



Formerly VeriCheck, Inc.

## ACH Origination Agreement Terms & Conditions

These Terms and Conditions (“Terms and Conditions”), which are incorporated by reference into and form part of the signed Application and ACH Origination Terms and Conditions (“Application,” altogether the “Agreement”) is entered into between VeriCheck, Inc. (“VCI” or “PROCESSOR”) and the company identified on the signed Application (“CUSTOMER”). PROCESSOR, in conjunction with an Originating Depository Financial Institution (“ODFI”) performs processing, and settlement services for CUSTOMER originating transactions through the ACH network. PROCESSOR will provide these services to CUSTOMER, for the purpose specified herein, but only if CUSTOMER agrees to abide by the terms and conditions set forth below. Although PROCESSOR will not control the payments, PROCESSOR will process automated clearing house (“ACH”) transactions as an agent of Merchant, causing funds to be transferred between Merchant’s designated account and the accounts of their customers, subject to the terms and conditions of this Agreement. In consideration of the mutual covenants and agreements set forth herein, PROCESSOR and CUSTOMER agree as follows:

### 1. ACH SETTLEMENT.

**1.1. Settlement Process and Timing.** CUSTOMER wishes to initiate debit and/or credit entries pursuant to the terms of this Agreement and the operating rules and guidelines of the National Automated Clearing House Association (“Nacha”) and any ACH Operator (the “Rules”), and applicable foreign, federal, state, and local laws and regulations, as the same may be amended from time to time (“Laws”) and in compliance with all applicable requirements of the ODFI and any applicable Federal, state or banking regulatory authority (“Agency”). PROCESSOR will only settle CUSTOMER’s transactions. Promptly after presentment of transaction records pursuant to this Agreement and in conformance with PROCESSOR’s Operating Guide, PROCESSOR will initiate a transfer of the applicable settlement funds to CUSTOMER within the agreed upon funding schedule after processing the applicable transactions by an Automated Clearing House (ACH) entry. Notwithstanding the foregoing, PROCESSOR reserves the right, at its sole and absolute discretion, to adjust the settlement cycle based upon account performance and changes in estimated exposure.

**1.2. Netting.** All daily settlements to CUSTOMER for transactions will be net of credits/refunds, adjustments, applicable discount fees when due, Chargebacks, and any other amounts then due from CUSTOMER to PROCESSOR.

**1.3. Provisional Credits.** All credits to CUSTOMER’s Settlement Account or other payments to CUSTOMER are provisional and are subject to, among other things, PROCESSOR’s final audit, Chargebacks (including PROCESSOR’s related losses), fees, and fines imposed by Nacha or any other third party arising out of transactions initiated by CUSTOMER. CUSTOMER agrees that PROCESSOR may debit or credit CUSTOMER’s Settlement Account for any deficiencies, overages, fees, and pending Chargebacks, or may deduct such amounts from settlement funds due to CUSTOMER. Alternatively, PROCESSOR may elect to invoice CUSTOMER for any such amounts, net due 30 days after the invoice date or on such earlier date as may be specified.

**1.4. Returned Entries.** PROCESSOR will apply returned Entries to CUSTOMER’s account when they are received in accordance with the Rules. CUSTOMER is solely responsible for payment of any and all returned Entries. CUSTOMER acknowledges that PROCESSOR has the right to establish return rate thresholds, which may be changed from time to time. PROCESSOR has the right to immediately suspend processing and terminate this Agreement if returns exceed the established thresholds. CUSTOMER may reinstate an Entry only in limited circumstances as permitted by the Rules, and only in compliance with the Rules.

**1.5. Notification of Change (NOC) Entries.** PROCESSOR will provide to CUSTOMER NOC information. CUSTOMER must immediately, but prior to any subsequent Originations, make the corrections as requested by the RDFI.

**1.6. Errors.** PROCESSOR will not be liable for any delays in receipt of funds or errors in debit and credit Entries caused by third parties including but not limited to the ACH Operator, the ODFI, the Receiving Depository Financial Institution (“RDFI”), or CUSTOMER’s financial institution. CUSTOMER AGREES TO PROMPTLY AND REGULARLY REVIEW ALL ENTRIES AND OTHER COMMUNICATION RECEIVED FROM PROCESSOR AND TO IMMEDIATELY NOTIFY PROCESSOR IF THERE ARE ANY DISCREPANCIES BETWEEN CUSTOMER’S RECORDS AND THOSE PROVIDED BY PROCESSOR, THE ODFI OR CUSTOMER’S BANK, OR WITH RESPECT TO ANY TRANSFER NOT AUTHORIZED BY CUSTOMER. IF CUSTOMER FAILS TO NOTIFY PROCESSOR WITHIN FOURTEEN (14) DAYS OF THE DATE PROCESSOR MAILED OR OTHERWISE PROVIDES A STATEMENT OF ACCOUNT OR OTHER REPORT OF ACTIVITY TO CUSTOMER, THEN CUSTOMER WILL BE SOLELY RESPONSIBLE FOR ALL LOSSES OR OTHER COSTS ASSOCIATED WITH ANY ERRONEOUS OR UNAUTHORIZED TRANSFER OR TRANSACTION.

**1.7. Identification.** CUSTOMER understands that PROCESSOR may rely solely on identifying numbers provided by CUSTOMER to determine the bank and account of a Receiver even if the numbers identify a bank or account holder different from the one identified by CUSTOMER by name. CUSTOMER will indemnify PROCESSOR and the ODFI, including their directors, officers, employees, and affiliates, for any claims, demands, losses, liabilities, costs, or expenses suffered or incurred (including attorneys' fees and costs) as a result of an incorrect account or other identification. CUSTOMER's indemnity obligation hereunder shall survive termination of the Agreement. CUSTOMER understands that at certain times, they must perform account validation prior to originating Entries to certain routing numbers and/or account numbers.

