a credit slip evidencing the amount of the refund or adjustment. A Merchant that provides express payment services may either make a cash refund to Cardholder or deliver a credit slip to M&T evidencing the amount of the refund or adjustment. Merchant will deliver to Cardholder a true and correct copy of the credit slip that includes the date, a brief identification of the goods returned, services canceled or adjustment made, and the amount of the credit in sufficient detail to identify the Transaction. The refund or adjustment indicated on a credit slip may not exceed the original Transaction amount. Merchant may not issue a credit slip for sales originally paid for with cash.

## **18. CONFISCATION OF CARDS**

If an Authorization center directs Merchant to confiscate a Card, or Merchant has reasonable grounds to believe a Card is counterfeit, disfigured, fraudulent or stolen, Merchant will use reasonable efforts to confiscate it. M&T has no liability to Merchant for injury or damage resulting from Merchant's confiscation or attempt to confiscate Cards whether or not the Authorization center directed Merchant to do so.

## **19. PROHIBITED ACTIVITIES OR TRANSACTIONS**

Merchant shall not:

- i. Represent that an Association has endorsed or approved of its goods or services,
- ii. Disparage the services the Associations offer,
- iii. Use 2 or more Transaction Records to avoid calling the Authorization center,
- iv. Require Cardholders to provide personal information such as a home or business telephone number, a home or business address, a social security number, or a driver's license number as a condition to honor Cards unless the Associations require that information under appropriate circumstances,
- v. Present for processing or entry into an interchange, directly or indirectly Transaction



- Records that were not originated as a result of a Transaction between Cardholder and Merchant, or that was not in the ordinary and customary business of Merchant, as identified to M&T in Merchant's Application,
- vi. Present for processing or entry into an interchange, directly or indirectly Transaction Records that Merchant knows or should have known to be fraudulent or not authorized by Cardholder,
  - vii. Receive payments of cash or anything else of value directly from Cardholder with respect to goods or services that are included on Transaction Records or credit slips generated by Merchant in connection with the use of a Card,
  - viii. Make cash disbursements to Cardholders,
  - ix. Receive cash or anything else of value from Cardholder for the purpose of processing a credit to Cardholder's account
  - x. Accept Cardholder payments for previous Card charges, Require Cardholder to complete a postcard or similar document that includes Cardholder's account number, Card expiration date, signature or other Card account data in plain view when mailed,
  - xi. Add tax to a Transaction unless required by Law,
  - xii. Present for processing Transaction Records for a Transaction that was previously charged back to M&T and returned to Merchant, irrespective of Cardholder approval,
  - xiii. Use arbitrary or estimated amounts to obtain Authorization, except as specifically permitted in the Rules,
  - xiv. Require an Authorization hold for an amount that exceeds the Transaction amount in violation of the Rules,
  - xv. Require Cardholder to pay all or part of a Merchant Service Fee by increasing the price of the goods or services or otherwise,
  - xvi. Require Cardholder to pay finance charges in connection with a Transaction;
  - xvii. Accept Card account numbers through electronic mail over the Internet;
  - xviii. Submit a Transaction on behalf of a third party.

## **20. SPECIAL PROVISIONS FOR PIN DEBIT CARDS**

For each Transaction accepted where Cardholder uses a debit Card with a PIN, Merchant must:

- i. Treat transactions from different Card issuers in the same manner,
  - ii. Obtain Authorization and process each Transaction electronically,
  - iii. Issue a receipt to Cardholder for each Transaction with the Card account number masked so that only the last four digits appear with the masked digits appearing as non-numeric characters such as an asterisk,
  - iv. Include applicable tax in the total Transaction amount for which Authorization is requested,
  - v. Secure all terminals and institute appropriate controls to prevent employees and others from submitting refunds and voids that do not reflect bona fide returns or credits for prior Transactions,
  - vi. Within one business day of the Transaction, balance each location to the system for each business day each location is open,
  - vii. Pay applicable adjustment and annual fees that a network may charge,
  - viii. Not manually enter Card account number,
  - ix. Not complete a PIN debit Card Transaction without Cardholder first entering its PIN,
  - x. Not obtain PINs verbally or in written form,
  - xi. Not obtain voice Authorization or imprinter procedure for PIN debit Card Transactions,
  - xii. Not process a credit Card Transaction to provide a refund on PIN debit Card Transactions,
  - xiii. Not establish a minimum or maximum Transaction amount,
  - xiv. Not collect separately in cash; or

- xv. Not require additional personal information to complete Transaction unless the circumstances appear suspicious. Signatures are not required for PIN debit Card Transactions.

