

MIVAPAY

TERMS AND CONDITIONS OF USE

This Agreement ("Agreement") is entered between you ("Customer" or "you") and Miva, Inc., a California corporation ("Miva"). This Agreement sets forth the terms and conditions of your use of MivaPay (the "Service"), along with any amendments thereto and any operating rules or policies of Miva. By your use of the Service, you agree that you are: (1) eighteen years of age or older, (2) have the capacity and authority to enter into this Agreement, (3) have read and understand this Agreement, and agree to be bound by its terms. This Agreement shall become effective on the date (the "Effective Date") that your first payment for the Service is received and accepted by Miva, or upon your initiating use of the Service, whichever occurs first.

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements contained herein, Customer and Miva hereby agree as follows:

1. DEFINITIONS

Any capitalized terms used this Agreement, but not otherwise defined herein, shall have the meaning as defined below. For all purposes hereof:

"Admin." means the Miva Merchant Software Administration interface of Customer's Website.

"Billing Cycle" means the interval at which Miva charges Customer for the Service. The default Billing Cycle is monthly, although Customer may elect a quarterly or annual Billing Cycle, if made available by Miva.

"Customer's Account" means the combination of all account(s) through which Miva provides and bills for Miva Products and/or Services to Customer. If Customer has more than one website, for the purposes of this Agreement, "Customer's Account" shall mean all account(s), for all of Customer's websites, through which Miva provides and bills for Miva Products and/or Services to Customer.

"Customer Content" means any and all material developed, purchased, or otherwise acquired by Customer that is published, made available or otherwise used in conjunction with Customer's Website. Customer's Content includes, without limitation, Customer Data, as well as any and all text, graphics, videos, and other information or media, displayed on Customer's Website.

"Customer Data" means any data (including but not limited to cardholder data) received by the Service, from Customer or End User(s), as a result of Customer's or End Users(s)' access or use of the Service.

"Customer Website" means Customer's Internet presence, identified by the domain name provided, to Miva, by Customer.

"End User" means Customer's employee, customer, other individual affiliated with Customer, who is provided access to or use of the Service through Customer's Website.

"End User Account" means an account, authorized by Customer, or otherwise created through Customer's Website, through which an End User may access or use the Service.

"Miva Merchant Software" means Miva's ecommerce software, "Miva Merchant," including Miva's proprietary technology and source code therein, and any updates by Miva thereto.

"Miva Products and/or Services" means any and all products and/or services Miva may provide to Customer, including but not limited to Miva Merchant Software, hosting services, MivaPay, Managed Account Program ("MAP"), etc.

"Miva Technology" means all of Miva's proprietary technology that Miva makes available to Customer as part of, or in connection with, the Service (including, without limitation, any and all software, hardware, products, processes, APIs, algorithms, user interfaces, trade secrets, know-how, techniques, designs and other tangible or intangible technical material or information).

"Miva's Website" means Miva's corporate website, <http://www.miva.com/>.

"MivaPay" or "Service" means Miva's PCI-compliant cardholder data tokenization software-as-a-service ("**SaaS**"), known as "MivaPay," available for use in conjunction with Miva Merchant Software (versions 9.6 or later).

"Point of Contact" means the person designated, by Customer, to be Miva's sole point of contact for all official communications with Customer regarding this Agreement, including but not limited to billing for Miva Products and Services, and having full authority to enter into agreements and make binding decisions on behalf of Customer.

"Service Subscription" means Customer's subscription to MivaPay.

"Subscription Fee" or "Subscription Renewal Fee" means the recurring fee charged for Customer's use of MivaPay.

2. OWNERSHIP

A. Miva's Property. Miva owns and shall retain all rights, title, and interest in and to Miva Technology (and any and all copies, derivative works, extensions, or modifications thereof), including but not limited to copyright, patent, trademark, service mark, trade name, trade secret, and other worldwide intellectual property rights.

