

# MIVA

## SOFTWARE SERVICES, LICENSE AND HOSTING AGREEMENT

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 Miva's e-commerce shopping cart software ("Miva Merchant Software" or "Software") and/or hosting services ("Hosting" or "Hosting Services") (collectively "Services"), along with any amendments thereto and any operating rules or policies of Miva. By your use of the Software and/or Hosting Services, 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 said Software and/or Hosting Services is received and accepted by Miva, or upon your initiating use of the Software and/or Hosting Services, 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. SOFTWARE AND HOSTING SERVICES

A. Hosting Services. Miva shall provide access to the Miva Merchant Software and make it available for Customer's End Users to access.

B. Service Levels. For certain plans, Miva shall provide Hosting in substantial compliance with the Hosting Service Level Warranty set forth below.

C. Service Level Warranty (applies to Professional and Enterprise plans only). Miva guarantees that its Hosting network 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 Customer's Website or the Miva Merchant Software;
- 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 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 Miva Merchant Software and/or Hosting Services, for each 30 minutes of downtime (up to and not to exceed 100% of Customer's monthly Subscription Fee for the Services). Any such credit for network downtime will only apply to Customer's Subscription Fee allocable to Customer's Website directly 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 directly resulting from such inability to transmit and receive data 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 server 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 Miva Merchant Software Administration interface of Customer's Website (the "Admin."), or by e-mailing [support@miva.com](mailto: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 line, at the time in which your call enters our Support queue (as recorded by our telephone system). If Customer fails to comply with this notice requirement, Customer forfeits its right to receive a service credit.

### 2. FEES

A. Miva's Fees. Customer agrees to pay all fees due according to the pricing and terms listed in any invoice Customer receives from Miva, and acknowledges that the Subscription Fee for the Services, and any other fees that Customer may incur in connection with Customer's use of the Services, are based on the current version of the Services, and are in no way contingent on Miva's delivery of any future features or functionality. Customer's Billing Cycle begins on the Effective Date, and payment will be due on that same 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. Customer understands that Customer's Subscription to the Services will automatically renew each month, on the Billing Cycle Due Date, until terminated in accordance with section 5 of this Agreement; and, Customer authorizes Miva to automatically charge Customer's credit card (provided as required in paragraph 2(C) below), for said Subscription Renewal Fee, as well as any other fees that Customer may incur in connection with Customer's use of the Services.

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

C. Payment. Upon subscribing to the Services, Customer agrees to provide Miva with a credit or debit card, or set up electronic ACH (Automated Clearing House), for payment of any and all fees associated with the Services provided to Customer, and agrees to provide Miva with updated payment information, as needed. 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. 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 submitted to Customer, Miva reserves the right to interrupt or terminate Customer's access to and use of the Services and to any other Miva Products and/or Services. Miva is not responsible for any losses or damages resulting from any interruption or termination of the Services due to outdated or incorrect payment information. Any such interruption or termination does not relieve Customer from 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.

D. Taxes. All fees charged by Miva for Hosting are exclusive of all taxes and similar fees now in force or enacted in the future imposed on the delivery of Hosting, 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.

E. Refunds. If Customer cancels its Subscription within thirty (30) days of the Effective Date of this Agreement, Miva will issue a full refund of Customer's first month's Subscription Fee, upon request. All other payments to Miva are non-cancelable and non-refundable, including but not limited to any payments for setup fees, SSL Certificates, or unused Services.

### 3. NO SUBLICENSE

Customer may not sublicense or resell Miva Merchant Software or Hosting to any third parties without the prior written permission of Miva. As an example, Customer may not provide website Hosting to any third party without Miva's prior written permission. Any attempts to do so will constitute a material breach and entitle Miva to terminate this Agreement, in accordance with section 5(B) below.

### 4. INTELLECTUAL PROPERTY LICENSES

Customer hereby grants Miva a non-exclusive right and license to use 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's services, and, (iii) in applications reasonably necessary and ancillary to the foregoing. 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 via which Customer's Content is available. Neither license granted in this section 4 shall constitute a transfer of any ownership interest in either Customer's or Miva's Marks.

### 5. TERM OF AGREEMENT

A. Term. The term of this Agreement shall begin on the Effective Date, and shall continue on a month-to-month basis until either party gives the non-terminating party written notice of its election to terminate this Agreement. Notice of termination must be sent to Miva in accordance with section 17 below in order to be effective.

