



## **Merchant Processing Terms & Conditions**



## Merchant Credit Card Processing Terms & Conditions

APEX Merchant Group is a registered ISO/MSP with Visa and MasterCard and is an authorized agent of Fifth Third Bank, an Ohio banking corporation, Member FDIC. Bank has assigned processing functions and legal rights under agreement to First American Payment Systems, L.P.

THIS AGREEMENT is made by and between Fifth Third Bank, an Ohio banking corporation, Member FDIC, and First American Payment Systems, L.P. ("Bank") and "MERCHANT," whose name and address are stated on the Merchant Application & Agreement.

WHEREAS, Bank in its sole discretion will designate which of the above referenced financial institutions will be the bank made a party to this Agreement (as defined below), Bank and such designated financial institution being collectively referred to herein as the "Bank"; and

WHEREAS, Bank is engaged in the business of financial transaction processing which includes, but is not limited to, the processing of and providing for the payment of charges created by the holders of bank cards bearing the Visa U.S.A. Incorporated ("Visa") MasterCard International Incorporated ("MasterCard"), and DFS Services LLC ("Discover") trademarks, as well as certain credit, debit, and other electronic payment cards, each of such cards (hereinafter referred to as a "bank card"); and

WHEREAS, Fifth Third Bank, an Ohio banking corporation, Member FDIC, has entered into an agreement with First American Payment Systems, L.P. ("First American") authorizing First American to perform the processing functions and exercise the legal rights under this Agreement; and

WHEREAS, MERCHANT hereby warrants that it is engaged in a lawful business and is duly licensed under the laws of the state, county, and city disclosed by MERCHANT on the Merchant Application & Agreement, to conduct such business; and

WHEREAS, MERCHANT currently accepts or desires to accept bank cards for its customers' purchase of goods and services it provides or anticipates providing; and

WHEREAS, MERCHANT warrants that neither it nor any of its officers, directors, partners, managers or owners has been terminated for any reason by any bank or any processor in connection with any agreement regarding depositing or processing bank card sales or transactions.

NOW, THEREFORE, in consideration of the representations, covenants, and promises made herein, the receipt and sufficiency of which are acknowledged, Bank and MERCHANT agree as follows:

**1. Agreement.** Reference to "this Agreement" includes all supplements, schedules, appendices, Merchant Application & Agreement, additional location documentation, any terms and conditions, and any other documents requested by Bank. This Agreement is not in full force and effect until accepted by Bank. Bank may adjust or amend the Merchant Profile section with or without notice to MERCHANT prior to accepting the Agreement. MERCHANT acknowledges that Bank will provide transaction processing hereunder. MERCHANT agrees that Bank may perform the functions hereunder and that Bank may receive the benefits of and enforce the terms of this Agreement against MERCHANT and any third party as an assignee of Bank's rights hereunder, whether or not Bank is a party to such proceeding or transaction.

**2. Additional Locations.** MERCHANT must complete an Additional Location Form for each additional MERCHANT location. MERCHANT expressly agrees and acknowledges that each MERCHANT location shall be governed by these Merchant Processing Terms & Conditions and the Merchant Application & Agreement, including and without limitations, the rates and fees described therein, as may be amended from time to time.

**3. Acceptance of Bank Cards.** MERCHANT agrees to honor without discrimination all lawful and valid bank cards when properly presented as payment by customers and within MERCHANT's approved processing profile parameters, in connection with bona fide, legitimate business transactions arising out of MERCHANT's usual trade or business as disclosed in the Merchant Application & Agreement. However, the MERCHANT may elect to accept card transactions from: (1) All Visa, MasterCard and Discover programs, (2) Visa and MasterCard Signature Debit programs only, or (3) Visa and MasterCard Credit/Business programs only. MERCHANT agrees not to submit any bank card transactions that will violate applicable laws or rules and regulations of Visa/MasterCard and Discover. The acceptance of all other credit cards (e.g., American Express, Diner's Club) is subject to the rules and regulations of the issuing organizations. Such rules and regulations are incorporated herein by this reference.

MERCHANT is prohibited from using the Program Marks, as defined below, other than as expressly authorized in writing by Bank. Program Marks mean the brands, emblems, trademarks and/or logos that identify various bank cards. Additionally, MERCHANT shall not use the Program Marks other than to display decals, signage, advertising and other forms depicting the Program Marks that are provided to MERCHANT by Bank pursuant to the Merchant Program or otherwise approved in advance in writing by Bank. MERCHANT may use the Program Marks only to promote the services covered by the Program Marks by using them on decals, indoor and outdoor signs, websites, advertising materials and marketing materials; provided that all such uses by MERCHANT must be approved in advance by Bank in writing. MERCHANT shall not use the Program Marks in such a way that customers could believe that the products or services offered by MERCHANT are sponsored or guaranteed by the owners of the Program Marks. MERCHANT recognizes that it has no ownership rights in the Program Marks. MERCHANT shall not assign to any

third party any of the rights to use the Program Marks.

**4. Completion of Bank Card Sales Draft.** MERCHANT agrees to complete all bank card sales drafts (hereinafter "sales slips") or credit drafts or vouchers (hereinafter "credit slips") in accordance with prescribed rules and regulations of Visa, MasterCard, and Discover or any other applicable card issuing organization. MERCHANT agrees that in all face-to-face sales to either (i) imprint the sales slip with the embossed data from the customer's bank card and the MERCHANT's imprint plate, or (ii) generate electronically a sales slip by swiping through a POS terminal (as defined below) a customer's bank card. MERCHANT shall obtain the cardholder's signature on the sales slip and confirm that such signature matches the signature on the card. MERCHANT shall verify that the embossed cardholder number is the same cardholder number contained in the bank card's magnetic strip. MERCHANT agrees not to accept bank cards when the customer's signature does not match the signature on the signature strip or the bank card has expired. Notwithstanding MERCHANT's use of an electronic terminal or similar device through which an authorization may be obtained (a point of sale "POS" terminal), for all face-to-face sales MERCHANT must still obtain the cardholder's signature on the printed sales receipt. Failure to properly follow all terms of this Agreement may result in a delay or denial in processing, a chargeback or sales proceeds not being paid to MERCHANT's account. MERCHANT shall be solely responsible for the proper verification of the cardholder's signature and the expiration date of the bank card, which obligation shall not be discharged by receipt of an electronic approval code.

**5. Point-of-Sale Devices.** MERCHANT agrees to keep all imprinters and POS terminals used to process bank card transactions in good working order. MERCHANT understands that Bank cannot and does not warrant the connectivity, performance of equipment, or quality of services as a result of any Voice over Internet Protocol ("VoIP") or similar type service. MERCHANT agrees that Bank is not responsible for, and MERCHANT accepts full responsibility for issues that may arise when utilizing VoIP or similar service, including but not limited to; failure to obtain authorizations, batching, settlement, equipment, equipment/Software installation, communications, downloads and internet connectivity. Further, MERCHANT acknowledges it will not make any claim against Bank for any losses or damages, including, but not limited to, loss of income, loss of revenue, economical loss, consequential, direct, indirect, special, exemplary, or punitive relating to the use or connectivity of any VoIP or similar services.

**6. Bank Card Authorization.** MERCHANT understands and acknowledges that all transactions must be authorized. MERCHANT also understands that transaction authorization is not a guarantee of payment from First American, nor does the transaction authorization prohibit the card holder or card issuer from initiating a chargeback.

In the event of a POS terminal failure, bank card defect, or communication error, MERCHANT agrees to obtain (i) authorization according to voice back-up procedures furnished by Bank and (ii) in the case of a face-to-face sale, an imprinted sales slip.

**7. Mail Order, Telephone Order, and Electronic Commerce Sales.** Bank discourages MERCHANT from accepting mail, telephone or electronic commerce orders because of the high incidence of fraud associated with such sales. MERCHANT also understands Bank does not allow transactions to be processed for items sold through online auction sites, where bidding for merchandise takes place, due to the high incident of fraud and chargebacks. MERCHANT acknowledges that Bank shall have the right to immediately terminate this Agreement without liability, if MERCHANT has not received previous written approval from Bank to accept mail, telephone or electronic commerce orders or if MERCHANT exceeds the percentage of mail, telephone or electronic commerce orders previously approved by Bank or described in the Merchant Profile section of the Merchant Application & Agreement. Bank's failure to hold funds, suspend processing or terminate this Agreement shall not constitute a waiver of such rights and such rights may be exercised at any time regardless of when Bank determines to exercise such rights. MERCHANT agrees to use and retain proof of a traceable delivery system as means of shipment of product to customer.

**8. Transaction Records.** MERCHANT agrees to balance and deliver to Bank all bank card transactions on the same day they are processed.

**9. Payments.** All payments to MERCHANT for legitimate and authorized bank card sales shall be made by Bank through the funds transfer system known as the Automated Clearing House (ACH) pursuant to governing rules adopted by the National Automated Clearing House Association, and shall be electronically transmitted to an account of the MERCHANT. MERCHANT understands that payments are transmitted daily, except on weekends and bank holidays. However, Bank cannot guarantee the timeliness with which any payment may be sent to or credited by MERCHANT's bank. MERCHANT understands that due to the nature of the ACH and the electronic networks involved and the fact that not all banks belong to an ACH, errors can occur and payment to the MERCHANT can be delayed. In such cases, the MERCHANT agrees to assist Bank to help resolve any problems in crediting MERCHANT's account. MERCHANT agrees to provide Bank three (3) days prior written notice of any change of account and to abide by Bank's policies regarding changes to accounts. MERCHANT and not Bank or any processor shall be responsible for verifying that account information is correct on the Merchant Application & Agreement, voided check and all account statements. Bank is not responsible for incorrect

account numbers. Unless proper notice is provided by MERCHANT to Bank, MERCHANT shall not change any of its accounts. All payments to MERCHANT for the amount of bank card sales properly submitted to Bank shall be less discount, credit chargebacks, reserve amounts, transaction fees, statement fees, and other applicable fees all of which are the responsibility of MERCHANT. Any payment made by Bank to MERCHANT shall not be final but shall be provisional credit under the Uniform Commercial Code and is subject to subsequent review and verification by Bank. MERCHANT acknowledges and agrees that Bank shall have no obligation to make any payment to MERCHANT with respect to transactions described in Sections 17, 18 and 28 of this Agreement unless and until MERCHANT provides to Bank the requested documentation. If MERCHANT fails to provide requested documentation, such payments shall be earned compensation of Bank. Fees and other charges due Bank hereunder may be deducted from amounts due MERCHANT or may be debited against any of MERCHANT's accounts at Bank's sole discretion. The discount and other fees may be collected by Bank on a daily, monthly, or other basis, as determined by Bank. All reserve amounts may be deducted from amounts otherwise due MERCHANT, debited against MERCHANT's account, or paid directly by MERCHANT through ACH or otherwise at Bank's sole discretion. MERCHANT must notify Bank in writing of any errors on any statement within ninety (90) days after mailing the first statement on which the error or problem appeared or failed to appear. MERCHANT agrees to examine all statements upon receipt and to verify all credits and debits to any account against all transactions, bank statements and other information indicating activity of Bank and MERCHANT subject to or relating to this Agreement or Bank's obligations hereunder. Save and except Bank's right to funds owed Bank under this Agreement or incorrectly paid to MERCHANT, if no notice of error is received within the ninety (90) day period, the account shall be deemed correct and MERCHANT shall have no recourse for errors. Any amount inadvertently or incorrectly paid to MERCHANT may be debited from any account of MERCHANT, at the sole discretion of Bank and, in any event, remains an obligation of MERCHANT to Bank payable in full and on demand.

**10. Sales Slip Storage and Retrieval.** Visa, MasterCard, and Discover require Bank to obtain from MERCHANT and forward to bank card issuers, upon request, copies of sales or credit slips. MERCHANT shall set up a system satisfactory to Bank to store and maintain sales slips and MERCHANT shall deliver to Bank within 24 hours of request copies of any sales slip requested by Bank. MERCHANT shall preserve a copy of the actual paper sales slips, credit slips and, if a mail order or pre-authorized order is involved, the customer's signed authorization for the transaction, for at least three (3) years after the date MERCHANT presents the transaction data to Bank. To assist in the resolution of any dispute and in addition to and without limiting the foregoing provisions of this paragraph, MERCHANT agrees to retain for one (1) year and make available within three (3) days of a request all pertinent records pertaining to each transaction in question, including, but not limited to, itemized bills, authorization requests, and other related documents. MERCHANT shall preserve the confidentiality all information in an area limited to selected personnel and exercise best efforts to maintain these materials in a secure manner. MERCHANT's obligations under this paragraph shall survive following the close of MERCHANT's business or the termination of this Agreement. MERCHANT understands that its failure to respond timely to a retrieval request may result in a chargeback under Visa, MasterCard, and Discover rules and regulations. All chargebacks and fees shall be the responsibility of MERCHANT and paid by and charged to MERCHANT. In connection with retrieval requests or other administrative requirements associated with any MERCHANT agreement or account, Bank and/or its designated processor may charge retrieval fees and administrative charges which shall be the responsibility of MERCHANT. Bank and/or its designated processor shall determine in their sole discretion the amount of any retrieval fee and administrative charge and when such fee and charge shall be assessed. MERCHANT shall not be entitled to notice of any such fee or administrative charge or with respect to any change in the amount of any fee or administrative charge.

**11. Warranties by MERCHANT.** MERCHANT warrants that it shall fully comply with all federal, state, and local laws, rules, and regulations, as amended from time to time, including, but not limited to, the Federal Truth-in-Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System.

As to each bank card sale presented to Bank for payment, MERCHANT warrants that:

- (a) The sales slip is valid in form and has been completed in accordance with current instructions, if any, furnished by Bank;
- (b) MERCHANT has delivered MERCHANT's merchandise to the cardholder signing such sales slip or completed MERCHANT's service described on the slip in accordance with MERCHANT's underlying agreement with the cardholder;
- (c) MERCHANT has delivered to the cardholder a true and complete copy of the sales slip or suitable receipt evidencing the transaction involving use of the bank card;
- (d) Each sales slip represents the cardholder's indebtedness to MERCHANT for the amount shown;
- (e) The cardholder has no defense, right of offset, or counterclaim against MERCHANT in connection with the purchase of the goods or services;
- (f) Unless expressly authorized in writing by Bank and as permitted by Visa, MasterCard, and Discover rules and regulations, MERCHANT has not and shall not make any cash advances to cardholder, either directly or by deposit to the cardholder's account;
- (g) Neither MERCHANT nor any owner, director, officer, member, partner or employee of MERCHANT ("Affiliates") has advanced any cash to cardholder or any person in connection with the purported bank card sale;
- (h) MERCHANT has not imposed any minimum purchase amount nor charged cardholder any separate or additional fee(s) or surcharge or required cardholder to pay any part of any charge imposed on MERCHANT by Bank in connection with the acceptance of a bank card transaction. The foregoing shall not prohibit MERCHANT from extending discounts to customers paying cash, check, or any other means other than by bank

card, provided such discounted price is presented as a discount from the standard price available for all other means of payment;

- (i) In any bank card transaction, MERCHANT warrants the customer's true identity as an authorized user of the bank card;
- (j) In any face-to-face sale, MERCHANT warrants it has verified the existence of a signature in the bank card signature panel and compared such signature with the signature on the sales slip;
- (k) MERCHANT warrants that bank card has not and will not be used for verification of age;
- (l) MERCHANT warrants that it shall not, without the cardholder's consent, sell, purchase, provide, or exchange bank card account number information in the form of imprinted sales slips, mailing lists, tapes, or any other media obtained by reason of a bank card transaction or otherwise to any third party other than to MERCHANT's agents for the purpose of assisting the MERCHANT in its business, to Bank, to Visa, to MasterCard or to Discover, or pursuant to a valid subpoena;
- (m) MERCHANT warrants that it will not submit any transactions that are not in compliance with both this Agreement and any such codes or rules and hereby indemnifies and holds Bank harmless against any loss or damage Bank may suffer as a result of a breach of this or any other warranty or agreement by MERCHANT;
- (n) MERCHANT may display the proprietary names and symbols associated with bank cards only while this Agreement is in effect, or until MERCHANT is notified by Bank or the bank card associations/organizations to cease such usage. Bank and the bank card associations/organizations shall have the right at anytime to require MERCHANT to cease such usage for any reason, whether or not this Agreement remains in effect. MERCHANT may use the proprietary names and symbols associated with Bank or with bank cards only to indicate that bank cards are accepted for payment and shall not indicate, directly or indirectly, that Bank, Visa, MasterCard, Discover, or any other bank card association/organization endorses MERCHANT's products or services;
- (o) MERCHANT understands that sales completed at one location may not be processed at another location;
- (p) MERCHANT shall not, under any circumstances, present to Bank a sale which has been split into multiple bank card transactions; and
- (q) If an authorization number is required or requested, MERCHANT warrants it shall use only the authorization number obtained through the Voice Authorization Network phone number provided by Bank. MERCHANT shall not use any number given by the cardholder or any type of number which has been obtained from any other source.
- (r) MERCHANT is responsible for its employees' actions while in its employ.
- (s) MERCHANT will not sell, purchase, provide, exchange or in any manner disclose Card account number, Transaction, or personal information of or about a Cardholder to anyone other than its Acquirer, to the Corporation, or in response to a valid government demand. This warranty applies to Card imprints, TIDs, carbon copies, mailing lists, tapes, database files, and all other media created or obtained as a result of a Transaction.

**12. Business Changes.** MERCHANT shall provide at least thirty (30) days written notice to Bank for any of the following anticipated changes: MERCHANT's business type, including any change in goods or services sold, name, entity type, address, change of Sales Profile as described in the Merchant Application & Agreement, any ownership change, or transfer or sell of substantially all of the assets of MERCHANT. At all times MERCHANT shall provide Bank with its current mailing address. If Bank receives a returned mail item with no forwarding address, Bank may exercise its right to suspend mailing Merchant Statements until such time as the correct address has been provided by MERCHANT. MERCHANT shall not change its usual trade or business, move its trade or business to a new location, utilize the merchant account to process e-commerce transactions or commence operating an unrelated trade or business on the same premises where MERCHANT operates this stated trade or business without obtaining Bank's prior written consent to the change, move, or addition. MERCHANT also agrees that prior to any changes, Bank must first accept the change and confirm such acceptance in writing. MERCHANT acknowledges that the codes of professional responsibility and the rules and regulations of professional associations may apply to the transactions covered by this Agreement. MERCHANT may, however, bring any inconsistency between this Agreement and such codes and rules to the attention of Bank and request a modification to this Agreement to eliminate such inconsistency. Bank may, in its discretion, agree to such modification to the extent it is consistent with Bank policy and in conformity with then existing Visa, MasterCard, and Discover rules, regulations and applicable laws. Until Bank agrees to such modification in writing, the terms of this Agreement shall remain in place.

MERCHANT shall be responsible for any administrative charges of Bank associated with any change.

**13. Returns and Credits.** MERCHANT shall properly complete a credit slip and deliver one completed copy to cardholder at the time of each return of merchandise or cancellation of sale. Bank shall charge MERCHANT the transaction fee as well as other fees applicable to all credit transactions. MERCHANT shall not, under any circumstances issue: (i) cash or MERCHANT's check for returns of merchandise or cancellation of service where goods or services were originally purchased in a bank card transaction; (ii) credit MERCHANT or its Affiliates for returns of merchandise or cancellation of service where goods or services were originally purchased in a bank card transaction; (iii) a credit slip to a cardholder without having completed a previous purchase transaction with the same cardholder; or (iv) a credit slip to a cardholder for any prior sale or service made or provided at a location other than the location where the credit slip is issued.

With proper disclosure at the time of the transaction where purchased goods or services are delivered to cardholder, MERCHANT may:

- (a) Refuse to accept merchandise in return or exchange and refuse to issue a refund

to a cardholder; or

(b) Accept returned merchandise in exchange for the MERCHANT's promise to deliver goods or services of equal value available from MERCHANT at no additional cost to cardholder.

Proper disclosure shall be deemed to have been given if, at the time of the transaction and prior to obtaining the customer's signature, the following notice appears on all copies of the sales slip in legible letters at least 1/4 inch high and in close proximity to the space provided for the cardholder's signature stating "NO REFUND" or "EXCHANGE ONLY" or "IN STORE CREDIT ONLY," as applicable, or equivalent language.