B. Customer's Property. Customer owns and shall retain all rights, title, and interest in and to Customer Data and Customer Content, including any and all copies, derivative works, extensions, or modifications thereof. Miva has no proprietary, financial, or other interest in Customer's Content, and Customer is solely responsible for the integrity, quality, performance, and all other aspects of Customer's Content. Customer warrants that it owns or has the right to use and offer Customer's Content in connection with Customer's Marks in the manner in which such Customer Content is offered and will be offered by Customer during the term of this Agreement.

3. RIGHTS & RESTRICTIONS OF USE

A. Rights Granted to Customer. Miva hereby grants, to Customer, a non-exclusive, non-transferrable, worldwide, royalty-free right to access and use the Service through Customer's Website, subject to the terms and conditions of this Agreement. Customer may allow its own customers, employees, or other individuals affiliated with Customer, to access or use the Service, through Customer's Website only. Any rights not expressly granted to Customer herein remain the exclusive rights of Miva.

B. Restrictions of Use. With exception to rights specifically granted to Customer, in section 3(A) above, Customer may not copy, modify, rent, resell, lease, sublicense, or transfer access to the Service to a third party. Customer is also expressly prohibited from: (1) creating derivative works of, or reverse engineering, the Service; (2) gaining unauthorized access to the Service or its related systems or networks; (3) interfering with the performance of the Service or the data contained therein; (4) using, storing, or sending any data or material, in connection with the Service, for which Customer lacks rights of ownership or use, or which contain computer code, files, scripts, agents, or programs, considered harmful or malicious; and (5) using Customer Data for marketing purposes, unless Customer has received the End User's consent for such use, and such use complies with all applicable local, state, and federal statutes, rules, and regulations, including but not limited to the Gramm-Leach Bliley Act, as well as payment network rules, and Customer's own privacy policy, which shall be easily accessible to End Users. Any of the above actions, by Customer, will constitute a material breach, and entitle Miva to terminate this Agreement, in accordance with section 7(B) below.

4. USE OF SERVICE

A. Miva Merchant Software. The Service works with both SaaS and on premise installations of Miva Merchant Software, versions 9.6 and later. Customer understands and acknowledges that Customer is expected to install any Miva Merchant Software updates within 90 days of release, or within 30 days of release if the Miva Merchant Software update has been identified as a security-related update. If Customer's Website is running outdated Miva Merchant Software, it will be subject to a monthly Non-Compliance Fee ("NCF"), beginning 30 days following the release of a security-related update, or 90 days following release of a standard update, until its Miva Merchant Software is brought current (see Miva's [Software Maintenance and End of Life Policy](#) for all terms and conditions).

B. MivaPay Subscription. Customer must subscribe to use the Service. Service Subscriptions are only available through Miva.

C. Third Party Software & Services. Use of MivaPay may require Customer's use of third party products or service (e.g. payment gateway, web browser, etc.), in connection with the Service. Any and all communications, purchases, subscriptions, use, and terms of use, of such third party products or services, are solely between Customer and the third party providers. Miva does not support, endorse, make any representations or warranties, or assume any liability for any third party products or services used in connection with MivaPay.

D. End User Accounts. Customer is responsible for all activity under End User Accounts, and all Customer Data received via End Users' accounts, and agrees to comply with all applicable federal, state, and local statutes, rules, and regulations, as well as payment network rules. Customer agrees to promptly notify Miva, upon discovering any misuse of the Service (including but not limited to those specific Restrictions of Use set forth in section 3(B) above), unauthorized use of Customer Data, or other breach of Service security.

5. WARRANTIES & DISCLAIMERS

A. Service Level Warranty (applies to Professional and Enterprise level Service Subscriptions only). Miva guarantees that the Service will be available 99.9% of the time in any given calendar month. The foregoing warranty shall not apply to any performance outages:

- i. That are scheduled by Miva for the purpose of maintaining or updating the Service or Customer's access to or use of the Service;
- ii. That resulted from any actions or omissions of Customer or any third parties;

- iii. That resulted from Customer's equipment and/or third party equipment;
- iv. That resulted from software related issues other than a bug in MivaPay or the Miva Merchant Software; or
- v. To the extent caused by factors outside of Miva's commercially reasonable control.