## 21. THIRD PARTY SERVICES

If Merchant elects to receive any part of the Merchant Services that are provided through M&T by a third party (“**Third Party Product**”) Merchant will use the Third Party Product and any of its related software and services subject to the following terms and conditions.

- A. Upon electing to use a Third Party Product, Merchant shall execute any additional agreements that govern the Third Party Product as required by such third party.
- B. M&T and its third party providers reserve the right to make changes to the Third Party Product, schedule interruptions of service for maintenance activities and on prior notice to Merchant, terminate the Third Party Product.
- C. M&T and its third party providers may create, develop, apply for, obtain and otherwise use and enjoy any logos, trademarks and trade names with respect to Third Party Products and may apply for and obtain trademark, patent and copyright protection for it.
- D. Merchant may not modify, publish, transfer, sell or create derivative works, or in any way exploit any of the content of Third Party Products in whole or in part, whether copyrighted, trademarked, proprietary or otherwise and any changes to or deletion of trademarks, author attribution or copyright notice is prohibited.
- E. M&T or its third party providers are the owners of all right, title and interest in and to the Third Party Products and nothing transfers to Merchant any rights in or to the Third Party Products except as expressly set out in this Agreement.
- F. On receipt of notice from M&T or on termination of this Agreement, Merchant will immediately cease use of all Third Party Products.
- G. Unless expressly set out in this Agreement, M&T has no obligation to provide support or maintenance for the Third Party Product.
- H. Merchant is solely responsible for interpreting Laws and regulations applicable to its business and its use of Merchant Services, including all Third Party Products and services.

## 22. DEVICES

- A. M&T will deliver and install devices or cause them to be delivered and installed at Merchant’s locations. Merchant will bear the cost of installation and is responsible for arranging for installation of necessary communication lines. Charges associated with line installation maintenance are Merchant’s responsibility. Communication lines must conform to the manufacturer’s specifications for each device and to M&T’s reasonable requirements.
- B. All devices are and will remain M&T property and will not be deemed to be fixtures for any purpose. M&T has the right to remove any device in Merchant’s possession. M&T cannot guarantee the functionality of any device not provided by M&T or those devices purchased by or previously used by the customer. In the event such customer-owned devices fail to operate in accordance with M&T-

provided services, the customer will be required to purchase devices through M&T.

- C. Merchant will promptly notify M&T of:
  - i. Loss of or damage to a device,
  - ii. Loss arising out of the use or operation of a device; or
  - iii. Apparent failure, malfunction, or breakdown of a device or of the authorization or draft capture system.
- D. Merchant may use and operate devices only in accordance with the manufacturer's specifications and in the manner authorized by M&T. Only authorized personnel may access the devices.
- E. Merchant is responsible to M&T for the care, use, location and operation of the devices.
- F. If Merchant is required to return a device to M&T, it will follow M&T's instructions.
- G. Merchant may not remove devices from their locations without first obtaining M&T's written consent.
- H. Merchant may not make or permit its employees to make any alterations, attachments, additions or modifications to the Devices.
- I. Merchant grants to M&T and its agents, the right access Merchant's locations for so long as any device is on premises or deemed to be Merchant's possession, at any time during Merchant's normal business hours to install, replace, inspect, relocate, maintain, remove or otherwise access any device and related apparatus, including without limitation telephone line connections. M&T is not responsible for damage or injury to persons or property caused by an act of omission of its agents. Unless otherwise agreed in writing, M&T has no support or maintenance obligations for the devices.

### **23. EUROPAY, MASTERCARD, VISA ("EMV")**

Effective as of October 1, 2015, merchants may be liable for card-present fraud if they are presented with a chip card and cannot read the chip data based on their point-of-sale technology. Although not a mandatory initiative, merchants are urged to consider upgrading their terminals or software to solutions that can support chip technology to avoid receiving chargebacks with no rebuttal rights. M&T Bank is not liable for merchants' failure to upgrade devices.