**14. Chargebacks.** MERCHANT expressly acknowledges and agrees to any charge or debit made by Bank against any of MERCHANT's accounts as a result of the exercise of chargeback or retrieval rights by a cardholder, issuing bank, processor, or other intermediary pursuant to applicable operating regulations of Visa, MasterCard, Discover or other card associations/organizations as the same may be in effect from time to time. MERCHANT also understands and acknowledges that Bank may debit or reduce MERCHANT's bank account whether or not cardholder has returned merchandise. Without prior notice, Bank shall have the right, at any time, to reduce MERCHANT's bank card sales proceeds received from issuing banks, debit any of MERCHANT's accounts and/or demand immediate payment from MERCHANT through ACH or otherwise for any bank card transaction which is disputed, questioned or returned to Bank by the financial institution or company which has issued the bank card (the "Card Issuer") and to chargeback such sale to MERCHANT in any of, but not limited to, the following situations:

- (a) Where goods originally purchased have been returned to MERCHANT by cardholder and cardholder requested a credit slip and such credit slip was not processed by MERCHANT;
- (b) Where the purchase had not been authorized as required;
- (c) Where sales slip covers goods or services other than those described in the Merchant Application & Agreement;
- (d) Where a cardholder contends or disputes to the Card Issuer that: (i) goods or services were not received by cardholder or by authorized user; or (ii) goods or services received by cardholder or by authorized user do not conform to what was described on the sales slip; or (iii) goods or services were defective or of unsatisfactory quality;
- (e) Where original sales slip is not received by Bank from MERCHANT when requested by Bank in accordance with paragraph 10 of this Agreement;
- (f) Where sales slip does not contain a transaction date or the face of such sales slip shows that such date or dollar amount has been altered or incorrectly entered;
- (g) Where the sales slip delivered to Bank contains the imprint or description of a bank card other than the bank card processed;
- (h) Where the sale was generated through the use of an expired bank card;
- (i) Where no signature appears on sales slip and the cardholder has represented in writing to Bank or the Card Issuer that the cardholder did not make or authorize the transaction;
- (j) Where the sales slip does not contain the embossed legend from a bank card or MERCHANT has failed to obtain proper authorization to complete the transaction or the cardholder has represented in writing to Bank or the Card Issuer that the cardholder did not make or authorize the transaction;
- (k) Where the signature on the sales slip is different from the signature appearing on the signature panel of the card or where no signature appears on the signature panel of the card;
- (l) Where a Card Issuer or Bank has information that impropriety or fraud occurred at the time of transaction, whether or not such transaction was properly authorized by the Card Issuer or the cardholder participated in or authorized the transaction, or the Card Issuer represents that there is no bank card outstanding with the account number used;
- (m) Bank reasonably determines that the transaction record is improper, fraudulent, not a bona fide transaction in MERCHANT's ordinary course of business or is subject to any claim of illegality, cancellation, rescission, avoidance, or offset for any reason whatsoever, including without limitation, negligence, fraud, impropriety, or dishonesty on the part of card user, cardholder, MERCHANT or Affiliates;
- (n) In any situation where the sales slip was executed or credit given to MERCHANT in circumstances constituting a breach of any representation or warranty of MERCHANT hereunder, or MERCHANT's violation of Visa, MasterCard, or Discover rules and regulations which has resulted in a sale being charged back by the Card Issuer;
- (o) As required by bank card association/organization rules or regulations as they currently exist or as they may be amended from time to time;
- (p) In such other circumstances where Bank determines or suspects in its sole discretion that the transaction may result in a chargeback for any reason, whether or not enumerated under this paragraph and whether or not the transaction results in a chargeback; or
- (q) If with respect to any of MERCHANT's outlets, the ratio of bank card counterfeit and fraud volume to bank card sales volume or the ratio of the number of bank card chargebacks to the number of bank card sales exceeds 1% or credits processed exceed ten percent (10%) for any given month. In such event, without limiting other rights hereunder, Bank in its sole and absolute discretion may charge back all bank card sales for all locations.

MERCHANT understands that Bank will assess MERCHANT a fee as well as administrative costs as determined by Bank for each chargeback. MERCHANT, whether consented to or not by cardholder, shall not present to Bank for processing any sales slip representing a transaction which has been previously charged back to Bank and returned to MERCHANT. MERCHANT's obligations and Bank's rights under this paragraph shall survive the termination of this Agreement.

**15. Electronic Commerce.** If Bank approves MERCHANT to accept bank cards via the Internet, then MERCHANT will provide secure encryption capability, such as Secure Socket

Layer (SSL), to cardholders. MERCHANT agrees that it must also in addition not in lieu of other applicable procedures and rules comply with the following:

- (a) Post its privacy and security policy on its website, where such policies shall be clearly marked for consumers to see and clearly review; and
- (b) Website must include the following information displayed in the following manner: (i) complete description of the products offered, (ii) return merchandise and refund policy, (iii) method for the cardholder to acknowledge their acceptance of the Terms & Conditions for return merchandise or for the refund policy; this acknowledgement should be in a format that complies with association guidelines for proper disclosure, (iv) customer service contact, including email address and/or telephone number, (v) any applicable export or legal restrictions, (vi) delivery policy and (vii) consumer data privacy policy.

In any real-time electronic commerce bank card transaction, MERCHANT will cause the cardholder to enter the verification value located on the back of the card and the cardholder's street number and zip code for address verification. MERCHANT acknowledges and agrees all e-commerce transactions must be submitted utilizing e-commerce certified software acceptable to Bank. MERCHANT acknowledges that the electronic commerce indicator must be used to identify e-commerce transactions in the authorization request and clearing record. Penalties can be assessed for failure to use the correct electronic indicator. MERCHANT acknowledges and agrees they will not submit e-commerce transactions via a point-of-sale (POS) terminal. MERCHANT agrees to use and retain proof of a traceable delivery system as means of shipment of product to customer.

**16. Recurring Transactions.** If MERCHANT agrees to accept a transaction from a cardholder for the purchase of goods or services which are to be delivered or performed periodically (a "Recurring Transaction"), the cardholder must complete and deliver to MERCHANT a written request for such goods or services to be charged to the cardholder's account periodically. Each of the following provisions shall apply to all recurring transactions:

- (a) The cardholder's written authorization must be retained for the duration of the recurring charges and provided promptly in response to a cardholder's request for a copy;
- (b) MERCHANT must not complete an initial or subsequent recurring transaction after receiving a cancellation notice from the cardholder, Bank, or another bank;
- (c) MERCHANT shall type or print legibly, on the "Signature Line" of the sales draft for recurring transactions, the words "Recurring Transaction";
- (d) The cardholder's written authorization must include the amount of the transaction, frequency of the charge and the duration of time for which cardholder's permission is granted; and
- (e) If the cardholder elects to renew a Recurring Transaction, the cardholder must complete and deliver to MERCHANT a new written Recurring Transaction request.

**17. Improper Transactions; Forward Commitments.** Bank may hold funds, suspend processing, terminate this Agreement with or without notice, or require MERCHANT to process a refund upon any determination by Bank, in its sole discretion, of improper, fraudulent, suspicious or questionable transactions, including, but not limited to, any transactions for items or services with a future delivery date or forward commitment, transactions that fail to meet the requirements of this Agreement or which vary from the information represented or disclosed in the Merchant Profile Section of the Merchant Application & Agreement. Bank may also at its sole discretion block, reject, or deny any transaction for any reason. MERCHANT acknowledges and agrees that Bank shall have no obligation to make any payment to MERCHANT with respect to such transaction(s) unless and until MERCHANT provides to Bank the documentation sufficient for Bank to determine that the transaction(s) is verified, legitimate, and Bank's risk has been mitigated. Bank reserves the right, at its sole discretion, to adjust or amend the Merchant Profile Section of the Merchant Application & Agreement with or without notice to MERCHANT. MERCHANT acknowledges no discount or transaction fees will be refunded as a result of Bank withholding payment to MERCHANT, including but not limited to reversals, returns and/or credits.

**18. Fraudulent Sales/Factoring.** MERCHANT shall not present to Bank directly or indirectly, any transaction(s) (i) that results from processing credit or debit, directly or indirectly, transaction(s) not originated as a result of an act directly between cardholder and MERCHANT, (ii) that MERCHANT processes for any other person or business (iii) that results from a transaction outside MERCHANT's normal course of business as described in the Merchant Application & Agreement, (iv) that MERCHANT knows or should have known to be fraudulent, improper, illegal, or not authorized by the cardholder, or (v) that contains the account number of a bank card account issued to MERCHANT. Should MERCHANT do so, Bank may hold funds, suspend processing or terminate this Agreement with or without notice following the determination, at Bank's sole discretion, of improper, fraudulent, suspect, or other questionable transactions, including, but not limited to, transactions varying materially in character from the information represented or disclosed in the Merchant Profile Section of the Merchant Application & Agreement as approved by Bank. MERCHANT acknowledges and agrees that Bank shall have no obligation to make any payment to MERCHANT with respect to such transaction(s) unless and until MERCHANT provides to Bank the documentation sufficient for Bank to determine that the transaction(s) is verified, legitimate, and Bank's risk has been mitigated. MERCHANT acknowledges no discount or transaction fees will be refunded as a result of Bank withholding payment to MERCHANT, including but not limited to reversals, returns and/or credits.

**19. Exclusivity.** MERCHANT agrees that it will not use the service of any corporation, entity or person other than Bank for the processing of bank card transactions.

**20. Rules and Regulations.** This Agreement shall be subject to the bylaws and operating rules and regulations of Visa, MasterCard, and Discover as amended from time to time.

**21. PCI DSS Compliance and Customer Information Security.** MERCHANT and Agent (as defined below) will exercise reasonable care to prevent disclosure or use of

Customer Information (as defined below), other than (i) to MERCHANT's agents and contractors for the purpose of assisting MERCHANT in completing a payment transaction, (ii) to the applicable card association or organization or governmental entities and authorities, or (iii) as specifically required by law. MERCHANT is prohibited from storing CVV2 or CV2, magnetic stripe track data and PIN data. "Customer Information" means personal information related to a customer of MERCHANT or a customer's payment instrument that is obtained by MERCHANT as a part of a transaction. Such information shall include a customer's name, address, phone number, date of birth, payment instrument account number and expiration date, PIN data, and CVV2 or CVC2 data, and any data read, scanned, or otherwise obtained from the payment instrument, whether printed thereon, or magnetically, electronically or otherwise stored thereon. MERCHANT will store all media containing allowed Customer Information, currently limited to customer name, payment instrument account number and expiration date, in an unreadable format wherever it is stored and in an area limited to selected personnel on a "need to know" basis only and prior to either party discarding any material containing Customer Information, the party will destroy it in a manner rendering the account numbers unreadable. If at any time MERCHANT determines that Customer Information has been compromised MERCHANT will notify Bank immediately and assist in providing notification to the proper parties, as we deem necessary. MERCHANT information may be shared by Bank with Bank's affiliates and with governmental entities and authorities and the card associations or organizations subject to the provisions of this Agreement and the bylaws, rules and regulations, as they exist from time to time, of the card associations and organizations, as well as applicable laws and/or regulations (the "Rules"). MERCHANT agrees to comply with all security standards and guidelines that may be published from time to time by any card association or organization, including, without limitation, the Payment Card Industry Data Security Standards ("PCIDSS"), the Visa Cardholder Information Security Program ("CISP") the MasterCard Site Data Protection program ("SDP") and the Discover-Security Requirements (collectively, the "Security Guidelines"). All Service Providers MERCHANT uses must be recognized by Visa as CISP compliant service providers and payment applications MERCHANT uses must be recognized by VISA as compliant with the Payment Application Data Security Standards ("PA-DSS"). "Service Provider" means any party that processes, stores or transmits Customer Information on MERCHANT's behalf. MERCHANT understands that failure to comply with the Rules, including PCIDSS, CISP, SDP or other Security Guidelines, or the compromise of any customer account information, may result in assessments, fines, and/or penalties by the card associations and organizations or governmental entities or authorities, and MERCHANT agrees to indemnify and reimburse Bank immediately for any assessment, fine, or penalty imposed on Bank due to any such event or MERCHANT's breach of this paragraph and any related loss, cost or expense incurred by Bank, including but not limited to, forensic investigation costs. Furthermore, MERCHANT must comply with Bank's request to upgrade any non-compliant POS system and/or terminal within ten (10) business days of such request. Bank reserves the right of set-off to any and all credit card proceeds to be applied toward any and all balances relating to such expenses, cost and/or fees, with or without notice to MERCHANT. MERCHANT further agrees to (i) exercise reasonable due diligence to ensure that all of MERCHANT's Service Providers, payment applications, agents, business partners, contractors, and subcontractors maintain compliance with the Security Guidelines and (ii) provide Bank upon Bank's request with the assessment of MERCHANT's compliance with the Rules, Security Guidelines and PA-DSS as required by the card associations and organizations. If any card association and organization, governmental entity or authority requires an audit of MERCHANT or any of MERCHANT's Service Providers, payment applications, agents, business partners, contractors, or subcontractors due to a data security compromise event or suspected event, MERCHANT agrees to cooperate with such audit and agrees to pay for all costs and expenses related to such audit, including all of Bank's costs relating to such audit, including attorneys' fees. MERCHANT's obligations and Bank's rights under this section shall survive the termination of this Agreement.

Bank may make available a PCI DSS compliance program through a third-party. Bank shall have the right to charge a PCI fee of no less than one-hundred twenty-four dollars and seventy-five cents (\$124.75) billed via ACH (Automated Clearing House) whether or not MERCHANT participates in the program. Further, Bank may charge a non-compliance fee on a frequency to be determined by Bank for merchants who fail to provide certification of PCI compliance, and maintain an annual certificate of compliance.

MERCHANT acknowledges and agrees that MERCHANT's use of the third-party services does not guarantee MERCHANT's compliance with any of the rules or security standards established by Visa/MasterCard/Discover and any other applicable card companies. MERCHANT further acknowledges and agrees that MERCHANT's use of the third-party services does not guarantee the security of MERCHANT's IP addresses or that MERCHANT's systems are secure from unauthorized access. MERCHANT is responsible for establishing and maintaining security policies and procedures, and for compliance with the rules and security standards of Visa/MasterCard/Discover and any other applicable card companies, including any obligation to notify Visa/MasterCard/Discover and any other applicable card companies and Bank of any suspected breach of MERCHANT's systems.

MERCHANT may elect to use a third party as MERCHANT's agent ("Agent") to perform some of MERCHANT's obligations under this Agreement. Agents include, but are not limited to, MERCHANT's software providers and/or equipment providers. MERCHANT shall bear all risk and responsibility for conducting MERCHANT's own due diligence regarding the fitness of an Agent for a particular purpose and for determining the extent of an Agent's compliance with the Bank Rules, the Operating Regulations, and the Laws. Bank may approve or deny the use of an Agent in Bank's sole discretion and at any time. MERCHANT acknowledges and agrees that MERCHANT shall cause its Agent to complete any steps or certifications required by any Association (e.g., registrations, PA-DSS, PCI, audits, etc.) If an Agent is designated a service provider under any applicable Operating Regulation, MERCHANT shall cause such Agent to cooperate with Bank in completing any due diligence and/or steps required for registration and/or certification. MERCHANT is

solely responsible for any and all applicable fees, costs, expenses and liabilities associated with such steps, registrations, and certifications. MERCHANT expressly agrees that Bank shall in no event be liable to MERCHANT or any third party for any actions or inactions of any Agent used by MERCHANT (even if such Agent is introduced, recommended, or resold by Bank), and MERCHANT hereby expressly assumes all such liability.

MERCHANT expressly authorizes Bank to access information regarding MERCHANT's PCI compliance status. Upon Bank's request, MERCHANT or MERCHANT's PCI vendor must provide information, including but not limited to, PCI compliance/validation certification, SAQ (Self-Assessment Questionnaire), and Network scan results, and any other information Bank requests with regard to MERCHANT's PCI compliance within ten (10) business days of request.

Bank at its discretion may discontinue, modify or amend the PCI DSS compliance program at any time. Upon termination of this Merchant Application and Agreement, MERCHANT's right to participate in the above referenced PCI DSS compliance program shall cease notwithstanding the prior payment of any PCI fee paid by MERCHANT.

MERCHANT expressly acknowledges and agrees that Bank shall be a third party beneficiary of any agreement entered into between MERCHANT and Bank's third party service provider and MERCHANT relating to the above-referenced PCI compliance program and Bank shall have the rights, remedies and protections afforded therein to such third party service provider.

**22. Assignment.** This Agreement and the rights and obligations underlying this Agreement may be assigned by Fifth Third Bank, an Ohio banking corporation, Member FDIC, or First American Payment Systems, L.P., or their respective affiliates or subsidiaries. This Agreement may not be assigned by MERCHANT.

**23. Term; Termination.** The initial term of this Agreement shall commence upon Bank's acceptance hereof (as evidenced by Bank's performance hereunder) and continue in full force and effect for a term of three (3) years from acceptance by Bank. Thereafter, the Agreement will automatically renew for additional one-year periods unless MERCHANT gives (and Bank receives) written notice of non-renewal, no less than thirty (30), but no more than ninety (90), days prior to the end of the applicable term. Notwithstanding any other provision hereof, the Agreement may be terminated by Bank, with or without cause or reason, and with or without notice. Termination by Bank for any service results in termination of all services. In the event MERCHANT submits bank card transactions to Bank after the date of termination, the bank card transactions may (at Bank's option) be processed subject to the terms and conditions of this Agreement. If this Agreement is terminated by MERCHANT without proper notice, Bank will be entitled to recover, and MERCHANT will pay on demand, any and all losses (including consequential damages, loss of profits, costs, expenses and liabilities) incurred by Bank in connection with termination. MERCHANT agrees to pay bank/processor early termination fees established by Bank, but in no event less than four hundred ninety five dollars (\$495.00) for each MERCHANT location, plus any and all losses (including consequential damages and loss of profits, costs, expenses, and liabilities) incurred by Bank in connection with termination. Bank may hold payment of any monies due MERCHANT to ensure that all obligations of MERCHANT are satisfied. MERCHANT remains liable for any and all unpaid amounts due under this obligation or related to this Agreement.

**24. Authorization.** MERCHANT hereby authorizes Bank in accordance with this Agreement to initiate debit/credit entries to any account as indicated herein. The authority to initiate such debit/credit entries shall remain in full force until Bank shall have been paid all fees under this Agreement and all chargebacks and other amounts shall have been paid.

**25. Terminated Merchant File/MATCH/CMNF.** MERCHANT may be placed on the Combined Terminated Merchant File, MATCH, or the Consortium Merchant Negative File upon violation of any terms of this Agreement or any bank card association/organization rules or regulations. MERCHANT hereby releases, indemnifies, and holds Bank harmless for any loss or damage it may incur as a result of Bank's actions hereunder or as a consequence of MERCHANT being placed by Bank or its agents on the Combined Terminated Merchant File, MATCH, CMNF or other applicable list where such events are reported.

**26. Attorneys' Fees and Collection Costs.** MERCHANT shall be liable for and shall indemnify and reimburse Bank for any attorneys' fees, arbitration cost, and expenses incurred by Bank in the enforcement hereof, including but not limited to collecting any amounts or obligations due from MERCHANT. Bank shall assess a collection fee of not less than two hundred dollars (\$200.00) in the collections of any obligation or amounts due by MERCHANT.

**27. Rates; Fees; Adjustments.** "Discount Rate" shall mean a percentage of the total sales deposited to MERCHANT's account. "Transaction Fee" shall mean a fee charged on each sales draft and each credit draft regardless of the total stated. "Authorization Fee" shall mean the fee charged on each transaction attempted whether approved or declined and whether or not the sale was actually charged. A "Batch Settlement Fee" will be charged on all batch settlements. The Visa/MasterCard/Discover Discount Rate listed on the Merchant Application & Agreement applies to "Qualified Transactions". Qualified transactions are those in which an authorization was obtained electronically, the transaction was settled within the appropriate time frame, and the transaction meets all other requirements imposed by the bank card associations. Other transactions have higher Discount Rates and are categorized as "Mid-Qualified" or "Non-Qualified" transactions. Mid-Qualified transactions include but are not limited to those transactions where the card is affiliated with a special issuer program or did not meet requirements imposed by the bank card associations. Non-Qualified transactions include but are not limited to those transactions where the authorization was obtained by calling a voice or Voice Recognition Unit (VRU)



authorization number, the card is affiliated with a special issuer program, the transaction was not settled in the appropriate time frame, or the transaction did not meet the requirements imposed by the bank card associations.