Upon experiencing network downtime above and beyond the 99.9% availability in any calendar month, Miva will issue a credit, to Customer's Account, equal to 5% of Customer's monthly Subscription Fee for MivaPay, for each 30 minutes of downtime (up to and not to exceed 100% of Customer's monthly Subscription Fee for MivaPay). Any such credit for network downtime will only apply to Customer's Subscription Fee allocable to Customer's Website affected by the downtime, for the month in which the downtime occurred.

Network downtime exists when a Customer is unable to transmit and receive data through the Service, and Miva records such failure in its service repair system. Network downtime is measured from the time service notification is received by Miva, from Customer, to the time the Service is once again able to transmit and receive data. Service notification may be made to Miva by submitting a ticket to Miva's Technical Assistance Center ("TAC"), through Miva's Website, the Admin., or by e-mailing support@miva.com; or, by calling Miva's TAC 24/7 telephone line at (800) 608-6482. Notification is deemed received by Miva as of the time stamp on the automatic reply generated for all ticket submissions, or in the case of a telephone call to our TAC telephone line, at the time in which your call enters our call queue (as recorded by our telephone system). If Customer fails to comply with this notice requirement, Customer forfeits the right to receive a service credit.

B. Security Warranty. Miva warrants that MivaPay securely stores and transfers all Customer Data in compliance with the PCI Security Standards Council's Payment Card Industry Data Security Standard ("PCI DSS"). The foregoing Security Warranty applies to Customer's use of MivaPay only, does not apply to any other Miva Products and/or Services, and is made to and for the benefit of Customer only. Notwithstanding, Miva is not responsible, and will not be liable, for any damage, deletion, or loss of Customer Data that does not arise from a breach by Miva of its obligations under this Agreement.

C. Disclaimers. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, MIVA MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. EXCEPT AND UNLESS OTHERWISE EXPRESSLY SET FORTH HEREIN, MIVAPAY IS PROVIDED BY MIVA ON AN "AS IS" AND "AS AVAILABLE" BASIS, AND MIVA NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR MIVA ANY OTHER LIABILITY IN CONNECTION WITH SAID SERVICE PROVIDED UNDER THIS AGREEMENT. MIVA WILL NOT BE RESPONSIBLE FOR CUSTOMER'S SALE OF PRODUCTS OR SERVICES, OR BILLING PRACTICES, AND ASSUMES NO RISK RELATED THERETO, INCLUDING BUT NOT LIMITED TO CREDIT CARD FRAUD OR CHARGEBACKS.

D. Customer's Warranty. Customer represents, warrants, and agrees that Customer's use of the Service, and any information gathered by it in connection with use of the Service, will be compliant with all applicable local, state, and federal statutes, rules, and regulations, and will be used in connection with the Service only.

6. FEES FOR SERVICE

A. Payment Method. Upon subscribing to the Services, Customer agrees to provide Miva with a credit or debit card, or set up electronic ACH (Automated Clearing House) ("Designated Payment Method"), for payment of any and all fees associated with the Services provided to Customer, and agrees to provide Miva with updated information, as needed.

B. Payment for Services. Customer agrees to pay all fees due according to the pricing and terms listed in any invoice Customer receives from Miva. Unless otherwise stated, all invoices from Miva are due on receipt, and invoices are deemed received when emailed, by Miva, to Customer's Point of Contact. Customer further agrees that its Subscription Fee for the Service is based on the current version of the Service, and is in no way contingent on Miva's delivery of any future features or functionality.

C. Billing Cycle. Customer's Billing Cycle begins on the Effective Date, and payment will be due on that day, each month thereafter ("Billing Cycle Due Date"). In the event that Services were first ordered on a day not contained in a given month, Customer's Billing Cycle Due Date for said month will be determined by Miva, in its sole discretion.