**1.8. Settlement Account.** CUSTOMER represents and warrants that the Settlement Account is a demand deposit account which is used primarily for business purposes. CUSTOMER may not designate an account which is used primarily for personal or consumer purposes as its Settlement Account.

**1.9. Termination/Requalification.** In the event CUSTOMER's processing activity and/or credit profile differs materially or is no longer substantially consistent with the information provided to PROCESSOR at the time PROCESSOR approved CUSTOMER to receive its services, in addition to any other remedies under this Agreement, PROCESSOR may (1) terminate this Agreement and suspend processing for CUSTOMER, or (2) withhold settlement funds, and establish or increase a Reserve Account (as hereinafter defined) pursuant to the terms of this Agreement until PROCESSOR has either re-qualified CUSTOMER based upon its then present processing and credit profile, or until PROCESSOR determines, in its sole discretion, that the increased risk associated with providing the services to CUSTOMER no longer exists. PROCESSOR may charge CUSTOMER a reasonable fee for such requalification of their processing and credit profile.

## **2. RESERVE ACCOUNT; SECURITY INTEREST.**

**2.1. Establishment.** CUSTOMER expressly authorizes PROCESSOR to establish a reserve account (the "Reserve Account") pursuant to the terms and conditions set forth in this Agreement. The initial amount of such Reserve Account shall be set by PROCESSOR, in its sole discretion, based upon CUSTOMER's processing history and the anticipated risk of loss to PROCESSOR.

**2.2. Funding.** The Reserve Account shall be fully funded upon three days' notice to CUSTOMER, provided, however, in the event of fraud, default, or suspected or known financial loss to PROCESSOR, Reserve Account funding may be immediate. Such Reserve Account may be funded by all or any combination of the following: (i) one or more debits to CUSTOMER's Settlement Account or any other accounts held by PROCESSOR, or ODFI or any of their respective affiliates; (ii) one or more deductions or offsets to any payments otherwise due to CUSTOMER; (iii) CUSTOMER's delivery to PROCESSOR of a letter of credit; or (iv) if PROCESSOR so agrees, CUSTOMER's pledge to PROCESSOR of a freely transferable and negotiable certificate of deposit. Any such letter of credit or certificate of deposit shall be issued or established by a financial institution acceptable to PROCESSOR and shall be in a form satisfactory to PROCESSOR. In the event of termination of this Agreement by either CUSTOMER or PROCESSOR, an immediate Reserve Account may be established without notice in the manner provided above. Any Reserve Account will be held by PROCESSOR for the greater of ten (10) months after termination of this Agreement or for such longer period of time as is consistent with PROCESSOR's potential liability for transactions in accordance with the Rules. CUSTOMER's funds held in a Reserve Account may be held in a commingled Reserve Account for the reserve funds of PROCESSOR's customers, without involvement by an independent escrow agent. If CUSTOMER's funds in the Reserve Account are not sufficient to cover the Chargebacks, adjustments, fees, and other charges due from CUSTOMER, or if the funds in the Reserve Account have been released, CUSTOMER agrees to promptly pay PROCESSOR such sums upon request. In the event of a failure by CUSTOMER to fund the Reserve Account, PROCESSOR may fund such Reserve Account in the manner set forth in this Agreement.

**2.3. Security Agreement.** To secure CUSTOMER's obligations to PROCESSOR and its affiliates under this Agreement and any other agreement for the provision of related equipment or related services ("Obligations"), CUSTOMER grants to PROCESSOR a lien and security interest in and to any of CUSTOMER's funds pertaining to the transactions contemplated by this Agreement now or hereafter in the possession of PROCESSOR or the ODFI, whether now or hereafter due or to become due to CUSTOMER from PROCESSOR. In addition to any rights granted under applicable law, PROCESSOR is hereby authorized (any related notice and demand are hereby expressly waived), to set off, recoup, appropriate, and apply any and all such funds against and on account of CUSTOMER's Obligations, whether such Obligations are liquidated, non liquidated, fixed, contingent, matured, or non matured. CUSTOMER agrees to duly execute and deliver to PROCESSOR such instruments and documents as PROCESSOR may reasonably request to perfect and confirm the lien, security interest, right of set off, recoupment, and subordination set forth in this Agreement.

**3. CUSTOMER'S REPRESENTATIONS AND WARRANTIES; INDEMNIFICATION.** All indemnity obligations of CUSTOMER and representations and warranties made by CUSTOMER in this Section 3, and elsewhere in the Agreement, shall survive any expiration or termination of the Agreement and the termination of services provided by PROCESSOR.

*– see next page for more –*

**3.1. Receiver Authorization.** CUSTOMER agrees to obtain authorization from Receivers pursuant to the requirements of the Rules prior to debiting or crediting Receivers' accounts. CUSTOMER must retain the original or a copy of each written authorization of a Receiver, or a readily and accurately reproducible record (as such term is defined in the Rules) evidencing any other form of authorization, for two years from the termination or revocation of the authorization. CUSTOMER represents and warrants with respect to all Entries originated by CUSTOMER and processed by PROCESSOR for CUSTOMER that (1) each Receiver has authorized the debiting and/or crediting of its account, (2) each Entry is for an amount agreed to by the Receiver, (3) appropriate authorization methods for different Standard Entry Class (SEC) codes are used, as may differ in Nacha Rules; and (4) each Entry is in all other respects properly authorized. CUSTOMER agrees to indemnify PROCESSOR and the ODFI, including their directors, officers, employees, and affiliates, for any claims, demands, losses, liabilities, costs, or expenses suffered or incurred (including attorneys' fees and costs) relating to, arising out of, or involving any breach of these representations and warranties. CUSTOMER must provide a valid copy of the Proof of Authorization (POA), if requested by PROCESSOR, within two (2) banking days. Failure to provide a valid and compliant POA or not providing one within the timeframe will result in a permissible return of the transaction, and a subsequent debit to the CUSTOMER's account or settlement proceeds.