### **24. ONLINE REPORTING SERVICES AND FEES**

Upon Merchant's written request and acceptance of the same by Processor, Processor will allow access to Processor's proprietary and confidential Direct, Direct Express, or iQ service (collectively "Online Reporting Services Services") whereby Processor makes available Processor's data base of Merchant's activity. Processor's Online Reporting Services are subject to change without notice and will be provided in accordance with Processor's standards. Merchant may request establishment on Processor's system of one or more user IDs ("User ID") to access the Online Reporting Services. In the event Merchant utilizes Processor's iQ online reporting tool, Merchant will have User ID administration capabilities which may be subject to software licensing terms as applicable. User ID Setup and Standard Maintenance will be performed in accordance with Processor's general timeframes, standards, and scheduling. Although not obligated to, Processor reserves the right at its option and without notice to suspend the password on a User ID or inactivate and/or delete any User ID if it has not successfully logged on to the Online Reporting Services in a sixty day (or other interval determined by Processor) period, it has shown suspicious activity or Processor determines that there is or may be a violation of Processor's then current security procedures or standards involving the Online Reporting Services or Merchant's access to the same. However,

Merchant shall provide Processor with prompt written notice of all User IDs which are no longer active, should be deleted and/or should otherwise be changed (e.g., password change, etc.). Processor reserves the right (but shall not have any obligation) to request that Merchant designate in writing those employees or agents of Merchant which may authorize establishment of Merchant IDs on Processor's system. However, Merchant shall be solely responsible for any unauthorized access to the Online Reporting Services and Merchant's data therein including but not limited to unauthorized Merchant employee or agent access, action taken on behalf of Merchant or at the request of any of Merchant's employees or agents (even if not authorized) and/or failure to notify Processor in writing and independently verify suspension of a password on a User ID or inactivation and/or deletion of a User ID. Merchant acknowledges that Processor's standard policy and practice is to truncate all primary account numbers ("PAN") appearing on the Online Reporting Services. However, Merchant has requested that certain of its User IDs will be established with the ability to view the entire PAN. Merchant acknowledges that there is risk involved in accessing a full PAN, and Merchant hereby assumes all such risk, whether or not foreseeable. Merchant shall not sell, purchase, provide, or exchange any PAN accessed via the Online Reporting Services to any third party, and Merchant shall be fully responsible for any unauthorized disclosure of any such PAN. Although not obligated to, Processor reserves the right at its option and without notice to suspend the ability to view full PANs on a User ID without prior notice to Merchant in Processor's reasonable discretion. Merchant shall provide Processor with prompt written notice of all User IDs which need access to full PAN data, and Merchant will supply Processor with all information reasonably requested by Processor in order to properly establish such User IDs. In conformance therewith, Merchant shall be solely responsible for ensuring the accuracy of all User ID's with access to full PAN Data, and Merchant shall be solely responsible for any use of a PAN by Merchant or its agent, officer, employee, or other user of any of Merchant's User IDs, whether authorized or unauthorized, and Merchant shall indemnify, defend, and hold harmless Processor, and its directors, officers, employees, affiliates and agents from and against all proceedings, claims, losses, damages, demands, liabilities and expenses whatsoever, including all legal and accounting fees and expenses and all collection costs, incurred by Processor, its directors, officers, employees, affiliates and agents resulting from or arising out of the use of the Online Reporting Services system by Merchant or its employees, agents, or officers. In the event Merchant accesses the Online Reporting Services through one or more third parties (e.g., through the internet, a third party provider, etc.), Merchant acknowledges and agrees that Processor shall have no responsibility or liability whatsoever for any actions or inactions of such third parties, including but not limited to inability to access the Online Reporting Services, interruption in access to the Online Reporting Services, errors or inaccuracies in data received by Merchant, etc. Not limiting the generality of the foregoing, Processor's only obligation will be to make the Online Reporting Services available on Processor's system in accordance with Processor's standards. Merchant agrees that even if Merchant is billed for the Online Reporting Services pursuant to a Merchant Price Schedule, that all of the foregoing terms and conditions apply to the Online Reporting Services. Processor shall assess fees to Merchant for either Direct, Direct Express, or iQ, depending on which service has been established on Processor's system with respect to Merchant. In the event that Merchant believes that Processor has established the incorrect Online Reporting Service on its system, and/or has billed Merchant for the incorrect Online Reporting Service Merchant shall send Processor written notice of such fact, and Processor will change Merchant's Online Reporting Service definitions and/or billing as may be appropriate. Merchant shall be responsible for any amounts invoiced to Merchant for the applicable Online Reporting Service that Merchant is actually provided access.