D. Recurring Fees. Customer's Service Subscription shall automatically renew, each month, on Customer's Billing Cycle Due Date, until terminated in accordance with section 7 of this Agreement. Customer authorizes Miva to automatically charge Customer's Designated Payment Method (provided as required in paragraph 6(A) above), for said Subscription Renewal Fees, as well as any other fees that you may incur in connection with your use of the Service.

E. Taxes. Subscription Fees for the Service are exclusive of all taxes and similar fees now in force or enacted in the future, for which Customer will be solely responsible and hereby agrees to pay in full (excluding any taxes based on Miva's net income). If applicable law requires Miva to pay such taxes directly, Customer will, upon receipt of Miva's invoice, promptly reimburse Miva for any such taxes paid by Miva.

F. Refunds. All payments for the Service are non-cancelable and non-refundable.

G. Non-Payment. If a payment is returned or rejected by Miva's bank, or if Miva incurs additional costs related to Customer's

payment, for any reason, then (i) Customer shall pay a service fee of \$40 and reimburse Miva for all such fees and costs incurred by Miva, and (ii) Customer shall be in default of this Agreement. If Customer's Account is not paid in full by the fifteenth day after an invoice is received by Customer, Miva reserves the right to interrupt or terminate the Customer's access to and use of the Service and to any other Miva Products and Services. Any such interruption does not relieve Customer of the obligation to pay all fees due to Miva, including, without limitation, Subscription Renewal Fees. Accounts and all amounts in default are subject to a late payment charge of 1.5% per month, or the maximum amount permitted by law, whichever is less, until fully paid. If Customer defaults, Customer agrees to pay Miva its reasonable expenses, including attorney and collection agency fees, incurred in enforcing its rights under this Agreement.

H. Pricing Changes. Miva reserves the right to adjust its pricing for the Service, following thirty (30) days' notice to Customer, by electronic mail ("e-mail"), by posting the pricing changes on Miva's Website, or by posting a notice in the Admin.

7. TERM OF AGREEMENT

A. Term. The term of this Agreement shall begin on the Effective Date, and shall continue until either party to this Agreement gives the non-terminating party written notice of its election to terminate this Agreement. Notice of termination must be given in accordance with section 14 below.

B. Termination for Breach. Either party to this Agreement shall have the right to terminate this Agreement, upon prior written notice, if the other party is in material breach of any term of this Agreement, including without limitation the payment of monies, and the breaching party fails to remedy such breach within thirty (30) days.

C. Account Cancellation; Termination of Agreement. Requests to cancel your account and terminate this Agreement must be sent to Miva, by e-mail to saas@miva.com. To ensure that you are not charged for another Billing Cycle of Service, you must cancel your account before your Billing Cycle Due Date.

D. Effects of Cancellation or Termination. Unless otherwise specified, all account cancellation requests are processed immediately, upon receipt. Regardless of the reason for termination of this Agreement, and regardless of which party initiated termination, Miva will not be obligated to retain Customer Data for longer than thirty (30) days following termination, and no prorated refund will be issued for an account cancellation or termination request received before the completion of a Billing Cycle.

8. MIVA'S ACCEPTABLE USE POLICY

A. Acceptable Use Policy. Customer agrees to abide by Miva's Acceptable Use Policy ("AUP"), as posted on Miva's Website. Miva may modify its AUP at any time, and shall post the then-current AUP on Miva's Website, which will be effective upon posting. Customer will be notified by Miva via e-mail when the AUP has changed. Miva strongly recommends that Customer carefully review the new AUP and its terms.

B. End Users to Comply with AUP. Customer acknowledges that Miva may terminate an End User's access to Customer's Website for non-compliance with Miva's AUP. Miva may terminate such End User's access to the Service and/or Customer's Content, even if End User has not violated Customer's own terms and conditions of use of Customer's Website. Decisions as to whether a violation of the AUP has occurred shall be made by Miva in its sole and absolute discretion. Miva acknowledges that Customer may terminate End User's access to the Service or Customer's Content for non-compliance with Customer's terms and conditions.

