

# ACHIEVA CREDIT UNION

## ACH/REMOTE DEPOSIT SERVICES AGREEMENT

THIS ACH/REMOTE DEPOSIT SERVICES AGREEMENT ("Agreement") is made by and between ACHIEVA CREDIT UNION ("CU"), a Florida-chartered credit union, and the undersigned merchant ("Merchant") as of the date this Agreement is signed by CU (the "Effective Date").

CU and its affiliates provide Automated Clearing House services and remote deposit services (collectively the "Services") to merchants engaged in the selling of goods or services. CU is the Originating Depository Financial Institution through which debit and credit transactions are submitted to the ACH Network in conjunction with ACH and remote deposit check processing origination and settlement services. Merchant is lawfully engaged in the business of selling goods or services to third parties (a "Checkwriter") and is an Originator that wishes to initiate credit and/or debit ACH entries ("Entries").

Merchant desires that CU provide the following Services: **[check applicable box]**

ACH Services Only       Remote Deposit Services Only       ACH and Remote Deposit Services

For and in consideration of the mutual covenants herein, the sufficiency of which is hereby acknowledged, CU and Merchant agree as follows:

**1. NACHA RULES, CHECK 21 AND CU GUIDELINES:**

Merchant agrees that it will comply with the current rules and regulations of the National Automated Clearing House Association ("NACHA") and/or all regional payment alliances associated with NACHA (the "NACHA Rules") applicable to Merchant at all times during the term of this Agreement. Merchant agrees to immediately obtain a current copy of the NACHA Rules upon execution of this Agreement from NACHA and to maintain and review a current copy of the NACHA Rules at all times during the term of this Agreement. In addition, CU may publish to Merchant and other merchants its own standard operating and implementation guidelines ("CU Guidelines") for the Services which will govern and apply to this Agreement as if set forth herein. Merchant understands and agrees that if a check/draft ("Check") from any Checkwriter cannot be properly converted into an ACH Entry, the Check may be rejected or converted into a Substitute Check/Image Replacement Document ("IRD") (as that term is defined in the Check Clearing for the 21<sup>st</sup> Century Act, also known as Check 21) as determined by CU in CU's sole discretion. Merchant agrees that it will comply with all Check 21 laws, regulations and related requirements for any Checks.

**2. SERVICES:** CU shall provide the Services as selected by Merchant above. Services will be provided through ACH processing or Remote Deposit processing as selected by Merchant. Merchant shall utilize and access the selected Services in accordance with the practices and procedures established by CU as amended by CU in its sole discretion from time to time. All equipment and documentation provided by CU to Merchant pursuant to this Agreement is proprietary and shall be returned to CU upon termination of this Agreement by either party for any reason. All user guides, manuals, data, software, processes, and other information provided to Merchant in connection with the Services and all fee and pricing information with respect to the Services ("Information") is the proprietary and confidential property of CU and/or its relevant licensors or

suppliers. Merchant agrees to use the Information only in the manner specified by CU and in the ordinary course of Merchant's business, to return it to CU upon termination of the relevant Services, and to keep the Information confidential and limit access thereto only to its agents and employees who require access in the normal course of their duties, except to the extent the Information is already in the public domain or Merchant is required to disclose the Information by law. CU may act on any communication and provide the Services using any payment system or intermediary organization it reasonably selects. CU's performance of the Services is subject to the rules and regulations of any such system or organization. CU may engage third parties to provide the Service. CU shall have no obligation to disclose arrangements with third parties to Merchant or obtain Merchant's consent thereto. Merchant authorizes the transfer of information relating to Merchant to agents of CU or Merchant for use in connection with the Services or as required by law.

**3. MERCHANT ACCOUNTS:** Merchant agrees to immediately reimburse CU for any shortfalls that occur due to non-sufficient funds in the CU accounts owned by Merchant (the "Merchant Accounts") designated by Merchant for use in conjunction with the Services. CU reserves the right to delay the availability of funds for deposit without prior written notices to Merchant if in its sole discretion CU deems itself at financial or relative risk for any and all services performed under this Agreement. The Services are subject to CU's terms and conditions of accounts and availability schedules in effect from time to time.