B. Termination For Breach. Either Miva or Customer 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. Cancelling Your Account. To cancel your account and terminate this Agreement, a Customer's request must be received in writing by U.S. certified mail or submitted to Miva via e-mail. Written requests should be addressed to Miva, Inc., 16745 W. Bernardo Drive, 4<sup>th</sup> Floor, San Diego, CA 92127, or submitted via e-mail to [saas@miva.com](mailto:saas@miva.com). To ensure that you are not billed for another month 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 initiates 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.

### 6. MIVA'S ACCEPTABLE USE POLICY

A. Acceptable Use Policy. Miva maintains, on its website, Miva's then-current Acceptable Use Policy ("AUP"), attached to this agreement. Customer agrees to abide by the AUP. 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 that 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 Customer's Content even if the End User has not violated Customer's own terms and conditions of use of Customer's Website. Miva acknowledges that Customer may terminate an End User's access to Customer's Content for noncompliance with Customer's terms and conditions. Decisions as to whether a violation of the AUP has occurred shall be made by Miva in its sole and absolute discretion.

## 7. MIVA'S CONTENT

Upon payment of any fees charged for the development of Miva's Content, Miva hereby provides Customer with a non-exclusive, royalty-free, irrevocable, non-supported license to use Miva's Content as part of Customer's Website. Customer agrees to maintain a text hyperlink to "<http://www.miva.com>" at the footer/bottom of Customer's Website. The link must be standard html, contain no JavaScript, and be approved by Miva.

## 8. CUSTOMER'S CONTENT

A. Protection of 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/archiving Customer's Content.

B. Ownership of Content. Customer acknowledges and agrees that (i) unless expressly stated elsewhere, Miva has no proprietary, financial, or other interest in Customer's Content; (ii) Miva does not, by virtue of offering or hosting Customer's Content, edit, distribute, market, sublicense, publish, or otherwise provide Customer's Content to End Users; and (iii) Customer is solely responsible for the information, data, graphics, text, quality, performance, and all other aspects of its Content. Customer warrants that it owns or has the right to use and offer the Content in connection with Customer's Marks in the manner in which such Content is offered and will be offered by Customer during the term of this Agreement.

## 9. SECURITY

Customer acknowledges that the Internet is not a secure or completely reliable system, and that the purpose of Hosting is to allow End Users easy access to Customer's Content consistent with current technology. Miva will take such precautions Miva deems reasonable in its sole discretion to secure Customer's Website from attack, but Miva makes no warranty, whether express or implied, that there will be no outages or interruptions of service, or that Customer's Content will be secure against attack of any form by End Users or other third parties. Customer is urged to take reasonable steps to protect the security of its Website from attack, including but not limited to installing updated Miva Merchant Software on Customer's Website, as soon as it becomes available. When an update to the Software is released, Customer will be notified via the Customer's Website Admin. and e-mail notification. Customer is expected to install any Software updates within 90 days of release, or within 30 days of release if the Software update has been identified as a security-related update. A Website running outdated Software 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 Software update, until its Software is brought current. For details, see Miva's [Software Maintenance and End of Life Policy](#).

## 10. PCI GUIDELINES

Miva Merchant Software is capable of being PCI-DSS compliant under optimal security settings. However, if Customer chooses to view credit card information and/or involves a less secure set of security settings, Customer assumes all liability for their actions and the inherent risk associated with viewing credit card information.

If Customer chooses to view credit card information, Customer is certifying that Customer understands and is following all PCI guidelines for viewing credit card information. The guidelines can be found at Visa's website: [PCI Overview](#). If Customer does not follow all of the PCI guidelines when viewing credit card information, Customer will be in breach of this Agreement with Miva and may also be in breach of agreements with credit card companies.

Customer hereby agrees to comply with the PCI DSS, assumes all liability applicable to PCI DSS, and further agrees to use a strong security protocol (e.g. SSL) to safeguard sensitive cardholder data over networks.

At its sole discretion, Miva reserves the right to change the security settings of Customer at any time with or without warning.

## 11. PROHIBITED PRACTICES

Miva shall have no duty or obligation to monitor Customer's Content or any other content provided or distributed by others, and Miva agrees not to edit or otherwise exercise any control over Customer's Content. Nevertheless, Miva may, in its sole discretion, at any time, without notice or liability to Customer, remove from public view, disconnect, or terminate the Hosting of any of Customer's Content or other content that Miva deems in its sole discretion to be offensive or illegal, for any reason, including, without limitation, the following:

- i. Content in violation of the laws of the state where the server resides; illegal or sexually explicit content or activities, or any content that allegedly violates the law, rules or regulations of any country or subdivision thereof.