## **25. POINT TO POINT ENCRYPTION (P2PE)**

The P2PE Service is a two part service designed to: (i) encrypt (make unreadable) card data information at the origin of the payment transaction, which is a PCI-PTS certified Secure Cryptographic Device (SCD) that has licensed P2PE functionality that aligns with the P2PE technologies hosted by the Processor; and, (ii) decrypt card data information at the destination of the transaction, which are the Processor's data systems. Merchant acknowledges and agrees that SCD P2PE functionality is required and may require Merchant to engage an appropriate third party provider or authorized reseller and that said licensed

functionality may incur fees in addition to those set forth herein. Card data information protected by the P2PE Service may include Track 1 or Track 2 data (Magnetic Stripe Data obtained through a magnetic card swipe read) or PAN Data (Manually Entered Personal Account Number ("card") data) as appropriate to the type of transaction processed on the SCD. The SCD functionality supporting the P2PE Service is designed to securely store or generate encryption keys which are used in conjunction with the P2PE functionality to encrypt card data at the moment that the card data is captured by the SCD. The P2PE Service applies only to transactions that were encrypted by the SCD and sent from the terminal to Processor's authorization and settlement systems pursuant to the Agreement. Supported transactions include, but may not be limited to, those associated with credit (signature), debit (signature) and debit (PIN). Merchant acknowledges that provision of P2PE Service to Merchant is subject to the availability of the licensed encryption software from the applicable third party provider and Merchant's compliance with the terms of this amendment and the Agreement.

## **26. BREACH ASSIST**

In the event Merchant is enrolled in the Breach Assist Program ("BAP") offered by Processor through OmniShield or otherwise, the indemnification required by Merchant under this Agreement will only be reduced by amounts up to the limits set by the service provider that are actually recovered by Processor in connection with the BAP and only to the extent that such amounts are specifically related to a data breach involving solely Merchant. The limited indemnity waiver provided by the BAP will not cover all the costs associated with a data breach. The specific terms and conditions of the BAP are available for Merchant to review at [www.RoyalGroupServices.com/breach-assist/](http://www.RoyalGroupServices.com/breach-assist/) or by contacting a customer service representative at 1-800-393-1345.

## **27. EMV NON-ENABLED FEE**

The EMV Non-Enabled Fee is effective beginning October 2015 if Merchant does not have EMV enabled equipment and/or software. The EMV Non-Enabled Fee is determined based on the chargeback liability risk of Merchant's MCC as determined by Processor. Transactions will be evaluated monthly at the MID level and assessed at the chain level when applicable. This fee is based on the gross sales amount of each card present transaction.

## **28. EMV SUPPORT**

Europay, MasterCard, and Visa ("EMV") is a set of global standards for credit, debit and contactless card payments. EMV chip cards help prevent in-store fraud and are nearly impossible to counterfeit. Starting October 1, 2015 merchants who have not made the investment in chip-enabled technology may be held liable for card-present fraud. EMV acceptance requires an EMV enabled standalone terminal or POS system. Processor is enabled to process in-store EMV transactions to help reduce fraud liability

## **29. OMNISHIELD**

OmniShield means bundles of some or all security services offered by Processor that are intended to address the risks associated with accepting, transporting and storing cardholder data within and throughout the Merchant's environment in accordance with Processor's standards, which Processor may change from time to time in its sole discretion. Card Present PCI Level 4 as well as certain PCI Level 3 Merchants must participate in one of the following bundles: OmniShield Assure, OmniShield Assure Basic, OmniShield Breach Assist. Notwithstanding anything to the contrary in this Agreement, Processor may enroll Merchant in any bundle at any time in Processor's sole discretion. For example, Merchant will be enrolled in the OmniShield Breach Assist bundle if at any time Merchant's equipment and/or software are not enabled for EMV and P2PE. "OmniShield" shall individually or collectively refer to the following bundles: OmniShield Assure, OmniShield Assure Basic, OmniShield Breach Assist. Only PCI Level 3 or 4 Merchants that process all of their transactions in a Card Not Present environment qualify for the Breach

Assist security bundle.

### **30. PCI ASSIST**

PCI Assist is a set of streamlined online tools to help merchants achieve, maintain and track PCI compliance. PCI Assist helps clients review PCI DSS compliance requirements and complete their Self Assessment Questionnaire (SAQ) and, as recommended, conduct periodic vulnerability scans of their network.

