

## HEARTLAND ACH PROCESSING AGREEMENT TERMS AND CONDITIONS

This Heartland ACH Processing Agreement (the "Agreement") is by and between Heartland Payment Systems, Inc. (HPS), a Delaware corporation with its principal place of business located at 90 Nassau Street, Princeton, NJ. 08540 ("HPS") and \_\_\_\_\_ ("Customer"). This Agreement shall be effective as of the date of its execution by HPS. This Agreement sets forth the Terms and Conditions under which HPS will provide certain services to Customer and Customer may exercise a limited right to use certain computer software marketed by HPS (the "Software"):

### LICENSE GRANT; SCOPE OF USE

1.1 HPS hereby grants to Customer a personal, nontransferable and nonexclusive license to use the Software and its related documentation during the term of this Agreement. Upon termination of the Agreement, Customer's ability to process transactions will be terminated. Customer may continue to use the Software throughout the term of this Agreement. 1.2 Customer agrees to use the Software as the means for conveying data of financial instruments received by Customer in payment for goods or services, either directly or indirectly through a headquarters location, to HPS for the performance of the services described in Section 2.1 of the Agreement (the "Transmission").

### SERVICES

2.1 HPS agrees to offer to Customer the following data processing services, hereinafter collectively referred to as the "Services": a. Capturing of data of financial instruments created by the Software and transmitted by Customer to HPS through use of the Software, with acknowledgement of receipt thereof being in turn transmitted within one business day by HPS to Customer (the "Acceptance"); b. Sorting of data as required by HPS in the applicable web system interface.; c. Management of exceptions to deposits.

2.2 Subject to the terms of this Agreement and so long as Customer complies with this Agreement, the Services shall be provided in the following manner: a. Irrespective of Customer's selection of Funding Frequency Options in the application, HPS may at its sole discretion and at any time during the term categorize all or any transactions as Express, Standard, or High Risk. All transactions must be successfully transmitted and received by HPS by 7:00 PM EST. Express transactions will originate an Automated Clearing House (ACH) record the same business day to the customer's designated depository account with a next day effective date. Standard transactions will originate an ACH record the following business day to the customer's designated depository account with an

effective date of the day after the ACH record. High Risk transactions will originate an ACH record in four business days to the customer's designated depository account with an effective date of the day after the ACH record. b. HPS will designate at its sole discretion for Customer a "Maximum ACH Dollar Amount". Transactions above the Maximum ACH Dollar Amount will be considered a higher risk transaction and could fall outside of the aforementioned funding parameters and the effective date will be at the discretion of HPS. c. HPS may impose certain fees at its sole discretion, including, but not limited to returned item fees, volume-based monthly fees and per item fees. d. HPS may hold any transactions or decline to process through ACH at their discretion.

2.3 The Transaction processing deadline, ("Cut-off time") is 7:00 PM EST each business day, (Monday through Friday, excluding holidays). Deposits made after the "Cut-off time" on any business day or on non-business days, (Saturdays, Sundays, and legal holidays) will be considered made on the next business day. B. Legal holidays include: New Years Day, Martin Luther King Day, Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day and Christmas Day. For legal holidays falling on a Saturday, all Federal Reserve Banks and branches will be open for business on the preceding Friday. For legal holidays falling on a Sunday, all Federal Reserve Banks and branches will be closed the following Monday.

### APPLICATIONS TO BE USED

3.1 Customer must meet HPS's operating system and communication requirements. These requirements may be amended by HPS at its sole discretion if and when HPS deems such amendment necessary.

### DELIVERY AND INSTALLATION

4.1 HPS will deliver, upon acceptance by HPS of the application, the user name and temporary

password to allow access to the Software by Customer.

- 4.2 HPS will provide, at Customer's designated business site and to Customer's designated personnel, training, reference materials and other assistance to enable Customer to use the Software and receive the Services.