**3.2. Compliance.** CUSTOMER, including its subsidiaries, predecessors, principals, officers, or managing members, has complied with and shall remain in compliance with all Rules, applicable Laws, and applicable ODFI and Agency requirements, and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure to comply. CUSTOMER bears the final responsibility to ensure that CUSTOMER's policies and procedures meet the requirements of the Rules and all applicable Laws. CUSTOMER is encouraged to consult counsel regarding compliance with the Rules and applicable law whenever there is any doubt about compliance. CUSTOMER represents and warrants that all Entries originated by CUSTOMER and processed by PROCESSOR for CUSTOMER comply with the Rules and all applicable Laws, including without limitation the following: 1) FTC Act (15 U.S.C. §§ 41, et seq.); 2) TSR (16 C.F.R. 310, et seq.); 3) Electronic Fund Transfer Act (15 U.S.C. §§ 1601, et seq.) and Regulation E (12 C.F.R. 205, et seq.), if applicable; 4) Uniform Commercial Code Article 4-A, if applicable; 5) Federal Reserve Board Regulation J, if applicable; 6) the rules and sanctions laws of the Office of Foreign Assets and Control ("OFAC"); 7) Unlawful Internet Gambling Enforcement Act (31 U.S.C. §§ 5361, et seq.) and accompanying regulations (12 C.F.R. 233; 31 C.F.R. 132); 8) PACT Act (15 U.S.C. §§ 376, et seq., Jenkins Act (15 U.S.C. §§ 375, et seq. and accompanying regulations); 9) Title X of the Dodd-Frank Act and accompanying regulations; and (10) all applicable foreign, state, and local laws and regulations, all as the same may be amended from time to time. CUSTOMER further represents and warrants that it shall not originate any Entries that constitute (i) improper telemarketing in violation of the TSR or other applicable Rules or applicable Laws; (ii) sales or marketing of advance-fee credit cards in violation of the TSR or other applicable Rules or Laws; (iii) restricted Internet gambling transactions; (iv) unlawful Internet tobacco sales; and/or (v) that violate or are alleged to violate any Rule, applicable Laws, or applicable ODFI or Agency requirement. CUSTOMER represents and warrants that it will not transmit any Entries that violate the laws of the United States, any applicable foreign, state, or local law. CUSTOMER will indemnify PROCESSOR and the ODFI, including their directors, officers, employees, and affiliates, for any claims, demands, losses, liabilities, costs, or expenses suffered or incurred (including attorneys' fees and costs) relating to, arising out of, or involving any breach of these representations and warranties or failure to comply with any of the Rules or applicable Laws, or applicable ODFI or Agency requirement. Without limiting any of its other rights under this Agreement, PROCESSOR may immediately cancel this Agreement and terminate CUSTOMER if PROCESSOR reasonably believes that CUSTOMER is violating or has previously violated the Rules or applicable Laws or is in breach of these representations and warranties.

**3.3. Entries.** In addition to all other representations and warranties made in this Agreement, CUSTOMER represents and warrants the following to PROCESSOR and the ODFI; now and as of the time it initiates each Entry:

**3.3.1.** As to each Credit Entry submitted by CUSTOMER:

- Each person shown as the Receiver on an Entry received by PROCESSOR from CUSTOMER has authorized the initiation of such Entry and the crediting of its account in the amount and on the Effective Entry Date shown on such Entry;
- Such authorization is operative at the time of transmittal or crediting by PROCESSOR as provided herein;
- Entries transmitted to PROCESSOR by CUSTOMER are limited to those types of credit Entries set forth on the Application and in the Operating Guide;
- The Entry is timely;
- The Entry is in conformity with the Rules, applicable Law, and applicable ODFI and Agency requirements;
- That, at the time the Entry is transmitted to the ACH Network by PROCESSOR, CUSTOMER does not have actual knowledge of the revocation or termination of the authorization by the Receiver;
- That the Receiver's authorization is neither inoperative nor ineffective by operation of law, nor has it been terminated by operation of law;
- That CUSTOMER has provided all written disclosures required by the Rules, applicable law, and applicable ODFI or Agency requirements to all consumers on whose behalf PROCESSOR performs any Service;
- CUSTOMER will comply with all provisions of the Rules, Laws, and ODFI and Agency requirements applicable to the services provided under this Agreement to CUSTOMER; and
- CUSTOMER acknowledges and agrees that all Entries originated as part of a service shall comply with all applicable Laws, including but not limited to, any economic sanctions administered by OFAC and shall not act on behalf of, or transmit funds to or from, any party subject to such sanctions.

