



END USER LICENSE AGREEMENT

This End User License Agreement (the “EULA”) is entered into by and between Monetate, Inc. (“Monetate”) and any End User(s) who purchases access to use the Monetate Web Services, either directly or through a reseller (each a “End User”). End User and Monetate shall each be referred to herein as a “Party” and collectively, the “Parties.”

RECITALS

1. Definitions.

- a. “Acceptable Use Policy” means Monetate’s [Acceptable Use Policy](#).
- b. “Affiliate” means an entity controlling, controlled by or under common control with a Party where control means the ownership or control, directly or indirectly, of more than fifty percent (50%) of all the voting power of the shares (or other securities or rights) entitled to vote for the election of directors or other governing authority.
- c. “Ancillary Software” means any software, utilities, or tools, if any, that Monetate makes available to End User for download on End User’s devices for purposes of facilitating access to, operation of, and/or use with, the Web Services.
- d. “Effective Date” means the date upon which End User’s access to the Web Services commences.
- e. “End User Data” means all information and data inputted or otherwise submitted by End User or on End User’s behalf through the use of the Web Services.
- f. “Content” means information, data, templates, text, software, music, sound, photographs, graphics, video messages or other material to which End User is provided access by Monetate through the Web Services. Content excludes End User Data.
- g. “Documentation” means the user instructions, release notes, manuals and on-line help files as updated by Monetate from time to time, in the form generally made available by Monetate, regarding the use of the Web Services.
- h. “Excluded Matters” means infringement claims whereby the alleged infringement is based on or arises from (a) combination or use of the Web Services with hardware, software or other materials not provided by Monetate; (b) the modification of the Web Services by anyone other than Monetate; (c) the use of the Web Services not in accordance with the Documentation or this EULA; (d) End User’s requested configuration or implementation of any customizations (unique functionality that is custom built for a Web Service) or integrations (integrating a Web Service with various third-party products and services); (e) any allegation based upon actions against, or taken by End User, prior to the Effective Date, or relating to any patent claim that End User was aware of prior to the execution of this EULA; or (f) any claim that the Web Services consist of a function, system or method that utilizes traditional online commerce functionality that is in general use in the industry.
- i. “Intellectual Property” means any and all intellectual property rights, recognized in any country or jurisdiction in the world, now or hereafter existing, and whether or not perfected, filed or recorded, including without limitation inventions, technology, patents rights (including patent applications and disclosures), copyrights, trade secrets, trademarks, service marks, trade dress, methodologies, procedures, processes, know-how, tools, utilities, techniques, various concepts, ideas, methods, models, templates, software, source code, algorithms, the generalized features of the structure, sequence and organization of software, user interfaces and screen designs, general purpose consulting and software tools, utilities and routines, and logic, coherence and methods of operation of systems, training methodology and materials.
- j. “Web Services” means the provision of access to the online proprietary applications developed, owned and maintained by Monetate, and associated Ancillary Software.

2. EULA and Incorporation by Reference.

The Parties hereby covenant and agree that End User shall at all times be bound by this EULA while accessing or using the Web Services. This EULA incorporates by reference, and End User agrees to comply with and be subject to:

- (i) Monetate’s [Data Security Schedule](#)
- (ii) Monetate’s [Acceptable Use Policy](#) and
- (iii) Monetate’s [Data Processing Addendum](#)

Monetate reserves the right to update the terms and conditions of the Data Security Schedule, Acceptable Use Policy and Data Processing Addendum at any time and in its sole and absolute discretion.

3. Intellectual Property Rights.

- 3.1 Rights of Monetate. The Web Services, Documentation and Content, and all Intellectual Property embodied therein (collectively, the "Monetate IP"), will at all times remain the exclusive, sole and absolute property of Monetate or its licensors. End User shall not acquire any right, title, or interest in or to the Monetate IP. All rights, title and interest in or to any copyright, trademark, service mark, trade secret, or other proprietary right relating to the Products, Deliverables and Services and the related logos, product names, etc. and all Intellectual Property rights not expressly granted herein are reserved by Monetate and its licensors. End User shall not obscure, alter or remove any copyright, patent, trademark, service mark or proprietary rights notices on any Documentation, Content or other Monetate materials.
- 3.2 End User Data. The Parties hereby acknowledge and agree that End User may be required to provide certain customer data related to End User or its Authorized Users ("End User Data") to Monetate in the provision of or access to the Web Services. End User hereby grants Monetate a non-exclusive, sublicensable, fully paid and royalty free license to access and use the End User Data in connection with the provision of the Web Services. End User hereby represents and warrants that by supplying End User Data to Monetate, End User does not violate any agreement with any third party and that End User has the authority and consent to provide the End User Data to Monetate. End User has sole responsibility for the legality, reliability, integrity, accuracy, and quality of the End User Data. End User grants Monetate a paid-up, worldwide, irrevocable license to use or disclose any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by End User during the term of this EULA relating to the operation of the Web Services.