- ii. Content which constitutes harassment of users, including, but not limited to, by means of Customer's billing practices.
- iii. Claims made by third parties against Miva that Customer or any of its End Users has engaged in one or more of the above practices.
- iv. Customer's noncompliance with or material breach of any of the terms and conditions of the AUP or this Agreement.

## 12. WARRANTIES OF BOTH PARTIES

Each party warrants and represents to the other party that it has the complete right to enter into and perform its responsibilities under this Agreement.

## 13. DISCLAIMER OF ALL OTHER WARRANTIES BY MIVA

EXCEPT AS OTHERWISE SET FORTH IN SECTIONS 1(C) AND 12 ABOVE, MIVA MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. THE MIVA MERCHANT SOFTWARE AND HOSTING SERVICES ARE 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 SOFTWARE OR HOSTING SERVICES PROVIDED UNDER THIS AGREEMENT.

## 14. LIMITATION OF MIVA'S LIABILITY

MIVA ASSUMES NO RESPONSIBILITY REGARDING CUSTOMER'S OR END USER'S USE OF THE MIVA MERCHANT SOFTWARE OR HOSTING SERVICES AND SHALL NOT BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, OR SPECIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF USE, BUSINESS INTERRUPTION, OR 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 SERVICES, DURING ANY 12-MONTH PERIOD.

## 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. POINT OF CONTACT

Upon initiating use of Miva's Services, Customer shall designate a person to be Miva's Point of Contact for all official communications with Customer regarding this Agreement. Customer's designated Point of Contact shall have full authority to enter into agreements and make binding decisions on behalf of Customer. Customer agrees that Miva may rely on representations made by Customer's designated Point of Contact, and is under no obligation to accept instructions from anyone other than Customer's designated Point of Contact. Customer may change its designated Point of Contact, at any time, by giving written notice to Miva in accordance with the notice provisions of this Agreement. Miva. 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.

## 17. 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), to the address listed above in this Agreement, for Miva, or the address provided for Customer's designated Point of Contact, for Customer. 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, the time period shall commence only when all of the required Notices have been deemed given. Either Miva or Customer 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.

## 18. NOTICES OF COPYRIGHT INFRINGEMENT

A. Copyright Infringement Claims. It is Miva's policy to promptly investigate notices of alleged copyright infringement ("Copyright Infringement Notification" or "Claim"), regarding materials hosted on our system or network, that comply with the requirements set forth in the Digital Millennium Copyright Act ("DMCA"). In response to a compliant Claim, Miva reserves the right to remove or disable access to the material in question, or to Customer's Website. For more information on Miva's Copyright Infringement Policy, see <http://www.miva.com/DMCA>.

B. Copyright Infringement Counter Notifications. Customer has the right to dispute a Claim by submitting a Copyright Infringement Counter Notification ("Counter Notification"). Counter Notifications may be submitted as described at <http://www.miva.com/DMCA-counter-notification>.

C. Repeat Infringers. A Customer whose account has been the subject of three separate Copyright Infringement Claims to Miva, which resulted in the removal of materials from the Customer's Account or suspension of Customer's Website, will be deemed a "repeat infringer" and may be subject to termination. However, in the event that the Customer's materials were authorized to be restored following the Customer's filing of a counter notification in compliance with DMCA requirements, Miva will consider the underlying Copyright Infringement Claim as withdrawn, for purposes of this repeat infringer policy. Notwithstanding, Miva reserves the right to terminate or limit access to a Customer's Website that has been the subject of fewer than three Copyright Infringement Claims to Miva, when deemed appropriate by Miva, in its sole discretion.

D. Processing Fees. To cover the increasing cost of processing Copyright Infringement Claims, Miva reserves the right to charge a fee of \$150 for each instance of Copyright Infringement Notification received from a legitimate copyright holder.

## 19. 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 User's use, of Customer's Content, 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.

## 20. MISCELLANEOUS

A. Entire Agreement. This Agreement represents the entire understanding of the parties with respect to the subject matter hereof, 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 Services 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 been amended. Miva strongly recommends that Customer carefully review the amended 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.

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.

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

"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's 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's Data, as well as any and all text, graphics, videos, and other information or media, displayed on Customer's Website.