**4. SETTLEMENT RESERVE:** Merchant may be required to maintain a reserve ("Settlement Reserve") of an amount to be solely determined by CU. Merchant hereby acknowledges and agrees that any Settlement Reserve will be deposited in a CU account for exclusive use by CU for purposes of offsetting any Merchant obligations under this Agreement. If Merchant's Settlement Reserve falls below the required amount, Merchant authorizes

CU to immediately replenish the Settlement Reserve to an amount to be determined by CU via a withdrawal from the Merchant Account, an ACH debit to the Merchant Account or by a direct deposit to the Settlement Reserve. No interest will be paid on the Settlement Reserve. Merchant grants CU a security interest in any Settlement Reserve so that CU may enforce any obligation owed by Merchant under this Agreement without notice or demand to Merchant. Merchant's obligation to maintain a Settlement Reserve shall survive the termination of this Agreement for any reason until CU has determined that maintenance of the Settlement Reserve is no longer necessary.

**5. RIGHT OF SETOFF:** Merchant hereby acknowledges and agrees that CU shall have a right of setoff against any and all fees, Returns, Refunds or other amounts owed by CU to Merchant under this Agreement.

**6. PRICING AND PAYMENT:** Merchant shall pay CU the fees, penalties and charges for the Services shown in CU's then-current standard published Services fee schedule for merchants, the current copy of which is attached hereto and incorporated by reference. CU may increase any Services fees at any time in CU's sole discretion by giving Merchant at least ten (10) days' prior written notice of such increase.

**7. PROCESSING DEADLINE:** CU has specific processing deadlines for ACH Entries and Checks. Entries and Checks received by the deadline on a CU business day will be processed that day for settlement. Entries and Checks received after the deadline will be processed the next business day.

**8. INDEMNIFICATION:** Merchant shall indemnify and hold harmless CU and each of its directors, officers, employees, agents, successors, and assigns ("Indemnitees") from and against all liability, loss, and damage of any kind (including attorneys' fees and other costs incurred in connection therewith) incurred by or asserted against such Indemnitee in any way relating to or arising out of (a) the Services, (b) any Entry or Check, (c) any breach of this Agreement

by Merchant, (d) any failure of Merchant to comply with applicable laws and regulations, or (e) any acts or omissions of Merchant or any third party. All books and records of Merchant related to this Agreement and Merchant's obligations thereunder shall be made available at Merchant's principal office for examination and audit by CU at any and all reasonable times. This paragraph shall survive the termination of this Agreement for any reason.

**9. ENTRIES, CHECKS AND OTHER REPRESENTATIONS:**

Merchant shall be responsible for the accuracy and propriety of all Entries and Checks submitted to CU for processing, as well as responsible for obtaining all required approvals for the processing of the Entry or Check from the Checkwriter. Merchant shall be liable for each Entry and Check and warrants that its Entries and Checks comply with the NACHA Rules and/or the Check 21 requirements as applicable. Merchant represents and warrants that: (a) it is fully authorized to enter into and perform under this Agreement, and that this Agreement constitutes its legal, valid, and binding obligation; (b) Merchant is solvent and in good standing in the State of its organization; (c) it is not the present intent of Merchant to seek protection under any bankruptcy laws; (d) all Entries and Checks are currently and were at the time of their creation, bona fide and existing obligations of Checkwriters to Merchant, free and clear of all security interests, liens, and claims whatsoever of third parties and are not now nor have they ever been declared in default; (e) the documentation under which the Entries and Checks are payable authorize the payee to charge and collect the monies owed; (f) all Entries, all Checks and all documents and practices related to them comply with all applicable federal and state laws; (g) Merchant shall retain all Checks for at least ninety (90) days following the date such Checks are submitted to CU for processing; and (h) Merchant shall deliver any Check to CU upon CU's request. Merchant covenants that: (a) it will allow CU to review and inspect during reasonable business hours, and Merchant will supply, all financial information, financial records, and documentation of the Merchant regarding the Entries and Checks that CU may request; (b) the Entries and Checks submitted by Merchant are valid Entries and Checks, and Merchant will reimburse and indemnify CU for all loss, damage, and expenses, including reasonable attorneys' fees, incurred in defending such transactions as incorrect, invalid or fraudulent Entries or Checks; and (c) in the event of the commencement of any proceeding under any bankruptcy or insolvency laws by or against the Merchant, Merchant will not oppose or object to any motion by CU seeking relief from the automatic stay provisions of such laws. Credit given by CU to Merchant for any Entry or Check is provisional until CU receives final settlement for the Entry or Check. If CU does not receive such final settlement, Merchant acknowledges and