If you are a mail order telephone order or e-commerce MERCHANT, the bank card associations/organizations require additional data elements to be submitted as a part of the transaction record in order for the transactions to qualify for the lowest possible discount rate. Failure to submit the additional data elements or to meet all other requirements imposed by the bank card associations/organizations will result in the payment of a higher discount rate.

A Monthly Minimum fee may be charged, and if so, applies to Visa and MasterCard transactions only. The Annual Fee shall not be less than ninety-five dollars (\$95.00) per year and will be collected via ACH transfer within forty-five (45) days from the approval date of this Agreement and on the first business day of the anniversary month each year thereafter.

In the event MERCHANT accepts a rate or fee reduction on any rate or fee set forth herein, the Term of this Agreement shall automatically be extended for an additional one (1) year term from the date of the current contract end date.

Bank shall have the right to adjust charges as necessary to offset any direct or indirect increase to Bank in the costs of providing services hereunder including, but not limited to, costs associated with collection and administration of chargebacks, fees charged by Visa, MasterCard, or Discover fees charged by other providers in processing, increases in the cost of living index or changes in rules, regulations, or operating procedures of Visa, MasterCard, and Discover or other applicable bank card association/organization, charges for changes to merchant accounts or information, adjustments in foreign exchange rates, or any additional requirement imposed by any federal or state governmental agency or regulatory authority, or due to any increases in communication costs charged to Bank by common carriers. Such charges shall, without prior notice, become effective as of the date of change. Upon any request from MERCHANT for copies of file information, account research, or other information, Bank may charge fees for such services, including per hour fees as determined by Bank. Without limiting the foregoing, Bank shall have the absolute and unconditional right to introduce new fees and increase Discount Rates, Transaction Fees, Authorization Fees, Per Item Fees, Statement Fees, Access Fees, Monthly Minimums and any other fees for any reason when deemed appropriate in Bank's sole discretion. MERCHANT understands and agrees that Bank reserves the right to assess any associated fees not previously specified in the "Fees Section" of the Merchant Application & Agreement that are billed to Bank as a result of the device(s) or software used by MERCHANT communicating with any third party host. Bank may charge a fee not less than thirty dollars (\$30.00) for a change of depository bank account or a change of name by MERCHANT.

Equipment supplies provided shall consist of (i) replacement of printer receipt paper and (ii) replacement of receipt printer ribbons only. Supplies provided are intended for use with Bank processing services only and Bank reserves the right to limit quantities based upon MERCHANT transaction history.

POS Terminal replacement services shall consist of replacement or repair, at Bank's option, of MERCHANT's processing equipment (terminal, printer, pinpad or check reader.) Bank will perform this service if (i) MERCHANT has honored and paid all amounts owed to Bank including, but not limited to, all amounts owed for Chargebacks and ACH rejects, (ii) the equipment has been verified to be in working order with Bank (verification of this shall occur by MERCHANT submitting a transaction to Bank using the equipment that is being requested to be replaced). Bank, at its option, may use refurbished equipment for replacement and at Bank's sole discretion may substitute comparable equipment. Bank shall charge a shipping fee of not less than six dollars (\$6.00) plus applicable tax for each supply request. Additional fees will apply to orders above the standard quantities established by Bank. Bank shall charge a fee not less than fifty dollars (\$50.00) for shipping and handling on equipment exchanges or swaps and a fee not less than one-hundred seventy-five dollars (\$175.00) for all premium equipment, including but not limited to, all wireless equipment and select check imagers. MERCHANT is required to return all defective equipment replaced by Bank to Bank. Bank may assess a restocking fee of not less than fifty dollars (\$50.00) on all returned equipment. If equipment is not returned, Bank, at its sole discretion, may assess a fee of not less than four hundred dollars (\$400.00) for each piece of equipment not returned and a fee not less than eight hundred dollars (\$800.00) for each piece of premium equipment not returned, including but not limited to, all wireless equipment and select check imagers. Bank reserves the right to assess a fee, to be determined by Bank, for equipment upgrades when compatible equipment is not available or when MERCHANT's existing equipment is obsolete or no longer supported by Bank.

**28. Variances.** If in MERCHANT's processing there is a variance from the information, amounts or percentages included, represented, or disclosed by MERCHANT in the Merchant Profile Section of the Merchant Application & Agreement as approved by Bank or if Bank determines that such variance may otherwise be detrimental to Bank, then Bank shall have no obligation to pay MERCHANT any settlement funds until MERCHANT has provided to Bank documentation sufficient for Bank to determine that the variance is verified, legitimate, and Bank's risk has been mitigated. MERCHANT further acknowledges that Bank, at its sole discretion, may hold or delay settlement of funds, suspend MERCHANT's processing, terminate this Agreement, or require MERCHANT to run a return/credit on a sale with or without notice upon the occurrence of any of the events specified above. MERCHANT shall immediately contact Bank in writing if variances occur from the information, amounts or percentages included, represented, or disclosed by MERCHANT in the Merchant Profile Section of the Merchant Application & Agreement as approved by Bank. For purposes hereof, Bank's determination shall be binding upon MERCHANT. MERCHANT hereby releases, indemnifies and holds Bank harmless for any losses or damage it may incur as a result of Bank's actions hereunder, or as a consequence of the settlement funds being held, delayed or suspended. MERCHANT also agrees to

pay all bank fees associated with processing any transaction, regardless if funds are held, delayed, suspended or if MERCHANT is required to run a return/credit.

**29. Credit Card/Money Laundering.** MERCHANT agrees to abide by all local, state, and federal laws and statutes and Visa, MasterCard, and Discover regulations regarding Credit Card/Money Laundering. MERCHANT acknowledges that it may only enter transactions into the credit card system if (i) transactions are through an approved merchant account for sales which are originally generated by MERCHANT, (ii) transactions are between MERCHANT and a bona fide cardholder, and (iii) transactions are submitted from MERCHANT's own accounts. Bank reserves the right to terminate this Agreement, with or without notice, if Bank reasonably believes MERCHANT is in violation of any of the above.

**30. MERCHANT Reserve Account.** Bank may require the MERCHANT or any guarantor to establish a reserve account against current and future indebtedness for any reason. Any reserve will be held by Bank for a period of time as is consistent with Bank's liability. Bank may immediately estimate the amount of the potential losses, fees, and costs and require MERCHANT or any guarantor to establish a reserve account for the full amount of the estimate. Payment of the reserve estimate shall be immediate. Failure to fund the reserve may result in immediate termination of the Agreement. MERCHANT also understands and agrees, Bank may withhold and retain any and all settlement funds in order to establish a Merchant Reserve Account without notice to MERCHANT. MERCHANT understands and agrees that all reserve funds held will be placed in a non-interest bearing account.

This Agreement will constitute a security agreement under the Uniform Commercial Code. MERCHANT grants to Bank a security interest in and lien upon all of the following (collectively, the "Secured Assets"): (i) all funds at any time in the designated account, (ii) the reserve account, (iii) future sales transactions, (iv) all funds, deposits, deposit accounts, moneys, securities, and other property now or hereafter in the possession of or on deposit with, or in transit to Bank or any other direct or indirect subsidiary or affiliate of Bank, whether held in a general or special account or deposit, whether held jointly with someone else, or whether held for safekeeping or otherwise, excluding, however, all IRA, Keogh, and trust accounts; and (v) all of MERCHANT's rights relating to this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement. MERCHANT warrants and represents that no other person or entity has a security interest in the Secured Assets. These security interests and liens will secure all of MERCHANT's obligations under this Agreement and any other agreements between MERCHANT and Bank, including but not limited to MERCHANT's obligation to pay any amounts due to Bank. With respect to such security interests and liens, Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity and the right to perfect such security interests as required by the Uniform Commercial Code. In addition to the security interests in the Secured Assets, Bank shall have, a contractual right of setoff against the Secured Assets without notice to MERCHANT.

**31. Governmental Reporting Requirements.** MERCHANT acknowledges and agrees that all information provided in the Agreement is true and correct. MERCHANT also acknowledges that Bank may be required to report certain information regarding MERCHANT including but not limited to MERCHANT's TIN, Entity Name, DBA, processing volume, principal's Social Security Number to governmental agencies such as the Internal Revenue Service (IRS). MERCHANT agrees to fulfill any request from Bank for additional information which may be required or requested by any government agency. Notwithstanding the foregoing, MERCHANT understands that Bank may be required to withhold processing funds and forward such funds to the IRS as a result of incorrect information provided by MERCHANT or at the direction of a government agency. MERCHANT expressly agrees and releases Bank from any and all liability hereunder resulting from incorrect information being submitted to any government agency and/or the withholding of funds. MERCHANT is responsible for any fines or penalties which may be assessed to MERCHANT and/or Bank.

**32. Guarantor.** Any guarantor hereby guarantees performance of all obligations of MERCHANT and agrees that Bank may require performance of any obligation of MERCHANT hereunder directly from guarantor.

**33. Amendments.** Bank has the right to amend this Agreement, by notice to MERCHANT. Any amendments shall become effective no earlier than ten (10) days from date of notice.

**34. Taxes.** MERCHANT shall pay and be responsible for all sales, use, value added, and other taxes and duties, of whatever nature levied or imposed as a result of this Agreement or in connection with any services hereunder.

**35. Arbitration.** Without resort to any form of class, collective or representative action, or joinder or consolidation of claims, any dispute, controversy, or claim arising out of or relating to this Agreement, including any breach hereof, shall be resolved by arbitration in the City of Fort Worth, Tarrant County, Texas, pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

**36. Force Majeure.** Bank is released from liability hereunder for failure to perform any of the obligations herein where such failure to perform occurs by reason of any acts of any other party or third party or any acts of God, fire, flood, storm, earthquake, tidal wave, computer or communications failure, software failure, program failure, network problem, sabotage, war, military operation, national emergency, mechanical or electrical breakdown, civil commotion, or the order, requisition, request, or recommendation of any governmental agency or acting governmental authority, or Bank's compliance therewith or government proration, regulation, or priority, or any other cause beyond Bank's reasonable control whether similar or dissimilar to such causes.

**37. Indemnification.** MERCHANT hereby releases, indemnifies and holds Bank harm-

less for any losses, claims, costs or damages to MERCHANT or any third party as a result of Bank's acts or omissions under this Agreement, including, as a consequence of Bank's own negligence. The indemnification provisions herein shall survive the termination of this Agreement.

**38. Limitation of Damages.** Bank shall not be liable for special, consequential, exemplary, or punitive damages. In no event shall Bank's cumulative liability to MERCHANT hereunder, including as a result of Bank's or any processor's own negligence, breach or error, exceed one hundred fifty dollars (\$150.00). MERCHANT acknowledges and agrees that Bank shall not be liable for losses, claims, or damages that arise as a result of acts or omissions, including, but not limited to, those constituting fraud, misrepresentation, misconduct, or negligence committed by MERCHANT or its Affiliates in connection with or relating to the execution, delivery or performance of the Merchant Application & Agreement/Merchant Processing Terms & Conditions, whether such acts or omissions were known or unknown by Bank.

**39. Waiver.** The parties and any guarantor expressly waive the right and agree not, to bring or participate in, any class action or joinder or consolidation of claims with respect to any dispute under or relating to this Agreement, including in any arbitration. ALL PARTIES TO THIS AGREEMENT HEREBY **WAIVE TRIAL BY JURY** IN ANY ACTION, PROCEEDING, SUIT, CLAIM, COUNTERCLAIM OR THIRD PARTY CLAIM BROUGHT BY THE PARTIES HERETO ON ANY MATTER ARISING OUT OF OR OTHERWISE RELATED TO OR CONNECTED WITH THIS AGREEMENT.

**40. Disclaimer.** Bank disclaims all warranties, express or implied, written or oral, including but not limited to warranties of merchantability and fitness for a particular purpose. MERCHANT acknowledges that the service may not be uninterrupted or error free.

**41. Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Texas applicable to agreements made and to be performed entirely within such state without regard to the conflicts of law principles of such state. The parties hereby agree that venue of any action under this agreement shall be exclusively in the state courts of Tarrant County, Texas.

**42. Severability.** In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement will continue in full force and effect and the illegal, invalid or unenforceable provision is modified to give effect to the original intent consistent with being valid and enforceable under applicable law.

**43. Counterparts.** This Agreement may be executed in counterparts, including facsimile counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same agreement.

**44. Prior Processor Termination Fee Refund.** If MERCHANT incurs a fee for canceling MERCHANT's immediately preceding credit card processing agreement in order to sign this Agreement, Bank may, at their sole and exclusive discretion, either reimburse MERCHANT for such fee up to but not exceeding three hundred dollars (\$300.00) via credits posted to their account or cancel the processing agreement with Bank or allow MERCHANT to transfer back to the previous service provider. Any such reimbursement by Bank will occur within one hundred twenty (120) days after the merchant I.D. Number issued date, provided that MERCHANT has given Bank: 1) a bank statement evidencing payment of the cancellation fee and 2) collateral material from prior processing documenting cancellation fee within thirty (30) days after the merchant I.D. Number issued date and MERCHANT is processing with Bank at the time of the reimbursement.

**45. Notices.** If to Bank, all written notices under this agreement shall be delivered to:

First American Payment Systems  
100 Throckmorton Street, Suite 1800  
Fort Worth, TX 76102

If to MERCHANT, the proper notice shall be the address stated on the records of Bank. Notice to MERCHANT may be by letter, facsimile and/or the Monthly Merchant Statement.

If such transmitted notice is by MERCHANT to Bank, the original of any communication shall also be mailed to Bank on the date of the transmission and it shall not be deemed served until the mailed copy is received and confirmed by Bank.

**46. Survival.** Any and all provisions of this Agreement that impose or could be construed to impose a continuing obligation, duty, or requirement upon MERCHANT including, but not limited to indemnification, PCI DSS Compliance, and chargeback liability, shall survive the expiration or termination, for any reason, of this Agreement.

**47. Member Bank Disclosure.** The responsibilities listed below do not supersede terms of the Merchant Application & Agreement or the Merchant Terms & Conditions and are provided to ensure MERCHANT understands some important obligations of each party and that the Visa Member (Acquirer) is the ultimate authority should the MERCHANT have any problems.

(a) Member Bank (Acquirer) Information:

Acquirer Name: Fifth Third Bank  
Acquirer Address: 38 Fountain Square Plaza  
Cincinnati, OH 45263  
Attn: Relationship Manager  
Contact/Customer Service Phone: 817-317-2996  
Acquirer Phone: 513-534-5300

(b) Important Member Bank (Acquirer) Responsibilities:

- (i.) A Visa Member is the only entity approved to extend acceptance of Visa products directly to a MERCHANT;
- (ii.) A Visa Member must be a principal (signer) to the Merchant Agreement;
- (iii.) The Visa Member is responsible for educating MERCHANTS on pertinent Visa Operating Regulations with which MERCHANTS must comply;
- (iv.) The Visa Member is responsible for settlement of funds to the MERCHANT;
- (v.) The Visa Member is responsible for all funds held in reserve that are derived from settlement.

(c) Important MERCHANT Responsibilities:

- (i.) Ensure compliance with cardholder data security and storage requirements;
- (ii.) Maintain fraud and chargeback below thresholds;
- (iii.) Review and understand the terms of the Merchant Agreement;
- (iv.) Comply with Visa Operating Regulations.

**48. Entire Agreement Changes.** This contains, and any applicable Supplements contain, the entire agreement between the parties and may not be altered, amended, modified, terminated or otherwise changed except in writing and signed by Bank.

**49. If any term, provision, covenant or condition of this Agreement is determined by any local, state or federal court or law enforcement agency to be invalid, illegal, void or unenforceable in any jurisdiction, then such provision, covenant or condition shall, as to such jurisdiction, be modified or restricted to the extent necessary to make such provision valid, binding and enforceable, or, if such provision cannot be modified or restricted, then such provision shall as to such jurisdiction, be deemed to be excised from this Agreement and any such invalidity, illegality or unenforceability with respect to such provision shall not invalidate or render unenforceable such provision in any other jurisdiction, and the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated.**



## Debit/EBT Processing Terms & Conditions

The following Debit/EBT Processing Terms & Conditions apply only if you have agreed to process Debit/EBT transactions.

THIS AGREEMENT is made by and between First American Payment Systems and "MERCHANT," whose name and address are stated on the Merchant Application & Agreement and shall be effective upon acceptance by First American; and

WHEREAS: First American is engaged in the business of financial processing which includes, but is not limited to, the processing of and providing for the payment of charges created by the holders of debit network cards hereinafter referred to as "debit cards"; and

WHEREAS: Debit networks are sponsored by J.P. Morgan Chase, N.A. and Fifth Third Bank, an Ohio banking corporation, Member FDIC, or as amended from time to time; and

WHEREAS: First American provides Electronic Benefits Transfer (EBT) processing capabilities which includes acceptance of EBT cards from cardholders that receive food stamp benefits and/or cash benefits from the individual states and/or United States Government; and

WHEREAS: MERCHANT hereby warrants that it is engaged in a lawful business and is duly licensed under the laws of the state, county, and city as disclosed by MERCHANT on the Merchant Application and Agreement, to conduct such business; and

WHEREAS: MERCHANT currently accepts or desires to accept debit cards and/or EBT cards for the purchase of goods and services it provides or anticipates providing; and

WHEREAS: MERCHANT warrants that neither it nor any of its officers, directors, partners, managers or owners has been terminated for any reason by any bank or any processor in connection with any agreement regarding depositing or processing of any transactions.

NOW, THEREFORE, in consideration of the representations, covenants, and promises made herein, the receipt and sufficiency of which are acknowledged, First American and MERCHANT agree as follows:

**1. Agreement.** Reference to this "Agreement" includes all schedules, appendices, Merchant Application & Agreement, additional location documentation, any terms and conditions, and any other documents requested by First American. MERCHANT acknowledges that First American will provide transaction processing hereunder through First American or other third parties. MERCHANT agrees that First American may enforce the terms of this Agreement against MERCHANT and any third party, whether or not First American is a party to such proceeding or transaction.

**2. Additional Locations.** MERCHANT must complete an Additional Location Form for each additional Merchant location. MERCHANT expressly agrees and acknowledges that each Merchant location shall be governed by these Merchant Processing Terms & Conditions and the Merchant Application & Agreement, including and without limitations the rates and fees described therein, as may be amended from time to time.

**3. Acceptance of Debit Cards or EBT Cards.** MERCHANT agrees to honor without discrimination all lawful and valid debit cards or EBT cards when properly presented as payment by customers in connection with bona fide, legitimate business transactions arising out of MERCHANT's usual trade or business as disclosed in the Merchant Application & Agreement. MERCHANT agrees not to submit any transactions that will violate applicable laws, rules and regulations. MERCHANT shall not honor expired, counterfeit, or revoked cards, nor honor cards presented by persons other than the proper cardholder as authorized by the entry of a Personal Identification Number (PIN).

**4. Point-of-Sale Devices.** MERCHANT agrees to utilize a Point of Sale ("POS") electronic terminal and PIN entry device in connection with all debit card transactions processed pursuant to this Agreement. MERCHANT agrees to keep all POS equipment used to process debit card or EBT card transactions in good working order. Merchant agrees to use only POS equipment and PIN entry device equipment that meets network and/or association compliance guidelines, including, but not limited to, Triple-DES DUKPT (Derived Unique Key Per Transaction) compliance requirements. MERCHANT understands that First American cannot and does not warrant the connectivity, performance of equipment, or quality of services as a result of any Voice over Internet Protocol ("VoIP") or similar type service. MERCHANT agrees that First American is not responsible for, and MERCHANT accepts full responsibility for issues that may arise when utilizing VoIP or similar service, including but not limited to; failure to obtain authorizations, batching, settlement, equipment, equipment/Software installation, communications, downloads and internet connectivity. Further, MERCHANT acknowledges it will not make any claim against First American for any losses or damages, including, but not limited to, loss of income, loss of revenue, economical loss, consequential, direct, indirect, special, exemplary, or punitive relating to the use or connectivity of any VoIP or similar services.