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

"Customer's 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.

"Hosting" or "Hosting Services" means the services described in section 1(A) of this Agreement.

"Miva's Content" means any and all material designed, developed, or otherwise prepared by Miva, and made available for use by Customer.

"Miva Merchant Software" or "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's Website" means Miva's corporate website, [www.miva.com](http://www.miva.com).

"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/or Services, and having full authority to enter into agreements and make binding decisions on behalf of Customer.

"Subscription" means Customer's subscription to use the Miva Merchant Software and/or Hosting Services.

"Subscription Fee" or "Subscription Renewal Fee" means the recurring fee charged for Customer's use of the Miva Merchant Software and/or Hosting Services.

## 21. APPLE PAY PLATFORM TERMS & CONDITIONS

Subject to its availability, Customer may voluntarily choose to enable Apple Pay from within Customer's Miva Merchant Admin. By enabling Apple Pay, Customer agrees to be bound by the Apple Pay Platform Web Terms and Conditions for Direct Merchants ("Apple Pay Merchant Terms"), which Apple may update from time to time. Any such updates to the Apple Pay Merchant Terms shall be posted to <http://www.miva.com/pdf/ApplePayMerchantTerms.pdf>, or its successor link, and shall become effective immediately on posting. Customer's continued use of Apple Pay on Customer's Website constitutes Customer's acceptance of, and agreement to be bound by, said updated Apple Pay Merchant Terms. If Customer does not agree with the updated Apple Pay Merchant Terms, it is Customer's sole responsibility to discontinue use of Apple Pay on Customer's Website, and deactivate Apple Pay in Customer's Admin. Should Customer be found to have violated the Apple Pay Merchant Terms, Miva reserves the right to remove Apple Pay from Customer's Website, with or without notice.

Last updated March 1, 2017.

# MIVA

## ACCEPTABLE USE POLICY AND TERMS

Miva's Acceptable Use Policy & Terms ("AUP Policy")

### I. MIVA'S PRIVACY POLICY AND STATEMENT

Miva, Inc. ("Miva") collects certain information from you to ensure we are giving you the support you need. Because we respect your privacy, we assure you that we will maintain and use this information responsibly.

A. General Web Browsing. Miva collects navigational information about where you go on our Website. This navigational information allows us to see which areas are most visited and which are not. Additional non-personally identifiable information (i.e., domain type, browser version, service provider and IP address) may also be collected to provide information regarding your use of our Website (such as the time of your last visit to a page on our Website). Collecting this information helps us improve the quality of visitors' online shopping experiences by delivering more of the features, services and products our visitors prefer.

B. Miva's Disclosure Of Personal Information. Any information you provide to us at this Website when you establish or update an account, purchase credits online or request information (i.e., name, address, e-mail address, telephone number and credit card information), is maintained on our secure web server and our internal systems. This information is used to enable Miva to deliver services to you. To ensure compliance with federal law, Miva does not maintain information provided by children under the age of 16.

You should be aware that we may disclose specific information about you if necessary to do so by law or based on our good faith belief that it is necessary to conform or comply with the law or is necessary to protect the users of our Website, the site or the public.

Miva does not sell, rent or trade your e-mail address to third parties. We may, however, use third parties to help us provide services to you, such as fulfilling orders, processing payments, monitoring site activity, conducting surveys, and administering e-mails. If personally identifiable information (i.e., name, address, e-mail address, telephone number) is provided to any of these third parties, we will require that such information be maintained by them in strictest confidence.

C. Updating Your Personal Information. We prefer our Customers to keep their personal information accurate and up-to-date. To do this, we provide Customers with the opportunity to update or modify their personal information, including billing and shipping information, by logging into their accounts.

D. Miva's Use Of Cookies. Miva uses a browser feature known as a cookie, which assigns a unique identification to your computer. Cookies also allow Miva to make our sites more responsive to your needs, by delivering a better and more personalized experience to you. The cookies are typically stored on your computer's hard drive and are used by Miva to help track your clicks as you go through the pages within your Website. In addition, Miva uses cookies to help keep track of support requests and to tell us whether you have previously visited Miva's Website. This allows registered users to avoid re-entering information upon each new visit to our site.

E. Links. Our Website may contain links to other sites. However, Miva is not responsible for the privacy practices or the content of such websites.