agrees Merchant shall pay to CU the amount of any Entry or Check for which CU does not receive timely final settlement. CU will process, encode, and deposit into the designated Merchant Account, Checks submitted by Merchant through the Remote Deposit Services in accordance with CU's internal procedures and all state and federal laws, during any CU business day, subject to the cutoff times established by CU from time to time as determined by CU in its sole discretion. CU is not required to examine Checks to verify any data or dates. CU will process the Check according to the amount entered by Merchant, if applicable, or by the numeric amount shown. If the numeric amount is unclear, CU may process the Check according to the written amount, and CU may correct the amount entered by the Merchant. If the Check is ambiguous, CU may return the Check as an exception. If a Check does not have the necessary information to be processed by CU, then CU may treat the Check as an exception. If a Check is treated as an exception, it may be forwarded by CU to Merchant, and not deposited or otherwise reflected in any Merchant Account. CU is entitled to disregard any notation on a Check containing "paid in full" or other restrictive notation, whether preprinted or handwritten, and treat any such Check as though such notation did not appear thereon. Merchant warrants that all communications from Merchant to CU, including, without limitation, all electronic communications, will (a) comply with all applicable laws and regulations and (b) be free from all viruses, malware, spyware, poison pills, and any other destructive programming or code. Merchant shall maintain a commercially reasonable fraudulent transaction detection system, provided that the maintenance of such system shall not relieve Merchant of any duties, obligations, indemnity or any other terms or conditions of the Agreement. Merchant shall employ commercially reasonable methods of authentication to verify the identity of all Receivers of Entries and Checks, provided that the employment of such methods shall not relieve Merchant of any duties, obligations, indemnity or any other terms or conditions of the Agreement. Merchant shall employ commercially reasonable methods to verify that all Entry routing numbers are valid, provided that the employment of such methods shall not relieve Merchant of any duties, obligations, indemnity or any other terms or conditions of the Agreement. Merchant shall conduct an annual audit to ensure that the financial information it obtains from Receivers is protected by security practices and procedures that include, at a minimum, adequate levels of (1) physical security to protect against theft, tampering, or damage, (2) personnel and access controls to protect against unauthorized access and use, and (3) network security to ensure secure capture, storage, and distribution, provided that the employment of such audit, security and controls shall not relieve Merchant of any duties, obligations, indemnity or any other terms or conditions of the Agreement.

**10. DISCREPANCIES:** In the event of any conflicts in the instructions received by CU regarding the Merchant or any Entries or any Checks relating to them, CU may at its option and with or without notice, hold or interplead, comply with the legal process or other order, or otherwise limit access by the Merchant or by CU to the funds, Entries, Checks or proceeds thereof. Merchant shall promptly notify CU in writing of any error in connection with the Services and any discrepancies between any records maintained by Merchant and any notice Merchant receives from CU with respect to the Service, and Merchant shall provide CU with any information it may reasonably request in connection therewith. Merchant agrees that ten (10) days is a reasonable time for Merchant to notify CU of errors or discrepancies, unless any other agreements, laws, rules, or regulations provide for a shorter period. CU shall have the right to correct the amount in the data field for any Entry or Check that has an incorrect amount to be consistent with the Entry or the image of the Check.

**11. SECURITY PROCEDURES:** Merchant shall comply with the security procedures described herein; Merchant acknowledges that the purpose of such security procedure is for verification of authenticity and not to detect an error in the transmission or content of an Entry or a Check. No security procedure for the detection of any such error has been agreed upon between CU and Merchant. Merchant is strictly responsible to establish and maintain the procedures to safeguard against unauthorized transmissions.

- a. CU will provide Merchant with an Administrative and Gateway User Name and Password. Merchant may appoint an individual ("Administrator") with the authority to: (a) determine who will be authorized to use the Services; (b) establish separate passwords for each user; and (c) establish limits on each user's authority to access information and conduct transactions. Merchant is responsible for the actions of its Administrator, the authority the Administrator gives other to act on its behalf, and the actions of the persons designated by the Administrator to use the CU service. Merchant agrees to: (a) take reasonable steps to safeguard the confidentiality of all Passwords; (b) limit access to its passwords to persons who have a need to know such information (c) closely and regularly monitor the activities of employees who access the CU service; and (d) prohibit its employees and agents from initiating Entries or Checks without proper supervision and adequate controls.
- b. Merchant understands that the use of Passwords and the CU service instructions is confidential and agrees to assume all risks of accidental disclosure or inadvertent use by any party whatsoever, whether such disclosure of use are on account of Merchant's negligence or are deliberate acts. Merchant acknowledges that no person

from CU will ever ask for any Passwords and that CU employees do not need and should not ask for passwords.