4. **Restrictions on Use.** End User may not itself, or through any Affiliate, employee, consultant, contractor, agent or other third party: (i) sell, resell, distribute, host, lease, rent, license or sublicense, in whole or in part, the Documentation, Content or Web Services; (ii) decipher, decompile, disassemble, reverse assemble, modify, translate, reverse engineer or otherwise attempt to derive source code, algorithms, tags, specifications, architecture, structure or other elements of the Web Services, in whole or in part, for competitive purposes or otherwise; (iii) allow access to, provide, divulge or make available the Web Services to any user other than Authorized Users; (iv) write or develop any derivative works based upon the Web Services; (v) modify, adapt, tamper with or otherwise make any changes to the Documentation, the Content or any part thereof; (vi) obliterate, alter, or remove any proprietary or intellectual property notices from the Documentation, Content or Web Services; (vii) create Internet "links" to or from the Web Services, or "frame" or "mirror" any Content; (viii) use the Web Services to provide processing services to third parties, or otherwise use the same on a 'service bureau' basis; (ix) disclose or publish, without Monetate's prior written consent, performance or capacity statistics or the results of any benchmark test performed on the Web Services; or (x) otherwise use or copy the same except as expressly permitted herein.

5. Termination.

- 5.1 Term. The term of this EULA shall commence on the Effective Date and shall continue in full force and effect for so long as End User has access to the Web Services pursuant to its purchase order for the Web Services, unless otherwise terminated earlier as provided hereunder.
- 5.2 Events of Termination. If End User or any of its Authorized Users uses or attempt to use the Web Services in a manner that is contrary to this EULA, Monetate may, without liability, immediately (a) suspend any or all Web Services until such use, breach or threatened breach is cured, or (b) terminate End User's or any of its Authorized Users' access to the Web Services if such breach is not cured or is not curable.
- 5.3 Effects of Termination. Upon termination of the Web Services for any reason, End User shall have no further right to use the Web Services which are terminated, and End User shall, and shall cause its Authorized Users to, immediately discontinue use of the Web Services, Documentation and Content. Promptly after the termination date hereof, End User shall deliver to Monetate or permanently delete, at End User's expense, all originals and copies of the (i) Ancillary Software; (ii) Documentation and Content; and (iii) Confidential Information of Monetate in the possession or under the control of End User. All rights, licenses, consents and authorizations granted by Monetate to End User hereunder will automatically terminate after the termination date hereof. End User shall certify in writing to Monetate within ten (10) days following termination that it has complied with this Section 5.3.