F. Use Of Forums And Discussion Boards. None of the information contained on our Website is medical, legal, business, or other advice or opinion of Miva. Any opinion that is expressed on or through these services is that of its author. Users are reminded that postings are instantaneous, automatic, and are not pre-screened. Additional facts and information on legal or other developments may affect the subjects discussed. Confidential information should never be discussed. Miva assumes no responsibility for the content or consequences, whether direct or indirect, of communications by users.

G. Privacy Policy Subject to Change. The information above covers Miva's privacy policy in part only. Miva maintains its complete and current Privacy Policy at <http://www.miva.com/privacy> ("Privacy Policy"), which may be updated from time to time, and supersedes this AUP in the event of a conflict of terms. If you are concerned about how your personal information is used, please visit our Website often for this and other important announcements about Miva.

H. Questions. If you have any questions with respect to Miva's Privacy Policy, please feel free to contact us at [saas@miva.com](mailto:saas@miva.com).

Miva is committed to providing a safe and secure shopping experience for all of our Customers. We provide stringent and effective security measures on our Website. It is Miva's policy to never send private information, such as your credit card number, via e-mail. In fact, this is a practice we recommend our Customers adopt in all of their Internet activities.

### II. TERMS AND CONDITIONS

To maintain our system integrity and resources, we expect our customers to act responsibly. When you use any Miva services, in any form, you automatically agree to the following Conditions:

- No Spam, as defined by the CAN-SPAM Act, or unsolicited e-mailing. (See Miva's E-mail Policies in Section IV below).
- No IRC. We do not allow IRC or IRC bots to be operated on our servers.
- No server abuse. Any attempt to undermine or cause harm to a server, or to a Customer's Website is strictly prohibited.

- No Warez, cracks, or copyright infringement.
- No adult content. (See Miva's Adult Material Policy in Section V below).
- No background running programs without prior approval. Prior approval is required for any programs to run continually in the background.
- No IRC chat rooms. We do not allow Customers to install their own chat rooms of any kind, without first approving it with Miva's Support team.
- No unauthorized use of other people's accounts or computers.
- No online gambling.
- Payment Policies: All accounts are set up on a pre-pay basis. Setup fees are charged for all new accounts and major account changes. All pricing is guaranteed for the term of pre-payment. We reserve the right to change prices at any time, unless other terms have been agreed upon. Customers are responsible for all money owed on their accounts from the time their accounts were established until the time that Miva receives an official cancellation request form from the Customer.
- Domain registration fees are non-refundable.
- Miva's Cancellation Policy: We reserve the right to cancel service at any time. Any violation of policies, which results in extra costs, will be billed directly to the Customer (e.g., transfer, space etc.).
- Lawful Purposes: Miva reserves the right to refuse service to anyone. Customers may use our servers only for lawful purposes. Any transmission of material in violation of Federal, State or Local regulations is prohibited.
- Indemnification: Customer agrees that it shall defend, indemnify, save and hold Miva harmless from any and all demands, liabilities, losses, costs and claims, including reasonable attorneys' fees asserted against us, our agents, our customers, officers and employees, that may arise or result from any service provided or performed or agreed to be performed or any product sold by Customer, it's agents, employees or assigns. Customer agrees to defend, indemnify and hold us harmless against liabilities arising out of:
  - Any injury to person or property caused by any products sold or otherwise distributed in connection with our servers;
  - Any material supplied by Customer infringing or allegedly infringing on the proprietary rights of a third party;
  - Copyright infringement; and
  - Any defective products sold to customer from our servers.

We reserve the right to suspend or cancel a Customer's access to any or all services we provided when we decide that the account has been inappropriately used.

Disclaimer: Miva will not be responsible for any damages your business may suffer. Miva make no warranties of any kind, expressed or implied for services we provide. Miva disclaims all warranties, including but not limited to merchantability or fitness for a particular purpose. This includes loss of data resulting from delays, non-deliveries, wrong delivery, and any and all service interruptions caused by our Web Hosting Service and our employees. We reserve the right to revise these policies at any time.

- All end-users, resellers and dedicated servers of ours must adhere to the above policies.
- Use of any mass e-mail programs in conjunction with Miva's SMTP servers is strictly prohibited.
- Failure to follow any term or condition is grounds for immediate account deactivation.

In addition, any website using Miva Merchant Software must maintain a hyperlink to "<http://www.miva.com>" at the bottom/footer of the web site, which is visible throughout the majority of the web site. If the hyperlink is not found, Miva reserves the right to place the hyperlink on your Website without notice.