## ACH Origination Terms and Conditions

Page 4 of 9

### 3.3.2. As to each Debit Entry submitted by CUSTOMER:

- The Entry is for a sum due and owing to CUSTOMER from a customer or for a sum specified by a customer to be paid to CUSTOMER;
- The Entry is timely;
- The Entry is forwarded in accordance with an authorization executed by the Receiver and held by CUSTOMER;
- The Entry is in conformity with the Rules, applicable Laws, and applicable ODFI and Agency requirements;
- That, at the time the Entry is transmitted to the ACH Network by PROCESSOR, CUSTOMER does not have actual knowledge of the revocation or termination of the authorization by the Receiver;
- That the Receiver's authorization is neither inoperative nor ineffective by operation of law, nor has it been terminated by operation of law;
- The Entry is of a type of debit Entry specified in the Application and the Operating Guide;
- CUSTOMER has complied with the Rules, applicable Laws, and applicable ODFI and Agency requirements pertaining to the Entry;
- CUSTOMER shall be bound by and comply with the Rules as in effect from time to time, including, without limitation, the provision making payment of an Entry by the RDFI of final settlement for such Entry; and CUSTOMER specifically acknowledges that it has received notice of the Rule regarding provisional payment and of the fact that, if such settlement is not received, the RDFI shall be entitled to a refund from the Receiver of the amount credited and CUSTOMER shall not be deemed to have paid the Receiver the amount of the Entry;
- CUSTOMER will comply with all provisions of the Rules, Laws, and all ODFI and Agency requirements applicable to the services provided to CUSTOMER under this Agreement; and
- CUSTOMER acknowledges and agrees that all Entries originated as part of a service shall comply with all Regulations, including but not limited to, any economic sanctions administered by OFAC and shall not act on behalf of, or transmit funds to or from, any party subject to such sanctions.
- NACHA rules require all first-time WEB debits from consumers be validated before submission to the ACH system. VCI will provide NACHA-approved account screening as part of the authorization process on first-time (not recurring) WEB debits. As disclosed in the merchant agreement, VCI will charge a fee for this service unless CUSTOMER opts out of this service. If CUSTOMER opts out of this service, CUSTOMER agrees to be solely responsible for any unauthorized transactions which result from this election, and to indemnify VCI and its ODFI, including their directors, officers, employees, and affiliates, for any claims, demands, losses, liabilities, costs, or expenses suffered or incurred (including attorneys' fees and costs) relating to, arising out of, or involving this election or failure to comply with any of the Rules, applicable Laws, or applicable ODFI or Agency requirements.
  - CUSTOMER "opts out" of VCI's WEB debit validation service. (Not Recommended)

**3.4. Breach of Representations and Warranties.** PROCESSOR, in its sole and absolute discretion, has the right to immediately suspend or terminate processing for CUSTOMER and/or this Agreement if PROCESSOR, the ODFI, the ACH Operator, Nacha, or any applicable Agency believes that CUSTOMER has breached these representations and warranties, any other representations and warranties made elsewhere in this Agreement, or has initiated any unauthorized Entries. In addition to all other indemnification obligations in this Agreement, CUSTOMER agrees to indemnify, hold harmless, and defend PROCESSOR and the ODFI, including all of their directors, officers, employees, and affiliates, for any claims, losses, liabilities, costs, fines, or expenses suffered or incurred (including attorneys' fees and costs) relating to, arising out of, or involving any actual or alleged breach of these representations and warranties, any other representations and warranties made elsewhere in this Agreement, or unauthorized Entries. If CUSTOMER breaches these representations and warranties, any other representations and warranties made elsewhere in this Agreement, or has initiated any unauthorized Entries, CUSTOMER acknowledges that PROCESSOR and/or the ODFI will suffer irreparable harm and the total amount of monetary damages for any injury to any or all of them will be impossible to calculate and therefore are an inadequate remedy at law. Accordingly, PROCESSOR or the ODFI may seek temporary and permanent injunctive relief against CUSTOMER, or exercise any other rights and seek any other remedies to which PROCESSOR, or the ODFI, as applicable, may be entitled to at law, in equity and under this Agreement.

#### 4. RESERVED.

#### 5. TERM, TERMINATION, AND FEES.

**5.1. Term; Renewal.** THE INITIAL TERM OF THIS AGREEMENT SHALL COMMENCE UPON THE EFFECTIVE DATE AND SHALL CONTINUE IN FORCE FOR TWELVE (12) MONTHS. THIS AGREEMENT SHALL RENEW AUTOMATICALLY FOR SUCCESSIVE TWELVE-MONTH PERIODS UNLESS ANY PARTY TERMINATES THIS AGREEMENT BY NOTICE TO THE OTHER, IN WRITING, AT LEAST 60 DAYS PRIOR TO THE EXPIRATION OF THE THEN CURRENT TERM. IN THE EVENT PROCESSOR CHANGES FEES OR LIMITS, CUSTOMER MAY TERMINATE THIS AGREEMENT UPON SIXTY (60) DAYS WRITTEN NOTICE TO PROCESSOR, PROVIDED SUCH NOTICE IS RECEIVED BY PROCESSOR WITHIN THIRTY (30) DAYS OF CUSTOMER'S NOTIFICATION BY PROCESSOR OF THE CHANGES IN FEES OR LIMITS. IF CUSTOMER DOES NOT INITIATE TERMINATION THIS AGREEMENT WITHIN THE THIRTY-DAY NOTICE PERIOD, THEN THIS AGREEMENT WILL REMAIN IN FULL FORCE AND EFFECT SUBJECT TO THE NEW FEES AND LIMITS.

**5.2. Immediate Termination for Cause.** CUSTOMER agrees that PROCESSOR may discontinue services to CUSTOMER immediately in the event PROCESSOR reasonably believes that CUSTOMER has failed to comply with the rules and regulations set forth in this Agreement, the Operating Guide, and/or the Rules of Nacha, or otherwise breaches any warranty, obligation, or term of this Agreement or applicable Laws or applicable ODFI or Agency requirement, or engaged in a Change in Control (as hereinafter defined) not approved in advance by PROCESSOR, or at the request of an ODFI, the ACH Operator, Nacha, or an Agency.