## MAINTENANCE

- 5.1 Throughout the term of this Agreement, HPS will provide: a. Corrections for problems that HPS diagnoses as defects in the Software, as solutions become known to HPS. b. Modifications to the Software to accommodate any new operating system release, provided that: (i) the operating system remain compatible; (ii) HPS has available to it all the necessary information regarding the operating system release; and (iii) HPS has installed and operated said modifications for its own use at the time Customer requests, in writing, said modifications. If the above conditions are satisfied, said modifications shall be provided to Customer at no cost and within a reasonable time after the Software update incorporating such modifications is released for general distribution. c. Modifications, improvements, and refinements to the Software which are not separately priced or marketed by HPS. d. Telephone and e-mail support for use of the Software.

## PAYMENT

- 6.1 The compensation to HPS for the licensing of the Software described and the providing of the Services described in Section 2.1 of this Agreement shall be set forth on the application accompanying this Agreement and may be revised by HPS upon no less than ninety (90) days prior written notice to Customer by HPS. Customer agrees to reimburse HPS for all reasonable expenses incurred in providing all training, installation or other assistance under this Agreement. Customer further agrees to pay to HPS all taxes imposed as a result of this Agreement except for HPS's franchise taxes or taxes based on HPS's net income. All amounts due and owing by Customer under this Agreement shall be paid within thirty (30) days following the date of HPS's invoice for those amounts. An invoice is considered past due if payment has not been received by day thirty-one. All sums due and owing after that period shall bear interest at the rate of eighteen percent (18%) per annum, or at the maximum interest rate permitted by law, until paid.

- 6.2 Customer shall at all times maintain a direct deposit account (the "Account" or "DDA") at a bank that is a member of the Federal Reserve ACH System. Customer agrees that all credits for collected funds and debits for fees, Returned Transactions, Check Batches, payments and adjustments and other amounts due under the terms of this Agreement (including but not limited to fines, attorneys fees and early termination charges) shall be made to the Account. Customer shall not close, restrict or change the Account without prior written approval from HPS. Customer is solely liable for all fees including overdrafts, NSF Fees for ACH rejects and DDA Change fees regardless of cause. HPS shall have the unlimited right to debit without prior notice, any Account containing funds for the purpose of satisfying any liability incurred on behalf of Customer.

- 6.3 If Customer is also a Merchant that has signed a Merchant Processing Agreement with HPS, Customer hereby authorizes HPS to access the Customer's direct deposit accounts and/ or offset any merchant account to satisfy any and all of Customer's obligations under this Agreement.

## SYSTEM AVAILABILITY

- 7.1 HPS will provide 24-hour access to Heartland ACH System (the "System Availability"). Notwithstanding the foregoing, HPS is not responsible for the inability of Customer to access Heartland ACH System due to difficulties or interruptions of service beyond the reasonable control of HPS. 7.2 HPS reserves the right to suspend availability of Heartland ACH System for brief periods for purposes of system maintenance. Such system maintenance shall be excluded from System Availability. HPS will use reasonable efforts to notify Customer in advance of any scheduled maintenance and will also use commercially reasonable efforts to (a) limit the number of hours of scheduled maintenance each month and (b) schedule maintenance during off-peak usage. 7.3 For purposes of this Agreement, System Availability excludes any scheduled maintenance or uncontrolled downtime as defined in 7.4. 7.4 Customer acknowledges that from time to time the System may be inaccessible or inoperable for the following reasons (which shall not constitute System Availability): (a) System

maintenance on the part of HPS's permitted subcontractors; (b) insufficient or inadequate bandwidth or insufficient hardware/software technology of Customer due to the failure of Customer

to implement bandwidth or hardware/software recommendations by HPS in a timely manner; (c) problems with hardware/software of Customer that is not under the use or control of HPS or its permitted subcontractors; (d) insufficient or inadequate bandwidth or hardware/software of Customer; (e) general Internet brown-outs, black-outs and slowdowns; (f) any "hacking" or "denial of service" activity by a third party not due to negligence of HPS with regard to security; (g) any acts of God, the elements, war, civil disturbances, acts of civil or military authorities, acts of terrorism, or other similar causes beyond HPS's control; and/or (h) any problems due to a third party that is not under contract with HPS, or is due to a third party that is not under HPS's direct or indirect control. Clauses (a) through (h) are collectively referred to as "Uncontrolled Downtime".