### **31. TOKENIZATION**

Tokenization is a service in which cardholder PAN data, once received by the Processor, is replaced with a surrogate (“Token”) value. Deliverables of the Tokenization service include; (1) the creation of tokens and (2) the recognition and use of a Processor issued pre-existing token to support all post authorization transactions with the Processor, which includes initiating a new authorization with a token value. Data necessary to convert tokens back to Cardholder data will be maintained in Processor’s systems. Merchant access to the Tokenization service requires integrating systems to certify token services using Processor’s appropriate message specification. Message specifications are limited to those that exist in Processor’s current Service offering. The Parties agree that the scope of the Tokenization service does not include the certification or systematic configuration of third parties or firmware licensing as selected by the Merchant to support Tokenization services. Non-Standard, GUI and Batch Tokenization are separate and unique service offerings and respective fees will be quoted to merchant for the use of each service.

- “Standard Tokenization” is provided on a per transaction basis in-line with each authorization request
- “Non-Standard Tokenization” is provided as separate “non-authorization” message to the Processor that results in a token being generated and returned outside of a purchase transaction
- “Graphical User Interface (GUI) Tokenization” is provided for merchant operations personnel with appropriate credentials to convert or revert card values and tokens via Processor provided product interface(s).
- “Batch Tokenization” is provided as a file based service to support the mass conversion of any existing store of cardholder data, and shall mean the process of receiving a file that includes multiple card values, performing the tokenization process for each card value and returning a response file that includes the corresponding token value.

At the conclusion of the contracted term for Tokenization services, Merchant will have 90 days to request, via written request to Processor, a Batch De-Tokenization of the merchant’s token store, located within the Merchant’s systems. For purposes herein, Batch De-Tokenization shall mean the process of receiving a file that includes multiple token values, performing the de-tokenization process for each token value and returning a response file that includes the corresponding card value. After 90 days, Processor will no longer be responsible for maintaining the data necessary to De-Tokenize Merchant’s token store or be able to guarantee availability of data. Upon mutual agreement, Processor may offer the Merchant De-Tokenization Data Management Services under a separate agreement to support the token store after the termination of the current agreement supporting Tokenization services.

### **32. FRAUDSIGHT**

Processor’s FraudSight product analyzes both in-store and eCommerce authorizations in real time to assess, using Processor’s methodology, the likelihood that a given transaction is of a potentially fraudulent nature. The FraudSight product is designed to assist Merchant in its decision about whether to complete a given card transaction by leveraging advanced machine learning technology and data entities that are highly correlated with fraud. Processor makes no representations, warranties, covenants, or guarantees that the FraudSight product will detect or prevent fraud, and Merchant expressly

acknowledges and agrees that it remains responsible for fraud at all times, including fraud caused by first or third parties. FraudSight may also leverage certain partners to provide the service. One such partner is ThreatMetrix, Inc., a Delaware corporation (“ThreatMetrix”), which provides device identification, device scoring, device reputation, and data analytics services (the “TMX Services”). The TMX Services analyzes the activities and other attributes of a device used in a transaction, and provides information and a rating score based on the data analyzed and the defined business policies. The TMX Services provides information as to whether the device contains attributes which correlate to a device(s) used in a fraudulent transaction, but does not determine the eligibility of Merchant’s customer (or any other individual) for credit. Merchant acknowledges and agree that the reports generated by the TMX Services (the “Device Reports”), are not considered consumer reports subject to the federal Fair Credit Reporting Act (“FCRA”). Merchant represents that it will not use the TMX Services for making credit eligibility decisions or for any other permissible purpose listed in section 604 of the FCRA (15 U.S.C. 1681b). In addition, Merchant shall not, and shall not permit any employee or third party to: (a) copy all or any portion of any materials; (b) decompile, disassemble or otherwise reverse engineer (except to the extent expressly permitted by applicable law, notwithstanding a contractual obligation to the contrary) the TMX Services or any portion thereof, or determine or attempt to determine any source code, algorithms, methods, or techniques used or embodied in the TMX Services (c) modify, translate, or otherwise create any derivative works based upon the TMX Services; (d) distribute, disclose, market, rent, lease, assign, sublicense, pledge, or otherwise transfer the TMX Services in whole or in part, to any third party; or (e) remove or alter any copyright, trademark, or other proprietary notices, legends, symbols, or labels appearing on the TMX Services. Merchant shall not: (i) interfere with or disrupt the integrity or performance of the TMX Services or the data contained therein; or (ii) attempt to gain unauthorized access to the TMX Services or its related systems or networks. Merchant will provide such attribute information, including but not limited to user service data, IP addresses, anonymous device information, machine learning data, user data pre-existing or brought into the system by Processor, device scores, transaction history, any corollaries, associations and conclusions, (“Attribute Information”) to Processor. Merchant also will take such actions as may be legally and technically necessary to allow Processor to collect the attribute information Merchant decides to receive in connection with providing the TMX Services. Merchant acknowledges that this Agreement does not and shall not be construed to convey any ownership or other rights not otherwise expressly provided herein. Specifically, Processor shall own all right, title and interest, including all related intellectual property rights, in and to the Attribute Information.