**5.3. Early Termination Fee.** The parties further agree and acknowledge that, in addition to any remedies contained herein or otherwise available under applicable law: If (a) CUSTOMER breaches this Agreement by improperly terminating it prior to the expiration of the applicable term of the Agreement, or (b) this Agreement is terminated prior to the expiration of the applicable term of the Agreement due to an event of default by CUSTOMER, then PROCESSOR will suffer a substantial injury that is difficult or impossible to accurately estimate. Accordingly, in an effort to liquidate in advance the sum that should represent such damages, the parties agree that the amount for each CUSTOMER location and/or account shall equal the greater of (a) \$125, or (b) six (6) months of the current monthly minimum and statement/gateway fees for each CUSTOMER location and/or account. No Early Termination Fee will apply in the event CUSTOMER terminates this agreement pursuant to paragraph 5.1 following notification of a change in fees or limits.

**5.4. Fees for Services.**

**5.4.1.** PROCESSOR shall charge CUSTOMER a fee for the services provided herein, which shall be calculated and payable pursuant to the Pricing portion of the Agreement and any additional pricing supplements, which are hereby incorporated by reference herein. CUSTOMER shall pay PROCESSOR the fees and rates set forth in this Agreement plus all applicable taxes, as amended from time to time, by PROCESSOR. PROCESSOR reserves the right to change, at its discretion, any Fees or Rates, by giving written notice to CUSTOMER. Such changes shall be effective as of the date of the notice. CUSTOMER's failure to give PROCESSOR written notice of termination of this Agreement after such notice of changes, shall be deemed to constitute acceptance of changes.

**5.4.2.** Unless otherwise agreed by PROCESSOR in writing, CUSTOMER authorizes PROCESSOR to debit all payments owed to PROCESSOR under this Agreement (including all chargebacks for Returns), and to credit all amounts owed to CUSTOMER under this Agreement to CUSTOMER's account. If there are insufficient funds in CUSTOMER's Account to pay amounts owed to PROCESSOR, including delinquent fees, CUSTOMER shall immediately reimburse PROCESSOR upon demand. PROCESSOR may, at its option, offset such amount against any amounts due CUSTOMER from PROCESSOR, including funding of transactions under this or any other Agreement between CUSTOMER and PROCESSOR. A delinquency charge of 1½ percent per month or the highest amount permitted by law, whichever is lower, shall be added to the outstanding balance of any transactions due and all transactions previously authorized, during any period in which CUSTOMER's account is delinquent. For any payment of services or charges provided herein, CUSTOMER agrees to pay PROCESSOR a Returned Item Fee of \$25 or the maximum allowed by state law for such payment that is not paid by CUSTOMER's bank upon presentment. CUSTOMER agrees that the Returned Item Fee may be debited from CUSTOMER's account or Settlement funds.

**5.4.3.** The fees for service by PROCESSOR are based upon assumptions associated with the anticipated annual volume and average transaction size for all services and CUSTOMER's method of doing business; including, but not limited to products/services being sold. If the actual volume or average transaction size are not as expected or if CUSTOMER significantly alters its method of doing business, PROCESSOR may adjust CUSTOMER's discount fee and transaction fees without prior notice.

**5.4.4.** CUSTOMER agrees to pay PROCESSOR any fees or fines imposed on PROCESSOR by any third party, including any Agency, Nacha, and the ODFI, resulting from Chargebacks, breaches of the Rules or applicable Laws, or with respect to acts or omissions of CUSTOMER.

**5.4.5.** If CUSTOMER's Unauthorized Returns percentage as calculated by Nacha (using codes R05, R07, R10, R11, R29 and/or R51; and as may change from time to time) for any line of business exceeds Nacha's Unauthorized Returns percentage of 0.50% (which may change from time to time), CUSTOMER must also maintain Administrative Returns percentage as calculated by Nacha (using codes R02, R03, R04; and as may change from time to time) and Overall Returns percentage as calculated by Nacha (all Return codes, excluding RCK; and as may change from time to time) of 3% and 15% respectively (which may change from time to time). CUSTOMER shall be assessed any applicable handling fees and/or fines imposed by Nacha as a result of exceeding any Return category thresholds. In addition to the foregoing, CUSTOMER shall pay PROCESSOR any fee assessed by the ODFI as a result of exceeding this Return category thresholds.

**5.4.6.** If CUSTOMER believes any adjustments should be made with respect to CUSTOMER's Settlement Account, CUSTOMER shall notify PROCESSOR in writing within 45 days after any debit or credit is or should have been effected. If CUSTOMER notifies PROCESSOR after such time period, PROCESSOR may, in its discretion, assist CUSTOMER, at CUSTOMER's expense, in investigating whether any adjustments are appropriate and whether any amounts are due to or from other parties, but PROCESSOR shall not have any obligation to investigate or effect any such adjustments. Any voluntary efforts by PROCESSOR to assist CUSTOMER in investigating such matters shall not create any obligation to continue such investigation or any future investigation.

**5.4.7.** All Fees and Rates are due and payable upon receipt. PROCESSOR reserves the right to suspend its services and obligations to CUSTOMER, including payment of any transactions due and all transactions previously authorized, during any period in which CUSTOMER's account is delinquent. Continuance of service and payment during any period of delinquency shall not constitute a waiver of PROCESSOR's right of suspension or termination.