**5. Transaction Records.** MERCHANT agrees to balance and deliver to First American all debit/EBT transactions on the same day they are processed.

**6. Payments.** MERCHANT understands that an authorization is not a guarantee of payment from First American. All payments to MERCHANT for legitimate and authorized debit/EBT transactions shall be made by First American through the funds transfer system known as the Automated Clearing House (ACH) pursuant to governing rules adopted by the National Automated Clearing House Association, and shall be electronically transmitted to an account of the MERCHANT. MERCHANT understands that payments are transmitted daily, except on weekends and bank holidays. However, First American cannot guarantee

the timeliness with which any payment may be sent to or credited by MERCHANT's bank. MERCHANT understands that due to the nature of the ACH and the electronic networks involved and the fact that not all banks belong to an ACH, errors can occur and payment to the MERCHANT can be delayed. In such cases, MERCHANT agrees to assist First American to help resolve any problems in crediting/debiting MERCHANT's account. MERCHANT agrees to provide First American three (3) days prior written notice of any change of account and to abide by First American's policies regarding changes to accounts. MERCHANT and not First American or any processor shall be responsible for verifying that account information is correct on the Merchant Application & Agreement, voided check and all account statements. First American is not responsible for incorrect account numbers. Unless MERCHANT provides proper notice to First American, MERCHANT shall not change any of its accounts.

All payments to MERCHANT for the amount of debit or EBT card transactions properly submitted to First American may be less amounts owed by MERCHANT. Any payment made by First American to MERCHANT shall not be final but shall be provisional credit under the Uniform Commercial Code and is subject to subsequent review and verification by First American. MERCHANT acknowledges and agrees that First American shall have no obligation to make any payment to MERCHANT with respect to transactions described in Sections 12, 13, 14 and 28 of this Agreement unless and until MERCHANT provides to First American the requested documentation. If MERCHANT fails to provide requested documentation, such payments shall be earned compensation of First American. Fees and other charges due First American hereunder shall be deducted from amounts due MERCHANT or may be debited against any of MERCHANT's accounts at First American's sole discretion. The network fees and other fees shall be collected by First American on a daily, monthly, or other basis, as determined by First American. All reserve amounts may be deducted from amounts otherwise due MERCHANT, debited against MERCHANT's account, or paid directly by MERCHANT through ACH or otherwise at First American's sole discretion. MERCHANT must notify First American in writing of any errors on any statement within ninety (90) days after mailing the first statement on which the error or problem appeared or failed to appear. MERCHANT agrees to examine all statements upon receipt and to verify all credits and debits to any account against all transactions, bank statements and other information indicating activity of First American and MERCHANT subject to or relating to this Agreement or First American's obligations hereunder. Save and except First American's right to funds owed First American under this Agreement or incorrectly paid to MERCHANT, if no notice of error is received within the ninety (90) day period, the account shall be deemed correct and MERCHANT shall have no recourse for errors. Any amount inadvertently or incorrectly paid to MERCHANT may be debited from any account of MERCHANT, at the sole discretion of First American and, in any event, remains an obligation of MERCHANT to First American payable in full and on demand.

**7. Sales Receipt Storage and Retrieval.** To assist in the resolution of any dispute, MERCHANT agrees to retain for one (1) year and make available within three (3) days of a request all pertinent records pertaining to each transaction in question, including, but not limited to, itemized bills, batch total reports, and other related documents. MERCHANT shall preserve the confidentiality of all information in an area limited to selected personnel and exercise best efforts to maintain these materials in a secure manner. MERCHANT's obligations under this paragraph shall survive following the close of MERCHANT's business or the termination of this Agreement. MERCHANT understands that its failure to respond timely to a retrieval request may result in a chargeback. All chargebacks and fees shall be the responsibility of MERCHANT and paid by and charged to MERCHANT. In connection with retrieval requests or other administrative requirements associated with any MERCHANT agreement or account, First American and/or its designated processor may charge retrieval fees and administrative charges, which shall be the responsibility of MERCHANT. First American and/or its designated processor shall determine in their sole discretion the amount of any retrieval fee and administrative charge and when such fee and charge shall be assessed. MERCHANT shall not be entitled to notice of any such fee or administrative charge or with respect to any change in the amount of any fee or administrative charge.

**8. Warranties by Merchant.** MERCHANT warrants that it shall fully comply with all federal, state, and local laws, rules, and regulations, including, but not limited to, the Federal Truth-in-Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System, Debit Network Operating Rules and Regulations and the USDA's Food and Consumer Service (FCS) Regulations, all as may be amended from time to time.

As to any transaction presented to First American for payment, MERCHANT warrants that:

- The transaction is valid in form and has been completed in accordance with current instructions, if any, furnished by First American;
- MERCHANT has delivered MERCHANT's merchandise to the cardholder entering the PIN code or completed MERCHANT's service described on the sales receipt in accordance with MERCHANT's underlying agreement with the cardholder;
- MERCHANT has delivered to the cardholder a true and complete copy of the sales receipt evidencing the transaction involving use of the card;
- Each sales receipt represents the cardholder's payment to MERCHANT for the amount shown;
- The cardholder has no defense, right of offset, or counterclaim against MERCHANT



in connection with the purchase of the goods or services;

(f) Neither MERCHANT nor any owner, director, officer, member, partner or employee of MERCHANT ("Affiliates") has advanced any cash to cardholder or any person in connection with the purported debit/EBT transaction which is not authorized by the card issuer;

(g) In any debit/EBT transaction, MERCHANT warrants the customer's true identity as an authorized user of the debit card or EBT card;

(h) MERCHANT warrants that debit card or EBT card will not be used for verification of age;

(i) MERCHANT warrants that it shall not, without the cardholder's consent, sell, purchase, provide, or exchange debit card or EBT card account number information, personal information or any other transaction information, in any form obtained by reason of a debit/EBT transaction or otherwise to any third party other than to MERCHANT's agents for the purpose of assisting the MERCHANT in its business, or to First American for the sole purpose of: (i) assisting MERCHANT in completing the transaction or (ii) as specifically required by law;

(j) MERCHANT warrants that it will not conduct any transactions that are not in compliance with both this Agreement and any applicable codes or rules and hereby indemnifies and holds First American harmless against any loss or damage First American may suffer as a result of a breach of this or any other warranty or agreement by MERCHANT;

(k) MERCHANT may display the proprietary names and symbols associated with debit cards or EBT cards only while this Agreement is in effect, or until MERCHANT is notified by First American or the debit/EBT networks to cease such usage. First American and the debit/EBT networks shall have the right at any time to require MERCHANT to cease such usage for any reason, whether or not this Agreement remains in effect. MERCHANT may use the proprietary names and symbols associated with First American or with debit/EBT networks only to indicate that debit cards or EBT cards are accepted for payment and shall not indicate, directly or indirectly, debit/EBT card networks endorse MERCHANT's products or services; and

(l) MERCHANT warrants it has not participated in assisting cardholder in entering PIN into the PIN entry device. MERCHANT also warrants that no photographic, video surveillance, or any other recording device is being used which would compromise any cardholder PIN or confidential information.

(m) MERCHANT may not reverse engineer any software of First American found or used in connection with the operation of the POS equipment.

(n) MERCHANT will not sell, purchase, provide, exchange or in any manner disclose Card account number, Transaction, or personal information of or about a Cardholder to anyone other than its Acquirer, to the Corporation, or in response to a valid government demand. This warranty applies to Card imprints, TIDs, carbon copies, mailing lists, tapes, database files, and all other media created or obtained as a result of a Transaction.

**9. Business Changes.** MERCHANT shall provide at least thirty (30) days written notice to First American for any of the following anticipated changes: MERCHANT's business type, including any change in goods or services sold, name, entity type, address, change of Visa/MasterCard Sales Profile as described in the Merchant Application & Agreement, any ownership change, or transfer or sell of substantially all of the assets of MERCHANT. At all times MERCHANT shall provide First American with its current mailing address. If First American receives a returned mail item with no forwarding address, First American may exercise its right to suspend mailing Merchant Statements until such time as the correct address has been provided by MERCHANT. MERCHANT shall not change its usual trade or business, move its trade or business to a new location, utilize the merchant account to process e-commerce transactions or commence operating an unrelated trade or business on the same premises where MERCHANT operates this stated trade or business without obtaining First American's prior written consent to the change, move, or addition. MERCHANT also agrees that prior to any changes, First American must first accept the change and confirm such acceptance in writing. MERCHANT acknowledges that the codes of professional responsibility and the rules and regulations of professional associations may apply to the transactions covered by this Agreement. MERCHANT may, however, bring any inconsistency between this Agreement and such codes and rules to the attention of First American and request a modification to this Agreement to eliminate such inconsistency. First American may, in its discretion, agree to such modification to the extent it is consistent with First American policy and in conformity with then existing Debit/EBT Network Operating Rules and Regulations and other applicable laws and regulations. Until First American agrees to such modification in writing, the terms of this Agreement shall remain in place.

MERCHANT shall be responsible for any administrative charges of First American associated with any change.

**10. Returns.** MERCHANT acknowledges no debit returns are permitted. With respect to EBT, MERCHANT shall properly complete an EBT refund and deliver a completed receipt to the cardholder at the time of each return of merchandise or cancellation of sale. First American shall charge the MERCHANT an EBT Transaction Fee as well as other fees applicable to all transactions.

MERCHANT shall not, under any circumstances issue: (i) a credit to an EBT cardholder without having completed a previous purchase transaction with the same EBT cardholder; or (ii) a credit to an EBT cardholder for any prior sale or service made or provided at a location other than the location where the credit is issued.

With proper disclosure at the time of the transaction where purchased goods or services are delivered to cardholder, MERCHANT may:

(a) Refuse to accept merchandise in return or exchange and refuse to issue a refund to a cardholder; or

(b) Accept returned merchandise in exchange for the MERCHANT's promise to deliver goods or services of equal value available from MERCHANT at no additional cost to cardholder.

Proper disclosure shall be deemed to have been given if, at the time of the transaction and prior to obtaining the customer's PIN, the following notice appears on all copies of the sales slip in legible letters at least 1/4 inch high and close proximity to the space provided for the cardholder's signature stating "NO REFUND" or "EXCHANGE ONLY" or "IN STORE CREDIT ONLY," as applicable, or equivalent language.

**11. Chargeback.** MERCHANT expressly acknowledges and agrees to any charge or debit made by First American against any of MERCHANT's accounts as a result of the exercise of chargeback or retrieval rights by a cardholder, issuing bank, processor, or other intermediary pursuant to applicable operating regulations of the debit/EBT networks or other card associations as the same may be in effect from time to time. MERCHANT also understands and acknowledges that First American may debit or reduce MERCHANT's bank account whether or not cardholder has returned merchandise. Without prior notice, First American shall have the right, at any time, to reduce MERCHANT's debit/EBT sales proceeds received from issuing banks, debit any of MERCHANT's accounts and/or demand immediate payment from MERCHANT through ACH or otherwise for any debit/EBT card transaction which is disputed, questioned or returned to First American by the financial institution or company which has issued the debit/EBT card (the "Card Issuer") and to chargeback such sale to MERCHANT in any of, but not limited to, the following situations:

(a) Where goods originally purchased have been returned to MERCHANT by cardholder and cardholder requested a credit and MERCHANT did not process such credit slip;

(b) Where sales slip covers goods or services other than those described in the Merchant Application & Agreement;

(c) Where a cardholder contends or disputes to the Card Issuer that: (i) goods or services were not received by cardholder or by authorized user; or (ii) goods or services received by cardholder or by authorized user do not conform to what was described on the sales slip; or (iii) goods or services were defective or of unsatisfactory quality;

(d) Where original sales receipt or batch total report is not received by First American from MERCHANT when requested by First American in accordance with paragraph 7 of this Agreement;

(e) MERCHANT has failed to obtain proper authorization to complete the transaction or the cardholder has represented in writing to First American or the Card Issuer that the cardholder did not make or authorize the transaction;

(f) Where a Card Issuer or First American has information that impropriety or fraud occurred at the time of transaction, whether or not such transaction was properly authorized by the Card Issuer or the cardholder participated in or authorized the transaction, or the Card Issuer represents that there is no debit card or EBT card outstanding with the account number used;

(g) First American reasonably determines that the transaction is improper, fraudulent, not a bona fide transaction in MERCHANT's ordinary course of business or is subject to any claim of illegality, cancellation, rescission, avoidance, or offset for any reason whatsoever, including without limitation, negligence, fraud, impropriety, or dishonesty on the part of card user, cardholder or MERCHANT;

(h) In any situation where the transaction was executed or credit given to MERCHANT in circumstances constituting a breach of any representation or warranty of MERCHANT hereunder, or MERCHANT's violation of debit/EBT network rules and regulations which has resulted in a sale being charged back by the Card Issuer;

(i) As required by bank card association/network acquirer rules or regulations as they currently exist or as they may be amended from time to time;

(j) In such other circumstances where First American determines or suspects in its sole discretion that the transaction may result in a chargeback for any reason, whether or not enumerated under this paragraph and whether or not the transaction results in a chargeback; or

(k) If with respect to any of MERCHANT's outlets, the ratio of bank card or debit/EBT card counterfeit and fraud volume to bank card or debit/EBT card sales volume or the ratio of the number of bank card or debit/EBT chargebacks to the number of bank card or debit/EBT sales exceeds one percent (1%) or credits processed exceed ten percent (10%) for any given month. In such event, without limiting other rights hereunder, First American in its sole and absolute discretion may charge back all debit/EBT or bank card sales for all locations.

MERCHANT understands that First American will assess MERCHANT a fee as well as administrative costs as determined by First American for each chargeback.

MERCHANT, whether consented to or not by cardholder, shall not present to First American for processing any transaction, which has been previously charged back to First American and returned to MERCHANT. MERCHANT's obligations and First American's rights under this paragraph shall survive the termination of this Agreement.

**12. Improper Transactions; Forward Commitments.** First American may hold funds, suspend processing, terminate this Agreement with or without notice, or require MERCHANT to process a refund upon any determination by First American, in its sole discretion, of improper, fraudulent, suspicious or questionable transactions, including, but not limited to, any transactions for items or services with a future delivery date or forward commitment, transactions that fail to meet the requirements of this Agreement or which vary from the information represented or disclosed in the Merchant Profile Section of the Merchant Application & Agreement. MERCHANT acknowledges and agrees that First American shall have no obligation to make any payment to MERCHANT with respect to such transaction(s) unless and until MERCHANT provides to First American the documentation sufficient for First American to determine that the transaction(s) is verified, legitimate, and First American's risk has been mitigated. MERCHANT acknowledges no Debit Transaction Fees or Debit Network Fees will be refunded as a result of First American withholding

payment to MERCHANT with respect to improper, fraudulent, suspicious or questionable transactions including, but not limited to, when a MERCHANT processes a refund, or during any period of suspension. MERCHANT may be placed on the Combined Terminated Merchant File/MATCH upon violation of any terms of this Agreement. MERCHANT hereby releases, indemnifies, and holds First American harmless for any loss or damage it may incur as a result of First American's actions hereunder or as a consequence of MERCHANT being placed by First American or its agents on the Combined Terminated Merchant File/MATCH or other applicable list where such events are reported.

**13. Recurring Transactions.** Recurring transactions are not allowed.

**14. Fraudulent Sales/Factoring.** MERCHANT shall not present to First American directly or indirectly, any transaction(s) (i) that MERCHANT knows or should have known to be fraudulent, improper, illegal, or not authorized by the cardholder, (ii) that results from a transaction outside MERCHANT's normal course of business as described in the Merchant Application & Agreement, as approved by First American (iii) that results from processing debit/EBT, credit, directly or indirectly, of any transaction not originated as a result of an act directly between cardholder and MERCHANT, or (iv) that contains the account number of a debit/EBT bank card account issued to MERCHANT. Should MERCHANT do so, First American may hold funds, suspend processing or terminate this Agreement with or without notice following the determination, at First American's sole discretion, of improper, fraudulent, suspect, or other questionable transactions, including, but not limited to, transactions varying materially in character from the information represented or disclosed in the Merchant Profile Section of the Merchant Application & Agreement, as approved by First American. MERCHANT acknowledges and agrees that First American shall have no obligation to make any payment to MERCHANT with respect to such transaction(s) unless and until MERCHANT provides to First American the documentation sufficient for First American to determine that the transaction(s) is verified, legitimate, and First American's risk has been mitigated. MERCHANT acknowledges no discount or transaction fees will be refunded as a result of First American withholding payment to MERCHANT, including but not limited to reversals, returns and/or credits.

**15. PCI DSS Compliance and Cardholder Information Security.** MERCHANT agrees to abide by all Debit/EBT Network Operating Rules and Regulations regarding the safeguarding of cardholder information. MERCHANT agrees not to store the Card Verification Value (CVV) or Card Verification Code (CVC) (the three (3) digit code found on the back of the bank cards) and or cardholder PIN and to implement the joint Payment Card Industry (PCI) standards in whole and in part as they relate to the Visa Cardholder Information Security Program (CISP), the MasterCard Site Data Protection (SDP) program, the Debit/EBT Operating Rules and Regulations, and any successor programs as the standard for protecting cardholder information. MERCHANT agrees to comply with the PCI, CISP SDP, Debit/EBT Operating Rules and Regulations programs. MERCHANT is responsible for demonstrating compliance, by its agents, with the requirements of CISP. All Service Providers MERCHANT uses must be recognized by Visa as CISP compliant service providers and payment applications MERCHANT uses must be recognized by VISA as compliant with the Payment Application Data Security Standards ("PA-DSS"). "Service Provider" means any party that processes, stores or transmits Customer Information on MERCHANT's behalf. MERCHANT agrees to immediately contact First American if any cardholder information has been compromised in any manner. MERCHANT acknowledges and agrees that if any cardholder information is compromised, whether due in part to a third party software provider, VAR, vendor, or employee, MERCHANT will be liable for all fines, fees or damages which may be assessed to First American by the debit/EBT networks. Technical standards and information on meeting PCI, CISP and SDP can be located on the web at [www.usa.visa.com](http://www.usa.visa.com) and [www.mastercard.com](http://www.mastercard.com). MERCHANT bears all responsibility for ensuring that it is up to date on all new requirements using these tools and will be liable for all fines and fees assessed by First American for non-compliance of the PCI, CISP, SDP and Debit/EBT Operating Rules and Regulations. MERCHANT's obligations and First American's rights under this section shall survive the termination of this Agreement.

First American may make available a PCI DSS compliance program through a third-party. First American shall have the right to charge a PCI fee of no less than one-hundred twenty-four dollars and seventy-five cents (\$124.75) billed via ACH (Automated Clearing House) whether or not MERCHANT participates in the program. Further, First American may charge a non-compliance fee on a frequency to be determined by First American for merchants who fail to provide certification of PCI compliance, and maintain an annual certificate of compliance.

MERCHANT acknowledges and agrees that MERCHANT's use of the third-party services does not guarantee MERCHANT's compliance with any of the rules or security standards established by Visa/MasterCard/Discover and any other applicable card companies. MERCHANT further acknowledges and agrees that MERCHANT's use of the third-party services does not guarantee the security of MERCHANT's IP addresses or that MERCHANT's systems are secure from unauthorized access. MERCHANT is responsible for establishing and maintaining security policies and procedures, and for compliance with the rules and security standards of Visa/MasterCard/Discover and any other applicable card companies, including any obligation to notify Visa/MasterCard/Discover and any other applicable card companies and First American of any suspected breach of MERCHANT's systems.

MERCHANT may elect to use a third party as MERCHANT's agent ("Agent") to perform some of MERCHANT's obligations under this Agreement. Agents include, but are not limited to, MERCHANT's software providers and/or equipment providers. MERCHANT shall bear all risk and responsibility for conducting MERCHANT's own due diligence regarding the fitness of an Agent for a particular purpose and for determining the extent of an Agent's compliance with the First American Rules, the Operating Regulations, and the Laws. First American may approve or deny the use of an Agent in First American's sole discretion and at any time. MERCHANT acknowledges and agrees that MERCHANT shall cause its Agent to complete any steps or certifications required by any Association (e.g., registrations,

PA-DSS, PCI, audits, etc.) If an Agent is designated a service provider under any applicable Operating Regulation, MERCHANT shall cause such Agent to cooperate with First American in completing any due diligence and/or steps required for registration and/or certification. MERCHANT is solely responsible for any and all applicable fees, costs, expenses and liabilities associated with such steps, registrations, and certifications. MERCHANT expressly agrees that First American shall in no event be liable to MERCHANT or any third party for any actions or inactions of any Agent used by MERCHANT (even if such Agent is introduced, recommended, or resold by First American), and MERCHANT hereby expressly assumes all such liability.