6. Confidentiality.

- 6.1 Definition. "Confidential Information" includes, but is not limited to, technical information, information about product plans and strategies, promotions, customers and related technical, financial or business information which the disclosing Party (the "Disclosing Party") considers to be the confidential information of the Disclosing Party or its third-party contractors, licensors or suppliers. Confidential Information shall be (a) written information received from the Disclosing Party which is marked or identified as confidential; or (b) oral or visual (or other non-tangible format) information identified as confidential at the time of disclosure which is summarized in writing to the receiving Party (the "Receiving Party") promptly after such disclosure; or (c) information which a reasonable person under the circumstances would know the Disclosing Party intended to be treated as Confidential Information. All usernames and passwords to the Web Services, and any documentation, release notes, collateral materials, operating instructions and information related to system performance provided by Monetate shall be considered Confidential Information of Monetate, regardless of whether it has been designated as such. End User Data shall be considered Confidential Information of End User, regardless of whether it has been designated as such.
- 6.2 Protection of Confidential Information. The Receiving Party shall use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care). The Receiving Party shall (a) not use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, and (b) except as otherwise authorized by the Disclosing Party in writing, limit access to Confidential Information of the Disclosing Party to those of its, and its Affiliates', employees, consultants, contractors and agents who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with the Receiving Party containing protections of the Disclosing Party's Confidential Information no less stringent than those herein. Neither Party shall disclose the terms of this Agreement to any third party other than its Affiliates and their legal counsel and accountants without the other Party's prior written consent. In addition to the foregoing, End User shall not provide any information regarding the Web Services, the Documentation, the Content or any other Confidential Information of Monetate to any entity that provides services similar to the Web Services. Each Party will be responsible for the actions of its Affiliates and their respective employees, consultants, contractors and agents in violation of this Section 6.2.
- 6.3 Exceptions. The confidentiality obligations herein will not extend to information that: (a) was already known by or available to the Receiving Party without obligation of confidentiality prior to disclosure under this EULA; (b) is or becomes publicly known without breach by the Receiving Party; (c) is rightfully received by the Receiving Party from a third party without a duty of confidentiality; (d) is independently developed or learned by the Receiving Party without use of the Disclosing Party's Confidential Information; (e) is disclosed by the Receiving Party with the Disclosing Party's prior written approval, or (f) is required to be disclosed pursuant to a lawful order of a governmental authority, so long as the Party required to disclose the information provides the Party owning such Confidential Information with timely prior notice of such requirement and provided that such information will remain confidential for all other purposes under this EULA.
- 6.4 Remedies. Each Party acknowledges that a Disclosing Party will suffer irreparable damage in the event of any material breach of the provisions of this Section 6. Accordingly, in such event, a Disclosing Party will be entitled to injunctive relief, as well as any other applicable remedies at law or in equity, against the Party who has breached or threatened to breach this Section 6.
7. **Acceptable Use.** Monetate does not monitor or police the content of communications, data, or transactions of its users or customers, including End User, transmitted through the Services, and Monetate shall not be responsible for the content of any such communications or transmissions. End User shall use the Web Services exclusively for authorized and legal purposes, consistent with all applicable laws and regulations. This EULA incorporates by reference, and End User agrees to comply with the Acceptable Use Policy. Monetate reserves the right to update the terms and conditions of the Acceptable Use Policy at any time and in its sole and absolute discretion.
8. **Security.** End User will not: (a) breach or attempt to breach the security of the Web Services or any network, servers, data, computers or other hardware relating to or used in connection with the Web Services, or any third party that is hosting or interfacing with any part of the Web Services; or (b) use or distribute through the Web Services any software, files or other tools or devices designed to interfere with or compromise the privacy, security or use of the Web Services or the operations or assets of any other customer of Monetate or any third party. End User will comply with the user authentication requirements for use of the Web Services. End User is solely responsible for monitoring its Authorized

Users' access to and use of the Web Services. Monetate has no obligation to verify the identity of any person who gains access to the Web Services by means of an access ID.