– see next page for more –

**6. NO WARRANTY.** CUSTOMER acknowledges and agrees that PROCESSOR does not have control over the conditions under which CUSTOMER uses the payment processing system, and does not and cannot warrant the results obtained by such use. PROCESSOR DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, RELATING TO THE PROCESSING AND/OR PROCESSOR'S SERVICES, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES AGAINST INFRINGEMENT OF THIRD-PARTY RIGHTS OR THE IMPLIED WARRANTIES OF CUSTOMER ABILITY AND FITNESS FOR A PARTICULAR PURPOSE. PROCESSOR DOES NOT WARRANT THAT OPERATION OF THE SERVICE WILL BE UNINTERRUPTED, ERROR-FREE, OR SECURE. CUSTOMER ACKNOWLEDGES THAT THE PAYMENT PROCESSING SYSTEM IS PROVIDED FOR USE BY CUSTOMER "AS IS." CUSTOMER FURTHER ACKNOWLEDGES THAT PROCESSOR BEARS NO RESPONSIBILITY FOR CUSTOMER'S WEB SITE(S), POLICIES, OR PROCEDURES. CUSTOMER ACKNOWLEDGES THAT AN AUTHORIZATION FOR PAYMENT IS NEITHER A WARRANTY THAT THE PERSON PRESENTING THE AUTHORIZATION IS THE RIGHTFUL ACCOUNT HOLDER NOR A PROMISE OR GUARANTEE BY PROCESSOR THAT IT WILL PAY OR ARRANGE FOR PAYMENT TO CUSTOMER FOR THE AUTHORIZED TRANSACTION. CUSTOMER ACKNOWLEDGES THAT AN AUTHORIZATION DOES NOT PREVENT A SUBSEQUENT REVERSAL OF A PREVIOUSLY AUTHORIZED TRANSACTION PURSUANT TO THIS AGREEMENT.

**7. LIMITATIONS OF LIABILITY.** PROCESSOR will be responsible for the performance of services provided hereunder in accordance with the terms of this Agreement and the Rules and applicable Laws. PROCESSOR will not accept responsibility for errors, acts, or failure to act by others (whether directly or indirectly), including but not limited to, financial institutions (including but not limited to the ODFI and RDFI), communication providers, common carriers, or clearing houses through which Entries may be passed and/or originated. PROCESSOR is not responsible for any loss, liability, or delay caused by fires, earthquakes, war, civil disturbances, power surges or failures, acts of governments, labor disputes, negligence, intentional conduct, failures in communication networks, intervening criminal, or tortious acts of third parties who are not within PROCESSOR's control or employ, legal constraints or other events beyond the control of PROCESSOR. PROCESSOR shall not be liable to CUSTOMER for any delays in receipt or transmittal of funds or errors in credit or debit Entries caused by third parties, including without limitation, the Automated Clearing House, any depository financial institution, or any agent of CUSTOMER. IN NO EVENT SHALL PROCESSOR OR ODFI BE LIABLE TO CUSTOMER FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, OR SPECIAL DAMAGES WHICH CUSTOMER OR ITS CUSTOMERS, AFFILIATES, PARENT COMPANIES, ASSOCIATES, AGENTS, OFFICERS, DIRECTORS, OR EMPLOYEES MAY INCUR OR SUFFER IN CONNECTION WITH THIS AGREEMENT, INCLUDING LOSS OR DAMAGE FROM SUBSEQUENT WRONGFUL DISHONOR RESULTING FROM PROCESSOR'S ACTS OR OMISSIONS PURSUANT TO THIS AGREEMENT

**8. NO LIABILITY FOR LOSSES.** CUSTOMER shall bear all risk of loss, without warranty or recourse to PROCESSOR for the face amount of any transaction submitted to PROCESSOR and any fees or other amounts due PROCESSOR associated with any transaction (including PROCESSOR's actual costs and expenses). CUSTOMER agrees that PROCESSOR is not guaranteeing any consumer sales transactions. It is further agreed that PROCESSOR has no liability for any losses that CUSTOMER may incur as the result of a consumer sales transaction that has been authorized by CUSTOMER using PROCESSOR. It is also agreed that PROCESSOR has no liability for any losses that CUSTOMER may incur as a result of any failure of equipment.

**9. AUTHORIZATION.** CUSTOMER authorizes the account designated by CUSTOMER on the Application, and any other funds of CUSTOMER in PROCESSOR's direct or indirect control, to be debited and/or credited by PROCESSOR according to the terms of this Agreement and that adjustment Entries may be made to this account to ensure an accurate and balanced accounting of all transactions and to process Chargebacks made to CUSTOMER for ANY reason. CUSTOMER further authorizes PROCESSOR to process electronic funds transfers through the account. This authorization is also applicable for any new account information provided by CUSTOMER at a future date. This authorization shall continue in perpetuity until all obligations to PROCESSOR are met and the authorization shall survive termination of this Agreement and the termination of services provided by PROCESSOR.

**10. ADDITIONAL REPRESENTATIONS AND WARRANTIES OF CUSTOMER.** CUSTOMER is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its organization. CUSTOMER has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes valid and legally binding obligations of CUSTOMER and is enforceable in accordance with its terms and conditions. Neither the execution or delivery of this Agreement, nor the consummation of the transactions contemplated hereby, will violate any statute, regulation, rule, injunction, judgment, order, decree, ruling, charge, or other restriction of any government Agency, or court to which CUSTOMER is subject or any charter of CUSTOMER, or conflict with or create any right to accelerate, terminate, modify, or cancel or require any notice under any other agreement, or other arrangement to which CUSTOMER is a party or by which either is bound. CUSTOMER has provided to PROCESSOR a copy of any and all government or Agency inquiries or complaints regarding CUSTOMER or any of its subsidiaries, predecessors, principals, officers, or managing members. The information, authorizations, documents, reports, financial statements, and other documentation provided by CUSTOMER pursuant to this Agreement are correct, accurate, and complete and do not contain any untrue or misleading statement or fact. The representations and warranties made by CUSTOMER in this Agreement, including but not limited to this Section 10, shall survive termination of this Agreement and the termination of services provided by PROCESSOR.