MERCHANT expressly authorizes First American to access information regarding MERCHANT's PCI compliance status. Upon First American's request, MERCHANT or MERCHANT's PCI vendor must provide information, including but not limited to, PCI compliance/validation certification, SAQ (Self-Assessment Questionnaire), and Network scan results, and or any other information First American requests with regard to MERCHANT's PCI compliance within ten (10) business days of request.

First American at its discretion may discontinue, modify or amend the PCI DSS compliance program at any time. Upon termination of this Merchant Application and Agreement, MERCHANT's right to participate in the above referenced PCI DSS compliance program shall cease notwithstanding the prior payment of any PCI fee paid by MERCHANT.

MERCHANT expressly acknowledges and agrees that First American shall be a third party beneficiary of any agreement entered into between MERCHANT and First American's third party service provider and MERCHANT relating to the above-referenced PCI compliance program and First American shall have the rights, remedies and protections afforded therein to such third party service provider.

**16. Terminated Merchant File/MATCH.** MERCHANT may be placed on the Combined Terminated Merchant File/MATCH upon violation of any terms of this Agreement or any debit/EBT network or bank card association rules or regulations. MERCHANT hereby releases, indemnifies, and holds First American harmless for any loss or damage it may incur as a result of First American's actions hereunder or as a consequence of MERCHANT being placed by First American or its agents on the Combined Terminated Merchant File/MATCH or other applicable list where such events are reported.

**17. Limitation of Damages.** First American shall not be liable for special, consequential, exemplary, or punitive damages. In no event shall First American's cumulative liability to MERCHANT hereunder, including as a result of First American's or any processor's own negligence, breach or error, exceed the amount of processing fees paid by MERCHANT to First American for the transaction in question.

**18. Arbitration.** Without resort to any form of class, collective or representative action, or joinder or consolidation of claims, any dispute, controversy, or claim arising out of or relating to this Agreement, including any breach hereof, shall be resolved by arbitration in the City of Fort Worth, Tarrant County, Texas, pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

**19. Force Majeure.** First American is released from liability hereunder for failure to perform any of the obligations herein where such failure to perform occurs by reason of any acts of any other party or third party or any acts of God, fire, flood, storm, earthquake, tidal wave, computer or communications failure, software failure, program failure, network problem, sabotage, war, military operation, national emergency, mechanical or electrical breakdown, civil commotion, or the order, requisition, request, or recommendation of any governmental agency or acting governmental authority, or First American's compliance therewith or government proration, regulation, or priority, or any other cause beyond First American's reasonable control whether similar or dissimilar to such causes.

**20. Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Texas applicable to agreements made and to be performed entirely within such state without regard to the conflicts of law principles of such state. The parties hereby agree that venue of any action under this agreement shall be exclusively in the state courts of Tarrant County, Texas.

**21. Rules and Regulations.** This Agreement shall be subject to the operating rules and regulations of the debit/EBT networks as amended from time to time.

**22. Assignment.** This Agreement and the rights and obligations underlying this Agreement may be assigned by First American. This Agreement may not be assigned by MERCHANT.

**23. Term; Termination.** The initial term of this Agreement shall commence upon First American's acceptance hereof (as evidenced by First American's performance hereunder) and continue in full force and effect for a term of three (3) years from acceptance by First American. If Debit/EBT Processing services are added as an additional service to an existing First American Credit Card Processing Agreement in good standing; your Debit/EBT approval date will reflect the approval date of the existing Credit Card Processing Agreement. Thereafter, the Agreement will automatically renew for additional one-year periods unless MERCHANT gives (and First American receives) written notice of non-renewal, no less than thirty (30), but no more than ninety (90), days prior to the end of the applicable term. Notwithstanding any other provision hereof, the Agreement may be terminated by First American, with or without cause or reason, and with or without notice. Termination by First American for any service results in termination of all services. In the event MERCHANT submits bank card transactions to First American after the date of termination, the bank card transactions may (at First American's option) be processed subject to the terms and conditions of this Agreement. If this Agreement is terminated by MERCHANT without proper notice, First American will be entitled to recover, and MERCHANT will pay on demand, any and all

losses (including consequential damages, loss of profits, costs, expenses and liabilities) incurred by First American in connection with termination. **MERCHANT agrees to pay First American Early Termination Fees established by First American, but in no event less than one hundred dollars (\$100.00) for each MERCHANT location, plus any and all losses (including consequential damages and loss of profits, costs, expenses, and liabilities) incurred by First American in connection with termination.** First American may hold payment of any monies due MERCHANT to ensure that all obligations of MERCHANT are satisfied. MERCHANT remains liable for any and all unpaid amounts due under this obligation or related to this Agreement.

**24. Authorization.** MERCHANT hereby authorizes First American in accordance with this Agreement to initiate debit/credit entries to any account of MERCHANT. The authority to initiate such debit/credit entries shall remain in full force until First American shall have been paid all fees under this Agreement and all chargebacks and other amounts shall have been paid.

**25. Attorneys' Fees and Costs.** MERCHANT shall be liable for and shall indemnify and reimburse First American for any and all attorneys' fees, arbitration cost, and other costs and expenses paid or incurred by First American in the enforcement hereof, including but not limited to, collecting any amounts or obligations due from MERCHANT.

**26. Rates; Fees; Adjustments.** "Debit Transaction Fee" shall mean a fee charged on each debit transaction submitted for authorization, regardless of the total stated. "EBT Transaction Fee" shall mean a fee charged on each EBT transaction submitted for authorization, regardless of the total stated. "Debit Network Fee" shall be charged on each transaction submitted for authorization, regardless of the total stated, at a rate set by the debit/EBT network, and shall be in addition to the Debit Transaction Fee. "Debit Related Fee" shall mean a fee charged on each transaction submitted for authorization of no less than three cents (.03) per transaction for other debit related costs including, without limitation, debit sponsorship, audit, and network registration.

First American shall have the right to adjust charges as necessary to offset any direct or indirect increase to First American in the costs of providing services hereunder including, but not limited to, costs associated with collection and administration of chargebacks, fees charged by the debit/EBT networks, all other fees charged by other providers in processing, increases in the cost of living index or changes in rules, regulations, or operating procedures of the debit/EBT network or other applicable bank card organization or network acquirer, charges for changes to merchant accounts or information, or any additional requirement imposed by any federal or state governmental agency or regulatory authority, or due to any increases in communication costs charged to First American by common carriers. Such charges shall, without prior notice, become effective as of the date of charge. Upon any request from MERCHANT for copies of file information, account research, or other information, First American may charge fees for such services, including per hour fees as determined by First American. Without limiting the foregoing, First American shall have the absolute and unconditional right to introduce new fees or increase Debit Transaction Fees, EBT Transaction Fees or Debit Network Fees, and any other fees for any reason when deemed appropriate in First American's sole discretion. First American may charge a fee not less than thirty dollars (\$30.00) for a change of depository bank account or name change by MERCHANT. First American shall charge a fee not less than fifty dollars (\$50.00) for shipping and handling on equipment exchanges or swaps.

**27. Debit Surcharge.** MERCHANT must not impose a surcharge on any debit/EBT transaction. MERCHANT will be liable for all fines, fees or damages that may be assessed to First American by the debit/EBT networks or any other association or network as a result of any such surcharging by MERCHANT.

**28. Variances.** If in MERCHANT's processing, there is a variance from the information, amounts or percentages included, represented, or disclosed by MERCHANT in the Merchant Profile Section of the Merchant Application & Agreement as approved by First American or if First American determines that such variance may otherwise be detrimental to First American then First American shall have no obligation to pay MERCHANT any settlement funds until MERCHANT has provided to First American documentation sufficient for First American to determine that the variance is verified, legitimate, and First American's risk has been mitigated. MERCHANT further acknowledges that First American, at its sole discretion, may hold or delay settlement of funds, suspend MERCHANT's processing, terminate this Agreement, or require MERCHANT to run a return/credit on a sale without or without notice upon the occurrence of any of the events specified above. MERCHANT shall immediately contact First American in writing if variances occur from the information, amounts or percentages included, represented, or disclosed by MERCHANT in the Merchant Profile Section of the Merchant Application & Agreement as approved by First American. For purposes hereof, First American's determination shall be binding upon MERCHANT. MERCHANT hereby releases, indemnifies and holds First American harmless for any losses or damage it may incur as a result of First American's actions hereunder, or as a consequence of the settlement funds being held, delayed or suspended. MERCHANT also agrees to pay all bank fees associated with processing any transaction, regardless if funds are held, delayed, suspended or if MERCHANT is required to run a return/credit.

**29. Merchant Reserve Account.** First American may require MERCHANT or any guarantor to establish a reserve account against current and future indebtedness for any reason. Any reserve will be held by First American for a period of time as is consistent with First American's liability. First American may immediately estimate the amount of the potential losses, fees, and costs and require MERCHANT or any guarantor to establish a reserve account for the full amount of the estimate. Payment of the reserve estimate shall be immediate. Failure to fund the reserve may result in immediate termination of the Agreement. MERCHANT also understands and agrees, First American may withhold and retain any and all settlement funds in order to establish a Merchant Reserve Account without notice to MERCHANT. MERCHANT understands and agrees that all reserve funds held will be placed in a non-interest bearing account.

This Agreement will constitute a security agreement under the Uniform Commercial Code. MERCHANT grants to Bank a security interest in and lien upon all of the following (collectively, the "Secured Assets"): (i) all funds at any time in the designated account, (ii) the reserve account, (iii) future sales transactions, (iv) all funds, deposits, deposit accounts, moneys, securities, and other property now or hereafter in the possession of or on deposit with, or in transit to Bank or any other direct or indirect subsidiary or affiliate of Bank, whether held in a general or special account or deposit, whether held jointly with someone else, or whether held for safekeeping or otherwise, excluding, however, all IRA, Keogh, and trust accounts; and (v) all of MERCHANT's rights relating to this Agreement including, without limitation, all rights to receive any payments or credits under this Agreement. MERCHANT warrants and represents that no other person or entity has a security interest in the Secured Assets. These security interests and liens will secure all of MERCHANT's obligations under this Agreement and any other agreements between MERCHANT and Bank, including but not limited to MERCHANT's obligation to pay any amounts due to Bank. With respect to such security interests and liens, Bank will have all rights afforded under the Uniform Commercial Code, any other applicable law and in equity and the right to perfect such security interests as required by the Uniform Commercial Code. In addition to the security interests in the Secured Assets, Bank shall have, a contractual right of setoff against the Secured Assets without notice to MERCHANT.

**30. Governmental Reporting Requirements.** MERCHANT acknowledges and agrees that all information provided in the Agreement is true and correct. MERCHANT also acknowledges that First American may be required to report certain information regarding MERCHANT including but not limited to MERCHANT's TIN, Entity Name, DBA, processing volume, principal's Social Security Number to governmental agencies such as the Internal Revenue Service (IRS). MERCHANT agrees to fulfill any request from First American for additional information which may be required or requested by any government agency. Notwithstanding the foregoing, MERCHANT understands that First American may be required to withhold processing funds and forward such funds to the IRS as a result of incorrect information provided by MERCHANT or at the direction of a government agency. MERCHANT expressly agrees and releases First American from any and all liability hereunder resulting from incorrect information being submitted to any government agency and/or the withholding of funds. MERCHANT is responsible for any fines or penalties which may be assessed to MERCHANT and/or First American.

**31. Guarantor.** Any guarantor hereby guarantees performance of all obligations of MERCHANT and agrees that First American may require performance of any obligation of MERCHANT hereunder directly from guarantor.

**32. Amendments.** First American has the right to amend this Agreement, by notice to MERCHANT. Any amendments shall become effective no earlier than ten (10) days from date of notice.

**33. Taxes.** MERCHANT shall pay and be responsible for all sales, use, value added, and other taxes and duties, of whatever nature levied or imposed as a result of this Agreement or in connection with any services hereunder.

**34. Indemnification.** MERCHANT hereby releases, indemnifies and holds First American harmless for any losses, claims, costs or damages to MERCHANT or any third party as a result of First American's acts or omissions under this Agreement, including, as a consequence of First American's own negligence. The indemnification provisions herein shall survive the termination of this Agreement.

**35. Counterparts.** This Agreement may be executed in counterparts, including facsimile counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same agreement.

**36. Waiver.** The parties and any guarantor expressly waive the right and agree not, to bring or participate in, any class action or joinder or consolidation of claims with respect to any dispute under or relating to this Agreement, including in any arbitration. ALL PARTIES TO THIS AGREEMENT HEREBY **WAIVE TRIAL BY JURY** IN ANY ACTION, PROCEEDING, SUIT, CLAIM, COUNTERCLAIM OR THIRD PARTY CLAIM BROUGHT BY THE PARTIES HERETO ON ANY MATTER ARISING OUT OF OR OTHERWISE RELATED TO OR CONNECTED WITH THIS AGREEMENT.

**37. Severability.** In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement will continue in full force and effect and the illegal, invalid or unenforceable provision is modified to give effect to the original intent consistent with being valid and enforceable under applicable law.

**38. Notices.** If to First American, all written notices under this agreement shall be delivered to:

First American Payment Systems  
100 Throckmorton Street, Suite 1800  
Fort Worth, TX 76102

If to MERCHANT, the proper notice shall be the address stated on the records of First American. Notice to Merchant may be by facsimile and/or the Monthly Merchant Statement.

If such transmitted notice is by MERCHANT to First American, the original of any communication shall also be mailed to First American on the date of the transmission and it shall not be deemed served until the mailed copy is received and confirmed by First American.

**39. Survival.** Any and all provisions of this Agreement that impose or could be construed to impose a continuing obligation, duty, or requirement upon MERCHANT including, but not limited to indemnification, PCI DSS Compliance, and chargeback liability, shall survive the expiration or termination, for any reason, of this Agreement.



## Check Services Terms & Conditions

The following Check Services Terms & Conditions apply only if you have agreed to accept Secur-Chex® Check Services.

THIS AGREEMENT is made by and between First American Payment Systems, L.P. ("Secur-Chex" or "First American") and "MERCHANT," whose name and address are stated on the Merchant Application & Agreement and shall become effective upon approval by Secur-Chex. Secur-Chex® is a DBA of First American Payment Systems, L.P. First American may adjust or amend the Maximum Guarantee Amount with or without notice to Merchant prior to approving the Agreement.

WHEREAS, Secur-Chex is engaged in the business of providing electronic check conversion, verification and if elected, guarantee for participating MERCHANTS under the programs herein described;

WHEREAS, MERCHANT wishes to participate in this check conversion, verification and/ or guarantee program under the rules and in accordance with this agreement established by Secur-Chex; and

NOW, THEREFORE, in consideration of the mutual obligations and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, the parties agree to the following:

### AGREEMENTS

**1. Qualifying Check Requirements/Limitations to Guarantee.** In order for MERCHANT to receive guaranteed payment from Secur-Chex for any product, MERCHANT must ensure that the check and/or the original conversion receipt meets all of the Qualifying Check Requirements included in this Agreement:

- (a) Check must have received a valid authorization code;
- (b) The check must not have been previously negotiated or voided;
- (c) The check must be drawn on or payable through a federally insured depository financial institution, be machine readable MICR-encoded with the bank routing number, account number and check serial number printed on check;
- (d) The check must be drawn on the consumer's personal, non-corporate demand deposit account. A corporate check is defined as 1) "checks or sharedrafts that contain an Auxiliary On-Us Field in the MICR line"; and 2) "checks or sharedrafts in an amount greater than twenty-five thousand dollars (\$25,000)", or 3) as defined by NACHA ACH Rules;
- (e) MERCHANT shall obtain a written customer authorization (ie. original conversion receipt) in a form acceptable to Secur-Chex for each check transaction submitted for electronic conversion;
- (f) The date of the check and the date of the inquiry must be the same and must be the current date;
- (g) The check writer's name must be imprinted by the bank on the check;
- (h) The address must appear on the check. If there is a Guarantee Conversion - No Image relationship then it must appear on the original conversion receipt. P.O. Boxes are not acceptable for listed address. If it is not listed on the check it must be legibly handwritten on the check and original conversion receipt and match the address on the identification required;
- (i) All checks must be completely filled out by the check writer and made payable to the MERCHANT business name;
- (j) MERCHANT shall not accept any third party items or checks made payable to "cash" or "bearer" and MERCHANT shall not accept a traveler's check, money order, payroll check, counter check or sight draft;
- (k) The amount in words and figures must coincide and must match that of the inquiry amount;
- (l) The non-corporate check and the original conversion receipt must be signed by an individual whose name is imprinted on the check;
- (m) The signature on the check and/or original conversion receipt must correspond to the signature contained on the identification presented;
- (n) Check writer's work phone number must appear on the check or the original conversion receipt. If there is no work number, then the home phone number must appear or the words "no work phone" and "no home phone." The phone number may be legibly written if it is not imprinted;
- (o) MERCHANT must make an inquiry on the consumer's valid identification and receive an approval code obtained from Secur-Chex. The only acceptable forms of valid identification are a state issued drivers license or state issued identification card. Military and student I.D.s are not acceptable;
- (p) MERCHANT shall not submit a check for goods or services that are not concurrently provided to the customer, including, service contracts or similar transactions, or for goods or services provided to a third party;
- (q) Consumer's driver's license identification number and state of issue must appear on the front of the check or the original conversion receipt;
- (r) Checks must be accepted at the physical address shown on the Merchant Application & Agreement;
- (s) Checks must be for full amount or final payment amount of goods or services exchanged;
- (t) Any alterations on the checks must be initialed by the check writer;
- (u) MERCHANT shall not knowingly submit or convert a check on an account that Secur-Chex previously denied authorization;
- (v) MERCHANT is responsible for collecting all taxes at the time of sale and shall be responsible for paying all taxes collected to the appropriate authorities in a timely manner;
- (w) Checks or converted checks where only cash is exchanged, even if the check is

payable to MERCHANT, will not be guaranteed;

- (x) Secur-Chex will not guarantee payment for checks or converted checks returned for the following reasons: i. "stop payment" checks; ii. "Customer Advises Not Authorized, Notice Not Provided, Improper Source Document, or Amount of Entry Not Accurately Obtained from Source Document"; iii. "forgery", "lost" or "stolen" checks, unless an affidavit of forgery is provided with the submission form for the claim on these checks;
- iv. "signature irregular", "counterfeit", "refer to maker" or "tax levy" checks;
- (y) MERCHANT must deliver transactions to Secur-Chex, the day the check was authorized; and
- (z) Any fees assessed by Secur-Chex, which are unpaid, will invalidate ANY guarantee coverage.

Any check or conversion items that do not meet the requirements listed above will be deemed ineligible for guarantee, even if an authorization number is obtained. In the event a claim is paid and through collection or investigation of such claim Secur-Chex determines that the check did not meet the Qualifying Check Requirements or that the check fails under any requirements or procedures contained in this Agreement, Secur-Chex may debit the MERCHANT's account without notice the amount of such claim and send notice to MERCHANT following such action. MERCHANT's violation of any of the above procedures may invalidate coverage and all funds in the MERCHANT's account may be placed on hold.

**2. Guaranteed Conversion/Guaranteed Conversion Plus.** If MERCHANT has marked the Guaranteed Conversion or the Guaranteed Conversion Plus box on the MERCHANT Application & Agreement, then MERCHANT wishes to participate in the electronic check conversion with guarantee services provided by Secur-Chex. In accordance with the terms of this Agreement, Secur-Chex shall provide electronic check conversion services and guarantee payment to the MERCHANT for each check accepted by the MERCHANT during the term of this Agreement which meets the Qualifying Check Requirements in an amount up to, but not exceeding, the maximum guarantee amount designated herein (the "maximum guarantee amount").