## RESPONSIBILITIES OF CUSTOMER

**8.1** Prior to commencing implementation of the Software, Customer will designate a coordinator to support implementation. Prior to commencing the implementation, and at a mutually agreeable time, Customer will designate appropriate staff members and make them available for training associated with the Product and related equipment. Customer will also identify an IT/Desktop Support contact to be available to work with HPS regarding any software installation issues.

**8.2** Customer is responsible for determining the legality of use of the customer and financial information ("Transaction Data") and adhering to any and all local, state, or federal laws, rules or regulations, including but not limited to, the NACHA Rules, as well as those laws, rules and regulations pertaining to the use and destruction of the Transaction Data.

**Customer represents and warrants that it will only submit ACH Transactions that (1) do not violate the laws of the United States; (2) are authorized; (3) are timely; (4) comply with the NACHA Rules; (5) the authorization for which has not been revoked at the time of submission; and (6) for debit Transactions, for an amount that has been specified by such party to be paid**

**to the Originator, or is a correction of a previously transmitted erroneous credit.**

Customer will maintain all consents and authorizations for ACH Transactions for a period of two years after they terminate and will provide copies of such consents or authorizations and any other information requested by HPS pursuant to this Agreement in order to comply with the Rules within three (3) business days of HPS request.

- 8.3** Customer agrees that it will utilize the Software, subject to normal operating conditions, in its check processing operations and will only submit Transactions through the Software.
- 8.4** Customer agrees to assume responsibility for keeping any hardware associated with the Software in good working order, notwithstanding any maintenance services provided by HPS or any third party with which it contracts to provide such services.
- 8.5** Performance of the Software may be affected by external factors such as communication network latency. Customer is responsible for ensuring that the Software enables the scanner or the retry transmission until the Transaction Data is sent and/or the application reports failure in receiving the Transaction Data.
- 8.6** [intentionally left blank].
- 8.7** [intentionally left blank].
- 8.8** Customer acknowledges Heartland ACH does not detect fraudulent transactions/checks or protect the Customer against any claims including those filed under NACHA Rules and Regulations. Customer acknowledges and agrees that use of Heartland ACH will not eliminate the risk or exposure to liability that is inherent in Customer's ACH activities.
- 8.9** Customer will protect the Software and related equipment from theft, tampering, sabotage, copying, and other acts of malicious or damaging intent. Customer agrees not to copy, reverse engineer, decompile, or otherwise misappropriate the Software.
- 8.10** Customer agrees to accept full responsibility for the payment of all Transactions processed using Heartland ACH and to indemnify, defend, and hold harmless HPS or its agents and employees from and against any and all claims, costs, and expenses made by any such person(s) or entities arising out of or in connection with access or use of Heartland ACH.

- 8.11 Customer should communicate with the checkwriter about convenience fees that will be charged for WEB/TEL transactions.
- 8.12 Customer understands for TEL transactions that their checkwriters have to be notified of the debit via USPS mail or electronic communication. The customer will choose at time of transaction which method to use and agrees to pay additional fees associated with the notification.
- 8.13 Customer agrees it will not use this Service to deposit Transactions drawn on its own accounts with any financial institution unless an addendum has been signed granting the Customer permission.

### **LIMITS ON TRANSACTIONS**

- 9.1 HPS will, using whatever internal review process it deems appropriate, impose limits on amounts and volumes of ACH Transactions the Customer may process using the Software. Transactions may also be limited by applicable rules and regulations specified in Section 13.1.