### **33. FASTACCESS™ FUNDING PROGRAM SERVICES**

FastAccess™ Funding Program Services. The FastAccess funding program provides accelerated funding of Merchant’s card transactions, typically between two and five hours after settlement of Merchant’s credit and debit card transactions, by way of Original Credit Transaction (“OCT”) through VisaNet or Maestro which permits Processor through Member Bank to initiate credits to Merchant’s designated Visa or MasterCard debit card account (the “FastAccess Services”). The above debit card account designated by you must be a U.S. issued debit card with an institution that is enabled for OCT transactions. Merchant authorizes Processor to initiate a zero dollar authorization to such account as part of the establishment of Merchant’s use of the FastAccess Services.

b. Pricing. Pricing for the FastAccess Services will be as quoted to Merchant on the Application and Price Schedule, Addendum or other Amendment to the Agreement.

c. FastAccess Services Terms, Conditions and Limits. The FastAccess Services are part of the Services under the Agreement and subject to the terms and conditions of Merchant’s use of Services under the Agreement as well as the terms, restrictions, and condition in this Addendum which include those listed below:

- i. Limits. The per transaction limit applicable to the FastAccess Services is \$15,000.00. Daily limits also apply.
  - ii. Limitations on Availability of FastAccess Service. FastAccess Services is not supported by all Card issuers. Further, certain debit card financial institutions may delay the posting of credits to debit cards from the FastAccess Services, please inquire with your debit card financial institution on their practices.
  - iii. Changes to or Removal of Attributes, Requirements, and Functionality. Visa, Maestro, and Processor may at any time change or remove any of the attributes, requirements, and functional specifications related to the OCT and FastAccess funding program or withdraw such services entirely.
  - iv. Default Settlement and Suspension of Service. Transactions that do not meet the requirements, exceed the limits, or are otherwise not settled via the FastAccess Services shall route your settlement via the normal ACH Card transaction settlement solution under the Services. The trigger of certain limits or limitations may suspend the use of the FastAccess Services.
- d. Disclaimer and Limitation of Liability. Merchant understands and agrees that the disclaimer of warranties and limitation of liabilities applicable to Processor and Member Bank set forth under the Agreement apply to the herein FastAccess Services and neither Processor nor Member Bank shall be liable to Merchant for any loss, delay, error, interruptions or damage of any kind or character, whether direct, indirect or consequential, resulting from the use, delay, inoperability, or other failure of the Fast Access Services.

### **34. ELECTRONIC BENEFITS TRANSFER (“EBT”) SERVICES**

The Financial Management Services (“FMS”) of the U.S. Department of Treasury, and/or various of the EBT Program State(s)/Alliance(s), have entered into agreement(s) with third party processor(s) (collectively and individually, “Contractor”) to manage the EBT Program(s) implemented by FMS and/or the EBT Program State(s)/Alliance(s).

Processor has entered into agreements with one or more Contractors (collectively and individually “Processor Agreement”) which permit Processor to be an acquirer processor in certain of the EBT Programs.

Acquirer Services shall mean the data processing systems and procedures provided by Processor to facilitate Merchant’s participation in the EBT Program(s). In the event Merchant receives any of the Acquirer Services or otherwise participates in any of the EBT Programs, Merchant agrees to the following obligations which are in addition to Merchant’s obligations in the Agreement and in addition to any other obligations in the Operating Rules relating to the EBT Program(s) and/or Acquirer Service(s), as they may be amended from time to time.

Merchant will be solely responsible for obtaining a copy of the then current Operating Rules for each EBT Program in which Merchant elects to participate from the applicable Contractor, EBT Program State/Alliance, FMS or Processor, no less than 30 days prior to the commencement of Merchant's participation in each such EBT Program. Merchant agrees to abide by and fully comply with the Documentation as may be in effect from time to time, and to perform and fulfill any and all obligations and responsibilities, and discharge any and all duties and liabilities relating to Processor, Contractors or Retailers to which it may be subject in accordance with such Documentation or other rules or regulations adopted by Contractor(s), FMS or the EBT Program States/Alliances, or which may arise in any other manner or from any other source related to the Acquirer Services or the EBT Program(s).