If MERCHANT participates in the Guaranteed Conversion program, Secur-Chex may require MERCHANT, at its sole discretion, to provide the original conversion receipt for any transaction. The original receipt must meet the Qualifying Check Requirements, as described in this Agreement, and the legibly printed name and phone number for the check writer must appear on the authorization slip. If MERCHANT fails to provide original receipt within fourteen (14) days of request, Secur-Chex will not guarantee the converted item if dishonored for any reason. The maximum guarantee amount Secur-Chex will guarantee for Guaranteed Conversion is one thousand five hundred dollars (\$1,500.00). The maximum guarantee amount Secur-Chex will guarantee for Guaranteed Conversion Plus is seven thousand five hundred dollars (\$7,500.00).

**3. Check Guarantee (Paper-Based).** The following provisions apply only to MERCHANTS participating in the Check Guarantee (Paper-Based) program. All checks which meet the Qualifying Check Requirements received between the 1st and prior to the 15th of the month will be paid to the MERCHANT on the 1st of the following month or the first business day thereafter. All checks which meet the Qualifying Check Requirements received between the 16th and prior to the last day of the month will be paid to the MERCHANT on the 15th of the following month or the first business day thereafter. All checks must be deposited within three (3) business days of receipt. Secur-Chex reserves the right, at its sole discretion, to deny any claims for payment for checks submitted thirty (30) days after the date of the authorization or issuance. Secur-Chex reserves the right to investigate any check presented for payment and withhold payment pending resolution of any matters associated with determining whether or not the check meets the Qualifying Check Requirements. The maximum guarantee amount Secur-Chex will guarantee for Check Guarantee is seven thousand five hundred dollars (\$7,500.00).

**4. Check Guarantee for Corporate Checks (Paper-Based).** The following provisions apply only to MERCHANTS participating in the Check Guarantee for Corporate Checks (Paper-Based) program. In addition to the Qualifying Check Requirements, all Corporate Checks must be approved with the correct and current business phone number as answered and listed in the business' name. Business checks approved in any other manner will be excluded from guarantee coverage. The valid I.D. of the person presenting the business check must be written on the check. All checks which meet the Qualifying Check Requirements received between the 1st and prior to the 15th of the month will be paid to the MERCHANT on the 1st of the following month or the first business day thereafter. All checks which meet the Qualifying Check Requirements received between the 16th and prior to the last day of the month will be paid to the MERCHANT on the 15th of the following month or the first business day thereafter. All checks must be deposited within three (3) business days of receipt. Secur-Chex reserves the right, at its sole discretion, to deny any claims for payment for checks submitted thirty (30) days after the date of the authorization or issuance. Secur-Chex reserves the right to investigate any check presented for payment and withhold payment pending resolution of any matters associated with determining whether or not the check meets the Qualifying Check Requirements. The maximum guarantee amount Secur-Chex will guarantee for Corporate Checks is seven thousand five hundred dollars (\$7,500.00).

**5. A La Carte.** The following options are available under the A La Carte - Custom Features for Check Guarantee (Conversion and Paper-Based) program for an additional fee:

- (a) Bank Fee Reimbursement: Any check submitted for a claim with an itemized statement from MERCHANT's bank showing the fees charged for the unpaid item will be



paid the fees charged by MERCHANT's bank in addition to the qualifying amount of the check submitted for a claim. The bank form must clearly show the fees, identify the item on which fees are paid, and state the bank name to qualify for this feature. No copies of the bank form are acceptable; it must be an original bank notice. This benefit has a maximum guarantee amount of twenty-five dollars (\$25.00) per item submitted for claims. All other Qualifying Check Requirements must be followed in order to qualify for this benefit.

(b) No Fault Coverage: Any check or check conversion which meets the Qualifying Check Requirements submitted for a claim, will be paid, even if the item is missing one or more of the following guarantee requirements: date not current; the amount in words and figures does not agree; the check writer's home phone and work phone numbers or the words "no home phone" and "no work phone" do not appear on the check; check writer's date of birth, identification number, state of identification or approval code obtained do not appear on the check; or any alterations not initiated by the check writer. Only the exceptions listed apply to this benefit. All other Qualifying Check Requirements must be followed in order to qualify for this benefit.

(c) 7 Day Claims Pay: All check claims submitted that meet the Qualifying Check Requirements will be paid within seven (7) days of receipt of the MERCHANT's claims by Secur-Chex. All other Qualifying Check Requirements must be followed in order to qualify for this benefit.

(d) Stop Payment Coverage: Any check or check conversion which meets the Qualifying Check Requirements submitted for a claim that is marked "stop payment" will be paid like any other claim, up to ten percent (10%) of the maximum guarantee amount of guarantee. Secur-Chex will contact the check writer to determine if a dispute exists between MERCHANT and the check writer. In the event that the check writer confirms a dispute, then MERCHANT must assist Secur-Chex in validation and collection efforts, to the extent Secur-Chex requests such assistance. In the event MERCHANT does not assist, as requested by Secur-Chex, then any payment on the claim will be reversed and an ACH debit made to MERCHANT's DDA account on file with Secur-Chex. All other Qualifying Check Requirements must be followed in order to qualify for this benefit.

To qualify under any of the A La Carte - Customized Check Guarantee programs, MERCHANT must meet the Qualifying Check Requirements, follow all procedures and comply with the terms of this Agreement.

**6. Electronic Check Conversion.** If MERCHANT has chosen Electronic Check Conversion, then MERCHANT understands that Secur-Chex will provide check verification, electronic check conversion, and certain collection services and will not guarantee or be liable in any way for any returned checks of MERCHANT or its customers for any reason. MERCHANT also agrees and understands that Secur-Chex does not in any way guarantee the accuracy, timeliness or validity of the check verification process and further understands that a valid authorization code IS NOT a guarantee of payment from check writer.

**7. Check Verification (Paper-Based).** If MERCHANT has chosen Check Verification (Paper-Based), then MERCHANT understands that Secur-Chex will provide check verification only and will not guarantee or be liable in any way for any returned checks of MERCHANT or its customers for any reason. MERCHANT also agrees and understands that Secur-Chex does not in any way guarantee the accuracy, timeliness or validity of the check verification process and further understands that a valid authorization code IS NOT a guarantee of payment from check writer.

**8. Additional Locations.** MERCHANT must complete an Additional Location Form for each additional MERCHANT location. MERCHANT expressly agrees and acknowledges that each MERCHANT location shall be governed by these Merchant Processing Terms & Conditions and the Merchant Application & Agreement, including and without limitations the rates and fees described therein, which may be amended from time to time.

**9. Secur-Chex Bank Verification Statement.** Upon initial installation of new equipment or reprogramming of existing equipment, MERCHANT agrees to the following: (i) MERCHANT shall run a test transaction to ensure equipment functionality, (ii) Verify the accuracy of receipt information, and (iii) MERCHANT shall verify proper deposit into MERCHANT's DDA accounts in no less than four (4) banking days and no more than six (6) banking days from the time of the first valid customer transaction. MERCHANT shall immediately notify Secur-Chex in writing of any failure of the above within ten (10) banking days. Failure to notify Secur-Chex within said time frames shall result in Secur-Chex being relieved of any liability and responsibility for any equipment failure or misrouted funds.

**10. Term; Termination.** This AGREEMENT shall continue in full force and effect for a term of three (3) years from acceptance by First American/Secur-Chex. If Secur-Chex services are added as an additional service to an existing First American Credit Card Processing Agreement in good standing, your Secur-Chex approval date will reflect the approval date of the existing Credit Card Processing Agreement. Thereafter, this AGREEMENT will automatically renew for additional one-year periods unless terminated per this paragraph or other provisions of this AGREEMENT. The initial term of this Agreement shall commence upon Secur-Chex's acceptance hereof (as evidenced by Secur-Chex's performance hereunder) and continue until either (i) terminated by MERCHANT by giving at least thirty (30) days, but no more than ninety (90) days, written notice of non-renewal to Secur-Chex with termination effective at the end of the applicable term or (ii) terminated by Secur-Chex, with or without cause or reason, and with or without notice. Termination by Secur-Chex for any service may result in the termination of all services. If this Agreement is terminated by MERCHANT without proper notice, Secur-Chex will be entitled to recover, and MERCHANT will pay on demand, any and all losses (including consequential damages and loss of profits, costs, expenses and liabilities) incurred by Secur-Chex in connection with termination. **MERCHANT agrees to pay Secur-Chex an Early Termination Fee established by Secur-Chex, but in no event less than one hundred dollars (\$100.00), for each plus any and all losses (including consequential damages and loss of profits, costs, expenses and liabilities) incurred**

**by Secur-Chex in connection with termination.** First American may withhold payment of any monies due MERCHANT to insure that all obligations of MERCHANT are satisfied. MERCHANT remains liable for any and all unpaid amounts due under this obligation or related to this entire Agreement.

**11. Rules and Regulations.** MERCHANT agrees to be bound by all state and federal laws. This Agreement shall also be subject to the Operating Rules of the National Automated Clearing House Association. MERCHANT agrees not to submit any check or conversion transaction that will violate applicable state and federal laws or rules of the National Automated Clearing House Association. Such rules and regulations incorporated herein by this reference and may be amended from time to time. Any violation in these laws or rules may be subject to fines by the governing body.

**12. Transaction Records.** If MERCHANT has chosen Electronic Check Conversion with Guarantee - Image, MERCHANT agrees to electronically capture, store, and deliver to Secur-Chex an image of each check, daily. MERCHANT agrees to retain the original conversion receipt for a period of two (2) years and shall make available, upon request by Secur-Chex, a copy of such receipt. In addition, MERCHANT agrees to balance and deliver to Secur-Chex all transactions on each POS terminal used, by midnight of the day Secur-Chex authorizes the transaction. MERCHANT acknowledges that failure to deliver transactions on the day the check was authorized, will delay funds being deposited and may result in a loss of guarantee coverage.

**13. Debit/Credit Authorization.** MERCHANT hereby grants authorization to Secur-Chex to credit and/or debit MERCHANT's account for chargebacks, fees imposed and for claim reimbursement payments pursuant to automated electronic debit or credit via the automated clearinghouse ("ACH"). MERCHANT agrees to provide a preprinted voided check for proper and accurate set up of bank and account information as well as ACH. MERCHANT will maintain sufficient funds in account to satisfy all obligations, including fees, contemplated by this Agreement. Any change in account status or information or lack of funds during any attempted ACH shall give Secur-Chex the right to terminate this Agreement immediately without notice to MERCHANT. MERCHANT acknowledges that Secur-Chex will monitor MERCHANT's daily deposit, chargeback and settlement activity. MERCHANT agrees that Secur-Chex has a right of offset and may take all steps necessary to collect amounts owed by MERCHANT. These steps include offsetting uncollected amounts against amounts due to MERCHANT under this, or any other First American agreement. In addition, MERCHANT agrees that Secur-Chex may, upon reasonable grounds, divert the disbursement of MERCHANT's funds for any reasonable period of time required to investigate unusual or suspicious activity. Secur-Chex shall have no liability for any losses, claims or damages, which MERCHANT may attribute to said diversion of funds. All diverted funds shall be deposited immediately into a non-interest bearing account and will not be released until such time as suspicious transactions have been resolved to the satisfaction and at the sole discretion of Secur-Chex.

**14. Offset and Security Interest.** MERCHANT hereby grants Secur-Chex a right of offset against any amounts now or hereafter owing to MERCHANT under this or any other agreement with First American or held by First American and agrees that all such amounts may be applied to payment of any obligations now or hereafter owing by MERCHANT to Secur-Chex, whether due or not, and in such order as Secur-Chex may elect, and for this purpose Secur-Chex may withdraw via ACH or otherwise hold or apply any accounts, funds or amounts in its discretion. In addition to and independent of all other rights and remedies available to Secur-Chex, including, without limitation, the right of offset, whether created by this Agreement or otherwise, MERCHANT hereby grants to Secur-Chex a security interest in all accounts, funds, and amounts of any description whatever, whether now or hereafter owing to MERCHANT under this or any other agreement with First American, and all proceeds thereof, to secure payment of any obligation now or hereafter owing from MERCHANT to Secur-Chex, and with respect to the security interest herein granted, Secur-Chex shall have all of the rights and remedies of a secured party under the Uniform Commercial Code. MERCHANT authorizes Secur-Chex to file such financing statement, as Secur-Chex may deem appropriate to perfect the security interest granted herein. MERCHANT agrees to provide additional collateral or security upon the request of Secur-Chex. The rights of Secur-Chex under this security interest shall be independent of and cumulative of any rights of offset. All of the rights of Secur-Chex shall survive the termination of this Agreement.

**15. Schedule of Fees and Compensation of Secur-Chex.** Attached to this Agreement under the section of the Agreement entitled "Secur-Chex Check Services" and incorporated herein by reference is a schedule of fees that contains a programming fee, a voice authorization fee, a transaction fee, a guarantee rate fee, a minimum per check fee, a monthly minimum fee, a statement fee, an uncollectible item fee and any other fee(s) in effect at the signing of this Agreement. Without limiting the foregoing, Secur-Chex shall have the absolute and unconditional right to introduce new fees or increase fees, with or without notice, for any reason when deemed appropriate in Secur-Chex's sole discretion. Added after sentences above as continuation: Secur-Chex shall have the right to adjust charges as necessary to offset any direct or indirect increase to Secur-Chex in the costs of providing services hereunder including, but not limited to, costs associated with collection and administration of returned checks, fees charged by other providers in processing, increases in the cost of living index or changes in rules, regulations, or operating procedures of the National Automated Clearing House Association or other applicable association/organization, charges for changes to merchant accounts or information, adjustments in foreign exchange rates, or any additional requirement imposed by any federal or state governmental agency or regulatory authority, or due to any increases in processing costs charged to Secur-Chex. Such charges shall, without prior notice, become effective as of the date of charge. Without limiting the foregoing, Secur-Chex shall have the absolute and unconditional right to introduce new fees and increase fees for any reason when deemed appropriate in Secur-Chex's sole discretion. MERCHANT understands and agrees that Secur-Chex reserves the right to assess any associated fees not previously specified in the "Secur-Chex Check Services" section of the Merchant Application & Agreement that are billed to Secur-Chex



as a result of the device(s) or software used by MERCHANT communicating with any third party host. Secur-Chex may charge a fee not less than thirty-five dollars (\$35.00) for a change of depository bank account or a change of name by MERCHANT. Upon any request from MERCHANT for copies of file information, account research, or other information, Secur-Chex may charge fees for such services, including per hour fees as determined by Secur-Chex. Any fees assessed by Secur-Chex, which are unpaid, will invalidate ANY guarantee coverage. Fees not collected within the month of billing will accrue interest at the maximum rate allowed by law per month, beginning on the first day of the month following the billing month until all fees and accrued interest are paid in full. Each month Secur-Chex shall provide the MERCHANT with an itemized statement containing accumulated conversion and guarantee charges based on MERCHANT's inquiries and the amount of such statement shall be paid by MERCHANT to Secur-Chex via ACH. In the event the ACH for collection of fees owed to Secur-Chex is rejected by the MERCHANT's bank, MERCHANT agrees to pay Secur-Chex a reject fee of no less than thirty dollars (\$30.00) and no more than fifty dollars (\$50.00). These fees shall be paid by MERCHANT to Secur-Chex via ACH. MERCHANT must notify Secur-Chex in writing of any errors on any statement within ninety (90) days after mailing the first statement on which the error or problem appeared or failed to appear. MERCHANT agrees to examine all statements upon receipt and to verify all credits and debits to any account against all transaction, bank statements and other information indicating activity of Secur-Chex and MERCHANT subject to or relating to this Agreement or Secur-Chex's obligations hereunder. Save and except Secur-Chex's right to funds owed Secur-Chex under this Agreement or Secur-Chex's right to funds incorrectly paid to MERCHANT, if no notice of error is received within the ninety (90) day period, the account shall be deemed correct and MERCHANT shall have no recourse for errors. National Automated Clearing House Association fines assessed as a result of MERCHANT failing to follow procedures will be passed through to the MERCHANT.

**16. MERCHANT Cooperation.** MERCHANT and its employees shall cooperate with Secur-Chex's collection efforts, including working with local law enforcement, on checks and converted items guaranteed hereunder and further acknowledges full assignment of all rights in and to the instrument to Secur-Chex and its assigns. Secur-Chex shall have the right to pursue collection, including the filing of suit, if necessary, of any guaranteed item hereunder. In addition, the MERCHANT agrees to sign a separate assignment form on any instrument, as well as provide any documentation associated with the transaction, upon request by Secur-Chex. MERCHANT hereby agrees that failure to provide requested documents will result in the non-guarantee of a returned item.

**17. Responsibility and Liability of MERCHANT.** MERCHANT shall assume the responsibility and the risk of ascertaining the validity and comparing signatures of any identification presented to MERCHANT in connection with the making of a check in which a check conversion or guarantee authorization has been obtained by Secur-Chex. MERCHANT understands that Secur-Chex cannot and does not warrant the connectivity, performance of equipment, or quality of services as a result of any Voice over Internet Protocol ("VoIP") or similar type service. MERCHANT agrees that Secur-Chex is not responsible for, and MERCHANT accepts full responsibility for issues that may arise when utilizing VoIP or similar service, including but not limited to: failure to obtain authorizations, batching, settlement, equipment, equipment/Software installation, communications, downloads and internet connectivity. Further, MERCHANT acknowledges it will not make any claim against Secur-Chex for any losses or damages, including, but not limited to, loss of income, loss of revenue, economical loss, consequential, direct, indirect, special, exemplary, or punitive relating to the use or connectivity of any VoIP or similar services.

**18. Record Retention.** MERCHANT understands that it is a federal violation for MERCHANT to process debit requests against a consumer bank account without the electronic check writer's expressed authority and consent. MERCHANT shall retain all records related to this authorization, including all sales and credit receipts, original conversion receipt and the authorization agreements for a period of two (2) years following the date of the transaction. MERCHANT shall produce such original records within twenty (20) days of request by Secur-Chex.

**19. Use of MERCHANT Name.** MERCHANT hereby authorizes Secur-Chex to utilize, in advertisements or otherwise, the name of MERCHANT as being a Secur-Chex user.

**20. Collection Reimbursement.** Checks which meet the Qualifying Check Requirements up to the maximum guarantee amount are paid an amount equal to the full face value of the check. Checks which meet the Qualifying Check Requirements over the maximum guarantee amount are paid up to the maximum guarantee amount. For collections made by Secur-Chex, which are in excess of the maximum guarantee amount, MERCHANT will receive a reimbursement payment equal to seventy percent (70%) of such excess collection. Collection attempts on all checks over the maximum guarantee amount will be limited to ninety (90) days from the date of submission of the claim on the check. MERCHANT agrees that Secur-Chex shall be entitled to all collection costs, damages and fees against the check writer or account holder that are allowed by law. If MERCHANT collects directly from the check writer on a previously paid claim, the claim amount and a collection fee will be debited from MERCHANT's account via ACH.

**21. Goodwill of a Returned Item.** Secur-Chex, in its discretion, may voluntarily reimburse MERCHANT for a specific Returned Item. Secur-Chex's election to reimburse a Returned Item(s) shall not act as a waiver of Secur-Chex's right to decline to pay any other Returned Items.

**22. Attorneys' Fees and Costs.** MERCHANT shall be liable for and shall indemnify and reimburse Secur-Chex for any and all attorneys' fees, arbitration cost, and other costs and expenses paid or incurred by Secur-Chex in the enforcement hereof, including but not limited to, collecting any amounts or obligations due from MERCHANT.

**23. Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Texas applicable to agreements made and to be performed entirely within such state without regard to the conflicts of law principles of such state. The parties hereby agree that venue of any action under this agreement

shall be exclusively in the state courts of Tarrant County, Texas.

**24. Arbitration.** Without resort to any form of class, collective or representative action, or joinder or consolidation of claims, any dispute, controversy, or claim arising out of or relating to this Agreement, including any breach hereof, shall be resolved by arbitration in the City of Fort Worth, Tarrant County, Texas, pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

**25. Amendment.** Secur-Chex has the right to amend this Agreement, by notice to MERCHANT. Any amendments shall become effective no earlier than ten (10) days from date of notice.