**11. PROCESSOR'S REPRESENTATIONS AND WARRANTIES.** PROCESSOR is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its organization. PROCESSOR has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder. This Agreement constitutes valid and legally binding obligations of PROCESSOR and is enforceable in accordance with its terms and conditions.

**12. FINANCIAL AND OTHER INFORMATION.**

**12.1. Provision of Information.** CUSTOMER will provide PROCESSOR quarterly financial statements of CUSTOMER within 45 days after the end of each fiscal quarter and annual audited financial statements within 90 days after the end of each fiscal year, if requested by PROCESSOR. Such financial statements shall be prepared in accordance with generally accepted accounting principles. CUSTOMER also will provide to PROCESSOR or its officers, agents, accountants, or representatives such other financial statements and other information concerning CUSTOMER's business and CUSTOMER's compliance and ability to comply with the terms and provisions of this Agreement, Nacha Rules, and applicable law as PROCESSOR may reasonably request. CUSTOMER authorizes PROCESSOR to obtain from third parties financial and credit information relating to CUSTOMER in connection with PROCESSOR's determination whether to accept this Agreement and PROCESSOR's continuing evaluation of the financial and credit status of CUSTOMER. Upon request, CUSTOMER shall provide to PROCESSOR or its representatives reasonable access to CUSTOMER's facilities and records for the purpose of performing any inspection and/or copying of CUSTOMER's books and/or records deemed appropriate by PROCESSOR.

**12.2. Credit Inquiries.** A credit report may be required in connection with the processing of CUSTOMER's Application. CUSTOMER and its principals authorize PROCESSOR, or any credit bureau or any credit reporting agency employed by PROCESSOR or any agents of PROCESSOR to investigate the references provided or any other statements or data obtained from CUSTOMER, or any of the principals of CUSTOMER listed on the Application, for the purpose of entering into this Agreement. CUSTOMER also authorizes PROCESSOR to obtain additional credit reports regarding CUSTOMER and its principals on an annual basis, unless PROCESSOR, in its sole and absolute discretion, determines that it is necessary for PROCESSOR to periodically obtain such credit reports on a more than annual basis, in which case CUSTOMER authorizes PROCESSOR to obtain such additional credit reports on a more frequent basis. Notwithstanding anything in this paragraph, CUSTOMER authorizes PROCESSOR to obtain a credit report regarding CUSTOMER and its principals if CUSTOMER requests increased processing amounts or parameters or if, in the sole discretion of PROCESSOR, there is a material change in the transactional volume of CUSTOMER.

**12.3. Notice of Adverse Change or Action.** CUSTOMER will provide PROCESSOR with prompt notice of any material adverse change in its financial condition. Without limiting the foregoing, CUSTOMER will provide PROCESSOR with written notice of any judgment, writ, warrant of attachment, execution, or levy against any substantial part (25% or more in value) of CUSTOMER's total assets not later than three (3) days after CUSTOMER obtains notice thereof.

**13. CONFIDENTIAL INFORMATION.** The parties acknowledge that each shall have access to and shall become acquainted with confidential and/or proprietary information and data relating to each other's business. This may include information with respect to operations, sales, marketing, customer lists, and other aspects of each other's business and in connection therewith. Each party agrees not to directly or indirectly disclose such *confidential or proprietary* information to any firm, person, company, or other entity not a party to this Agreement, except that PROCESSOR may share information with the ODFI and to third parties as permitted under the Rules, and as required by Laws or legal orders.

**14. SECURITY REQUIREMENTS.** CUSTOMER must establish, implement, and update, as appropriate, policies, procedures, and systems with respect to the initiation, processing, and storage of Entries that are designed to: (a) protect the confidentiality and integrity of Protected Information until its destruction; (b) protect against anticipated threats or hazards to the security or integrity of Protected Information until its destruction; and (c) protect against unauthorized use of Protected Information that could result in substantial harm to a natural person. Such policies, procedures, and systems must include controls that comply with applicable regulatory guidelines on access to all systems used by CUSTOMER to initiate, process, and store Entries.

**15. RETENTION OF RECORDS.** Except where the Rules proscribe a different document retention period, CUSTOMER must retain legible copies of transaction records and proofs of authorization for a period of at least three years from the date of each such transaction. CUSTOMER must submit to PROCESSOR a legible copy of a transaction record or proofs of authorization within 48 hours of a request by PROCESSOR. Without limiting the foregoing, CUSTOMER shall be responsible for the retrieval of all transaction records and authorizations requested by PROCESSOR within the shortest time limits established by the Rules, or as specified in the Operating Guide, this Agreement, or other notice from PROCESSOR. CUSTOMER will not be relieved of its responsibility under the preceding sentence for any deficiencies in check transaction data transmitted or otherwise delivered to PROCESSOR, even though PROCESSOR may agree to capture or produce images of, store and retrieve any such incomplete data on CUSTOMER's behalf.

– see next page for more –

**17. CHANGE IN BANK OR COMPANY INFORMATION; CHANGE IN CONTROL.**

**17.1. Change of Account Number.** If CUSTOMER desires to change account from that identified on the Application, CUSTOMER must contact its relationship manager or customer service representative at PROCESSOR immediately and to promptly execute any further documents deemed necessary by PROCESSOR to enact a change. CUSTOMER agrees to provide new account information to PROCESSOR immediately and allow for at least five (5) business days for changes to be effective.

**17.2. Change in Legal Name or Structure or Change in Products/Services Sold.** CUSTOMER must contact its relationship manager or customer service representative at PROCESSOR and CUSTOMER will be required to execute a replacement Application and enter into a replacement Agreement.

**17.3. Change in Company DBA Name, Address, Telephone, Website, Email Address or Fax Number.** CUSTOMER must contact a customer service representative at PROCESSOR.