1. Merchant will provide personnel, one of whom shall be a management level technical interface person, to monitor, oversee and maintain its devices participation in the EBT Program(s). This personnel will also be responsible for monitoring Merchant's compliance with Documentation, including but not limited to, each EBT Program's procedures and requirements applicable to Customer and its processor and for ensuring Merchant fulfills all of its responsibilities in connection with its participation in each EBT Program.
2. Processor will make available to Merchant activity files of its EBT Program transactions in a Processor format, unless similar information is provided by Processor through other services provided to Merchant.
3. Processor will not provide: (i) routing of activity files received from Contractor(s) to Merchant; or (ii) any other files or reports not specifically described above. Merchant shall be responsible for, and agrees to pay Processor, all telecommunications fees, assessments and related expenses in connection with Processor establishing and maintaining a link with each Contractor in order to provide Acquirer Service to Merchant. Processor may allocate such fees, assessments and related expenses in such manner as it deems advisable in its sole discretion.
4. Merchant agrees to allow the auditors of Processor, Contractor(s), FMS or the EBT Program State(s)/Alliance(s), to review the files held and procedures followed, and inspect the facilities used, by Merchant in connection with the Acquirer Services or the EBT Program(s). Processor may be required to perform on-site inspections of Merchant's premises and Merchant agrees to be responsible for Processor's out of pocket expenses and its standard fees for the time spent by Processor's personnel (which will be assessed at Processor's then current Standard Hourly Rate) in conducting such on-site inspections.
5. Merchant agrees to immediately notify Processor and the applicable Contractor in writing of any changes in the goods and services for which EBT Program cards are accepted as payment from participants in the applicable EBT Program.
6. Merchant authorizes Processor to provide Contractor(s), FMS and/or the EBT Program State/Alliance with such information about Merchant, as requested or required according to the Processor Agreement(s), the Retailer Agreement(s), the Operating Rules or the other Documentation, or as may be required to participate in the EBT Program(s).
7. Reports and Settlement

Merchant agrees to take all steps necessary to settle with Processor for EBT Program transactions involving Merchant's terminals in accordance with Processor's standards and Documentation; and Merchant shall be responsible for making any necessary reconciliation or adjustments in accordance with the Documentation. Processor will provide Merchant standard Processor reports for the services provided to Merchant. Merchant shall always maintain an open checking account at a financial institution which Processor or its agent can access through the Federal Reserve's Automated Clearing House ("ACH") system. Merchant authorizes Processor and its agents to debit and/or credit the account to settle any and all amounts due under the Agreement and any Addenda including, but not limited to, processing fees and transaction settlement. Unless otherwise agreed to in writing by Processor, Merchant shall be treated as one settlement endpoint with respect to all transactions processed by Processor using Acquirer Services. Merchant shall always maintain the account with sufficient cleared funds to meet its obligations under this Agreement. In the event Merchant desires to change the account or the financial institution where

the account is located, Merchant shall give Processor at least 30 days prior written notice of any such change.

### **35. MISCELLANEOUS**

Merchant acknowledges responsibility for any liability resulting from its decision not to participate in optional Association programs, including but not limited to any increased Data Incident liability resulting from its decision not to participate in an Association EMV program. In the event Merchant chooses to participate in an optional Association program, including but not limited to an EMV program, Merchant shall be responsible for (a) ensuring compliance with any applicable program requirements and/or Operating Regulations applicable to such program, including but not limited to making any updates to its point of sale equipment and (b) any cost associated with its participation in the applicable program, including any costs assessed to Merchant by Processor. If Merchant uses any third party provider in connection with its participation in an optional Association program, including but not limited to an EMV program, Merchant acknowledges that such provider is a Merchant Supplier under the Agreement, and Processor shall not be responsible for the acts or omissions of such third party.

Merchant acknowledges that, notwithstanding anything to the contrary in the Privacy Notice or the Agreement, Processor may use, disclose, share, and retain any information provided by Merchant and/or arising out of the Services , during the term and thereafter, to perform analytic services for Merchant, Processor and/or others including but not limited to analyzing, tracking, and comparing transaction and other data to develop and provide insights for such parties as well as for developing, marketing, maintaining and/or improving Processor's products and services.

## **ADDENDUM 1 DEFINITIONS**

**“Agent”** has the meaning given to it in Section 23 of these Terms and Conditions.

**“Agreement”** means the (1) Merchant Services Application, (2) Pricing Disclosure, (3) these Merchant Services Terms and Conditions including Processing Terms (“T&C”), (4) Personal Guaranty (if applicable), (5) Card Association Rules (as defined in the T&C), and (6) any and all other applicable addenda, schedules, exhibits, attachments, or amendments thereto.