**26. Assignment.** Subject to Secur-Chex's right of amendment upon notice, any of the terms, provisions, representations, warranties, covenants, or conditions hereof may be amended, only by a written instrument executed by all parties hereto, or, in the case of a waiver, by the party waiving compliance. The failure of any party at any time to require performance of any provision hereof shall not constitute a waiver and in no manner affect the right to enforce the same. The rights and obligations of MERCHANT hereto may not be assigned or ownership of MERCHANT transferred without the prior written consent of Secur-Chex.

**27. Indemnification.** MERCHANT does hereby indemnify and hold harmless Secur-Chex from and against any claims, damages, actions, costs or expenses, including reasonable attorney's fees and costs of court for any breach by MERCHANT or any of its employees, agents, independent contractors or customers, of any provision of this Agreement, for failure to submit checks which meet or do not meet the Qualifying Check Requirements, and for third party claims resulting from or arising out of, Secur-Chex exercising any rights under this Agreement, or in connection with, the indemnifying party's failure to comply with the terms of this Agreement. The indemnification provisions herein shall survive the termination of this Agreement.

**28. Limitations on Liability.** Secur-Chex shall be responsible for the performance of ACH processing services as a third-party provider in accordance with the terms of this Agreement. MERCHANT agrees that Secur-Chex shall not be responsible for any errors, acts, omissions, negligence, failures to act, intentional conduct, delays or losses unless caused by Secur-Chex's gross negligence or willful misconduct. Any liability of Secur-Chex shall be limited to the amount of fees paid by MERCHANT to Secur-Chex for check conversion or check guarantee services for the previous twelve (12) months. In no event shall Secur-Chex be liable for punitive, special, consequential or indirect damages in connection with any service performed under this Agreement. Secur-Chex's limitations of liability shall survive termination of this agreement.

**29. Limitation of Damages.** Secur-Chex shall not be liable for special, consequential, exemplary, or punitive damages. In no event shall Secur-Chex's cumulative liability to MERCHANT hereunder, including as a result of Secur-Chex's or any processor's own negligence, breach or error, exceed the amount of processing fees paid by MERCHANT to Secur-Chex for the transaction in question.

**30. Waiver.** The parties and any guarantor expressly waive the right and agree not, to bring or participate in, any class action or joinder or consolidation of claims with respect to any dispute under or relating to this Agreement, including in any arbitration. ALL PARTIES TO THIS AGREEMENT HEREBY **WAIVE TRIAL BY JURY** IN ANY ACTION, PROCEEDING, SUIT, CLAIM, COUNTERCLAIM OR THIRD PARTY CLAIM BROUGHT BY THE PARTIES HERETO ON ANY MATTER ARISING OUT OF OR OTHERWISE RELATED TO OR CONNECTED WITH THIS AGREEMENT.

**31. Guarantor.** Any guarantor hereby guarantees performance of all obligations of MERCHANT and agrees that Secur-Chex may require performance of any obligation of MERCHANT hereunder directly from guarantor.

**32. Taxes.** MERCHANT shall pay and be responsible for all sales, use, value added, and other taxes and duties, of whatever nature levied or imposed as a result of this Agreement or in connection with any services hereunder.

**33. Counterparts.** This Agreement may be executed in counterparts, including facsimile counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same agreement.

**34. Severability.** In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this Agreement will continue in full force and effect and the illegal, invalid or unenforceable provision is modified to give effect to the original intent consistent with being valid and enforceable under applicable law.

**35. Notices.** All written notices under this Agreement shall be delivered to:

Secur-Chex  
100 Throckmorton Street, Suite 1800  
Fort Worth, TX 76102

If to MERCHANT, the proper notice shall be the address stated on the records of Secur-Chex.

**36. Survival.** Any and all provisions of this Agreement that impose or could be construed to impose a continuing obligation, duty, or requirement upon MERCHANT including, but not limited to indemnification, offset and limitation on liability, shall survive the expiration or termination, for any reason, of this Agreement.

**37. Entire Agreement.** This Agreement, when executed by both Secur-Chex and MERCHANT, shall constitute the entire agreement as between the parties, and shall supersede and cancel all prior offers and negotiations whether in writing or otherwise.



## Processing Terms & Conditions

The following FirstPay.Net Processing Terms & Conditions apply only if you have agreed to utilize FirstPay.Net™ 2.0 Internet Services.

This Supplement is entered into by and between First American Payment Systems, L.P., whose principal place of business is 100 Throckmorton Street, Suite 1800, Fort Worth, Texas, 76102 (hereinafter referred to as "FirstPay.Net"), and "MERCHANT," whose name and address are stated on the Merchant Application & Agreement. FirstPay.Net™ is a DBA of First American Payment Systems, L.P. For purposes of this Agreement, FirstPay.Net and First American Payment Systems, L.P. shall be synonymous and reference to one includes reference to the other.

MERCHANT expressly agrees and acknowledges that the FirstPay.Net Processing Terms & Conditions are a Supplement to the Merchant Credit Card Processing Terms & Conditions. The Merchant Credit Card Processing Terms & Conditions, which are incorporated herein by reference, and the Processing Terms & Conditions set forth below shall apply if MERCHANT has agreed to utilize the FirstPay.Net products.

MERCHANT understands that if a conflict exists between the provisions of the Merchant Credit Card Processing Terms & Conditions and the FirstPay.Net Terms & Conditions – Supplement, the FirstPay.Net Terms & Conditions contained herein shall control.

### Products:

**A. Moto Virtual Terminal.** If MERCHANT has marked the "Moto Virtual Terminal" box on the Merchant Application & Agreement, then MERCHANT agrees to utilize the software and services provided by FirstPay.Net for the acceptance and transmission of cardholder data for its customer's purchase of goods and services when the purchase and cardholder information has been provided to MERCHANT via telephone or in written form via mail. MERCHANT understands the "Moto Virtual Terminal" is a secure virtual terminal. MERCHANT also understands that transactions processed utilizing this product do not contain an e-commerce indicator and that all customer orders for purchases must be obtained via the telephone or by mail.

**B. Internet Payment Gateway.** If MERCHANT has marked the "Internet Payment Gateway" box on the Merchant Application & Agreement, then MERCHANT agrees to utilize the software and services provided by FirstPay.Net for the acceptance of and transmission of cardholder data for its customer's purchase of goods and or services via the Internet. MERCHANT understands that the "Internet Payment Gateway" consists of a payment gateway and virtual terminal for transmitting cardholder data with an e-commerce indicator via the Internet.

**C. Total Package.** If MERCHANT has marked the "Total Package" box on the Merchant Application & Agreement, then MERCHANT understands that the Total Package contains the MOTO Virtual Terminal and Internet Payment Gateway as described in A. and B. above, as well as a shopping cart and website templates.

**D. Batch Upload (Offline Transactions Only).** If MERCHANT has marked the "Batch Upload" box on the Merchant Application & Agreement, then MERCHANT agrees to utilize the software and services provided by FirstPay.Net for the offline acceptance of and transmission of cardholder data for its customer's purchase of goods and or services.

**1. Transaction Processing.** FirstPay.Net agrees to perform transaction-processing services for MERCHANT. This includes the acceptance and authorization of transactions forwarded from MERCHANT in a timely manner, the subsequent transmission of transactions to the processing network and the detailed reporting of those transactions via MERCHANT's web-based Merchant Menu.

**2. Fees.** In addition to the fees outlined in the Credit Card Processing Terms & Conditions, MERCHANT hereby authorizes FirstPay.Net to initiate debit/credit entries to the bank account supplied or any other bank account number, for monthly or other applicable charges. This billing will occur once each month regardless of the number of days in which services were actually performed for that month. MERCHANT understands and agrees there are additional fees associated with using the FirstPay.Net products, in addition to the fees described in the Merchant Credit Card Processing Terms & Conditions – Rates; Fees; Adjustments section.

**3. Acceptable Use Policy.** MERCHANT will not engage in "Net Abuse", which can be defined as, but is not limited to: (i) sending any kind of unsolicited or unwelcome email to a substantial number of network users, anywhere on the Internet, (ii) posting a single article or substantially similar articles to an excessive number of newsgroups or mailing lists (i.e., 20 or more), (iii) repeated or deliberate posting of articles that are off-topic according to the charter of that newsgroup or mail list, (iv) posting commercial advertising in almost any conference or newsgroup, unless it is specifically permitted within that group. MERCHANT understands that FirstPay.Net investigates all reported occurrences of Net Abuse, and will

take action according to the circumstances and severity of the abuse. Depending on the severity of the breach of this policy, FirstPay.Net may, at its sole discretion, with or without notice, suspend processing or terminate account immediately.

**4. Indemnification.** MERCHANT hereby releases, indemnifies, and holds FirstPay.Net harmless for any losses, claims, cost or consequential damages to MERCHANT, purchaser, or any other third party as a result of FirstPay.Net's acts or omissions under this Agreement, including but not limited to:

- (a) Any delays in the performance of services hereunder or for any failure to perform same hereunder if such delays are due to strikes, inclement weather, acts of God, Internet disruption, network failure, or other causes beyond FirstPay.Net's reasonable control. FirstPay.Net will not be liable for performance of services where delayed by war, riots, embargoes, strikes, or acts of its vendors and suppliers, concealed acts of workmen or third parties (whether of FirstPay.Net or others), criminal conduct, or accidents;
- (b) FirstPay.Net shall not be responsible or liable for unauthorized access of facilities or to MERCHANT's data or programs due to any intentional act or accident, and whether by illegal or fraudulent means or devices;
- (c) Failures in software, whether known or not known;
- (d) Failures in communications or connectivity;
- (e) Any damage caused by or resulting in a loss from negligence, fraud, dishonesty, or willful behavior by MERCHANT's employees, customers or agents;
- (f) FirstPay.Net shall not be liable for the individual merit, legitimacy or authenticity of orders forwarded from MERCHANT regardless if an authorization number is issued; and
- (g) FirstPay.Net is not responsible for the security of data residing on the server of the MERCHANT, or a third party designated by a MERCHANT (e.g., a host).

**5. Transaction Data.** FirstPay.Net shall retain full ownership of all data submitted by either MERCHANT or Purchaser through the FirstPay.Net Payment Gateway (Payment Gateway refers to the electronic systems through which a MERCHANT may pass payment information to FirstPay.Net) including, but not limited to name, mailing & shipping address, email address, phone number, dollar amount of purchase, type of purchase and description of purchase. Cardholder data is stored for ninety (90) days in the virtual terminal.

**6. Validity.** If any provision in this Agreement is invalid, such invalidity shall not affect the validity of the remaining provisions of this Agreement, and MERCHANT and FirstPay.Net agree to substitute for the invalid provision a valid provision that most closely approximates the effect and intent of the invalid provision.

**7. Payment Gateway Monitoring.** MERCHANT understands that FirstPay.Net has full authority and rights under this Agreement to deny orders, transactions or halt processing of transactions, with or without notice, for transactions, which exceed any of the parameters set forth in the Merchant Profile Section of the Merchant Application & Agreement.

**8. DISCLAIMER.** FIRSTPAY.NET DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. MERCHANT ACKNOWLEDGES THAT THE SERVICE MAY NOT BE UNINTERRUPTED OR ERROR FREE.



# FirstAdvantage™

The First Choice for Gift & Loyalty

## Processing Terms & Conditions

The following Processing Terms & Conditions apply only if you have agreed to utilize FirstAdvantage™ Gift Card Program.

THIS AGREEMENT is made by and between First American Payment Systems, L.P. ("FirstAdvantage" or "First American") and "MERCHANT," whose name and address are stated on the Merchant Application & Agreement and shall become effective upon approval by FirstAdvantage. FirstAdvantage is a DBA of First American Payment Systems, L.P.

WHEREAS, FirstAdvantage is engaged in the business of providing electronic gift card transaction processing services for participating merchants under the programs herein described;

WHEREAS, MERCHANT wishes to participate in this gift program under the rules and in accordance with this AGREEMENT established by FirstAdvantage; and

NOW, THEREFORE, in consideration of the mutual obligations and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, the parties agree to the following:

**1. Agreement.** Reference to "this AGREEMENT" includes all schedules, appendices, Merchant Application & Agreement, additional location documentation, any terms and conditions, and any other documents requested by FirstAdvantage. MERCHANT acknowledges that FirstAdvantage will provide transaction processing services hereunder through First American or other third parties. MERCHANT agrees that First American may perform the functions of FirstAdvantage hereunder and that First American may receive the benefits of and enforce the terms of this AGREEMENT against MERCHANT and any third party as an assignee of FirstAdvantage's rights hereunder, whether or not FirstAdvantage is a party to such proceeding or transaction.

### **2. Services.**

**A. Cards.** FirstAdvantage will produce Cards in the quantities ordered by MERCHANT from time to time for the fees set forth on the FirstAdvantage Application.

**B. System.** FirstAdvantage will maintain an electronic method of capturing data relevant to MERCHANT'S Cards and the availability of funds on the Cards. FirstAdvantage will also provide access to web interfaces allowing MERCHANT and MERCHANT'S customer access to their pertinent data.

**C. Operation of System.** FirstAdvantage will operate the System to enable MERCHANT to sell and redeem electronic gift cards for the fees set forth in the Fee Schedule on the FirstAdvantage Application. This will include downloading System software onto the terminals designated by MERCHANT, providing authorizations of transactions for Cardholders and tracking monetary value assigned to Cards. FirstAdvantage will maintain an accessible electronic record of the transactions for a period of sixty (60) days. MERCHANT understands that all monetary values assigned to each Card and collection of funds from Cardholders are the sole responsibility of MERCHANT and that FirstAdvantage will have no responsibility or liability for any monetary transaction between Cardholder and MERCHANT.

### **3. System License.**

**A. License.** FirstAdvantage grants to MERCHANT a non-exclusive, non-transferable, limited license to use the System in the United States for MERCHANT'S own electronic gift card program and to install the System on point-of-sale terminals agreed to by FirstAdvantage.

**B. Restrictions.** MERCHANT shall have no right to obtain source code for the System by any means. MERCHANT shall not reverse engineer, decompile, disassemble, translate, modify, alter or change the System, or any part thereof. Except as set forth in this AGREEMENT, MERCHANT shall have no right to market, distribute, sell, deliver or otherwise transfer the System. MERCHANT shall not copy, nor allow others to copy, any part of the System. MERCHANT shall not remove from the System, or add or alter, any trademarks, trade names, logos, patent or copyright notices, or other notices or markings, or add any other notices or markings to the System unless written consent is given by FirstAdvantage. MERCHANT shall not permit any person to use the System in violation of the export control laws of the United States.

**C. Indemnity.** MERCHANT assumes all liability for use of the System.

**4. Additional Locations.** MERCHANT must complete an Additional Location Form for each additional MERCHANT location. MERCHANT expressly agrees and acknowledges that each MERCHANT location shall be governed by these Merchant Processing Terms & Conditions and the Merchant Application & Agreement, including and without limitations the rates and fees described therein, as may be amended from time to time.

**5. FirstAdvantage Verification Statement.** Upon initial installation of new equipment or reprogramming of existing equipment, MERCHANT agrees to run a test transaction to ensure equipment functionality. MERCHANT shall immediately notify FirstAdvantage in writing of any failure of the above within ten (10) banking days. Failure to notify FirstAdvantage within said time frames shall result in FirstAdvantage being relieved of any liability and responsibility for any equipment or transaction failure.

**6. Warranties by MERCHANT.** MERCHANT warrants that it shall fully comply with all federal, state, and local laws, rules, and regulations, as amended from time to time.

As to each gift card sale presented to FirstAdvantage for processing, MERCHANT warrants that:

(a) MERCHANT understands and agrees that the FirstAdvantage Services require additional charges to be billed directly by FirstAdvantage to MERCHANT, payable pursuant to paragraph 8 listed below.

(b) By signing this AGREEMENT, MERCHANT will indemnify, protect, defend and hold FirstAdvantage, affiliates and/or subsidiaries and all of its or their officers, agents and/or employees, harmless from and against any and all claims, losses, demands, actions, expenses, damages, liability, and/or causes of action, including, without limitation attorneys' fees, other costs of defense and/or collection fees, which in any way result directly or indirectly from any damage or loss caused by negligence, fraud, dishonesty or willful behavior by MERCHANT or any of MERCHANT'S employees, customers, or agents.

(c) MERCHANT shall supply to FirstAdvantage all information and data reasonably required from time to time by FirstAdvantage to perform the Services, including the dollar value to be attributed to each card, each card transaction, the location of point-of-sale terminals and cardholder data and content as may be agreed upon by the parties from time to time and within the time necessary to perform the Services promptly.

(d) MERCHANT will be responsible for the accuracy and adequacy of all data transmitted by it or on its behalf for processing by the System.

(e) MERCHANT warrants to FirstAdvantage that MERCHANT is engaged in the lawful business shown on any agreement with FirstAdvantage which includes the sale of merchandise and/or services, and is duly licensed to conduct such business under the laws of the state, county and city in which MERCHANT is located.

(f) MERCHANT agrees not to change its type of business, without the express written consent of FirstAdvantage.

**7. Term; Termination.** This AGREEMENT shall continue in full force and effect for a term of three (3) years from acceptance by First American/FirstAdvantage. If FirstAdvantage services are added as an additional service to an existing First American Credit Card Processing Agreement in good standing, your FirstAdvantage approval date will reflect the approval date of the existing Credit Card Processing Agreement. Thereafter, this AGREEMENT will automatically renew for additional one-year periods unless terminated per this paragraph or other provisions of this AGREEMENT. The initial term of this AGREEMENT shall commence upon FirstAdvantage's acceptance hereof (as evidenced by FirstAdvantage's performance hereunder) and continue until either (i) terminated by MERCHANT by giving at least thirty (30) days, but no more than ninety (90) days, written notice of non-renewal to FirstAdvantage with termination effective at the end of the applicable term or (ii) terminated by FirstAdvantage, with or without cause or reason, and with or without notice. Termination by FirstAdvantage for any Service may result in the termination of all Services. If this AGREEMENT is terminated by MERCHANT without proper notice, FirstAdvantage will be entitled to recover, and MERCHANT will pay on demand, any and all losses (including consequential damages and loss of profits, costs, expenses and liabilities) incurred by FirstAdvantage in connection with termination. MERCHANT agrees to pay FirstAdvantage a de-conversion fee established by FirstAdvantage, but in no event less than one hundred dollars (\$100.00) for each MERCHANT location. MERCHANT authorizes FirstAdvantage to debit any account for said de-conversion fees, plus any and all losses (including consequential damages and loss of profits, costs, expenses and liabilities) incurred by FirstAdvantage in connection with termination. First American may withhold payment of any monies due MERCHANT to insure that all obligations of MERCHANT are satisfied. MERCHANT remains liable for any and all unpaid amounts due under this obligation or related to this entire AGREEMENT.

**8. Debit/Credit Authorization.** MERCHANT hereby grants authorization to FirstAdvantage to credit and/or debit MERCHANT'S account for fees imposed via the automated clearing house ("ACH"). MERCHANT agrees to provide a preprinted voided check for proper and accurate set up of bank and account information as well as ACH. MERCHANT will maintain sufficient funds in account to satisfy all obligations, including fees, contemplated by this AGREEMENT. Any change in account status or information or lack of funds during any attempted ACH shall give FirstAdvantage the right to terminate this AGREEMENT immediately without notice to MERCHANT. MERCHANT agrees that FirstAdvantage has a right of offset and may take all steps necessary to collect amounts MERCHANT owes. These steps include offsetting uncollected amounts against amounts due MERCHANT under this, or any other First American Agreement.

**9. Offset and Security Interest.** MERCHANT hereby grants FirstAdvantage a right of offset against any amounts now or hereafter owing to MERCHANT under this or any other agreement with First American or held by First American and agrees that all such amounts may be applied to payment of any obligations now or hereafter owing by MERCHANT to FirstAdvantage, whether due or not, and in such order as FirstAdvantage may elect, and for this purpose FirstAdvantage may withdraw via ACH or otherwise hold or apply any accounts, funds or amounts in its discretion. In addition to and independent of all other

rights and remedies available to FirstAdvantage, including, without limitation, the right of offset, whether created by this AGREEMENT or otherwise, MERCHANT hereby grants to FirstAdvantage a security interest in all accounts, funds, and amounts of any description whatever, whether now or hereafter owing to MERCHANT under this or any other agreement with First American, and all proceeds thereof, to secure payment of any obligation now or hereafter owing from MERCHANT to FirstAdvantage, and with respect to the security interest herein granted, FirstAdvantage shall have all of the rights and remedies of a secured party under the Uniform Commercial Code of Texas as may be amended or supplemented from time to time. MERCHANT authorizes FirstAdvantage to file such financing statements, as FirstAdvantage may deem appropriate to perfect the security interest granted herein. MERCHANT agrees to provide additional collateral or security upon the request of FirstAdvantage. The rights of FirstAdvantage under this security interest shall be independent of and cumulative of any rights of offset. All of the rights of FirstAdvantage shall survive the termination of this AGREEMENT.