### **PROPRIETARY DATA AND RESTRICTIONS**

- 10.1 Customer agrees that the Software licensed under this Agreement and all materials provided by HPS in connection with maintenance of the Software are copyrighted property and constitute trade secrets and proprietary data of the third-party provider from whom HPS has obtained marketing rights. Customer acknowledges that the Software will remain the exclusive property of the third-party provider and that Customer is obtaining no title to or ownership of the Software or other materials licensed or received as a result of this Agreement.
- 10.2 Customer acknowledges that HPS's third-party provider for the Software grants any and all licenses for use of the Software solely to HPS.
- 10.3 Customer shall not copy the Software and shall not transfer or disclose it to any other person, firm or corporation, except for those employees of Customer who require such knowledge of the Software in the ordinary course and scope of their employment by Customer. Customer shall not reverse assemble or reverse compile any Software, in whole or in part, or permit any other person to do so. The provisions of this article shall survive termination or expiration of this Agreement.

### **CONFIDENTIALITY**

- 11.1 HPS reserves the right to disclose confidential information, including but not limited to financial, personal and business information ("Confidential Information") as needed for purposes of this Agreement, with its subcontracted provider and with the financial institutions affected by this Agreement.
- 11.2 Customer acknowledges that the information regarding the Software and related equipment contains information that is confidential and proprietary to HPS and is considered Confidential Information. Any information learned by Customer in using, viewing, and reviewing the operation of the Software and its capabilities will be Confidential Information falling within the terms of this Agreement.
- 11.3 Customer agrees to use the Confidential Information solely for internal use and agrees not to disclose the Confidential Information to any third party or to use or exploit the Confidential Information for its benefit or the benefit of any third party for a period of five (5) years from the date of this Agreement. This provision will not apply: a. To general, publicly available information concerning the Software and related equipment after these have been introduced for commercial sale by HPS. This exclusion will not apply to specific information such as, but not limited to, design, function, failure rates, software bugs, throughput, scrap rates, and other information concerning the operation of the Software and related equipment or system until such time as said information will enter the public domain; or b. Upon specific authorization from HPS in writing.
- 11.4 Customer agrees that it will permit only those Customer employees who have a "need to know" to view the internal operations of the Software and related equipment. Customer will not permit third parties to view the internal operations of the Software and related equipment. Customer further agrees that it will not make for its own purposes or allow to be made for third parties, copies of documentation, user operation or repair manuals, drawings, prints, schematics or other materials that HPS may provide to Customer in connection with the Software and related equipment.
- 11.5 HPS acknowledges that third parties may have occasion to view the external features and operations when the Software and related equipment is operated as planned in normal use. Demonstrations, private showings, or

operation of the equipment to or by third parties are strictly prohibited.

- 11.6** Customer agrees not to remove any Software or equipment from its premises without prior written authorization by HPS. Upon HPS's request or upon termination, Customer will promptly destroy or deliver to HPS all records, notes, or other materials in any form (and all copies of same) containing Confidential Information relating to the Software. In the case of destruction, Customer will provide HPS with an affidavit that all Confidential Information has been destroyed within five (5) business days of such destruction request.

## **WARRANTY**

- 12.1** HPS warrants that during the term of the Agreement: The Software will perform in substantial compliance with the specifications set forth in this Agreement.
- 12.2** EXCEPT AS SET FORTH IN SECTION 12.1, HPS MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, IN LAW OR IN FACT, INCLUDING WITHOUT LIMITATION, OWNERSHIP OF INTELLECTUAL PROPERTY, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR AS TO THE SUITABILITY OR COMPATIBILITY OF HPS'S SOFTWARE, EQUIPMENT OR COMMUNICATION INTERFACES WITH THOSE USED BY CUSTOMER. CUSTOMER ACKNOWLEDGES THAT SUCCESSFUL TRANSMISSION OF TRANSACTION DATA DOES NOT CONSTITUTE (A) A WARRANTY THAT THE PERSON REQUESTING THE TRANSACTION IS THE AUTHORIZED ACCOUNT HOLDER, OR (B) A PROMISE OR GUARANTEE BY HPS THAT IT WILL PAY OR ARRANGE FOR PAYMENT TO CUSTOMER FOR THE AMOUNT OF A RETURNED TRANSACTION.