9. Indemnity; Limitation of Damages and Liability; Disclaimers.

- 9.1 Indemnity. End User will defend or settle, at its option and expense, any action, suit, investigation, or proceeding brought against Monetate (i) alleging that the End User Data or End User's use of the Web Services or Content in breach of this EULA, infringes or misappropriates a third party's intellectual property rights or violates applicable law; (ii) arising from End User's breach of Section 7; (iii) arising from End User's or Authorized Users' breach of the Acceptable Use Policy or the Acceptable Use Policy of any Third Party Product provider; (iv) arising from End User's breach of Section 8; (v) arising from End User's advertising and sale of products, the purchase and use of products advertised and/or sold by End User and any liability relating to or arising therefrom; (vi) arising from End User's violation of law in connection with the use of the Web Services; or (vii) by End User relating to or arising from any act or omission of End User in connection with the performance of its obligations under this EULA or otherwise owed to Monetate, including any act or omission relating to the termination of the Services pursuant to Section 5.
- 9.2 Limitation of Types of Damages. EXCEPT AS PROHIBITED BY LAW, MONETATE AND ITS SUPPLIERS SHALL NOT IN ANY CASE BE LIABLE TO END USER, ITS AUTHORIZED USERS OR ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY OR PUNITIVE DAMAGES OR LIABILITIES FOR ANY CAUSE WHATSOEVER ARISING OUT OF OR RELATING TO THIS EULA OR ANY AGREEMENT BETWEEN END USER AND MONETATE OR ITS RESELLERS, INCLUDING ALL SERVICE ORDERS, ADDENDA OR AMENDMENTS THERETO, WHETHER IN CONTRACT OR TORT OR BY WAY OF INDEMNITY OR OTHERWISE, INCLUDING A BREACH THEREOF OR INCLUDING WITHOUT LIMITATION, DAMAGES OR LIABILITIES FOR LOST PROFIT, LOST REVENUE, LOSS OF USE, LOSS OF DATA, BUSINESS INTERRUPTION, DEPRECIATION OF STOCK PRICE, COSTS OF RECREATING LOST DATA, THE COST OF ANY SUBSTITUTE EQUIPMENT, PROGRAM, OR DATA, CLAIMS BY ANY THIRD PARTY, OR OTHER SPECIAL, PUNITIVE, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES ARISING FROM OR IN RELATION TO THIS EULA, ANY AGREEMENT BETWEEN END USER AND MONETATE OR ITS RESELLERS, OR THE USE, SUSPENSION, INTERRUPTION OR TERMINATION OF THE SERVICES, HOWEVER CAUSED AND REGARDLESS OF THEORY OF LIABILITY, REGARDLESS OF WHETHER SUCH DAMAGES OR LIABILITIES HAVE BEEN COMMUNICATED TO MONETATE AND REGARDLESS OF WHETHER MONETATE HAS OR GAINS KNOWLEDGE OF THE EXISTENCE OF SUCH DAMAGES OR LIABILITIES.
- 9.3 Limitation of Liability. EXCEPT AS PROHIBITED BY LAW, THE CUMULATIVE, AGGREGATE LIABILITY OF MONETATE AND ITS SUPPLIERS (INCLUDING ATTORNEYS FEES AWARDED UNDER THIS EULA) TO END USER, ITS AUTHORIZED USERS AND ANY OTHER THIRD PARTIES FOR ALL CLAIMS, LIABILITIES AND DAMAGES ARISING OUT OF OR RELATING TO THIS EULA OR ANY AGREEMENT BETWEEN END USER AND MONETATE OR ITS RESELLERS, INCLUDING ALL SERVICE ORDERS, ADDENDA OR AMENDMENTS THERETO, WHETHER IN CONTRACT OR TORT OR BY WAY OF INDEMNITY OR OTHERWISE, SHALL NOT EXCEED: THE FEES PAID BY END USER TO MONETATE OR ITS RESELLERS FOR THE WEB SERVICE GIVING RISE TO THE LIABILITY, FOR THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE BREACH FOR WHICH THE DAMAGES ARE CLAIMED, LESS REFUNDS AND CREDITS IF ANY. IN NO EVENT WILL MONETATE BE LIABLE TO END USER OR ANY THIRD PARTIES WITH RESPECT TO CLAIMS OF ANY NATURE RELATED TO THIRD PARTY SOFTWARE OR PRODUCTS.
- 9.4 Disclaimer. MONETATE, ITS LICENSORS AND SUPPLIERS EXPRESSLY DISCLAIM TO THE MAXIMUM EXTENT PERMITTED BY LAW, ALL WARRANTIES, EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THE WEB SERVICES, INCLUDING, WITHOUT LIMITATION, (I) ANY WARRANTY THAT THE WEB SERVICES ARE ERROR-FREE OR WILL OPERATE WITHOUT INTERRUPTION OR THAT ALL ERRORS WILL BE CORRECTED; (II) ANY AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, (III) ANY WARRANTY WITH RESPECT TO THIRD PARTY PRODUCTS, SOFTWARE OR SERVICE (IV) ANY WARRANTY OR LIABILITY RELATING TO COOKIE ACCEPTANCE OR DELETION BY WEB SITE VISITORS; AND (V) ANY AND ALL IMPLIED WARRANTIES ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE. NO ADVICE, STATEMENT OR INFORMATION GIVEN BY MONETATE, ITS AFFILIATES, CONTRACTORS OR EMPLOYEES SHALL CREATE OR CHANGE ANY WARRANTY PROVIDED HEREIN.

- 10. Technology Partners.** End User has the option of engaging certain third-party providers, some of which may be listed online at [Monetate Partner Network](#), that offer products and services related to the Web Services, including consulting services and applications (both offline and online) that work in conjunction with the Web Services, such as by exchanging data with the Web Services or by offering additional functionality. Monetate is not responsible for any exchange of data or other interaction or transaction between End User and such third-party providers.
- 11. Links.** The Web Services may contain links to other websites or resources. Monetate is not responsible or liable for (a) the availability or accuracy of such sites or resources; or (b) the content, advertising, or products on or available from such website or resources. The inclusion of any link on the Web Services does not imply that Monetate endorses the linked website. End User uses any such links at its own risk.
- 12. Third Party Beneficiary.** End User acknowledges and agrees that (a) the acknowledgements, obligations, restrictions and undertakings given or accepted by End User in this EULA are for the benefit of Monetate and its licensors, and Monetate and such licensors are third-party beneficiaries under this EULA and may enforce those provisions directly against End User or through Reseller; and (b) End User is prohibited from bringing any claims related to Reseller's services against Monetate or such licensors.