c. Merchant shall change its passwords periodically and whenever anyone who has had access to a password is no longer employed or authorized by it to use the CU service. CU may require Merchant to change its passwords at any time. CU may deny access to the CU service without prior notice if it is unable to confirm (to its satisfaction) any person's authority to access the service or if CU believes such action is necessary for security reasons.

**12. WARRANTY:** CU warrants to Merchant that its Services will be performed in a professional and timely manner consistent with industry standards and any written CU policies and procedures communicated by CU to Merchant. EXCEPT FOR THE FOREGOING WARRANTY, CU MAKES NO OTHER THE SERVICES ARE PROVIDED BY CU ON AN 'AS IS' BASIS WITHOUT WARRANTY OF ANY KIND, AND CU DISCLAIMS ANY AND ALL PROMISES, REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE SERVICES, WHETHER EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CU does not guarantee the completeness or accuracy of the information provided from a third-party database. CU shall have no liability to Merchant for any invalid Checkwriter information or Checkwriter checks returned unpaid to Merchant.

**13. LIMITATION OF LIABILITY:** CU's cumulative liability to the Merchant for all claims relating to or stemming in any way from the Services, this Agreement, or the relationship between CU and Merchant, including any cause of action in contract, negligence, tort, strict liability of otherwise, shall not exceed the total amount of all fees paid by the Merchant to CU during the three (3) month period preceding the origination of the claim giving rise to liability. CU will exercise ordinary care in providing the Services and will be responsible for any loss sustained by Merchant only to the extent such loss is caused by CU's reckless or willful misconduct. In no event shall clerical errors or mistakes in judgments constitute failure to exercise ordinary care, nor shall CU have any liability for any indirect, incidental, consequential (including lost profits), special, or punitive damages, whether arising in contract or in tort, and whether or not the possibility of such damages was disclosed to or could have been reasonably foreseen by CU. Under no circumstances shall CU be responsible for any liability, loss, or damage resulting from any delay in performance of or failure to perform in connection with the Services which is caused by interruption of telephone, telefacsimile, or communication facilities; delay in transportation, equipment breakdown, or mechanical malfunction; electrical, power, or computer failure; accidents, fire, flood, explosion, theft,

natural disaster, or other catastrophe; acts or failure to act by Merchant or any third party; strikes or lockouts; emergency conditions; or riots, war, acts of government, or other circumstances which are unavoidable or beyond CU's control. CU shall not be liable for failure to perform any of its obligations in connection with the Services if such performance would result in it being in breach of any law, regulation, or requirement of any governmental authority. If CU fails to credit any of Merchant Accounts utilized in connection with the Services in accordance with this Agreement, upon discovery or notification of such error, CU will properly credit such account, but CU shall not incur any liability therefore, including any loss resulting from failure by Merchant to invest the amount of funds not properly credited to the account.

#### **14. TERM AND TERMINATION:**

a. **TERM:** This Agreement shall have an initial term of twelve (12) months from and after the Effective Date. Upon expiration of the initial term, this Agreement shall automatically renew for additional consecutive twelve (12) month terms unless either party gives written notice of its election not to renew to the other party no later than thirty (30) calendar days prior to the end of the current term, whether the initial term or any renewal term.

b. **TERMINATION:** This Agreement may be terminated by either party for cause upon giving the other party written notice of the breach of this Agreement committed by the other party and giving the other party a reasonable time to cure the breach. CU may also terminate or suspend the Services without notice to Merchant if any of the following occurs: (a) Merchant becomes insolvent or files, or has filed against it, any bankruptcy or other insolvency, reorganization, liquidation, or dissolution proceeding of any kind; (b) a material adverse change occurs in Merchant's business or financial condition; (c) CU has reason to believe that Merchant has engaged in fraudulent or illegal activity; (d) Merchant fails to maintain balances in accounts sufficient to cover overdrafts; (e) Merchant violates the terms of this Agreement or any other agreement with CU; (f) Merchant fails to provide financial information reasonably requested by CU; (g) CU determines it is impractical or illegal to provide the Services because of changes in laws, regulations, or rules; or (h) CU, in good faith, is unable to satisfy itself that the Services have been properly authorized by Merchant. Notwithstanding any termination, the terms of this Agreement shall apply to all Entries, Checks or other transactions which have been initiated prior to termination. For the purpose of this Agreement, a reasonable time to cure the breach specified in the written notice shall be deemed to be:

(1) For any breach of Section 3, 4 or 6 above: Five (5) business days.