9. LIMITATION OF MIVA'S LIABILITY

MIVA ASSUMES NO RESPONSIBILITY REGARDING CUSTOMER'S OR END USERS' USE OF MIVAPAY, AND SHALL NOT BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, OR SPECIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF USE, BUSINESS INTERRUPTION, AND LOSS OF PROFITS, OR INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, EVEN IF MIVA IS AWARE OF (OR HAS BEEN INFORMED BY CUSTOMER OF) THE POSSIBILITY THEREOF. MIVA SHALL IN NO EVENT BE LIABLE FOR MORE THAN THE TOTAL FEES ACTUALLY RECEIVED BY MIVA FROM CUSTOMER, FOR THE SERVICE, DURING ANY 12-MONTH PERIOD.

10. LICENSE TO USE TRADE NAMES & TRADEMARKS

A. Customer's Marks. Customer hereby grants Miva a non-exclusive right and license to use, display, store, or reproduce Customer's name and such of Customer's trade names, trademarks, and service marks (collectively, "Customer's Marks") as are listed on Customer's Content or otherwise provided to Miva in connection with this Agreement. The license shall permit Miva to use Customer's Marks (i) on Miva's Website, (ii) in printed and online advertising, publicity, directories, newsletters, and updates describing Miva Products and/or Services, and, (iii) in applications reasonably necessary and ancillary to the foregoing.

B. Miva's Marks. Customer may use Miva's trade name, trademarks, and service marks (collectively, "Miva's Marks") in advertising and publicity in conjunction with the offering of Customer's Content via Miva; provided, however, that Customer shall submit a copy of its proposed use to Miva for its prior written approval; and provided further that under no circumstances shall such use imply that Miva endorses, sponsors, certifies, approves or is responsible for Customer's Content. Notwithstanding the foregoing, Customer need not obtain Miva's prior written approval where use of Miva's Marks is limited to inclusion in a list of systems through which Customer's Content is available; nor does Customer need to obtain Miva's prior written approval to the extent that Miva's

Marks may appear on the MivaPay interface, emails or other documentation generated by the Service. Miva reserves the right to include Miva's Marks on the MivaPay interface, emails or other documentation generated by the Service, which Customer agrees to maintain intact.

C. No Transfer of Ownership. Neither license granted in this section shall constitute a transfer of any ownership interest in either Customer's Marks or Miva's Marks.

11. CUSTOMER'S CONTENT

Customer acknowledges and agrees that Customer is solely responsible for ensuring the integrity of Customer's Content. Although Miva provides data backup services, Customer is advised that Miva is not responsible for any damages resulting from the loss of Customer's Content, regardless of the reason for such loss. Customer is solely responsible for backing-up and/or archiving Customer's Content. To the extent Customer Data includes cardholder data input into MivaPay, Customer understands and agrees that said Customer Data cannot be exported or transferred from MivaPay.

12. FORCE MAJEURE

With exception to payment obligations set forth herein, if either party to this Agreement is prevented from, or otherwise unable to, perform its obligations under this Agreement, due to causes beyond the party's reasonable control, including but not limited to war, act of terrorism, strike or labor dispute, embargo, government order, epidemic, earthquake, fire, flood, other natural disasters or acts of God (each a "Force Majeure Event"), said failure to perform its obligations shall not constitute a material breach of this Agreement, provided however, that said party shall make reasonable effort to immediately notify the other party of said Force Majeure Event, in accordance with the notice requirements of section 14 below.

13. POINT OF CONTACT

Customer agrees that Miva may rely on representations made by Customer's Point of Contact. Customer may change its Point of Contact, at any time, by giving written notice to Miva in accordance with section 14 below. Miva is under no obligation to accept instructions from anyone other than Customer's Point of Contact. Customer shall be responsible for timely notifying Miva of any changes to the Customer's Point of Contact email that shall be used for all notification in accordance with this Agreement and section 14 below.