## **APPLICABLE RULES, REGULATIONS & POLICIES**

- 13.1** Payment Items deposited through Heartland ACH are subject to federal, state and local rules and regulations, including to NACHA rules and regulations. Customer is bound by the applicable laws, rules and regulations and Customer is responsible for becoming familiar and understanding the laws, rules and regulations.

## **INDEMNIFICATION**

- 14.1** Customer will indemnify and hold HPS, its officers, directors, agents and employees, harmless from and against any and all liability, claims, loss, damages, suits, costs or expenses, whether direct or indirect, including reasonable attorney's fees and costs arising from the acts or omissions of the Customer in connection with this Agreement or arising from any act, omission or failure, or for the breach of any representation or warranty by Customer pursuant to the terms of this Agreement and the rules and operating regulations referenced in Section 13.1 hereof and violations of any federal or state law, rule or regulation.

## **LIMITATION OF LIABILITY**

- 15.1** IN NO EVENT WILL HPS, ITS OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES BE LIABLE OR RESPONSIBLE FOR CONSEQUENTIAL, EXEMPLARY, PUNITIVE, SPECIAL, INDIRECT OR INCIDENTAL DAMAGES OR LOSSES, INCLUDING LOST PROFITS OR INTEREST (WHETHER THE CLAIM IS IN CONTRACT, TORT, OR OTHERWISE, AND WHETHER OR NOT HPS WAS ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES).
- 15.2** [Intentionally Omitted]
- 15.3** Customer's remedies against HPS for any performance or alleged failure of performance by HPS under this Agreement shall be as follows: a. Customer will first give HPS the opportunity to cure or correct, to the extent reasonably practical, any data in which errors have been caused by HPS, provided that Customer notifies HPS of any such error within forty-five (45) days after such error occurs. b. In the event that HPS is unable to cure, HPS's liability for damages for any performance or alleged failure of performance by HPS under this Agreement shall not exceed the fees paid by Customer during the six (6) months immediately preceding the act or omission giving rise to a claim by Customer.
- 15.4** If Customer fails to perform according to the terms of this Agreement or fails to report an error or omission with forty five (45) days after such error occurs, HPS will not be liable for any loss.
- 15.5** HPS shall have no liability for any negligent design or manufacture of any equipment

provided by HPS and makes no warranty of any kind with respect thereto.

- 15.6 HPS assumes no liability for the security of any Internet connection Customer employs in the course of using the Software.
- 15.7 HPS shall have no liability for Customer data or Transaction Data that is lost or stolen from Customer's computers and Customer shall indemnify HPS from any claim or loss arising out of or relating to such lost or stolen data.
- 15.8 HPS shall have no liability for increased fees or other charges resulting from Customer's use of equipment or software not provided and installed by HPS.
- 15.9 HPS shall not be liable to Customer for delays in data transmission. Customer acknowledges that any losses hereunder are commercial in nature.
- 15.10 HPS shall not be liable for delays in processing or other non-performance caused by such events as fires; telecommunications failures; equipment failures; strikes; riots; war; nonperformance of vendors, suppliers, processors or transmitters of information; acts of God or any other causes over which HPS has no control.
- 15.11 HPS shall have no liability to Customer arising under or in connection with this Agreement or any action taken or omitted in connection herewith except as otherwise specifically provided herein.

## TERM AND TERMINATION

- 16.1 The initial term for the Heartland ACH services will be for three (3) years from the later of (a) the date of the Agreement or (b) the implementation of Heartland ACH, which is understood as the installation of hardware at the Customer's facility and successful initiation of the Software enabling remote deposits by use of the Software. Thereafter, the Agreement will automatically renew for additional twelve (12) month periods unless terminated by any party by giving sixty (60) days written notice prior to the end of any term
- 16.2 Either party shall have the right to terminate this Agreement upon material failure by the other party to perform its responsibilities under this Agreement by giving written notice to that other party of its material failure, provided that material failure has not been corrected within thirty (30) days following receipt of that notice. In the event of fraud or violation of any law,

rule or regulation on the part of Customer, HPS shall have the right to terminate this Agreement immediately. Upon expiration or termination of this Agreement, Customer shall return the Software and all related materials received from HPS under this Agreement. Customer shall also pay all amounts then due and owing to HPS within thirty (30) days following the effective date of termination. Customer agrees upon its early termination of this Agreement to pay HPS an early termination fee amount not to exceed \$295.00 or the maximum fee permitted by applicable law. Early termination fees will not be charged in the event Customer terminates during the first thirty (30) days of the term.