### III. MIVA'S BILLING POLICIES AND CYCLES

Miva offers billing via credit card, debit card, electronic ACH (Automated Clearing House) charge only.

- Initial fees must be paid prior to setup of Services. These fees include:
  - Service setup fees; and
  - 1st month charge for Services.
- Your billing cycle begins on the day we setup your account, and payment is due on that day each month thereafter.
- All accounts not paid within 15 days after your due date may be suspended. Suspended accounts will not be allowed any access to their servers.
- Miva automatically attempts to charge credit cards on file for any past due invoice for current, suspended and cancelled accounts.
- Accounts suspended and subsequently reactivated must pay all past due and current amounts, and are subject to the following reactivation fees:
  - Shared Servers: \$100 reactivation fee
  - Dedicated Servers: \$500 reactivation fee
- Accounts more than 30 days past due may not be available for restoration. If such an Account is available for restoration, it will be subject to the reactivation fee listed above. If such an Account is not available for restoration, Customer must sign up for Services, as a new customer, and pay the full setup fees associated with the server option they choose.
- To cancel your account, your request must be received in writing, by e-mail or certified mail. Please send your written request to [saas@miva.com](mailto:saas@miva.com), or if by mail to Miva, Inc., 16745 W. Bernardo Dr., 4<sup>th</sup> Floor, San Diego, CA 92127. In order to ensure that you are not billed for an additional month of service, you must cancel your account before your billing cycle due date. All accounts requesting cancellation are terminated upon receipt of submission, unless otherwise requested. Please note that cancellation requests submitted prior to the end of a billing cycle will not receive a prorated refund.



Note: All billing correspondence (e.g., invoices, notifications, etc.) is done via e-mail. It is crucial that you maintain a current e-mail address with us.

Our online account login enables every customer to:

- View your past and current order history.
- Update your e-mail address, billing address, shipping address, etc.
- Update credit card information.
- Print out your invoices.

We currently accept payment, in US Dollars only, through the following sources:

- Discover
- MasterCard
- VISA
- American Express

You can contact our billing department by e-mailing [support@miva.com](mailto:support@miva.com).

#### IV. MIVA'S E-MAIL POLICY

Miva has a zero tolerance spam (i.e., unsolicited commercial e-mail) policy. Miva does not permit spam being sent using Miva mail servers, or being sent via third parties advertising content hosted by Miva servers.

All e-mail sent via Miva servers, and/or advertising sites hosted on Miva servers, must meet the following criteria:

- The recipient of your e-mail must have made a purchase, requested information, responded to a questionnaire or a survey, or had offline contact with you.
- The e-mail "from address" is required to contain the domain name of your Miva store.
- No e-mail subject lines can contain misleading information.
- Any and all non-correspondence e-mails (i.e., outbound marketing and/or newsletter e-mails) must contain a working web link, which allows recipients to unsubscribe. Use of manually processed methods of unsubscribing, such as "mailto" links, is not acceptable for e-mails sent from our servers. These emails must also abide by all requirements of the "CAN-SPAM" act (U.S. Code, Title 15, Chapter 103).
- All requests to unsubscribe must be processed within 10 days.
- Any and all non-correspondence e-mails (i.e., outbound marketing and/or newsletter e-mails) must be sent using software that AUTOMATICALLY handles removal of recipient e-mail addresses that result in a delivery failure.

Miva actively monitors our mail servers for abuse. Any Customer found to be using Miva mail servers to send spam will be immediately cut-off from use of Miva services. Further, any use of mass e-mail programs in conjunction with Miva SMTP servers is strictly prohibited.

#### V. MIVA'S ADULT MATERIAL POLICY

Material that is appropriate in some countries may not be appropriate in others. For this reason and many others, we maintain a strict "No Adult Material Policy."

Miva defines "adult material" as any of the following:

- Any photos or videos showing any sexually explicit nudity;
- Any audio clips or text containing sexually explicit material; or
- Any photos or videos showing frontal nudity on either men or women.

We also prohibit the following:

- Any websites with direct links to other websites containing such material.

Further, we reserve the right to determine what might be considered "sexually explicit" or "sexually related." If you are unsure if your Website contains such material, please let us know prior to placing the order.

#### VI. INTERPRETATION

Any capitalized terms used this AUP Policy but not otherwise defined herein shall have the meaning given in the current Miva Software Services, License and Hosting Agreement.

Last updated March 1, 2017.