**10. Schedule of Fees and Compensation of FirstAdvantage.** Attached to this AGREEMENT and incorporated herein by reference is an Application containing the Schedule of Fees that may be amended or supplemented from time to time, and that contains an account setup fee, transaction fee, account maintenance fee and any other fee(s) in effect during the term of this AGREEMENT. Fees not collected within the month of billing will accrue interest at the maximum rate allowed by law per month, beginning on the first day of the month following the billing month until all fees and accrued interest are paid in full. Each month FirstAdvantage shall provide MERCHANT with an itemized statement containing accumulated gift charges based on MERCHANT'S activity and the amount of such statement shall be paid by MERCHANT to FirstAdvantage via ACH. In the event the ACH for collection of fees owed to FirstAdvantage is rejected by MERCHANT'S bank, MERCHANT agrees to pay FirstAdvantage a reject fee of no less than thirty dollars (\$30.00). These fees shall be paid by MERCHANT to FirstAdvantage via ACH. MERCHANT must notify FirstAdvantage in writing of any errors on any statement within ninety (90) days after mailing the first statement on which the error or problem appeared or failed to appear. MERCHANT agrees to examine all statements upon receipt and to verify all credits and debits to any account against all transaction, bank statements and other information indicating activity of FirstAdvantage and MERCHANT subject to or relating to this AGREEMENT or FirstAdvantage's obligations hereunder. Save and except FirstAdvantage's right to funds owed FirstAdvantage under this AGREEMENT or FirstAdvantage's right to funds incorrectly paid to MERCHANT, if no notice of error is received within the 90 day period, the account shall be deemed correct and MERCHANT shall have no recourse for errors.

**11. Use of MERCHANT Name.** MERCHANT hereby authorizes FirstAdvantage to utilize, in advertisements or otherwise, the name of MERCHANT as being a FirstAdvantage user.

**12. Attorneys' Fees and Costs.** MERCHANT shall be liable for and shall indemnify and reimburse FirstAdvantage for any and all attorneys' fees, arbitration cost, and other costs and expenses paid or incurred by FirstAdvantage in the enforcement hereof, including but not limited to, collecting any amounts or obligations due from MERCHANT.

**13. Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Texas applicable to agreements made and to be performed entirely within such state without regard to the conflicts of law principles of such state. The parties hereby agree that venue of any action under this agreement shall be exclusively in the state courts of Tarrant County, Texas.

**14. Arbitration.** Without resort to any form of class, collective or representative action, or joinder or consolidation of claims, any dispute, controversy, or claim arising out of or relating to this Agreement, including any breach hereof, shall be resolved by arbitration in the City of Fort Worth, Tarrant County, Texas, pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

**15. Force Majeure.** FirstAdvantage is released from liability hereunder for failure to perform any of the obligations herein where such failure to perform occurs by reason of any acts of any other party or third party or any acts of God, fire, flood, storm, earthquake, tidal wave, computer or communications failure, software failure, program failure, network problem, sabotage, war, military operation, national emergency, mechanical or electrical breakdown, civil commotion, or the order, requisition, request, or recommendation of any governmental agency or acting governmental authority, or FirstAdvantage's compliance therewith or government proration, regulation, or priority, or any other cause beyond FirstAdvantage's reasonable control whether similar or dissimilar to such causes.

**16. Amendment.** FirstAdvantage has the right to amend this AGREEMENT, by notice to MERCHANT. Any amendments shall become effective no earlier than ten (10) days from date of notice.

**17. Assignment.** Subject to FirstAdvantage's right of amendment upon notice, any of

the terms, provisions, representations, warranties, covenants, or conditions hereof may be amended, only by a written instrument executed by all parties hereto, or, in the case of a waiver, by the party waiving compliance. The failure of any party at any time to require performance of any provision hereof shall not constitute a waiver and in no manner affect the right to enforce the same. The rights and obligations of MERCHANT hereto may not be assigned or ownership of MERCHANT transferred without the prior written consent of FirstAdvantage.

**18. Indemnification.** MERCHANT hereby releases, indemnifies and holds FirstAdvantage harmless for any losses, claims, costs or damages to MERCHANT, MERCHANT'S customers or any third party, including without limitation FirstAdvantage, as a result of FirstAdvantage's acts or omissions under this AGREEMENT, including, as a consequence of FirstAdvantage's own negligence. The indemnification provisions herein shall survive the termination of this Agreement.

**19. Limitations on Liability.** FirstAdvantage shall be responsible for the performance of Services described in this AGREEMENT. MERCHANT agrees that FirstAdvantage shall not be responsible for any errors, acts, omissions, negligence, failures to act, intentional conduct, delays or losses unless caused by FirstAdvantage's gross negligence or willful misconduct. Any liability of FirstAdvantage shall be limited to the amount of fees paid by MERCHANT to FirstAdvantage for gift card Services for the previous twelve (12) months. In no event shall FirstAdvantage be liable for punitive, special, consequential or indirect damages in connection with any Service performed under this AGREEMENT. FirstAdvantage's limitations of liability shall survive termination of this AGREEMENT.

**20. Limitation of Damages.** FirstAdvantage shall not be liable for special, consequential, exemplary, or punitive damages. In no event shall FirstAdvantage's cumulative liability to MERCHANT hereunder, including as a result of FirstAdvantage's or any processor's own negligence, breach or error, exceed the amount of processing fees paid by MERCHANT to FirstAdvantage for the transaction in question.

**21. Waiver.** The parties and any guarantor expressly waive the right and agree not, to bring or participate in, any class action or joinder or consolidation of claims with respect to any dispute under or relating to this Agreement, including in any arbitration. ALL PARTIES TO THIS AGREEMENT HEREBY **WAIVE TRIAL BY JURY** IN ANY ACTION, PROCEEDING, SUIT, CLAIM, COUNTERCLAIM OR THIRD PARTY CLAIM BROUGHT BY THE PARTIES HERETO ON ANY MATTER ARISING OUT OF OR OTHERWISE RELATED TO OR CONNECTED WITH THIS AGREEMENT.

**22. Disclaimer.** FirstAdvantage disclaims all warranties, express or implied, written or oral, including but not limited to warranties of MERCHANT ability and fitness for a particular purpose. MERCHANT acknowledges that the Service may not be uninterrupted or error free.

**23. Guarantor.** Any guarantor hereby guarantees performance of all obligations of MERCHANT and agrees that FirstAdvantage may require performance of any obligation of MERCHANT hereunder directly from guarantor.

**24. Taxes.** MERCHANT shall pay and be responsible for all sales, use, value added, and other taxes and duties, of whatever nature levied or imposed as a result of this AGREEMENT or in connection with any Services hereunder.

**25. Counterparts.** This AGREEMENT may be executed in counterparts, including facsimile counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same AGREEMENT.

**26. Severability.** In the event that any provision of this AGREEMENT or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remainder of this AGREEMENT will continue in full force and effect and the illegal, invalid or unenforceable provision is modified to give effect to the original intent consistent with being valid and enforceable under applicable law.

**27. Notices.** All written notices under this AGREEMENT shall be delivered to:

FirstAdvantage  
100 Throckmorton Street, Suite 1800  
Fort Worth, TX 76102

If to MERCHANT, the proper notice shall be the address stated on the records of FirstAdvantage.

**28. Survival.** Any and all provisions of this Agreement that impose or could be construed to impose a continuing obligation, duty, or requirement upon MERCHANT including, but not limited to indemnification and limitation on liability, shall survive the expiration or termination, for any reason, of this Agreement.

**29. Entire Agreement.** This AGREEMENT, when executed by both FirstAdvantage and MERCHANT, shall constitute the entire AGREEMENT as between the parties, and shall supersede and cancel all prior offers and negotiations whether in writing or otherwise.



**American Express**

The following applies only if you have applied to accept American Express.

The Terms & Conditions for American Express Card Acceptance will be sent to the business entity indicated on the First American Merchant Application & Agreement along with the welcome letter upon approval of such business entity to accept the American Express Card by American Express Travel Related Services Company, Inc. By accepting the American Express Card for the purchase of goods and/or services, you agree to be bound by the Terms & Conditions of American Express.

# AMERICAN EXPRESS

## U.S. MERCHANT PRICING - QUICK REFERENCE CARD

Industry	Discount Rate
Retail**	2.89% plus \$0.10 Transaction Fee*
Services, Wholesale & All Other	2.89% plus \$0.15 Transaction Fee*
Restaurant	3.50% plus \$0.05 Transaction Fee* (for MCC 5811, 5812 and 5813)
Mail Order & Internet	3.50%
Lodging	3.50%
Office-based Healthcare	2.55% (only for MCC 8011,8021; for all other Healthcare see Services, Wholesale & All Other)
Supermarket	2.30%
Travel Agency	2.75%
Travel & Transportation	3.50%
Tuition	2.40%

\*Fee to be applied by American Express

\*\*0.30% downgrade will be charged for Retail transactions whenever a CNP or Card Not Present Charge occurs.

CNP means a Charge for which the Card is not presented at the point of purchase (e.g., Charges by mail, telephone, fax or the Internet), is used at unattended Establishments (e.g., customer activated terminals, called CATs, or for which the transaction is key-entered).

RETAIL	RETAIL (CONTINUED)	SERVICES, WHOLESALE & ALL OTHER (CONTINUED)	SERVICES, WHOLESALE & ALL OTHER (CONTINUED)
ANTIQUE REPRODUCTION (5937)	STAMP/COIN STORE (5972)	ELECTRICAL CONTRACTOR (1731)	TAILOR/SEAMSTRESS (5697)
ANTIQUE SHOP (5932)	SWIMMING POOLS (5996)	ELECTRICAL EQUIPMENT (5065)	TAX PREPARATION (7276)
ART DEALER/GALLERY (5971)	TENT AND AWNING STORE (5998)	ELECTRONICS REPAIR (7622)	TELEGRAPH SERVICE (4821)
ARTIST SUPPLY/CRAFT (5970)	TYPEWRITER STORE (5978)	EMPLOYMENT AGENCY (7361)	TESTING LABORATORY (8734)
AUTO/HOME SUPPLY (5531)	USED MERCHANDISE (5931)	EQUIPMENT RENTAL (7394)	TICKET AGENCY (7922)
AUTO PARTS/ACCESSORY (5533)	VARIETY STORE (5331)	EXTERMINATE DISINFECT (7342)	TIRE REPAIR (7534)
AUTO SUPPLIES/PARTS (5013)	VIDEO RENTAL STORE (7841)	FABRICS (Wholesale) (5131)	TOURIST ATTRACTION (7991)
AUTOMOTIVE TIRE STORE (5532)	WATCH/JEWELRY REPAIR (7631)	FLORIST'S SUPPLIES (5193)	TOWING SERVICE (7549)
BAKERY (5462)	WHOLESALE ALCOHOL (5715)	FREIGHT/MOVING (4214)	TRADE VOCATIONAL SCHOOL (8249)
BICYCLE SHOP (5940)	WIG AND TOUPEE STORE (5698)	FUEL DEALER (5983)	TYPESETTING SERVICE (2791)
BOAT DEALER (5551)	WOMEN'S ACCESSORIES (5631)	FUNERAL SERVICE (7261)	VETERINARY SERVICE (0742)
BOOK STORE (5942)	WOMEN'S CLOTHING (5621)	FURNITURE REPAIR (7641)	VIDEO GAME ARCADE (7994)
BOOKS/NEWSPAPERS (5192)		GENERAL CONTRACTOR (1520)	VIDEO GAME SUPPLY (7993)
CAMERA/PHOTO SUPPLY (5946)	<b>SERVICES, WHOLESALE &amp; ALL OTHER</b>	HEALTH/BEAUTY SPA (7298)	VIDEO PRODUCTION (7829)
CANDY/CONFECTIONERY (5441)	AC/REFRIG REPAIR (7623)	HEARING AIDS (5975)	WAREHOUSING/STORAGE (4225)
CARD/SOUVENIR STORE (5947)	ACCOUNTING/AUDITING (8931)	HEATING PLUMBING AC (1711)	WELDING SERVICE (7692)
CATALOG SHOWROOM (5965)	ADVERTISING SERVICE (7311)	HOSPITAL (8062)	WHOLESALE CLUB (5300)
CHILDREN'S CLOTHING (5641)	AGRICULTURAL CO-OP (0763)	INDUSTRIAL SUPPLY (5085)	WINE PRODUCER (0743)
CIGAR STORE STAND (5993)	AMBULANCE SERVICE (4119)	INSURANCE SALES (6300)	WRECKING/SALVAGE (5935)
CLOTHING RENTAL (7296)	AMUSEMENT PARK (7996)	JEWELRY/WATCHES (Wholesale) (5094)	
COMPUTER STORE (5734)	APPLIANCE REPAIR (7629)	LANDSCAPE HORTICULTURE (0780)	<b>RESTAURANT</b>
CONVENIENCE STORE (5499)	AQUARIUM (7998)	LAUNDRY SERVICE (7211)	BAR NIGHTCLUB (5813)
COSMETIC STORE (5977)	ARCHITECT/ENGINEER (8911)	LEGAL SERVICE (8111)	CATERER (5811)
DAIRY PRODUCTS STORE (5451)	AUTO BODY REPAIR (7531)	MARINE SERVICE SUPPLY (4468)	FAST FOOD RESTAURANT (5814)
DEPARTMENT STORE (5311)	AUTO DEALER - NEW/USED (5511)	MASONRY/TILE/INSULATE (1740)	RESTAURANT (5812)
DISCOUNT STORE (5310)	AUTO DEALER - USED (5521)	MEDICAL/DENTAL LAB (8071)	
DRAPERY UPHOLSTERY (5714)	AUTO PAINT SHOP (7535)	MEDICAL EQUIPMENT (5047)	<b>MAIL ORDER &amp; INTERNET</b>
DRUG STORE PHARMACY (5912)	AUTO SERVICE (7538)	MEDICAL SERVICE (8099)	CATALOG MERCHANDISE (5964)
DUTY-FREE STORE (5309)	AUTOMOBILE ASSOC (8675)	MEMBERSHIP CLUB (7997)	DIRECT MKTG INTERNET (5967)
ELECTRIC RAZOR STORE (5997)	BEAUTY BARBER SHOP (7230)	MEMBERSHIP ORGS (8699)	DIRECT MKTG MISC (5969)
ELECTRONICS STORE (5732)	BILLIARD/POOL (7932)	METAL SERVICE CENTER (5051)	SUBSCRIPTIONS (5968)
FAMILY CLOTHING (5651)	BOAT RENTAL (4457)	MGMT CONSULTING PR (7392)	
FIREPLACE ACCESSORIES (5718)	BOWLING ALLEY (7933)	MISC CLEANING PRODUCT (2842)	<b>LODGING</b>
FLOOR COVERING STORE (5713)	BUSINESS SERVICE (7399)	MISC CONTRACTOR (1799)	CAMPGROUND (7033)
FLORIST (5992)	BUYING SHOPPING CLUBS (7278)	MISC ENTERTAINER (7929)	LODGING (7011)
FREEZER/LOCKER MEAT (5422)	CAMPER TRAILER DEALER (5561)	MISC PERSONAL SERVICE (7299)	
FURNITURE HOME STORE (5712)	CAR WASH (7542)	MISC REPAIR SHOP (7699)	<b>OFFICE-BASED HEALTHCARE</b>
FURRIER AND FUR SHOP (5681)	CARPENTRY CONTRACTOR (1750)	MISC VEHICLE DEALER (5599)	DENTIST ORTHODONTIST (8021)
GENERAL MERCHANDISE (5399)	CARPET CLEANING (7217)	MOBILE HOME DEALER (5271)	DOCTOR PHYSICIAN (8011)
GLASS/PAINT/WALLPAPER (5231)	CHAMPAGNE PRODUCER (0744)	MOTOR HOME DEALER (5592)	
GLASSWARE/CRYSTAL (5950)	CHARITABLE ORG (8398)	MOTORCYCLE DEALER (5571)	<b>SUPERMARKET</b>
HARDWARE EQUIPMENT (5072)	CHEMICALS (5169)	MOVIE THEATER (7832)	GROCERY STORE (5411)
HARDWARE STORE (5251)	CHIROPRACTOR (8041)	NON-DURABLE GOODS (5199)	
HOBBY/TOY/GAME (5945)	CIVIC/SOCIAL ASSOC (8641)	NURSING PERSONAL CARE (8050)	<b>TRAVEL AGENCY</b>
HOME SUPPLY WAREHOUSE (5200)	CLEANING GARMENT (7210)	OFFICE SUPPLIES (Wholesale) (5111)	TRAVEL AGENCY (4722)
HOUSEHOLD APPLIANCES (5722)	CLEANING JANITORIAL (7349)	OPTICIAN (8043)	
JEWELRY/WATCH/SILVERWARE (5944)	COMMERCIAL CLOTHING (5137)	OPTOMETRIST (8042)	<b>TRAVEL/TRANSPORTATION</b>
LAWN GARDEN SUPPLIES (5261)	COMMERCIAL FOOTWEAR (5139)	ORTHOPEDIC PROSTHETIC (5976)	AIRPORT/TERMINAL (4582)
LIQUOR STORE (5921)	COMMERCIAL PHOTO ART (7333)	OSTEOPATH (8031)	BUS LINE (4131)
LUGGAGE LEATHER GOODS (5948)	COMMERCIAL SPORTS (7941)	PAINTS/VARNISHES (Wholesale) (5198)	MISC TRANSPORTATION (4789)
LUMBER/BUILDING (5211)	COMMERCIAL EQUIPMENT (5046)	PARKING LOT/GARAGE (7523)	TAXICAB/LIMOUSINE (4121)
MEN'S CLOTHING (5611)	COMPUTER MAINTENANCE (7379)	PAWN SHOP (5933)	
MEN'S/WOMEN'S CLOTHING (5691)	COMPUTER PROGRAMMING (7372)	PHOTO FINISHING (7395)	<b>TUITION</b>
MISC APPAREL STORE (5699)	COMPUTERS/EQUIPMENT (Wholesale) (5045)	PHOTOGRAPHIC STUDIO (7221)	CHILD CARE SERVICE (8351)
MISC HOME FURNISHINGS (5719)	CONCRETE WORK (1771)	PLUMBING HEATING (5074)	COLLEGE UNIVERSITY (8220)
MISC SPECIALTY RETAIL (5999)	CONSTRUCTION MATERIAL (5039)	PODIATRIST (8049)	RECREATION CAMP (7032)
MUSIC STORE (5733)	COPY REPRODUCTION (7338)	PROFESSIONAL SERVICE (8999)	SCHOOL (8211)
NEWS DEALER/NEWSSTAND (5994)	CORRESPONDENCE SCHOOL (8241)	PUBLISHING/PRINTING (2741)	
OFFICE EQUIPMENT (5044)	COUNSELING SERVICE (7277)	RECREATION SERVICE (7999)	
OFFICE FURNITURE (5021)	COURIER SERVICE (4215)	RELIGIOUS ORG (8661)	
OFFICE SUPPLY STORE (5943)	CREDIT REPORTING (7321)	ROOFING/SIDING (1761)	
PET SHOP/FOOD/SUPPLY (5995)	DANCE HALL/SCHOOL (7911)	SECRETARIAL SCHOOL (8244)	
RECORD STORE (5735)	DIRECT MKTG INSURANCE (5960)	SECRETARIAL SUPPORT (7339)	
RELIGIOUS GOODS STORE (5973)	DRUGS (5122)	SHOE REPAIR/SHINE (7251)	
SEWING/FABRIC STORE (5949)	DRY CLEANER (7216)	SNOWMOBILE DEALER (5598)	
SHOE STORE (5661)	DURABLE GOOD (5099)		
SPORTING GOODS STORE (5941)	EDUCATIONAL SERVICE (8299)		
SPORTS CLOTHING (5655)			