**“Application”** means the Merchant Services Application.

**“Associations”** means VISA USA, VISA International, MasterCard International, Discover Network, and American Express if included as an election in the Application, and Election Form.

**“Authorized Representative”** means an individual with actual or apparent authority to act on Merchant’s behalf, to sign documents or take any action contemplated under this Agreement on Merchant’s behalf.

**“Authorization”** means an affirmative response by or on behalf of Cardholder’s bank to a request to effect a Transaction.

**“Card”** means a valid Visa U.S.A, Inc., MasterCard, PayPal, Discover Network Card, or an American Express Card if designated as an acceptable Card in the Application or Election Form, including those used through mobile devices.

**“Cardholder”** means an individual that is deemed to be issued a Card.

**“Cardholder Information”** means Transaction Records, Card account number and other Card information, deposit account information, information concerning a natural person which because of name, number, personal mark, or other identifier, can be used to identify that natural person in combination with any one or more of the following data: **(a)** social security number; **(b)** driver’s license number or non- driver identification card number; **(c)** mother’s maiden name, financial services account number or code, savings account number or code, checking account number or code, debit card number or code, automated teller machine number or code, electronic serial number or personal identification number; or **(d)** any information subject to Gramm-Leach-Bliley Act, Fair Credit Reporting Act, and Fair and Accurate Credit Transactions Act and all Laws affecting the subject matter and their respective regulations or guidelines.

**“Device”** means a terminal, point-of-sale PIN pad, printer, card readers, tablets, and other similar electronic devices Merchant uses to process Card Transactions.

**“Election Form”** means the Pricing Terms, Card Network and Service Election Form included in the application.

**“Exception Event/Event of Default”** has the meaning given to it in Section 16.

**“Internet”** means any electronic gateway for transmitting information, including, for example, the World Wide Web.

**“Laws”** means United States federal, state and local laws, regulations, rules and ordinances as from time-to-time in effect that are applicable to M&T, Merchant, Agents, and Associations.

**“Merchant Deposit Account”** means Merchant’s deposit account maintained at M&T or other financial institution that is credited or debited on account of Transaction Records. A Merchant Deposit Account is deemed a “Deposit Account” as defined in Revised Article 9 of the UCC.

**“Merchant Obligations”** means any charges related to the merchant activity, fees, credit slips, charge-backs, dispute fees, returned items adjustment fees, discount fees, any and all amounts resulting from any Transactions, including fraudulent Transactions, even if the Merchant is PCI compliant, indemnities, interest, fines, and other obligations owing to M&T under this Agreement.

**“Merchant Service(s)”** means Visa, MasterCard and Discover® Network, and Other Networks (if included as a Merchant Service in the Election Form) merchant card processing services, and such services and products as Merchant elects to use from time-to-time in the Election Form.

**“Other Networks”** means any network or card association other than VISA, MasterCard or Discover that is identified in the Election Form and in which Merchant participates under this Agreement.

**“PIN”** means a Cardholder’s personal identification number.

**“Processor”** means, as of the commencement of this Agreement, Worldpay. LLC.

**“Recurring Transaction”** means a Transaction where a Cardholder provides Merchant permission, either written or electronically, to periodically charge Cardholder’s Account for recurring goods or services.

**“Rules”** means by-laws, rules, regulations, operating manuals, operating letters and policies of the Associations and Other Networks, in effect, and as amended from time-to- time.

- For Visa, the rules can be found at: <https://usa.visa.com/support/small-business/regulations-fees.html>
- For MasterCard, the rules can be found at: <https://www.mastercard.us/en-us/about-mastercard/what-we-do/rules.html>
- For American Express, the rules can be found at: [https://merchant-channel.americanexpress.com/merchant/en\\_US/merchant-regulations](https://merchant-channel.americanexpress.com/merchant/en_US/merchant-regulations)

**“Security Breach”** means an incident where Cardholder Information is or is threatened to be lost, stolen, damaged or inappropriately accessed or used.

**“Set-up Form”** is defined in Section 1.2 of these Terms and Conditions.

**“Transaction”** means a Cardholder request for an electronic funds transfer to the Card issuer to debit or credit funds from Cardholder’s account.

**“Transaction Record”** means an electronic or paper record of a Transaction generated on completion of a sale or refund.