- 16.3 Neither the expiration nor termination of this Agreement shall terminate the obligations nor rights of the parties pursuant to provisions of the Agreement which by their terms are perpetual, irrevocable or intended to survive this Agreement.

## PARTNER TERMS AND CONDITIONS

- 17.1 In addition to this Agreement, all Terms and Conditions that are referenced during enrollment are incorporated by reference and agreed to by Customer.

## GENERAL PROVISIONS

- 18.1 **Assignment.** This Agreement may not be assigned, sublicensed or transferred, in whole or in part, directly or by operation of law, by Customer without HPS's prior written consent. Any assignment by Customer without the prior written consent of HPS shall be null and void. HPS may assign this Agreement without Customer's consent. This Agreement shall be binding upon the parties hereto, their successors and permitted assigns.
- 18.2 **Relationship of the Parties.** Nothing contained herein shall be deemed to create a partnership, joint venture or any agency relationship between HPS and Customer, except as expressly set forth herein.
- 18.3 **Severability.** If the performance by either party of any provision of this Agreement is determined to be unlawful or in violation of any state, federal or local statute, law, ordinance, regulation or rule, or of the rules, regulations and policies referenced in Section 13.1 of this Agreement, said party shall seek to cure the

illegality or violation within thirty (30) days following the date that such party is first informed of such violation or illegality. If such cure is not effected within such thirty (30) day period, the illegal or violating provision shall be null and void. The determination that any provision of this Agreement is invalid shall cause it to be deemed severed from the remainder of this Agreement. The remainder of this Agreement shall remain in full force and effect.

**18.4 No Waiver of Rights.** Any failure of HPS to enforce any of the terms, conditions or covenants of this Agreement shall not constitute a waiver of any rights under this Agreement.

**18.5 Notice.** All notices, requests or other communications required or permitted hereunder shall be in writing and shall be given by personal delivery, national overnight courier, facsimile transmission, or electronic, certified or registered mail, to either party at the respective addresses set forth on the last page of this Agreement, or to such other address as shall be specified in writing by such party to the other party in accordance with the terms and conditions of this Section. All notices, requests or other communications shall be deemed effective (a) immediately if delivered personally or by facsimile transmission, (b) the next business day if delivered by national overnight courier, or (c) three (3) business days after deposit with the United States Postal Service, postage prepaid, if delivered by certified or registered mail.

**18.6 Governing Law and Jurisdiction.** This Agreement shall be construed and governed by the laws of the State of New Jersey without regard to legal principles related to conflict of laws. Any suit, action or proceeding (collectively "action") arising out of or relating to this Agreement shall be brought only in the Superior Court of the State of New Jersey, or the United States District Court for the District of New Jersey. Customer hereby agrees and consents to the personal and exclusive jurisdiction of said courts over it as to all such actions, and Customer further waives any claim that such action is brought in an improper or inconvenient forum. In any such action, the parties waive trial by jury. In any judicial proceeding arising out of or relating to this Agreement, the prevailing party shall recover, in addition to all damages awarded, all court costs, fees and expenses of experts and reasonable attorney's fees.

**18.7 Entire Agreement.** This Agreement, together with all applications

and order forms added to it, constitutes the entire agreement between the parties regarding the Software licensed under this Agreement. This Agreement may be amended only by a written instrument executed by both parties.

**18.8 Changes:** HPS may change the terms of or add new terms to this Agreement at any time in accordance with applicable law. Any such changes or new terms shall be effective when notice thereof is given by HPS either through written communication or on its website at [www.heartlandcheckmanagement.com](http://www.heartlandcheckmanagement.com).