(2) For all other breaches of this Agreement: Thirty (30) calendar days.

#### **15. MISCELLANEOUS:**

a. **GOVERNING LAW:** This Agreement will be governed by and construed in accordance with the laws of the State of Florida, without regard to its conflicts of laws principles.

b. **NOTICE:** Any notice required or permitted hereunder shall be in writing and shall be sent by certified mail, return receipt requested, or by overnight express mail, with proof of delivery retained, and addressed to the respective parties at the address set forth below.

c. **ASSIGNMENT:** This Agreement shall not be assigned or delegated by Merchant to any other party without the prior written consent of CU.

d. **LEGAL FEES:** In the event of any dispute arising out of or related to the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees, court costs and collection expenses in addition to any other recovery. The parties agree any legal action related to this Agreement shall be filed and heard in the county and state in which CU's principal place of doing business is located, except as prohibited by applicable law.

e. **FORCE MAJEURE:** If performance by CU or CU's affiliates of any Services or obligation under this Agreement is prevented, restricted, delayed or interfered with by reason of, among other things, labor disputes, strikes, acts of God, fire, floods, lightning, earthquakes, severe weather, utility or communications failures, failures of the ACH network, computer associated outages or delay in receiving electronic data, war, civil commotion, or any law, order or regulation, etc. having legal effect, then CU and CU's affiliates shall be excused from their performance hereunder to the extent of the prevention, restriction, delay or interference.

f. **HEADINGS:** The headings preceding the text of the sections and subsections of this Agreement are used solely for convenience of reference and shall not affect the meaning, construction or effect of this Agreement.

g. **BENEFICIARIES:** This Agreement is an agreement only by and between CU and Merchant and for their benefit and the benefit of their successors and assigns as permitted by this Agreement. No other person or party, including any Checkwriter, shall be a beneficiary hereof or have any rights hereunder, and no rights are conferred by this Agreement upon any other person or party, whether or not identified in this Agreement.

h. **AMENDMENT:** CU may amend this Agreement at any time in CU's sole

discretion by providing Merchant with at least ten (10) days prior written notice of such amendment. In the event that any amendment is required by a change to applicable laws or regulations or ten days' prior written notice is impractical as determined by CU in CU's sole discretion, any such amendment may become effective immediately upon notice to Merchant.

i. **SEVERABILITY:** Any provision of this Agreement that is unenforceable shall be ineffective to the extent of such provision, without invalidating the

remaining provisions of this Agreement. If performance of the Services would result in violation of any law, regulation, or governmental policy, this Agreement shall be deemed amended to the extent necessary to comply therewith.

j. **RELATIONSHIP OF PARTIES:** This Agreement shall be interpreted to create an independent contractor relationship between Merchant and CU. Nothing contained herein shall be deemed to create fiduciary status on the part of CU in connection with the provision of the Service.

k. **CAPITALIZED TERMS:** All capitalized terms used in the Agreement that are not expressly defined in this Agreement have the meaning assigned to that term in the current NACHA Rules.

l. **ENTIRE AGREEMENT:** This Agreement, contains the entire agreement between the parties relating to the subject matter addressed herein, and supercedes any prior or contemporaneous understandings or agreements, whether oral or written, between the parties regarding the subject matter contained herein.

In witness of this Agreement, the authorized representatives of the parties have signed this Agreement below.

**ACHIEVA CREDIT UNION**

“CU”

By: \_\_\_\_\_  
Signature  
Its: Vice President- Business Banking Services  
Print name: Gary A. Burden  
Date: \_\_\_\_\_

**[INSERT MERCHANT NAME]**

“Merchant”

By: \_\_\_\_\_  
Signature  
Its: \_\_\_\_\_  
Print name: \_\_\_\_\_  
Date: \_\_\_\_\_

SAMPLE