**17.4. Change in Control.** CUSTOMER will not transfer, sell, merge, or liquidate its business or assets or otherwise transfer control of its business, change its ownership in any amount or respect, engage in any joint venture partnership or similar business arrangement, or change its basic method of doing business (each of which constitutes a "Change in Control") without providing sufficient notice to PROCESSOR of such intended actions so that if PROCESSOR chooses to terminate this Agreement, the Parties can wind down operations in an orderly manner.

**18. GOVERNING LAW, VENUE, AND JURISDICTION.** This Agreement shall be governed by and construed to be in accordance with all of the laws of the State of Georgia. The Parties agree that the sole and exclusive venue for the resolution of disputes between the parties arising out of or related to the Agreement shall be brought in a court of competent jurisdiction in Atlanta, Fulton County, Georgia.

**19. MEDIATION.** Any controversy or claim arising out of or related to this Agreement, shall be submitted to Non-binding Mediation. Such Mediation shall be conducted in good faith and shall result either in settlement or findings of fact by the Mediator. The Parties may not invoke the jurisdiction of the courts unless and or until they have unsuccessfully concluded good faith Mediation. The Mediator chosen shall be agreeable to both Parties under the applicable conditions of Georgia law. The parties shall share the cost of Mediation unless the Mediation is unsuccessful. If litigation becomes necessary, the losing party shall bear the full costs of Mediation.

**20. ATTORNEYS' FEES.** In the event that it becomes necessary for PROCESSOR to hire an attorney to enforce or interpret this Agreement, PROCESSOR shall be entitled to recover its reasonable attorneys' fees, costs, and disbursements from CUSTOMER.

**21. FORCE MAJEURE.** PROCESSOR shall not be responsible for delays, nonperformance, damages, lost profits, or other losses caused directly or indirectly by any act of god, including without limitation, fires, earthquakes, tornadoes, hurricanes, wars, labor disputes, communication failures, legal constraints, power outages, data transmission loss, failure or interception, incorrect data transmission, or any other event outside the direct control of PROCESSOR.

**22. HEADINGS.** The Paragraph headings in this Agreement are inserted for purposes of convenience only and shall have no substantive effect.

**23. ENTIRE AGREEMENT; NO HANDWRITTEN ALTERATIONS, ADDITIONS, DELETIONS, OR MODIFICATIONS; AMENDMENTS; RULES GOVERN.** No representative of PROCESSOR or CUSTOMER may make any alteration, addition, deletion, or modification of this Agreement by marking up a copy of the printed Agreement. This Agreement, together with the Operating Guide and schedules (including any fee schedules) incorporated by reference herein, represents the entire agreement between PROCESSOR and CUSTOMER with respect to the subject matter and supersedes any prior negotiation or agreement, whether written or oral. Except as explicitly set forth herein, the Agreement may only be modified in writing, signed by all parties hereto. PROCESSOR may impose and adjust fees and charges as set forth in this Agreement. From time to time, PROCESSOR may amend operating procedures and processing to conform to updated software or to conform to and comply with any federal, state, or local law or regulation changes or changes to the Rules. Such amendments to operations or procedures, including but not limited to those in the Operating Guide, shall become effective upon CUSTOMER's receipt of notice as provided for by this Agreement, or upon such later date as may be provided in the written notice. Use of the services after receipt of notice of such changes shall constitute evidence of CUSTOMER's acceptance of changes by the parties. No other amendments to this Agreement will be effective unless such changes are reduced to writing and are signed by the duly authorized party or parties to this Agreement. In the event of any conflict between this Agreement and the Rules, the Rules govern.

**24. THIRD-PARTY BENEFICIARIES.** CUSTOMER and PROCESSOR acknowledge that the ODFI is an express and intended third-party beneficiary to this Agreement and has all the rights under this Agreement as if it were a party thereto, including, without limitation, the right to enforce any terms of the Agreement or assert claims against CUSTOMER for breach of this Agreement. Except with respect to ODFI this Agreement is not for the benefit of any other person or entity. No other person or entity shall have any right against the PROCESSOR hereunder.



**26. BINDING AGREEMENT; ASSIGNMENT.** CUSTOMER may not assign or transfer any rights under this Agreement unless and until it receives the prior written approval of the PROCESSOR. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors, and permitted assigns.

**27. NOTICE.** All notices between the parties hereto shall be in writing and shall be served by national overnight courier or by certified mail, return receipt requested. All notices shall be deemed received upon receipt or refusal to accept such notice.

**28. SEVERABILITY.** If any provision of this Agreement is held to be illegal, invalid, or unenforceable, such finding shall not affect any other provisions hereof. This Agreement shall, in such circumstances, be deemed modified to the extent necessary to render enforceable the provision in question.

**29. NONWAIVER.** The failure or delay on the part of PROCESSOR to exercise any right, remedy, power, or privilege hereunder shall not operate as a waiver thereof or give rise to an estoppel nor shall it be construed as an agreement to modify the terms of this Agreement. Nor shall any single or partial exercise of any right, remedy, power, or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power, or privilege with respect to other occurrence. No waiver by a party hereunder shall be effective unless it is in writing and signed by the party making such waiver, and then such waiver shall apply only to the extent specifically stated in such writing.

**30. COUNTERPARTS; EFFECTIVE DATE.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and such counterparts are deemed to constitute but one and the same instrument. CUSTOMER acknowledges that it may not receive a countersigned Agreement from PROCESSOR unless such countersigned Agreement is requested by CUSTOMER. All terms and conditions in this Agreement are deemed accepted by CUSTOMER upon PROCESSOR's receipt of the Application executed by CUSTOMER and the terms and conditions in this Agreement are deemed accepted by PROCESSOR upon the commencement of its provision of the services.