14. NOTICES

Unless otherwise provided elsewhere herein, any notice or other communication ("Notice") required or permitted pursuant to this Agreement shall be in writing by e-mail, or by certified mail (with postage prepaid, return receipt requested), for Miva to saas@miva.com or Miva, Inc. 16745 W. Bernardo Drive, 4th Floor, San Diego, CA 92127, and for Customer, to the e-mail or mailing address provided by Customer for Customer's Point of Contact. Notice is deemed given on proof of delivery. If any time period in this Agreement commences upon the delivery of Notice to the other party to this Agreement, the time period shall commence only when all of the required Notices have been deemed given. Either party may designate, by Notice to the other, substitute addresses or addressees for Notices, and thereafter, Notices are to be directed to those substitute addresses or addressees.

15. NO ASSIGNMENT BY CUSTOMER

Customer shall not assign this Agreement without the prior written consent of Miva, which Miva may refuse in its sole and absolute discretion. Any attempt by Customer to assign this Agreement without the prior written consent of Miva shall be null and void. Miva may assign this Agreement, without prior consent from Customer, which assignment shall be effective upon written notice provided to Customer.

16. CUSTOMER'S INDEMNIFICATION

Customer shall indemnify, defend, and hold Miva harmless from and against any and all claims, demands, actions, causes of action, suits, proceedings, losses, damages, costs, and expenses, including reasonable attorneys' fees, arising from or relating to Customer's provision, or an End Users' use, of the Service, or any act, error, or omission of Customer in connection therewith, including but not limited to matters relating to incorrect, incomplete, or misleading information; libel; invasion of privacy; infringement of a copyright, trade name, trademark, service mark, or other intellectual property or other right; or violation of any applicable law.

17. MISCELLANEOUS

A. Entire Agreement. This Agreement represents the entire understanding of the parties with respect to the Service, and there are no representations, promises, warranties, covenants or understandings with respect thereto other than those contained in this Agreement. Without limiting the generality of the foregoing, it is expressly agreed that the terms of any purchase order issued by Customer, with respect to the Service provided under this Agreement, shall not be applicable, and that any acceptance of such purchase order by Miva shall be for acknowledgment purposes only.

B. Amendments. Miva reserves the exclusive right to amend, waive, change, modify or discharge the terms of this Agreement, at any time, in its sole and absolute discretion. Customer will be notified by Miva, via e-mail, that the Agreement has changed. Miva strongly recommends that Customer carefully review the updated Agreement and its terms.

C. Severability. In the event that any one or more of the provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remainder of the Agreement shall not in any way be affected or impaired.

D. Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of California, without regard to its conflicts of laws principles.

E. Venue; Attorney's Fees. Any action to enforce or interpret this Agreement shall be brought in the appropriate state or federal court located in San Diego County, California, and in any such action, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

F. Remedies. The remedies set forth in this Agreement are cumulative and are in addition to any other remedies allowed by law. Resort to one form of remedy shall not constitute a waiver of alternate remedies.

G. Waiver. Failure to insist upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of that term, covenant or condition or of any other term, covenant or condition of this Agreement. Any waiver or relinquishment of any right or power hereunder at any one or more times shall not be deemed a waiver or relinquishment of that right or power at any other time.

H. Headings. The section and subsection headings have been included for convenience only, are not part of this Agreement and shall not be taken as an interpretation of any provision of this Agreement.

I. General. Wherever used in this Agreement, the singular shall include the plural, and the plural shall include the singular. The use of any gender, tense or conjugation shall include all genders, tenses and conjugations. The parties are independent contractors and nothing contained herein shall constitute this arrangement to be employment, a joint venture, or a partnership. This Agreement is only between Miva and Customer, and does not make any third party a beneficiary of this Agreement, whether known or contemplated by either party to this Agreement. Further, this Agreement does not make Customer a third party beneficiary of any agreement that Miva may have with third parties, nor does this Agreement make Miva a third party beneficiary of any agreement that Customer may have with third parties.

Last updated October 2016.